CHAPTER 11
RECOGNITION

Meaning and Definition of the term 'Recognition'*

As aptly remarked by Professor G. Schwarzenberger, "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 relations. Like most clubs, the society of sovereign States is based on the principle of co-option. In exercising this preorgative the existing subjects of international law employ the device of recognition." According to Prof. L. Oppenheim, "In recognising a State as member of international community, the existing States declare that in their opinion the new State fulfils the conditions of statehood as required by international law." [1] Fenwick also subscribes to the view that through recognition the members of the international community formally acknowledge that the new State has acquired international personality. The Institute of International Law has defined the term 'recognition' in the following words : it is ".....the free act by which one or more States acknowledge the existence of a definite territory of a human society politically organized independent of any other existing States and capable of observing obligations of international law by which they manifest through their intention to consider it a member of international community."[2] According to Kelsen, a community to be recognised as an internaitonal person must fulfil the following conditions : (1) The community must be politically organised ; (2) It should have control over a definite territory ; (3) This definite control should tend towards permanence ; and (4) The community thus constituted must be independent.[3] Thus the conditions of a Statehood are (a) People ; (b) a territory ; (c) a government ; and (d) sovereignty. "Recognition of a State is an act by which another State acknowledges that the political entity recognized possesses the attributes of statehood." [4] In short, we may say that through recognition, the recognising State acknowledges that the recognised State possesses the essential conditions of statehood. However, international law does not provide as to how these essential conditions are to be determined. In fact, international law leaves members of international community free to determine by themselves whether the recognised States contain the essential condtions of statehood. It is because of this reason that very often recognition is said to be a political diplomatic function.[5]

Theories of Recognition**

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

(1) *Constitutive theory.****—According to this theory, recognition clothes the recognized State with rights and duties under International law. Recognition is a process through which a political community acquires internaitonal personality by becoming a member of family of nations. Hegel, Anzilloti, Oppenheim, etc. are the chief exponents of

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* See also for P.C.S. (1982), Q. NO. 2 C.S.E. (1988), Q. 6(a), P.C.S. (1990) Q. 8(a).

1. L. Oppenheim, International Law, Vol. I, Eighth Edition, p. 127. See also Oppenheim's International Law Ninth Edition, Longman Group UK Ltd. and Mrs. Tomoko Hudson, 1992, pp. 127, 128 and p. 132.
2. Charles G. Fenwick International Law (1971), p. 156.
3. See A.J.I.L. (1936), Vol. 30, Supplement, at p. 185.
4. Hans Kelsen, "Recognition in International Law", A.J.I.L. Vol. 55 (1941), p. 605 at pp. 607-8.
5. Philip C. Jessup, A Modern Law of Nations (1948), p. 63.

** See also I.A.S. (1960), Q. No. 4 and P.C.S. (1983), Q. No. 5 ; C.S.E. (1979), Q. No. 8 (a) ; P.C.S. (1983) Q. 2(a) C.S.E. (1987), Q. 6 (a) , C.S.E. 1988, Q. 6 (a) C.S.E. (1990) Q. 6(a) ; P.C.S. (1990) Q. 8(a) P.C.S. (1991) Q. 7(a), P.C.S. (1995) Q. 6 (a)

*** See also for I.A.S. (1971), Q. No. 5 and I.A.S. (1962), Q. No. 4.

constitutive theory. In the words of Professor Oppenheim,[6] "A State is, and becomes, an international person, through, recognition only and exclusively."* "According to the Constitutive theory, statehood and participation in the international legal order are attained by politcal group only in so far as they are recognised by established State."[7] Holland also supports the Constitutive theory. In his view, recognition, confers maturity upon State and until and unless a State is recognised, it cannot acquire rights under international law. In the view of Judge Lauterpacht, Constitutive theory is in accordance with the practices of the State and is based on sound legal principles. The practice of States, however, indicates the contrary. In practice most of the States accept the Declaratory theory. In this connection, Judge Lauterpacht has remarked that the wide acceptance of Declaratory theory is due to the reaction against the traditional conception of recognition as a political act purely and simply. In his view, there is a legal duty on the part of the State to recognize any community that has in fact acquired the characteristics of statehood.

Criticism.—Jurists have criticized the Constitutive theory. The view of Judge Lauterpacht that there is legal duty on the part of the existing States to recognize any community that has in fact acquired the characteristics of statehood, does not seem to be correct. In practice, State do not accept any such obligation. "The practice indicates, however, that although established States normally recognize new States and new governments that in fact exist, they have not consented to law norms that obligate them to do so."[8] Besides this, the Constitutive theory presents several other serious difficulties. According to this theory, if a State is not recognized it can have neither duty nor rights under international law. This is a very absurd suggestion. If we accept this proposition, it will create difficulties in the case of new State which is recognized by some States but not recognized by others. The examples of China and Bangladesh can be cited in this connection. China was not recognized by America and other Western countries for a number of years although China possessed all the essential attributes of State. But to assert that China, therefore, did not have rights and duties under international law would be an absurd proposition. Similarly, Bangladesh was not recognised for sometime by China, Pakistan, Albania, etc.

However, in support of the constitutive theory, it must be admitted that once a state is recognized it acquires status and is recognized as such by the municipal courts of the recognising state.

(2) Declaratory Theory****

According to this theory, statehood or the authority of the new government exists as such prior to and independently of recognition. Recognition is merely a formal acknowledgment through which established facts are accepted. The act of recognition is merely declaratory of an existing fact that a particular State or government possesses the essential attributes as required under international law. The chief exponents of this theory are Hall, Wagner, Brierly, Pitt Cobbet and Fisher. According to Prof. Hall, a State enters into the family of nations as of right when it has acquired the essential attributes of statehood. Pitt Cobbet has expressed the view that existence of a State is a matter of fact. In his words, "So long as a political community possesses in fact the requisites of a statehood, formal recognition would not appear to be a condition precedent to acquisition of the ordinary rights and obligaitons incident thereto." Brierly has also remarked, "the granting of recognition to a new State is not a 'Constitutive' but a 'Declaratory' act. A State may exist without being recognized and if it exists 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."[9] The Soviet view and practice are also in favour of the declaratory theory of recognition.

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6. Oppenheim : See Supra note 1, at p. 125.
* Asked in I.A.S. (1973), Q. No. 6(b).
7. P.E. Corbett, The Growth of World Law (1971), p. 62.
8. Edward Collins, International Law in a Changing World (1969), p. 88.
** See also for P.C.S. (1990) Q. 10(b).
9. J.L. Brierly. The Law of Nations, Sixth Edition (1946), p. 139.

According to the Soviet view, birth of a State is the act of internal law rather than that of international law.[10] In modern times international personality does not depend upon recognition.[11]

Criticism.—This theory has also been subject to criticism. The view that recoginition is only a declaratory of an existing fact is not completely correct.[12] In fact when a State is recognized, it is a declaratory act. But the moment it is recognized, there ensue some legal effects of recognition which may be said to be of constitutive nature.

Conclusion.—On the basis of the above discussion, it may be concluded that recognition is declaratory as well as constitutive act. "Probably the truth lies somewhere between these two theories. The one or the other theory may be applicable to different sets of facts." [13] Judge Lauterpatcht has also expressed the view that it is declaratory of a simple fact of existence of political community after ascertaining facts of statehood in the functional way. On such declaration of statements, recognition is constitutive of certain legal consequences. Svarlien has also subscribed to this view. Prof. Oppenheim who has been classed among the exponents of constitutive theory, has admitted that "Recognition is declaratory of an existing fact but constitutive in nature." [14] In the Ninth Edition of Oppenheim's International Law[15] it has been pointed out that there is "no settled view whether recognition is the only means through which a new State becomes part of the international community". On the one hand there is the view that a new State comes into existence as a matter of fact and becomes a member of international community irrespective of the fact whether it has been recognised or not. On the other hand the view is that recognition constitutes the new State as a member of the internatonal community ; no State has a duty to recognise a new State ; and that no new State has a right to be recognised by other State.[16] Indeed, "The problem is largely theoretical because state practice is inconclusive and may be reationalised either way." [17] Prof. Briggs has rightly remarked, "Juridical theories of recognition deduced from jurisprudential concepts fail to explain the facts of State conduct, and inductions from State conduct have failed to provide a juridical unambigous theory of recognition." [18] Prof. T.C. Chen has also remarked, "In the last analysis, the question of international recognition is but a reflection of the fundamental cleavage between those who regard the State as the ultimate source of international rights and duties and those who regard it as being under a system of law which determines its rights and duties under that law." * The exponents of constitutive theory want the institution of recognition to be under a system of law and that is why, Lauterpacht, the chief exponent of constitutive theory, posits a legal duty on the part of existing States to recognize any community that has in fact acquired the characteristics of statehood. The act of recognition is thereby defined as a clearly legal act, with new States having the legal right to be recognised and established States having the legal duty to recognize them. Similar reasoning is used to posit a legal duty to recognize new governments that in fact come to power in existing States." [19] On the other hand, exponents of declaratory theory contend that international personality does not depend upon recognition. They regard the State as the ultimate source of international rights and

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10. See Kazimierz Grozybowski Soviet Public International Law (A.W. Sijthoff, Leyden (1970), p. 69.
11. Ibid at p. 70 M. Lachs has also observed : "We face today the waning legal importance of recognition..... Non-recognition based on political considerations has lost most of its meaning. It no longer produces all the effects it was meant to in the past." "Recognition and Modern Methods of International Co-operation." BYBIL, Vol.. XXXV, (1959) p. 252 at p. 259.
12. See Oppenheim, Supra note 1 at p. 128.
13. J.G. Starke, Introduction to International Law, Tenth Edition, (1989), p. 133 ; see also Svarlien, An Introduction to the Law of Nations, pp. 97-98.
14. L. Oppenheim. International, Law, Vol. I, Eighth Edition, p. 128.
15. See note 1, at p. 128.
16. Ibid, at pp. 128-129.
17. Ibid. at p. 129.
18. Herbert W. Briggs, "Recognition of States : Some Reflections on Doctrine and Practice", A.J.I.L. Vol. 43 (1949), p. 113 at p. 121.
* Asked in I.A.S. (1967), Q. No. 3.
19. Edwards Collins, International Law in a Changing World (1969), p. 88.

duties. According to them, there is no legal duty to recognise State even after it has attained Statehood. Thus, according to the declaratory theory, recognition depends upon the discretion or sweet will of the recognising States. States are, in practice, not prepared to be bound by any norms in this connection. However as was aptly remarked by an eminent writer,[20] "Non-recognition based on political considerations has lost most of its meaning. It no longer produces all the effects it was meant to in the past ..... Since institutions of international law are but reflex of history, they are produced by it and in turn influence its further course. That is why in the long turn the institution of recognition will surely be more and more affected by inevitable trend towards greater mutual understanding and towards the adoption of principles and criteria reflecting the growing co-operation of States of different political and economic structure."

Modes of Recognition*

Recognition may be of two kinds—*De facto* and *de jure* recognition. The practice of States shows that in first stage the State generally give *de facto* recognition. Later on, when they are satisfied that the recognized State is capable of fulfilling international obligations, they confer *de jure* recognition on it. That is why, it is sometimes said, *de facto* recognition of State is a step towards *de jure* recognition."** We will now discuss in a little greater detail both kinds of recognition.

De facto Recognition

According to Prof. G. Schwarzenberger, "When a State wants to delay the *de jure* recognition of any State, it may, in the first stage grant *de facto* recognition." The reason for granting *de facto* recognition is that it is doubted that the State recognized may be stable or it may be able and willing to fulfil its obligations under international law. Besides this, it is also possible that the State recognized may refuse to solve its main problems. *De facto* recognition means that the State recognized possesses the essential elements of statehood and is fit to be a subject of international law. However, the effects of *de jure* recognition are more far-reaching. In the words of Oppenheim, "The *de facto* recognition of a State or government takes place when, in the view of the recognising State the new authority although actually independent and wielding effective power in the territory under its control, has not acquired sufficient stability or does not yet offer prospects of complying other requirements of recognition such as, willingness or ability to fulfil international obligations." [21] In the view of Judge Lauterpacht, *de facto* recognition shows that the recognizing State wants to establish its relations with the recognised State without establishing diplomatic relations. As remarked by Prof. Oppenheim, *De facto* recognition is, in a sense, provisional and liable to be withdrawn if the absent requirement of recognition fails to materialize." [22] In the view of Judge Philip C. Jessup, *"De facto* recognition is a term which has been used without precision when properly used to mean the recognition of the *de facto* character of a government, it is objectionable and indeed could be identical with the practice suggested of extended recognition without resuming diplomatic relations." [23]

De jure Recognition

De jure recognition is granted when in the opinion of recognizing State, the recognized State or its Government possesses all the essential requirements of statehood, and it is capable of being a member of the international community. As pointed out by Prof. H.A. Smith, the British practice shows that three conditions precedent are required for the grant of *de jure* recognition of a new State or a new Government. The three conditions are as (i) A reasonable assurance of stability and permanence ; (ii) The

20. M. Lachs, see supra note 11.

* C.S.E. (1987) Q. 6 (a).

** Asked in I.A.S. (1974), Q. No. 2 ; For answer of this question see the two kinds of recognition and the distinction between them discussed below.

21. See Oppenheim, see supra note 14, at pp. 134-35.

22. Ibid at p. 136.

23. Phillip C. Jessup. A Modern Law of Nations, p. 57.

Another leading case on the point is *The Arantzazu Mendi.*[32]* The facts of the Arantzazu Mendi case are as follows :

The Arantzazu Mendi was a Spanish ship registered at Bilbao. After the occupation of Bilbao by insurgents led by General Franco, the republican Government of Spain passed a decree taking the *Arantzazu Mendi* in its possession. At this, the ship was in the High Seas. When the ship reached London on August 11, 1937, the onwer of the ship held a writ for taking possession of the ship. The ship was arrested by the Admiralty-Marshall. The Republican Government made a conditional appearance as the defendant. In March, 1938, General Franco passed a decree taking the said ship and other ship in his possession. Till April, 13, the owners of the ship consented to the decree in General Franco and declared the ship to be under him. On the same day. the Republican Government issued a writ but the officers of the Government of Franco argued that the same was ineffective because it was against a foregin Sovereign State which does not consent to be under its jurisdiction. The Republican Government of Spain was a Government recognised *de jure* by Britain while the National Government under General Franco was a Government recognised *de facto* by Britain. The House of Lords dismissed the writ and declared the warrant of arrest as invalid. Lord Atkin observed : "By 'exercising *de facto* administrative control' or 'exercising effective administrative control' I understand exercisng all the functions of a Sovereign Government .....It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels whether warship or merchant ships. In those cirumstances, it seems to me that recognition of a Government as possessing all those attributes in a territory while not subordinate to any other Government in that terrtory is to recognise it as sovereign, and for the purposes of international law as a foreign State." He further observed : "There is ample authority for the proposition that there is no difference for the present purpose between a recognition of a State *de facto* as opposed to *de jure*. For these reasons I think it was established by the foregin office letter that the National Government of Spain at the date of writ was a foreign State and could not be impleaded."

As pointed out earlier, one of the main differences between *de facto* and *de jure* recognition is that in *de facto* recognition diplomatic relations are not formally established. Diplomatic relations are formally established only after the grant of *de jure* recognition. The majority of jurists are of the view that so far as the legal effects are concerned, there is hardly any difference between the two types of recognition. According to Wiliam W. Bishop, if at all there is difference, it is political rather than legal.[33] In the view of Prof. Kelsen, "From the juristic point of view, the dinstinction between *de jure* and *de facto* recognition is of no importance. Any codification of International Law relating to rec gnition can ignore it." [34] In the view of Fenwick and Judge Lauterpacht, there are certain differences between *de facto* and *de jure* recognition. They have pointed out that in case of succession only the State, which has been granted *de jure* recognition will be deemed to be the successor State. It may, however, be pointed out that in last few years, the judicial decisions have not subscribed to this view. "Since succession to liabilities is same, whether *de facto* or *de jure* recognition is extended, it cannot be argued consistently that a difference arises in succession of rights." [35]

It is, therefore clear from the above discussion that if at all there is a difference between *de facto* and *de jure* recognition, it is chiefly political rather than legal. In *de jure* recognition formal diplomatic relations are established whereas in *de facto* recognition diplomatic relations are not established. To conclude in the words of Prof. Charles L. Cochran, "Whatever the merits of the arguments for or against the distinction between *de facto* and *de-jure* recognition, it is clear that the difference, if any, is becoming less clear.

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32. (1939) A.C. 256.
* See also for I.A.S. (1973), Q. No. 7 (b) and I.A.S. (1968), Q. No. 11 (a).
33. See William W. Bishop, Jr. International Law : Cases and Material, 2nd Ed. (1962), p. 289.
34. H. Kelsen, "Recognition in International Law", AJIL, Vol. 35 (1941), p. 605 at p. 613.
35. Charles L. Cochran, "De-facto and De-jure Recognition : Is there a Difference ?" AJIL, Vol. 62 (1968), p. 457.

Government should command the general support of the population; and (iii) It should be able and willing to fulfil its international obligations.[24] Further, "Recognition *de jure* results from an expressed declaration or from a positive act indicating clearly the intention to grant this recognition such as the establishment of diplomatic relations." [25] *De jure* recognition is final, and once given cannot be withdrawn. As pointed out earlier, for *de jure* recognition and the intention to establish diplomatic relaitons are necessary.

Distinction between De facto and De jure Recognition*

As observed by Prof. G. Schwarzenberger, *"De jure* recognition 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 in that there is not yet a formal exchange of diplomatic representatives. *De jure* recognition .....is complete, implying full and normal diplomatic relaiton." In the words of Kelsen :".....*de jure* recognition is final, whereas *de facto* recognition is only provisional and thus may be withdrawn." [26] According to Prof. Oppenheim, so far as the legislative and other internal acts of the State recognized are concerned, there is hardly any difference between *de facto* and *de jure* recognition.[27] Thus we see that from the point of legal effect, there is hardly any difference between *de jure* and *de facto* recognition of a State. As a matter of fact, *de facto* Government enjoys same immunities from suits as *de jure* Government. However, diplomatic courtesies and representations are usually not accorded to *de facto* government except in extraordinary circumstances occurring in times of war. Thus, "The distinction between *de jure* and *de facto* recognition is in essence that the former is the fullest kind of recognition while the latter is a lesser degree of recognition, taking account on a provisional basis of present realities." [28]

In *Luther* v. *Sagor,*[29] it was held that there is no distinction between *de facto* and *de jure* recognition for the purpose of giving effect to the internal acts of the recognized authority. The facts of this case are as follows :—

In June, 1918, Russia nationalised timber and other industries. Consequently, the mill of the plaintiff was acquired. In August, 1920, the representatives of the Russian Government entered into a contract with the defendant to sell some timber, etc. The plaintiff requested the Court to declare that all the goods purchased by the defendant under the said contract were his property. The defendant contended that Russia was a Sovereign State and by the act of a Sovereign State, the ownership of the plaintiff was ended. Britain had given *de facto* recognition to Russia. The court decided in favour of the defendant. Warrington, L.J. held : ".....there is no difference for the present purposes between a Government recognised as such *de jure* and one recognised *de facto*. In the latter case, as well as in the formal the government in question acquires the right to be treated by the recognising State as an independent Sovereign State ....."[30]

This rule has been applied in a number of cases. For example in *Bank of Ethopia* v. *National Bank of Egypt. and Liquori,*[31] the court ruled that in view of the fact that the British Government granted recognition to the Italian Government as being the *de facto* Government of the area of Abyssinia, which was under Italian control, effect must be given to an Italian decree in Abyssinia dissolving the plaintiff bank appointing liquidator.

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24. H.A Smith, Great Britain and the Law of Nation, Vol. I, p. 79.
25. Philip Marshall Brown "Legal Effects of Recognition", A.J.I.L., (1950), p. 617 at p. 639
* See also for I.A.S. (1970), Q. No. 4 and P.C.S. (1973), Q. No. 3 ; P.C.S. (1982) Q. No. 2 ; P.C.S. (1983) Q. 2(b) ; C.S.E. (1984) Q. 5(b) ; C.S.E. (1988) Q. 6 (a) ; C.S.E. (1993) Q. 6(b).
26. "Recognition in International Law", AJIL, Vol. 35 (1941), p. 605 at p. 612.
27. Oppenheim, se supra note 14, at p. 136.
28. Oppenheim's International Law, note 1, at p. 155.
29. (1921) 3 K. B. 532 ; see also Williams v. Bruffy, (1917) U.S. 178 at p. 186 and Underhill v. Hernandez, (1897) 168 U.S. 230 at p. 253.
30. Adopted from L.C. Green, International Law Through Cases Third Edition (1970), pp. 133-134.
31. (1937) Ch. 517.

The existence of *de facto* recognition is becoming a moribund issue simply by not being raised as a possbility by the Government." [36]

Recognition of Insurgency*

Insurgency denotes the state of political revolt in a State. Insurgency, presupposes a civil war.[37] "Insurgency is used to denote the condition of political revolt in a country where the rebels have not attained the character of belligerents." Thus "Insurrection is a war of citizens against the State for the purposes of obtaining power in the whole or part. It always implies a sustained armed struggle by a group of citizenry against an established order." [38] In fact, insurgency is an intermediate stage between tranquillity and belligerency. In the view of Judge Lauterpacht if the State recognizes the insurgents of another State, it would imply that it would not treat such insurgents as violators of law. It also implies that such a State wishes to establish relations with such insurgents on a temporary basis. The effect of insurgency is that it partially internationalises the conflict. In the view of Judge Lauterpacth, it is not against international law to recognize insurgents as a *de facto* government over the territory under their control. It is merely an acknowledgment of fact situation for practical purposes.

Essential Conditions for Recognising Insurgents

Following are the essential conditions for recognition of insurgents :—

(1) Control over a considerable part of the territory ;

(2) Considerable support to the insurgents from the majority of the people living in the territory ; and

(3) Insurgents should have the capacity and will to carry out the international obligations.

Effects of recognition of insurgency—The recognition of insurgency is less important than the recognition of belligerents. The following effects ensue from the recognition of insurgency :—

(1) They (*i.e.* insurgents) are not treated as pirates ;

(2) The rebels of civil strife are treated as *hostes generis humani* (the public enemy) until they are recognized as insurgents ;

(3) The international rules of war become applicable to them.

Recognition of belligerency **

"When the insurgents are well organized, conduct hostilities according to laws of war and have a determinate territory under their control they may be recognized as belligerents whether or not the parent State has already recognized that status."[39] As in the case of a recognition of a State recognition of belligerency is the question of policy and not of law. Consequently some States find it convenient to recognise belligerency and some do not. The policy of State in this regard hinges upon national interest of recognizing State." [40] The belligerency is in fact the final status of three stages of the ascending intents of the conflict which presents a 'violent challenge to the sovereign authority within a State'. "Recogniton of belligerency is the acknowledgment of a juridical fact that there exists a state of hostilities between two factions contending for power or authority." [41]

Essential conditions for the recognition of belligerents

Recognition of belligerency is treated to be an unfriendly act until the following conditions are present :

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36. Ibid at p. 460.
* See also for IAS (1971), Q. No. 6; IAS (1957), Q. No. 3; PCS (1982), Q. No. 7 (e) ; P.C.S. (1983) Q. 8 (b).
37. Kelsen "Recognition in International Law", AJIL, Vol. 35 (1941), p. 605 at p. 616.
38. R.P. Dhokalia, "Civil Wars and International Law", AJIL, Vol 11 (1971), p. 219 at p. 225 ; see also Chen Tichiang, The International Law of Recognition, p. 398 ; H. Lauterpacht, Recognition in International Law, p. 275.
** See also for IAS (1957), Q. No. 3 ; IAS (1955), Q. No. 8 ; PCS (1982), Q. No. 7(e) ; PCS (1983) Q. 8(b).
39. Philip C. Jessup, A Modern Law of Nations, p. 53.
40. M.K. Nawaz "Bangladesh and International Law", AJIL (1971), p. 251 at 259.
41. Ibid

(1) The armed conflict is to be of general character ;

(2) The insurgents occupy and administer a considerable portion of the national territory.

(3) They conduct hostilities through armed forces under a responsible authority. Moreover, they conduct hostilities in accordance with the rules of war ; and

(4) The hostilities are to be of such magnitude that the foreign States may find it necessary to define their attitude towards the belligerents and the established government.

Effects of recognition of belligerents.—Following are the effects or consquences of the recognition of belligerency :

(1) From the date on which the recognition of belligerency is accorded international law rules governing the conduct of hostilities apply.

(2) The conflict is internationalised and the belligerents get some rights under International Law.

(3) The relations between the recognized belligerent authorities established government and the recognising States are governed by International Law rather than municipal law.

Distinction between recognition of States and Government.*

Generally a State is recognized when it possesses essential elements of Statehood. The recognition of a State means that it has been included as a member of international community. There is a difference between recognition of State and of a government. Once a State is recognized, it becomes a member of international community. By recognition the international community determines that the recognized State possesses the essential qualities of a State, and is able and willing to fulfil its international obligations. But so far as the recognition of a government is concerned, it simply means that the government recognized is entitled to represent the state concerned and that it depends on facts and circumstances. For example if there is a civil war in a State and through revolution the government of that State changes, the other States have to take a decision as to whether to grant recognition to the said government or not. If the change in the government takes place in accordance with the constitutional provision through peaceful means, then such a government ordinarily receives recognition from other States and the existing ambassadors continue without any change or their formal reappointment on the same post. For example, after the replacement of Congress (I) government by the National Front Government recently recognition of the new government was implicit in continuance of the existing diplomatic envoys. The position is, however, different when the change takes place by the use of force or revolution. In such a case other States have to see whether the new government commands the respect of the people. Besides, it has also to be ascertained as to whether the new government has signs to become permanent or stable. When the other States are satisfied that the new government commands the support of the majority of the people and may become stable, other States accord recognition to such a government. Ordinarily it is seen that recognition of government is given simultaneously with the recognition of the State. For example, most of the States which recognized Bangladesh also recognized simultaneously its government. The distinction between recognition of State and Government has been aptly summed up by P.E. Corbett in the following words : "The recognition of governments is a different matter, but one clouded with similar ambiguities. What is involved is not the acknowledgment of statehood but decision as to who is entitled to act for a given State.[42]

As in the case of recognition of States, in respect of the recognition of a government also states do not accept any obligation and much depends on their discretion or sweet will. This can be explained with the example of China. Most of the

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* See also for I.A.S. (1957), Q. No. 3 and P.C.S. (1968), Q. No. 5 ; C.S.E. (1987), Q. 6(a) ; P.C.S. (1988), Q. 6, P.C.S. (1990) Q. 8(a) ; P.C.S. (1991) Q. 7 (a).

42. P.E. Corbett, The Growth of World Law (1971), p. 66.

States accepted China as a State but for many years they did not recognise the Government of Communist China on the mainland of China and Formosa which is practically a government in exile on an island 70 miles off the Chinese mainland, having support of less than two per cent of the Chinese population, was officially held by the majority of States to be the *de jure* government of China's immense territory and seven hundred million people. P.E. Corbett has, therefore, suggested that ".....the decision should be in the hands of an organisation of that universality, and the U.N. is our nearest approach. Agreement that the Committees which pass upon credentials of delegates to the General Assembly and the Security Council should be their decision confirm or deny, in such a way as to bind all members, the title of the delegates senders to govern, would be a long step in the right direction." [43]

Recognition of governments serves three functions—(i) it ensures that only regimes which clearly deserve such status are accepted as governments of states ; (ii) it assures new governments that others will respect their status ; and (iii) it serves to inform courts, government agencies and nationals of recognising states that a particular regime is in fact the government of another state.[44] Lately some scholars have expressed the view that recognition of governments should be abolished because decision in respect of recognition of new government often depends on policy and the current doctrine on the effects of recognition or non-recognition creates unnecessary confusion.[45] But it has been correctly pointed out that "..... abolishing recognition of governments would be a mistake. This is not to argue that existing institution is perfect. Far from it advocates of abolition are correct in their basic criticism of recognition as it has been practiced and in their insistence that any government in effective control of its state should have its status acknowledged and respected. If recognition of governments is to perform its proper functions and confusion among acknowledgments of status, communication, and approval is to be avoided, recognition decisions must be based solely on whether the new government has control of that state." [46]

*Is there a duty to recognize.** —As pointed out earlier a State is generally recognized when it possesses the essential conditions and elements of statehood as noted earlier. In the view of Judge Lauterpacht, if a State possesses the above mentioned essential elements of statehood, International Law posits a duty on other States to recognise such a community. The view of Judge Lauterpacht is not supported by the parties of States. In practice, States have not consented to any such obligation. "Practice indicates, however, that although established States normally recognise new State and new governments, that in fact exist they have not consented to law norms that obligate them to do so." [47] Kelsen also subscribes to this view. He writes : "such an obligation, however, desirable is not stipulated by positive international law Existing States are only empowered, they are not obligated to perform the acts of recognition. Refusal to recognise the existence of a new State is no violation of general international law." [48]

*Facultative Theory of Recognition** or is recognition a political or discretionary act ?*—As pointed out earlier, a State to be recognized should possess the above-mentioned elements of statehood. But International Law does not provide as to how the above-mentioned essential elements are to be ascertained. In fact the granting of recognition depends upon the discretion of the recognizing State. In other words, International law leaves the States free to determine as to whether a particular State

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43. Ibid, at p. 57.
44. M.J. Patterson, "Recognition of Governments should not be abolished" A.J.I.L., Vol. 77 (1983) p. 31.
45. Ibid.
46. Ibid., at pp. 49-50.
* See also for PCS (1976), Q. No. 3 ; For answer of this question see also theories of recognition discussed earlier.
47. Edward Collins, see supra note 19 at p. 89.
48. Kelsen, Supra note 31, at p. 610.
** See also for IAS (1972), Q. No. 10(c) ; IAS (1969), Q. No. 4 and IAS (1960) Q. No. 4 ; CCS (1979) Q. No. 8 (a) ; C.S.E. (1992) Q. 5 (d).

possesses the essential elements of statehood. In the view of Judge Lauterpacht, International Law posits a duty on the existing States to recognize any community which possesses the essential elements of statehood. This view does not seem to be correct because neither it is supported by the practice of States nor does International Law impose any such duty upon States. As pointed out earlier, the granting of recognition depends much upon the discretion of the State. The practice of the States shows that recognition is a political function. "Recognition constitutes the weakest link in international law. Since recognition tends to enhance the prestige of recognized community, and also sometimes its material resources, recognition is accorded prematurely to sympathetic regimes and is protectedly withheld from unsympathetic ones"[49] Prof. Schwargenberger has also remarked : "In the absence of established rules or treaty obligation to the contrary, recognition is a matter of discretion." "Recognition of a new State or government is a political diplomatic function ..... It is determined by reasons of expediency and high State policy. No State or group of persons organized politically has legal claim to recognition though it may possess moral claim." [50]

Since recognition of a new State is a political diplomatic function, States sometimes grant premature recognition to a new State. A premature recognition is granted to new State although it has yet not attained statehood. Since the granting of recognition is a discretionary act, granting of premature recognition is not forbidden. Whatever be the reasons which prompt an existing State to recognise a new State, even though prematurely, it cannot be regarded as violative of international law because granting of recognition is a matter which depends upon discretion of the recognising States.

According to the Soviet view also, recognition is a political act and it is in the establishment of diplomatic relations which facilitate co-operation between States, that the political meaning of recognition above all consists.[51] The People's Republic of China also seems to follow this view.[52] In respect of recognition, the British practice is also based on political realism.[53] In practice, India also considers recognition as a political and discretionary act. The practice of States shows clearly that recognition is political function and it ultimately depends upon the discretion of the States. For example, China was not recognized by many countries for a long time although China possessed all the essential elements of statehood. The obvious reason for this was that it was in the political interests of States not to recognize China.

Suggestions.—Judge Philip C. Jessup has suggested that the matter of the existence of the statehood of a new State must be subject to the collective decision. In his view, unless a declaration is made in regard to the existence of the statehood of any political community, the members of the U.N. should not recognise such a new State. The General Assembly may make such a declaration on the recommendation of the Security Council. In the words of Judge Jessup, "The declaration of the General Assembly might also include a statement of the position that members of the U.N. would not independently accord recognition to new State." [54] If this suggestion is accepted and implemented, recognition will cease to be a political and discretionary act and will become a matter under the International collective control. Percy E. Corbett also agrees with the view of Judge Jessup. He writes : "Since any group satisfying conditions will, judging now by 23 years (now 45) of experience almost certainly desire the prestige and other advantages of membership in the U.N., its application could be treated at the same time as a submission of its claim to statehood, and its admission accepted as a conclusive evidence of this status and of international personality."[55]

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49. A.V. Levontin, The Myth of International Security, pp. 122-23.
50. Philip Marshall Brown, "Legal Effects of Recognition, AJIL Vol. 44 (1950) p. 617.
51. See Academy of Sciences of U.S.S.R., International Law, p. 117.
52. See James C. Hsiung, "China's Recognition, Practice and its Implications in International Law" in China's Practice of International Law ; Some case studies Edited by Jerome Alan Cohen (1972), p. 14 at p. 23.
53. See J.G. Merrils, "Recognition and Construction", ICLQ, Vol. 20 (July, 1971) p. 476.
54. Philip C. Jessup, A Modern Law of Nations, pp. 47-48.
55. P.E. Corbett, the Growth of World Law (1971), p. 64.

*Legal effects of recognition.** —As pointed out earlier, recognition is, a political diplomatic function and depends upon the discretion of the recognizing State. But once recognition is accorded, there ensue certain legal effects. The recognized State acquires certain rights, privileges and immunities under international law as well as municipal law. In the words of Starke, "Recognition produces legal consequence affecting the rights, powers and privileges of the recongised States or government both at International Law and under the municipal law of States which have given it recognition." [56] Some jurists are of the view that since recognition is a political act, there ensue no legal effects except the special agreements which are made at the time of granting recognition. For example, Philip Marshall Brown holds this view.[57] But this view does not seem to be correct. "The typical act of recognition has two legal functions. Firstly, the determination of statehood, a question of law : Such individual determination may have evidential effect before a tribunal. Secondly, the act of recognition is a condition of the establishment of formal, optional and bilateral relations, including diplomatic relations and the conclusion of treaties. It is this second function which has been described by some jurists as 'constitutivist' although here it is not a condition of statehood." [58] Kelsen has rightly written that by the grant of recognition, legal relations are established between the recognising and the recognised States and their relations are governed by the rules of international law.[59]

Following are the main effects of recognition :

(1) The recognized State becomes entitled to sue in the courts of the recognized State ;

(2) The courts of the recognizing State given effect to the past[60] as well as present legislation and executive acts of the recognized State.

(3) In case of *de jure* recognition, diplomatic relations are established and the rules of international law relating to privileges and immunities apply.

(4) A recognised State is entitled to sovereign immunity for itself as well as its property in the Courts of the recognising State.

(5) The recognised State is also entitled to the succession and possession of the property situated in the territory of the recognising State.

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

It is clear from the above discussion that after being recognized, the new State becomes a member of the international community. After the grant of *de jure* recognition the State recognized becomes entitled to establish diplomatic relations with other States. Since it becomes a member of international community, it requires certain rights as well as duties under international law.

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* See for IAS (1973), Q. No. 11(b) and IAS (1955), Q. No. 2 ; CCS (1979), Q. No. 8(a).

56. Starke, supra note 13 at p. 146 : Edward Collings also writes; "Although recognition is essentially a political act, it is important to realize that the consequences of non-recognition are of both political and legal importance." Supra note 16 at p. 89.
57. Philip Marshall Brown, See Supra Note, 22 at p. 640.
58. Ian Brownlie, Principles of Public International Law, Second Edition (1973), p. 93.
59. Kelsen, see Supra note 34, at p. 609.
60. For retroactive of recognition. See Boguslawski and Another v. Gdynia Amervka Line, (1950) 2 All E.R. 355 ; see also Luther v. Sagor (1921) 3 KB 532 ; Guarantee Trust Co. v. U.S. 340 U.S. 140 ; U.S. v. Pink, 315 U.S. 203.

** P.C.S. (1983) Q. 2(b). For answer see also recognition of government discussed earlier.

Consequence of Non-recognition*

Although recognition is essentially a political act, there are certain political as well as legal consequences of non-recognition as a State. 'Recognition can bring, *inter alia*, an opportunity to establish diplomatic and consular relations with recognising States ; an increase in stability at home and prestige abroad ; access to foreign aid, loans and trade ; and, the case of a new government of an established State, access to State funds on deposit in the banks of recognizing States. A decision to withhold recognition can be a powerful or an important political weapon, depending upon the relative power of the non-recognizing and unrecognized entities." [61] There may be following consequences of non-recognition of State :—

(1) An unrecognised State cannot sue in the courts of non-recognising State. In *Russian Socialist Federated Soviet Public* v. *Cirbaria*,[62] the New York Court had observed that such a State cannot sue, as matter of right, in American courts. In *Guarantee Trust Co. of New York* v. *U.S.*,[63] it was laid down that the court is not competent to recognise such a State. It is the function of the Executive. Similarly in *U.S.* v. *Pink*[64] the Supreme Court of the United States of America laid down the principle that the court shall decide the cases of only those States which has been recognised by the United States of America. The British Courts have also given similar decisions. For example, in re *Al Fin Corporation's Patent*,[65] it was held that the Court shall recognise the executive acts of only those States who have been recognised.

Thus, where a new government is established in a State as an outcome of rebellion and it is recognised by some governments as *de jure* Government, while some have not recognized at all, the new government can intervene in judicial proceedings instituted to proceed against the assets of the State claiming sovereign immunity in the State which have recognised either *de facto* or *de jure* but it cannot sue in the courts of States which have not recognized it.** It can institute actions to take possessions of the assets of the State in the courts of those States which have recognized it.*** Where the recognised Government has expropriated the property of a company belonging to a citizen, and bestowed title in a State Corporation. The Corporation sells the oil to a Multinational Corporation. The Multinational Corporation shall enjoy a firm title to the oil in those States which have recognized it.****

(2) A State which has not been recognised, is not entitled to enter into diplomatic relations with the non-recognising States.

(3) The diplomatic representatives of a State which has not been recognised do not possess immunities from legal processes in foreign States.

(4) Such States are also not entitled to get their property situated in foreign States. A leading case on this point is *Bank of China* v. *Wells Fargo Bank & Union Trust Co.*[66] In this case, the defendant was a Californian Bank, in which the money of Bank of China was deposited. Bank of China was a Chartered Bank according to the Chinese Law having two-thirds stocks of the Government of China and the rest of the Chinese citizens. In 1949, the Bank of China filed a suit in the District Court to get the money deposited in the defendant Bank. On June 27, 1945, the defendant Bank was informed through cable from Shanghai that the Bank of China had been taken over by the Chinese People's Liberation Army. On 26th January, 1950, the New People's Republic Government of China requested the court that the suit of the plaintiff be dismissed and they should be substituted in place of the plaintiff. On the other hand, the Nationalist Government of China said that it was the

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* See for IAS (1955), Q. No. 2 ; C.S.E. (1982) Q. 6, P.C.S. (1983) Q. 6.

61. Edward Collins, see Supra note 49.
62. New York Court of Appeals, 235-255.
63. (1938) 304 U.S. 126 at p. 137.
64. (1942) 315 U.S. 203 ; 86 L. Ed. 796.
65. (1970) Ch. 160 ; see also Zeiss case, (1967) I.A.S. 853.

** See for C.S.E. (1982) Q. 6 (a) : see also the fourth print discussed below.
*** C.S.E. (1982) Q. 6(b).
**** C.S.E. (1982) Q. 6 (c).

66. (1952) 104 F. Supp. 59.

lawful claimant of the said money on the ground that America has recognised only it. Moreover, the court cannot bring about change in the management of the Bank on the basis of acts of a government which has not been recognised. The Court held : "It is not a proper function of a domestic court of the United States to attempt to judge which government best represents the interests of the Chinese State in the Bank of China. In this situation, the court should justly accept, as the representative of the Chinese State, that government which our executive deems best able to further the mutual interests of China and the United States. Since the court is of opinion that it should recognize the Nationalist Government of China as legally entitled to exercise, the Controlling corporate authority of the Bank of China in respect to the deposit in suit, the motion for summary judgment in favour of the Bank of China, as controlled by the Nationalist Government, is granted....."

Implied Recognition

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

(1) When the recognized State and the recognizing State enter into a bilateral treaty and formally sign it ;

(2) The beginning of formal diplomatic relations, exchange of Consuls, etc.

In addition to the above-mentioned conditions following circumstances may also indicate implied recognition : (i) Participation of the State concerned in a multi-lateral treaty ; (ii) Participation in international conference ; and (iii) The start of negotiations between the recognising and the recognized States.

Recognition subject to a condition

Since recognition is said to be a political diplomatic function and depends much upon the discretion of the recognizing State, recognising States often impose certain conditions along with their grant of recognition. For example in 1878 while recognizing Bulgaria and Rumania, Germany imposed the condition that the said States shall not discriminate their citizens on the basis of religion. It may, however, be noted that under international law such a condition is meaningless. It can never imply that if the condition is not fulfilled the recognition shall be withdrawn. According to international law, recognition denotes that the recognized State has attained statehood and has become a member of the international community. Hence such a condition will have no effect. In the words of Starke, "It is true, however, that if recognition should under International Law become purely and simply the cognitive act of registering the statehood or of government capacity, it could not be subject to any such extrinsic terms of conditions." [67] To conclude in the words of another author ".....the very essence of recognition is that the recognising State thereby declares that it has satisfied itself that the recognised authority possesses the distinguishing marks of a State. To say that one recognises that has been, subject to its conduct being satisfactory in other particulars, is sheer nonsense. It is like telling a pupil that her sum is correct if she will promise to be a good girl." [68]

Collective Recognition*

By collective recognition we mean the recognition granted by number of States collectively. For example, when a State is admitted to the United Nations, it will mean collective recognition by those States which voted in favour of the admission of such a

67. Starke, note 13, p. 159.
68. Baty, "So-called De-facto Recognition" 31 Yale L.J. (1922), p. 469.

* See also for P.C.S. (1990) Q. 8(a).

State. In its advisory opinion on *Condition of admission of a State to the United Nations,*[69] the International Court of justice also opined that if a State is admitted as a member of the United Nations, it will amount to collective recognition by the States who voted in favour of the admission of such a State. It may, however, be noted here that recognition is the free act of each State. The collective recognition will therefore not mean that all the members of the United Nations have recognized such a State.

Is withdrawal of Recognition possible ?

Recognition *de jure* is final and once given cannot be withdrawn. If the recognized State finds that the State recognized *de facto* is not capable of fulfilling its international obligation or lacks the signs of stability, it will not grant *de jure* recognition to such a State. In other words, we may say that in certain circumstances, *de facto* recognition may be withdrawn. But *de jure* recognition once given can never be withdrawn, because if after granting *de jure* recognition a State wants to withdraw its recognition then it will have no meaning under International law. Under International Law, recognition means that the State recognized has attained statehood. The simple fact of withdrawal of recognition by a State would not necessarily mean that the State recognized has ceased to be a State.

Retroactive Effects of Recognition

Jurists are of the view that *de jure* recognition has retroactive effect. In other words, after a State is recognized, its acts done prior to recognition are also recognized. As pointed out by J.M. Jones, this rule is based on policy of the States, rather than on any juristic logic. When a State recognizes another State it often recognizes the past acts of such a State with a view to establish friendly relations with such a State. *Civil Air Transport Incorporated Co.* v. *Central Air Transport Corporation,*[70] is a leading case on the retroactive effect of recognition. In this case, the appellants were a registered corporation in Delware State of the United States of America and the respondent corporation was an institution under the national government of China. After the revolution in China Chiang Kai Shek fled away to Formosa. Consequently, the Chairman of the respondent Corporation also fled away from Hongkong to Peking and declared his loyalty towards the Peking Government. The Peking Government declared respondent corporation was its property. After fleding away from China the government of Chiang-Kai-Shek established its headquarters in Formosa and sold the property of the respondent corporation to an American firm. This property included 40 air-crafts which were lying at an airfield in Hongkong. The Court had to decide whether the Chiang-Kai-Shek government was entitled to sell this property. In other words, the courts had to decide the retroactive effects of the grant of *de jure* recognition to the communist government by England, *i.e.* whether past acts of *de jure* government can be valid only if such a government is the same which had been granted *de facto* recognition previously. The court also ruled that the retroactive effect of a *de jure* recognition of a government did not mean that the legal acts performed by other *de jure* government would become invalid. Lord Simon of the Judicial Committee of the Privy Council observed : Primarily, at any rate, retroactivity to recognition operates to validate act of a *de jure* government which has subsequently become the new *de jure* government and not invalidate acts of previous *de jure* government." [71] In other words, at the date when the transaction regarding the sale of the property of the respondent corporation took place, the nationalist China was *de jure* government of China and hence it was entitled to sell its property. In short, the granting of *de jure* recognition of a communist government of China would not invalidate the legal acts of the former *de jure* government of China.

In British Courts such retroactive operation is extremely wide. Thus : (a) A cause of action based upon the existence of a particular State or Government at the date of institution of proceeding, is nullified if before or at the time of the hearing the British Government recognises another State as government as having been in existence at the

69. I.C.J., Rep. (1948), p. 4.
70. (1953) A.C. 70 ; See also Gdynia Wmeryka Linie (Zeglugowe Spolka Akcyjna) v. Boguslnwskl, (1953) A.C. 11.
71. Adopteu from I.C. Green, International Law Through Cases, Edition (1970), p. 147.

date the action commenced ; (b) A judgment of a Court of first instance based upon the existence of a particular State or Government at the date of judgment may be set aside on appeal if before or at the time the appeal is heard, the British Government recognises another State Government as having been in existence at the time the judgment was delivered." [72] But the correct position has been aptly summed up by Brownlie[73] in the following words : "British and American Courts have applied the principle of retroactivity in following or interpreting the views of the executive in matter of recognition but Oppenheim describes the rules as one of convenience rather than of principle." Once again one ought not to generalize except to say that on the international plane there is no rule of retroactivity. When a State makes a late acceptance of the existence of a State than in the field of the basic rights and duties of existence, this recognition *ex hypothesi* cannot be 'retroactive' because in a special sense it is superfluous. In the sphere of optional relation and voluntary obligation may or may not be, since the area is one of discretion."

Thus retroactive effect of recognition and its extent depends upon the intention of the recognising state.[74]

Estrada Doctrine

This doctrine was propounded by Mr. Estrada, the Foreign Minister of Mexico. In this doctrine he declared that regarding the establishment of diplomatic relations with other States, Mexico Government considers itself free to determine it in accordance with the facts and circumstances of each case. In other words if the Mexico Government considers that after the change of government in any State through revolution, a revolutionary government commands the support of the people, it may establish diplomatic relations with it. This doctrine has been subject to servere criticism because it disregards the rules of International Law. It encourages the individual appraisal in this field. However in practice it takes a new way so far as the recognition of new States are concerned. As pointed out by Philip C. Jessup,..... the Estrada doctrine properly assumes that diplomatic representatives should be considered as accredited to the State and not to the government." [75] This doctrine, therefore, does not seem to be correct and needs to be discouraged.

Stimson Doctrine

This doctrine was propounded by Mr. Stimson, Secretary of State of the United States of America. This doctrine is also often called the doctrine of non-recognition. According to this doctrine if a State grants recognition to another State in violation of international treaty, such a recognition would not be valid. By international treaty, the Stimson doctrine mainly meant the Pact of Paris, 1928, or Kellog Briand Pact, through which the State parties renounced war as an instrument of their national policy. The League Assembly also passed a resolution that any State who violated the Pact of Paris, 1928, would not be granted recognition. The Secretary of the State of the United States of America prpounded this doctrine after Japan attacked Manchuria in 1931. In this doctrine the American Secretary of States declared that any contract or treaty which was contrary to the Paris Pact of 1928 would not be acceptable. It may be noted here that China, Japan and America were all parties to the Paris Pact, 1928. Although this doctrine has much to recommend itself, it is not always followed by the States so far as the grant of recognition to new State is concerned. States refuse to accept any such obligation and treat recognition as a political diplomatic function.

Hallestein Doctrine

This doctrine was propounded in the context of the division of Germany into two *i.e.* East and West Germany. According to it, no State should have diplomatic relations with both the Germany. This doctrine has become inadequate and obsolete in the present times and circumstances. Now both, East Germany and West Germany, have become the

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72. Starke, note 13 at p. 173.
73. See note 58, at p. 97-98.
74. See Gdynia Ameryka Lenie (Zeglugowe Spolka Akchjna) v. Boguslawaski, (1953) AC 11.
75. Philip C. Jessup—A Modern Law of Nations p. 58.

members of the United Nations. Some States supporting the State of Pakistan referred this doctrine in the context of Pakistan and Bangladesh. But this doctrine has no relevance, legal or political, in the present times and circumstances especially because, *inter alia*, the unification of Germany has now been effected.

India's Practice and Policy of Recognition of States and Governments.—Recognition of a new State is often described as "a political diplomatic function." [76] "Recognition, or the withholding of recognition is often used as a political instrument to express approval or disapproval of a new State Government or a territorial change." [77] It may, however, be noted that "In the practice of States, the birth of a new State, the establishment of a new Government, or a territorial change, is frequently recognised by states." [78] This is true of India also. Like most other countries, India has also granted recognition to States and governments as a matter of course or routine. India has generally accorded recognition to State as soon as the conditions of statehood were fulfilled." [79] In some cases, however India was also guided by certain other considerations. It will be desirable to discuss briefly some of such cases in which recognition was not granted by India as a matter of course or routine.

China.—The first of such cases which deserves mention here is relating to China. India was one of first States to recognise People's Republic of China. (The First Country, outside the Communist block, to recognise China was Burma). India recognised China on 30th December, 1949. While many countries in the world were still waiting or were withholding recognition of China, India accorded recognition. Subsequently India's example was followed by many other States.[80]

Israel.—Probably diametrically opposed to the above case was the case of India's delayed recognition of the State of Israel. Israel, emerged as a sovereign State on May 14, 1948, and was, within a short time recognised by a number of States. But India delayed the recognition of Israel for more than two years and even when she recognised Israel on 17th September, 1950, the announcement simply stated : "The Government of India has decided to accord recognition to the Government of Israel." In this announcement, India did not express her willingness to establish (nor did it establish) diplomatic relations with the State of Israel. India has not yet established diplomatic relations with the State of Israel. India's policy in regard to Israel has been subjected to severe criticism inside as well as outside the country. Her belated recognition and non-establishment of diplomatic relations with Israel was due to the attitude of Arab States towards Israel. However, India's announcement makes at least one thing clear that India recognises the fact of the statehood of Israel. It has been aptly remarked, "In recognising Israel, India once more reiterated her determination to subscribe to the principle of *de factoism*, even if it was at the risk of some misunderstanding or alienating the sympathies of some of her best friends in the world. At the same time it is quite true that to a degree India's policy was a matter of expedience governed by the consideration that restraint was essential.....Further, by recognsing Israel, though not establishing diplomatic relation with her to this date, the Government of India has clearly provided weighty reasons for thinking that it distinguishes between recognition as a legal act and the establishment of diplomatic relations as a purely political act, a view confirmed by the State practice of the most countries." [81]

In January 1992, India decided to establish diplomatic relations with Israel. Subsequently this decision was immediately implemented and diplomatic relations were set up with Isreal. India took this decision in view of changed international situation. It may be noted here that earlier China, Soviet Union and some other countries had set up

76. Philip C. Marshal Brown, "Legal Effects of Recognition," AJIL Vol. 44 (1950), p. 617 at p. 639.
77. Max Sorensen's Manual of Public International Law (1968), p. 267.
78. Ibid.
79. See K.P. Misra, "India's Policy of Recognition of States and Governments' AJIL, Vol. 55 (1961), p. 398 at p. 422.
80. See also Q. Wright, "The Chinese Recognition Problem," AJIL, Vol. 49 (1955) p. 322.
81. K.P Misra, see Supra note 79 at pp. 408-409.

diplomatic relations. One of the main reasons for this was the forthcoming West Asia Peace talks in Moscow beginning on January 29, 1992.

Spain.—Next typical case is that of Spain which was recognised by India on May 2, 1956. In this case also India had delayed recognition because of political considerations. In the press communique issued on the said date, wilingness to establish diplomatic relations was clearly expressed. This is a sharp contrast to the case of Israel discussed earlier. Yet another important thing in this case was that, while expounding India's policy of recognition, Pandit Nehru stated that it was India's policy "to recognise any country that was an independent functioning country represented in U.N." Thus weightaghe was given to the fact of a country being represented in the U.N.

Bangladesh.—Another important case which deserves mention is that of Bangladesh which also evoked criticisms from certain countries. India recognised Bangladesh on 6th December, 1971. India's recognition of Bangladesh was widely welcomed inside the country and Indian jurists justified it. Some Indian writers even expressed the view that the elements of statehood were present in Bangladesh long before 6th December, 1971.[82] On the other hand, India's action was subjected to criticism and was regarded as premature. Thus while recognition in respect of Israel, Spain, Vietnam and East Germany had been delayed, India was very quick to accord recognition to Bangladesh. India was the first country to recognise Bangladesh. This was obviously due to expedience and political considerations.

Cambodia.—So is also the case of India's recognition of Royal Cambodian Government headed by Prince Sinhanouk. On April 1, 1975, India accorded full diplomatic recognition to the Royal Cambodian Government headed by Prince Sinhanouk in a joint communique issued at the end of the visit of the Foreign Minister of the Royal Government Mr. Sarin Chhal who claimed 97 per cent of the Cambodian territory under control of his government.[83]

Vietnam and Germany.—A brief mention of cases of North Vietnam and East Germany will not be out of place here. In both these cases, India waited for sufficiently long time before according recognition. In case of Vietnam it may be argued that her refusal to recognize was "a kind of moral pressure" that it wanted "to use for attaining the objectives set forth by the Geneva Conference." [84] The same can be said about East Germany. India might be waiting to see whether unification of Germany took place or they remained as two distinct States. Despite these weighty reasons, involvement of expediency, national interest and political considerations cannot altogether be ruled out.

Provisional Revolutionary Government of Vietnam.—A brief mention of India's recognition of the Provisional Revolutionary Government (PRG) of South Vietnam will also be desirable here. On April 30, 1975, South Vietnam surrendered unconditionally to the communists. Within hours of surrender of the Saigon regime, India accorded full diplomatic recognition to the PRG of South Vietnam. The announcement was made in the Lok Sabha by Mr. Bipinpal Das, Deputy Minister for External Affairs. This was again based on the principle of *de factoism*.

Recognition of the new Government of Afghan Republic under the New President.—On 1st May 1971 Afghanistan was proclaimed a democratic republic with Mr. Nur Mohammad Tarakki as President of the newly constituted Revolutionary Council. This Government was established after a coup replacing former President Daoud. India recognised the new Government on 2nd May, 1978. India was thus one of the first countries to accord recognition to the new Government of Afghanistan. Soviet Union and Bulgaria also recognised the new Government on the said date.

On the basis of the above discussion, it may be concluded that while in many cases India has accorded recognition to States and governments on the principle of *de factoism*

82. See for example, Dr. Debiprosad Pal, "Bangladesh in the Eye of International Law" A.I.R. (July, 1971), Journal section, p. 102 and O. Chinappa Reddy, "Bangladesh and the Question of Recognition", Lawyer (February, 1972), p. 19.
83. The Times of India, April 2, 1975.
84. See K.P. Misra, Supra note 78, at p. 421.

and as matter of course or routine, in some cases, however, she has either delayed recognition or accorded quickly being influenced by her national interest, expediency and political consideration. Recognition being a diplomatic political function, it need not be over-emphasised that this is in no way contrary to international law. India's practice is in conformity with the norms and principles of international law as well as general practice of States in this connection.

CHAPTER 12

STATE SUCCESSON*

Definition and meaning of 'State Succession.'—"A succession of government occurs when the government of a State is replaced with a new one. State succession occurs when a State ceases to exist or a new State is formed within the territory of an existing State or territory is transferred from one State to another State. When a succession situation arises, the point of chief legal interest is the effect, if any, on the international rights and obligations of the State or States concerned." [1] According to Oppenheim, "A succession of international person occurs when one or more international persons take place of another international person, in consequence of certain changes in the latter's condition." [2]

The rule of State succession was incorporated from the Roman law by Grotius.[3] In Roman Law when a person dies his rights and duties are succeeded by his successors. This principle was applied by Grotius in International Law as well. Later on, there were certain international treaties through which the rules of State succession were developed. The Law of State Succession is still developing.

Term "State Succession" misnomer.—According to T.T. Poulose, "Under traditional rules of International Law the term 'State Succession' is used when there is transmission of the rights and obligations of one State to another in consequence of territorial sovereignty." Further "the term 'State succession' has been regarded as inaccurate because it is based on municipal law analogy of the actual demise of a person and the transmission of his rights and liabilities to his successor, used by classical International law writer like Gentilis, Grotius, Pufendorf and Vattel,"[4] D.P.O. ' Connell also writes, "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 as well as in fact, the latter's successor". The significance of the term is to be limited, however, to the factual situation which arises when one State is substituted for another in sovereignty over a given territory, and in this sense it enjoys the authority of an extensive literature. It does not necessarily presuppose a juridical substitution of the acquiring State in the complex of rights and duties possessed by the previous sovereign.[5] 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." [6] This seems to be correct to a great extent. But to say that no succession takes place among the States would not be correct. Most of the jurists agree that when an international person extincts or disappears then some of its rights and obligations are succeeded by other international persons which take place. There is, however, controversy and uncertainty as to which rights and duties devolve on the successor.[7]

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* See also for I.A.S. (1963), Q. No. 3; P.C.S. (1989) Q. 4(a).

** See also for P.C.S. (1995) Q. 9(a)

1. Edward Collins, International Law in a Changing World (1969), p. 105.
2. L. Oppenheim, International Law, Vol. I, 8th Edition, p. 157. See also Oppenheim's International Law, Ninth Edition, Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group UK Limited and Mrs. Tomoko Hudson, 1992, p. 208.
3. Charles G. Fenwick, International Law (Third Indian Reprint, 1971), p. 172.

*** See also for I.A.S. (1966), Q. No. 4 ; PCS (1995) Q. 9(a).

4. T.T. Poulose, "State Succession in India," IJIL. Vol. 10 (1970), p. 175.
5. D.P.O.' Connell, State Succession in Municipal Law and International Law, Vol. 1 (1976), p. 3.
6. Oppenheim, Supra note 2, at p. 159 ; See also Oppenheim's International Law, note 2, p. 210.
7. Oppenheim's International Law, note 2, at p. 209.

Kinds of State Succession*

State Successions are of two types—(1) Universal succession ; and (2) Partial succession. "If the legal identity, of a community is completely destroyed there is said to be a 'total succession' of States. If the territory is lost while personality and legal responsibility remain unimpaired, the process is described as 'partial succession'. This does not imply a total or partial succession respectively to the legal relation of the previous sovereign, but is merely an abbreviated way of defining the extent of the change."[8]

Universal succession.—Universal succession takes place under the following circumstances :—

(a) When one State is completely absorbed in another State either through subjugation or voluntary merger.

(b) When a State breaks into several parts and each part becomes a separate international person or are annexed by surrounding international persons.[9]

Partial succession.—Partial succession takes place—

(a) When a part of the State revolts and after achieving freedom becomes a separate international person. The breaking away of Bangladesh and becoming international person is a glaring example of partial succession. A part of state may also become independent through agreement or any other peaceful means.

(b) When a part of a State is ceded to another State.

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

Principle of the Continuity of States**

The succession of Governments is based on the principle of the continuity of States. The change in the Government of a State does not affect the legal personality of the State.[10] The new Government succeeds to the rights and obligations of the predecessor Government.[11] This principle is based on the common interests of international community. The importance of the international agreements will suffer a set-back in case the treaty obligations are disregarded in consequence of the change of Government of a State.[12] But the treaties entered into by a State come to an end in case it is completely absorbed in another State. This rule also applies in a case when a part of State revolts and after becoming an international person, refuses to follow the treaties entered by its parent State.[13] For example, Bangladesh is not bound by the treaties entered into by Pakistan.

Reference may be made here to *The Tinoco Arbitration*: *Great Britain—Costa Rica* (1923)[14], wherein :—

In January, 1917, the Government of Costa Rica under President Alfredo Gonzalez, was overthrown by Federico Tinoco, the Secretary of War. Gonzalez fled. Tinoco assumed power, held an election, and established a new constitution in June, 1917. His Government continued until August, 1919, when Tinoco retired, and left the country. His Government fell in September following. After a provisional government under one Barquero, the old constitution was restored and elections were held under it. The restored

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* See also for P.C.S. (1973), Q. No. 2(c).

8. O'Connell, see Supra note 5, at p. 4.
9. See also theory of Universal Succession referred on the next page.

** See also for P.C.S. (1967), Q. No. 6.

10. See *Lazard Brothers* v. *Midland Bank Ltd.*, (1933), A.C. 283 : 102 LJKB 191 ; See also *Dr. Ram Babu Saxena* v. *The State*, A.I.R. 1950 S.C. 155 at p. 163.
11. See Moore, Digest of International Law, Vol. 1, p. 249.
12. See Kaplan and Katzenbach, The political Foundations of International Law, p. 113.
13. D.P. O'Connell, "Independence and Prolems of Succession" in William V. O'Brien. The New Nations in Independonce Law and Diplomacy (London, 1965), p. 20.
14. 1. United Nations Reports of Inernational Arbitral Awards, p. 369.

government was a signatory to this treaty of arbitration. On the 22nd of August, 1922, the constitutional congress of the restored Costa Rican Government passed a law known as Law of Nullities No. 41. It invalidated all contracts between the executive power and private persons, made with or without approval of the legislative power between January 27, 1919, and September 2, 1919, covering the period of the Tinoco government. It also nullified the legislative decree No. 12 of the Tinoco government, dated June 28, 1919, authorizing the issue of the fifteen million colones currency notes. Great Britain claimed that the Royal Bank of Canada and the Central Costa Rica Petroleum Company were British corporations whose shares were owned by British subjects ; that the Banco International of Costa Rica and the Government of Costa Rica were both indebted to the Royal Bank in the sum of 998,000 colones, evidenced by 998, one thousand bills held by the Bank ; that the Central Costa Rica Petroleum Company owned by due assignment, a grant by the Tinoco government in 1918 of the right to explore for and exploit oil deposits in Costa Rica, and that both the indebtedness and the concession have been annulled without right by the Law of Nullities and should be expected from its operation. She asked for an award that she was entitled on behalf of her subjects to have the claim of the bank paid, and the concession recognized and given effect by the Costa Rican Government. The Government of Costa Rica denied its liability for the acts or obligations of the Tinoco government and maintained that the Law of Nullities was a legitimate exercise of its legislative government power. It further denied the validity of such claims on the merits, unaffected by the Law of Nullities.

William H. Taft, Arbitrator held that the Law of Nullities in decreeing the invalidity of the Amory Concession worked no injury to the Central Costa Rica Petroleum Company Ltd., its sole stockholder, of which Great Britain can complain, because the concession was in fact invalid under the constitution of 1917. Expounding the law on the subject he observed : "The courts of the restored government are bound to administer the law of the restored government under its constitution and their decisions are necessarily affected by the limitation of that instrument. This may prevent the Court from giving full effect to international law that may be at variance with the municipal law which under the restored constitution the national courts have to administer. It is obvious that the obligations of a restored government for the acts of the usurping *de facto* government if succeeds cannot, from the international standpoint, be prejudiced by a constitution which though restored to life is for the purpose of this discussion, exactly as if it were new legislation which was not in force when the obligations arose." Mr. Taft, Arbitrator, quoted with approval the following observation of Dr J.B. Moore[15] : 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 reserve ; but, *though the government changes, the nation remains, with rights and obligations unimpaired.*" Further, "The *principle of the continuity of States has important results. The State is bound by engagements entered into by governments that have ceased to exist; the restored government is generally liable for the acts of the usurper* ..... The origin and organization of government are questions generally of internal discussion and decision. Foreign powers deal with the existing *de facto* government when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the State in its ability to maintain itself and discharge its internal duties and its external obligations". According to Mr. Taft, this statement of law "announces the general principle which has had such universal acquiescence as to become well-settled international law."

Theories of State Succession*.—Prof. D.P.O.' Connell classifies the theories of State Succession into the following categories :

I. Theories of Continuity. II. Negative Theories. III. Theories Importing International Law. IV. Communist Theory of State Succession.

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15. Digest of International Law, Vol. I, 249 ; emphasis added.

* See for I.A.S. (1972), Q. No. 6.

i. **Theories of Continuity**

(a) *The theory of universal succession*—According to this theory, "change of rules ..... whether effected by cession of territory, by revolution or by death, cannot involve the replacement of one right or duty by another, but only a replacement of their subjects. If a ruler acts in a private capacity his contracts expire with his death or expulsion ; but if he acts in his princely office his commitments relate not to himself but to people through whom in virtue of the social contract, he ultimately derives his authority." [16] This theory was in vogue up to the middle of the nineteenth century. According to this theory, succession takes place by virtue of a legal principle antecedent to the enacted law of any society, and therefore, antecedent to the positive law of nations. But it may be noted that "Succession occurs, not in virtue of an external legal prescription, but in virtue of a legal quality which reposes in the objects of succession." [17]

(b) *The theory of popular continuity.*—According to this theory, "Change of Sovereignty involves no more than a change in the fictitious element in political organisation, the real element surviving intact. Obligations of a political character, such as, treaties attach to the element of sovereignty and lapse with it, obligations of a patrimonial character, including most economic and judicial matters attach to society and remain attached." Thus, "While the emphasis in this theory is upon legal continuity, therefore, the degree of continuity, actually achieved is, in virtue of this transformation, considerably less than that achieved in the theory of Universal Succession." [18]

(c) *The theory of organic substitution.*—This theory emphasises more the nature of change itself than the legal effects of political change. When States appear and disappear, the people and territory are integrated in a new organic being. There is a change in the juridical element of organisation, which does not occur in cases of change of government. The legal institutions which attach to the factual elements survive the change while those which attach to the organisational element do not survive it. This theory does not radically, differ with the preceding ones. In the words of D.P.O' Connell, "..... this means that the successor State takes over all the rights and duties of its predecessor, save those which are essentially political, if it substitutes itself factually in the property of its predecessor it must also substitute itself in the encumbrances upon that property." [19]

(d) *The theory of self abnegation.*—The State is at liberty to take over or reject whatever suits it in the previous legal order. It integrates within its own legal order all existing law which is compatible therewith and which is not expressly repealed. This theory emphasises the continuity rather than disruption and constructs the legal bonds of continuity on the basis of tacit consent of all the parties concerned.[20]

ii. **Negative Theories.**—Since the Universal Succession theory did not take into account the existing facts of international practice, negative theories were developed during the latter half of the nineteenth century and early part of the twentieth century. According to these theories "the sovereignty of the predecessor State over the absorbed territory is abandoned. A hiatus is, thus, created between the expulsion of one sovereignty and the extension of the other. The successor State does not exercise its jurisdiction over the territory in virtue of a transfer of power from its predecessor, but

16. D.P.O.' Connel, State Succession in Municipal Law and International Law, Vol. I (1967), p. 9.
17. Ibid, at p. 11.
18. Ibid.
19. Ibid at p. 13.
20. "While the State is formally at liberty to take over or reject whatever suits it in the previous legal order, it is in fact materially required in the interest of realizing its own aims to permit only the least disturbance thereof. Therefore, in practice, it integrates within its own legal order all existing law which is compatible therewith and which is not expressly repealed." Ibid. at p. 14.

solely because it has acquired the possibility of expanding its own sovereignty in the manner dictated by its own will. None of the incidences of sovereignty passes to the successor State. The latter seizes what it can and repudiates what it will." [21]

III. Theories Importing International Law.—According to this theory, International Law, based on the positive practice of State "directs the successor State to discharge certain of its predecessor's obligations, and vests in it, certain of its predecessor's rights. This approach is useful with respect to the affect of change of sovereignty on relationships governed by international law, such as, treaties and indeed. It may be the only feasible approach with respect to these. But it is quite irrelevant to the solution of problems raised by change of sovereignty with respect to relationships governed exclusively by municipal law and even of the problem of the survival of that law itself.[22]

IV. Communist Theory of State Succession.—The main emphasis under this theory is that a successor State is unencumbered by the economic and political commitments of the predecessor.

Conclusion.—Prof. D.P.O'Connel has rightly concluded, "The law of State Succession in the mid-twentieth century has reached a position of crisis because evident moral and sociological pressures emphasise the need for continuity and avoidance of disruption, while theory remains enmeshed in the nineteenth century conception of sovereign will. The problem is to give expression in normative form to a reconciliation of two competitive pressures, that of stability in the international and internal orders, and that of adjustment of legal relationship to the social and economic effect of change. The solution lies in a presumption of continuity which concrete analysis may rebut." [23]

Rights and Duties arising out of State Succession*

When an international person takes the place of another international person following rights and duties arise :

(1) Political Rights and Duties.—No succession takes place in respect of political duties and rights. As remarked by Prof. Oppenheim, "No succession takes place, thereof, with regard to rights and duties of the extinct State arising either from the character of latter as an international person or from its purely political treaty".[24] Hence the succeeding State is not bound by the political treaties of the former State. The successor State is not bound by the treaties of peace or neutrality entered into by the extinct State. But it may be noted that, "International Practice as to succession to treaties is not sufficiently abundant and uniform to permit an attempt at generalisation. The State practice is haphazard and inconsistent. Even the same State adopts different attitudes at different times".[25] 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 general opinion of International jurists is that treaties of the former are automatically terminated. The result is said to be produced by reason of complete loss of personality consequent on extinction of State life.[26] Thus, the forceable incorporation of Hanover into the Prussian Kingdom destroyed the previous treaties of Hanover. The admission of Texas into the United States of America by joint resolution extinguished the treaties of the Independent Republic of Texas.[27] The position was same when Korea merged into Japan.

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21. Ibid. at pp. 14-15.
22. Ibid. at p. 17.
23. Ibid, at pp. 34-35. In the words of another author, "The State practice as to succession to treaties is haphazard and inconsistent. The practice is more dictated by public policy of the respective States than by any legally accepted principle. Large scale economic considerations tend to override legal reasoning. Generally speaking, States have attempted to thwart any principle which is politically detrimental to their vital interests. "P.K. Menon," International Practice as to Succession of New States to Treaties of their Predecessor", AJIL Vol. 10 (1970), p. 459 at p. 467.
- * See for IAS (1968), Q. No. 3 ; IAS (1957) Q. No. 4 and PCS (1967).
24. Oppenheim, International Law, Vol. I, Eighth Edition pp. 158-59.
25. P.K. Menon, Supra note 23, at p. 476.
26. Hyde on International Law, Vol. III, p. 1529.
27. Ibid, at p. 1531.

No succession of rights and duties ordinarily takes place in such cases and as political and personal treaties presuppose the existence of a contracting state, they are altogether extinguished. It is a debatable point whether succession takes place in cases of treaties relating to commerce or extradition but here again majority of writers are of the opinion that they do not survive merger or annexation.[28] When as a result of amalgamation or merger, a State loses its full and independent power of action over the subject-matter of a treaty previously concluded the treaty must necessarily lapse.[29] "Thus treaties of alliance or of arbitration or of neutrality or of any other political nature fall to the ground with the extinction of the State which concluded them." [30] Reference may also be made here to *Terlinden* v. *Ames*[31] where the question was whether an Extradition Treaty between Prussia and America, which was entered into in 1882, could be given effect to after the incorporation of Prussia into the German Empire. The question was answered in affirmative. It was pointed out *inter alia* that the constitution of the German Empire left sufficient independent power and sovereignty to the States composing the confederation to enable them to act upon these treaties, and it was observed by Fuller C.J. who delivered the opinion of the Court, that where Sovereignty in respect of the execution of treaties is not extinguished and the power to execute remains unimpaired as void. But where the power of the State concerned to execute the treaty is altogether gone, the treaty cannot but be regarded as void.[32]

(2) *Local rights and duties.*—A genuine succession takes place in respect of local rights and duties. In respect of land, rivers, roads, railways, etc., therefore, the succeeding State succeeds the rights and duties of the former State. In *German Settlers in Poland*[33] the Permanent Court of International Justice, in its advisory opinion, held that private rights do not end by the change of sovereignty.

(3) *Fiscal property debts.*—According to Oppenheim,[34] succession takes place in regard to fiscal property. But he adds that no private person gets the right to claim the old debts from succeeding international person. So far as the question of foreigners is concerned, the position is a little different. They may seek the protection of their government and may pressurize the succeeding international person to pay the whole debts.

Public debts.—There is a controversy in regard to the succession of public debts. Jurists are of view that it depends upon the discretion of the succeeding international person whether to pay the public debts of the former State.[35] Part IV of Vienna Convention on State Property, Archive and Debts, 1983 deals with state debts *i.e.* the financial obligation of a predecessor state towards another state or an international organization. Article 36 of the convention provides that the succession of a state does not as such affect the rights and obligations of creditors. Further when the successor State is newly independent state, no State debts shall pass to the new State, unless an agreement between the two states provides otherwise, according to the convention. Such an agreement, however, shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibria of the newly independent State (Article 38). In case of separation of part of the territory the State debt of the predecessor State should pass to the successor State in an "equitable proportion "taking into account the property, rights and interest passing to the successor States (Article 40).

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28. Dr Ram Babu Saxena v. The State, AIR 1950 SC 155 at p. 162; Oppenheim, International Law, Vol. I, p. 152.
29. Ibid, at p. 162 ; Hyde on International Law, Vol. III, p. 1535.
30. Oppenheim's International Law, note 2, at p. 211.
31. 184 US 270.
32. AIR 1950 S.C. 155 at p. 162.
33. PCIJ (1923), Series B, No. 6.
34. L. Openheim, International Law, Vol. I, Eighth Edition, pp. 159-161.
    See also for P.C.S. (1995) Q. 9(a).
35. When one State absorbs another State, for example it always 'succeeds' to the public property of the extinct State but only occasionally "succeeds" to its liabilities for illegal acts committed against other States". Edward Collins, International Law in a Changing World (1969), p. 106 ; see also The Treaty of Versailles (1919), Article 254-257.

(4) *Contracts**.—Most of the jurists are of the view that the succeeding State should be bound by the contract entered into by extinct State. But in the *West Rand Central Gold Mining Co. Ltd* v. *King*,[36] the King's Bench of England ruled just the reverse. In this case, the Court ruled that the succeeding State is entitled to decide whether it would accept the financial obligations of the former State. The facts of this case are as follows :—West Rand Central Gold Mining Co. Ltd., was a registered Company in England. It was engaged in the work of digging of gold mines in Transval. In October 1899, two parcels containing, gold were seized by the officers of the South African Republic. According to the law prevailing at that time, it was the responsibility of the South African Republic to return the said parcels of gold or equivalent money in lieu of the parcels. Meanwhile war broke out between Britain and South African Republic and the latter was conquered by Britain on October 11, 1899. West Rand Central Gold Mining Co. Ltd., filed a petition to claim the parcels of gold on the ground that after conquering the South African Republic, the obligations of the South African Republic automatically became the obligations of Britain. It was, therefore, argued that the British Government was liable to return either the parcels of gold or pay its value in money. The Court rejected the contentions of the company and held that the conquering State is not liable to fulfil the private contractual obligations of the conquered State. International Law does not impose any obligations upon the conquering State to fulfil the obligations of the conquered State. The court further observed that *acts of State* are beyond the jurisdiction of the Municipal court. Conquest of South African Republic being act of State the appellant company can get no relief in a Municipal court. It may, therefore, be said that much depends upon the discretion of the succeeding State. In the absence of express understanding a conqueror assumes no obligation of the conquered State. There is a difference between the private right of individuals in private property and contractual rights which are sought to be enforced against the sovereign. Lord Alverstone[37] observed : "It must not be forgotten that the obligations of the conquering State with regard to private property of private individuals particularly by land as to which the title had already been perfected before the conquest or annexation are altogether different from the obligations which arise in respect of personal rights by contract ..... cession of territory does not mean the confiscation of the property of individuals in that territory." [38]

Illustration.—A company registered in India was carrying on trade in Sikkim before it became part of India. The Government of Sikkim confiscated a few consignments sent to company's office in Sikkim from India. Soon thereafter Sikkim became part of India. The company claims the consignments or their value from the Government of India.**

The facts of this problem resemble that of the case of *West Rand Central Gold Mining Co. Ltd* v. *King* discussed above. As held in this case conquering State or for that matter the State, (*i.e.* India) in which new State (*i.e.* Sikkim) merges, is not liable for the acts of latter state (*i.e.* Sikkim). Moreover, merger of state is an act of state which is beyond the jurisdiction of a municipal court. The Government of India is not therefore liable to return the consignments or their value. As a matter of fact and practice it depends upon the discretion of the succeeding state (*i.e.* India) to deny or accept the claims of the company.

(5) *Concessionary contracts.*—Although much depends upon the discretion of the succeeding State so far as the contracts in general of the former State are concerned, the position is different in respect of the concessionary contracts. By concessionary contracts, we mean the contracts through which certain concession, such as, digging of mines, laying of railways, etc. are given through contracts. These are mostly of local nature. Succeeding State may or may not be bound by such depending concessionary contracts upon the facts and circumstances of each concessionary contract. In

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* P.C.S. (1985) Q. 3—the facts of the case given are those of West Rand Central Gold Mining Co Ltd. v. King which has been discussed below ; P.C.S. (1988) Q. 10(c) ; C.S.E. (1991) Q. 8(b).

36. (1905) 2 KB 391.
37. Ibid, at p. 411.
38. See also Cook v. Sprige, (1899) AC 572 at p. 578.

** C.S.E. (1987) Q. 6 (b) (i).

Premchibar v. *The Union of India*,[39] wherein the Government of India rejected the application of a former Portuguese citizen for extension of the period of licence granted to him by the then Portuguese Government, the Supreme Court of India held, "In such a case the residents of territories did not carry with them the rights which they possessed as subjects of the ex-sovereign, and that as subjects of the new sovereign they had only such rights as are granted or recognised by him, so far as the relations between the subject and the sovereign are concerned. "Further, whether new sovereign has recognised the rights of the new subjects as against himself and has undertaken the liabilities arising thereunder is a question of fact depending upon the new sovereign after the requisition territory concerned." In this case the petitioner was a citizen of former Portuguese territory. On December 20, 1961 Portuguese territory was merged in India and the petitioner adopted Indian citizenship. About three months before merger of Portuguese territory in India, the petitioner had obtained a licence for importing goods worth about 10 lakhs pounds and on the basis of the said licence he had even advanced some money. After acquiring Indian citizenship he requested the Government of India to extend the period of licence, but his application was rejected. He filed a writ-petition in the Supreme Court and contended that the rejection of his application amounted to the violation of his fundamental right mentioned in the Constitution and that he was discriminated which was also contrary to the provision of the Constitution. But the Supreme Court dismissed his petition. *State of Gujarat* v. *Vora Fiddali*,[40] and *State of Rajasthan* v. *Shyamlal*,[41] also deserve mention in this connection.[42]

(6) *Laws.*—So far as the laws of the former State are concerned, civil law continues until it is changed by the succeeding State.[43]

(7) *Unliquidated damages for torts.*—No succession takes place in respect of unliquidated damages for torts. This was held in *Robert E. Brown's* claim.[44] The facts of this case are as follows :

Robert E. Brown was an American citizen. In 1894, he went to South Africa and started the work of digging gold mines. After some, time the head of the State of South Africa declared that in the eastern part of that area, State would undertake the work. Robert Brown submitted an application of licence for carrying on digging of goldmines but it was rejected. Later on, the Government withdrew its earlier order for carrying on digging of goldmines. Robert E. Brown filed a suit in 1895 for recovery of compensation. But the case could not proceed because in the meantime Great Britain conquered South Africa and incorporated it in its Empire. The Government of America contended that her citizen, Mr Brown, had been authorized to carry on digging of goldmines but this right was subsequently snatched from him before South Africa was annexed by Britain. It was agreed to refer this dispute to arbitrators. The arbitrators had to decide mainly two questions : (1) Whether South Africa refused to do justice to Robert E. Brown ? and (2) If justice was denied to him, whether the succeeding State of South Africa would be responsible for the loss and damages. In other words, whether Britain was liable to pay compensation ? In reply to the first question, the arbitrators held that justice was denied to Robert E. Brown because if the case had proceeded, South Africa would have been

39. AIR 1966 SC 442. See also Rajavi Amar Singh v. State of Rajasthan, AIR 1958 SC 228 at pp. 230-231 ; see also State of Madras v. K.M. Rajagopalan, AIR 1955 SC 817, Reilly v. The King, (1934) AC 176 ; Noakes v. Doncaster Amalgamated Colliers Ltd., (1940) AC 104.
40. AIR 1964 SC 1043.
41. AIR 1964 SC 1495.
42. For detailed study. See D.P.O'Connell Economics Concessions in the Law of State Succession, BYBIL, Vol. (1950), pp. 93-124.
43. In Virendra Singh and others v. State of U.P.. AIR 1954 SC 447 at p. 452, the Supreme Court observed ".....all authorities are agreed that it is within the competence of the new Sovereign to accord recognition to existing rights in the conquered or ceded territories and, by legislation or otherwise, to apply its own laws to them ; and these laws can, and indeed when the occasion arises must be examined and interpreted by the municipal courts of the absorbing State". For detailed study see also Shabtai Rosenne, "Effect of Change of Sovereignty upon Municipal Law," BYBIL, Vol. XXVIII (1950), pp 267-292.
44. American and British Claim Arbitration Tribual, Nov. 1923 in BYBIL (1924), pp. 220-221.

liable to pay damages. In reply to the second question referred to them, the arbitrators decided that the peace agreement under which South Africa surrendered before Great Britain, Britain did not undertake the liability for torts committed by South Africa, hence Britain was not liable. But if the former State had accepted or had decided to pay the compensation, then the succeeding State should pay the damages for torts.

(8) *Nationality.*—The nationals of the former State lose their nationality at the extinction of the State and become the nationals of new international person. In this connection it may, however, be noted that generally such nationals are given a certain period within which they have to decide whether they continue their loyalty towards the former State or will accept the citizenship of the succeeding State.[45]

(9) *Succession to property in foreign State.* —As regards the succession to property in foreign State, jurists are of the view that succeeding States become the successors of such property.

Part II of the Vienna Convention on State Property, Archives and Debts 1983 deals with "State Property." Article 11 of the convention provides that unless otherwise agreed, the passing of state property will take place without compensation. Article 12 provides that property, rights and interests owned by a third State should not be affected by succession of states. Article 13 asks the predecessor state to take all measures to prevent damage or distruction to State property which passes to successor State. As regards succession in case of newly independent States Article 15 allows special reference to be made to bilateral agreements between the predecessor State and the newly independent State but it shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources."

(10) *Succession to State Archives.*—Article 25 of the Vienna Convention on State Property, Archives and Debts, 1983 lays special emphasis on preserving the integral character of grounds of State archives of the predecessor State. The convention provides that the passing of or appropriate reproduction of State archives of the predecessor State to a newly independent successor State should be determined in such a manner that "each of those States can benefit as widely and equitably as possible" from those archives. Bilateral agreements between the two states should not "infringe the right of the peoples of those states to development, to information about their history, and to their cultural heritage.

(11) *Succession of States in Respect of Treaties.*—The traditional doctrine of the State succession in respect of treaties have been rejected by the large number of newly independent States. These newly independent States have relied upon the rules of "moving treaty frontiers" and "clean state." These rules are not simply reactions against the inheritance treaties and devolution agreements but were necessitated by the changing times and circumstances. On 23rd August, 1978, Vienna Convention on Succession of States in Respect of Treaties was adopted. The provisions of the convention show that the clean State rule has been followed and due recognition has been given to the consent of States. The clean State rule is similar to negative theories and communist theory discussed earlier. According to 'Clean State' rule, a newly independent State is unencumbered by the obligations and commitments of the predecessor State. It has, therefore, full freedom to continue or discontinue the treaties of the predecessor State. The 'moving treaty frontiers' rule is based on the association of a territory with an already established State and on the basis of the prior legal nexus a newly independent State is entitled to claim its succession to multilateral treaties.

Article 1 of the Vienna Convention on Succession of States in Respect of Treaties, 1978 which deals with the scope of the convention provides that the convention applies to the effects of a succession of states in respect of treaties between states. As regards agreement for the devolution of treaty obligations or rights from a predecessor State to a successor State, Article provides that the obligations or rights of a predcessor State under treaties in force in respect of a territory at the date of succession of States do not

45 See AIR 1954 SC 447 at p. 454.

• See also for P.C.S. (1995) Q. 9(a).

become the obligations or rights of the successor State towards 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. So is the effect of, as provided by Article 9, unilateral declaration by successor State regarding treaties of the predecessor State.

Article 11 of the Convention which deals *Boundary Regimes,* clearly provides that a succession of states does not as such affect : (a) a boundary established by a treaty, or (b) obligations and rights established by a treaty and relating to the regime of a boundary. Obviously to avoid chaos regarding established situation, clean State rule does not apply here.

Article 15 of the Convention deals with *Succession in Respect of Part of Territory.* It provides : 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 that 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 States 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 State relates from the date of the succession of States, unless it appears from the treaty or is otherwise established 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 operation.

As regards the position of newly independent States in respect of the treaties of the predecessor State, a general rule is laid down in Article 16 which provides that the newly independent State is not bound to maintain the treaty in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of states relates. This provision clearly follows clean State rule.

Article 24 deals with conditions under which a *Bilateral treaty* is considered as being in force in the case of a succession of States. It provides : A bilateral treaty which at the date of a succession of states was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent state and the other State party when : (a) they expressly so agree; or (b) by reason of their conduct they are to be considering as having so agreed. So far as the position between the predecessor State and the newly independent State is concerned, Article 25 provides that a treaty which under Article 24 is considered as being in force between a newly independent state and the other State party is not by reason only of that fact to be considered as being in force also in the relations between the predecessor State and the newly independent State. A brief reference may also be made to the provisions of the convention relating to uniting and separation of states. Article 31, which deserves a special mention in this connection provides :

When two or more States unite and so form one successor State, any treaty in force at the date of succession of state in respect of any of them continues in force in respect of the successor State unless :

(a) the successor state and the other State party or State parties otherwise agree ; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 34, which deals with succession of States in cases of separation of parts of a State, provides as follows :

1. When a part or parts of territory of a State separate to form one or more States, whether or not the predecessor State continues to exist :

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed ;

(b) any treaty in force at the date of the succession of States in respect only of that part, of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply to :

(a) the States concerned otherwise agree ; or

(b) it appears from the treaty or is otherwise established that application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

As regards multilateral treaties, Article 17 provides that a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of states was in force in respect of the territory to which the succession of State relates. But this rule does not apply if it appears from the treaty or is otherwise that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. Similarly when according to the object and purpose of the treaty, the participation of any other State in the treaty must be considered requiring the consent of ali the parties, the newly independent state may establish its status as a party to the treaty only with such consent. As regards participation in treaties not in force at the date of the succession of states, Article 18 provides that a newly independent state may by a notification establish its status as a contracting state if at the date of succession of states the predecessor state was a contracting state in respect of the territory to which that succession of state relates.

As regards succession to reservations, Article 23 provides that when a newly independent state establishes its status as a state party or as a contracting state to a multilateral treaty by a notification of succession under Article 17 or 18, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of states in respect of the territory to which the succession of states relates unless when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject-matter as that reservation.

The convention also contains provision for settlement of disputes in respect of the application of the conventions, provisions relating to consultation and negotiation, conciliation, judicial settlement and arbitration, settlement by common consent and other provisions in force for the settlement of disputes are contained in Articles 41 to 45.

Succession regarding membership of the United Nations

The question of the succession regarding membership of the United Nations arose for the first time after the partition of India into India and Pakistan. India was originally the member of the United Nations having signed the United Nations Charter at San Francisco. Later on, it was ratified by the Government of India. After partition, Pakistan claimed that since it was a part of India which was an original party to the United Nations Charter, it should get the membership of the United Nations in succession automatically. The General Assembly of the United Nations rejected this claim of Pakistan. According to General Assembly, when a State becomes international person, it can become the member of the United Nations only after it is admitted in accordance with the provisions of the Charter. That is to say, a State to be admitted to the United Nations, should apply for the membership. A State is admitted as the member of United Nations by the decisions of the General Assembly by 2/3 majority of the members present and voting on the recommendation of the Security Council. Thus the principle of succession does not apply in case of the membership of the United Nations.

Succession in Respect of International Organisations.—Ordinarily, the succession of International Oraganizations depends upon the constituent instrument

or special agreements. "While as a rule devolution of rights and competencies is governed either by the constituent instruments of the organs 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 is indicated by the reasonably assumed intention of the parties as interpreted in the light of the parties of the organisation in question." [46] The law regarding the succession of International Organisation has been clarified by the International Court of Justice in its Advisory Opinion of 1950 in the following case :—

Status of South West Africa.[47]—Trusteeship Council of the United Nations succeeded to all rights and duties of the Mandatory Commission. That is to say, all the territories which were under the Mandatory Commission came under the control of the Trusteeship Council. Thus, South West Africa also came under the control of the Trusteeship Council. In the beginning, South Africa accepted the control of the Trusteeship Council and sent its reports, etc. to the United Nations in this connection but later on South Africa contended that after the extinction of the League of Nations, South West Africa ceased to be under control of any international institution and became a part of the South Africa, and as such Trusteeship Council had no control over it. Consequently, South Africa refused to follow the directions and control of the Trusteeship Council. In 1950, the General Assembly referred this matter to the International Court of Justice for its advisory opinion. The International Court of Justice advised that Mandatory Commission was an Institution of international status and the Mandatory Commission had created an international status of South West Africa which could not be modified unilaterally by South Africa. Besides this, the functions and purpose of the Mandatory Commission and Trusteeship Council are same. Keeping in view the desirability of the requirement of continuity of international life, the Trusteeship Council succeeded all the functions of the Mandatory Commission. Consequently, the South West African Republic was a Trust Territory under the control of Trusteeship Council and hence South Africa was bound to follow the directions and control of the Trusteeship system of the United Nations. The conclusion that the United Nations succeeded to the supervisory functions of the League of Nations in the matter of Mandated Territories flow partly from the principle adopted by the court that the regime established for the mandates was of an international status as distinguished from a purely contractual agreement.[48] The other principle that the court applied was that if the nature, functions and purposes of the new international organisation are the same, succession may take place in regard to the functions and powers of an international organisation.

Question of Application of the Rules of State Succession in respect of division of India into two Independent States (India and Pakistan).— After the passing of the Indian Independence Act, 1947, India and Pakistan became two independent dominions. There was no controversy regarding the status of Pakistan. Pakistan emerged as a new State in the horizon of International community. But a controversy arose in respect of India as to where India emerged as a new State having acquiesced new international personality. By the Independence Act of 1947, British India was divided into two independent states on the basis of equality on the basis of International agreements rights, property, obligations etc. were divided between the two states. It was not, therefore, a case of cession. The Supreme Court has expressed the same view in *Virendra Singh* v. *State of U.P.*[49] In fact, it was a case of dismemberment of British India. Therefore, the principle of state succession will apply to determine the rights and obligations of both the states. So far as Pakistan is concerned there took place state succession in respect of local rights and obligations. The rules of International law of state succession applied in respect of law, property situated in foreign countries etc. But there

46. L. Oppenheim, International Law, Vol. 1, Eighth Edition, p. 158.
47. ICJ Rep. (1950), p. 79 ; for more details see Chapter on "Trusteeship Council".
48. Oppenheim, Ibid, note 46, at p. 169.
49. AIR 1954 SC 447, 454.

was no state succession of political rights and duties consequently it was not bound by political treaties earlier entered into by Britain.

In respect of India also the abovementioned rules of International law applied. But the position is not clear in respect of India. Although, in respect of India also, the rules of state succession applied in some respects, such as local rights and duties, law, property situated foreign in countries etc. but in other respects India's international status continued to be the same as was during the British period. Exercising its influence, Britain got India become a member of the League of Nations and International Labour Organization, in 1919. Even after India became an independent sovereign state, India continued to remain the member of these international organizations. Similarly, India had become an original member of the United Nations and continued to remain so even after she become an independent sovereign state. Thus even before independence, India's international personality had been recognized. But a similar thing did not happen in respect of Pakistan. After emerging as a new independent state Pakistan claimed that it should also be recognized as an original member of the United Nations because it became an independent state in consequence of the division of the sub-continent of India into India and Pakistan. But this claim of Pakistan was rejected by the General Assembly of the United Nations. According to the General Assembly, whatever the territory, population etc. of a state after emerging as a new state, it can become a member of the United Nations only in accordance with the provisions of the U.N. Charter on the other hand, India was not regarded as a new state. India was and original member of the U.N. and continued to remain so even after independence.

CHAPTER 13

INTERVENTION

Meaning and definition of the word "Intervention"*

The word 'intervention', has been defined as dictatorial inference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of thing." [1] In principle, international law prohibits intervention. The prohibition of intervention "is the corollary of every State's right to sovereignty, territorial integrity and political independence." [2] But as pointed out by Hans Kelsen, international law does not prohibit intervention in all circumstances. According to him, when one State intervenes in the affairs of another State through force, then as a reaction against this violation, international law permits intervention. In the view of Quincy Wright, "Intervention may be diplomatic as well as military. A diplomatic communication of peremptory or threatening tone, implying possible use of military or other coercive measures may constitute intervention."

The principle of non-intervention propounded under the Charter under Article 2(7) is applicable to the United Nations and not to the States.[3] In fact, the principle of non-intervention by States has been propounded in Article 2(4) of the United Nation's Charter. Article 2(4) runs as follows : "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." This principle has been re-affirmed by the General Assembly through its resolution 2131 (xx) of December 1965. "The principle of non-intervention is in fact the search of an ideal of equality and sovereignty of the States. In accordance with this principle a State should not interfere in the affairs of another State. The Governments of States also accept this principle. But so far the real practice is concerned this principle is not followed by the States." [4] Dr. Thomas Frank has even pronounced the death of Article 2(4) and proceeded to tell us who killed it.[5] But as pointed out by Prof. Louis Henkin, "..... the death certificate is premature and the indictment for legicide must be redrawn to change lesser through aggravated degrees of assault. Article 2(4) lives and while its condition is grave indeed, its maladies are not necessarily terminal." [6] He adds : "For me, if Article 2(4) were dead indeed, I should have to conclude that it rules—not mocks us from the grave. In fact, despite common mis-impressions Article 2(4) lives and can live. No government, no responsible official of Government, has been prepared or has wished to pronounce it dead. Article 2(4) was written by practical men who knew all about national interest. They believed the norms they legislated, to be in their nation's interest, and nothing that has happened in the past 25 years (now 49 years) suggests that it is not." [7]

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* See for IAS (1957), Q. No. 5 ; PCS (1974), Q. No. 10(a) ; PCS (1972), Q. No. 9 : PCS (1978), Q. No. 9(a) : PCS (1981), Q. 3 ; PCS (1982), Q. 5(b); C.S.E. (1991), Q. 5(b) ; C.S.E. (1992) Q. 6(a).

1. L. Oppenheim, International Law, Vol. I, Eighth Edition, p. 305; See also Oppenheim's International Law, Ninth Edition, vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group U.K. Limited and Mrs. Tomoko Hudson, 1992, p. 430.
2. *Ibid* at p. 428.
3. Nicholas Greenwood Onuf, "The Principle of Non-Intervention, the United Nations and the International System," Int. Orgn., Vol. XXV (1971), p. 209 at p. 212.
4. "Civil Wars and International Law", I.J.I.L., Vol. II (1971), p. 219 at p. 233.
5. Thomas Frank, "Who killed Article 2(4) or Changing Norms Governing the Use of Force by States", AJIL, Vol. 64 (1970), p. 809.
6. Louis Henkin, "The reports of the Death of Article 2(4) are Greatly Exaggerated", AJIL, Vol. 65 (1971), p. 544.
7. Ibid at p. 547.

In 1970, the General Assembly adopted unanimously a resolution[8] entitled *Declaration on Principles of international Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the U.N.* The resolution declared : "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized 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." [9] As regards the principle of non-intervention 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.

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 organize, 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." [10]

It has been rightly remarked that the above resolution contains "a far reaching interpretation of the fundamental principle embodied in Article 2 of the Charter. For instance, the additional principles relating to the prohibition of the use of force make it clear that force may not be used not only across existing international boundaries, but also across international lines of demarcation ; that acts of reprisal involving the use of force are included in the prohibition ..."[11] 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 the non-members, 'to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles'. This is but one important example of the legislative activity of the General Assembly, leading to the creation of new international law applicable to all States." [12] Thus, non-interference in the internal affairs of States has become firmly established in international relations and international law as a fundamental and generally recognized principle.[13] Reference may also be made to the *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or use of Force in International Relations* adopted by the General Assembly on 18 November 1987.[14] This Declaration solemnly declared :

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 U.N. 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 aliance.

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 U.N.

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8. General Assembly Resolution 2625 (XXV) of 24th October, 1970 GA, Official Records, Twenty-fifth Session, Suppl., No. 28 (1971), pp. 121-124.
9. Ibid. at p. 122-123
10. Ibid. at p. 123.
11. Prof. Louis B. John, "The Development of the Charter of the United Nations ; the Present State "in The Present State of International Law and other Essay", (1973) p. 39 at p. 50.
12. Ibid, at p. 52 ; emphasis added.
13. Valentin Yaroslavatsev, "Non-Interference—A Basic Principle," New Times, No. 20 (May 1977). p. 18 at p. 19.
14. See A/42/766 and Corr. 1.

4. States have the duty not to urge, encourage or assist other States to resort to the 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 organizing, instigating, assisting or participating in paramilitary, terrorist or subversive acts, including acts of mercenaries, in other States or acquiescing in organized activities within their territory directed towards commission of such acts.

6. States have the duty to abstain from 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.

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 purpose and principles of the U.N. States have the duty to refrain from propaganda for wars of aggression.

The preamble of the above Declaration (of 18 November, 1987) recalls "that this principle is enshrined in Article 2, paragraph 4, of the Charter of the United Nations and has been reaffirmed in a number of international instruments" and reaffirms "the obligation to maintain international peace and security in conformity with the purposes of the United Nations." Thus what has been stated above of the Declaration of 1970 is also true of this Declaration and may be regarded as authoritative interpretation of Article 2(4) of the Charter or extension of the Charter itself. It uses the term 'use of force' which is definitely a much wider term. In case concerning *Military and Para-Military Activities in and Against Nicaragua* (1986), Judge Nagendra Singh (who was then the President of the World Court) in his separate opinion, aptly remarked : "..... it represents the contribution of the court in emphasizing that the principle of non-use of force belongs to the realm of *jus cogens* and is the very corner stone of the human effort to promote peace in a world torn by strife. This aspect does need to be emphasized."

Article 2(4) and the limits of the use of force.*—Article 2(4) as noted above contains prohibition of the unilateral use of force or threat thereof by States in their international relations. The only exception of this recognised under the U.N. Charter is individual and collective self defence as contained in Article 51. But in an article,[15] Reisman has given a very dangerous interpretation. He has tried to justify the use of force to oust a repressive government. He argues : "Coercion should not be glorified, but is native and indeed subversive of public order to insist that it never be used, for coercion is a ubiquitous feature of all social life and a characteristic and indispensable component of law. The critical question in a decenralized system is not whether coercion has been applied but whether it has been applied in support of or against community order and basic policies and whether it was applied in ways whose net consequences include increased congruence with community goals and minimum order." [16] He has suggested that while interpreting Article 2(4), attention should be given to the spirit of charter and not merely the letter of the provision.[17] This is indeed a very dangerous interpretation of the article 2(4) and must be refuted. Schacter[18] has rightly refuted and criticised Reismans' interpretation of Article 2(4). In his view, Reisman's argument is not only against text of the charter it is also against the interpretation which states have given in the past decades. He has rightly remarked, "It would introduce a new normative basis for recourse to war that would give powerful states an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will or to the goal of self-determination."[19]

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* See also for C.S.E. (1992) Q. 8(b).

15. W. Michael Reisman, "Coercion and Self-Determination : construing Charter Article 2(4)", AJIL, Vol. 78 (1984) p. 642.
16. Ibid, at p. 645.
17. Ibid.
18. See Oscar Schacter, "The Legality of Pro-Democratic Invasion", AJIL, Vol. 70 (1984) p. 645.
19. Ibid. at p. 649.

In the *Corfu Channel case* (1949) the U.K. had contented that it had used armed force in the cause of international iustice but such a contention was rejected by the International Court of Justice.[20] According to Schacter, "The fragility of international organisation enhances the danger. This is surely not the time for international lawyers to weaken the principal normative restraint against the use of force. The world will not be made safe for democracy through new wars or invasions of the weak by the strong." [21]

Prof. M.K. Nawaz has also refuted the interpretation of Article 2(4) given by Reisman and has supported the views of Schacter.[22] He has aptly remarked, "The up-shot of all this is to say that no state under international law, especially the U.N. Charter, can intervene with armed forces either to change the existant government or to create political environment for installing a government of its liking. Nor can it so act militarily to suppress the processes of self-determination : the only exception being a state that can not go to the aid of another state, if an armed attack occurs against it, presumably at the request of the attacked state." [23]

So long as the words "armed attack" are retained in Article 51, this seems to be the correct interpretation of the charter. This interpretation also finds support from the verdict of the International Court of Justice indicating interim measures in case *Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States of America*).[24] The world court held by a majority of fourteen votes to one, the right to sovereignty and to a political independence possessed by the republic of Nicaragua, like any other State of the region or of world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that states should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any states, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a state, principles embodied in the United Nations Charter and the charter of the organization of American States.

It may be noted that outlining the policy of U.S. in Nicaragua President Reagan openly declared that unless the Nicaraguan Government sought democracy the only other alternative for the rebels would be to have their way and take over. With this policy in view, the U.S. was giving $10 million military aid to contras. But as rightly indicated by the International Court of Justice in its final verdict in June 1986, by a majority of 12 to 3 votes, the aiding of contra rebels with money and military hardware, U.S. supported attacks on Nicaraguan ports and oil installations and U.S. intelligence flights over Nicaraguan territory constituted an infringement of Nicaragua's sovereignty and a flagrant violation of the principles of the U.N. charter which ban unlawful use of force by one state against another. The world court held that there is no rule in customary international law permitting another state the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the state for whose benefit this right is used will have declared itself to be the victim of an armed attack.[25] Further, the lawfulness of the use of collective self-defence by the third state for the benefit of the attacked state also depends on a request addressed by that state to the third state. The requirement of a request by the state which is the victim of the alleged attack is additional to the requirement that such a state should have declared itself to have been attacked.[26] This case clearly illustrates the dangers involved in Reisman's thesis about Article 2(4). The interpretation given by Schacter and Prof. Nawaz is correct and has much to commend itself.

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20. Ibid, at p. 650.
21. Ibid.
22. Dr. M.K. Nawaz, "What Limits on the Use of Force? Can Force be Used to Depose an Oppressive Government?" IJIL, Vol. 24 (1984), p. 406 at p. 410.
23. Ibid.
24. ICJ Rep. (1984) p. 169.
25. I.C.J. Reports 1986, p. 14, at p. 104.
26. Ibid, p. 104-105.

Reference may also be made here to a recent case of International Court of Justice, namely *Case Concerning Legality of use of Force* (*Yugoslavia* v. *United States of America*).[26a] It may be noted here that on 29 April, 1999 Yugoslavia filed as many as ten separate applications instituting proceedings against the U.S., the U.K., Spain, Portugal, the Netherlands, Italy, Germany, France, Canada and Belgium alleging that they were guilty 'for violation of the obligation not to use force" and requested for the indication of provisional measures. The above case is one of the said ten cases, the International Court of Justice rejected the request for indication of provisional measures on the ground that in the absence of the consent by the United States the Court cannot exercise jurisdiction. The Court ordered that the case be removed from the list. However, the World Court remarked :

"Whereas there is a fundamental distinction between the question of the acceptance by a state of the Court's jurisdiction and the compatibility of particular acts with international law; the former requires consent; the latter question can only be reached when the Court deals with merits after having established its jurisdiction and having heard full legal arguments by both parties;[26b]

Further, "whereas whether or not states accept the jurisdiction of the Court they remain in any event responsible for acts attributable to them that violate International law including humanitarian law; whereas any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties;[26c]

In this context the World Court asked the parties that they "should take care not to aggravate or extend the dispute."[26d] Lastly the Court observed : "whereas, when such a dispute gives rises to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter.[26e]

Grounds of intervention*

The coming into force of the Charter of the U.N. has brought about revolutionary changes regarding the valid grounds of intervention. Most of the traditional grounds have ceased to be valid. The charter has, however, introduced a new ground, namely, Collective Measures or Collective Intervention founded on the concept of Collective Security. Broadly speaking, there are now only two valid grounds of intervention—one for the states *i.e.* self-defence and the other for the United Nations *i.e.* Collective intervention or enforcement action under Chapter VII of the Charter. A critical discussion of the following grounds is being undertaken with a view to see which of these grounds are still valid :

(1) Self-defence ; (2) on humanitarian grounds ; (3) to enforce treaty rights ; (4) intervention to prevent illegal intervention ; (5) balance of power ; (6) for protection of persons and their property ; (7) collective intervention ; (8) intervention to maintain international law ; and (9) intervention in civil wars.

(1) *Self-defence.***—Self-defence has been a valid ground of intervention for long time. On the ground of self-defence a State may intervene in the affairs of another State. In this connection Mr. Webster, the Secretary of United States of America propounded a very important principle in the famous case, *The Caroline* (1841). In this case Mr. Webster declared that the necessity of self-defence should be *instant, overwhelming and leaving*

26a. Decided on 2 June, 1999.
26b. Para 30 of the judgement.
26c. Para 31 of the judgement.
26d. Para 32, ibid.
26e. Para 33, ibid.

* See P.C.S (1968), Q. No. 9 ; For answer see also definition of "Intervention" discussed earlier, P.C.S. (1989) Q. 9(b) ; See also for C.S.E. (1992) Q. 69 (a).

** See for I.A.S. (1964), Qs. No. 2 and 7 ; P.C.S. (1973), Q. No. 4 ; P.C.S. (1965), Q. No. 1 ; P.C.S. (1977) Q. 9 ; C.S.E. (1982) Q. No. 5(c) ; P.C.S. (1983), Q. 6 ; P.C.S. (1988) Q. 2(b).

no choice of means and no moment for deliberation.[27] This principle was affirmed by *Nuremberg Tribunal* in 1946.[28] The test laid down in *The Caroline* was finally affirmed by the International Court of Justice in the *Corfu Channel* case.[29]

The facts of *the Caroline* case are as follows :—

In Canada, which was then the colony of Britain, some revolutionaries were trying to overthrow the government. The ship named *Caroline* was carrying arms and men from across the river Niagra (within the territory of America) to assist the rebels. The British Government lodged a protest against the American Government but with no effect. Consequently the British soldiers crossed the river, seized the ship in the American territory and left it floating. The American Government protested and asked the British Government to justify its action on the ground of self-defence and self-preservation The American Secretary of State. Mr Webster propounded the above-mentioned test. England failed to justify its action on the basis of this test and had to express regrets.

The facts of the *Corfu Channel case** (1949) are as follows :

North Corfu Channel is between Albania and Greece. A part of it is within the maritime belt of Albania. Before May.1946, the British ships had removed the mines from the channel and had ensured that it was safe for the passage of ships. That very month some British ships were fired at from the territory of Albania resulting in damage to the ships. In addition to this, after some time the British ships suffered loss and damages due to mines which were laid in the territorial waters of Albania. This also resulted in the loss of lives of some persons. Consequently, the British ships removed mines and explosive substance from the said portion without seeking permission of the Albanian Government in this connection. Albania protested against this and contended that it was a clear violation of Albania's Sovereignty. On the other hand, due to the loss and damage to the British ship by mines laid down by Albania, Britain raised this matter in the Security Council. The Security Council advised Albania and Britain to refer this matter to the International Court of Justice. In the beginning, Albania raised the objection in regard to the jurisdiction of the International Court of Justice in this matter. The International Court of Justice rejected the objection of Albania. Ultimately Britain and Albania agreed to refer the matter to the International Court of Justice for adjudication. Albania and Britain entered into a special agreement and through this agreement referred the following two questions for adjudication of the Court : (1) Was Albania liable under International Law for explosions in its maritime belt and if the answer is yes whether, Albania is liable to pay damages for the same? (2) Whether Britain violated the Sovereignty of Albania by removing the explosive substance, mines, etc., from the territorial waters of Albania ?

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27. In his note dated April 24, 1841, Mr Webster Wrote "..... it will be for Her, Majesty's government to show upon what state of facts and what rules of national law the destruction of the 'Caroline' is to be defended. It will be for that government to show a *necessity of self-defence instant, overwhelming, leaving no choice of means, and no moment for deliberation.* It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did 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. It must be shown admonition or remonstrance to the persons on board the "Caroline" was impracticable, or would have been unavailing. It must be shown that day light could not be waited for : that there could be no attempt or discrimination between the innocent and the guilty ; that it would not have been enough to seize and detain the vessel; but that there was necessity, present and equitable for attacking her in the darkness of the night, while unarmed to the shore, and while unarmed men were asleep on board killing some and wounding others, and then drawing her into the current above the cataract, setting her on fire and careless to know where there might not be in her the innocent with the guilty ; or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this the government of the United States cannot believe to have existed."

28. The Nuremberg Tribunal observed : "it must be remembered that preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity of self-defence, leaving no choice of means and no moment of deliberation" (The Caroline's case, Moore's Digest of International Law, Vol. 11, p. 412).

29. ICJ Rep. (1949), p. 4.

* See also for IAS (1957) Q. No. 6(b), IAS (1977) Q. No. 10(d); P.C.S. (1964) Q. No. 4(b)

The International Court of Justice answered the first question in favour of Britain. That is to say, the Court decided that Albania was responsible for explosions in its territorial waters. The Court answered the second question in favour of Albania. That is to say, Britain violated the Sovereignty of Albania by removing the explosive substances from the territorial waters of Albania without its permission. The Court observed that Albania was under an obligation to inform Britain about the mines and explosive substance in the North Corfu Channel. Albania did not give any such warning to the warships of Britain. In addition to this, no such endeavour was made by Albania as might prevent the harm caused to the warships of Britain. The Court, therefore, ruled that Albania was liable for the loss and damage caused to the British warships on account of explosions and was also liable to pay compensation to Britain.

The Court observed :

> "It is generally recognised and in accordance with international customs 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 authorization of a coastal State, provided that passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace."

But by removing mines etc. from territorial waters of Albania without its permission, Britain was guilty of the violation of Albanian sovereignty. However, in view of the gravity of Albanian act of firing on British ships the world Court did not award any compensation on this account.

The test propounded by Mr Webster is still valid with the only difference that intervention on the ground of self-preservation is no more allowed. Thus instead of self-defence and self-preservation the valid ground now is only self-defence, that too very much limited and curtailed by Article 51 of the Charter of the U.N. However the concept of self-defence as expounded under Article 51 includes the defence of others and is called the right of individual and collective self-defence.

The United Nations Charter enshrines the principle of individual and collective self-defence in Article 51.[30] Article 51 provides : "Nothing in the present Charter shall impair the inherent *right of individual or collective self defence* if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures to maintain international peace and security. Measures taken by members in exercise of this right shall be immediately reported to the Security Council and shall not in any way effect 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." The right of self-defence under Article 51 is subject to following conditions : (i) There should be an armed attack ; (ii) The right exists until Security Council has taken any action ; (iii) It should be reported to the Security Council ; (iv) It is subject to the review by Security Council ; (v) This right shall not affect the responsibility of the Security Council for the maintenance of peace and security ; (vi) The right is not available against a non-member of the United Nations.[31] Thus, "The beginning of an armed attack is condition precedent for resort to force in self-defence".[32] This may be explained with the help of following illustration : (i) State *A* receives information that its neighbour State *B* is preparing to invade its territory. In order to forestall the invasion *A* attacks *B* and disperses the troops amassed in *B*. *A* and *B* are both members of the U.N. *B* brings a complaint against *A* in the Security Council that State *A* has committed aggression. *A*

30. According to Josef L. Kunz : "Under general international law, States have the right to use military force as sanctions, Article 51 gives he same right of self-defence plus the right of defence of others incorrectly-called self-defence." "Sanctions in International Law," AJIL, Vol. 54 (1960), p. 324 at p. 328.

31. Julius Stone, Legal Control of International Conflicts (London, Stevens & Sons, 1954), p. 244.

32. "The Use of Force in Self-Defence," BYBIL, Vol. 37 (1966) p. 266 ; see also Josef L. Kunz, "Individual and Collective Self-Defence in Article 51 of the Charter of the U.N." AJIL Vol. 41 (1947), p. 872.

pleads self-defence.* (ii) Similarly, the territories of a big and powerful State *"X"* lie between the territories of two small states "A" and *"B"*. State *"A"* is towards the east and the State *"B"* is towards the west of the State *"X"*. After certain border incidents during the course of which a few soldiers belonging to each of the three States were killed and wounded, the State *"X"* attacked States *"A"* and *"B"* and occupied major portions of their territories. The Security Council tried to intervene but the reply was given by the State *"X"* was that the States *"A"* and *"B"* were about to attack *"X"* and the latter had started military operations in order to protect its interests. The State *"X"* also contended that it alone could determine whether or not such danger existed.** In illustration (i) intervention by State *A* is not justified under Article 51 of the Charter. Similarly in illustration (ii) intervention by *"X"* is also not justified because Article 51 of the Charter permits the right of self-defence only if "an armed attack occurs against a member of the United Nations." [33] In both the above illustrations, armed attack had not taken place but the contention was that preparations were being made to launch the attack. Moreover, in the second illustration, *X*'s contention that it alone could determine whether or not such danger existed, is not justified because Article 51 of the Charter clearly provides that "measures taken by members in exercise of this right..... 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 to maintain or restore international peace and security."

Thus, alarming military preparations by a neighbouring State would not justify resort to anticipatory force by the State which believed itself threatened." It has been rightly remarked : "The principal lesson of the League experience and two world wars is that the plea of self-defence should be held within strict confines, so that States may be precluded from embarking upon aggressive wars in the name of self-defence. The Charter of the United Nations has rightly restricted self-defence to armed attack. The solemn words of the preamble of the U.N. Charter that the 'scourge of war which twice in our life-time has brought untold sorrow to mankind' warn against an interpretation of the Charter which extends the scope of self-defence beyond the limits of Article 51.[34] In case concerning *Military and Para-Military Activities in and Against Nicaragua (Nicaragua* v. *United States of America)*[35], the International Court of Justice held that the right of collective self-defence pre-supposes that an armed attack has occurred.[36] Further, *under international law in force today—whether customary international law or that of the United Nations system—States do not have a right of "collective armed response to acts which do not constitute an "armed attack."* [37] As regards the definition of an armed attack, the world court observed : "..... an armed attack must be understood as including not merely action by regular armed forces across an international border but also 'the sending by or on behalf' of a state of armed bands, groups, irregulars or mercenaries, which carryout acts of armed force against another state of such gravity as to amount an actual armed attack ..... or its substantial involvement therein." [38]

* Asked in P.C.S. (1973), Q. No. 4.

** Asked in P.C.S. (1975), Q. No. 8.

33. As rightly remarked by Judge Philip C' Jessup : "This restriction in Article 51 very definitely narrows the freedom of action which States had under international law. A case could be made out for self-defence in the traditional law where the injury was threatened but no attack had yet taken place. Under the Charter, alarming military preparations by a neighbouring State would justify a resort to the Security Council, but would not justify resort to anticipatory force by the State which itself threatened." A Modern Law of Nations (New York, Macmillan, 1948), p. 166; see also Quincy Wright, "The Cuban Quarantine" AJIL, Vol. 57 (1963), p. 546.
34. M.K. Nawaz, "Limits of Self-Defence : Legitimacy of Use of Force Against Economic Strangulation ?", IJIL, Vol. 16 (1976), p. 252 at p. 264.
35. I.C.J. Reports 1986, p. 14.
36. Para 233 of the majority judgment.
37. Para 211 of the majority judgment.
38. Ibid. pp 103-104.

*Distinction between self-defence and self-preservation.**— A few words will not be out of place here to explain the distinction between "self-defence" and 'self-preservation'. Under the traditional or general international law, there was hardly any distinction between the two terms. However, it must be noted that the term 'self-preservation' is much wider than the term 'self-defence'. Under the traditional international law, intervention on the ground of self-preservation was permitted. Even military preparations in the neighbouring State could justify intervention in the affair of that State. The Charter of the U.N. does not at all mention the term 'self-preservation'. The Charter recognizes retaliatory measures or use of force only on the ground of 'self-defence'. As compared to 'self-preservation', right of 'self-defence' is a very much restricted right and can be exercised only when an armed attack occurs. Other conditions mentioned in Article 51, as explained earlier, must also be fulfilled.

Distinction between self-defence and self-help : It is sometimes said, international Law, in its technical aspects, is a primitive law functioning in a society yet in an embroynic state and characterised by the technique of self-help."** This view does not seem to be correct. The traditional or general international law recognised the right of self-help in many situations. The Charter of the U.N. has greatly restricted this right. The Charter confers on each State the right of individual and collective self-defence in case an armed attack occurs. Thus in case of an armed attack, even the Charter recognises the right of self-help. But this right recognised under the Charter is subject to several restrictions as pointed out earlier including the review by the Security Council. The right recognised under the Charter is thus distinct from that of self-help and is therefore, and rightly too, referred as the right of 'self-defence'. As remarked by Gerald Fitzmaurice, "The Charter frowns on self-help ; it goes far towards rendering unenforceable by direct action the whole of international law except the breach of peace.*** Article 2(4) of the Charter provides that all members shall refrain in their international relation 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. Moreover, it is one of the purposes of the U.N. to maintain international peace and security, and to that end : to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about the peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace.[39] The Charter, however, recognises the right of individual and collective self-defence if an armed attack occurs. But even this right which may to some extent be called the recognition of the right of self-help is subject to the review and control of the Security Council which, as Article 24 provides, has the primary responsibility for the maintenance of international peace and security and acts on behalf of the members of the U.N.

Thus, there is a difference between self-defence and self-help. Self-help is a right which existed in the primitive legal order. In an advanced international legal order, it is prohibited. So long as international law was a primitive legal order, there was provision for self-help in the form of war and reprisal. On the contrary, self-defence is based on the illegality of war. As aptly pointed out by Josef L. Kunz, "Self-defence as a truly judicial institution presupposes an advanced legal order and international self-defence is therefore closely bound up with a more advanced international organisation.[40] As pointed out earlier, Article 51 of the U.N. Charter which provides the right of self-defence, also provides for its limitations. Moreover, it is subject to the control of the Security Council.

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* See also for P.C.S. (1985) Q. 10(b).

** Asked in P.C.S. (1975) Q. No. 1.

*** Asked in I.A.S. (1964), Q. No. 7.

39. Article 1(1) of the United Nations Charter.

40. Josef L. Kunz, "Individual and Collective Self-Defence in Article 51 of the Charter of the U.N.", AJIL, vol. 41 (1947), p. 872 At p. 875.

(2) *Intervention on humanitarian ground.**—Intervention was permitted in past on humanitarian grounds. After coming into force of United Nation's Charter, the United Nations has done commendable work in the field of human rights. If at all intervention is permitted on humanitarian grounds, it may be done only by the United Nations. On the basis of Articles 1, 55 and 56, it may be said that Charter provisions relating to human rights create legal obligation upon the members in respect of human rights. But the Charter does not authorise any State to intervene in the affairs of another State. This is clear from Article 2(4). Even U.N. has been prohibited, under Article 2(7), from intervening in the domestic affairs of Member States. Consequently, on the ground of human rights alone, even the U.N. cannot intervene in the affairs of any member State. It can, however, do so by connecting or linking the matter of human rights with that of the maintenance of international peace and security. That is to say, if under Article 39 the Security Council determines that violation of human rights in any State poses a threat to peace or amounts to breach of peace then the Security Council may intervene for then the provision of Chapter VII of Charter become applicable.[41] The glaring example of this is recent intervention by the U.N. in Iraq on behalf the Kurdish people.

(3) *To enforce treaty rights.*—Intervention was also permitted in past under International law to enforce treaty rights. The Charter of the U.N. does not permit intervention on this ground.

(4) *Intervention to prevent illegal intervention.*—In past there have been several cases of intervention by States in order to prevent illegal intervention by other States. Intervention by one State in the affairs of another State on this ground is no more permissible.

(5) *Balance of Power.*—In past there have been many cases of intervention in order to maintain balance of power. Under the United Nations Charter this is not at all valid ground. Thus no State can intervene in the internal or external affairs of another State in order to maintain the balance of power. As a matter of fact, International law today tends to convert the system of balance of power into a system of collective security.** The system of balance of power has been replaced by a system of collective security.[42]

Though intervention by a State or U.N. in the domestic affairs of a State on the ground of balance of power is no more permissible, politically reference of this ground is still not uncommon. A major nuclear confrontation between the two super powers—the U.S. and the U.S.S.R., has so far been avoided on the basis of balance of power in respect of nuclear weapons. It would not be wrong to say that in all talks of disarmament between the two super powers, balance of power forms the basis directly or indirectly. Besides, whenever India protests against U.S. supply of dangerous weapons to Pakistan, reference of the disturbance of balance of power in the sub-continent is made.

(6) *For Protection of persons and property.*—In past, International Law permitted intervention by a State for protection of the persons and property of its citizens. This ground is no more permissible under the Charter of the U.N.

(7) *Collective intervention or collective measures.****—Under the U.N. Charter 'Collective intervention' can be made to check an aggression on the breach of international peace and security. Under Chapter VII, Security Council has been empowered to take collective action if there exists a threat or a breach of international peace and security or an aggression has taken place. In the first stage, the Security Council takes such collective measures as do not involve the use of force. But if such an action does not prove to be adequate, the Security Council is empowered to employ armed

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* See also for P.C.S. (1964) Q. 9(b) ; C.C.S. (1981) Q. 5(b).

41. See also Chapter on "Human Rights".

** See for P.C.S. (1969), Q. No. 2.

42. For a detailed discussion of this see Chapter on "Collective Security".

*** See also for P.C.S. (1985) Q. 5 ; For detailed answer see also Chapter on "The Security Council".

forces. The United Nations took such action in Korea (1950) and in Congo (1961). The recent example of such action is Gulf War (1991) for the vacation of Iraqi aggression and occupation of Kuwait. (See Appendix II.) This has been discussed in detail in Chapter on "The Security Council".

(8) *Intervention to maintain International Law.*—Before the establishment of League of Nations and United Nations, International Law permitted intervention for maintenance of International Law. Intervention on this ground is no more permissible.

(9) *Intervention in Civil Wars.*—In view of the continuous growth of International community, nations of the world have established close relations with each other. If anything happens in a State, it is quite natural that it makes its effect on other States as well. If there is a civil war in a State, it is likely to affect directly or indirectly other States. In past there have been interventions by States in affairs of other States on this ground. For example, in 1934-38 Germany and Italy intervened in the war of Spain. In 1968, Russia intervened in the Civil War of Czechoslovakia. Similarly, Russia intervened in the affairs of Hungary. The question arises how far such type of intervention is justified in view of the fact that United Nation's Charter has propounded the principle of non-intervention by States in the affairs of other States. Jurists are of the view that Russian interventions in Czechoslovakia and Hungary were not justified. But Russia claimed that it intervened in the affairs of Czechoslovakia and Hungary on the request of their respective governments. It has been suggested that in civil war the United Nations should have the right to intervene. The United Nations should take necessary action to check such type of war. Prof. R.P. Dhokalia has pointed out that a successful example of intervention by United Nations is the case of Congo in 1961. In Congo United Nations succeeded in ending the civil war and in establishment of law and order.[43] It may be noted here that the U.N. can intervene in civil war only if the Security Council first determines under Article 39 of the Charter that it poses a threat to the peace, breach of the peace, or amounts to an act of aggression. If the Security Council makes this determination, provisions of Chapter VII of the Charter become applicable. The recent examples of such intervention by the U.N. Security Council are : (i) intervention in Iraq on behalf of the Kurdish people and (ii) intervention in civil war of Yogoslavia ; and (iii) Somalia.

Conclusion.—In view of the above discussion it may be concluded that a State may intervene in the affairs of another State only on the ground of self defence. The U.N. may intervene in the domestic affairs of member State on the ground of maintenance or restoration of international peace and security. That is to say, it can take collective measures or can make collective intervention if an aggression has taken place or there is a threat to international peace and security. The U.N. may also intervene in case of civil wars between two member States or in case of violation of human rights in a member State if the Security Council under Article 39 first determines that the civil war or the violation of human rights poses a threat to international peace and security.

Intervention under League of Nations and United Nations and the Concept of Domestic Jurisdiction*.— Article 2(7) of the United Nations' Charter provides, "Nothing contained in the present Charter authorises the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State ....." According to Prof. Quincy Wright, it is clear that the obligations which arise from the implementation of the provisions of Charter are matters which are not within the domestic jurisdiction of any State. Article 2(7) has made it clear that the prohibition regarding non-intervention by the United Nations in the domestic jurisdiction of any State will not apply to the Security Council when it takes any enforcement or preventive action against any State for the maintenance of international peace and security.

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43. R.P. Dhokalia, "Civil Wars and International Law", IJIL Vol. II (1971), p. 219 at p. 238 ; see also "Biafra, Bengal and Beyond : International Responsibility and Genocidal Conflict," AJIL, Vol. 66 (1972), p. 89 at p. 94-95.

* See also for I.A.S. (1971), Q. No. 11 (a) ; P.C.S. (1973), Q. No. 10(e) and P.C.S. (1967), Q. No. 8 ; C.C.S. (1981), Q. 5(a) ; C.S.E. (1994) Q. 8(a).

Comparison with League of Nations.—Article 15 of the Covenant of the League of Nations was to a great extent, similar to Article 2(7) of the United Nations' Charter. Article 15 of the Covenant of the League of Nations provided that the League of Nations could not intervene in matters which were "solely within the domestic jurisdiction" of the States. Prof. Julius Stone[44] has pointed out the following differences in the League provisions and the provisions of the United Nations' Charter :—

(i) Under the League of Nations, the League Council had to decide whether a matter was within the domestic jurisdiction of a State or not. There is no such provision in the United Nations' Charter. According to Prof. Kelsen, this will mean that under the United Nations' Charter each State is free to determine whether a particular matter is within its domestic jurisdiction or not. Prof. Julius Stone does not agree with this view. In his view, each organ of the United Nations before which the matter arises is entitled to determine whether a particular matter is within the domestic jurisdiction of a State or not.

(ii) Under the League of Nations, any State which claimed that a particular matter was within its domestic jurisdiction, had to prove it. There is no clear provision in this connection in the United Nations' Charter.

(iii) Under the League of Nations, a matter could be within the domestic jurisdiction of a State if it was not covered by international law. Under Article 2(7) of the United Nations' Charter, it is not necessary.

Thus the provisions of the Covenant of League of Nations and the United Nations' Charter are different. As regards the words "a matter which by international law is solely within the domestic jurisdiction of a State", Prof. Brierly has expressed the view that no matter which is regulated by international law can be a matter within the domestic jurisdiction of a State.[45] Thus it is clear that United Nations cannot intervene in domestic jurisdiction of any State. But "what these matters would be was not settled once and for all in advance. This was left to be decided pragmatically in the practice of the United Nations".[46] On a perusal of the historical perspectives, debates and conferences, it is clear that the representatives of tne States in San Francisco Conference intended that the United Nations should neither discuss nor pass any resolution in regard to matters which are within the domestic jurisdiction of any State.[47] However, this conception has undergone significant changes. It is now well recognized that the discussions in the United Nations and the passing resolution to implement the provisions of the Charter do not amount to intervention in the domestic affairs of any State.[48] Inclusion of any matter in the agenda of General Assembly, discussion on it, its study or the passing of a general resolution would not amount to intervention[49] Famous Indian Jurist M.S. Rajan has also made it clear in his book, that the resolutions of the General Assembly which are passed to fulfil international obligations of members are within the jurisdiction of the United Nations. As pointed out above, the United Nations is empowered to intervene in civil wars of States. Examples of Congo and Cyprus may be cited in this connection. In his view when the civil wars reach a stage which endangers international peace and security it becomes necessary for the United Nations to take necessary collective action.[50]

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44. Julius Stone, Legal Control of International Conflicts (London, Stevens & Sons), 1954 pp. 254-56.
45. J.L. Brierly, "Matters of Domestic Jurisdiction," BYBIL, Vol. 6 (1925), at p. 8.
46. G. Schwarzenberger, Power—Politics, Second Edition (1951), p. 449 ; see also Waldock, 31 BYBIL, p. 96.
47. D. Gilmour, "The meaning of 'Intervene' within Article 2(7) of the U.N. Charter,—An Historical Perspective," I.C.L.Q., Vol. 16 (1967), p. 300 at p. 349.
48. Ibid, at p. 251.
49. See Quincy Wright, "Is discussion Intervention?" A.J.I.L., Vol. 50 (1956), p. 102
50. See R.P. Dhokalia, "Civil Wars and International Law", IJIL, Vol. II (1971), p. 219 at p. 238.

Legitimacy of use of force against economic coercion : Example of Bangladesh *.—It is now generally and universally recognized that human rights were openly violated in Bangladesh in 1971. Under the Military Government of General Yahiya Khan, not a single stone was unturned to suppress the human rights and fundamental freedoms of the people. Even after the elections, the elected representatives of the people were not allowed to form their government. The violation of human rights in Bangladesh reached such a magnitude that it ceased to be a matter within the domestic jurisdiction of a State and became an international matter. "The scenes of blood and bestiality ensuing from the military crack down under General Tikka Khan's deadly directions was such the like of which no eye had seen and no tongue could adequately tell... the appealing annihilation perpetrated by military personnel of Pakistan in Bangladesh, its dimensions and destardiness *prima facie* constitute an international crime." [51] In the view of Dr L.M. Singhvi, the influx of lakhs of refugees to India endangered international peace. Besides this, the crime of genocide, which was perpetrated, was an international crime and did not come within the domestic jurisdiction of any State. "The Genocide Convention is the expression of the world's conscience through law and makes it plain by affirming that crimes referred to in Article II and III thereof are a matter of international concern and so outside the matters essentially within the domestic jurisdiction of any State of Article II, Para 7 of the United Nations' Charter." [52].

The United Nations could intervene in Bangladesh on humanitarian grounds for the genocide committed and atrocities caused by Pakistani armed forces were clear violation of human rights and posed a grave threat to peace. It must however be noted that the U.N. could intervene only if the Security Council determined under Article 39 that the situation there posed a threat to the international peace and security. But under the charter no state can intervene in the affairs of another state on the ground of violation of human rights. But it has been pointed out : ".....the essence of aggression is that a State poses a threat to the socio-political fabric of another State. All the underlying idea of individual self-defence is that if a State's fabric is threatened by another State, it has a right to take all the steps it may deem necessary to terminate that threat to protect itself ..... An obvious corrollary to this is that a State's right of self-defence is not confined to cases of armed attack only." [53]

It was alleged by Pakistan that Indian armed forces went into action on 21st November, 1971, and from 3rd December, they were collaborating with the guerrillas of Bangladesh. The Indian representative in the U.N. admitted that India took military initiative on 21st November, 1971, but he added that it should not be looked at in isolation from other events which had occurred and were occurring. The influx of refugees continued and it endangered India's social and political life. As pointed out by Prof. K.P. Misra, "..... civil aggression as it took place in India cannot be excluded from the concept of aggression. Once this is accepted it logically allows the victim of aggression the right of self-defence.[54] This is the only justification which one can give in favour of India's action. The provisions of the Charter as they stand at present do not permit such type

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* See for P.C.S. (1972), Q. No. 9; C.C.S. (1981), Q. 5(b).

51. V.R. Krishna Iyer, "Laws Trust with the Dead in Bangladesh *vis-a-vis* Punishment of Humanicidists "National Herald," February 4, 1972.

52. Ibid.

53. K.P. Misra, The Role of the Indo-Pakistan Conflict, 1971 (Vikas Publications House, Pvt. Ltd., Delhi, 1973) p. 130.

54. Ibid ; see also S.K. Kapoor, "Humanitarian Intervention : Could U.N. Intervene in Bangladesh on Humanitarian Grounds ?" Law Review, Vol. 2, (Sept. 1974), p. 9.

of intervention.[55] But it has been pointed out, "A large number of the Third World and Socialist States have taken the view that the term 'force' must be construed as to include not only physical or armed force, but also all forms of coercion, including those of economic, political and other character." [56] Further, overwhelming majority of States now subscribe to the view that "economic and other forms of coercion are violative of the principle of non-intervention." [57]

The situation with which India was confronted was unprecedented and if India had not taken the said action probably it would have become impossible to ensure the return of the refugees. The framers of the charter probably never envisaged such a situation. The U.N. Charter should. therefore, be suitably amended to cover such situations. It would not be wrong to say that India's action has already modified thinking of the international community in this respect. The General Assembly on 18 November, 1987 adopted a Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or use of Force in International Relations. In this Declaration, the General Assembly solemnly declared :

"States have the duty to abstain from 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."*

Monroe Doctrine*.—This doctrine was propounded by President Monroe of United States of America. This doctrine was in fact the reaction of the treaty which Nepoleon had entered into with some European States. In American continent all those States which were previously the colonies of Spain and other States, had become independent. The European States wanted to re-establish their colonies in America and wanted to help Spain. In the background of these events the American President Monroe made a declaration in 1823 which is called Monroe doctrine. The Monroe doctrine contained three important points : (i) The States of American continent would no more be made subject of colonisation in future. (ii) America would not interfere in the mutual wars of European States. (iii) If European States interfered in the affairs of American continent, America would consider it unfriendly act, and would take necessary action in this connection. In short, Monroe doctrine was based on the principle of non-intervention. Through this doctrine, President Monroe declared that America would neither interfere in the affairs of European States nor would it tolerate the interference of European States in the States of American continent. "The importance of the Monroe doctrine is largely of a political, not of a legal character.....while its claim to legal validity has never been admitted, it has not been actively opposed by the European powers. It was given a quasi-legal status by Article 21 of the Covenant which lays down that it does not affect, regional understandings like Monore doctrine." [58] In the presence of U.N. Charter it has lost all its significance.

Drago Doctrine.—This doctrine is called Drago doctrine because it was propounded by Mr. Drago, foreign minister of Argentina. In fact, this is complementary of the Monroe doctrine. According to this doctrine European States could not intervene in the affairs of States of American continent on the ground of claiming public debts. This principle was propounded because European States had started using military force to

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55. For Example Prof. M.K. Nawaz writes : "The Charter of the United Nations has rightly restricted self-defence to armed attack. The solemn words of the Preamble of the U.N. Charter that the 'scourge of war which twice in our lifetime has brought untold sorrow to mankind' warn against an interpretation of the Charter which extends the scope of self-defence beyond the limits of Article 51. International Law 'de legelatta' prescribes the exercise of force as a measure of self-defence in case of economic strangulation 'Limits of Self-Defence : Legitimacy of Use of Force Against Economic Strangulation ?" IJIL, Vol. 16 (1976), p. 252 at p. 264 ; See also discussion under the heading "Article 2(4) and the Limits of the Use of Force" made earlier in this Chapter.

56. V.S. Mani, "The Concept of Economic Coercion", India Quarterly, Vol., XXXIII No. 3 (July-September, 1977, p. 334 at p. 337.

57. Ibid, at p. 341.

* See also for I.A.S. (1973), Q. No. 3(a) : I.A.S. (1961), Q. No. 5, for answer of this question see also discussion of the law of intervention made earlier.

58. Oppenheim, see supra note 1 at p. 316.

enforce the claims of their citizens. For example, England, Germany and Italy had enforced blockade against Venezuela. This blockade was imposed because Venezuela had failed to fulfil its financial obligations. As noted earlier, Drago doctrine is complementary to Monroe doctrine and has less significance than he Monroe doctrine. It may be noted here that United Nation's Charter has propounded the principle of non-intervention and in this context both Monroe doctrine and Drago doctrine have lost their importance and utility.

Historical precedents of Intervention on the grounds of self-defence and on other grounds

Following are some of the main historical precedents of intervention :

(1) *The Caroline,* 1841[59].*

N.B.—The facts of this case and the principles propounded have been discussed earlier under the ground of 'Self-defence'.

(2) *Corfu Channel case* (1949)[60] : *N.B.*—This has been discussed earlier in this Chapter.

(3) *Case of Korea,* 1950.—In 1950, North Korea invaded South Korea. This invasion was also not justified on the ground of self-defence. The Security Council of the United Nations, therefore, decided to take enforcement action against Korea. China also intervened in Korea. China claimed that the presence of the United Nations forces in Korea was against the interest and self-preservation of China. But the United Nations declared the intervention of China as illegal intervention.[61]

(4) *Russian intervention in Hungary,* 1956.**—In 1956, there took place a Civil War in Hungary. Russia sent its forces in Hungary and, suppressed the revolt there. Imri Negi, the then Prime Minister of Hungary, requested the United Nations to intervene. Before the United Nations could take action, Imri Negi was removed from the Post of Prime Ministership. Russia claimed that she intervened in Hungary on the request of the Hungarian Government. But the United Nations established an Enquiry Committee which reported that Russian intervention in Hungary was not justified. The Civil War in Hungary started in October 1956. The people of Hungary wanted complete independence and with this objective in view they wanted to get rid of Russian influence and control. Imri Negi was the favourite leader of the people and they wanted to make him the Prime Minister. Martial law was declared in Hungary but even this failed to establish peace. Ultimately Imri Negi was made the Prime Minister. Respecting the wishes of the people he announced his decision to do the following : (a) To give representation to all the political parties in the Government ; (b) To have relations with Soviet Union on the basis of equality and to end Russian control in Hungary ; (c) To ensure withdrawal of Russian armed forces from Hungary ; and (d) To hold elections from the Legislative Assembly of Hungary. But in the meantime Janos Kadar established a parallel government at a distance of 50 miles from Budapest and asked Soveit Union to intervene in Hungary. On the other hand, Negi reacted by ending the Warsaw Pact. But Soviet Union contended that Warsaw Pact can be terminated with the consent of all parties to the treaty. At the request of Kadar, Russian armed forces entered Hungary. The wishes and aspirations of the Hungarian people were ruthlessly crushed by force. Negi took asylum in Yugoslavian embassy and later on he was expelled and sent to Rumania. The Soviet Union argues that she intervened under the provisions of the Warsaw Pact and at the request of Hungary. At the instance of the Communist Party, people's movement was crushed by force. Such an intervention is not permissible under the U.N. Charter.

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59. The Caroline Case, Moore's Diggest of International Law, Vol. II, p. 412.
* See also for I.A.S. (1957), Q. No. 6(c).
60. I.C.J. Reports (1949), p. 5.
61. See also Chapter on "Security Council" for a little detailed discussion.
** See also for I.A.S. (1957), Q. No. 5 : To elaborate it connect it with principle of non-intervention discussed earlier.

(5) *Intervention by U.K., France and Israel in Egypt* (1956)*.—In 1956, Egypt nationalised Suez Canal on the ground of obtaining money to build Aswan Dam. France, Britain and Israel reacted strongly against this action of Egypt and jointly made armed intervention in Egypt in order to prevent Egypt from nationalising the Suez Canal. This was a flagrant violation of provisions contained in Articles 2(4) and 51 of the U.N. Charter. The problem was resolved through the efforts of Soviet Union, Security Council and General Assembly. Subsequently it was agreed that Egypt was entitled to realise taxes for the use of canal but the canal would remain free from international politics and would remain open for shipping, to all States.

(6) *The case of Goa.***—After the exit of Britishers from India, Goa could not become a part of the Indian Republic because the Portuguese continued their occupation over Goa. India was committed to free Goa which was an integral part of India historically, geographically and on other grounds. In between 1947 and 1961, the people of Goa several times revolted against the established government but the rulers of Goa ruthlessly suppressed their revolt. In 1955 unarmed satyagrahis were fired at. Consequently India recalled its Consul and ordered the closure of the offices of the Portuguese Consul in Bombay and Madras. In 1961, certain incidents took place because of which it became necessary for India to take some action. In 1961 the Portuguese soldiers fired at Indian ships. Besides this, the fishing vessels were also fired at. The Portuguese aircrafts also crossed Indian borders several times. The Indian Government protested against this and communicated warning for the same but with no response. Consequently, it became necessary and expedient for India to take some action. On December 17, 1961 Indian forces entered Goa, and within a short time liberated Goa, Daman and Diu. This action of India was severely criticized by Western Countries. The then Prime Minister of India, Sri Nehru propounded a doctrine similar to that of Monroe doctrine in 1955. In this declaration Prime Minister Nehru made it clear that India would not tolerate the Portuguese presence on her land. After the exit of Britishers, the Portuguese should also have left India, but they continued their occupation over the land. Consequently, India had to take the said action to end the occupation of Portugal over Indian land.

It may be noted here that in the last 25 years, the States of Africa, Asia and other States have started wars of liberation. They have contended that on this ground intervention in the internal affairs of a State may be permitted.[62] It would not be wrong to say that the United Nation's Charter can be enforced in civil wars of a State.[63] In the view A. Rigo Sureda,[64] Portugal lost legal title to Goa when it was declared a non-self governing territory within the meaning of Article 73 of the UN. Charter. According to the principle of self-determination, as expounded by the General Assembly in its *Declaration of Principles of International Law concerning Friendly Relation and Co-operation among States in accordance with the Charter of the United Nations* : Every State has the duty to refrain from any forcible action which deprives peoples of .....their right to self-determination and freedom and independence. In their action against, and resistence to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.[65] The General Assembly further declared that "Principles of the Charter which are embodied in this Declaration constitute basic principles of the International law" and appealed to all States, including the non-members, "to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles." "All these declarations are not ordinary international treaties or conventions and were not subject to ratification. Nevertheless,

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* See also for P.C.S. (1967), Q. No. 5(b).

** See also for C.S.E. (1983) Q. 7(b) (i).

62. See R.P. Dhokalia, Supra note 43 at p. 236.
63. Ibid, at p. 250.
64. A. Rigo Sureda, The Evolution of the Right of Self-Determination (A.W. Sijhoff, Leiden, 1973), p. 353.
65. General Assembly Resolution 2625 (xxv) of 24th October, 1970 : General Assembly Official Records, Twenty-fifth Session, Suppl. No. 28 (1971) at p. 124.

there is a wide consensus that these declarations actually established new rules of international law binding upon all States. This is not treaty-making but a new method of creating customary international law.[66]

The Goans were fighting for their liberation and were entitled to seek Indian help for their liberation and self determination. India assisted the Goans in their efforts to achieve this objective. Thus although it is very difficult to find a precedent to justify India's action in Goa, yet it can be justified on the support of U.N. resolutions. A General Assembly resolution is generally of recommendatory nature and lack binding force. But a resolution interpreting the provisions of the U.N. Charter or expounding general or customary international law, creates legal implications and may assume binding force. In the light of the above discussion, it would not be wrong to contend that India's action in Goa can be justified on the ground that it was to give support to Goans asserting their right to self-determination which has become a binding principle of international law for *"Peoples under alien subjection."* [67] It has been argued by some authors[68] that under special circumstances, the principle of self-determination may be applied even to a non-colonial setting. But this is very controversial. It is, however, now generally agreed that the principle of self-determination has become binding principle of international law in the context of colonialism.

It may, be noted that justification or otherwise of Indian action in Goa has now only an academic interest because on 31st December, 1974, a treaty between India and Portugal was signed wherein Portugal has recognised the full sovereignty of India over Goa, Daman and Diu, Dadra and Nagar Haveli.

(7) *American intervention in Cuba.**—In 1962, America enforced blockade against Cuba and justified its action on the ground of self-preservation. America referred in this connection, Article 3 of the Treaty of Havana. America claimed that the nuclear weapons which were going to be supplied by Russia, would have jeopardised the security of America. The jurists are, however, of the view that the Cuban blockade enforced by America was not justified on the ground of individual and collective self-defence. "It is difficult to find out that the Soviet Union violated any obligation of international law in shipping misiles to, and installing them in Cuba, at the request of the Castro Government." [69] Further, "The quarantine itself was a preventive measure to be enforced with conventional weapons, prior to an armed attack by Cuba or the Soviet Union upon the United States, or any other American country and without authority of the United Nations or the consent of all the States which might be injured by its application. It could not, therefore, be justified under the terms of Article 2, paragraph 4, of the Charter and the recognized exceptions, such as that in Article 51 to this general prohibition against the threat or use of force in international relation." [70]

(8) *Vietnam.*—In Vietnam also, America had tried to justify its action on the ground of individual and collective self-defence. But the majority of the jurists have expressed the view that American action is not covered under Article 51 of the Charter, which

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66. Louis B. John, "The Development of the Charter of the United Nations : the Present State" : In the Present State of International Law and other Essays, Edited by Prof. Marten Bos. (1973), p. 33 at p. 52.
67. Rupert Emerson, "Self-determination", Revisited in the Era of Decolonization", Occasional Papers in International Affairs, No. 8 (Dec. 1964). Harvard University Centre for International Affairs, Cambridge, Mass, 1964, p. 64.
68. Ved P. Nanda, "Self-determination in International Law : The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)", AJIL, Vol. 66 (1972), p. 321 at p. 336, see also for a little detailed study of the Principle of self-determination ; S.K. Kapoor, "The Principle of Self-determination Under International Law and the Indian Practice" Lawyer, Vol. VIII—(11 November, 1976), p. 167. See also Suprata Chowdhury, "Portuguese Territories in India—Some Aspects of International Law", A.I.R. 1957 Journal Section, pp. 23-31.

* See also for P.C.S. (1967), Q. No. 5(c).

69. Quincy Wright, "The Cuban Quarantine," AJIL, Vol. 57 (1963), p. 546.
70. See also Covey Oliver, "International Law and Quarantine in Cuba," AJIL (1963), p. 588. Brunson Machsney, "Some Comments on the 'Quarantine' of Cuba", Ibid., p. 592; Myres S. MacDougal, "The Soviet-Cuban Quarantine and Self-Defence", Ibid, p. 597; "Intervention and Cuba in 1961", Proc. ASIL (April 27-29, 1961) p. 2 ; For Contra see also Leonard C. Meeker, "Defensive Quarantine and the Law", AJIL, Vol. 57 (1963), p. 515.

provides the right of individual and collective self-defence. Prof. Quincy Wright[71] and William Standard[72] have repudiated the claim of America that its action was justified on the ground of collective self-defence. As rightly pointed out by the Lawyers Committee on American Policy Towards Vietnam, the U.S. intervention in Vietnam was illegal".[73] The Committee based its decision on the following points : (i) The Unilateral military intervention of the United States violates the Charter of the U.N. The Charter's exceptional authorisation of individual and collective self-defence "if an armed attack occurs against a Member of the United Nations" cannot apply in the case of Vietnam. (ii) The military presence of the U.S. in Vietnam violated the Geneva Accords of 1954. (iii) The U.S. was not committed by the SEATO Treaty or otherwise to intervene in Vietnam. (iv) The intensity and destructiveness of U.S. Warfare in Vietnam was contrary to international law.

(9) *American Intervention in Cambodia.*—America had tried to justify its intervention in Cambodia on the ground of collective self-defence. Jurists have refuted the American claim. American Intervention in Cambodia is not justified on the ground of collective self-preservation.[74] The U.S. action does not satisfy even the traditional law requirements for military intervention, because "the preventive action in foreign territory is justified only in case of an instant and overwhelming necessity for self-defence, leaving no choice of means, and no moment for deliberation, (*The Caroline case,* Moore's Digest of International Law, II, 412)." [75] Further, "the only legal remedy available to the U.S. was to take the issue to the U.N. Cambodia like the U.S. is an independent Sovereign member of the U.N. and a recourse to the U.N. would have been the appropriate action for the U.S. Instead, President Nixon took the law into his own hands on the mistaken hope that in politics the end justifies the means and that he would be rejected by the American electorate and condemned by history, only if his gamble failed. Legal considerations do not appear to have weighed with him".[76]

(10) *The Afghan Issue.*—The contention of Soviet Union is that it sent Soviet troops to Afghanistan at the request of Afghan Government and that it was in conformity with the Soviet-Afghan Treaty of Friendship, Good-neighbourliness and co-operation and Article 51 of the United Nations Charter. Under Article 4 of the Treaty, Soviet Union had pledged to come to the rescue of Afghanistan if it was involved in armed conflict. This Treaty, it may be submitted is in conformity with Article 52, para 1 of the Charter. The essential condition under which Article 51 can be validly invoked is that "an armed attack occurs". Though ordinary border conflicts do not constitute "armed attacks", these words also do not necessarily connote a full-fledged war. What was happening in Afghanistan at the support and instigation of Pakistan, Iran and the U.S., was nothing less than an armed attack. Guerillas were being sent and arms and weapons were being supplied to the dissidents in Afghanistan to strengthen the anti-Soviet elements so as to engineer the overthrow of the new Afghan regime headed by Babrak Karmal. In this context, President Babrak Karmal was fully entitled and competent to seek Soviet assistance and the Soviet Union was justified in responding to the request. As regards the contention that Soviet Union sent troops at the request of Kabul, this statement has been corroborated by the new Afghan regime at the U.N. and elsewhere several times. Even if the words 'armed attack' are given very narrow and strict interpretation and it is conceded that Article 51 could not be validly involved, sending of troops by Soviet Union under Soviet-Afghan

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71. Legal Aspects of the Vietnam Situation", AJIL (1966), pp. 750-69; see also J.N. Moore, "The Lawfulness of Military Assistance to the Republic of Vietnam" AJIL (1967), pp. 1-34.
72. "U.S. Intervention in Vietnam is not Legal", A.J.I.L. (1966) pp. 633-34, see also R.P. Dhokalia, 'Civil War and International Law", I.J.I.L., (1971), p. 219 at pp. 241-42.
73. The New York Times (January 15, 1967), p. E 9 appearing in Edward Collins' Intrnational Law in a Changing World (1969), pp. 378-84.
74. B.S.N. Murty, "The U.S. intervention in Cambodia", IJIL (1970) p. 196 at p. 198.
75. Ibid, pp. 197-198.
76. Ibid. at p. 202 ; For detailed study see also Richard A. Falk, "The Cambodian Operation and International Law", AJIL (1971), p. 1 ; William Rogers, "The Constitutionality of Cambodian Incursion", AJIL (1971) p. 26 ; John Norton Moore, "Legal Dimensions of the Decision to Intercede in Cambodia", AJIL (1971), p. 38.

treaty at the request of Kabul does not constitute violation of International Law including the Charter of the U.N. so long as Soviet troops remain in Afghanistan and do not attack any other Sovereign State. It may be noted here that on 15 October, 1986, the Soviet Union started pulling out some of its troops stationed in Afghanistan. Earlier the Soviet leader, Mikhail Gorbachov declared on 28 July, 1986 that six Soviet regiments would be withdrawn from Afghanistan before the end of this year. Subsequently, all Soviet troops were withdrawn from the Soviet Union.

(11) *Argentine Intervention in Falkland Islands.**—Falkland islands were discovered by Spanish navigators in the 16th century. Nearly 150 years later, a British navigator, John Strong passed through the islands, and without occupying them, named "Falkland" after Viscount Falkland who was the treasurer to the British navy in those days. Thus Falkland Islands first belonged to Spain followed by France. They became British in 1765, Spanish in 1770 and Argentine from 1822 to 1833. On 2nd January, 1833, at Port Soleded, British captain John James Orslow, in command of the Corvette "Clio" took the Islands by force, expelling the Argentine population and authorities residing in them.[77] Since at that time in war much less use of force, was not prohibited, under international law, annexation of territory by force could not be termed as illegal. War was then considered as an attribute of sovereignty. The position has altogether changed after the adoption of the Charter of the United Nations. The Charter prohibits not only, war but also 'use of force' for the settlement of international disputes.

On 2 April, 1982, the military government of Argentina declared that the country's armed forces had 'recovered' Malvinas (Falkland), South Georgia and South Sandwick Island through a successful military operation. On 3, April, 1982 Britain ordered a large naval task force to the Falklands and froze Argentine assets in retaliation of military invasion. On April 4, 1982, the Security Council passed a resolution calling for immediate withdrawal of Argentine troops from Falkland Islands. On 30 April, 1982, Argentine accepted, rather was forced to accept due to British action, the Security Council resolution to withdraw its forces from Falkland Islands.

Argentina's action was clearly violative of Article 2(4) and Article 2(3) of the U.N. Charter. It amounted to aggression and therefore, Britain was justified to exercise her right of self-defence under Article 51 of the Charter. The Argentine action cannot be justified even on the ground of the principle of self-determination.[78] Unlike, India's action in Goa, inhabitants of the Falkland Islands had opted to remain in and with Great Britain, they even resisted the capture of the Islands by Argentina. But as a colonial situation, British action deserves condemnation. Sooner it quits the Islands the better.

(12) *American Intervention in Grenada.*—On 25 October, 1983, America and 6 Caribbean countries (Antigua, Barbados, Dominica, Jamaica, St. Jucia and St. Vincent) attacked Grenada. The U.S. claimed that its troops had participated in the joint action to protect U.S. citizens and evacuate those who wished to leave and to provide support for the Eastern Caribbean forces in helping the people of Grenada and restore order in that country.

America is guilty of making unilateral armed intervention in Grenada.[79] It is a flagrant violation of International Law including the Charter of the U.N. America has sought to justify its action in Grenada on the following three grounds—(1) Safety of innocent people including 1,000 Americans ; (2) To arrest or check increasing disorder in Grenada, and (3) To establish law and order in governmental institutions in Grenada. The first ground is totally unjustified because in accordance with international law including the charter of the U.N., no State is entitled to intervene in the affairs of another State except on the ground

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* See also for C.S.E. (1988) Q. 8(b).

77. For more details see Madan Lal, "The Falkland Crisis : A Preliminary Assessment" Foreign Affairs Reports, Vol. XXXI No. 6 (June, 1982) pp. 99-113.

78. See also Thomas Frank, "Dulce et Decorum Est The Strugle of Legal Principles in Falklands War," AJIL, Vol. 77 (1983) p. 109.

79. See also Christopher C. Joyner, "The U.S. Action in Grenada Reflections on the Lawfulness of Invasion", AJIL, Vol. 78 (1984) p. 141 at p. 144 ; "International Lawlessness in Grenada", AJIL Vol. 78 (1984) p. 174.

of self-defence. As regards the ground of self-defence, a member State of the U.N. can intervene in the affairs of another State if an armed attack on it has taken place. Moreover, other conditions mentioned in Article 51 of the charter must be fulfilled. It may be added here that leaving apart the legal position even on facts American action cannot be justified. Out of 1000 Americans in Grenada, 800 are the students of a Medical College. The Chancellor of the said Medical College made it clear that there was no danger to the security of American students. Therefore, legally or otherwise, American claim is untenable.

The second ground is also untenable. The disorder, if any, in Grenada is internal and domestic affairs of Grenada and no other State is entitled to intervene in Grenada on this ground.

The third ground is also untenable and unjustified. On the basis of facts also American claim is wrong because the military coup had not led to an increase of disorder in Grenada. Even if there was some increase in the disorder, the conditions were rapidly returning to normalcy.

It may, therefore, be concluded that American intervention in Grenada cannot be justified on any ground whatsoever. It is clear and flagrant violation of the rules of International Law including the Charter of the U.N. and deserves to be condemned by all the member-States of the U.N. and other States.

(13) *U.S. Intervention in Nicaragua.**—On 9 April 1984, Nicaragua filed a case against the United States of America in the International Court of Justice at Hague charging the U.S. with waging of "covert" war to topple the Government in Managua (Nicaragua). Nicaragua told the world court that (i) more than 6,000 counter-revolutionaries raided Nicaragua in last month, (ii) they mined the three main sea ports damaging ships besides threatening to cut off Nicaragua economically from the rest of the world, and (iii) the Reagan Administration was seeking $21 million in funding to support contra activities. President Reagan of the U.S. expressed the view that Nicaragua's Sandinista government must be overthrown if it continued to refuse to share power. He further said that unless the Nicaraguan government sought democracy the only alternative for the rebels would be "to have their way and take over."

In *case concerning Military and Para Military Activities in and against Nicaragua (Nicaragua* v. *U.S.)*[80] International Court of Justice indicated interim measures on 10 May, 1984 holding unanimously that the U.S. should immediately cease and refrain from any action restricting blocking or endangering access to or from Nicaragua ports, and in particular the laying of mines. The world Court further held that the right to sovereignty and to political independence possessed by Nicaragua, like any other State of the region or of the world should be fully respected and should not in any way jeopardized by any military and para-military activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any States and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the U.N. Charter and the charter of the organization of American States.

The world Court gave its final verdict on 27 June, 1986. The Court held : ".....the arming and training of the contras is a violation of the prohibition of the force (as laid down in the U.N. charter) .:.....The financing of the contras undoubtedly constitutes intervention in Nicaraguan Sovereignty by the U.S.A." The U.S. government announced its decision to ignore the verdict of the court. The U.S. charged that the objectives of the court were being subverted by Nicaraguan's effort to use the court as a political weapon. Thus there was no justification whatsoever for the U.S. to intervene in the affairs of Nicaragua. American intervention in Nicaragua was a flagrant violation of the basic provisions of the U.N. charter. The U.S. assumed upon itself the role of international policeman in central America. This is prohibited by the charter of the U.N. and deserves to be universally

* See also for C.S.E. (1996) Q. 8(c).

80. I.C.J. Rep. (1984) p. 169.

condemned. The main reason given by the U.S. to give aid to Nicaraguan rebels was to overthrow dictatorship or oppressive government or to restore democracy. International Law does not permit intervention on this ground.

(14) *U.S. Attack on Libya (1986).*—On 15 April, 1986 American aircrafts attacked two cities of Libya—Tripoli and Bengazi. According to the American government, the said air attack was a reprisal against terrorist activities against American nationals and was launched to discourage Libya from engaging in such terrorist activities. It was the immediate reaction of Berlin explosion wherein one American and one Turkish had dead. Holding Libya responsible for the explosion, President Ronald Reagan of the U.S. declared that such attacks would be repeated if Libya did not cease terrorist activities against the Americans.

The main target of the attack was the residence of Col. Gaddaffi. Though Col. Gaddaffi himself escaped, his 15 months adopted daughter died and his two sons were injured. Indeed the U.S. attack on Libya was a shameless and naked aggression and deserves to be universally condemned. The matter was raised in the Security Council and an endeavour was made to condemn American action through a resolution but it was defeated by triple veto exercised by the U.S., U.K., and France. However, the General Assembly of the U.N. on 21 November, 1986 passed a resolution condemning the U.S. military attack against Libya. The resolution affirmed the right of Libya to receive appropriate compensation for the material and human loss inflicted upon it. The U.S. attack was rightly described as violation of international law including the charter of the U.N. Besides being violative of Article 2(4) of the U.N. charter American action was also not justified on the ground of reprisal. There was no reasonable proportion between American air attack and the alleged terrorist acts of Libya. As regards triple veto exercised by the U.S., U.K., and France, though it cannot be termed as a violation of the U.N. charter, it is definitely an abuse of the power conferred on the permanent members of the Security Council.

(15) *Dropping of supplies by Indian Aircrafts in Sri Lanka, despite opposition of Sri Lanka.*—The dropping of supplies in Jaffna (Sri Lanka) by Indian aircrafts on humanitarian grounds amounted to intervention in the internal affairs of Sri Lanka and cannot be justified on any ground whatsoever under international law. As held by the International Court of Justice in *Case Concerning Military and Para-Military Activities in and against Nicaragua (Nicaragua* v. *U.S.)* [Judgment dated 27 June, 1986] in the absence of the request of a sovereign State concerned, entry of aircrafts in the air space of that State amounts to intervention. Since Indian action was not on the request of Sri Lanka, rather it was opposed by Sri Lanka, it was clearly violative of Article 2(4) of the United Nations charter. It may, however, be noted that the matter of dropping of supplies by Indian aircrafts has now only academic interest because of the Indo—Sri Lanka Accord of 29 July, 1987 and subsequent events.

(16) *Questions of the withdrawal of Indian Peace Keeping Forces (I.P.K.F.) from Sri Lanka.*—Para 6 of the Indo-Sri Lanka Agreement of July 29, 1987 provided the following :

> The Prime Minister of India and President of Sri Lanka also agree that in the terms of paragraph 2.14 and paragraph 2.16(c) of the agreement, an Indian peace-keeping contingent may be invited by the President of Sri Lanka to guarantee and enforce the cessation of hostilities, if so required."

I.P.K.F. were sent on the request of the President of Sri Lanka and hence when the latter requested for their withdrawal, they ought to have been withdrawn forthwith. When President Premdasa asked India to withdraw I.P.K.F. by the end of July 1989. India instead of withdrawing the I.P.K.F. as desired connected the withdrawal of I.P.K.F. with the devolution of powers in the north-east provinces. India, however proposed to withdraw I.P.K.F. by 31 December 1989. The I.P.K.F. were not withdrawn even by 31 December 1989.

It was wrong and unjustified on the part of India to connect the withdrawal of I.P.K.F. with devolution of powers in north-east provinces. As pointed out by Sri V.R. Krishna Iyer, retired Judge of the Supreme Court, "our army went in only on condition that it would be

there only ..... on invitation by the President and agreeing to leave on request by him..... To turn an invited army into a defiant foreign force, refusing to quit when demanded is blatant breach." [81] Further, "Even an infant in international law will call this negative aggression..... negative aggression is where a foreign force, once in by invitation for a limited purpose, exceeds that purpose or refuses to return on revocation of the invitation." [82] Thus continued presence of I.P.K.F. after the request of Sri Lanka was clearly violative of international law.

During the Prime Ministership of Mr V.P. Singh India adopted a reasonable attitude and agreed to withdraw I.P.K.F. by 31 March, 1990. In pursuance of the said agreement, India withdrew I.P.K.F. even earlier than the said date *i.e.* by 24 March, 1990.

(17) *American Intervention in Panama.*—American intervention in Panama has rightly been termed as brutal and wholly unwarranted interference in the affairs of a small country. General Manuel Noriega was the Panama's top military officer and effective ruler since 1983. In February he formally seized power of the ruler. Elections were held in 1989 but when it became clear that the opposition was gaining a decisive victory and that Mr Guillermo Endara had won the Presidential election, Gen. Noriega annulled elections. Besides doing his best to destroy democratic norms in Panama, he deserved universal condemnation for his connection with drug business. He was accused of accepting millions of dollars in bribes from the Colombian Madelin drug cartel to protect shipments of cocaine.

The immediate cause or excuse for U.S. intervention arose when an unarmed U.S. officer was shot and killed in confrontation, another was injured and third was manhandled and his wife was abused. On the midnight of 19 December 1989, U.S. forces invaded Panama and removed Gen. Noriega from power. President Bush of the U.S. had ordered U.S. military forces into Panama city in order to "protect American lives, restore the democratic process, preserve the integrity of the Panama canal treaties" and apprehend General Manuel Antonio Noriega who was under indictment in U.S. on drug trafficking charged. The U.S. claimed to have removed a 'dictator' and restored 'democracy'.

After seeking political asylum in Papal Nuncio in Panama for some time, Gen. Noriega ultimately surrendered to the U.S. troops on 4 January, 1990. Noriega was immediately taken to the U.S. for his trial. None of the grounds advanced by the U.S. justify U.S. invasion of Panama. Since the U.S. not at all the victim of an "armed attack" U.S. intervention on the ground of self-defence was not at all justified and it was clearly violative of Article 51 of the U.N. charter.

Yet another ground advanced by the U.S. to justify its action in Panama was to remove a dictator and to restore democracy. Intervention on this ground is not at all permissible under the charter of the U.N. The U.S. intervention was clearly violative of Article 2(4) of the charter. In *Case concerning Military and Para-Military Activities in and against Nicaragua*[83], the International Court of Justice held that "no general right of intervention in support of an opposition within another state exists in contemporary international law."[84] Further, "under international law in force today whether customary international law or that of the United Nations system, states do not have a right of collective armed response to acts which do not constitute an 'armed attack'." [85] Thus America's intervention on the ground of restoring democracy in Panama cannot at all be justified.

Yet another ground taken by America as justification of its action in Panama was to apprehend Gen. Noriega and try him in America on the charge of drug trafficking. But even this was violating of Article 2(4) and Article 51 of the charter. The U.N. is based on sovereign equality of all its members. Even the drug menace cannot dilute that principle.

(18) *Iraqi invasion and annexation of Kuwait.**—On 2nd August, 1990, Iraq invaded Kuwait. Subsequently Iraq annexed Kuwait and declared it to be 19th province of Iraq. An

81. V.R. Krishna Iyer, "Aggression in a Huff of Hagemoney", Indian Express, 27 July 1989.
82. V.R. Krishna Iyer, "Peace Even at the Cost of Prestige", Indian Express, 28 July 1989.
83. I.C.J. Rep. (1986) p. 14.
84. Para 209 of the Judgment.
85. Ibid., para 211.

* See also for C.S.E. (1996) Q. 6(a).

emergency session of the Security Council was immediately called on 2nd August, 1990. The Security Council passed a resolution condemning Iraqi action and asking Iraq to withdraw its forces unconditionally from Kuwait. On 6th August, 1990, the Security Council passed another resolution declaring commercial, financial and military blockade against Iraq. On 9th August, 1990, the Security Council passed yet another resolution declarating 'Null and void' Iraq's annexation of Kuwait and declaration of Kuwait as 19th province of Iraq and asking all other States not to recognize Iraq's annexation of Kuwait. Subsequently Security Council passed a number of other resolutions in this connection but none of the above resolutions had any effect on Iraq.

Consequently, the Security Council took action under Chapter VII of the Charter of the U.N. On 29th November, 1990, the Security Council passed its twelfth resolution (Resolution 678) which allowed the States cooperating with Kuwait Government to use *"all necessary means"* to remove Iraqi forces from Kuwait. It may be noted that resolution 678 had also provided that in case Iraq did not implement Resolution 660 and other resolutions by 15th January, 1991, the States cooperating with the Kuwait Government could use *"all necessary means"* to implement resolution 660 and to maintain international peace and security. But even this resolution did not have the desired effect on Iraq.

Gulf war (1991) started on 17th January, 1991. America and its allied forces crippled Iraqi power and forced Iraq to withdraw its forces from Kuwait. On 26th January, 1991, Iraq announced that it was withdrawing its forces from Kuwait. Later on, the Security Council established a committee which would hear claims of States, individuals and corporations who suffered damage during war and to award compensation to them.

Iraq was clearly and without any shade of doubt guilty of aggression against Kuwait, and for that matter against the whole international community. Iraq's invasion and annexation of Kuwait was a flagrant violation of Articles 2(3) and 2(4) of the U.N. Charter. The Security Council, therefore, rightly took action under Chapter VII of the Charter. This is the most successful collective action taken by the Security Council under Chapter VII of the Charter.

(19) *Kurd's Problem and the Legality of the Action taken by America and the U.N.*— After being badly defeated by America and its allies during the Gulf War (1991), Iraq was confronted with many serious problems. One of such serious problems was insurgency of Kurd's people who utilized this opportunity for starting struggle for self-determination and independence from Iraq. Though the armies of President Saddam Hussain of Iraq were badly defeated by America and its allied armies, soldiers loyal to him, ruthlessly crushed the Kurd's revolt. Due to the atrocities caused by the armies of President Saddam Hussain of Iraq, lakhs of Kurds fled crossing the borders of Turkey and Iran. About 15 lakhs Kurds became refugees in their own country as well as in the neighbouring countries. On 4th March 1991, America warned President Saddam Hussain to stop the use of helicopters against the Kurds. On 5th March, 1991, the United Nations Security Council passed a resolution asking Iraq to stop repression of its civilians and to allow international humanitarian agencies to visit Iraq without any obstruction. The resolution condemned Iraqi repression of its civilian population and added that it posed a threat to international peace and security as large number of refugees were fleeing across Iraqi borders.

On 11th April, 1991, America once again warned Iraq not to fly its helicopters and aircrafts on its borders with Turkey. On 12th April, 1991, America announced that it would implement a four-point "operation provide comfort". In the first phase of the operation medicines and materials for shelter were to be air-dropped. In the second phase, America was to construct refugee camps in Iraqi areas, and these camps would later on be entrusted to international agencies. In the third phase, America would ensure that continuous supplies reached the refugees through aircrafts, trucks and helicopters. In the fourth and the last phase, America would entrust the refugee camps to international agencies such as the United Nations and International Red Cross. On 28th April, 1991, U.N. Secretary-General announced that he would ensure that the U.N. took the responsibility of refugee camps from America. There were reports that America and its

allied States were constructing a big airport in Iraqi area for rendering assistance to the Kurds.

Legal Aspects.—Iraqi repression against Kurds is a flagrant violation of human rights and deserves universal condemnation. As regards the question of the right of self-determination, it is not a binding principle of international law under ordinary circumstances. The principle of self-determination has become a binding principle of international law only in the context of colonialism. The problem of Kurd's people in Iraq is not a colonial situation. Iraq is an established state and is not bound to give to its own people the rights of self-determination.

The next legal question that arises is whether the U.N. or for that matter any state has the right to intervene in the internal matters of Iraq. International Law prohibits intervention. The charter of the U.N. propounds the principle of non-intervention by states under Article 2(4) and by the U.N. under Article 2(7).

Article 2(4) 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, or in any manner inconsistent with the purposes of the United Nations. Thus even 'use of force' has been prohibited. Individual and collective self-defence is however an exception to this rule. But this is a very limited right and can be exercised under the conditions mentioned in Article 51 of the charter of the U.N. One of the conditions mentioned in Article 51 is "if an armed attack occurs against a member of the United Nations". There is no such thing in respect of Kurds people in Iraq. Hence establishment of refugee camps within the Iraqi area, to provide them armed security, to warn Iraq not to cause repression of Kurd's people and to remove its armies from Southern Iraq, to construct airports in Iraq, to render assistance to Kurds people etc. are flagrant violation of territorial integrity or political independence of Iraq. According to America, it has constructed refugee camps within Iraqi area and rendered assistance on humanitarian grounds. But the charter of the U.N. does not permit any member state of the U.N. to intervene in internal affairs of any other member state on humanitarian grounds. Thus American action is clearly violative of the rules of international law.

Even the U.N. cannot intervene in the internal matters of any member state. Article 2(7) of the U.N. charter provides that nothing contained in the present charter shall authorise the U.N to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the member to submit such matters to settlement under the present charter ; *this principle shall not prejudice the application of enforcement measures under Chapter VII.* The words in italics herein show that Article 2(7) provides an exception to the principle of non-intervention by the U.N. in the domestic jurisdiction of any member state. Thus when the U.N. Security Council takes enforcement action under Chapter VII, the principle of non-intervention by the U.N. does not apply.

For taking action under Chapter VII of the Charter, the Security Council has first to determine under Article 39 that the violation of human rights has reached such a stage that it poses a threat to international peace and security. In other words, action under Chapter VII cannot be taken merely on the ground of violation of human rights. Action can be taken on the ground of international peace and security. The resolution passed by the Security Council on 5 April 1991 expressly mentioned that the "repression" of Kurds in Iraq posed a threat to international peace and security. Thus, Security Council's action in taking charge of refugee camps of Kurds in Iraq to render them assistance and to direct Iraq not to cause atrocities upon Kurds people is valid and legal.

(20) *Crisis in Somalia* [86]:

The situation in Somalia was unique and unprecedented. Somalian crisis was due to Civil war since 1991. Gen. Aidid never accepted Ali Mahdi Mohamed as interim President. Apart from these two groups, there are many other armed factions who are engaged in looting and robbery. Due to continuous violence and civil war the social and economic condition is in shambles. In short, violence, civil war, famine and drought are the main

86. For facts in detail see Dr. S.K. Kapoor, International Law, Tenth Edition, pp. 904-909.

problems of Somalia. Armed factions of Somalia have been obstructing the deliveries of humanitarian aid to Somalia people who are dying in large numbers due to starvation and diseases.

As noted above, on 20th January, 1992, Interim government of Somalia requested the Security Council of the United Nations to consider on the worsening humanitarian crisis in Somalia. The attention of the Security Council was also drawn towards the worsening civil war situation in Somalia. On 23rd January, 1992, Somalia asked all States to refrain from supply of arms and military equipment to Somalia. On 24th April, 1992, the Security Council established UNOSOM to supervise cease-fire in Somalia. On 3rd December, 1992, the Council allowed the use of "all necessary means" to secure the delivery of humanitarian aid to starving people of Somalia. By resolution 794 (1992), the Council acted under Chapter VII of the U.N. Charter which provides for action including the use of force with respect to threats to peace and acts of aggression. This was probably in response to American offer for deployment of American troops to ensure a secure environment for humanitarian relief operations in Somalia. On 26th March, 1993, the Council decided to transfer the task of securing humanitarian aid deliveries from a U.S. led international force to a U.N. Peace-keeping operation *i.e.* expanded U.N. Operation in Somalia called UNOSOM II. It was made clear that like UNITAF forces, UNOSOM II will operate under the provisions of Chapter VII, a mandate not initially given to UNOSOM.

Article 2(7) of the Charter of the U.N. provides : Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter, *but this principle shall not prejudice the application of enforcement measures under Chapter VII.*

It is clear from the above that when the Security Council takes action under Chapter VII of the Charter, the principle of non-intervention by the U.N. in the matter of the member States which are essentially within the domestic jurisdiction, does not apply. As regards Somalia, the interim government of Somalia requested the Council to consider worsening humanitarian problem and civil war. Thus first U.N. took action at the request of Somalia. The Council determined that humanitarian problem and civil war of Somalia posed a threat to international peace and security. When the Council found that action not involving use of force proved to be inadequate, the Council allowed the use of "all necessary means" (as it did earlier in case of Gulf War, 1991) to establish a secure environment for humanitarian relief. Thus United Nations, action in Somalia is fully justified under international law.

Ordinarily, even the U.N. cannot intervene on the ground of a violation of human rights or civil war in a member State. But if the Security Council determines that violation of human rights or civil war reaches such magnitude that it poses a threat to international peace and security, Security Council becomes entitled to take action under Chapter VII of the Charter by virtue of exception provided in Article 2(7) of the Charter. This is what the Council actually did in case of Somalia.

Some persons have criticized U.N. action in Somalia. They contend that in Somalia U.N. seems to be groping in the dark and has lost its way. There seems to be some force in this criticism. It was essential to prevent the wave of violence in Somalia and to achieve this the U.N. took upon itself the task of disarming the warlords of Somalia so as to ensure the secure environment for humanitarian deliveries to the starving people of Somalia. However, it must be kept in mind that the objective of the U.N. was to enforce rather than to impose, peace. After the failure of the American troops to disarm warlords of Somalia, especially to capture Gen. Aidid and his followers, this was realized by the U.N. Security Council. Instead of enforcing peace, American action led to outbursts of violence. American action came up for a lot of criticism. That is why, in January 1994, the Security Council gave U.N. Peace-keepers a limited mission after the withdrawal of American troops. It retreated from aggressive and combative peace-keeping operations and returned to a more cautious, neutral role which the U.N. has traditionally played.

In March, 1994 Gen. Aidid and Ali Mahdi signed an agreement at Nairobi. In this agreement they pledged to establish a government on the basis of national reconciliation. They agreed to abide by a cease-fire, to disarm armed groups and to hold a conference on 15th May, 1994 to elect a President, a Vice-President and a Prime Minister. But even this agreement could not be implemented.

The United Nations has accepted that its mission in Somalia has been unsuccessful. On 4th November, 1994, the Security Council unanimously resolved to withdraw its forces from Somalia by 31st March, 1995. Thus the U.N.'s Somalian mission came to an abrupt and unsuccessful end. However, it must be admitted that the failure of U.N. mission to Somalia was due to Somalian leaders and armed groups there. During the two years of its mission, 130 U.N. soldiers were killed and more than 1 billion dollars a year were spent. It cannot but be denied that during its Somalian mission, the U.N. rendered signal service in rendering humanitarian relief to the millions of Somalians.

(21) Russia—Chechnya conflict and Dagestan War

According to Russia, Chechnya an autonomous Republic of North Cancesus and rich in oil and culturally Muslim, had been smuggling its oil productions in world markets and had been becoming a centre for the crime of terrorism. During the Second World War Stalin had accused Chechens of cooperating with Germans. Since then Chechens had been nurturing bitterness and ill-will against the Moscow administration. In 1991 the Chechens under the leadership of former General of Soviet Air Forces Dudayer declared themselves independent. President Boris Yeltsin of Russia tried to prevent the separatist move of Chechens but with no success.

On 11th December, 1994, the Russian forces entered Chechnya and started attacking Chechen rebels. Thereafter, fierce fighting took place. By 21st December, 1994, Russian forces reached Grozny. In the fierce fighting that ensued nearly 1,000 Chechens were killed on 26th December, 1994 Russia announced the establishment of a new government in Chechnya. Though the Chechen rebels were defeated, they were, by no means, disgraced. They fled to mountain and continued guerilla war. Since then Chechens have become an eye-sore for Russians. On 30th July, 1995, an agreement was reached between Russians and Chechens on military issue but the critical problem of the breakaway republic's political futures remained unresolved.

In the second half of the year 1999 the separatist movement assumed serious proportions. In the first week of October, 1999 the separatist Government of Chechnya threatened to declare Martial Law and start a holy war (Jehad). In reply the Russia increased its military activities against Chechnya. To suppress the Chechnya rebels, Russian aircraft bombed Chechnya, especially its Capital Grozny. In a full-fledged war between the rebels and the Russian army large number of military and civilian persons have been killed. The Russian army surrounded the Capital Grozny from all sides. Being compelled the elected President of Chechnya, Asian Mashkhadov appealed for peaceful settlement of the dispute and to hold talks for the same. This appeal was made in the second week of October, 1999. But even this could not end the Chechnya war which is still continuing. The Russian Armed Forces have accelerated their actions against the rebel causing heavy casualties. In February, 2000 Russians claimed to have complete control over the situation. They claimed that most parts of Chechnya including Grozny were under their control. But what happened subsequently falsified their claim. In the beginning of the first week of March, 2000 the Chechnya rebels killed twenty Russian soldiers by laying ambush. This shows that the war is not yet over and the Chechnya rebels have not yet given up.

Dagestan War

There is yet another fact that shows that Russian problems are not yet over. Similar to Chechnya, the conflict has also started in Caspian province of Dagestan. In Caspian area Dagestan is a small republic of 32 tribes. Most of the people of this province are followers of Islam. The conflict in Dagestan started when in August, 1999 about 1500 Islamic extremists revolted under the leadership of a Chechnya rebel. According to some

sources and the claim of Russia, the revolt also involves mercenaries from Pakistan, Afghanistan and Turkey. Terrorist Chief and exile from Saudi-Arabia, Osama Bin Laden is also alleged to be involved in Dagestan war. Though the Russian armed force have started their action, it seems that like Chechnya war, Dagestan war may also last long.

Legal Aspects.—Chechnya-Russia conflict is clearly an internal matter of Russia. Therefore, the principle of self-determination contained in Article 1 of the U.N. Charter cannot be applied in case of Chechnya. The principle of self determination has become a binding principle of international law in the context of colonialism only. For nearly 130 years Chechnya has been a part of Soviet Union. Taking advantage of the breaking up of Soviet Union Chechnya unilaterally declared independence in 1999. but the Soviet Union never recognized it, will any established state of the world ever recognize such a unilateral declaration of its own people.

After the breaking up of the Soviet Union in 1991, many former Soviet Republics became independent. But they became independent by proper agreement and not through unilateral declarations. Similar developments took place in former Yugoslavia and Czechoslovakia. Infact Chechnya revolted against Russia and declared its independence. Under such circumstances the established State (Russia) is entitled to take proper action.

It may, however, be noted that human rights do not fall within the internal or domestic jurisdiction of any State. But on the ground of violation of human rights no State has the right to intervene in the affairs of another State. If any body can play some role in such a situation, it is the Security Council of the United Nations. It deserves mention that even the Security Council cannot intervene on the sole ground of violation of human rights. The Security Council can intervene only if it first determines that the violation of human rights has reached such a magnitude that it poses a threat to international peace and security. But in case of Chechnya the Security Council cannot take such a decision because Russia being a permanent member of the Security Council will veto any such more.

Reference may also be made to the four 1949 Red Cross Conventions which prohibit the attack on civilians. Russian forces and aircraft have been guilty of violation of these conventions. America and some other countries have expressed concern in this respect. Though such violations deserve condemnation by all, the fact remains that, as in the state field in the international field as well, it is difficult rather impossible to take action against the mighty ones. Though the principle of sovereign equality of states is enshrined in Article 2 of the U.N. Charter, in fact, states especially the mighty ones like Russia are unequal. This inequality also finds mention in the Charter itself because it confines veto on permanent members. Unless and until the international community finds alternative to veto, the world will have to learn to cope and learn to live with it.

Last but not the least, the principle of self determination, which is often invoked to challenge the territorial integrity of sovereign state, does not include a unilateral right to independence, or secession. Nor does the identity of different groups mean a right for members of these groups to dismember the state or destroy the fabric of the multi-cultural society. These conclusions have been drawn by a study prepared by the U.N. Human Rights Commission. Thus Chechnya rebels cannot successfully invoke the principle of self-determination.

(22) U.S. Air Strikes.—'Operation Desert Fox' Against Iraq for its violation of U.N. Declarations regarding possession of chemical, biological and nuclear weapons

N.B. : For this also please *see* Appendix II.

(24) American Missile Attack Against Sudan and Afghanistan in reaction Against Explosions in its Embassies (21 August, 1998)

N.B. : For this please *see* Appendix II.

(25) Pakistan's Fresh Intrusions in Kargil Area of Kashmir

N.B. : For a critical discussion of this also please *see* Appendix II.

(26) Attack on World Trade Centre (WTC) of America (11th September, 2001)

N.B. : For this also please *see* Appendix II.

(27) Attack on Taliban Government of Afghanistan and its overthrow by America and its Allies

N.B. : For this please *see* Appendix II.

(28) American Invasion on Iraq (March, 2003)

N.B. : For this also please *see* Appendix II.

CHAPTER 14

STATE JURISDICTION

As pointed out by an author, "State jurisdiction is the power of a State under international law to govern persons and property by its municipal law. It includes both the power to prescribe rules (prescriptive jurisdiction) and the power to enforce them (enforcement jurisdiction). The latter includes both executive and judicial powers of enforcement. Jurisdiction may be concurrent with the jurisdiction of other States or it may be exclusive. It may be civil or criminal. The rules of State jurisdiction identify the persons and the property within the permissible range of a state's law and its procedures for enforcing that law. They are not concerned with the content of a State's law except in so far as it purports to subject a person to it or to prescribe procedures to enforce it." [1] State jurisdiction connotes "essentially the extent of each State's right to regulate conduct on the consequences of events." [2] A State may regulate its jurisdiction by legislation, through its courts or by taking executive or administrative action. State Jurisdiction concerns both international law and internal law of the State. While the former determines the permissible limits of a State's jurisdiction in the various forms it may take, the latter prescribes the extent to which, and manner in which, the State in fact asserts its jurisdiction.[3] Though the relationship between jurisdiction and sovereignty is close, jurisdiction is not co-extensive with State sovereignty.[4] Each State has normally jurisdiction over all persons and things within its territory.

Distinction between exercise of jurisdiction and basis of jurisdiction.*—"In general, every State has exclusive jurisdiction within its own territory, but this jurisdiction is not absolute, because it is subject to certain limitations imposed by international law." [5] Thus in practice it is not always necessary that a State may exercise jurisdiction in its territory; on the other hand, in some circumstances, a State may exercise jurisdiction outside its territory. Moreover, there is a distinction between the exercise and basis of jurisdiction. J.E.S. Fawcett[6] has explained this with the help of the following illustration. An Englishman and a German murder a French man in Paris and thereafter run away to England. So long as they are in France, they can be arrested and tried by French Courts for they have committed the murder in France and the fact that they are foreigners does not make any difference. The very fact of their presence in France gives jurisdiction to the French Courts over them. Neither Germany nor England can interfere in this although they may demand their extradition. When they come to England, the English Courts can try the Englishman but they cannot try the German although the German accused for the time being is within the jurisdiction of the English Courts. This is due to the fact that there is no basis for jurisdiction for English Courts cannot try a foreigner for having committed murder in some foreign State.

Almost the same rule is applicable in India. Reference may be made here to a Supreme Court case *Central Bank of India* v. *Ram Narain*,[7] wherein the Supreme Court considered the question whether Penal Code could be applied to a person who was not a citizen of India at the time of committing the offence. The Supreme Court observed : "A foreigner was not liable to be dealt with in British India for an offence committed outside

1. D.J. Harris, Cases and Materials on International Law (London, Sweet & Maxwell, 1973) p. 235.
2. Oppenheim's International Law, Vol. I, Ninth Edition, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group UK Limited and Mrs. Tomoko Hudson, 1992, p. 456.
3. Ibid, at pp. 456-457.
4. Ibid, at p. 457.
* See also for P.C.S. (1957, Q. No. 2(a)
5. J.L. Brierly, The Law of Nations p.222.
6. J.E.S. Fawcett, The Law of Nations (1968) p. 55.
7. AIR 1975 S.C. 36.

British India under the provisions of the sections as they stood before the adaptations made in them after the partition in India. Illustration (a) to Section 4, I.P.C. delimits the scope of the section. It indicates the extent and ambit of this section. It runs as follows : '(a) *A*, a coolie, who is native Indian subject commits a murder in Uganda. He can be tried and convicted of murder in any place in British India in which he may be found. In the illustration, if *A* was not a native Indian subject at the time of the commission of the murder the provisions of Section 4, I.P.C. could not apply to the case. The circumstances, that after the commission of the offence a person becomes domiciled in another country, or acquires citizenship of that country cannot confer jurisdiction on courts of that territory retrospective for trying offences committed and completed at a time when that person was neither the national of that country nor was he domiciled there." [8]

Other Illustrations

(i) A French armed public ship flying the flag of France was in the British territorial waters when M, the Cabin boy of the ship, committed the offence of murder by shooting dead D, the captain of ship. Both M and D were British nationals serving at that time as members of the officer crew of the cruiser. Immediately after the incident the offices of a British police petrol launch were obtained and the injured was taken to the nearest British port to render medical help to the captain, if the doctors found that the life was not extinct. Extradition proceedings instituted by the French Government failed. M, who had been kept under arrest during extradition proceeding was released but arrested immediately thereafter for the murder committed within British territorial waters. During the trial that took place, M, pleaded that the British courts had no jurisdiction to try him for the murder committed on board a French cruiser flying French flag.* In this case the defence cannot succeed because the theory that the public ship of a State should be treated to be a floating portion of that State has long been discarded. Secondly, the offence was committed within the territory of Britain. Thirdly, seeking good offices of British police and medical aid, etc. amounted to a waiver of the immunity. Thus M could be tried by British courts.

(ii) A British subject was a member of the crew of a Chinese public ship. He murdered the captain on board the ship while in the territorial waters of Hong Kong. He then tried to commit suicide but failed. He was taken to a hospital in Hong Kong and (with the consent of the Chinese Government) was tried and convicted in a Hong Kong Court. On appeal to the Privy Council it was argued that the Hong Kong Court had no jurisdiction, over the accused as the public ship is extra-territorial and must, therefore, be considered a foreign territory.** In this case also, the defence cannot succeed because firstly, accused was a British subject, secondly, he was tried with the consent of the Chinese Government. Thus the Chinese Government instead of claiming immunity from the jurisdiction, submitted to its jurisdiction. Lastly, the theory of extra-territoriality has long been discarded and cannot be accepted.

It may be noted here that the facts of the above illustration resemble those of *Chung Chi Cheung* v. *The King*.[9] The facts of this case are as follows :—

Chung Chi Cheung was a British citizen, and was a cabin boy in a Chinese Armed Ship. On January 11, 1937, when the said ship reached the territorial waters of Hong Kong, Chung Chi Cheung shot dead the Captain of the ship and injured the Acting Chief Officer of the ship. Even in the wounded state, the Acting Chief Officer ordered the ship to be taken into the territorial waters of Hong Kong. When the ship reached Hong Kong, he

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8. Ibid, at pp. 38-39 ; The Supreme Court further observed : ".....Ram Narain's domicile of origin was in the district of Multan and when the District of Multan fell by partition of India in Pakistan, Ram Narain had to be assigned Pakistan domicile till the time he expressed his unequivocal intention of giving up that domicile and acquiring Indian domicile and also took up his residence in India ..... the decision of the High Court that Ram Narain could not be tried in any court in India for offences committed in Mailsi in November, 1947 is right and that the Provincial Government had no power under Section 188, Criminal Procedure Code to accord sanction to this prosecution." Ibid, at pp. 40-41.

* Asked in P.C.S. (1970), Q. No. 5.

** Asked in I.A.S. (1965) Q. No. 6(b) ; see also for C.S.E. (1995) Q. 7(c).

9. (1939) A.C. 160.

called the police and got the cabin boy arrested. The Chinese authorities started the proceeding for the extradition of the accused but with no success because the accused was a British citizen. Consequently, immediately after the release of the accused he was re-arrested and was tried in the Court of Hong Kong. The Court sentenced him to death. The accused filed an appeal in the Privy Council against the said decision. In the Privy Council the appellant (accused) contended that the ship on which the crime was committed was the public property of the Chinese Government and in accordance with the principle of extra-territoriality the said ship should be treated as the floating part of the State of China. The Court of Hong Kong could have jurisdiction over such a ship only when the Government of China waived its immunity. He further contended that in the present case the Government of China had not waived its immunity or exemption. It was also contended by the appellant that the servants of the ship also have immunity from being tried in the court of another State and that the Acting Chief Officer of the ship was not entitled to waive this immunity. The Privy Council dismissed the appeal and held that the Court of Hong Kong had jurisdiction to try this case. The Privy Council observed that the principle of extra-territoriality was not correct. Lord Atkin observed that it was not proper to say that the public ship of a country is the floating part of that State. In his opinion, the correct view is that according to International Law the Court grants certain immunities or exemption to the ships and crew of another State. The said immunities are conditional and may be waived by the State concerned. In the present case the Chinese Government submitted to the jurisdiction of the court and as such it would be deemed to have waived its immunity. Instead of demanding immunities the Chinese Government sent four witnesses to give evidence against the accused.

Territorial Sovereignty

N.B.—For this please see also Chapter 9 entitled "Nature of State and Different kinds of States and Non-State Entities".

Subjective and objective Territorial Principles*

It has been rightly pointed out : "The term 'jurisdiction' refers to the legal competence of State officials to prescribe and enforce rules with regard to persons, things and events. By distinguishing between those situations in which a State may exercise its jurisdiction and those situations in which it may not, international law serves to clarify the authority of officials and to minimize friction among States. The essence of the distinction is contained in the concept of Sovereignty, the principal collaries of which are an exclusive jurisdiction over the territory of the State and a consulative duty of non-intervention in the area of exclusive jurisdiction of other States.'[10] As remarked by Lord Macmillan, "It is an essential attribute of the sovereignty of this realm, as of sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes, civil and criminal arising within its limits." In his dissenting opinion in the *Lotus* case[11], Judge J.B. Moore observed : "It is an admitted principle of international law that a nation possesses and exercise within its own territory an absolute and exclusive jurisdiction and that any exception to this right must be traced to the consent of the nation, either express or implied." But there are certain exceptions to this rule. For example, in Britain Courts have jurisdiction over British nationals in respect of treason, murder, bigamy, etc., wherever committed. Reference may also be made here to subjective and objective territorial principles.

Subjective Territorial principle.—This is regarded as the technical extension of the territorial principles. According to this principle, a State may claim jurisdiction over crimes commenced within its territory but completed or consummated outside its territory. The State where the crime commenced or was initiated may enact under its criminal law that it will have jurisdiction over such preparatory acts. Ordinarily, States do not exercise this type of jurisdiction. There are, however, certain situations wherein States where the crime

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* See for I.A.S. (1974), Q. No. 4.

10. Edward Collins, International Law in a Changing World (1969), p. 188
11. P.C.I.J., Series A, No. 10 (1927), pp 68, 88.

commenced or was initiated, are under duty to punish the accused. This is provided for example, under the Geneva Convention for the Suppression of Counterfeiting of Currency (1929) and the Convention for the Supervision of the Illicit Drug Traffic (1936). State parties to these conventions have accepted this obligation so as to prevent commission of crime in other States.

Objective Territorial Principle.—According to this principle, a State gets jurisdiction over the crime, if any of the constituent elements of the crime is consummated in its territory. For the State concerned to assume jurisdiction it is also necessary that the act must have produced some harmful effect within or on the territory of State. Hyde has explained this principle in the following words : "The setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein justifies the territorial sovereign in prosecuting the actor when he enters its domain." In the *S.S. Lotus* case,[12] Judge Moore observed : "It appears to be now universally admitted that when a crime is committed in the territorial jurisdiction of one State as the direct result of the act of a person at the time corporeally present in another State, international Law, by reason of the constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former State, should he come within its territorial jurisdiction." [13] The objective territorial principle is generally accepted and often applied. "But the objective territorial theory does not meet at the view of States which claim a universal competence for their criminal courts, and even if this claim is limited to a claim to try offences against nationals, it rests on a false view of the nature of the right of protecting nationals which international law recognizes ; States have a right to diplomatic protection, a right to demand reparation for injuries done to their nationals abroad, but not a right to throw the shield of their own criminal law round them at a time when they have left this shelter." [14]

Thus the jurisdiction of a State is not always a co-incident with its territory. As pointed out earlier, each State exercises jurisdiction over its territory. The sovereignty of that State is limited to that territory. But there are certain exceptions to this general rule. There may be certain circumstances wherein a State may exercise jurisdiction outside its geographical limits.

Extra-territorial operation of State Laws and protective Jurisdiction of State over Foreigners.—The law relating to extra-territorial operation of laws has been discussed and clarified in a Full Bench decision of the Madras High Court, namely, *K.T.M.S. Abdul Cader and others* v. *Union of India.*[15] The facts of this case are as follows :—

The petitioner was alleged to have been smuggling or dealing with smuggled goods. This led the Madras State to reasonably apprehend that unless they were detained forthwith they would continue to indulge in similar activities which may prove a hazard to safety and security of the country. Hence detention orders were passed first under section 3(i)(c) of the Maintenance of Internal Security (Amendment) Ordinance, 1974 and then, under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ; but the warrant of arrest under the said two Acts, could not be executed because the petitioners continued to live abroad. Therefore, at the instance of the State Government issued proclamations under S. 82 (1), Cr.P.C. on 2-12-1974 and S. 7(1) (c) of the Act of 1974, read with S. 82 (1) of the Cr.P.C. on 16-1-1975. Before the Madras High Court the principal point urged by the petitioners was that the Act has no extra-territorial application and hence the State Government has no power under the Act to pass orders of detention against persons who at the time when the orders were made, were not within India but were outside its territorial limits. It may be noted here that in this case one of the petitioners was a foreign citizen. The Full Bench of the Madras High Court rejected the

12. Ibid.
13. See also Rex v. Godfrey, (1932) 1 K.B. 24 (facts of this case have been discussed in Chapter on "Extradition") and Ford v. United States, 273 U.S. 593.
14. J.L. Brierly, The Law of Nations, Sixth Edition, edited by Sir Humphrey Wadlock, (1963), pp. 301-302.
15. AIR 1977 Mad 386 : 1977 Cri. L.J. 1708.

contention of the petitioners and dismissed the petition.[16] The Supreme Court[17] observed that it is well established that the power of the Parliament to make a law in relation to the topic entrusted to it is plenary, that a law passed by the Parliament under Article 245 cannot be invalidated merely on the ground it has extra territorial operation and that such a law cannot be questioned on the ground that it may not be found capable of enforcement outside its territories.[18] The Full Bench further observed that the words, 'extra-territorial operation' are used normally in two different senses as connoting firstly, laws in respect of acts and events which take place inside the State but have operation outside, and secondly, laws with reference to the national of a State in respect of their acts outside. In its former sense the laws are strictly speaking intra-territorial though loosely termed as extra-territorial under Article 245(1) which are clearly within the competence of the Parliament. Therefore, merely because the law enacted by the Parliament has extra-territorial consequences it cannot be invalidated as has been set out in Article 245(2) of the Constitution. Their Lordships quoted with approval the following observation of Oppenheim :[19] "Many States claim jurisdiction with regard to certain acts committed by a foreigner in foreign countries. States which claim jurisdiction of this kind threaten punishment for certain acts either against the State itself, such as high treason, foreign banknotes and the like, or against its citizens, such as murder and arson, libel and slander, and the like. These States cannot, of course, exercise this jurisdiction as long as the foreigner concerned remains outside their territory and comes thereby under their territorial jurisdiction, they have an opportunity of inflicting punishment." The Lordships[20] also referred the following observations from Greig's book.[21] The jurisdictional competence of a State under international law is in many respects ill-defined and the task of determining and explaining of the scope of international law in this field is complicated by the fact that the word 'jurisdiction' is itself used to denote at least two similar, though nevertheless distinct nations, firstly the competence of a Court of law to try a particular dispute, and secondly, the right of a state to control or interfere with a particular person or object, and there is considerable uncertainty as to how far a State can legislate with respect to and its courts decide issues arising out of events taking place entirely abroad. It cannot be doubted that there should be some link between either the offence or the offender and the State claiming jurisdiction and now close that link must be to satisfy the requirement of international law may be difficult to state with accuracy. The State's Sovereign powers including the power to make its laws cannot be limited unless it is prohibited by any international law or by agreement, it has agreed to curtail its jurisdiction. It is true that the territory and population being two essential characteristics of a Statehood and therefore it is natural that territorial supremacy and the bond of nationality should form the basis of the State's jurisdictional competence. There may, however, be other circumstances which can confer the jurisdictional competence on a State. Such circumstances are following :—

(1) Territorial jurisdiction based on the theory that incidents occurring in or persons residing within the territory of the State are subjects to its laws ;

(2) Personal jurisdiction based on the fact that a State has the right to extend the application of its laws to its nationals even with respect to events occurring entirely abroad ;

(3) Universal jurisdiction based on the principle that any State may exercise jurisdiction over a crime committed such as piracy whatever the nationality of the perpetrators ;

(4) Protective jurisdiction—war crimes etc., under which the States are allowed to punish a foreign national by a State, the safety or public order which has been

16. See Ibid. at pp. 394-396.
17. Ibid, at p. 394.
18. See also British Columbia Ele. Rly Co. v. King, A.I.R. 1946 P.C. 180.
19. International Law, 8th Edn., Vol. I, at p. 331, para 147.
20. A.I.R. 1977 Mad. 386 at p. 395.
21. Greig, Treatise on International Law, pp. 164, 167.

jeopardised by acts committed by persons outside its territory ; and

(5) Jurisdiction based on passive personality principle which enables a State to exercise jurisdiction over a foreigner in respect of an incident taking place abroad resulting in an injury to one of its nationals.

It may be noted that a State cannot exercise its power in any form in the territory of another State except by virtue of a permissive rule derived from international custom or from a convention.[22] In the *Lotus* case,[23] the Permanent Court of International Justice has observed—"the first and foremost restriction imposed by international law upon a State is that failing the existence of a permissive rule to the contrary it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial ; it cannot be exercised by state outside its territory except by virtue of a permissive rule derived from International custom or from a convention. This discretion left to States by International law explains the great variety of rules which they have been able to adopt without objection or complaints on the part of the other States."

Thus a State may very well exercise civil or criminal jurisdiction over its nationals even with respect to their conduct outside its territory.[24] After reviewing the above authorities the Madras High Court[25] observed ..... though a State's jurisdiction is mainly territorial, its jurisdiction can extend in respect of things or acts, done by its nationals even outside its territories. It has also jurisdiction which may properly be called protective jurisdiction to deal with a foreign national whose acts have jeopardised or are about to jeopardise its safety or public order. The protective principle on the basis of which a State exercises its jurisdiction over foreigners for its own preservation is recognized in the international law. If such a protective jurisdiction is not given to a sovereign State, its stability and existence itself can be shaken by acts or things done by foreigners outside its territory and the State will be powerless to do anything against them Therefore, it should be taken to be the basic right of any State to protect itself from such prejudicial acts done by foreigners outside the State by dealing with them in any manner they like. It may be that any action taken by the State against a foreigner some times is ineffective so long as the foreigner is outside its territory. But merely on that ground, the action taken cannot be said to be invalid as the jurisdiction of the State to take action against a foreigner mainly depends upon its competency and not upon its effective execution. The jurisdiction to pass an order is different from the power to execute or effectuate that order. The fact that a foreigner cannot be proceeded against by a State so long as he is outside its power to exercise jurisdiction over foreigners invoking the protective principles."

In *G.B. Singh* v. *Government of India*,[26] the Supreme Court has recognised this protective jurisdiction of a State and observed : "The first duty of a State is to survive. To do so it has got to deal with enemies both overt and covert whether they be inside the country or outside. The fact that the appellant if released would go to England and from there continue to indulge in activities prejudicial to the security and integrity of this country is a relevant factor in determining whether he could be detained in this country when he is found in country."

The difference between power to pass a detention order and its effective enforcement has also been touched upon in the above decision in the following passage. "We are aware that there is no law in this country providing for extradition of persons against whom the country would consider it necessary to pass an order of preventive detention. It is not to be assumed that this country will indulge in such a useless and pointless exercise. But that is quite different from saying that there cannot be a law in this country providing for such detention. But if such a person happens to come to this country, we presume he can be detained. We do not accept the argument that a person like the appellant could be detained only if it is apprehended that if not detained he would

22. Max Sorensen, Manual of Public International Law, page 335, paragraphs 6, 23.
23. P.C.I.J. Series A, No. 10 at pp. 18-19 referred in Ibid.
24. See note 22.
25. A.I.R. 1977 Mad. 386 at p. 396.
26. A.I.R. 1973 S.C. 2667 : (1973) Cr.L.J. 1801.

indulge in prejudicial activities in this country and not if his activities are outside this country even though they may have a prejudicial effect on this country. Take the case of a person acting prejudicial to the security of a State in this country while residing in another State. We have no doubt that he can be detained by the former State. The same analogy applies to this case. International law does not seem to deal with the case of nationals of one country acting in that country to the prejudice of the security and integrity of another country and whether anything could be done about them."

After quoting the above observation of the Supreme Court, the Madras High Court finally observed : "Though as pointed out in the above passage, International Law does not directly deal with the case of nationals of one country acting in that country to the prejudice of the security and integrity of another country, it definitely recognizes the protective jurisdiction of one State to deal with foreign nationals acting in their country against its security and integrity."

Some exceptions of the exercise of Jurisdiction*

(1) *Diplomatic agents.*—Diplomatic agents enjoy certain privileges and immunities. They are immune from the jurisdiction of the civil and criminal courts of the receiving State. In this connection the old view was that the diplomatic agents enjoy these immunities and privileges because they were deemed to be outside the jurisdiction of the receiving State. In the present time this theory has been discarded. According to the modern view, diplomatic agents enjoy certain immunities and privileges because of the special functions they perform. This was affirmed in a case *Ex-parte Petroff* (1971) by the Supreme Court of Australia. The facts of this case have been mentioned in chapter on "Diplomatic Agents". Oppenheim also subscribes to this view.

(2) *Foreign embassies.*—Foreign embassies are often considered to be outside the jurisdiction of the State in which they are situated. For sake of convenience, embassies are to be treated a part of their home States. The correct view, however, is that though not part of their home States, embassies enjoy certain immunities because of the special functions performed by the diplomatic agents.

(3) *Foreign sovereigns***.—Foreign sovereigns are often treated to be outside the jurisdiction of other States and possess many privileges and immunities. This is based upon the principle that one sovereign cannot exercise jurisdiction over another sovereign. In the case of *Christina*[27] Lord Wright observed, "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 .....the rule may be said to be based on the principle of *par in Parem Non habit Imperium,* no state can claim jurisdiction over another state." This rule is subject to waiver by the consent of sovereign who may desire a legal adjudication of his rights. No such writ can be upheld against the sovereign state unless it consents. The principle of immunity of Foreign Sovereigns was developed in the early years of the nineteenth century. According to this principle vast immunities and exemptions were granted to the foreign sovereigns and foreign States. In the case of the *Schooner Exchange* v. *McFaddon,* (1812),[28] a French Naval Vessel stayed in Philadelphia for repairs after a storm. Some persons sought possession of the ship on the ground that in reality the ship was *Schooner Exchange,* an American ship which they owned and was seized by France on the High Seas in 1810 in pursuance of a Napoleonic Decree. The U.S. Government however requested the Court to refuse jurisdiction on the ground of Sovereign immunity. The Court held that the vessel was exempt from U.S. jurisdiction. Marshall, C.J. of the U.S. Supreme Court expounded the principle of sovereign immunity in the following words :

> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself ..... This full

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* See for I.A.S. (1969), Q. No. 5 ; I.A.S. (1963), Q. No. 2; P.C.S. (1982), Q. 5.

** See for I.A.S. (1970), Q. No. 2 ; I.A.S. (1963), Q. No. 2 ; I.A.S. (1965) Q. No. 6(c) ; P.C.S. (1973), Q. No. 6 ; See also for I.A.S. (1977), Q. No. 4 ; C.S.E. (1985) Q. No. 6(a).

27. (1938) A.C. 485.

28. (1812) 7 Cranch 116.

and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial powers, would not seem to contemplate foreign sovereigns nor their sovereign rights, as its subjects. One sovereign being in no respect amenable to another, and being a bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication and will be extended to him".

In *Vavasseur* v. *Krupp*[29] the plaintiff contended that the Japanese Government had violated his patent rights and therefore he demanded that the delivery of the goods by it be stopped. But the Court held that it had no jurisdiction over the property of the foreign sovereigns "more especially with what we call the public property of the State of which he is sovereign".

Similarly in *Parliament Belge*,[30] it was held that the British Courts have no jurisdiction over the person and property of the foreign sovereigns. In this case, the Parliament Belge was a Belgium mail vessel and was also used for commercial purposes. It collided with a British ship and owners of the ship had filed a case in the Admiralty Division demanding compensation. It was held that court has no jurisdiction over the Parliament Belge. Neither the sovereign of Great Britain nor any friendly sovereign can be impleaded in any of courts of Britain. The mere fact that the ship being used subordinately and partially for trading purposes will not take away the sovereign immunity.

In *Mighell* v. *Sultan of Johore*,[31]* the Sultan of Johore, during his stay in England, promised to marry the plaintiff. When the said promise was not fulfilled, the plaintiff filed a case for the breach of the promise. The Sultan of Johore contended that he was a sovereign of a foreign sovereign State who had not submitted to the jurisdiction of the court and as such the court could not have jurisdiction over him. The court accepted his contention and decided in his favour. Lord Esher, M.R. of the Court of Appeal held : "If it is shown that he is an independent sovereign, and does not submit to the jurisdiction, the court has no jurisdiction over him. It follows from this that there can be no inquiry by the court into his conduct prior to that date." His Lordship referred the following observation made by the Court in *The Parliament Belge* : "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 courts any of its 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." [32]

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29. (1878) 9 Ch. D. 351.
30. (1880) 5 P.D. 197.
31. (1894) 1 Q.B. 149.

* See also for C.S.E. (1995) Q. 7(b).

32. Other Illustrations :— (i) *X*, a Muslim ruler of State in Malayasia is sued by an Indian Muslim girl in Delhi for breach of promise to marry when *X* was holidaying in Delhi. In this case *X* can take the plea of his sovereign immunity that he is not subject to the jurisdiction of the court. As held in *Mighell* v. *Sultan of Johore*, (1894) discussed above, the Court cannot exercise jurisdiction. [This problem was asked in P.C.S. (1973), Q. No. 6; (ii) The Pakistan Government entered into contract with a foreign Government for the purchase of military equipment which provided that its interpretation should be governed by English law and stated that the Government agreed 'to submit, for the purposes of the agreement, to the jurisdiction of the English courts'. Yet when the dispute arose, the Pakistan Government objected to the jurisdiction of the English Court, saying that its waiver was not express, not made in the face of the court, and therefore, ineffective. [Asked in I.A.S. (1965), Q. No. 6(c)]. The objection of Pakistan is valid, immunity is to be claimed at the time when the question arises in the court and as held in *Mighell* v. *Sultan of Johore*. "..... there can be no inquiry by the court into his conduct prior to that date." See also for I.A.S. (1977), Q. No. 4(i)] ; for this see also Anglo-Iranian Oil Company case, I.C.J. Rep. (1952), p. 93.

The principle laid down in *Mighell* v. *Sultan of Johore*, was finally approved by the House of Lords in *Duff Development Co. Ltd.* v. *Government of Kelantan*.[33] The facts of *Duff Development Co. Ltd.* v. *Government of Kelantan* are as follows :—

In 1912, the Government of Kelantan granted certain concessions to the appellant in respect of digging mines. etc. The instrument under which these concessions were granted also provided for arbitration in case of a dispute. In 1921, a dispute was entrusted to an arbitrator who gave his award in favour of the Company (appellant). The respondent (*i.e.* the Government of Kelantan) had filed a case to get the said award invalidated, but the case was dismissed by the Court. This decision was approved by the House of Lords. Thereafter in 1922, the appellant-Company filed a case in the King's Bench of England requesting the Court for enforcing the said award, and the Court thereupon issued a garnishee order, but later on this order was declared null and void because the Government of Kelantan was independent sovereign State. The Court of Appeal approved this decision. Therefore, the appellant-Company filed an appeal against the said order in the House of Lords.

The British Foreign Office informed the Court that despite the above agreement British Government had recognised the Sultan of Kelantan as an independent sovereign State and the British Crown neither exercises nor claims sovereignty and jurisdiction over Kelantan.

The House of Lords decided in favour of the Government of Kelantan and dismissed the appeal of the appellant company. Thus the Court held that the Government of Kelantan was a sovereign State and could not be impleaded. The Court also observed that it is the duty of the Court to accept the statement of Secretary of State which if clearly and positively made, is conclusive upon the point of status of a foreign State. *Rahimtoola* v. *Nizam of Hyderabad*,[34] also deserves a mention in this connection.

But if the person concerned who claims immunity is ex or former or deposed sovereign, he will not be entitled to get immunity. Immunity can be granted only when the country where the suit has been filed regards him as Foreign Sovereign. If he is not regarded as foreign sovereign and is former sovereign or deposed King, the courts will not grant immunity. This is clear from the following illustration—

The deposed King of Afghanistan while living in exile in England proposes to marry an English lady. Later on he changed his mind and refused to marry. The lady brings a suit against him for breach of promise to marriage. The defendant contends that the court has no jurisdiction over him as he was the sovereign of an independent state, and that he has not submitted himself to the jurisdiction of an English Court.*

Immunity is given to the existing foreign sovereign. A deposed sovereign is not entitled to claim immunity. The position, however, will be different if England still regards him as foreign sovereign.

(4) *Immunity in respect of public property of Foreign Sovereign State.***—Like the person of foreign sovereign, the property of the sovereign or the public property of the State also receives certain immunities and exemptions from the exercise of jurisdiction. In the *Schooner Exchange* v. *McFaddon* (1812), Marshall, C.J. observed that 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 exempt by the consent of that power from its jurisdiction." In some countries, distinction is made between sovereign and commercial acts. For example, in America a foreign sovereign is not entitled to any exemption or immunity when engaged in commercial functions. This was held in *Ohio* v. *Helvering*[35] It is, however, difficult to determine as to whether a particular act is commercial or not. In

33. (1924), A.C. 797.
34. (1958), A.C. 379; See also Dollfus Mieget Compagnie S.A. v. Bank of England, (1950) 1 All E.R. 747.
* C.S.E. (1987) Q. 6(b) (ii).
** See also for I.A.S. (1963), Q. No. 2 ; C.S.E. (1985) Q. (a).
35. 293 U.S. 360.

this connection, it is worth remembering that many countries have nationalised industries and trades. Hence, classification of commercial functions is a matter of great importance. According to Prof. W. Friedmann,[36] in this connection, three views are prevalent—

(a) All that property which is owned by State is entitled to immunity. This view is followed in England and *Krajina* v. *Tass Agency*,[37] and *Rahimtoola* v. *Nizam of Hyderabad*,[38] deserve mention in this connection.

(b) According to the second view, this immunity is not absolute and it has certain limitation. It depends upon the type of the act. But it is difficult to determine as to whether a particular act is a sovereign act or not.

(c) According to the third view, immunity depends upon the nature of the function. In accordance with this rule, those ships which are owned by the State and perform commercial functions, are treated equivalent to private ships during peace times.

It may be noted here that ".....the absolute theory of sovereign immunity is no longer to be considered sacrosant.[39] In *Thai-Europe Tapioca Service Ltd.* v. *Govt. of Pakistan*,[40] the Court of Appeal held that a foreign sovereign has "no immunity when it enters into a commercial transaction with a trader here, and a dispute arises which is properly within the territorial jurisdiction of our courts." [41] Similarly a foreign sovereign has no immunity in respect of debts incurred in England for services rendered to foreign property situated in England. Almost the same view was taken by the Judicial Committee of the Privy Council in *Owners of the Ship Philippine Admiral* v. *Wallem Shipping (Hong Kong) Ltd. and Others*.[42] In *The State of Kerala* v. *K. Cheru Babu*,[43] the Division Bench of the Kerala High Court observed : "The doctrine of absolute immunity never formed part of classical law. Neither Grotius nor Bynkershoek nor Vattel accepted the doctrine in its absolute form. Nor does it find acceptance in modern jurisprudence. The doctrine is now confined to narrow regions, namely, (a) the immunity of a foreign State from the jurisdiction of the local courts in regard to acts *jure imperi* (non-commercial activities of State in its sovereign capacity) as distinguished from acts *jure gestionis* (commercial activities of State) ; and (b) the immunity of a State from the jurisdiction of its own courts in regard to acts of State and matters arising from military operations. The principle of State immunity—Whether of the territorial State or of the foreign State—is a survival of the period when the Sovereign was considered to be above the law. This is no longer the position." As remarked by Steven M. Schneebaum,[44] "Two United Kingdom decisions (*i.e.* the above mentioned two decisions) show the law of sovereign immunity to be undergoing rapid and perhaps dramatic change in a nation not long ago described as 'the only country that persists in the systematic adherence to the archaic view of absolute immunity." [45] What is even more important, however, and not least for its political and diplomatic implications, is the court's treatment of the rationale of the law. The role of the foreign sovereign in British jurisprudence is not what it once was and yet the change, even if a desirable and progressive one, seems based upon principles that are eminently in need of further clarification. Thus it may safely be concluded "that there is a definite trend towards

36. Law in a Changing Society (First Indian Reprint, 1970), pp. 325-26.
37. (1949) 2 All E.R. 274.
38. (1957) 3 All E.R. 441.
39. Steven M. Schneebaum, "Sovereign Immunity : The End of Absolution" IJIL Vol. 16 (1976), p. 267 at p. 274.
40. (1975) 3 All E.R. 961.
41. Ibid, at p. 966.
42. (1976) 1 All E.R. 71 at p. 95.
43. A.I.R. 1978 Ker. 43 at pp. 48-49.
44. See supra note 39, at p. 267.
45. See generally Sucharitkul, State Immunities and Trading Activities in International Law, 1959, p. 256; M.K. Nawaz : The Problem of Jurisdictional Immunities of Foreign States with particular reference to Indian State Practice, IJIL, (1962), p. 164.

a general acceptance, in the western world of restrictive theory of sovereign immunity in the context of commercial activities." [46]

The position of enforcement jurisdiction under English law, which more or less corresponds to Indian law, may be summarised as follows[47] :—

(i) Under international law, there is a distinction between immunity from adjudicative jurisdiction and enforcement jurisdiction of the forum state.

(ii) Such a distinction is recognized under English law and the State Immunity Act, 1978 provides different rules for immunity from execution.

(iii) International law permits waiver of immunity by a State from execution. So is also the case under English law and the opening of a special account or written authorization by State that funds should be placed in a special account to meet commercial creditor's claims constitutes such a waiver.

(iv) As regards enforcement jurisdiction, English law gives effect to it by a ruling that bank account of a State to meet the running expenses of a diplomatic mission is immune from enforcement measures.

(v) Despite the fact that international law permits a limited exercise of enforcement measures against a foreign State, the provisions of the said 1978 Act and the judgment creditor's onus of proof defeat such limited measures.

(vi) Without directly seeking the Amendment of 1978 Act, several methods may be found to ensure a wider power of attachment for commercial judgment debts. For example, the creditor may seek security of his commercial transactions with the State requiring the guarantee of a State trading entity.

(5) *International Organisations.*—International Organisations also enjoy certain immunities and privileges from the jurisdiction of the States in which they are situated. For example, the United Nations International Labour Organisation, and other specialized agencies enjoy several privileges and immunities. For the purposes of granting privileges and immunities to the U.N. a convention known as the Convention on the Privileges and Immunities of the United Nations was entered into. Reference may also be made here to the Act No. XLVI of 1947 to give effect to the Convention on the Privileges and immunities of the Union passed by the Dominion Legislature of India.[48]

(6) *Extradition Treaties.*—Under the provisions of the extradition treaties, the persons who run away from their country after committing crimes may be extradited. That is to say, the State where they have committed certain crimes may ask the State where the accused is for the time being to return him so that he could be prosecuted and punished according to the law of the land. Thus in respect of such persons also, State may exercise some sort of jurisdiction even outside its territory.

(7) *Foreign Troops.*—As pointed out by Marshall, C.J. in *The Schooner Exchange* v. *McFaddon,*[49] "a sovereign is understood to cede a portion of his territorial jurisdiction

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46. A.O. Adebe, "The Doctrine of Sovereign Immunity under National Commercial Law : An Observation on Recent Trends", IJIL, Vol. 17 (1977), p. 245 at p. 259 ; See also Trendtex Trading Corporation v. Central Bank of Nigeria, (1977) 1 All E.R. pp. 881-911. See also Victory Transport Inc. v. Comisaria General De Abaste Cimentos Y. Transporters, 381 U.S. 934 (1965) : 35 I.L.R. 110 ; Dralle v. Rep. of Czechoslovakia, International Law Reports, 17 (1950), p. 155 (Sup. Ct. of Austria 1950).

47. See Hazel Fox, "Enforcement Jurisdiction : Foreign State Property and Diplomatic Immunity", I.C.L.Q., Vol. 34 (1985) p. 115 at pp. 140-141.

48. According to Article I of the Schedule annexed to the Act., the United Nations shall possess juridical personality. It shall have the capacity : (a) to contract ; (b) to acquire and dispose of immovable and movable property ; (c) to institute legal proceedings. (Section 1). Article II provides : The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution (Section 2). The premises of the U.N. shall be inviolable (Section 3). Articles III, IV, VI, VII and VIII deal with Facilities of Communications, the Representatives of Members, Officials, Experts of Missions For the U.N., United Nations Laiseez Passer, and Settlement of Disputes, respectively.

49. (1812) 7 Cranch 116, See also G.P. Barton, "Foreign Armed Forces : Immunity from Criminal Jurisdiction", BYBIL, Vol. XXVII (1950), p. 186.

where he allows the troops of a foreign prince to pass through his dominions." The grant of free passage therefore implies a waiver of all jurisdictions over the troops during their passage and permits the foreign army authorities to exercise jurisdiction upon the army personnel to maintain discipline and to inflict those punishments which the government of his army may require.

(8) *Immunity of warship and their crew.*—Under international law warships enjoy a great measure of immunity. Warships are immune from legal process, execution or jurisdictional measures of foreign authorities. This immunity is applicable to the commander of the crew as well as to the ship itself. This immunity is not lost for acts of State (*i.e.* official acts) even if they are illicit (but not including crimes under international law). The home state of the warship will be responsible for its acts. Last but not the least, no immunity will be available if the warship, its commander or crew intrudes in a foreign country in *disguise and/or under false pretences.* In such a case the warship may be termed a 'spy' and may then be liable to confiscation and the legal process of the aggrieved coastal state.[50] The immunity of warship, even for illicit activities, "rests on the principle *par in parem non habet imperium, i.e.,* no State can sit in judgment of another State ..... even if foreign warships have acted contrary to international law by engaging in 'spy' missions in peacetime, the members of the crew have still acted as State agents and are, as such, immune to legal process in municipal courts. Retaliatory action for their activities must be directed against the sending ship itself and the sending State. The acts of the 'spy' ship have engaged the responsibility of that State, activating far-reaching rights of self-defence against the ship, as well as further retaliation and entitlement to reparation." [51]

Exercise of jurisdiction in case of collision of ships on high sea*.— In case of collision of two ships in the high seas, jurisdiction is ordinarily exercised by the State whose flag flies on the ship. However, on the basis of extra-territoriality that State which has been affected by the said collision may also exercise jurisdiction. The leading case on the point is *S.S. Lotus.*[52] This matter has been discussed in detail below in connection with the criminal jurisdiction in international law.

Criminal Jurisdiction in International Law**

There are several views prevalent in connection with the criminal jurisdiction in international law. There is great controversy among the States in this connection. Following are the three main views prevalent in this connection :

(1) According to the first view, each State can exercise criminal jurisdiction within its territory. This theory is popularly known as the theory of territoriality of criminal jurisdiction. This theory has been supported by Great Britain, America and some other States. These States subscribe to the view that each State is entitled to exercise criminal jurisdiction only within its territory.

(2) The second view is also known as the theory of territoriality, but it admits certain exceptions to this general theory. France, Germany, etc. are its chief supporters. These States have accepted the theory of territoriality with certain modifications. According to them, a State may exercise criminal jurisdiction even outside its territory on the basis of the national security and on economic grounds.

(3) The third theory is popularly known as the theory of extra-territoriality. Turkey, Italy, etc. are its chief supporters. According to this theory, crime is a social evil and it is in the interest of whole international community to ensure that he criminals get due punishment. In international field, there are many such matters in which the States exercise criminal jurisdiction even outside their territory.

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50. Ingrid Delupis, "Foreign warships and Immunity For Espionage", AJIL, Vol. 78 (1984) p. 53 at p. 71.
51. Ibid, at p. 75.
* See also for P.C.S. (1990) Q. 10(a).
52. (1927) P.C.I.J. Series A, No. 10.
** See also for C.S.E. (1991) Q. 5 (d).

The leading case on the point is *S.S. Lotus*[53] decided by the Permanent Court of International Justice in 1927. Facts of the case and principles laid down are discussed below.

*S.S. Lotus**.—A Turkish ship named Bozkourt collided with the French ship *S.S. Lotus*. In consequence of this collision certain Turkish national died. After the collision the French ship *S.S. Lotus* reached the Turkish port, Constantinopole. The Turkish Government arrested French national and the officers of the ship and started criminal proceedings against them in accordence with Turkish Law. They were held guilty and convicted by the Court. The French Government lodged a strong protest against this. Thereupon the Government of France and Turkey agreed to refer this matter to the Permanent Court of International Justice. The Permanent Court of International Justice propounded the following principles in this connection :—

(1) Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all of these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality by criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.

(2) That there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown.

Judge Moore who gave dissenting opinion agreed with the majority of the court, "..... it appears to be now universally admitted that where a crime is committed in the territorial jurisdiction of one State as the direct result of the act of a person at the time corporeally present in another State, international law, by reason of the principle of constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former State, should he come within its territorial jurisdiction."

The Court, therefore, ruled that by prosecuting and punishing French national and the officers on the board of the ship, the Turkish government did not act contrary to the rules of international law. It may, therefore, be concluded that even those countries which subscribe to the theory of extra-territoriality define offences in such a way that it is deemed to have committed within their territory if its effect falls upon their territory or if any of its elements is present in their territory.

Thus, "The theory of territoriality for application of criminal law is not an absolute principle of international law and this by no means coincides with territorial sovereignty.

It may, however, be noted that the decision in this case has become obsolete as regards collision cases because Article 11 (1) of the Geneva Convention on the High Seas, 1958[54] provides : "In the event of collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master of or any other person in the service of the ship, no penal or disciplinary proceeding, may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national." This provision without any change finds mention in Art. 97(1) of U.N. Convention on the Law of the Sea, 1982. A similar provision was earlier made in Brussels Convention of 10 May, 1952, relating to criminal jurisdiction in matters of collisions or other accidents of navigation.

Reference may also be made here to the Supreme Court case, *Mobarak Ali Ahmad* v. *The State of Bombay*[55] wherein the Supreme Court observed : "The fastening of criminal

53. Ibid.

* See also for IAS (1975), Q. No. 5(c) ; IAS (1957), Q. No. 6(a) ; PCS (1966) Q. No. 10(d) ; PCS (1983) Q. 10 (g) ; see also for C.S.E. (1993) Q. 7(c) (facts of this problem resemble those of S.S. Lotus).

54. U.N. Doc. A/Conf. 13/L 53.

55. AIR 1957 SC 857.

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 any 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." [56] The Supreme Court quoted with approval the following dictum of Holmes, J. : "Acts done outside a jurisdiction but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of harm as if he had been present at the effect if the State should succeed in getting him within its power." [57] The Court also quoted with approval the following observation of the Permanent Court of International Justice in *S.S. Lotus*[58] : It is certain that the Courts of many countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense, that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there." The Supreme Court further observed : "In noting the provisions of international law in this context we are conscious that what we have to deal with in the present case is a question merely of municipal law and not of any international law. But as is seen above, the principles recognised in this behalf are virtually based on the recognition of those principles in the municipal law of various countries and is really part of general jurisprudence relating to criminal responsibility under municipal law.

No doubt some of the above dicta have reference to offences actually committed outside the State by foreigners and treated as offences committed within the State by specific legislation. But the principle emerging therefrom is clear that once it is *treated* as committed within the State the fact that he is a foreigner corporeally present outside at the time of such commission is no objection to exercise municipal jurisdiction under the municipal law. This emphasises the principle that exercise of criminal *jurisdiction depends on the locality of the offence and on the nationality of the alleged offender* (except in a few specified cases, such as, ambassador, Princes, etc).[59]

N.B.—For criminal jurisdiction under International law see also matter discussed earlier under the heading 'Extra-territorial Operation of State Laws and Protective Jurisdiction of State Over Foreigners' in this Chapter.

Some Illustrations

(i) *K*, a British subject, fires across the channel and kills a Frenchman on the shore of France.* In this case Britain has jurisdiction over criminal *K* because *K* is a British subject and the crime is committed within the territory of Britain. France can also claim jurisdiction because though the crime was initiated in Britain, it was completed or consummated in the French territory. Moreover, the effect of the crime initiated in Britain fell on French territory. So if *K* goes to France, he can be apprehended and tried for murder.

(ii) *K*, an Indian subject, obtains money by false pretences by means of letters posted in Bhutan to a recipient in Pakistan.** *K* can be tried by Bhutan in whose territory the crime was committed by India, whose subject he is and also by Pakistan in whose territory the effect of the crime falls.

(iii) *K*, an American national, published in Texas a libel against a Mexican citizen, Later, *K* is in Mexico on a temporary visit and is arrested by the Mexican Government for prosecution. The Government of the United States protests against this.*** In view of

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56. Ibid, at p. 868.
57. Appearing in Hackworth's Digest of International Law, (1941 Edition), Vol. 11 at p. 188.
58. (1927) P.C.I.J., Series A, No. 10, 23.
59. See supra note 55, at p. 869.

* Asked in I.A.S. (1970), Q. No. 5(a) ; For the answer of this and the two succeeding illustrations refer the law as discussed above.

** Asked in IAS (1970), Q. No. 5(b).

*** Asked in I.A.S. (1970), Q. No. 5(c).

the law relating to criminal jurisdiction in international law, and general jurisprudence relating to criminal responsibility under municipal law discussed above, Mexican Government is within its right to arrest *K* for prosecution because the effect of the crime initiated in America fell on Mexico and protest of U.S. is not justified.

Criminal jurisdiction of the Coastal State in the Territorial Sea.—The sovereignty of a coastal State also extends to its territorial sea. This is, however, subject to the condition that ships of all States enjoy the right of innocent passage through the territorial sea. So far merchant ships are concerned, Article 19(1) of the Geneva Convention on the territorial sea and the contiguous zone, 1958, provides that the criminal jurisdiction of coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases : (a) If the consequences of the crime extend to the coastal State ; or (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea ; or (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies ; or (d) If it is necessary for the suppression of illicit traffic in narcotic drugs. Article 19(2) provides that the above provisions do not affect the right of the coastal State to take any steps authorised by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.[60] Under Article 17 of the U.N. convention on the Law of the Sea, 1982, subject to the convention, ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea. According to Article 18, passage shall be continuous and expeditious. However, passage includes stopping and anchoring but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in dangers or distress. As regards innocent passage, Article 19 provides that passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with the convention and with other rules of international law.

U.N. Crime Commission

N.B.—For this please see Chapter on "International Criminal Law and the Establishment of an International Criminal Court."

State Jurisdiction According to the Universal Principles*

As pointed out by Starke, "An offence subject to Universal jurisdiction is one which comes under the jurisdiction of all States wherever it be committed inasmuch as by general admission the offence is contrary to the interests of the international community, it is treated as a delicate *jure gentium* and all States are entitled to apprehend and punish the offenders. Clearly the purpose of conceding Universal jurisdiction is to ensure that no such offence goes unpunished."[61] Further, "There are probably today only two clear-cut cases of Universal jurisdiction, namely, the crime of piracy, *jure gentium* and war crimes ..... The principle of Universality of war crimes was affirmed by the Geneva Conventions of 1949 relative to prisoners of war, protection of civilians, and sick and wounded personnel ..... crimes or delicts *jure gentium,* other than piracy and war crimes, raise somewhat different considerations." [62] The principle of Universal jurisdiction was propounded first in respect of the crime of piracy. Since pirates were considered enemies of whole mankind, it was provided that any State could apprehend, try and punish pirates irrespective of the fact as to whether piracy was committed within or outside the jurisdiction of the State concerned. The law in this connection was codified in the Geneva Conference on the Law of the Sea, 1958. Article 19 of the Geneva Convention on the High

60. Provisions of Article 19(1) and (2) of the Geneva Convention, 1958 as referred above have been retained in Article 27(1) and (2) of the U.N. Convention on the Law of the Sea, 1982.

* See also for I.A.S. (1971), Q. No. 7 ; C.S.E. (1991) Q. 5(c).

61. J.G. Starke, Introduction to International Law, Tenth Edition, (1989), p. 234.

62. Ibid, at p. 234-235.

Seas[63] provides that on the high seas or in any other place outside the jurisdiction of any State, every State may seize pirate 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. 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 the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Since 'piracy' as defined in Article 15 of the Convention includes illegal acts of violence, detention or any act of deprecation, etc. against aircraft also, a case can be made out that the Universal jurisdiction principle should apply to the crime of hijacking also. The features of jurisdiction incorporated under the Hague Convention on Hijacking, 1970 have brought the offence of hijacking very near to piracy under International Customary Law.[64] As rightly remarked by Michael Akehurst, "..... although hijacking is not piracy, there is doctrinal authority for the view that it is subject to universal jurisdiction nevertheless. Hijacking threatens International communications to the extent as piracy ; it is an attack on international order and injures the international community as a whole, which means that all States have legitimate interest in reprssing it. The policy reasons which justify universal jurisdiction over piracy justify it equally in the case of hijacking. It might also be possible to justify Universal jurisdiction over hijacking on wider grounds ....."[65]

As regards war crimes, it is now generally agreed that States have Universal jurisdiction to apprehend, arrest and try the persons accused of war crimes. Reference may be made here to *Eichmann* case[66] wherein it was argued on behalf of the accused that when the crimes (*i.e.,* war crimes of which he was accused) alleged were committed, Israel did not exist as a State and hence the Israeli court had no jurisdiction over the crimes committed by him. The Supreme Court of Israel rejected this argument and held: "..... it is the Universal Charter of the crimes in question which vests in every State the power to try those who participated in preparation of such crimes, and to punish them therefor ..... " Further, "The abhorrent crimes ..... are not crimes under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations are grave offence against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal." Thus it may be concluded that the principle of Universal jurisdiction applies to international crimes of piracy and war crimes and to some extent also to aircraft hijacking. It may be suggested that it will be in the interest of international community to extend the principle of Universal jurisdiction to some other international crimes such as genocide, *apartheid* and international terrorism. An international Criminal Court should be established to try persons accused of the said international crimes.

International Servitudes.*—"International servitudes" or "State servitude is the term sometimes used to denote exceptional restrictions made by treaty or otherwise on the territorial supremacy of a State by which a part or the whole of its territory is in a limited way to serve a certain purpose or interest of another State." [67] Further, "It should, however, be said that there has always been some doubt how far the classical concept of servitude is either apposite or acceptable. The notion of servitude is not a happy one

63. See U.N. Doc., A/Con F. 53.
64. See Sami Shubber, "Aircraft Hijacking Under the Hague Convention 1970—A New Regime", I.C.L.Q., Vol. XXII (October 1973), p. 687 at p. 725; see also B. Cheng and R.H.F. Austin "Air Law' in the Present State of International Law and other Essays, Edited by Prof. Maarten Bos (Kluwer Netherlands 1973), p. 183 at pp. 196-97.
65. Michael Akehurst, "Hijacking", I.J.I.L., Vol. 14 (1974), p. 81 at pp. 83-84.
66. Eichmann v. Attorney-General of the Government of Israel, (1962) 136 I.L. 277. For facts of the cae see, Chapter on "War Cms. 6".
* See also for I.A.S. (1959) Q. No. 3, : P.C.S. (1966), Q. No. 9 ; I.A.S. (1956) Q. No. 5 ; P.C.S. (1995), Q. No. 8(a).
67. Oppenheim's International Law, note 2 at pp. 670-671.

politically. Moreover, its use nurtures the temptation to argue from the concept, even though this imports an analogy between territorial sovereignty and land ownership, which is outmoded." [68] Servitudes may be of following four types :[69]

(1) Positive.—The question of positive servitude arises when a state permits another state to do some work over a certain part of its territory.

(2) Negative.—The question of negative servitude arises when a state claims that other states should not work in its territory or a part of its territory in a particular way and if this claim is accepted by the state concerned.

(3) Military.—Military servitudes to fulfil the military requirements. To keep military or armed forces in another state is a type of military servitude. For example the state of Malta has given an island to Britain on lease and has allowed Britain to have its Military base on it. It may be termed as a type of military servitude.

(4) Economic servitude.—Economic servitudes are common and they arise when one state allows another state certain commercial or transport facilities.

In Teen Bigha case or *Union of India* v. *Sukumar Sen Gupta*[70], Sabyasachi Mukherji, C.J. of the Supreme Court observed :

> "Acceptance of servitude does not represent any negation of sovereignty. The term 'servitude' means nothing more than accepted restrictions and grant of servitude does not amount to cession." [71]

In 1974 an agreement was entered into between India and Bangladesh regarding the land boundary and related matters including transfer of enclaves. The Agreement provided that Indian enclaves in India should be exchanged expeditiously excepting the enclaves mentioned in para 14 without claim to compensation for the additional area, going to Bangladesh. Thereafter, an understanding was reached in October 1982 between the two Governments in connection with the "lease in perpetuity" in terms of item 14 of Article 1974 Agreement. Item 14 provided the following :

> "India will remain the southern half of South Berubari Union No. 12 and the adjacent enclaves, measuring an area 2.54 square miles approximately, and in exchange Bangladesh will retain the Dahagram and Angerpota enclave. India will *lease in perpetuity* to Bangladesh an area of approximately 178 metres × 65 metres near 'Tin Bigha' to connect Dahagram and Panbari Mouza (S. Patram) of Bangladesh."

Thus the agreement provided that the said land would be given on lease to Bangladesh to enable it to exercise sovereignty over Dahagram and Angerpota but India would continue to retain sovereignty over the said area and the rent for the lease area shall be Re. 1/- (Bangladesh Taka one) only per annum. The agreement added that Bangladesh shall not however be required to pay the said rent and the Government of India waived its right to charge such rent in respect of the leased area. Though the said agreement used the term "lease in perpetuity", the Supreme Court held that it was "servitude suffered by India in its territory, as known in international law". In the words of Sabyasachi Mukherji, C.J., who delivered the judgment of the Full Bench of the Supreme Court :

> "A fortiori, the said transaction did not amount to cession of the said area of Teen Bigha in favour of Bangladesh ..... the rights intended to be conferred on Bangladesh under the said agreements would amount to what is known as 'servitude' in international law." [72]

Further, "the term 'servitude' means nothing more than accepted restrictions and grant of servitude does not amount to cession of territory." [73]

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68. Ibid, at p. 671.
69. L. Oppenheim's International Law, Vol. I, 8th Edn., pp. 540-541.
70. AIR 1990 S.C. 1692.
71. Ibid, at pp. 1706-1707.
72. Ibid, at p. 1706.
73. Ibid at p. 1707.

CHAPTER 15

STATE TERRITORY

State territory has been defined as "portion of globe which is subjected to the sovereignty of a State. A State without a territory is not possible, although the necessary territory may be very small, as with Vatican city.....A wandering tribe, although it has a government and is otherwise organised, is not a State until it has settled down in a territory of its own." [1] Further, "the importance of State territory is that it is the space within which the State exercises its supreme and normally exclusive authority. State territory is an object of international law, because that law recognises the supreme authority of, which authority must of course be exercised in accordance with international law.....The exclusive domain of a State within its territory is basic to the international system and Article 2(4) of the U. N. Charter accordingly requires all members to refrain in their international relations from the threat or use of force against the territorial independence of any State." [2]

The territory of a State comprises not only its land mass but also its national waters (*i.e.*, rivers, lakes, bays, estuaries, other enclosed areas and territorial waters, and the air space above its land and water territory.* According to Article 8 (i) of the U. N. convention on the Law of the Sea, 1982, waters on the land ward side of the baseline of the territorial sea form part of internal waters of state.[3] But this is subject to Part IV of the convention which deals with Archipelagic states. Article 47 of Part IV of the convention provides that an archipelagic state[4] may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1". Further the length of such baselines shall not exceed 100 nautical miles, except that up to 3 percent of the total number of baselines enclosing any archipelago may exceed that length up to a maximum length of 125 nautical miles. Moreover, the drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago. According Article 50, within its archipelagic waters, the archipelagic state may draw closing lines for the delimitation of internal waters, in accordance with Articles 9, 10 and 11.

It may be further noted that if a river flows into the sea the baseline shall be a straight line across the mouth of the river between points on the low waterline of its banks.[5] As regards bays, the convention provides that if the distance between the low-water marks of the natural enterance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters. Where the distance between the low-water marks of the natural enterance points of a bay exceeds 24 nautical miles a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.[6] As regards ports, the convention provides that for the purposes of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded

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1. Oppenheim's International Law, Vol. 1, 9th Edition, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group U.K. Ltd. and Mrs. Tomoko Hudson, 1992 pp. 563-564.
2. Ibid, at p. 564.
* See also for P.C.S. (1964), Q. No. 7 ; I.A.S (1978), Q. No. 5(a).
3. See also Article 5 of the Geneva Convention on the Territorial Sea and Contiguous Zone, 1958.
4. That is a state constituted wholly by one or more archepelago and may include other Islands.
5. Article 9 of the U. N. Convention on the Law of the Sea, 1982.
6. Article 10.

as forming part of the coast off-share installations and artificial islands shall not be considered as permanent harbour works.[7]

Maritime Territory

Beyond inland waters, the sovereignty of a coastal state extents to maritime belt or territorial waters. Besides, territorial waters, the coastal state also exercises sovereign rights, for certain limited purposes, over continental shelf and exclusive economic Zone. The coastal state also exercises some control over contiguous zone. Each of these maritime Zones are critically discussed in a separate chapter entitled, "The Law of the Sea."

Modes of Acquiring Territory*.—Under international law, a state may acquire territory through any of the following modes—

(1) **Occupation****.—"Occupation is the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as it is at the time not under the sovereignty of another State." [8] Further, "It is therefore an *original* mode of acquisition in that the sovereignty is not derived from another State. Occupation can only take place by and for a State; it must be a State act, that is, it must be performed in the service of a State, or it must be acknowledged by a State after its performance." [9] Thus, "occupation consists in establishing sovereignty over a territory not under the authority of any other State whether newly discovered or an unlikely case-abandoned by the State formerly in control." [10] In order to see whether a State has occupation over a particular territory it is seen whether there is effective occupation of that State over the territory concerned.[11] The two essential elements or facts that constitute an effective occupation—(i) Possession ; and (ii) Administration.[12] The State acquiring territory must formally announce that the territory has been taken possession of and that it intends to keep it under its sovereignty. After taking the territory into possession, the possessor must establish some kind of administration thereon which shows that the possession really governs the territory. This must be done within reasonable time after taking the territory into possession.[13] The leading case on the point is *Island of Palmas Arbitrations*.[14] As regards the sovereignty over the Island of Palmas there was a dispute between America and Netherlands. While America contended that it had acquired the Island under a treaty of 1898 with Spain, Netherlands contended that the Island was never under the occupation of Spain and as such Spain had no authority to transfer it to any other State. Both the States referred the matter to arbitration. Deciding in favour of Netherlands, the arbitration court held that for acquiring sovereignty over a particular territory effective occupation is necessary. That is to say, there should be occupation and contacts with the inhabitants of the territory should be established. Occupation involves two elements—(a) will to exercise sovereignty, and (b) an exhibition of actual authority. The Arbitrator observed that if the Islands was discovered by Spain, there was nothing on record to prove that the Spaniards ever went to the Island, occupied it and established contacts with

7. Article 11.

* See also for IAS (1971), Q. 8 ; IAS (1954), Q. 3 ; PCS (1976), Q. 4 ; PCS (1973), Q. 7 ; PCS (1971), Q. 8 ; PCS (1972), Q. 8 ; PCS (1981), Q. 8(b), PCS (1984), Q. 3(a).

** See also for PCS (1965), Q. 7 (c) ; IAS (1964), Q. 12 ; IAS (1959), Q. 6(c) ; C.S.E. (1993) Q. 6(a) ; C.S.E. (1995) Q. 5(b).

8. Oppenheim, International Law, Vol. 1, Eighth Edition, p. 555; See also Oppenheim's International Law, note 1, at p. 686.
9. Oppenheim's International Law, ibid, at pp. 686-687.
10. J. G. Starke, Introduction to International Law. Tenth Edition (1989) p. 160.
11. See J.E.S. Fawcett, The Law of Nations (1968), p. 58.
12. See Oppenheim's International Law, note 1, pp. 688-689.
13. Ibid. at p. 689.
14. Award of the Permanent Court of Arbitration (1929), Hudson cases p. 361; See also A.J.I.L., Vol. 22(1968), pp. 867-912.

the inhabitants of the Island and established some sorts of administration. On the other hand, Netherlands had not only established contacts with the people of Islands but also had exercised sovereignty over it since 1700. Thus according to the Court of Arbitration, the Island of Palmas was a part of Netherlands which it had incorporated in its territory through occupation.[15]

In another case, namely, *Eastern Greenland Case,*[16] the Permanent Court of International Justice propounded the following two principles : (i) It is necessary for the occupation over the territory that there should be intention to establish sovereignty over the territory concerned; and (ii) There should be some actual exercise of such authority. The facts of this case are as follows : On July 10, 1931, Norway declared her sovereignty over the eastern part of Greenland through a Government decree. On the other hand, Denmark also claimed her Sovereignty over the said area during the Second World War and afterwards several allied powers had declared that the whole Greenland was a part of Denmark. They had also made it clear that they would not object to the sovereignty of Denmark over Greenland. The Foreign Minister of Norway had also accepted this fact and had made it clear that Norway would have no objection in this connection. By a majority of 12 against 2, the Permanent Court of International Justice decided that Eastern Greenland was under the sovereignty of Denmark. The Court held : "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 and will to act as Sovereign and some actual exercise or display of such authority. "Reference may also be made here to *Minquires and Ecrehos* (*France* v. *U.K.*) case[17] decided by the international Court of Justice. In this case, the court had to determine whether the sovereignty over the islets and rocks of the Minquires and Ecrehos groups respectively belonged to the U. K. or the French Republic. The Minquires and Ecrehos are two groups of islets situated between the British Island of Jersy and the coast of France. After the conquest of England by William, Duke of Normandy, in 1066, the Island formed part of the Union between England and Normandy which lasted until 1204, when Philip Augustus of France conquered Normandy but failed to occupy the Island. it was contended by the U. K. that the Islands then remained united with England and this situation was placed on a legal basis by subsequent treaties between the two countries. On the other hand, it was contended by France that the Minquires and Ecrehos were held by France after 1204, and referred to the same medieval treaties as those relied on by the U. K. In its judgment of 17 November, 1953, the Court observed that none of those treaties stated specifically which Island were held by the King of England or by the King of France. The Court added, what was of decisive importance was not indirect presumption based on matters in middle Ages, but *direct evidence of possession and the actual exercise of sovereignty*. After going through the evidence, the Court unanimously decided that "the sovereignty over the islets and rocks of the Ecrehos and Minquires groups in so far as these islets and rocks are capable of appropriation, belongs to the United Kingdom." Thus the two essential elements of occupation are : (i) direct evidence of possession; and (ii) actual exercise of sovereignty or establishment or some sort of administration exhibiting exercise of sovereignty.

Illustration.—(1) The State of Indonesia claims a fishing island in Indian Ocean as part of its territory because it is close to Indonesian shore. The island has been in Indian occupation for over a century though there is no permanent population on the island.* The claim of Indonesia is not justified because the island has been in Indian occupation. Mere proximity or contiguity is not a valid test to determine as to which State the territory in

15. It was held in the Palmas Island Arbitration that "Continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as title." The Arbitration Court finally concluded : "The Netherland's title of Sovereigty, acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700, therefore hold good.....The Island of Palmas (or Miangas) forms in its entirety a part of Netherlands territory."
16. P.C.I.J. (1933), A/B No. 53 (3 W.C.R. 151).
17. I.C.J. Reports 1953, p. 47.

* Asked in P.C.S. (1973), Q. No. 7; P.C.S. (1984) Q. 3(b).

question belongs. In *Island of Palmas Arbitration* it was rightly observed : "The principle, of contiguity in regard to island, may not be out of place when it is a question of alloting them to one State rather than another, either by agreement between the parties or by a decision not necessarily based on law, but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation to between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this Principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty, for it is wholly lacking in precision and would in its application lead to arbitrary results." Moreover, since the island has been in Indian occupation for over a century, India has acquired title over it by prescription also.[18]

(2) State *A* discovers a new island and displays its flag there. Thereafter State *B* occupies the island. After a few years State *A* desires to recover the island from State *B*.*

The facts of this problem resemble the facts of the case of *Island of Palmas Arbitration* which has been discussed above. For answer of this problem see the matter discussed above under the heading "occupation".

Arctic and Antarctic.**—Some States have asserted claims of sovereignty by occupation over some parts of Arctic and Antarctic on the basis of contiguity or proximity. As pointed out above for occupation two essential elements must be present—(i) direct evidence of possession ; and (ii) administration or actual exercise of sovereignty. Since such claims do not satisfy the above essential elements, they are not valid. They are also not valid under international law because effective occupation of these areas is not possible because of the extreme climate of these areas. Moreover, occupation of territory is not possible merely by declaration.

Argentina, Australia, Chile, France, New Zealad, Norway and U. K. are States who asserted claims over parts of Antarctic. U.S.A. and U.S.S.R. also asserted a basis for a claim to territorial sovereignty. They did not make any specific claim nor can it be made now in view of the Antarctic Treaty which prohibits new claims.

The Antarctic Treaty.—The Antarctic Treaty of 1 December, 1959 established a special regime over the Antarctic area south of 60^0 lattitutde. The original State parties to the treaty are : Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom and the United States. The main provisions of the Treaty are :

(1) During the continuance of the treaty existing sovereignty claims shall remain in a state of suspense. No new claim shall be asserted. This provision shall not affect previously asserted rights and that nothing done the treaty regime shall either further or prejudice the existing claims.[19]

(2) The Antarctic shall be used for peaceful purposes only. The treaty forbids the establishment of military basis and fortifications and the testing of any type of weapons.[20]

(3) Nuclear explosions and the disposal of radio-active waste material are prohibited.[21]

(4) The treaty establishes freedom of Scientific investigation.

(5) There shall be periodic consultative meetings in which recommendations may be made to governments for taking measures in furtherance of the objectives of the treaty.[22]

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18. See law relating to prescription discussed below.

* C.S.E. (1994) Q. 7(b).

** See also for P.C.S. (1984) Q. 3(a); P.C.S. (1973) Q. 7.

19. Article 4.

20. Article 1.

21. Article 5.

22. Article 9.

(6) The Treaty is of indefinite duration but is open to review after 23 June, 1991.[23]

A convention on the Regulation of Antarctic Mineral Resource Activities was concluded at Wellington in 1988. Some States, however, opposed it, mainly on environmental grounds, to any mineral resource activity. This movement was led by Australia and France. Consequently, an agreement was reached in October 1991 at Madrid banning for a period of 50 years any mineral resource activity other than scientific research.

Distinction between Occupation and Subjugation.—The distinction between occupation and subjugation is that in subjugation, the State subjugated was previously under the sovereignty of another country whereas in the case of occupation no country exercised sovereignty over it previously.

(2) *Prescription**.—Yet another mode of acquiring territory is prescription. If a State exercises control and establishes occupation over a particular territory for a long time and thus exercises *de facto* sovereignty over it, then the territory concerned becomes a part of that State. "Title by prescription (*i.e.,* acquisitive prescription) is the result of the peaceable exercise of *de facto* sovereignty for a very long period over a territory subject to the sovereignty of another, and this may be as the consequence of immemorial exercise of such sovereignty (*i.e.*, for such period of time as in effect to extinguish memories of the exercise of sovereignty by a predecessor) or as the result of lengthy adverse possession only." [24] Some jurists are of the view that international law does not recognize acquiring of territory through prescription. But some jurists are of the view that there are some precedents under international law, for example the case of *Island of Palmas Arbitration.* However, international law does not prescribe any fixed period for prescription. It may, therefore, be concluded that if any State exercises control over particular territory peacefully for a long time and establishes its sovereignty over it, then the territory concerned becomes a part of it. So far as the question of the period is concerned, the treaty of Washington, 1871 and British Gyanna Arbitration, 1899, fixed it for 20 years. This is however not a generally agreed period of acquiring of territory through prescription.[25] A State may acquire some territory by prescription only when some conditions are fulfiled. These conditions are : (i) A State may acquire some territory by prescription only when it has not accepted the sovereignty of any other States over the said territory; (ii) Possession should be peaceful and uninterrupted; (iii) Possession should be in public; and (iv) Possession should be for a definite period.[26] It may, however, be noted that in the presence of some treaty or convention, territory cannot be acquired by prescription through administrative acts only. *Frontier Lands case* (*Belgium-Netherlands*)[27] *and case Concerning the Temple of Preah Vihar* (*Merits*) (*Cambodia* v. *Thailand*)[28] deserve a special mention in this connection.

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23. Article 12.

* See also for I.A.S (1970), Q. No. 10(c).

24. J. G. Starke, Introduction to International Law. Tenth Edition (1989) p. 168.

25. According to D.H.N. Johnson, "Acquisitive prescription" is the means by which, under international law, legal recognition is given to the right of a State to exercise sovereignty over land or sea territory in cases where that State has, in fact, exercised its authority in a continuous uniterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected States (in the case of land territory the previous possessor, in the case of sea territory neighbouring and other States whose maritime interests are affected) have acquiesced in this exercise of authority. Such acquiescence is implied in cases where the interested and affected States have failed within a reasonable time to refer the matter to the appropriate international organisation or international tribunal or exceptionally in cases where no such action was possible have failed to manifest their opposition in a sufficiently positive manner through the instrumentality of diplomatic interests. The length of time required for a prescriptive title on the one hand and the exent of the action required to prevent the establishment of a prescriptive title on the other hand, are invariably matters of fact to be decided by the international tribunal before which the matter is eventually brought for the adjudication." "Acquisitive Prescription in International law", BYBIL, Vol. XXVII (1950), p. 332 at pp. 353-354.

26. See ibid, pp. 344-347

27. I.C.J. Rep. (1959), p. 209.

28. I.C.J. Rep. (1962), p. 6.

It may also be noted that mere silence of a state in respect of a territory will not deprive it of its claim. In the *Frontier Lands case* (*Belgium-Netherlands*)[29] the International Court of Justice held that mere administrative and routine acts done by a state officials (in this case Netherlands) in a particular area cannot deprive the legal title of other State (*i.e.*, Belgium) to the said area under a convention. In this case, the dispute was relating to sovereignty over two plots of land situated in an area where the Belgo-Dutch frontier presented certain unusual features. It was contended by Netherlands that the provision by which the two plots were attributed was vitiated by a mistake, and that Netherlands' sovereignty over the said plots had been established by the exercise of various acts of sovereignty since 1843. After considering the evidence adduced the court held that sovereignty over the disputed plots belonged to Belgium.

Illustration.—A range of hills separates the territories of two states A and B. There is a boundary dispute between A and B, A contending that the watershed has been traditionally the boundary, and B that the boundary is the line up to which each has been actually exercising sovereign authority, which differs from the watershed. Both sides negotiate and fail to agree. B finds a temple of great acheological interest on the A's side of the watershed, but within the boundary it has been claiming, and carries excavations for ten years. A comes to know about the temple and institutes proceedings before the International Court of Justice for a declaration of its title to the temple area.*

The excavation of a temple of archeological interest, in A's side shows that the area is under the sovereignty of A. Excavations for ten years etc. are simply administrative acts which cannot deprive A's claim of soverignty over the area in the absence of signs of effective occupation. The facts of the above problem resemble those of the *case concerning the temple of Preah Vihear* (*Cambodia* v. *Thailand.*)[30] In this case Cambodia contended that Thailand occupied a piece of its territory surrounding the temple of Preah Vihear, a place of pilgrimage and worship for cambodians. Cambodia therefore requested the court to declare that territorial sovereignty over the temple belong to it and Thailand was under obligations to withdraw the armed detachments stationed there since 1954. The Court held that the temple was situated on Cambodian territory and that Thailand was under obligation to withdraw any military or police force stationed there and to restore any objects removed from the ruins since 1954. The court held that merely the acts of local administrative authorities in a certain disputed area shall not negative a consistent attitude of Thailand to regards valid a certain frontier line according to which the sovereignty of Cambodia.

Distinction between Occupation and Prescription **—As noted above, occupation of a territory takes place when a State intentionally acquires sovereignty over such territory which is at that time not under the sovereignty of any other State Occupation involves two elements—(a) will to exercise sovereignty, and (b) show or exhibition of actual authority. On the other hand, title by prescription is acquired by peaceable exercise of *de facto* sovereignty for a long period. As pointed out by Max Huber in *Island of Palmas* case (*The Netherlands* v. *U.S.*)[31] condition of acquisition of sovereignty by prescription i.e. by way of continuous and peaceful display of State authority is that the display of such authority must be open and public. A clandestine exercise of State authority over an inhabited territory during a considerable length of time would not suffice. However, in the absence of an explicit rule of law, there is no obligation to notify to other States. As pointed out in *Western Sahara case*,[32] a cardinal condition

29. I.C.J. Rep. (1959), p. 209.
* (C.S.E. (1980) Q. No. 9(a).
30. I.C.J. Rep. (1962) p. 6.
** See also for CSE (1994) Q 7(b).
31. (1928) 2 RIAA 829.
32. 1975 ICJ Rep. 12 ; See also Legal Status of Eastern Greenland case, PCIJ, Series A/B, No. 53, pp. 44f and 63f.

of a valid "occupation" is that the territory should be *terra nullius* a territory belonging to no one at the time the act alleged to constitute the "occupation". There is no such condition for acquiring of territory by prescription. In case of prescription the territory to be acquired by prescription may be subject to the sovereignty of another State.

(3) *Accretion.*—A territory may also be acquired through Accretion, "Title by accretion occurs when new territory is added, mainly through natural causes.....to territory already under the sovereignty of the acquiring State. No formal act or assertion of title is necessary." [33] Thus Accretion "is the name for the increase of land through new formations" which may be artificial or natural. If they are as a result of the human work, they are artificial. On the other hand, if they are as a result of the operation of nature, they are natural. Further, it is a customary rule of international law that "enlargement of territory, if any, created through new formations, takes *ipso facto* by the accretion, without the State concerned taking any special step for the purpose of extending its sovereignty." [34]

(4) *Cession.*—Through cession also, a territory may be acquired. "The cession of a territory may be voluntary or it may be under compulsion as a result of war conducted successfully by the State to which the territory is ceded.[35] Cession shall be considered valid only when the sovereignty of a territory is transferred to another State. Reference may be made here to *In re Berubari Union and Exchange of Enclaves*[36] wherein the Supreme Court observed, ".....it is an essential attribute of sovereignty that a sovereign State can acquire foreign territory and can, in case of necessity, cede a part of its territory in favour of a sovereign State, and this can be done in exercise of its treaty-making power. Cession of national territory in law amounts to the transfer of sovereignty over the said territory by the owner State in favour of another State.....This power, it may be added, is of course subject to the limitations which the Constitution of the State may either expressly or by necessary implication impose in that behalf.[37] This case related to the exchange of certain territories. The Division of Berubari Union No. 12, and delimitation of the boundaries between India and the then East Bengal in pursuance of an Agreement entered into between India and Pakistan on 10th September, 1958. The President referred certain questions for the opinion of the Supreme Court under Article 143 (1) of the Constitution because some doubts had arisen as to whether the implementation of the Agreement relating to Berubari Union No. 12 and the exchange of Enclaves required any legislative action either by a suitable law of Parliament relatable to Article 3 of the Constitution of India or by amendment of the Constitution relatable to Article 368. The Supreme Court held, "...the Agreement amounts to a cession of a part of the territory of India in favour of Pakistan, and so its implementation would naturally involve the alteration of the content of and the consequent amendment of Article 1 and of the relevant part of the First Schedule to the Constitution, because such implementation would necessarily lead to the diminution of the territory of the Union of India. Such an amendment can be made under Article 368.....so it follows that acting under Article 368, Parliament may make law to give effect to and implement, the Agreement in question covering the cession of a part of Berubari Union No. 12 as well as some of the Cooch-Behar Enclaves which by exchange are given to Pakistan. Parliament may, however, if it so chooses, pass a law amending Article 3 of the Constitution so as to cover cases of cession of the territory of India in favour of a foreign State. If such a law is passed the Parliament may be competent

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33. Starke, see supra note 24 at p. 167. In the words of another writer, "A State acquires territory by accretion when new land is formed within its existing territorial limits : the Sea recedes, a river dries up, an island appears within the territorial sea. These acquisitions seldom result in either significant additions of territory or in controversy." Edward Collins, International Law in a Changing World (1969), p. 131.
34. Oppenheim's International Law, note 1, at p. 696.
35. Starke, note 24, at p. 167; See also Dr. Nagendra Singh, India and International Law (S. Chand & Co., Delhi, 1972), pp. 29-30.
36. A.I.R. 1960 S.C. 845.
37. Ibid, at pp. 856-57.

to make a law under the amended Article 3 to implement the Agreement in question on the other hand, if the necessary law is passed under Article 368 itself that alone would be sufficient to implement the Agreement." [38]

In the case of *Sugandha Roy* v. *Union of India and others*[39] the question arose whether giving of "Tin Bigha" area to Bangladesh on "lease in perpetuity" under the Agreement of 1974 and 1982 between India and Bangladesh amounted to cession or not ? As regards exchange of enclaves, Paragraph 14 of Article 1 of the Agreement of 1974 provided, "India will retain the southern half of South Berubary Union No. 12 and the adjacent enclaves. .....and in exchange Bangladesh will retain the Dahagram and Angarpota enclaves. *India will lease in perpetuity* to Bangladesh an area of approximately.....near "Tin Bigha....." In October, 1982 an understanding between the Governments of India and Bangladesh was reached in connection with the so-called "lease in prepetuity" in terms of item 14 of Art. 1 of the 1974 Agreement. It was further provided that it will be an integral part of the 1974 Agreement. The Agreement of 1982 provided, *inter alia* "sovereignty over the leased area shall continue to vest in India further ".....Bangladesh shall have undisturbed possession and use of the area leased to her in perpetuity."

Being aggrieved by the said 1974 and 1982 Agreements, the present writ petition was filed. The Calcutta High Court held; ".....the implementation of these two Agreements would not involve cession of any territory to Bangladesh in respect of Tin Bigha.....not merely that no exclusive possession of this area is sought to be transferred to Bangladesh, but no legal possession at all is being transferred. There is no question of transfer of sovereignty wholly or partially, in respect of the said area. What has merely been done is to enable the Government of Bangladesh and its nationals to exercise certain rights in respect of the said area which otherwise they would not have been entitled to do.....implementation of these two Agreements, so far as 'Tin Bigha is concerned' does not amount to cession of the said territory or transfer of sovereignty in respect of the same and does not require any constitutional Amendment. In spite of such Agreements India would still retain its sovereignty, ownership and control of Tin Bigha." [40] Accordingly the petition was dismissed.

There was an appeal before the Division Bench of the High Court. The Division Bench in judgment under appeal affirmed the decision by the learned single Judge. Against this judgment, appeal by special leave was made in the Supreme Court. In *Union of India* v. *Sukumar Sengupta*[41] i.e., the said appeal by special leave, the Supreme Court held :

> "Cession as understood in international law would result in an actual and physical transfer of the said area to Bangladesh following which Bangladesh would have the exclusive right to treat the said transferred territory as part of its own territory and exercise full control, dominion and right over the same. This is not the position or the situation which is contemplated under the agreements." [42]
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> According to the Court, "A fortiori, the said transaction did not amount to cession of the said area of Teen Bigha in favour of Bangladesh." [43]
>
> Further, ".....the complexities of modern developed societies need peaceful co-existence, if the world is to survive. Amicable and peaceful settlement of boundary disputes are in the interests of the international community. The older and absolute ideas of sovereignty and independence has thus necessarily to be modified in the dawn of the 21st century. A perpetual right of passage and other incidental rights given to Bangladesh for the limited purpose for exercising the sovereignty over

38. Ibid, at p. 861.
39. A.I.R. 1983 Cal. 468.
40. Ibid, at p. 492.
41. AIR 1990 SC 1692; the facts of this case have been referred in earlier chapter.
42. Ibid, at p. 1706.
43. Ibid.

her own two enclaves within the territory of India and/or if imposed restrictions on itself by India does not tantamount to transfer of interest in land." [44]

As regards the effect of cession on property belonging to the inhabitants, Chief Justice John Marshall of the U. S. Supreme Court observed : The modern usage of nations, which has become law would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled.....A cession of territory is never understood to be a cession of the property belonging to its inhabitants.....The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property.[45] The same view was followed by the Supreme Court in *Union of India* v. *Sudhansu Mozumdar.*[46]The correct position has been summed up by an Indian author[47] in the following words : "The Court's exposition of cession of territory is in accord with the principles of international law in so far as the power to cede territory is an essential attribute of Sovereignty, and as cession involves transfer of soveriegnty from one State to another. However, the Court's general ruling that in a cession there is no transfer of ownership or right of possession in the properties of the inhabitants of the ceded territory, cannot be accepted without a reservation. Although treaties of cession distinguish between the *imperium* of a State in respect of its territory, and the *dominium* held or owned by individuals, it is fairly well established under international law that a treaty of cession transfers only *imperium* and not *dominium* 'unless the latter is expressly or by implication included.[48] If therefore, follows that in the absence of any contrary indication in the treaty, a cession of territory by treaty cannot be held to be a transfer of the property belonging to its inhabitants."

(5) *Annexation.*—When a State conquers another State the conquering State after conquest establishes its sovereignty over the conquered State. It may, however, be noted that only conquest does not amount to establishment of sovereignty over the territory concerned. It is necessary for the establishment of sovereignty that conquering State should occupy effectively the territory concerned. This mode has been greatly affected by the charter of the U. N. under which member States cannot now acquire territories of each other by annexation. Even use of force or the threat thereof in the international relations against the territorial independence of any State or in any other manner inconsistent with the purposes of the U. N. is prohibited under Article 2 (4) of the U. N. Charter.

(6) *Lease.*—The territory may also be acquired through lease. A State may give its territory to another State under lease for a certain period. For the said certain period some rights of sovereignty are transferred to another State through lease although complete sovereignty over the said territory is not transferred. An example of this is the lease of an Island of Malta to Britain for some years. Recently there was a conflict between Malta and Britain in this connection. Malta wanted that Britain should enhance lease money. Thus territory may also be acquired through lease.

In the *Panama Canal's case,* a lease was granted to the United States in perpetuity. The United States was given the occupation and control of the area concerned over and

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44. Ibid at pp. 1707-1708.
45. United States v. Perchemann, (1963) 32 U.S. 51 at pp. 61-87; see also Shapleigh v. Mier, (1937) 292 U.S. 468 at p. 470, per Cardozo, J.; In its advisory opinion of September 10, 1923, on Certain Questions Relating to Settlers of German origin in the territory ceded by Germany to Poland, the Permanent Court of International Justice observed : "Private rights acquired under existing law do not cease on a change of sovereignty" , see also Virendra Singh v. State of Uttar Pradesh, A.I.R. 1954 S.C. 447 at pp. 450-451.
46. A.I.R. 1971 S.C. 1594 at p. 1599.
47. V.S. Mani, "The Berubari cases, From the Perspective of International Law", A.J.I.L. Vol. 11 (1971), p. 655 at pp. 659-660.
48. See Lord McNair, The Law of Treaties (Oxford, 1961), p. 331, citing the Perchman's case (1833), 7 Peters, p. 51, pp. 86-88 (Judgment by Chief Justice Marshall), with approval.

below the surface for the construction and protection of the canal. Moreover, the United States was allowed under the lease to exercise over the canal zone all rights, power and authority which it would possess if it were the sovereign of the territory. This case was referred to by the Supreme Court in *Union of India* v. *Sukumar Sengupta*[49] which related to Agreements of 1974 and 1982 by which India purported to give Teen Bigha to Bangladesh on "lease in perpetuity". Though the said agreements used the term "lease" the Supreme Court held that the concessions given to Bangladesh over the said area amounted to "servitude." [50]

(7) *Pledge.*—Sometimes there arise certain circumstances under which a State becomes compelled to pledge a part of its territory in return of some amount of money for which it is in dire need. In this case also, a part of sovereignty over the territory concerned is transferred. For example in 1768, the Republic of Geneo had pledged the Island of Corsica to France.

(8) *Plebiscite.*—Some writers are of the view that through plebiscite also new territory may be acquired. Although there are no definite rules in regard to acquiring of territory through plebiscite yet modern writers have expressed the view that through plebiscite also, a new territory may be acquired. A recent example of acquiring territory through plebiscite is that of West Irian. Both Netherlands and Indonesia claimed the territory of West Irian. Through the efforts of United Nations, it was decided that a plebiscite in the West Irian should be held and the people of West Irian should be given the freedom to decide whether they would like to merge with Netherlands or Indonesia. Consequently, plebiscite was held under the auspices of United Nations and the inhabitants of West Irian decided to merge with Indonesia. Hence the territory of West Irian is now a part of Indonesia.

Example of Kashmir.—In case of Kashmir, Pakistan claimed that there should be plebiscite and the people of Jammu and Kashmir should be given the freedom to decide whether they would like to merge with India or Pakistan. In Kashmir, the Government of India have taken the position that since the merger of Jammu and Kashmir with India several elections have taken place and the people have voted the question of plebiscite no longer arises. India claims, and rightly too, that Jammu and Kashmir is an integral part of India. It may, however, be noted that in the beginning India had agreed to hold plebiscitie in Jammu and Kashmir. But the position has changed since then, and in the changed circumstances it has become quite obvious that people of Jammu and Kashmir have opted to be within the Union of India and that is why the Government of India have completely rejected the claim of Pakistan to hold plebiscite in Jammu and Kashmir. Some jurists have expressed the view that the principle of self-determination should be applied in this case. But "the principle (*i.e.,* the principle of self-determination) must be deemed to have application in the process of decolonisation alone. It could not be applied to established States in their territorial disputes. No such State is likely to espouse this principle and invite self-destruction. For what else would it be but self-destruction if India accedes to the demands of the Nagas, the Mizos and others or if Iraq concedes to the demands of the Kurdish claim, or if the U. S. allows extremist Black panther demands for a separate Negroland.[51] Thus, support for the principle of self-determination has been obligatory on Member States cannot be found in Article 1 of the U. N. Charter.[52]

(9) Acquisition of territorial sovereignty by newly emerged State.—Yet another method of acquiring of territorial sovereignty is that of a newly emerged State. This is particularly true of those States who were previously the colonies of some States and later on were liberated. After liberation, they acquired territorial sovereignty over that territory.

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49. AIR 1990 SC 1962.
50. Ibid, at p. 1706.
51. Rahmatullah Khan, "The U. N. Handling of the Kashmir Problem", in Asian States and the Development of Universal International Law, Edited by R. P. Anand (1972), p. 108 at p. 118; see also S. K. Kapoor, "The Principle of Self-Determination Under International Law and the Indian Practice," Lawyer, Vol. VIII-11 (1976), p. 168 at pp. 174-175.
52. Ibid, at p. 115.

pointed out that "it is not within the arbitrary power of one of the riparian States for it is a rule of International Law that no State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State. For this reason a State is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either cause danger to the neighbouring State or prevents it from making proper use of the flow of the river on its part.[56] But this does not seem to be a correct statement of law. As rightly pointed out by Ian Brownlie : "For the most part the legal regime of rivers, creating rights for other riparian and non-riparian States and limiting the exercise of territorial jurisdiction of individual riparians, *depends on treaty.* Particularisation of the regimes for various river systems would seem to be inevitable since each system has its own character and technical problems." [57]

On the basis of treaty-practice sometimes broad principles of International rivers have come into existence,[58] but their precise formulation are yet not settled.[59] Thus, "In this field the lawyer has to avoid the temptation to choose rough principles of equity governing relations between riparians reflected in some treaty provisions and the work of jurists and learned bodies, as rules of customary law.[60] Starke also subscribes to this view and has rightly pointed out : "So far as the injurious use of river waters, or the diversion of and interference with the free flow of rivers is concerned, International Law has not advanced to the stage of settled rules in either domain." [61] The utmost that can be said in this connection is that the riparian State should not make any such use of the river water under its control as may cause grievous or irreparable damage of an economic character to other riparian States.[62] Reference may also be made here to the *Lake Lanoux Arbitration* (*France-Spain*)[53] wherein the Tribunal, held that "there was no duty on a riparian State under customary International Law to consult, or obtain the prior agreement of a co-riparian as a condition precedent of its right to begin new river work, although in carrying out the project it must take into account, in a reasonable manner, the interests of co-riparian." [64] Thus essentially "such problems of the utilization of rivers by one State to the injury of other States are a matter for treaty arrangement of the settlement by arbitration or conciliation in the most equitable manner." [65]

Reference may also be made here to the Indus Waters Agreement signed on 19th September, 1960 by India, Pakistan, and the International Bank for Reconstruction and Development for regulating the use of the Waters of Indus, Chenab and Jhelum rivers. This further confirms that in the absence of a treaty or agreement there can be no definite obligation of a riparian State in respect of the use of waters of a river. Reference may also be made here to Article 3 of the Charter of Economic Rights and Duties which provides : "In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others." * It will be desirable to refer here briefly the background and the controversy that arose before this article was adopted. "Article 3, the subject-matter of which was first suggested by Argentina, became a bone of contention primarily between developing

56. Ibid, at pp. 474-475.
57. Ian Brownlie, Principles of Public International Law, Second Edition (Clarendon Press, Oxford, 1973), pp. 264-65.
58. See Arbitration between France and Spain concerning waters of Lake Lanoux [A.J.I.L. (1959), p. 156].
59. J. I. Brierly, The Law of Nations, Sixth Edition, p. 231.
60. Ian Brownlie, Principles of Public International Law, Second Edition, Clarendon Press, Oxford, (1973), p. 265.
61. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 194, see also Hyde, International Law, Second Edition (1974), Vol. 1, pp. 565 et seq.
62. Ibid.
63. See A.J.I.L., No. 53, (1959), pp. 156-171.
64. Starke, note 61 p. 194.
65. Ibid, at pp. 194-195.

* See also for I.A.S. (1977), Q. No. 5.

In this connection the difficulty is that the territory which was previously a part of another State can acquire sovereignty only after becoming independent. "This abstract difficulty can be resolved by treating the people of the territory, as such, provided that have a sufficient degree of political maturity, as having or acquired sovereignty pending attainment of Statehood. Upon the foundation of the new State, there is simply a crystalization of the situation, territorial sovereignty of the people then becoming that of the State itself." [53]

Modes of Loss of Territory*.—Territory may be lost through the following modes :

(a) *Cession.*—As pointed out earlier, a territory may be acquired through cession. As one State acquires the territory through cession, the other State loses it.

(b) *Operation of Nature.*—Sometimes a State may lose its territory through the operation of nature. For example by earthquake a coast of the sea or an island may altogether disappear. Similarly, the change in the course of rivers may also result in the loss of territory.

(c) *Subjugation.*—As a State may acquire territory through annexation, the other State may lose it through subjugation. But like annexation this is no more a valid mode. For example, Kuwait lost its territory through subjugation by Iraq who declared it to be Iraq's 19th province. The Security Council not only disapproved of Iraq's action but passed a resolution asking all member States of the U. N. not to recognise it. Subsequently, Security Council took action against Iraq under Chapter VII allowing States cooperating with Kuwait to use all means to free Kuwait. Thus Iraq was forced to withdraw from Kurwait.

(d) *Prescription.*—When a State occupies a particular territory for a long period then it is entitled to acquire it through prescription. On the contrary, the State which had occupation over it earlier may lose it.

(e) *Revolt.*—When a new State takes birth in consequence of revolution or revolt, then it may be said that the former State has lost its territory. For example in 1579, through revolution Spain lost Netherland. Similarly in 1776 through the War of Independence of America, Great Britain lost the territory of America. Recently, Pakistan lost her territory of East Pakistan as people of the said territory revolted and formed a new State known as Bangladesh.

(f) *Dereliction.*—The territory may also be lost by dereliction which means by renunciation of a territory. That is to say, a State may slacken its occupation over a territory and in the course of time may lose not only the occupation over it but also sovereignty. Such examples occur very seldom in history.

(g) *Granting of Independence to a colony by the Imperialist State.*—Yet another mode of losing territory is granting of independence to a colony. This newly emerged State acquires territorial sovereignty and the State which grants independence loses that territory. So will be the case if the colony itself acquires independence.

International Rivers.**—Rivers which run through several States are described as 'non-national' rivers. Such rivers are owned by more than one State : each State owns that part of the river which runs through its territory.[54] Rivers which are navigable from the open sea and pass through several States, between their sources and mouths, are called *'International rivers'*. They are termed international "because freedom of navigation in time of peace on all such rivers in Europe and on many of them outside Europe for merchantmen of all nationals is recognised by conventional international law.[55] As regards the utilization of flow of waters of non-national and international rivers, Oppenheim has

53. Starke, supra 24 at p. 169.

* See also for P.C.S. (1981), Q. No. 8(b).

** See also for P.C.S. (1977) Q. No. 9(c); C.S.E. (1987) Q. 8(b).

54. L. Oppenheim, International Law, Vol. 1, Eighth Edition, pp. 464-465; In the Ninth Edition of Oppenheim's International Law (note 1, at p. 575) such rivers are described as pluri-national (or multinational) rivers.

55. Ibid, at p. 461. It is significant to note that this rule does not apply to all rivers outside Europe for Oppenheim uses the word "many".

countries.....Afghanistan, Bolivia, Brazil, Colombia, Costa Rica, Ethiopia, Nicaragua and Paraguay voted against this article, and 29 countries including China, France, the United Kingdom, Japan, the Federal Republic of Germany, Guyana, Bhutan and Nepal abstained,.....It has not established what the consultations should relate to, or what their scope should be. It would, in their opinion, give to certain States the right to delay or to dilate or even to veto the utilization by a third Sate of its own natural resources. They considered that Article 3 was not in keeping with the principle of the permanent sovereignty of Sates over their natural resources and the right of every State to the free and sovereign use of those resources which could brook no restrictions.[66] Further, "This article was considered primarily in the context of river resources though other resources, such as, icthyological and maritime wealth were also referred to Brazil. Paraguay and Bolivia, in particular, drew attention to the Declaration of Asuncion on the Use of International Rivers of 3rd June, 1971, to which Argentina, Bolivia, Paraguay and Uruguay have acceded to, and said that they could have accepted a formulation similar to the one contained in that Declaration which stated : *'In Contiguous rivers,* sovereignty is shared and any exploitation of shared their waters must be preceded by a bilateral agreement between the riparian States. *'In rivers or successive course* as sovereignty is not shared, each State may utilize its waters in accordance with its needs provided no significant change is caused to another State in the Basin.' Despite the apprehension expressed to the contrary, no delegation said that Article 3 should be interpreted as implying that any State had a right of veto.[67] Thus, there was disagreement about the content and scope of Article 3. The provisions contained in Article 3 are not binding for a number of reasons. In the first place, the Charter of Economic Rights and Duties was adopted by the General Assembly on 12 December, 1974 through resolution 3281 (XXIX). A General Assembly resolution in itself, is not binding. Secondly, there is disagreement in respect of the content, meaning and scope of Article 3. Last but not the least, provisions of Article 3 were not adopted unanimously. But as remarked by the Australian representative, while speaking on the significance of the Economic Charter : "The Charter might have a significant effect on the development of international economic law ; while it could not itself create law, it might influence the *opinio juris* and decisions by States on what their practice should be in the light of international law.[68]

The Farakka Issue :*

India has built Farakka Barrage on river Ganges to save the Calcutta port and to improve the lot of millions of people living in Eastern India, Bangladesh demanded uninterrupted flow of Ganga waters all the year round and insisted on India obtaining prior permission before utilizing or diverting any Ganga waters in its own territory. Bangladesh alleged that India made "unilateral withdrawal of water". Instead of settling the issue on bilateral basis, the Bangladesh Government sought to internationalise the issue. India's stand to the issue was that the issue should be settled bilaterally between Bangladesh and India. Its reference to the U. N. would delay the solution of the issue. The problem raised by Bangladesh was of a technical nature involving the fate of the economy of the whole of eastern India. Stressing the importance of the Farakka Barrage to eastern India, the Indian representative said, if Calcutta Port was further silted, the economy of the entire eastern region would be in peril. Further, while Bangladesh needs water only for irrigation, India needs increased flow of Ganga water to save Calcutta port from being choked by silt. On the other hand, Bangladesh contended that Ganga is an international river and demanded equitable sharing of its waters. India refuted this contention by pointing out that for about 90 per cent of course, the river flows through Indian territory and therefore, it cannot be termed as an international river. However, India expressed its

66. P. Chandrasekhra Rao, "Charter of Economic Rights and Duties of States", I.J.I.L., Vol. 15 (1975), p. 351 at p. 362.
67. Ibid, at pp. 362-363.
68. Adopted from Ibid, at p. 370, note 76.

* See also for I.A.S. (1977) Q. 5. See also matter discussed above under the heading "International Rivers".

willingness to consider sympathetically Bangladesh's requirements and to accommodate them as far as possible. India and Bangladesh agreed to discuss the issue on December, 6, 1976 at Dacca. The Indian team was led by Mr. Jagjiwan Ram the then Minister for Agriculture and Irrigation.

On the basis of above discussion it is doubtful whether river Ganges can be termed as an international river, particularly in view of the fact that for about 90 per cent of course, the river flows through Indian territory. Even if river Ganges is regarded a non-national or 'International river', India was under no obligation to obtain prior consent of Bangladesh for any use of diversion of its waters, although as pointed out by India, Bangladesh's allegation of 'unilateral upstream diversion' of waters was false and baseless. Hence India has not violated any principles of International Law. The utmost that can be said is that India should take into consideration the reasonable requirements of Bangladesh. Even for this India cannot be held guilty because time and again India has expressed its willingness to consider sympathetically the reasonable requirements of Bangladesh. It is an issue to be resolved bilaterally. It may be noted that ultimately good sense prevailed on Bangladesh as it agreed to hold talks with India for which December 6, 1976 was fixed.

As regards Article 3 of the Charter of Economic Rights and Duties, it has been pointed out earlier that it is not binding. Nevertheless, India's conduct is not even against it. Although India is not under obligation to obtain prior consent of Bangladesh yet she has time and again expressed her desire to cooperate "in order to achieve optimum use of such recourses without causing damage to the legitimate interest" of Bangladesh. India not only offered to co-operate with Bangladesh but in fact exhibited generosity. This is evident from the agreement entered into between India and Bangladesh on 30 September, 1977. India went a long way to accommodate the interest of Bangladesh. Some members of the Parliament criticised the agreement as sellout of national interest by India.

Conclusion.—The Farakka issue was a matter which could best be decided bilaterally between India and Pakistan. Talks were held in December, 1976, but with no success. A significant headway was made by the delegations of two Sates during the talks held at Dacca in April, 1977. Since then several rounds of talks were held between the two delegations both at New Delhi and Dacca. Finally, India and Bangladesh signed a comprehensive short and long term agreement on September 30, 1977. The agreement provides for withdrawal by India and Bangladesh during the leanest period—from April 21 to April 30—at the rate of 20,800 cusecs and 34,700 cusecs working out at 37.5 per cent and 62.5 per cent respectively of the minimum flow of 55.500 cusecs at Farakka in the lean season. After the leanest 10-day period, India's share will increase at a higher rate to get as closer to 40,000 cusecs as quickly as possible within the lean season. The rate of withdrawal by India during these periods will increase roughly from 2 per cent to 2.5 per cent. On a long term basis the two States have committed themselves to augment the flow of the Ganga. The Joint Rivers Commission will examine proposals made by either to assess their economic feasibility. These recommendations will then be submitted to the two Governments for their consideration within a five-year time frame. A remarkable feature of the agreement is the decision of both the countries to treat the issue and the implementation of the agreement as a bilateral one. The differences that might arise in the interpretation of the agreement are also to be resolved bilaterally.

Inter-Oceanic Canals

By inter-oceanic canals we mean the canals which connect the international waterways and are available for the shipping of all States. Generally the use and control of such canals are governed by international treaties. The more important of the inter-oceanic canals are discussed below :

Suez Canal.—Suez Canal is the most famous among the inter-oceanic canals. In the beginning, it was under the control of a French Company. Later on it came under the control of British Government. In 1954, Britain and Egypt concluded a treaty whereby Britain withdrew its forces from Suez Canal. The next important event took place in 1956 when Suez Canal was nationalised by Egypt. Egypt contended that it was done to derive

money to build Aswan Dam. Thus the Government of Egypt took over complete control of the Inter-occanic canal popularly known as Suez Canal. France, Britain, Israel, etc., reacted strongly against this action of Egypt. They jointly made an armed intervention in Egypt in order to prevent Egypt from nationalising the Suez Canal. The problem was resolved through efforts of Russia, Security Council and General Assembly. Subsequently, an agreement was concluded whereby it was agreed that Suez Canal would remain free from international politics and all the States shall have the right of shipping over this canal. However, the State of Egypt shall be entitled to realise taxes for its use. During the Arab-Israeli conflict, the canal became unsafe for navigation and was closed. On June 6, 1975, the Suez Canal resumed full scale operations.[69]

Keil Canal.—Yet another important inter-oceanic Canal is the Keil Canal which connects Baltic Sea and North Sea. In the beginning, this canal was completely under the control of Germany and was built for the requirements of German armed forces. After the First World War, the position changed significantly in connection with this canal as it was thrown open for all the States. *S. S. Wimbledon,*[70] is a leading case relating to Keil Canal. Article 380 of the Treaty of Versalles, 1919, provided : "The Keil Canal and its 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." On 21 March, 1921 the German authorities stopped a British ship, *S. S. Wimbledon,* on the ground that its cargo comprised of military goods which was being carried to Poland who was at war with Russia at that time. It was also contended by German authorities that if the said ship was allowed passage, it would amount to the violation of the German law of neutrality. The prominent allied powers filed the case in the Permanent Court of International Justice against Germany. The Court held that under Article 380, Germany was under obligation to allow passage to *S. S. Wimbledon,* through Keil Canal and should make reparation. The position changed significantly after the Second World War and now this canal is open to all States.

Panama Canal.—Panama Canal connects Atlantic Sea with the Pacific Sea. It is a very important canal for commercial and transport purposes. Under treaty of 1903 between Panama and the U. S. this Canal came under the control of the United States of America. After helping Panama to achieve independence in 1903, the United States completed the 82-Km. canal in 1914 and protected it with military bases. During the first and second world wars, the warships of all the States had freedom to pass through this canal. But this freedom lasted till America did not enter the war. Recently, there had been a lot of controversy in between Panama and America in regard to the use and control of this canal. Panama wanted to exercise greater control over this canal. In March, 1973, the Security Council held a special session in Panama. In this session, the Security Council considered the question of the status of Panama Canal. In the Security Council a proposal was brought which would have removed the control of America from this canal, but this proposal was vetoed by America. America, however, wanted to conclude a fresh treaty with Panama in connection with the use and control of this canal. On February 7, 1974, a joint statement was issued by Secretary of State, Henry H. Kissinger and Juan Antonio Tack, Minister of Foreign Affairs of the Republic of Panama, with respect to the Panama Canal. The Joint statement included a set of principles to serve as guidelines for further negotiation on a new treaty on the Panama Canal.

After prolonged negotiations for more than three years, the U.S.A. and Panama finally signed on 7th September, 1977 two treaties—(i) A treaty guaranteeing the permanent neutrality of the canal, and (ii) A basic treaty governing the use and defence of the canal through December 31, 1999—changing the status of the Panama Canal and the Canal Zone. One of the new treaties provides that the U.S.A. will turn over control of the canal and the Canal Zone to Panama by the end of this century. The other allows the

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69. See also R. Vasudeo Pillai, "The Suez Crisis and its Lasting Judicial Implications—A Plea for an International Waterways Organisation", A.I.R. 1957 Journal Section, pp. 88-94, 97-102.
70. P.C.I.J. (1923), Series A. No. 1 (1 W.C.R. 163).

United States to defend he strategic waterway, if need be, for an indefinite period. The treaties guarantee the permanent neutrality of the canal. The treaties had to be approved by a plebiscite in Panama and a two-thirds majority vote in the U. S. Senate.[71] It has been rightly pointed out, "Clearly, the new accord is more advantageous to the United States. If the phrase 'in perpetuity' in the original 1903 treaty was an irritant that bedeviled U.S.—Panamanian relations in the preceding years, it has been replaced in the new treaty, the United States will have the right to defend the canal from an attack by a third power even after the treaty runs out in the year 2000. By that time the U. S. bases (fourteen at present) would have been consolidated into three defence complexes and they will be governed by a statute similar to that provided for the U. S. bases in Spain, with the difference that the United Sates will not be paying any rent to Panama specifically for these bases.....The other aspects of treaty admittedly, advantageous to the United States relate to the Canal Zone and the North American employees of the Canal Company.....It is for these reasons perhaps, the treaty offers generous financial assistance to Panama under different heads.[72] The American Senate ratified the new treaties on 18th April, 1978. Panama has also ratified the treaties. Thus the problem of future use and control of the Panama Canal and Canal Zone has been amicably settled between Panama and the U. S. On October 1, 1979, the U. S. control over Panama Canal Zone ended. The U. S. will, however, retain five military bases and run the canal itself until 2,000 when all Americans are to be withdrawn on 31st December, 1999. The United States handed over the last military bases in fulfilment of the 1977 Canal treaties. President Moscoso of Panama declared that future national security plans would not include the presence of U.S. armed forces in Panama.

Straits.—According to international law, straits extending to the breadth of 6 miles are considered within the territory of the Coastal State, there is a controversy in regard to the straits which extend beyond 6 miles. But most of the jurists agree that the straits, the breadth of which is within 6 miles are within the territory of the Coastal State. There is no general agreement in this connection. However, it is definite that the straits, which are beyond 6 miles are outside the territory of the Coastal State and they are open to all these States without discrimination during war or peace. The Third U. N. Convention on the Law of the Sea has codified the rules of international law relating to Straits used for International navigation.[73]

Bays.—Article 7 (2) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone defines a 'bay' as a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than of the semi-circle whose diameter is a line drawn across the mouth of that indentation. For the purpose of measurement, it is provided that the area of an indentation is that lying between the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.[74] .f the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall not be considered as internal waters.[75] Where the distance between the low-

71. For background and the circumstances leading to the conclusion of the two treaties see R. Narayanan and Jayashri Deshpande, "The 'Big Ditch' and the 'Big Stick' : Panama Parleys" Foreign Affairs Reports, Vol. XXVI, No. 9 (September, 1977), pp. 179-200.
72. Ibid, at p. 198.
73. See Articles 34 to 45 (Part II) of the U. N. Convention on the Law of the Sea, 1982 (U. N. Document No. A/CONF, 62/122). See also for detailed study Manjula Shyam, "International Straits and Ocean Law", I.J.I.L., Vol. 15 (1975), p. 17.
74. Section 7 (3).
75. Section 7 (4).

water marks of the natural entrance points of a bay exceeds 24 miles, a straight base-line of 24 miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.[76] It may be noted here that Article 7, as noted above, applies only to bays the coasts of which belong to a single State.[77] Moreover, the foregoing provisions shall not apply to so-called "historic" bays, or in any case where straight baseline system provided in Article 4 of the Convention is applied.[78] It therefore, "leaves room for States to establish sovereign claims to the waters of bays under historic title."[79]

The U. N. Convention on the Law of the Sea, 1982 has retained the above provisions without any change.[80]

Historic waters.—In the *Fisheries case*, the International Court of Justice defined 'historic waters' in the following words : "By 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title."[81] The concept of historic bays "is but an enlargement of the doctrine of historic bays which developed much earlier." The doctrine of historic bays gradually emerged during the nineteenth century as the freedom of the high seas principle became established as a fundamental rule of international law....."The concept of historic waters, therefore, is a regime of exception to the general rules of law relating to the delimitation of the maritime domain of State.[82] Further,[83] "The 1958 Territorial Sea Convention has gone a long way to obviate the necessity of claiming certain bays on the basis of an historic title by extending the permissible closing line to 24 miles. As pointed out by Mc Dougal and Burke, the role of historic bays largely disappeared, if the Territorial Sea Convention can be considered as representing a general consensus regarding the maximum permissible close lines.[84] Indeed the 1958 Convention having been ratified by some 30 States including most of the major maritime powers, it does represent a general consensus of the international community regarding the basic principle contained therein; consequently, the concept of historic bay does have a more limited application that it formally did."

In summary of his examination of the question of historic waters, Prof. Donat Pharand aptly puts forward following propositions :

"1. The concept of historic waters constitutes regime of exception to the general rules of law relating to the delimitation of the maritime domain of a State.
2. The role of historic waters has largely disappeared since the advent of the 1958 Territorial Sea Convention which extends to 24 miles the permissible closing line for bays and permits use of straight baselines for deeply indented coasts to enclose as internal waters large water areas with possible entrances of over 24 miles.
3. Historic waters have the status of internal waters and innocent passage does not exist as of right.
4. Two basic requirements are necessary to support a claim to historic waters : (A) the exercise of exclusive authority and control by the Coastal State over a long period of time; (B) acquiescence by foreign States, particularly those affected by the claim in question.
5. A State may buttress its claim to historic waters by showing that its vital interests are at stake : considerations of geography, economics, and national security may be invoked.

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76. Section 7 (5).
77. Article 7 (1).
78. Article 7 (6).
79. J. G. Starke, An Introduction to International Law, Eighth Edition (1977) p. 236.
80. See Article 10 of the Convention.
81. (1951), I.C.J. Rep. 130.
82. Donal Pharand, "Historic Waters in International Law with Special Reference to the Article", University of Toronto Law Journal, Vol. XXI No. 1 (1971) p. 1 at p. 2.
83. Ibid , at p. 4.
84. McDougal and Burke, The Public Order of the Oceans (1972), pp. 357-58.

6. The burden of proving the existence of an historic title to certain water areas rests with the State making such claim."[85]

The above propositions represent the present position of law relating to waters.

Indian position.—Section 8 (1) of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, provides that the Central Government may, by notification in the official Gazette, specify the limits of such waters adjacent to its land territory as are the historic waters of India. Section 8 (2) further provides that the Sovereignty of India extends, and has always extended, to the historic waters of India and to the seabed and subsoil underlying, and the air space over such water. The Central Government, through Notification dated 15 January, 1977, notified the limits of the historic waters of India in Palk Strait and Palk Bay,[86] and Gulf of Mannar. The Notification further provided that the historic waters of India in Palk Strait and Palk Bay area of sea are internal waters of India. The historic waters of India beyond the appropriate baseline referred to in Section 3 (2) of the Act in the Gulf of Mannar area of sea have the same status as the territorial waters of India.

Air Space : Various theories regarding Air Space.—*N.B.*—For this please see Chapter 17 entitled "Air Law (including Aircraft-Hijacking)."

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85. Donat Pharand, see supra note 82, at p. 14.
86. See I.J.I.L., Vol. 16 (1976), pp. 561-62.

CHAPTER 16

THE LAW OF THE SEA

I. Introduction*

As pointed out by McDougal and Burke,[1] "The historic function of the law of the sea has long been recognized as that of protecting and balancing the common interests, inclusive and exclusive of all peoples in the use and enjoyment of the oceans, while rejecting all egocentric assertions of special interests in contravention of general community interest." The classical law of the sea divided the hydrospace into the territorial and the high seas, endowing the former to the coastal state, and keeping the latter free and open to States under the doctrine of the "freedom of the seas." "For more than three centuries, all the law on and about the hydrospace, covering approximately 71.4 per cent of the earth's surface, could be summed up in a simple formula : 'freedom of the seas'. The hallmark of this law, right upto the first half of the twentieth century, was freedom-meaning essentially non-regulation and *laissez faire.* Apart from a narrow belt of territorial waters with coastal States jurisdiction and a few 'rules of the road' that came to be developed, the whole watery five-sevenths of the globe remained an area of 'no law', free for all to be exploited as they wished, according to the chaotic play of their selfish interests."[2] The classical law of the sea no longer adequately reflects the needs of the international community and is rapidly falling into obsolescence. The once-proud doctrine of 'freedom of the seas' has now fallen on hard time. There was imperative necessity to adapt the traditional doctrine to the present times and circumstances so as to accommodate the interests of all States the developing and the developed.

In the course of time, uses of the sea multiplied resulting in conflicts between the wider claims of coastal States seeking to protect their economic interests over large parts of the sea and attempts by major maritime powers to maintain the *status quo* on the other. These claims and controversies assumed serious magnitude after the Second World War. With a view to reconcile these claims and resolve controversies, the two U. N. Conferences on the Law of the Sea were held in Geneva in 1958 and 1960. In the first conference, *i.e.,* 1958 Geneva Conference on the Law of the Sea, four conventions were adopted—(1) Convention on the Territorial Sea and Contiguous Zone,[3] (2) Convention on the High seas;[4] (3) Convention on Fishing and Conservation of Living Resources;[5] (4) Convention on the Continental Shelf.[6] The second U.N. Conference on the Law of the Sea was held at Geneva in 1960 to fix breadth of the territorial sea but it could not achieve success.

After the two U.N. Conferences on the Law of the Sea, certain developments emerged which considerably changed the situation. In the first place, a large number of new States, mostly in Asia and Africa, emerged. Secondly, rapid progress in science and technology made possible commercial exploitation of mineral and other resources at greater depths of the seabed. One of the most valuable resources on the bottom of the oceans are the black, potato shaped, mineral rich polymetallic nodules, more popularly called manganese nodules. Though containing as many as 40 different metals, the principal components of these nodules are manganese, nickel, copper and cobalt. Thirdly,

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* See also for P.C.S. (1987) Q. 6(a) ; C.S.E. (1994) Q. 6(b).

1. The Public Order of the Oceans, p. 1; see also "Crisis in the Law of the Sea : Community Perspectives v. National Egoism, 67 Yale L.J. 438-39 (1958).
2. R. P. Anand, "The Legality of Interim Seabed Mining Regime" Foreign Affairs Reports, Vol. XXIX, No. 2 (February, 1980), p. 29.
3. See U. N. Doc. A/CONF 13/L-52.
4. See U. N. Doc. A/CONF 13/L-53.
5. See U.N. Doc, A/CONF 13/L-54.
6. See U.N. Doc, A/CONF 13/L-55.

unprecedented growth in population and demands for higher living standards have intensified demands for food, fuel and other resources. Fourthly, the principal components of polymetalic manganese nodules, namely, nickel, copper, cobalt and manganese are vital minerals for basic industries. Fifthly while a few industrialized countries are the major consumers of these four metals, about 20 countries, most developing, are the major exporters of these minerals.

The above reasons, *inter alia*, made it imperative that the classical or traditional law of the sea must be re-formulated so as to adopt it to the present times and circumstances and to serve the interests of all States. The credit for making the initiative goes to Arvid Pardo of Malta who on August 18, 1967 submitted a request for inclusion in the agenda of the XXII Session of the General Assembly the item concerning the reservation exclusively for peaceful purposes of the Seabed and ocean flour beyond the limits of the present national jurisdiction (*i.e.*, "the Area" and the use of their resources in the interests of mankind.)[7] Although Pardo's initiative was confined to the "Area", in the course of time it became instrumental for the review and reformulation of the entire law of the Sea. In response to the Maltese initiative, the U.N. General Assembly established an *Ad Hoc* U.N. Seabed committee to study the scope and various aspects of the item submitted by Ambassador Pardo of Malta. Subsequently, this *Ad Hoc* committee was accorded a permanent status. During the deliberations in the committee it became clear that member States would be satisfied with nothing less than the review and re-formulation of the entire law of the Sea. The next landmark was the adoption, by the General Assembly on December 17, 1970, of the Declaration of Principles Governing the Seabed and Ocean-floor, and the Subsoil thereof, beyond the limits of National Jurisdiction.[8]

Following extensive preparatory work and the development of important principles by the U.N. Seabed Committee, the *first* session of the Third U.N. Conference on the law of the sea (hereinafter referred as the UNCLOS) was convened in Newyork from December 3 to 15, 1973 and was devoted to organisation and procedural matters. Thereafter ten more sessions were held. Upto the 9th session America actively participated in the conference and most of the provisions of the draft conventions were agreed to by consensus. In the tenth session America informed the conference that it will review the entire draft convention. After staying away the whole of 1981, America proposed many amendments to the already agreed to provisions. These proposals were rejected by the group of 77 countries.

On 30 April, 1982, the conference adopted the draft of the Convention on the Law of the Sea by an overwhelming majority of 130 States. The U.S. and three other States (Israel, Turkey and Venezuela) voted against it and 17 countries including Britain, Belgium, the Netherlands, Italy, West Germany and Soviet Union abstained. It was also decided that the Convention would be signed in September, 1982.

For signing the convention states assembled at U.N. Headquarters for three days beginning from 22 September, 1982. Soviet Union announced that it would sign the convention. There were also indications that some western countries might also sign the conventions. It was, therefore, decided to hold the signing ceremony of the convention from 6 December to 10 December, 1982. Thus states assembled at Mantego Bay (Jamaica) on 10 December, 1982 and 119 States finally signed the Convention on the Law of the Sea. 22 States including America, Britain, West Germany, Italy, Belgium and Japan did not sign the Convention. Thus ended the longest Conference in the history of International Law.

The U.N. Convention on the law of the sea[9] comprises of 320 Articles (divided into XVII parts) and IX annexes. It is a very comprehensive document and covers almost every aspect of the law of the sea. As many as 159 delegations had recorded their participation in the Third U.N. Conference on the Law of the Sea by signing its final Act.

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7. See U.N. Doc. A/6695.
8. See G.A. Res. 2479 (XXV), 17 December, 1970 ; Principles of this Declaration have been mentioned under the heading, "The International Seabed Area".
9. See U.N. Document No. A/CONF 62/122.

According to Article 308 of the Convention, the Convention shall enter into force 12 month after the date of deposit of the sixtieth instrument of ratification or accession. Once the Convention, enters into force, permanent machinery, notably an International Sea Bed Authority and an International Tribunal for the Law of the Sea, will be established to prepare the way for these new bodies, a Preparatory Commission began meeting at Kingston (Jamaica) on 15 March, 1983. The Convention remained open for signature for two years at Jamaican Ministry of Foreign Affairs in Kingston and at U.N. Headquarters. It was closed for signature at both places on 9 December, 1984, but remained open indefinitely for accession.

By 1st, Novembr, 1988, the Convention of Law of the Sea had been signed by 159 States. It obtained 60 ratifications or accessions required for its entry into force with the ratification by Guyana on 16th November, 1993. The convention therefore came into force on 16th November, 1994, *i.e.* one year after the deposit of the 60th instrument of ratification. By 31st January, 1995, the convention had been ratified, acceded or succeeded by 72 states. But some important developed countries such as the U.S., U.K., Belgium, France, the Federal Republic of Germany, Italy, Japan and Netherlands concluded on 3 August, 1984 Provisional undertaking regarding deep Sea-bed matters. This has rightly been termed as Mini-treaty, as contrasted with maxi-treaty *i.e.* the Convention of the Law of the Sea, 1982 and is aimed at erecting an alternative legal regime to facilitate exploitation of deep sea-bed resources on the basis of unilateral legislation. On 1st, November, 1988, the General Assembly, through resolution 43/18, called on states that had not done so to consider ratifying or acceding to the 1982 United Nations Convention on the Law of the Sea at the earliest, and to "safeguard the unified character of the Convention and related resolutions."

A mini-treaty, would clearly be violative of Article 137(3) of the U.N. Convention on the Law of the Sea, 1982 which provides : "No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part, otherwise no such claim, acquisition or exercise of such rights shall be recognized."

Reference may also be made to the Declaration adopted by the Preparatory Commission on 30 August, 1985.[10] The Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea expressed deep concern that some states have undertaken certain actions which undermine the Convention[11] and declared the following :

(a) The only regime for exploration and exploitation of the Area and its resources is that established by the U.N. Convention on the Law of the Sea and related resolutions adopted by the Third U.N. Conference on the Law of the Sea.

(b) Any claim, agreement or action regarding the Area and its resources undertaken outside the Preparatory Commission which is incompatible with the U.N. Convention on the Law of the Sea and its related resolutions shall not be recognized.

The Preparatory Commission rejected such claim, agreement or action as a basis for creating legal rights and regards it as wholly illegal.

Thus there was a clear conflict between the Maxi-treaty (*i.e.* the Convention) and the Mini-treaty. But as noted above as many as 159 States had signed the Convention. As aptly remarked by Dr M.K. Nawaz, "This raises a fundamental question whether any state in the 20th Century could long afford to go against world-consensus ? That is what it really amounts to as far as deep sea mining, without a licence from the International Sea-Bed Authority, is concerned. Sooner or later all states interested in deep sea mining must eventually fall in line with the Convention." [12]

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10. See I.J.I.L., Vol. 25 (1985) p. 358.
11. See also K.R. Simmonds, "The Status of U.N. Convention on the Law of the Sea", I.C.L.Q., Vol. 34 (1985) p. 364.
12. M.K. Nawaz, "Has the Law of the Sea Convention Run Aground"? I.J.I.L., Vol. 24 (1984) p. 538 at p. 541.

The obstacle for signing the convention by developed states was removed due to the efforts of the Secretary-General of the United Nations on 28th July, 1994 on Agreement Relating to the Implementations of Part XI of the United Nations on the Law of the Sea of 10 December, 1982. This Agreement was adopted by the General Assembly of the U.N. *vide* its resolution No. 48/263 dated 17th August 1994. While adopting and reproducing the Agreement as Annex to the Resolution, the General Assembly affirmed that the Agreement shall be interpreted and applied together with Part XI as a single instrument. It may also be noted that Article 2 of the Agreement also provides that the provisions of the Agreement and Part XI shall be interpreted and applied together as a single instrument and in the event of any inconsistency between this Agreement and Part XI, the provisions of this agreement shall prevail. As regards entry into force of the Agreement Article 6 of the Agreement provided that the agreement shall enter into force 30 days after the date on which 40 states has established their consent to bound in accordance with articles 4 and 5, provided that such states include at least seven of the states referred to in para 1 (a) of resolution II of the Third United Nations Conference on the Law of the Sea and that at least five of those states are developed states. If these condition for entry into force are fulfilled before 16 November 1994, this Agreement shall enter into force on 16 November, 1994.

It need not be over emphasized here that the agreement for the implementation of Part XI of the Convention on the Law of the Sea takes into account the concern of the developed states. The obstacle for this signing of the Convention by the developed states having been thus removed, it is hoped that the Convention will be signed and ratified by developed states and also by other states who have not so for signed and ratified it and soon this Convention will become universal in the real sense of the term.

It was hoped that realizing this and in the interests of its wider business community, the U.S. might join the Convention in a near future.[13]

Thus the U.N. Convention on the Law of the Sea, 1982 is a great landmark. It "..... is a fact. It exists. Whether or not it becomes a fully operational treaty-signed, ratified, in force, widely supported, generally followed—it is and will be cause of significant effects."[14] The Convention is in fact a comprehensive "constitution" of the oceans embodying hundreds of legal rights and duties for all uses of the sea and accepted a whole by a vast majority of States.[15] Even before the Convention came into force, a large part of it has already became part of customary international law.[16] In *case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* decided on 3 June 1985, the International Court of Justice aptly observed :

> *Nevertheless, it cannot be denied that the 1982 Convention is of major importance, having been adopted by an overwhelming majority of States, hence it is clearly the duty of the Court even independently of the references made to the Convention by the parties, to consider in what degree any of its relevant provisions are binding upon the parties as a rule of customary international law.*[17]

The Court further added :

> *The Court has thus had occasion to note the development which has occurred in the customary law of the Continental Shelf ; and which is reflected in Articles 76 and 83 of the United Convention on the Law of Sea, concerning the relationship between the concept of the Continental Shelf as the natural prolongation of the land territory of the coastal state and the factor of distance from the coast.*[18]

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13. See R.P. Anand, "U.N. Convention on the Law of the Sea and the United States", I.J.I.L., Vol. 24 (1984) pp. 198-199.
14. Philip Allott, "Power Sharing in the Law of the Sea", AJIL., Vol. 77 (1983) p. 1.
15. R.P. Anand, note 13, at p. 183.
16. Ibid, at p. 191.
17. Para 27 of the Majority Judgment,
18. Ibid., para 77.

There were, however, some provisions which proved to be an obstacle to universal participation in the convention. A number of industrialized countries objected to mandatory and regulatory approach to deep seabed mining. On 28th July, 1994, the General Assembly of the U.N. adopted the Agreement relating to the implementation of Part XI. It removed the final obstacles to broader participation in the treaty. It addressed particular seabed mining provisions replacing them with general principles geared more towards the emerging global consensus around market-oriented economic principles. The Agreement and Part XI are to be applied together. In case of a conflict between the two, the provisions of the Agreement would prevail.[19]

The Law of the Sea Convention, 1982 has so far been signed by 159 States and 72 States have ratified it. On 10 December, 1992, the General Assembly commemorated the tenth anniversary of the Convention's opening for signature in Montego Bay, Jamaica on 10th December, 1982.

Thus the U.N. Convention on the Law of the Sea, 1982 is of major importance and its very existence modifies political, economic and legal relationships in countless ways. It has turned the dream of a comprehensive law for the oceans into reality and is one of the greatest achievement of this century.[20]

II. Maritime Belt or Territorial Waters*

Maritime belt or territorial waters is that belt of the sea which is adjacent to the coastal State and over which the coastal State exercises the sovereignty.[21] Coastal State exercises sovereignty not only over the territorial waters, but also over air space over the territorial sea as well as to its bed and sub-soil.[22] According to Article 2(3) of the U.N. Convention on the Law of Sea, 1982, the sovereignty over the territorial waters is exercised subject to the convention and other rules of international law.

Problem of Breadth of Territorial Waters[23]

Maritime belt is that part of the sea over which the coastal States exercise sovereignty. Since the coastal State exercises sovereignty over this part of the sea. there should be a definite limit of the breadth of the maritime belt. There was a great controversy in this connection under international law for considerable period of time. In the view of the famous jurist Bynkershoek, the breadth of maritime belt extends to that distance where a cannon can fire. Up to eighteenth century, the range of cannon shot was three miles. Hence the cannon shot rule, *i.e.*, 3 miles of maritime belt, became a prevalent principle. According to Grotius, the sovereignty of the coastal State over the maritime belt should extend only to that area up to which it can exercise effective control. Another famous jurist, Vattel also subscribed to this view. In the nineteenth century, 3 miles cannon shot rule became very much prevalent. As a result of the scientific inventions and discoveries, the range of cannon shot considerably increased and hence it became necessary to change this rule.

In order to fix the breadth of the maritime belt, first important attempt was made by the League of Nations. The Hague Conference of 1930 made an unsuccessful attempt to obtain consensus of the nations on a specific breadth of the maritime belt. Since International Law could not fix definite breadth of the maritime belt, different countries claimed different breadths of maritime belt. In order to resolve these conflicts, a conference was called in Geneva, Conference on the Law of the Sea, 1958. Different

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19. U.N. Chronicle, Vol. XXXII, No. 1 (March, 1995) p. 8.
20. Ibid.
* See also for I.A.S. (1968), Q. No. 6 ; I.A.S. (1960), Q. No. 5 ; I.A.S. (1954), Q.N. 6 ; P.C.S. (1975), Q. No. 2(a) ; P.C.S. (1971), Q. No. 4(b) ; I.A.S. (1978), Q. No. 5(a) ; P.C.S. (1985), Q. No. 10(f) ; C.S.E. (1987), Q. 8(a) ; P.C.S. (1988), Q. 10(d) ; P.C.S. (1991) Q. 8(a).
21. Article 1 of the Geneva Convention on Territorial Waters and Contiguous Zone, (1958) ; See also Article 2 of U.N. Convention on the Law of Sea, 1982.
22. Article 2, ibid.
23. See also S. K. Kapoor, "The Problem of the Width of the Territorial Sea. "Lawyer", (August, 1972), p. 121 ; H. Leauterpacht, "Sovereignty over Submarine Areas", BYBIL, Vol. XXVII (1950), pp. 376-433.

countries put forward the claims of different breadth of maritime belt. This controversy could not be resolved in the Geneva Conference of 1958. In order to resolve this conflict another Conference, known as II U.N. Conference on the Law of the Sea, was called in 1960. In this conference, America presented a compromise formula which provided that the breadth of territorial waters should be 6 miles and beyond these 6 miles the coastal States should be given rights for fishing etc., for another 6 miles. This proposal could not be accepted as it was defeated by a majority of single vote. The claims of different countries, however, showed that this breadth should be in between 3 miles to 12 miles. A large number of States have now subscribed to the view that the breadth of the territorial waters should be 12 miles and it has already become part of international customary law.

The statement that States are completely free in regard to the fixing of the breadth of territorial waters is far from true. In *Anglo-Narwegian Fisheries* case,[24] the court observed that the States are not completely free in respect of delimitation of territorial waters with regard to other States. The International Court of Justice observed, "The delimitation of the 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 an 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 controversy relating to breadth of territorial sea has finally ended with the adoption of the U.N. Convention on the Law of the Sea, 1982.[25] Article 3 of the Convention provides that every state has the right to establish the breadth of its territorial sea upto a limit not exceeding 12 nautical miles measured from base lines determined in accordance with this convention. Under Article 4, the outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline, equal to the breadth of the territorial sea.

Delimitation of Territorial Sea between States with opposite or adjacent coasts

According to Article 15 of the 1982 Convention on the Law of the Sea provides :

"Where the coasts of two states are opposite or adjacent to each other, neither of two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond median line every point of which is equidistant from the nearest point on the baselines from which the breadth of the territorial seas of each of the two states is to be measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two states in a way which is at variance therewith."

The question of delimitation of territorial sea arises before the International Court of Justice in *case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar* v. *Bahrain)*. This case was decided by the International Court of Justice on 16th March, 2001. In this case, the world court referred to above Article 15 and pointed out that it is virtually identical to Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the contiguous zone and is to be regarded as having a customary character. It is often referred as "equidistance/special circumstances" rule. The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances. Once it is delimited the territorial sea to the parties, the court will determine the rules and principles of customary law to be applied to the delimitation of the rules and principles of customary law to be applied to the delimitation of the parties' continental shelves and their exclusive zones or fishery zones. The court will

24. I.C.J. Rep. (1951), p. 116.
25. See U.N. Document No. A/CONF 62/122.

further decide whether the method to be chosen for this delimitation differs from or is similar to the approach just outlined.[25a]

Further, the equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured. It can only be drawn when the baselines are known. In this case neither of parties has as yet specified the baselines which are to be used for determination of the breadth of the territorial sea, nor have they produced official maps or charts which reflect such baselines only during the present proceedings have they provided the court with approximate basepoints which in their view could be used by the court for the determination of the maritime boundary.[25b] The court will therefore first determine the relevant courts of the parties, from which will be determined the location of the baselines and the pertinent basepoints which enable the equidistance line to be measured.[25c]

In this case, Qatar argued that for purpose of this delimitation, it is the mainland-to-mainland method which should be applied in order to construct the equidistance line. It claimed that the motion of "mainland" applies both to Qatar Peninsula, which should be understood as including the main Hawar Island, and to Bahrain, of which the Islands to be taken into consideration are al-Awal (also called Bahrain Island), together with Musharraff and Sitrah. According to Qatar's view, application of mainland-to-mainland method of calculation could also mean that the equidistance line has to be constructed by reference to the high-water line. A clear distinction must be drawn between the determination of the outer limit of the territorial sea of a state or other territorial entity, and the delimitation of a maritime boundary between two states with opposite courts. In Qatar's view, the low-water line is not obligatory as a rule of general application and the use of the high-water line is justified on both technical and legal grounds, precisely in order to achieve an equitable delimitation. Qatar contended in particular that the low-water line is by definition precarious, subjective or even arbitrary in so far as it may vary with time, whereas the high-water line can be drawn in a sure and objective way, being relatively invariable.

On the other hand, Bahrain contended that it is a *de facto* archipelago or multiple-island state, characterised by a variety of maritime features of diverse character and size. All these features are closely inter-linked and together they constitute the State of Bahrain; reducing that state to a limited number of so-called "principal" islands would be a distortion of reality and refashioning of geography. Since it is the land which determines maritime rights, the relevant base-points are situated on all those maritime features over which Bahrain has sovereignty. Bahrain further contended that, according to conventional and customary international law, *it is the low-water line which is* determinative for the breadth of the territorial sea and for the delimitation of overlapping territorial waters. Finally, Bahrain stated that, as a *de facto* archipelagic state, it is entitled to declare itself an archipelagic state under Part IV of the 1982 law of the Sea Convention and to draw the permissive baselines of Article 47 of that convention *i.e.* straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago".

Qatar however, contested Bahrain claim that it is entitled to declare itself an archipelagic state under Part IV of the 1982 Convention, it contends *inter alia* that Part IV has not become customary law, and that consequently it is not opposable to it.

In its application Qatar had requested the world court :

(1) To adjudge and declare in accordance with international law.

A.(1) That the State of Qatar has sovereignty over the Hawar islands,

(2) That Sibal and Qit' at Jaradh shwals are low-tide elevations are under Qatar sovereignty.

B.(1) That the State of Bahrain has no sovereignty over the island of Janan;

25a. Para 176 of the judgment dated 16th March, 2001.
25b. *Ibid*, para 177.
25c. *Ibid*, para 178.

(2) That the State of Bahrain has no sovereignty over Zubarah;

(3) That any claim by Bahrain concerning archipelagic baselines and areas for fishing for pearls and swimming fish would be irrelevant for the purpose of maritime delimitation in the present case;

(II) To draw a single maritime boundary between the maritime areas of sea-bed, subsoil and superjacent waters appertaining respectively to the State of Qatar and the State of Bahrain, that boundary.

On the other hand, Bahrain requested the court to adjudge and declare that :

1. Bahrain is sovereign over Zubarah.

2. Bahrain is sovereign over the Hawar islands, including Janan and Hadd Janan.

3. In view of Bahrain's sovereignty over all the insular and other features, including Fasht ad Dibab and Qit at Jaradah, comprising the Baharains archipelago, the maritime boundary between Bahrain and Qatar, is as in Part two of Bahrain's Memorial Part two of Bahrain's counter Memorial and in reply.

The world court observed that in previous cases the court has made clear that maritime rights derive from coastal state's sovereignty over the land, a principle which can be summarized as "the land dominates the sea".[25d]

It is thus the terrestrial situation that must be taken as starting point for the determination of the maritime rights of a coastal state. In accordance with Article 121, paragraph 2, of the 1982 Convention on the law of the sea, which reflects customary international law, islands regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights as other land territory.[25e]

In order to determine what constitutes Bahrain's relevant coasts and what are the relevant baselines on the Bahraini side, the court must first establish which islands come under Bahraini sovereignty.[25f]

The legal definition of an island is "a naturally formed area of land surrounded by water, which is above water at high tide" (1958 Convention on the Territorial Sea and contiguous zone, Article 10, para 1, 1982 Convention on the Law of the Sea, Article 121, para 1.)

According to the relevant provisions of the conventions on the Law of the Sea, which reflect customary international law, a low-tide elevation is a naturally formed area of land which is surrounded by and above water a low-tide but submerged at high-tide (1958 Convention on the territorial sea and the contiguous zone, paragraph 1 of Article 11, 1982 Convention on the Law of the Sea, paragraph 1 of Article 13.

Under these provisions, the low-water line of a low-tide elevation may be used as the baseline for measuring the breadth of the territorial sea if it is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island. If a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea, it has no territorial sea of its own. The above mentioned conventions further provide that straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them. (1958 Convention, para 3 of Article 4, 1982 Convention).

7. According to Bahrain this is the case with low-tide elevations which are relevant in the present case for the delimitation process.[25g]

When a low-tide elevation is situated in the overlapping area of the territorial sea of two states, whether with opposite or with adjacent coasts, both states in principle are

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25d. Para 185; see North Sea Continental Shelf, I.C.J. Reports (1969) p. 51, para 96; Aegean Sea Continental Shelf, I.C.J. Reports (1978) p. 36, para 86.

25e. *Ibid.*

25f. Para 186.

25g. Para 201.

entitled to use its low-water line for the measuring of the breadth of their territorial sea. The same low-tide elevation then forms part of the coastal configuration of the two states that is so even if the low-tide elevation is nearer to the coast of one state then to the other, or nearer to an island belonging to one party than it is to the mainland coast of the other for delimitation purposes the combating rights derived by both coastal states from the relevant provisions of the law of the sea would by necessity seem to neutralize each other.[25h]

The few existing, rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute *terra firma*, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the view point of the acquisition of sovereignty be fully assimilated with islands or other land territory.[25i]

Further, the rule is that a low-tide elevation which is situated beyond the limits of the territorial sea does not have a territorial sea of its own. A low-tide elevation, therefore, as such does not generate the same rights as island or other territory. Moreover, it is generally recognized and implicate in the words of the relevant provisions of the conventions on the law of the sea that, whereas a low-tide elevation which is situated within the limits of the territorial sea may be used for determination of its breath, this does not hold for a low-tide elevation which is situated less than 12 nautical miles from that low-tide elevation but is beyond the limits of the territorial sea.[25j]

Paragraph 3 of Article 4 of the 1958 general convention on the Territorial Sea and the contiguous zone and paragraph 4 of Article 7 of the 1982 Convention on the Law of the Sea provide that straight baselines shall not be drawn to and from low-tide elevations unless light houses or similar installations which are permanently above sea level have been built on them. These provisions are another indication that low-tide elevations cannot be equated with islands, which under all circumstances qualify base-points for straight baselines.[25k]

The court, consequently is of the view that in the present case there is no ground for recognizing the right of Bahrain to use as a baseline the low-water line of those low-tide elevation which are situated in the zone of overlapping claims, for recognizing Qatar as having such a right. The court accordingly, concludes that for the purposes of drawing the equidistance line, such low-tide elevation must be disregarded.[25l]

According to Bahrain, as a multiple island state characterized by a cluster of islands of the court of its main islands, it is entitled to draw a line connecting the outermost islands and low-tide elevations. According to Bahrain, in such cases the external fringe should serve as the baseline for the territorial sea.[25m] But the court observed that the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. The method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along coast in its immediate vicinity.[25n] The fact that a state considers itself a multiple island state or a *de facto* archipelagic state does not allow it to deviate from the normal rules for the determination of baselines unless the relevant conditions are met. The coasts of Bahrains main islands do not form a deeply indented coast, nor does Bahrain claim this. It contends, however, that

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25h. Para 202.
25i. Para 206
25j. Para 207.
25k. Para 208.
25l. Para 209.
25m. Para 211.
25n. Para 212.

the maritime features off the coast of the main islands may be assimilated to a fringe of islands which constitute a whole with the mainland.[25o]

The court therefore, concluded that Bahrain is not entitled to apply the method of straight baselines. Thus each maritime feature has its own effect for the determination of the baselines, on the understanding that, on the grounds set out before, the low-tide elevations situated in the overlapping zone of territorial seas will be disregarded. It is on this basis that the equidistance line must be drawn.[25p]

On the basis of the above observations, *inter alia,* the World Court drew the equidistance line between Qatar and Bahrain and held the following :

(1) that the State of Qatar has sovereignty over Zubarah (unanimously);

(2) that the State of Bahrain has sovereignty over the Hawar Islands.

(3) the State of Qatar enjoys the territorial sea of Baharain separating the Hawar Islands from the other Bahraini islands the right of innocent passage accorded by customary international law (unanimously)

(4) the State of Qatar has sovereignty over Janan Island including, Hadd Janan (13 votes to four)

(5) that the State of Bahrain has sovereignty over the island of Qit' at Jaradah (12 votes to five)

(6) that the low-tide elevation of Fasht ad Dibal falls under the sovereignty of State of Qatar (unanimously)

(7) that the single maritime boundary that divides the various maritime zones of the State of Qatar and the State of Bahrain shall be drawn as indicated in para 250 of the judgement.

Indian position* —Upto 1956, India recognised 3 miles of territorial waters but in that year, it was extended to 6 miles by Presidential Proclamation and later on it was extended to 12 miles in 1967. The main reason for this extension was that it was discovered that India's territorial waters contained huge quantities of thorium.[26] In 1976 Article 297 of the Constitution was amended by Fortieth Amendment of the Constitution of India.[27] According to the amended Article 297, all lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone of India shall vest in the Union and be held for the purposes of the Union.[28] It is also provided that the limits of territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones of India shall be such as may be specified, from time to time, by or under any law made by Parliament.[29] In the same year the Parliament passed the Territorial Waters, Continental Shelf, Exclusive, Economic Zone and other Maritime Zones Act, 1976[30]. According to the Act, the limit of the territorial waters is the line every point of which is *at a distance of twelve nautical miles from the nearest point of the appropriate base line.*[31] Thus India's position corresponds to the rule adopted in the

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25o. Para 213.

25p. Para 215.

* See for IAS (1976), Q. No. 9(V).

26. See K.P. Mishra, "Territorial Sea in India", 6 I J.I.L., p. 470; see also statement of India's representative (Dr. Pannikkar) in Sub-committee of the Peaceful Uses of the Sea-bed and Ocean Floor Beyond the Limits of National Jurisdiction, 17 Aug., 1971 (U.N. Doc. A/C 1331 S.C. II Sr. 16, pp. 13-17) appearing in I.J.I.L., Vol. II (July, 1971), pp. 343-48.

27. See Gazette of India, 27-5-1976, Part II-S I, Ext., p. 639; see also A.I.R. 1976 Journal section, pp. 225-26.

28. Article 297 (1).

29. Article 297 (3).

30. It received the assent of the President on 25-8-1976 : For the text of the Act : See Gazette of India 26-8-76. Part II-S. I., Ext., p. 1067; see also A.I.R. 1976, Journal Section, pp. 268-72.

31. Section 3(2).

U.N. Convention on the Law of the Sea, 1982. India has signed the U.N. Convention on the Law of the Sea, 1982.

Innocent Passage.—Although 1958 Geneva Conference on the Law of the Sea failed to fix a definite breadth of territorial waters yet it laid down certain important principles in this connection. The 1958 Convention on the Territorial Waters and Contiguous Zones made it clear that the coastal State exercises sovereignty over the territorial water. But this is subject to certain exceptions. For example, the ships of other States are entitled to get passage through this part of the sea. In other words, we may say that although the coastal State exercises sovereignty over this part of the sea, yet it is the duty of the coastal State to provide innocent passage to the ships of other States. Moreover, it has also to provide facilities for laying cables, etc. In short, we may say that the coastal State exercise sovereignty over this part of the area and exercises general control over this area, but for international transport and communication some facilities are provided to other States. In *Corfu Channel* case,[32] the International Court of Justice ruled that during peace time the warships of the other States may pass through the territorial waters of a State. In this case, the Court ruled that Albania was guilty of causing loss to the British ships by firing at them or otherwise by laying mines in that part of the sea and it was, therefore, a clear violation of international law and the Court gave its verdict that Albania should pay appropriate compensation to Britain for this violation. Thus it is a well-recognised principle of customary International Law that foreign merchant vessels have a right of 'innocent passage' through the territorial waters.[33] The law in this connection was codified in the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958. Section III of which (comprising of Articles 14 to 23) deals with the right of innocent passage. Article 14 provides that ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the Territorial Sea. Article 17 of the U.N. Convention on the Law of the Sea, 1982 also provides that subject to this Convention, ships of all states, whether coastal or landlocked enjoy the right of innocent passage through the territorial sea. Passage means navigation through the Territorial Sea for the purpose either of traversing that Sea without entering internal waters, or of proceeding to internal waters, or making for the high seas forms internal waters. Passage includes stopping and anchoring but only in so far as the same are incidental to or are rendered necessary by *force majeure* or by distress.[34] Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State such passage shall take place in conformity with these articles and with other rules of International Law.[35] Further, passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in

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* See also for C.S.E. (1994) Q. 7 (c).

32. I.C.J. Rep. (1949), p. 4.

33. J.G. Starke, An Introduction to International Law, Eighth Edition (1977), p. 232.

34. Some little change has been brought about in this provision by the U.N. Convention on the Law of the Sea, 1982; Article 18(2) of the convention provides : "Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."

35. Article 19(2) of the U.N. Convention on the Law of the Sea has clarified and elaborated it by providing the following : Passage of a foreign ship shall be considered to be prejudicial of the peace, good order or security of the State, if in the territorial sea it engages in any of the following activities : (a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (b) Any exercise or practice with weapons of any kind; (c) Any act aimed at collecting information to the prejudice of the defence or security of the coastal State ; (d) Any act of propaganda aimed at affecting the defence or security of the coastal State ; (e) The launching or taking on board any aircraft ; (f) The launching, landing or taking on board any military device ; (g) The embarking or disembarking of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary regulations of the coastal State ; (h) Any act of wilful and serious pollution, contrary to the present convention; (i) Any fishing activities ; (j) The carrying out of research of survey activities ; (k) Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State ; (1) "Any other activity not having a direct bearing on passage".

order to prevent these vessels from fishing in the territorial sea. Submarines are required to navigate on the surface and to show their flag. It is also provided that the coastal State must not hamper innocent passage through the territorial sea. The coastal State is, however, required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea.[36] Article 16 of the Geneva Convention empowers the coastal State to take necessary steps in its territorial sea to prevent passage which is not innocent. Further, foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the Coastal State in conformity with the Convention and other rules of International Law and, in particular, with such laws and regulations relating to transport and navigation.[37]

It may be noted here that the 1958 Geneva Convention on Territorial Sea and the Contiguous Zone is conspicuous by its silence in respect of foreign nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious substance. The United Nations Convention on the Law of the Sea, 1982, has taken into account this matter and hence in Article 23 it is provided that foreign nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious nuclear substance shall, when exercising the right of innocent passage through the territorial sea carry documents and observe special precautionary measures established for such ships by international agreements. Obviously, it is far from satisfactory to ensure, peace, good order and security of the coastal State but it is only this provision which most of the States seemed to agree upon. As regards the duties of the coastal State, Article 24 of the 1982 convention provides that the coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this convention. In particular in the application of this convention or of any laws or regulations adopted in conformity with this convention, the coastal State shall not : (a) impose requirement on foreign ships which have the practical effect of denying or impairing the right of innocent passage ; or (b) discriminate in form or in fact against the ships of any state or against ships carrying cargoes to, from or on behalf of any State. Further, the coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.

Indian Position.—In the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, Article 4 provides for the use of territorial waters by foreign ships. It provides that without prejudice to the provisions of any other law for the time being in force all foreign ships (other than warships including submarines and other under water vehicles) shall enjoy the right of innocent passage through the territorial waters.[38] Foreign warships including submarines and other underwater vehicles may enter or pass through the territorial waters after giving prior notice to the Central Government provided that submarines and other underwater vehicles shall navigate on the surface and show flag while passing through such waters. It is further provided that the Central Government may, if satisfied that it is necessary so to do in the interests of peace, good order or security of India or any part thereof, suspend, by notification in the Official Gazette, whether absolutely or subject to such exceptions and qualifications as may be specified in the notification, the entry of all or any class of foreign ships into such area of the territorial waters as may be specified in the notification. Lastly, India is one of the signatories of the U.N. Convention on the Law of the Sea, 1982.

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36. Article 15(1) of the Geneva Convention on the Territorial Sea and Contiguous Zone, 1958 ; In Corfu Channel Case (Merits), I.C.J. Reports (1949) 4 et seq : it was held that during times of peace, warships are entitled to innocent passage through such parts of the territorial waters as from international highway. To quote the words of the World Court : "It is, in the opinion of the Court, generally recognised and in accordance with International custom that States in time of peace have a right to send their warship through straits used for International Navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through Straits in time of peace".
37. Article 17, ibid.
38. Explanation to section 4(1) adds that for the purposes of this section, passage is innocent so long as it is not prejudicial to the peace, good order or security of India.

III. Contiguous Zone*

Contiguous zone is that part of the sea which is beyond and adjacent to the Territorial Sea of the coastal State. According to Article 33 of the U.N. Convention on the Law of the Sea, 1982 : "In a zone 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". Thus the contiguous zone imposes certain restrictions on the freedom of the high seas. Further, contiguous zone may not extend beyond 24 nautical miles baseline from which the breadth of the territorial sea is measured.

Indian Position.—India's position is in conformity with the above provisions. India is one of the signatories of the U.N. Convention of the Law of the Sea, 1982.

IV. Straits Used for International Navigation.—As noted above, in *Corfu Channel case* (1949) the International Court of Justice has held that states in time of peace have a right to send their ships through straits used for International navigation between two parts of the sea without the previous authorization of a coastal State, provided that the passage is innocent. The same rule has been adopted in the U.N. Convention on the Law of the Sea, 1982. As regards straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic Zone, Article 38 of the Convention provides that all ships and aircraft shall enjoy the right 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. Further, transit means the exercise of the freedom of navigation and over flight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that state.

As regards duties of ships and aircraft during transit passage, Article 39 provides the following :

(1) Ships and aircraft, while exercising the right of transit passage, shall : (a) proceed without delay through or over the strait ; (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of states bordering the strait or in any other manner in violation of the principles of international law embodied in the charter of the United Nations ; (c) refrain from any activities other than those incidental to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress ; (d) comply with relevant part of Part III of the Convention.

(2) Ships in the transit passage shall : (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the international regulations for preventing collisions at sea ; (b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of population from ships.

(3) Aircraft in transit passage shall : (a) observe the Rules of the Air-established by the International Civil Aviation Organization as they apply to Civil aircraft ; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation ; (b) at all times monitor the radio frequency assigned by the competent internationally

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* See also for I.A.S. (1960), Q. No. 5 ; P.C.S. (1964), Q. 9(b) ; C.S.E. (1987), Q. 8(a) ; P.C.S. (1988), Q. 10(d).

designated air traffic control authority or the appropriate international distress radio frequency.

The Convention makes provision for laws and regulation of states bordering straits relating to transit passage. Further, foreign ships exercising the right of transit passage have to comply with such laws and regulations.[39] As regards duties of States bordering straits, Article 44 of the convention provides that states bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or over flight within or over the strait of which they have knowledge. There shall be no suspension of transit passage. Further, the provisions relating to innocent passage discussed earlier shall apply in straits used for international navigation : (a) excluded from the application of the regime of transit passage under Article 38; (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state. There shall be no suspension of innocent passage through such straits.[40] Last but not the least, the regime of passage through straits used for international navigation thus established shall not in other respects affect the legal status of the waters forming such straits or the exercise by the states bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and sub-soil. But the sovereignty or jurisdiction of states bordering the straits is exercised subject to Part III of the Convention and to other rules of international law.[41]

V. Archipelagic Waters of an Archipelagic State

An "archipelagic State" means a state constituted wholly by one or more archipelogs and may include other islands.[42] "Archipelago" means a group of islands, including parts of islands, inter-connecting waters and other natural features which are so closely inter-related that such islands, waters and other natural features form an intrinsic geographical, economic and political entity or which historically have been regarded as such.[43] An archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main island and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.[44] The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent. of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.[45]

Article 48 of the U.N. Convention on the Law of the Sea, 1982, provides that the breadth of the territorial sea, the contiguous zone, the Exclusive Economic zone and the continental shelf shall be measured from archipelagic baselines drawn in accordance with Article 47. As regards baselines, Article 47 provides the drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island. Further, the system of such baselines shall not be applied by an archipelagic state in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another state.

As regards the legal status of archipelagic waters, Article 49 of 1982 convention provides, the sovereignty of an archipelagic state extends to the water enclosed by the archipelagic baselines drawn in accordance with Article 47, described as archipelagic waters, regardless of their depth or distance from the coast. This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and sub-soil, and the

39. Article 42.
40. Article 45.
41. Article 34.
42. Article 46(a) of the U.N. Convention on the Law of the Sea, 1982.
43. Article 46(b), ibid.
44. Article 47(1).
45. Article 47(2).

resources contained therein. Article 50 provides that within its archipelagic waters, the archipelagic state may draw closing lines for the delimitation of internal waters, in accordance with Articles 9, 10 and 11.

Article 52 provides that ships of all states enjoy the right of innocent passage through archipelagic waters. However, the archipelagic state may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships of such suspension is essential for the protection of its security. Article 53 further provides that an archipelagic state may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea. All ships and aircrafts enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes.

Nature of Archipelagic Waters and Distinction with Territorial Waters and Inland Waters

While in some respects archipelagic waters resemble internal waters and territorial waters, in certain other respects they are different from such waters. The archipelagic waters resemble the territorial waters in so far as the sovereignity of the archipelagic state over the resources of the water column and the sea-bed and sub-soil is subject to the right of innocent passage in favour of foreign vessels and it is in this respect that it is distinct from the internal waters. But these waters are distinct from the territorial waters because of the extensive control and limitation of this passage by the archipelagic state.[46] Further, the right of innocent passage in case of archipelagic state is distinct from the right of innocent passage in case of territorial waters. "The right of passage through archipelagic waters is more limited than the right of innocent passage through the territorial sea at least in the three respects : (i) there is no express provision for the right of ships to stop and anchor where such stops and anchoring are incidental to ordinary passage or are required by reasons of *force majeure* ; (ii) the right of the coastal state to designate sea lanes and prescribe traffic separation scheme means that foreign vessels have less freedom than in passage through the territorial sea ; and (iii) the right of the coastal state in respect of warship that does not comply with its laws and regulations concerning passage extends beyond suspension and a request to leave the archipelago sea, to prohibiting the passage of such warships through its archipelagic sea for any length of time .....[47]. As regards the right of passage of foreign vessels through international straits, while in territorial sea foreign vessels possess a special right of passage through international straits under customary and under the Geneva Convention of 1958, such rights cover warships including sub-marines which need not surface and cannot be suspended by the coastal State.

The concept of archipelagic waters is also distinct from the internal waters. "No right of innocent passage is generally conceded in the case of internal waters. In case of archipelagic waters, such a right is recognized in principles, on the other hand, it would seem that the regime of archipelagic waters proposed by the archipelagic states is more akin to that of the territorial sea, although in some respects there are differences in the right of innocent passage conceded the special right of passage through international straits is not recognized." [48]

Thus while the archipelagic waters resemble in certain respects with internal waters and territorial waters, they are clearly distinct from both in certain respects. The territorial sea of an archipelagic state can be delimited only when we first determine the extent of archipelagic waters. Thus the area reserved as the common heritage of mankind, *i.e.* the International Sea-bed Area, as well as the area of the high seas, will be diminished for as against the straight baseline of a single island, straight baseline of an archipelago will

46. C.F. Amarsinghe, "The Problem of Archipelagos in International Law of the Sea," I.C.L.Q., Vol. 23, Part 3 (July, 1974), p. 539 at p. 552.
47. Ibid, at pp. 554-555.
48. Ibid.

result in enclosing a larger part of the sea to be called archipelago waters. But the inclusive claims of the International community had to concede this much for the exclusive claims of the archipelagic states. This was also necessary because the success of the third U.N. Conference on the Law of the Sea depended upon the acceptance of the package deal and one of the important parts of the package was the acceptance of the claims of the archipelagic states.

VI. Continental Shelf*

Though the geographical and geological concept of the Continental Shelf is quite an old one, the legal concept of the Continental Shelf which was fore-shadowed to some extent, by the U.K. Venezuela Treaty of 1942 providing for the division of gulf of Paria came into limelight since Truman Proclamation of 1945. In the Truman Declaration of 1945, it was declared that the United States considered the resources of the Shelf contiguous to the U.S. as "appertaining to the U.S. and subject to its jurisdiction and control." It was, however, made clear that this was in no way to affect the character of the high sea above the shelf. The said Declaration did not define the continental shelf. A subsequent U.S. State Department press release (dated 18th Sept., 1945), therefore defined it as "submarine land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 fist.) of water." Another significant thing to be noted in connection with the said proclamation is that it rejected the concept of the Continental Shelf *as res ominiam communis* and also avoided to make the basis of its right on the concept of the Continental Shelf as *res nullis* and justified it on the ground that since the Continental Shelf is the submarine extension of the coastal State, the latter has reasonable right to have jurisdiction on it.

Being encouraged by the American Proclamation certain other States made similar proclamations, for example Mexico in 1945, Argentina in 1945, Chile in 1947 and Peru, etc. made similar proclamations. These proclamations necessitated that a definite shape and form should be given to the International law relating to the Continental Shelf, because it was feared that in the absence of definite International Law on the point different countries of the world might occupy large portions of sea-bed and incorporate them into their territory.[49] In order to develop and codify definite rules of International Law relating to the Continental Shelf and other aspects of the law of the sea a conference was called at Geneva in 1958. After the discussion over different aspects of the problem a Convention known as Convention of Continental Shelf, 1958 was adopted. This convention has defined the term 'continental shelf' in the following words :

> "The Continental Shelf is—(a) the sea-bed and sub-soil of the submarine areas adjacent to the coast, but outside the area of the territorial sea to a depth of 200 metres or beyond that limit to where the depth of superjacent waters admits of the exploitation of the natural resources of the said areas ; (b) to the sea-bed and sub-soil of similar submarine areas adjacent to the coast of island".

It may be noted that instead of giving a definite form and certainty to the international law relating to the Continental Shelf, the definition adopted in the said convention made the matters more complicated. The definition of Continental Shelf in Art. I of the Geneva Convention is ambiguous and inadequate.

Criticism of the definition of Continental Shelf adopted to Geneva Convention of 1958.—The obvious reason for 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 so that minerals and

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* See also for I.A.S. (1960), Q. No. 5 ; I.A.S. (1956), Q. No. 4 ; P.C.S. (1974), Q. No. 10(b) ; P.C.S. (1964), Q. No. 9(b) ; I.A.S. (1978) Q. 5(b) ; P.C.S. (1982), Q. No. 7(a) ; P.C.S. (1985), Q. No. 10(f).

49. See Daniel S. Cheever, "The Role of International Organisation in Ocean Development", Int.-Organ., Vol. XXIII, No. 3 (Summer 1968), p. 645; see also W. Friedmann, The future of the Oceans Chs. 7 and 8 (1971) ; R.L. Friedheim and J.B. Kadane with J.K. Gamble, Jr., "Quantitiative Content Analysis of the U.N. Sea-bed Debate : Methodology and a Continental Shelf case study", Ins. Orgn. Vol. XXIV, (Summer 1970), p. 479 at p. 491.

oils can be exploited and extracted from the depth of thousands of feet of the oceans. It was feared, and rightly too, 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 this in its turn was contingent upon a workable definition of the continental shelf.

The definition of Continental Shelf contained in Art. 1 of the Geneva Convention, 1958, contains the three elements : (1) Adjacency, (2) Depth, and (3) Exploitability.[50] According to Juraj Andrassy,[51] five criteria can be taken as bases for delimitation of Continental Shelf. They are : (1) the 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 ; (5) an adjacency test. The practice of the States shows that they do not consider all these elements essential. On the contrary, they take it as alternative criteria for example, advanced countries lay more emphasis on the exploitability. It is quite obvious that the advanced countries can very well exploit the resources of the sea-bed up to the depth of thousands of feet. Thus, "The fatal flaw of Article 1 of the Continental Shelf Convention is surely one of the most disastrous clause ever inserted in a treaty of vital importance to mankind." [52] "Unfortunately, although the above interpretation is improper, the precise limits of the Continental Shelf and the appropriate circumstances for applying the exploitability test are unknown, and the adjacency test has never been clearly explained. Until these uncertainties are settled, and an interpretation offering definite boundaries proposed, there is a risk that man's need for precision will encourage him to accept the literal reading of the exploitability test as authoritative. The best way to avoid this possibility would be to redraft Article 1." [53] It may also be noted here that although the concept of legal shelf is different from the geological concept of the shelf, yet the former cannot be altogether divorced from the latter.[54] Obviously, the definition of Continental Shelf as adopted in Geneva Convention on the Continental Shelf, 1958, has not been derived from the geological concept of the time.[55]

Impact of North Continental Shelf cases (1969) on the concept and definition of Continental Shelf.—In the *North Sea Continental Shelf* cases,[56] the International Court of Justice observed, "The rights of the coastal State in respect of the area of the Continental Shelf that constitutes of *natural proiongation* of its land territory into and under the sea exist *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 here an inherent right." [57] The World Court further observed, 'More fundamental than the notion of proximity

50. See for example, "Whose is the Bed of the Sea?" Address by Ambassador Pardo, Permanent Representative of Malta to U.N., Proc. ASIL, April, 25-27 (1968), p. 219.
51. Juraj Andrassy, International Law and the Resources of the Sea (Columbia University Press, 1970), p. 76.
52. W. Friedmann, "Selden Redivivus—Towards a Partition of the Sea", A.J.I.L., Vol. 655 (1971), p. 757 at p. 759.
53. Andrassy, see supra note 40 at pp. 89-90. See also M.K. Nawaz "Alternative Criteria for Delimiting the Continental Shelf, I.J.I.L., Vol. 13 (1973), p. 25 at p. 39.
54. Richard Young, "The Limits of Continental Shelf and Beyond", Proc. A.S.I.L. April, 25-27 (1968), p. 230 ; see also Roger Denorme, "The Seaward Limit of the Continental Shelf", in the Law of the Sea-National Policy Recommendations—Proceedings of the 4th Annual Conference of the Law of the Sea Institute, June 23—June 26, 1969 (The University of Rhode Island Kingston Rhode Island, March, 1970), p. 263 at p. 267.
55. See H.M. Jain, "Continental Shelf—Some Geological Aspects", I.J.I.L. Vol. 12 (1972), 564, 580.
56. I.C.J. Reports (1969), p. 3. Facts of the case have been discussed later on in this Chapter, See also "Wolfgang Friedmann". The North Sea Continental cases : A critique", A.J.I.L., Vol. 64 (1970), p. 229; R.Y. Zennings, "The Limits of Continental Shelf Jurisdiction : Some possible Implications of the North Sea Judgment", I.C.L.Q., Vol. 18 (1869), p. 819; F.D. Brown, "The North Sea Continental Shelf Cases." Current Legal Problems, Vol. 23 (1970), p. 187 ; S.C. Chaturvedi, "The North Sea Continental Shelf Cases Analysed", I.J.I.L., Vol. 13 (1973), p. 481.
57. Ibid, at p. 22.

appears to be the principle—constantly relied upon by all the parties—of the *Natural prolongation or continuation of the land territory or domain,* or land sovereignty of the coastal State into and under the high seas, *viz.* the bed of its Territorial Sea which is under the full sovereignty of the State ..... What confers the *ipso jure* title with international law attributes to the coastal State in respect of its Continental Shelf is the fact that submarine areas concerned may be deemed, to be actually part of the territory over which the coastal State already has dominion, in the sense that although covered with water, they *are a prolongation or continuation of that territory, an extension of it under the sea."* [58]

It has been aptly remarked by other writer,[59] "The legal regime of the Continental Shelf has undergone profound changes since 1969 when the International Court of Justice handed down its historic verdict in the *North Sea Continental Shelf* cases. The change is in no small measure attributable to the Court's judgment which by its elucidation of the shelf of adjacent States gave a new turn to the law on the subject." Further, "It is of course true that the Court's pronouncement does not mark the outer limits of the Continental Shelf in terms of the continental rise. However, recent trends in International Conferences suggest that the 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 up to the edge of the continental margin. The future convention on the Continental Shelf will probably embody this trend." [60]

In the Third United Nations Conference on the Law of the Sea, consensus has emerged in favour of the 'natural prolongation' theory.[61] In Art. 76 of U.N. Convention on the law of the Sea, 1982, Continental Shelf has been defined as comprising, "the sea-bed and sub-soil 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." This definition incorporates in first part (this provision is divided in two parts by the word 'or') the concept of the Continental Shelf as highlighted by the world court. The second part provides for a uniform Continental Shelf upto a distance of 200 miles to those coastal States who have a short Continental Shelf and their continental shelf does not extend upto the said distance. The 1982 convention has thus satisfactorily resolved the controversy relating to the definition of the continental shelf.

Outer limits of continental shelf.—Paragraph 4(a) of Article 76 of U.N. Convention on the Law of the Sea, 1982 provides :

> "For the purposes of this convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either :
>
> (i) A line delineated in accordance with paragraph 7[62] by references to the outermost fixed points 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 in accordance with paragraph 7 to fixed points not more than 60 nautical miles from the foot of the continental slope."

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58. I.C.J. Reports (1969), p. 3 at p. 31.
59. M.K. Nawaz, "The North Sea Continental Shelf Cases Revisited", I.J.I.L., Vol. 15 (1975), p. 507 at p. 518.
60. Ibid. at p. 519.
61. See Surya P. Sharma, "Ocean Law on the Eve of the New York Sessions" , I.J.I.L., Vol. 16 (1976), p. 105 at p. 110.
62. Paragraph 7 of Article 76 provides : "The coastal State shall delineate the seaward boundary of its Continental Shelf where that shelf extends beyond 200 nautical miles from the baseline from which the breadth of the territorial sea is measured by straight lines not exceeding 60 nautical miles in length, connecting fixed points, such points to be defined by co-ordinates of latitude and longtitude".

After having provided the above method of establishing the outer edge of the continental margin, the convention on the Law of Sea lays down the formula for fixing the precise limits of the Continental Shelf of a coastal state in paragraph 5 of Article 76 in the following words :

"The fixed points comprising the line of the outer limits of the Continental Shelf on the sea-bed, drawn in accordance with paragraph 4(a) (i) and (ii), either shall not exceed *350 nautical miles* from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metres isobath, which is a line connecting the depth of 2,500 metres."

Illustration.—A State 'C"s Exploration Ship discovers oil below the depth of 1500 metre in the Seabed at a distance of 190 miles from the Indian coast. India claims that she has exclusive rights to exploit and use this oil. Is India's claim justified ?*

India's claim is justified because as for definition of continental shelf in Article 76 of the Law of the Convention, 1982, the continental shelf of a coastal State extends to the edge continental margin or 200 nautical miles where the outer edge of the continental margin does not extend upto that distance. Moreover, outer limit of the continental shelf may be upto 350 nautical miles from the baselines or may not exceed 100 nautical miles from the 2,500 metres isobath. Since 'C' State has discovered oil below the depth of 1500 metres in the Seabed at a distance of 190 miles from the Indian Coast, it is clearly within the continental shelf of India. As regards the rights of the coastal State over the continental shelf, Article 77 of the Law of the Sea Convention, 1982 provides that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. These rights are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the consent of the coastal State. Moreover, the rights of the State over continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

Besides this, the Seabed in question comes within the jurisdiction of India under the concept of Exclusive Economic Zone. According to Article 57 of the 1982 Convention, the exclusive economic zone of a coastal State may extend upto 200 nautical miles. Article 56 of the Convention makes it clear that in the exclusive economic zone, the coastal State has sovereign rights for the purpose of exploration and exploitation etc. of its resources.

Thus India's claim is justified.

Commission on the Limits of the Continental Shelf.—The 1982 Convention on the Law of the sea also establishes a Commission on the Limits of the Continental Shelf. Paragraph 8 of the Article 76 of the Convention on the Law of the Sea provides that information on the limits of the Continental Shelf beyond the 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal state to the Commission on the Continental Shelf set up under Annex III on the basis of equitable geographical representation. The Commission shall make recommendations to the coastal state on matters related to the establishment of the outer limits of their Continental Shelf. The limits of the shelf established by a coastal state on the basis of these recommendations shall be final and binding.

The provisions relating to the Commission are contained in Annex II of the convention. Article 1 of Annex II provides that in accordance with the provisions of Article 76, a commission on the limits of the Continental Shelf beyond 200 nautical miles shall be established. Article 4 of Annex II provides that where a coastal state intends to establish, in accordance with Article 76, the seaward boundary of its 'Continental Shelf beyond 200 nautical miles, the coastal state concerned shall submit particulars of such boundary to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this convention for that State. Further the Commission shall consider data and other material submitted by coastal states

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* P.C.S. (1990) Q. 7 (b).

and shall then make recommendations in writing to the coastal state which made the submission and to the Secretary-General.[63] In the case of disagreement by the coastal state with the recommendations of the Commission, the coastal state shall, within reasonable time make a revised or new submission to the Commission.[64]

Payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles.—As noted above, convention on the law of the sea provides that 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. This provision has been made with two main objectives. One of the objectives is to define the precise outer limits of the continental shelf and this has already been noted above. The second objective is to make the Continental Shelf of a coastal state beyond 200 nautical miles subject to some sort of international control. That is to say, while the coastal states shall have exclusive sovereign rights to exploit the resources of the continental shelf upto 200 nautical miles, they will have to make payments and contributions in respect of the exploitation of the Continental Shelf beyond 200 nautical miles. Article 82 of the convention on the law of the sea, therefore provides that 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 territorial sea is measured. The payments and contributions shall be made annually with respect to all production 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 percent thereafter. Production does not include resources used in connection with exploitation. The payments or contributions shall be made through the International Sea-bed Authority, which shall distribute them to States Parties to the convention on the basis of equitable sharing criteria, taking into account the interests and needs of developing states, particularly the least developed and land-locked amongst them. However, a developing state which is a net importer of a mineral resources produced from its Continental Shelf is exempt from making such payments of contributions in respect of that mineral resource.

Delimitation of the Continental Shelf between two or more States.—Article 6(1) of the Geneva Continental Shelf Convention provides that where the Continental Shelf is adjacent to the territories of two or more States whose coasts are opposite to each other, the boundary of the Continental Shelf appertaining to such State shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea is measured. Article 6(2) further provides that where the same Continental Shelf is adjacent to the territories of two adjacent States, the boundary of the Continental Shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the *principle of equidistance* from the nearest points of the baselines from which the breadth of the Territorial Sea of each State is measured. Reference may be made here to the *North Sea Continental Shelf* cases,*[65] wherein the International Court of Justice considered the principle of equidistance. The Court's judgment "will long be remembered for its classic exposition of doctrine of Continental Shelf delimitation of shelves of adjacent States.[66]

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63. Article 6.
64. Article 8, ibid.
* See also for I.A.S (1976), Q. No. 4 ; observations of the Court regarding the definition of Continental Shelf, Nature and Extent of Coastal State its right etc. have already been referred earlier.
65. I.C.J. Reports (1969), p. 3.
66. M.K. Nawaz, see Supra note 59 at p. 506.

North Sea Continental Shelf Cases (1969).—The facts of the case are as follows :

By the Special Agreements respectively, concluded between the Kingdom of Denmark and the Federal Republic of Germany and between the Federal Republic and the Kingdom of the Netherlands, the parties submitted to the Court certain differences concerning "the delimitation as between the parties of the areas of the Continental Shelf in the North Sea which appertain to each of them with the exception of those areas, situated in the immediate vicinity of the coast which have already been the subject of delimitation by two agreements dated 1st December, 1964, and 9th June, 1965, concluded in the one case between the Federal Republic and the Kingdom of the Netherlands and in the other between the Federal Republic and the Kingdom of Denmark. It was in respect of the delimitation of the Continental Shelf areas lying beyond and to seaward of those affected by the partial boundaries thus established, that the Court was requested by each of the two Special Agreements to decide what are the applicable "principles and rules of International Law."

The waters of the North Sea are shallow, and the whole sea-bed consists of Continental Shelf at a depth of less than 200 metres, except for the formation known as the Norweigian through a belt of water 200-650 metres deep, fringing the Southern and South Western Coasts of Norway to a width averaging about 80-100 kilometres. Much of the greater part of the Continental Shelf has already been the subject of delimitation by a series of agreements concluded between the United Kingdom (which lies along the whole western side of it) and certain of the States on the eastern side, namely, Norway, Denmark and the Netherlands.

The parties took up fundamentally different positions. On behalf of the Kingdoms of Denmark and the Netherlands it was contended that the whole matter is governed by a mandatory rule of law which, reflecting the language of Article 6 of the Convention on the Continental Shelf, 1958, was designated by them as the "equidistance special circumstances" rule. According to this contention, all Continental Shelf boundaries must be drawn by means of an equidistance line, unless or except to the extent to which "special circumstances" are recognised to exist. An equidistance line is a line every point of which is the same distance away from whatever point is nearest to it on the coast of the countries concerned—or rather strictly, on the baseline of the territorial sea along that coast. As regards what constitutes "special circumstances" according to Denmark and the Netherlands, the configuration of the German North Sea coast, its decisive character, and the fact that it makes nearly in a right-angled bend in mid-course, would not of itself constitute, for either of the two boundary lines concerned, a special circumstance calling for or warranting a departure from the equidistance method of delimitation. These various contentions, together with the view that a rule of equidistance—special circumstances are binding on the Federal Republic, were founded by Denmark and the Netherlands partly on the 1958 Geneva Convention on the Continental Shelf and partly on general considerations of law relating to the Continental Shelf lying outside this convention. The Federal Republic for its part, while recognizing the utility of equidistance as a method of delimitation and that this method can in many cases be employed appropriately and with advantage, denies its obligatory character for States not parties to the Geneva Convention, and contended that the correct rule to be applied, at any rate in such circumstances as those of the North Sea, is one according to which each of the States concerned should have a "just and equitable share" of the available Continental Shelf, in proportion to the length of its coastline or sea frontage. The International Court of Justice did not accept the doctrine of the just and equitable share for it is at variance with what the Court entertains no doubt is the most fundamental of all rules of law relating to the Continental Shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, namely, that the rights of the Coastal State in respect of the area of Continental Shelf that constitutes a natural prolongation of its land territory into and under the Sea exist *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 here, an inherent right." Thus "even in

such a situation as that of the North Sea, the notion of apportioning and as yet undelimitated area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to and inconsistent with the basic concept of Continental Shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected. The delimitation itself must indeed be equitable share, or indeed of a share, as such, at all for the fundamental concept involved does not admit of there being anything undivided to share out."

As regards the principle of equidistance, the court held "the notion of equidistance as being logically necessary, in the sense of being an inescapable *a priori* accompaniment of basic Continental Shelf doctrine, is incorrect." By majority of eleven votes to six, the World Court finally held that in each case—

(A) the use of the equidistance method of delimitation not being obligatory between the parties ; (B) there being no single method of delimitation, the use of which is in all circumstances obligatory ; (C) the principles and rules of International Law applicable to the delimitation as between the parties of the areas of the Continental Shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the agreement of 1st December, 1964 and 9th June, 1965, respectively are, as follows : (1) Delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way to leave as such possible to each party all those parts of the Continental Shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other ; (2) if in the application of the preceding sub-paragraph, the delimitation leaves to the parties areas that overlap, these are to be divided between them in agreed proportions or failing agreement, equally, unless they decide on a regime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them ; (D) in the course of negotiations, the factors to be taken into account are to include, (1) the general configuration of the coasts of the parties, as well as the presence of any special or unusual features ; (2) so far as known or readily ascertainable the physical and geological structure and natural resources, of the Continental Shelf areas involved ; (3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with quitable principles ought to bring about between the extent of the Continental Shelf areas appertaining with coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other Continental Shelf delimitations between adjacent States in that same region.

Being influenced by the above verdict of the International Court of Justice, Article 83 of the U.N. Convention on the Law of the Sea, 1982, provides that delimitation of the Continental Shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.[67] If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided in Part XV (*i.e.* settlement of disputes).[68]

Pending settlement, as provided in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature, and, during this transactional period, not to jeopardise or hamper the reading of the final agreement. Such arrangements shall be without prejudice to the final delimitation.[69] Where there is an agreement in force between the States concerned questions relating to the delimitation of the continental shelf shall be determined in accordance with the provision of that agreement.[70] Thus the 1982

67. Article 83, paragraph 1.
68. Ibid, paragraph 2.
69. Paragraph 3.
70. Paragraph 4.

Convention does not at all mention the principle of equidistance. It emphasizes agreement between the parties. However parties "in order to achieve an equitable solution" may take into account the principle of equidistance to conclude the agreement.

Case concerning Continental Shelf (Tunisia—Libyan Arab Republic),[71] is the next case decided by the International Court of Justice regarding delimitation of continental shelf between two states. In this case the court stressed the importance of "the satisfaction of equitable principles" in the delimitation process.[72] The court was requested in 1978 to determine principles and rules of international law which were applicable to the delimitation between Tunisia and Libyan Arab Jamahiriya of the respective area of continental shelf appertaining to each. The court considered arguments as well as evidence based on geology, physiography and bathymetry on the basis of which each party sought to claim particular areas of seabed as the natural prolongation of its territory and concluded in its judgment of 24 February, 1982 that the two countries abutted on a common continental shelf and that physical criteria were therefore of no assistance for the purpose of delimitation. Consequently, it had to be guided by "equitable principles" and by certain factors such as the necessity of ensuring a *reasonable degree of proportionality between the areas allotted and the lengths of the coastline concerned, but the application of the equidistance method could not, in the particular circumstances of the case lead to an equitable result. With respect to the course* to be taken by the delimitation line the court distinguished two sectors near the shore, it considered having taken note of some evidence of historical agreement as to the maritime boundary that the delimitation should run in a north-easterly direction at an angle of 26° further seawards, it considered that the line of delimitation should near eastwards at a bearing of 52" to take into account the change of direction of the Tunisian coast and the existence of the Kerkennah Islands.

By a majority of ten votes to four, the court held that the principles and rules of international law applicable for the delimitation of the areas of continental shelf appertaining to Tunisia and Libya should be following :

(1) The *delimitation is to be effected in accordance with equitable principles and taking into account of all relevant circumstances* ;

(2) The *area relevant for the delimitation constitutes a single continental shelf as the natural prolongation of the land territory of both parties, so that in the present case no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation as such ;*

(3) In the particular geographical circumstances of the present case, the *physical structures of the continental shelf areas is not such as to determine an ecquitable line of delimitation.*

Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada—U.S.)[73]—Yet another case in which the International Court of Justice was asked to delimit the areas of continental shelf between two states is the *case concerning Delimitation of the Maritime Boundry in the Gulf of Marine Area (Canada v. U.S.)* decided by the court on 12 October, 1984. In this case, Canada and the U.S. requested the International Court of Justice to constitute a chamber of the Court consisting of five judges to delimit the areas of continental shelf between the two countries by a single maritime boundary. The area within which the delimitation sought was to be carried out lies within the ill-defined limits of the "Gulf of Maine area". It may be noted here that there is a profound difference between this case and the two other cases referred above namely *North Sea Continental Shelf Case (1969) and the Case concerning Continental Shelf (Tunisia/Libya).* In other two cases, the Court was not required to draw a line of delimitation itself but merely to indicate the principles and rules of international law

71. I.C.J. Reports 1982, p. 21.
72. Ibid., p. 47, para 44.
73. Judgment of the I.C.J. of 12 October, 1984.

applicable to that determination. In *Tunisia/Libya* case, the court was also asked to clarify the practical method for the application of these principles and rules in the specific situation. Secondly, for the first time, the delimitation which the chamber is asked to effect does not relate exclusively to the continental shelf, but to both the continental shelf and the exclusive fishing zone, the delimitation by a single boundary.

While the parties recognized the "fundamental norm" governing maritime delimitation, each of the parties separately sought to ascertain whether international law might also contain other rules, possibly accompanied by corollaries, of mandatory application in the same field. In this connection, Canada relied on the concept of *geographic adjacency*, since it was convinced that this concept constituted the *"basis of title"* of the coastal State to the partial extension of its jurisdiction to the continental shelf and the waters of which it formed the bed. But the chamber rejected this argument and observed :

It should not be forgotten however, that "legal title" to certain maritime or sub-marine areas is always and exclusively the effect of a legal operation. The same is true of the boundary of the title. That boundary results from a rule of law, and not from any intrinsic merit in the purely physical fact. It is therefore correct to say that international law confers on the coastal state a legal title to adjacent continental shelf or to a maritime zone adjacent to its coasts, it would not be correct to say that international law recognizes the title conferred on the state by the adjacency of that shelf or that zone, as if the mere natural fact of adjacency produced legal consequences.

From the principle of 'adjacency' or 'proximity' Canada sought to deduce the existence in customary international law of rules for delimitation of continental shelves or adjacent maritimes zones overlap. Rejecting such contention the chamber observed :

The chamber merely notes it amount just one more, still unconvincing, endeavour to instill the idea that "equidistance" rather than "distance" is a concept endorsed by customary international law, since the objective is to assist that whatever lies less far from he coasts of one state than from those of another should automatically appertain to the former state. It is another attempt to turn equidistance into a genuine rule of law, one to which general international law has supposedly given expression while yet tempering it to take account of special circumstances, and thus into something other than it is in reality ; a practical method be applied for the purpose of delimitation.

Nevertheless this concept as manifested in decided cases, has not thereby become a rule of general International law, a norm logically flowing from a legally binding principle of customary international law, neither has it been adopted into customary law simply as a method to be given priority or preference.

"The Chamber further observed :

What general international law prescribes in every maritime delimitation between neighbouring states could there be defined as follows :

(1) *No maritime delimitation between states with opposite or adjacent coasts may be effected unilaterally by one of those states. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.*

(2) *In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographical configuration of the area and other relevant circumstances, an equitable result.*

Applying the governing principles and rules of law and equitable criteria and appropriate methods, the Chamber indicated the course of single maritime boundary that

divides the continental shelf and the exclusive fisheries zones of Canada and the United States of America.

Case concerning the continental shelf—Libyan Arab Jamahiriya/Malta.[74]—This is the latest case on the point. In this case the Court was requested to decide the question as to what principles and rules of international law are applicable in the delimitation of the areas of the continental shelf which appertains to Malta and the area of continental shelf which appertains to Libya and how in practice such principles and rules can be applied by the two Parties in this particular case in order that they may without difficulty delimit such areas by an agreement.

On behalf of Libya it was contended *inter alia* that the natural prolongation of the respective land territories into and under the sea is the basis of title to the areas of continental shelf which appertain to each of them. The delimitation should be accomplished in such a way as to leave as much as possible to each party all areas of continental shelf that constitute the natural prolongation of its land territory without encroachment on the natural prolongation of the other. Further, the delimitation in this case should reflect the element of a reasonable degree of proportionality which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the respective state and the lengths of the relevant parts of their coasts, account being taken of any other delimitation between states in the same region. Last but not the least, application of the equidistance method is not obligatory, and its application in the particular circumstances of this case would not lead to an equitable result.

On the other hand it was contended on behalf of Malta that the principles and rules of international law applicable in the area are that the delimitation shall be effected on the basis of international law in order to achieve an equitable solution and in practice the above principles and rules are applied by means of a median line every point of which is equidistant from the nearest points on the baselines of Malta and the low water mark of the coasts of Libya.

Both the parties have signed the 1982 U.N. Convention on the Law of the Sea but it has yet not entered into force. The Parties agreed that the dispute is to be governed by customary international law. As regards the 1982 convention the International Court of Justice observed that even independently of the references made it is the duty of the Court to consider in what degree any of its provisions are binding upon the parties as a rule of customary international law. The court referred to Art. 76, paragraph 10 and Article 83, paragraph 1 and observed :

That the questions of entitlement and of definition of continental shelf, on the one hand, and of delimitation of continental shelf on the other are not only distinct but are also complementary is self-evident. The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation."

The Court then quoted the following observation from its judgment in *the case concerning continental shelf (Tunisia/Libyan Arab Jamahiriya).* : [75]

"In the new text, any indication of a specific criterion which could give guidance to the interested states in their effort to achieve an equitable solution has to be achieved. The principles and rules, applicable to the delimitation of Continental shelf areas are those which are appropriate to bring about an equitable result....."

After quoting the above observation, the court aptly remarked, *"The Convention sets a goal to be achieved but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard and it is left to states themselves or to the courts, to endow this standard with specific content."* [76]

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74. I.C.J. Judgment of 3 June, 1985.
75. I.C.J. Reports 1982, p. 49, para 50.
76. I.C.J. Reports (1985) para 28.

For Malta, the reference to Art. 76 of the 1982 Convention represents a consecration of the "distance principle", for Libya the reference to natural prolongation corresponds to customary international law. The Court did not agree with Libyan contention that distance from the coast is not a relevant element for the decision of the present case.

As regards Libya's case that natural prolongation, in the physical sense of land territory into and under the sea is still a primary basis of title to continental shelf, the World Court observed :

".....Since the development of the law enables a state to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast whatever the geological characteristic of the corresponding sea-bed and sub-soil there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of states concerned or in preceding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned. Since at least in so far as those areas are situated at a distance of under 200 miles from the coast in question, title depends solely on the distance from the coasts of the claimant states of any areas of seabed claimed by way of continental shelf, and geological or geomorphological characteristic of those areas are completely immaterial. It follows that since the distance between the coasts of the parties is less than 400 miles so that no geophysical feature can lie more than 200 miles from each coast the feature referred to as the rift zone cannot constitute a fundamental discontinuity terminating the southwards extension of the Maltese shelf and northward extension of the Libyan as if it were some natural boundary." [77]

As regards Malta's contention regarding the principle of equidistance" the court observed :[78]

"The Court is unable to accept that, even as a preliminary and provisional step toward the drawing of a delimitation line, the equidistance method is one which must be used, or that the court is required, as a first step to examine the effects of a delimitation by application of the equidistance method.[79] *Such a rule would come near to an espousal of the idea of 'absolute proximity', which was rejected by the court in 1969*[80], *and which has since moreover failed of acceptance at the third United Nations conference on the Law of the Sea.....The application of equitable principles in the particular relevant circumstances may still require the adoption of another method, or combination of methods, of delimitation even from the outset."*

But on the basis of the circumstances in the present case, the court agreed that".....*the tracing of a median line between those coasts by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.*[81] *The court however, added that it "should not be understood as implying that an equidistance line will be an appropriate beginning in all cases, or even in all cases of delimitation between opposite states."* [82]

By a majority of 14 votes to 3 the Court concluded[83] *that the principles and rules of international law applicable for the delimitation are :*

;(1) the delimitation is to be effected in accordance with equitable principles and taking account of all relevant circumstances, so as to arrive at an equitable result

77. Ibid., para 39.
78. Para 43.
79. I.C.J. Reports 1982, p. 79, para 110.
80. I.C.J. Reports 1969, p. 30, para 41.
81. Note 77, para 62.
82. Ibid, para 77.
83. Ibid, para 79.

(2) *the area of continental shelf to be found to appertain to either party not exceeding more than 200 miles from the coast of the party concerned, no criterion for delimitation of shelf areas can be derived from the principles of natural prolongation in the physical sense.* Further, an *equitable result may be arrived at by drawing, as a first stage in the process a median line every point of which is equidistant from the low water mark of the relevant coast of Malta (excluding the islet of Filfla) and the low-water mark of the relevant coast of Libya.*

A perusal of the above cases shows that in the first place the principle of equidistance cannot be applied in all cases of delimitation between opposite states. In the absence of an agreement on the basis of circumstances of the case it may be applied by way of provisional step in the process to be continued by other operations. Secondly, since each coastal state can claim continental shelf upto a distance of 200 miles, the principle of natural prolongation has lost its importance and has been replaced to a great extent by distance criterion. Thirdly Article 83 which lays emphasis on equitable solution, sets a goal to be achieved but is silent as to the method to be followed to achieve it. Thus the rules and principles of law to be applied for delimitation of continental shelves between two opposite states are vague and far from satisfactory. The provisions of the 1982 convention relating to delimitation deserve to be suitably amended to remove uncertainty and vagueness. The function of law is not only to set goal to be achieved but also to lay down clearly the methods and procedures to achieve it.

Indian position on Continental Shelf.—India is one of the signatories of the U. N. Convention on the Law of the Sea but she has yet not ratified it.

VII. Exclusive Economic Zone or Patrimonial Sea :*

The concept of economic zone or patrimonial sea was for the first time advocated 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 of Sessions of the Committee held in January, 1972. Finally Kenya submitted the draft of exclusive economic zone concept in the 1972 Geneva Session of the United Nations Sea-bed Committee.[84]

Since the United Nation's efforts relating to the revision in law of the sea the concept of economic zone is probably the most dramatic development that has taken place.[85] After the concept was first advocated by Kenya, as noted above, it has attracted many adherents. The Third U. N. Conference on the Law of the Sea deserves credit for having settled the provisions relating to the concept of Exclusive Economic Zone. Article 55 of the U. N. Convention on the Law of the Sea, 1982, provides that the exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part (*i.e.*, Part V), under which the rights and jurisdictions of the coastal State and freedoms of other States are governed by the relevant provisions of this convention. Article 56 which deals with rights, jurisdiction and duties of a coastal State, in the exclusive economic zone provides the following :

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 seabed and sub-soil and the superjacent waters, and with regard to other activities for

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* See also I.A.S. (1978) Q. No. 5(c) and 9d) ; See also for P.C.S. (1990) Q. 7(b)—for this question see also problem discussed under the heading "Continental Shelf".

84. See Ebera Osieke, "The Contribution of States from the Third World to the Development of the Law of the Continental Shelf and the Concept of the Economic Zone", I.J.I.L., Vol. 15 (1975) p. 313 at pp. 328-29; see also Jorge Castaneda, "The Concept of Patrimonial Sea in International Law", I.J.I.L., Vol. 12 (1972), p. 535.

85. See M. K. Nawaz, "The Emergence of Exclusive Economic Zone : Implication for a New Law of the Sea", I.J.I.L., Vol. 16 (1976), p. 471 at p. 487.

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) the protection and preservation of the marine environment ;

(c) other rights and duties provided for in this convention.

2. In exercising its rights and performing its duties under this convention in the 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.[86]

As regards the breadth of the 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 the following :

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 to Article 87 of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful use 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[87] 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.

Article 73, which deals with the 'Enforcement of laws and regulations of the coastal state' provides the following :

1. The coastal state may in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the convention.
2. *Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.*
3. Coastal state penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the states concerned, or any other form of corporal punishment.
4. In cases of arrest or detention of foreign vessels the coastal state shall promptly notify the flag state, through appropriate channels, of the action taken and of any penalties subsequently imposed.

This Article 73 is part of a group of provisions of the Convention (Articles 61 to 73) which develop in detail the rule in Article 56 as far as sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of the exclusive

86. Part VI deals with Continental Shelf which has already been discussed earlier in this chapter.
87. These articles are relating to the High Seas.

economic zone are concerned. This was pointed out by the International Tribunal for the Law of the Sea in the *M/V "Saiga" case (saint Vincent and the Grenadines* v. *Guinea)*[87a] wherein Article 73, especially its paragraph 4, was applied. The facts and decision of this case have been discussed below in this chapter under the heading *"Settlement of Disputes"*.

The above provisions emerged after prolonged negotiations among the different groups of States and seek to maintain a just and equitable balance between the rights and duties of coastal States and those of other States in the exclusive economic zone. Besides the above provisions, land-locked States and states with special geographical characteristics have been given certain rights in the exclusive economic zone in Articles 69 and 70 respectively. As regards delimitation of the exclusive economic zone between States with opposite or adjacent coasts, Article 74 provides that it shall be effected by agreement in conformity with international law as referred to in Art. 38 of the Statute of International Court of Justice in order to achieve an equitable solution. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

The provisions of Article 74 are exactly similar to the provisions of Article 83 relating to the delimitation of Continental Shelf which have been discussed in detail earlier.

Continental Shelf and Execlusive Economic Zone distinguished

The concept of economic zone is related both to exclusive Fisheries Zone and Continental Shelf. It resembles them in certain respects and differs from them in certain respects. It has been rightly pointed, "The concept of exclusive Economic Zone differs both from the Continental Shelf and the exclusive Fisheries Zone. It differs from the former in that it extends to the living and non-living resources in the area of the sea, the outer limits of which are measured by distances rather than by depth or exploitability. It differs from the latter in so far as it adopts an uniform approach to all resources—living and non-living thereby ignoring the functional differences between the two kinds of resources.[88]

It may be noted here that the concept of Exclusive Economic Zone as highlighted by the 1982 convention on the Law of the sea has already become "part of modern law.[89] In *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*[90], the International Court of Justice, aptly observed :

"In the view of the Court even though the present case relates only to the delimitation of the continental shelf and not to that of the exclusive economic zone, the principles and rules underlying the latter concept cannot be left out of consideration. As the 1982 *convention demonstrates the two institutions, continental shelf and exclusive economic zone are linked together in modern law. Since the rights enjoyed by a state over its continental shelf would also be possessed by it over the sea-bed and sub-soil of any exclusive economic zone which it might proclaim, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of the state is the legally permissible extent of the exclusive economic zone appertaining to that state. This does not mean that the concept of continental shelf has been absorbed by that of the exclusive economic zone; it does however signify that greater importance must be attributed to elements such as distance from the coast which are common to both concepts.*[91]

Although the institution of the Continental Shelf and the Exclusive Economic Zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed are defined by reference to the regime laid down for the continental shelf.

87a. The case was decided on 4th December, 1997.

88. M. K. Nawaz, "The Limits of the Coastal Jurisdiction : Continental Shelf, Fisheries and Economic Zone", I.J.I.L., Vo. 14 (1974), p. 261 at p. 272.

89. Case Concerning the Continental Shelf (Tunisia/Libya), I.C.J. reports 1982, p. 74, para 100.

90. I.C.J. Reports 1985 (Judgment dated 3, June 1985), Majority Judgment, para 33.

91. Ibid, para 34.

Although there can be continental shelf where there is no exclusive economic zone there cannot be an exclusive economic zone without a corresponding continental shelf. It follows that for juridical and practical reasons, the distance criterion must now apply to continental shelf as well as to the exclusive economic zone and that quite apart from the provisions as to distance in paragraph 1 of Article 76.

Indian Position : Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 provides that the exclusive Economic Zone of India is an area beyond and adjacent to the territorial waters, and the limit of such Zone is two hundred nautical miles from the baseline from where territorial waters are measured.[92] The Central Government, may whenever it considers necessary so to do having regard to International Law and State practice, alter by notification in the official Gazette, the limit of the exclusive Economic Zone.[93] Resolutions approving the issue of such notification must be passed by both Houses of Parliament.[94] In the exclusive Economic Zone, the Union has—(a) sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producting engery from tides, winds and currents; (b) exclusive rights and jurisdiction for the construction maintenance or operation of artificial islands, off-shore terminals, installations and other structures and devices necessary for the exploration and exploitation of the resources of the zone or for any other purpose; (c) exclusive jurisdiction to authorise, regulate and control scientific research; (d) exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution; and (e) such other rights as are recognised by International Law.[95] Further, no person (including a foreign Government) shall, except under and in accordance with the terms of any agreement with the Central Government or a licence or a letter of authority granted by the Central Government explore, exploit any resources of the exclusive economic Zone or carry out any search or excavation or conduct any research within the exclusive Economic Zone or drill therein or construct, maintain or operate any artificial island, off-shore terminal, installation or other structure or device therein for any purpose whatsoever provided that nothing in this sub-section shall apply in relation to fishing by a citizen of India.[96]

But section 1 (2) of the Act provides that Sections 5 and 7 shall come into force on such date or on such different dates as the Central Government may, by notification in the official Gazette, appoint. On 15th January, 1977, Central Government issued the Notification bringing into force the provisions concerning the exclusive Economic Zone of India with effect from 15 January, 1977.[97]

VIII. The High Seas*

Definition.—The concept of freedom of open sea or high seas is very old. In the modern times it has assumed and added significance. In 1958 a convention was adopted on the high seas which is known as the Geneva Convention on the High Seas, 1958. Article 1 of the said Convention provided : "The term 'high seas' means the parts of the sea that are not included in the territorial sea or in the internal waters of a State." [98] In view of the recent developments, particularly the emergence of the concept of exclusive

92. Section 7 (1).
93. Section 7 (2).
94. Section 7 (3).
95. Section 7 (4).
96. Section 7 (5).
97. See I.J.I.L., Vol. 16 (1976), pp. 557-562.

* See also for I.A.S. (1968), Q. No. 8 ; I.A.S. (1964), Q. No. 4 ; I.A.S. (1969), Q. No. 5 ; P.C.S. (1975), Q. No. 5; P.C.S. (1971), Q. No. 6 ; P.C.S. (1970), Q. No. 8 ; P.C.S. (1971), Q. No. 8 ; I.A.S. (1973), Q. No. 3(c), P.C.S. (1970), Q. No. 2 ; P.C.S. (1980), Q. No. 8(a) ; P.C.S. (1982), Q. No. 10(e) ; P.C.S. (1983), Q. No. 3 ; P.C.S. (1984), Q. No. 10(e) ; C.S.E. (1985), Q. No. 7(a).

** See also for C.S.E. (1996) Q. 5 (d).

98. See U.N. Doc. A/CONF, 13/L. 53.

economic zone, this definition has become obsolete and inadequate and there is an urgent need to revise it. Article 86 of the U. N. Convention on the Law of the Sea, 1982, provides that the provisions of this Part (*i.e.*, Part VII) apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This Article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with Article 58. This provision instead of defining high seas describes it and its area.

Thus the emergence of the concepts of exclusive economic zone and archipelagic waters, have curtailed the limits of the high seas. Since the coastal state possesses some rights on contiguous zone also, this concept has also affected the traditional concept of high seas to some extent.

Development of the law relating to high seas : Conflict between maritime Sovereignty and the freedom of high seas.—In the ancient period, it was generally believed that high seas are a common heritage of mankind and are not within the property of any State. All the States were free to use it. During sixteenth and seventeenth centuries, States started occupying different parts of the high seas. In the modern period, the reply of Queen Elizabeth of England to the Spanish Ambassador in 1580 is an important event in regard to the freedom of the high seas. In her reply she had made it clear that seas and air are the property of all mankind and no State can claim occupation over them. In 1609, Grotius also expressed the same view in regard to the freedom of open sea. At present freedom of the high seas is a universally recognised principle and all the States subscribe to this view. The Convention on the high seas was adopted in 1958. As is clear from the preamble of the Convention, the provisions relating to high seas were declaratory of customary law. In the course of time, uses of oceans multiplied and the coastal States claimed wider parts of the sea. Many of the provisions of the Convention were criticized and even challenged. The U.N. Convention on the Law of the Sea, 1982, seeks to reconcile these claims and counter-claims of major maritime powers. Article 87 of the Convention provided that high seas are open for all the States, whether coastal or land-locked. Freedom of high seas is exercised under the conditions laid down by this convention and by other rules of International Law.

The 1982 Convention further provides that the high seas shall be reserved for peaceful purposes.[99] No state may validly purport to subject any part of the high seas to its sovereignty.[100] Every state, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.[101] Every State effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.[102] The 1982 Convention also imposes certain duties upon every State to take measures for ships flying its flag as are necessary to ensure safety at sea.[103] Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.[104] Ships owned or operated by a State and used only on governmental non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.[105] The 1982 Convention prohibits transport of slaves[106] and imposes duty upon all States to cooperate the repression of piracy.[107] So is also the case of illicit traffic in narcotic drugs or psychotropic substances.[108] All States are entitled to lay

99. Article 89.
100. Article 89.
101. Article 90.
102. Article 94 (1).
103. Article 94 (3)
104. Article 95.
105. Article 96.
106. Article 99.
107. Article 100.
108. Article 108.

submarine cables and pipelines on the bed of the high seas beyond the continental shelf. The convention also makes provision for the conservation and management of the living resources of the high sea.[109]

Freedoms of the High Seas.—Article 2 of the 1958, Geneva Convention on the high seas provides that the Freedom of the high seas comprises *inter alia,* both for coastal and non-coastal States : (1) Freedom of Navigation, (2) Freedom of fishing, (3) Freedom to lay submarine cables and pipelines, and (4) 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. That is to say, the freedoms enumerated are not exhaustive. They are in addition to those recognised by the general principls of international law. There is, however, no express provision of the freedom of scientific research and the freedom to construct Islands and other installations permitted under international law. The 1982 U. N. Convention on the Law of the Sea has included these two freedoms. The freedoms of high seas expressly enumerated in Article 87 (1) of the Convention are following : (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. It is also provided that 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 regard for the rights under the convention with respect to activities under the area.[110] It is further provided that the high seas shall be reserved for peaceful purposes.[111] Moreover, no State may validly purport to subject any part of the high seas to its sovereignty.[112]

A brief reference may also be made here to the Geneva Convention on Fishing and Conservation of the Living Resources on the High Seas, 1958. Article 1 of the Convention provides that all States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations, (b) tc the interests and rights of Coastal States as provided for in this convention, (c) to the provisions contained in the other articles of the convention. Further, all States have the duty to adopt, or to co-operate with other States in adopting such measures for their respective nationals as may be necessary for the conservation of the living resources of the High seas. Article 6 of the Convention provides that a Coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea." [113] Articles 116 to 120 of the U. N. Convention on the Law of the sea now deal with the conservation and management of the living resources of the high seas.

It may also be noted that the freedom of the high seas "is not an absolute principle and has never been applied in absolute terms; because it contains an inherent danger of abuse of rights it has long since been qualified in various ways (the classic example being the provision for the Universal jurisdiction with regard to crimes of piracy). State practice, including the practice of major maritime powers, amply, demonstrate that coastal State may and do exercise jurisdiction and control over foreign vessels beyond territorial waters in order to prevent injury to their territory, to ensure their self-preservation, and to enforce

109. Articles 116 to 120
110. Article 87.
111. Article 88.
112. Article 89.
113. As pointed out by H. Lauterpacht in his article "Sovereignty over Submarine Areas", BYBIL., Vol. XXVII (1950), 376 at p. 407; "Its (i.e.) freedom of the Seas true purpose is to ensure freedom of navigation, unhampered by exclusive claims of individual States, and freedom of utilization of the resources of the sea to a degree to which they can be equitably utilized by all. The resources of the submarine areas adjacent to the coast of the State cannot be feasibly and reasonably utilized by all. They can be so utilized mainly by the adjacent mainly (coastal State). Similarly, the true purpose of the object of securing the individual interest of any particular State provided that interest is not imcompatible with the two essential purposes of the freedom of the seas....."

their laws.....[114]. Further, "beyond the limits of national jurisdiction there will remain the greatest part of the seas and oceans of the world for which the traditional legal order must be reformed and revitalised to place less emphasis on *Laissez faire* and more on conservation and co-operation.[115] Finally, "what is required in the new legal order for the seas is a better balance of interests, a better balance as between exploitation and conservation, as between free seas and clean seas, as between peaceful uses strategic considerations, and as between coastal interests and flag interests." [116]

Criticism of the traditional doctrine of the freedom of the seas.—The doctrine of the freedom of the high seas is a typical example of Eurocentric law. It was devised and developed at a particular period of history to serve the needs and interests of the rich and powerful Industrial States of Western Europe and United States of America. It has been aptly remarked by Senator Metcalfe of the U.S.A. that "under the freedom of the seas doctrine there is not much equity, between developed and under-developed coastal nations" and "a less developed nation is a second class citizen." In the U. N. Seabed Committee, the representative of Kenya pointed out that in 1970 the developed countries with less than one-third of the world's population, had taken 60 per cent of the world catch of the fish while only 40 per cent had gone to the developing countries.[117] In the name of the freedom of the high seas the developed maritime countries have been using high seas for activities such as naval military operations, dumping radio active water, testing nuclear weapons and sending submarines equipped with nuclear missiles near the coasts of other states. The freedom of the seas was always interpreted by the technologically advanced and powerful military States as giving them a right to move across the wide open seas to threaten smaller States or to subjugate and colonize other people. Even today, the smaller States are concerned about several activities that take place on the high seas in the name of the doctrine of the freedom of the seas.[118] Further, "the assumptions on which the freedom of the seas doctrine was based have proved to be incorrect; the interests which it protected and the force which supported it have all radically changed." [119] The developing States of Asia, Africa and Latin America were very critical of the traditional doctrine of the freedom of the seas. It had, therefore, become necessary to adapt the traditional doctrine to the present times and circumstances so as to accommodate the interests of the developing and developed countries.[120]

The once-proud doctrine of 'freedom of the seas' has now fallen in hard time. The lawyers reared in the classical traditions of the law of the sea may deplore the sacrifice of large parts of the seas, but this appears to be the only alternative to chaos in an area which has become of major importance for the future and, indeed, for the survival of mankind.[121] The U. N. Convention on the Law of the Sea, 1982 has endeavoured to achieve the synthesis between the exclusive claims of developing countries and inclusive claims of major maritime powers.

Jurisdiction on the High Seas.—It is the duty of every State to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.[122]

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114. L.J.H. Legault. "The Freedom of the Seas : A Licence to Pollute ?", University of Toronto Law Journal, Vol. XXI (1971), p. 211 at p. 218.
115. Ibid, at p. 220.
116. Ibid, at p. 221.
117. U. N. Doc. A/A.C. 138/S.C. II S. R. 29 March, 1976, p. 6.
118. R. P. Anand, "Tyranny" of the Freedom of the Seas Doctrine", International Studies, Vol. 12 (1973), p. 416 at p. 442.
119. Ibid, at p. 429.
120. As pointed out by William V. O'Brien and Armando C. Chapelli, the "freedom of the seas" policies informing the old constitutive process are obsolete and must be revised to protect other values, notably conservation and prevention of pollu... : McGill Law Journal, Vol. 19 (1973), p. 322 at p. 325.
121. Lucius Caflisch, "The Future of the Law of the Sea", I.C.J. Review, No. 11. (December 1973), p. 35 at pp. 44-45.
122. Article 91 of the Law of the Sea Convention, 1982.

Ships shall sail under the flag of one State only, and, save in exceptional cases expressly provided for in international treaties or in the 1982 Convention on the Law of the Sea, shall be subject to its exclusive jurisdiction on the high seas. Except in case of a real transfer of ownership or change of registry, a ship cannot change its flag during a voyage or while in a port of call.[123] Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.[124] Warships on high seas have complete immunity from the jurisdiction of any State other than flag State.[125] This immunity is only for State owned or operated by State and used only on government non-commercial service.[126]

In case of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the State.[127]

It is clear from the above provision that the legal order on the high seas is based on the rule of international law under which every ship on the high seas is required to have the nationality of and to fly the flag of one State. Thus international law leaves it upon municipal laws of various States to fix conditions to be fulfilled by ships authorised to sail under its flag, rules relating to discipline on board of the ships and regarding punishment of ships sailing without authorisation under their flags. The rules of international law are thus supplemented by municipal laws of the States.[128]

Right of Visit.—The general rule is that the State whose flag ship is flying (and of course is entitled to fly) has complete jurisdiction over the ship and its crew. But this exclusive jurisdiction is subject to some exception. One such exception is right of visit. The general rule is that a war ship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity, is not justified in boarding it. But the war ship may board such a ship if there is reasonable ground for suspecting that :

(a) the ship is engaged in piracy ;
(b) the ship is engaged in slave trade ;
(c) the ship is engaged in unauthorized broadcasting and the flag State of the war ship has jurisdiction under Article 109 of 1982 Convention on the Law of the Sea ;
(d) the ship is without nationality; or
(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the war ship.

If any of the above grounds exist, the war ship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.[129]

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123. Article 92.
124. Article 94.
125. Article 95.
126. Article 96.
127. Article 97.
128. Oppenheim's International Law, Ninth Edition, Vol. 1, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group U. K. Ltd. and Mrs. Tomoko Hudson, 1992, p. 731.
129. Article 110.

Right of hot pursuit.—Yet another exception to the exclusive jurisdiction of the flag State over a vessel in the high seas is the right of hot pursuit. Article 111 of the U. N. Convention on the Law of the Sea, 1982 provides that the hot pursuit of a foreign ship may be undertaken when the competent authorities of the State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. The right of the 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 the convention to the exclusive economic zone or continental shelf, including such safety zones.

The right of the hot pursuit ceases as soon as the ship pursued enters territorial sea of its own State, or of a third State. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of the boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of territorial sea, or, as the case may be, without the contiguous zone or the exclusive Economic Zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

The above provisions also apply to a hot pursuit effected by an aircraft. It is, however, necessary to note that the right of hot pursuit can be exercised only by war ships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect.

Finally, there is a provision for payment of compensation for any loss or damage caused 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.

Conservation and Management of the Living Resources of the High Seas.—As noted earlier, freedom of high seas is not an absolute principle. It does not mean freedom to pollute or over-exploit. With a view to maintain a better balance between exploitation and conservation, U. N. Convention on the Law of the Sea, 1982 contains a separate section (*i.e.* Section 2 of Part VII - dealing with High Seas) relating to the conservation and management of the Living Resources of the High Seas.

The Convention confers on the nationals of all States the right to engage in fishing on the high seas. But this right is subject to (a) their treaty obligations; and (b) the rights and duties as well as the interests of the coastal States.[130] Thus the rights of the States or their nationals are not absolute. Further, all States have the duty to take, or to co-operate with other States in taking such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.[131] States shall also co-operate with each other in the conservation and management of living resources in the areas of the high seas.[132]

IX. REGIME OF ISLANDS

As regards the Regime of Islands, Article 121 provides the following :

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, 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.

130. Article 116.
131. Article 117.
132. Article 118; See also Article 119.

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

X. ENCLOSED OR SEMI-ENCLOSED SEAS

"Enclosed or semi-enclosed sea" means a gulf, basin, or sea surrounded by two or more states and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states.[133] States bordering an enclosed or semi-enclosed seas should co-operate with each other in the exercise of their rights and in the performance of their duties under the convention.[134]

XI. RIGHT OF ACCESS OF LAND-LOCKED STATES TO AND FROM THE SEA AND FREEDOM OF TRANSIT *

"Land-locked state" means a state which has no sea-coast.[135] "Transit state" means a state, with or without a sea-coast, situated between a land-locked state and the sea, through whose territory traffic in transit passes.[136] The U. N. convention on the Law of the Sea, 1982 provides that land-locked states shall have the right of access to and from the sea for the purpose of exercising the rights provided for in the convention including those relating to 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.[137] 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.[138] 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 Part X of the convention shall in no way infringe their legitimate interests.[139]

The provisions of the convention, as well as special agreements relating to the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked states, are excluded from the application of the most favoured nation clause.[140] Further, traffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connection with such traffic.[141] For the convenience of traffic in transit, free zones or other customs facilities may be provided at the ports of entry and exit in the transit states by agreement between those states and the land-locked states.[142] Last but not the least, ships flying the flag of land-locked states shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.[143]

XII. INTERNATIONAL SEA-BED AREA

Definition and Delimitation of the "Area"

The first essential requirement of a legal regime of the International Sea-bed Area (hereinafter called the "Area") is that the precise limits of the Area should be clearly defined and they should be delimited from other maritime zones. The Area has been defined as the sea-bed and ocean floor and sub-soil thereof beyond the limits of national

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133. U. N. Convention on the Law of the Sea, 1982, Article 122.
134. Ibid, Article 123.
* See also for P.C.S. (1995) Q. 8 (b).
135. Article 124 (1) (a).
136. Article 124 (1) (b).
137. Article 125 (1).
138. Article 125 (2).
139. Article 125 (3).
140. Article 126.
141. Article 127 (1).
142. Article 128.
143. Article 131.

jurisdiction. A pertinent question therefore arises as to what is the outer limit of a coastal State's jurisdiction in sea-bed. The first and second U. N. Conferences on the law of the sea failed to solve this question satisfactorily. The first U. N. Conference on the law of the sea which was held in Geneva in 1958 and which adopted four conventions including the convention on the continental shelf. It need not be overemphasized here that the outer limit of the continental shelf is the limit where the coastal state's national jurisdiction in sea-bed ends.

Beyond the continental shelf, the sea bottom falls away more steeply into deep water, until it levels out again in the floor of main ocean basins, which lie as much as ten or even fifteen thousand feet below the surface. The "Area" may therefore, be defined as the sea-bed and ocean floor of the sea and sub-soil thereof beyond the continental shelf of a coastal State and extending upto the continental shelf of other coastal States. But one million dollar question is as to where the continental shelf ends. We have seen earlier that the definition of the continental shelf contained in Article 1 of the Geneva Convention on Continental Shelf, 1958 is vague. The elastic clause of the definition providing the exploitability test created great confusion in this field.[144] An effective and workable definition of the "Area" is contingent upon a workable definition and agreement on the continental shelf. It is heartening to note that Article 76 of the U. N. Convention on the Law of the Sea, 1982 has removed the ambiguities of the earlier definition.[145]

As regards the outer limit of the continental shelf, Article 76, paragraph 5 now provides that it shall not exceed 350 nautical miles from the baselines 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.

It may be added that since the continental shelf comprises of the sea-bed and sub-soil of the submarine areas that extend beyond the territorial sea, its definition and delimitation is contingent upon a workable definition and agreement on the territorial sea. There is, however, a general consensus of States that the breadth of the territorial sea of a coastal State should be upto a limit not exceeding 12 nautical miles, measured from baselines. The limit has now been adopted in the Convention on the Law of the Sea, 1982.[146] The "Area" comprises of the sea-bed and ocean floor and sub-soil thereof beyond the limits of national jurisdiction. The sea-bed and ocean floor beyond the limits of national jurisdiction begins where the outerlimit of the continental shelf of a shelf ends. According to Art. 76 of the Convention, all coastal states have a continental shelf to a distance of 200 miles from the baselines from which the territorial sea is measured where the outer edge of the continental margin does not extends up to that distance. In case of states whose continental margin extends beyond 200 miles, the continental shelf shall not exceed 350 nautical miles or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

Development of the Law Relating to "Area"

The credit of taking the initiative to move the machinery of the U. N. for revision and progressive development of the law of the sea goes to Malta who in 1967 proposed the following in the General Assembly: "Declaration and Treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor underlying the seas beyond the limits of the present national jurisdiction and the use of their resources in the interest of mankind." [147] When the General Assembly met to consider the proposal, the representative of Malta moved for the deletion of the words "Declaration and Treaty" in view of the concern of certain delegations, who thought the emphasis on "legal objectives" was premature.[148] In pursuance of the proposal of Maltese Government the General

144. S. Oda, International Control of Sea Resources (Leyden, 1963), p. 167.
145. For definition of Continental Shelf ; sea Part VI of this Chapter.
146. See Article 3 of the Convention.
147. U. N. Doc A/6695.
148. See Daniel S. Cheever, "The Role of the International Organisation in Ocean Development", Int. Orgn., Vol. XXII (Summer 1968), p. 630.

Assembly established a 35-member *ad hoc* Committee on December 18, 1967, to study the peaceful uses of the sea-bed and ocean-floor beyond the limits of national jurisdiction. Subsequently, it was replaced by a permanent 42 members U. N. sea-bed committee to study the peaceful uses of the sea-bed and ocean floor. Its membership was increased to 86 and 91 in 1970 and 1971 respectively. Later on, for substantive work, the committee was organised into three sub-committees. These sub-committees were entrusted with the task of making substantive work for the preparations for the Third Conference on the Law of the Sea.

A great land mark in the development of law relating to the "Area" was the adoption of the Declaration of Principles of International Law, Governing the Deep Sea Floor (*i.e.*, International Sea-bed Area) by the General Assembly on December 17, 1970,[149] on the basis of the report of the U. N. Sea-bed Committee. It was adopted by a vote of 108 in favour to none against with 14 abstentions. The Declaration contained following principles : 1. Declaration of the "Area" as common heritage of mankind.[150] 2. Non-appropriation of the "Area" by States or Persons. 3. No claim, exercise or acquiring of rights by States or persons over the "Area" incompatible with future International Regime and the Declaration of Principles. 4. Availability of the Area to all States exclusively for peaceful purposes. 5. Regulation of activities of States on the Area in accordance with Principles of International Law including the Charter of the U. N. 6. Exploitation of Resources for the benefit of Mankind as a whole. 7. Reservation of the Area exclusively for peaceful purposes. 8. Establishment of an International Regime to be established by an international Treaty of a Universal character, generally agreed upon. 9. International co-operation in scientific research for peaceful purposes. 10. Prevention of pollution and contamination and protection and conservation of Natural Resources. 11. Due regard to the Rights and Legitimate Interest of coastal States. 12. The proposed International Regime not to affect superjacent waters, Air Space above waters and Rights of coastal States. 13. Responsibility of States to carry on the activities in the Area in conformity with the International Organisation to be established. 14. Adjudication of Disputes in the Area. 15. Moratorium on the Exploitation in the Area until the establishment of an International regime.

Declaration of the "Area" and its Resources as the common Heritage of Mankind.—As declared in the first paragraph of the operative part of resolution 2749 (xxv), dated 17 December 1970, "the sea-bed and ocean-floor and the sub-soil thereof, beyond the limits of national jurisdiction as well as the resources of the area, are the *common heritage of mankind.* As remarked by the late Ambassador, H. S. Amara Singhe, formerly President of the Third U. N. Conference on the Law of the Sea, in his banquet address to the Fifth Annual Conference of the Law of the Sea Institute, June 15 —19, 1970, "The concept of common heritage of mankind as we understand it, is in effect the concept of property held in trust for all mankind property which belongs to no single nation but to the entire world. The main objection to the common heritage concept seems to be based partly on the fear that some of the heirs to that heritage might carve out what they regard as their share. This is a misunderstanding of the common heritage concept. An essential feature of the concept of common heritage is the indivisibility of that heritage. It is the acceptance of the principle of indivisibility that a rational means of an equitable sharing in the benefits resulting from the exploitation of that heritage could be ensured." [151]

The principle of common heritage of mankind has become an indispensable principle so far as the "Area" and its resources are concerned. Reference may be made here to

149. General Assembly Resolution 2749 (XXV). For a detailed study; see S. K. Kapoor, "Principles of International Law Governing the Deep Sea Floor", Lawyer (July, 1973), pp. 133-143.

150. This is the most important principle relating to the Area. There is general agreement about this principle. Even before the entry into force of 1982 Convention, this principle has attained the status of Jus Cogens.

151. See The Law of the Sea—The U. N. Ocean Management, Edited by Lewis M. Alexander (1971) p. 373.

preamble of the Antarctica Treaty which recognized that "it is in the interest of mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord....."[152] Thus the Antarctica Treaty, though very near to it, stopped short of declaring the Antarctica as the common heritage of mankind. However, the principle of common heritage of mankind has been extended or applied in other fields also. For example, Art. 11, paragraph 1 of the Agreement Governing Activities of States on the Moon and other Celestial Bodies (1979)[153] incorporates this principle in respect of Moon and its natural resources.[154]

Article 136 of the U. N. Convention on the Law of the Sea, 1982 incorporates the principle in the following words : *"The Area and its resources are the common heritage of mankind.* This principle also finds mention in the preamble of the convention. Paragraph 6 of Article 311 (which deals with "Relation to other conventions and international agreements") provides : *"States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation* thereof." This is indeed a very important provision and by its adoption in the Convention on the Law of the Sea, 1982, the principle of common heritage of mankind has risen to the status of *jus cogens* or a peremptory norm of general international law.[155] However, it had certainly been better and of course more in conformity with Articles 53 and 64 of the Vienna Convention on the Law of Treaties, if it had added that any agreement entered into by any state party in respect of the "Area" and its resources in derogation of the principle of common heritage of mankind would be void.[156]

However, as pointed out by Ambassador Arvid Pardo of Malta, "No doubt, the declaration of the Seabed and its resources as the common heritage of mankind was bound to change the structural relationship between rich and poor countries. And that change amounted to a revolution not merely in the law of the sea but also in international relations." [157]

Significance of the 1970 Declaration of Principles.—Although the above principles were contained in a Central Assembly resolution, which is generally said to be of recommendatory character only, many of these principles have assumed added significance as there emerged general consensus of the States on them in the Sessions of the Third U. N. Conference on the Law of the sea and most of them have incorporated in the Convention of the Law of the Sea. Resolution 2749 (XXV) of the General Assembly which incorporated the above principles was adopted by 108 votes to none, with 14 abstentions. Since no state voted against it, it may be said to have been adopted unanimously. Even those States who on 17 December 1970 did not vote in favour of the resolution, subsequently supported it. Besides this, the principles contained in the said resolution have been recited and reaffirmed in subsequent resolutions of the General Assembly. Thus the principles declared in the said resolution are such as cannot be violated by member States and they will govern the Area until all international legal regime over the Area is established.

Resources of the International Seabed Area and U. N. Convention on the Law of the Sea, 1982.—On the basis of the report of the U.N. sea-bed committee, the Third U. N. Conference on the Law of the Sea held its first Session in Newyork in 1973. By the end of the ninth session consensus had emerged in respect of most of the issues relating to the legal regime of the area. After the end of the eleventh session on 30 April, 1982, the draft of the convention was adopted by an over-whelming

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152. See A.J.I.L., Vol. 54 (1960) p. 477.
153. See (A/34/664), Doc. A/Res/34/68.
154. For other provisions of the 1979 Agreement see Chapter on "Outer Space",
155. The author has expressed this view in his doctoral thesis on "The Legal Regime of the International Sea-bed Area" for which he has been awarded LL.D. by Lucknow University in 1986.
156. Ibid.
157. U. N. Chronicle, Vol. XXX, No. 1 (March, 1993), p. 87.

majority of 130 States. Finally on 10 December, 1982, as many as 119 States signed the Convention. By 31st January, 1995, 159 States have signed the Convention and 72 States have ratified it.

It may be noted here that the wealth of the sea is estimated at 300 million dollars but it could be several times more than that amount. One of the most valuable resources on the bottom of the oceans are the black potato shaped mineral rich manganese nodules. Indeed the immediate commercial focus is on these nodules which are strewen across the sea-floor. The manganese nodules contain as many as 40 different metals but the principal component of these nodules is manganese, nickel, cobalt, copper, zirconium and iron. According to the experts, bottom of the ocean contains copper enough to last the entire world for 6,000 years, compared with 40 years reserves on land. So is the case with nickel and aluminium—there is enough nickel to last 150,000, years as compared to 100 years, reserves on land and aluminium enough for 20,000 years, compared with 100 years' reserves on land. Thus, manganese nodules are "the largest mineral deposit on this planet. But for exploiting and processing these metals, highly sophisticated technology is required. Deep sea-bed mining and processing technology is possessed by a few corporations belonging to the industrialized countries. The corporations which are engaged in development of deep sea-bed mining technology are : American, British, French, Belgian, German, Dutch, Australian and Japanese. As pointed out in the Report of the Secretary-General, fewer than 10 ventures are likely to become operational within the next decade. The consortia, or corporations belonging to America have already invested $ 200 million for developing deep sea-bed technology and command a considerable lead over others.

Thus the exploitation of the resources of the Area will result in direct and immediate benefits to these corporations and ultimately to the few industrialized countries to which these corporations belong. These few industrialized countries also happen to be the major importers of the minerals to be exploited from the Area. On the other hand, there are about 20 developing countries who are the traditional exporters of the minerals to be exploited from the area. The commercial exploitation of manganese nodules will cause a decline of the prices of these minerals thereby adversely, affecting the export earnings of the land-leased developing producers of these minerals. There was therefore an urgent need to prevent or at least minimize adverse effects of the exploitation of the resources of the Area on these land-leased producer developing countries of these minerals. Consequently, before establishing a legal regime of the area, it was necessary to settle two major issues—(i) system of Exploration and Exploitation of the Area; and (ii) Production policies. Both these issues generated a lot of controversy during the third U. N. Conference on the Law of the Sea, (hereinafter referred as *U. N. CLOS*).

System of Exploration and Exploitation (or who may exploit the resources of the area ?) :

The developed and developing states took diametrically opposite positions in this respect when the Third U. N. CLOS started negotiations in this respect. The developed states wanted free and non-discriminatory access to the resources of the Area on the condition that, a part of the revenues earned would be given to the International Sea-bed Authority (hereinafter referred as *"the Authority"*). On the other hand, the developing states took the position that since the area and its resources have been declared as the common heritage of mankind the exploitation of the resources of the area will be carried out by 'the Enterprise' sea-bed mining arm of the proposed Authority. After prolonged negotiations, a package, or compromise was evolved reconciling the above opposite positions. This compromise is known as *'the parallel system'* which may be summarised in the following words :

The activities in the Area may be carried out by the Enterprise and States Parties or States Entities in association with the Authority. Activities in the Area shall be carried out and controlled on behalf of mankind as a whole. States Parties or States Entities will be allowed to exploit the minerals of the Area on the condition that for mining a site, they will have to submit an application covering a total area, sufficiently large and of sufficient

commercial value to allow two mining operations, within 45 days of the receipt of such application along with data concerning polymetallic modules, the Authority shall designate the part which is to be reserved solely for the conduct of activities by that Authority through the Enterprise or in association with the developing States. Each operator (other than Enterprise) will be allowed to exploit minerals only if he undertakes to transfer technology to the Enterprise. If the operator himself is not the owner of the technology, he shall obtain a written assurance from the owner of the technology that he shall transfer the same technology to the Enterprise if and when requested by the Authority. This will also apply to a developing State or group of developing States which has applied for a contract to mine sites. The obligation to transfer technology shall be included in each contract for the conduct of activities in the Area until 10 years after the Enterprise has begun commercial production of minerals from the resources of the Area and may be invoked during that period. This system shall continue for an interim period of 15 years. After fifteen years a review conference shall be held to see whether the 'parallel system' has worked properly, *i.e.*, to see whether the reserved areas have been exploited in an effective and balanced manner in comparison with non-reserved areas and whether the system has resulted in the equitable sharing of benefits to be derived from exploitation of the area taking into particular consideration the interests and needs of the developing countries.

The above 'package' can neither be said to be perfect or viable. It suffers from a number of defects but only this much was possible under the circumstances.

Production Policies

Yet another issue that generated a lot of controversy was production policies. A compromise or package that has been evolved in respect of production policies comprises of three main points : (i) Commodity Agreements, (ii) Production control Formula, and (iii) A system of compensation or other measures of economic adjustment assistance. As indicated above, exploitation of the resources of the Area will adversely affect the export earnings of land-based producer developing countries. With a view to meet this situation, consensus has emerged that the Authority, acting through existing forums or such new agreements as may be appropriate in which all interested parties, including both producers and consumers participate, shall take measures necessary to promote the growth, efficiency and stability of markets for those commodities produced from the resources of the Area, at prices remunerative to producers and fair to consumers.

As regards production control or ceiling formula, consensus emerged that during an interim period (which shall begin five years prior to 1st January of the year in which the earliest commercial production is planned to commence under an approved plan of work and shall last 25 years or until the end of the Review conference) commercial production shall not be undertaken pursuant to an approved plan of work until an operator has applied for and has been issued a production authorization from the Authority during a period beginning not more than five years prior to the planned commencement of commercial production under that plan of work unless the Authority prescribes another period in its rules and regulations having regard to the nature and timing of project development. There is also consensus in respect of the production ceiling which shall be fixed for any year of the interim period beginning with the year of the earliest commercial production.

As regards a system of compensation or other measures of economic adjustment assistance, there is general consensus that following the recommendations from the council on the basis of advice from Economic Planning Commission, the Assembly shall establish a system of compensation or other measures of economic adjustment assistance including co-operation with specialized agencies and other international organizations to assist developing countries which suffer adverse effects or their export earnings or economics resulting from a reduction in the price of an affected mineral or the volume of the mineral exported, to the extent that such reduction is caused by activities in the Area. The Authority on request shall initiate studies on the problems of those states which are likely to be most seriously affected with a view to minimizing their difficulties and assisting them in their economic adjustment.

International Sea-bed Authority

Article 156 the U.N. Convention on the Law of the Sea, 1982 provides for the establishment of the International Sea-bed Authority. All state parties to the Convention are *ipso facto* members of the Authority. The seat of the Authority is in Jamaica. The Authority may establish such regional centres or offices as it deems necessary for the exercise of its functions.

Nature and Fundamental Principles of the Authority.

The Authority is the organization through which state parties shall, in accordance with Part XI of the Convention organize and control activities in the International Sea-bed Area (hereinafter to be referred as the Area), particularly with a view to administering the resources of the Area. The powers and functions of the Authority shall be those expressly conferred upon it by the Convention. The Authority shall also have such incidental powers, consistent with the Conventions, as are implicit and necessary for the exercise of those powers and functions with respect to activities in the Area. The Authority is based on the principle of the sovereign equality of all its members

Principal Organs of the Authority

The principal organs of the Authority are following :—

(1) The Assembly.—The Assembly consists of all the members of the Authority each member shall have one representative in the Assembly, who may be accompanied by alternates and advisors. The Assembly shall meet in regular annual sessions and in such special sessions as may be decided by the Assembly, or convened by the Secretary-General at the request of the Council or of majority of the members of the Authority. The Assembly shall adopt its rules of procedure. A majority of the members of the Assembly shall constitute a quorum. Each member shall have one vote. Decisions on questions of procedure, including decisions to convene special sessions of the Assembly, shall be taken by a majority of the members present and voting. Decision on questions of substance shall be taken by a two-thirds majority of the members present and voting, provided such majority includes a majority of the members participating in the session. When the issue arises as to whether a question is one of substance or not that question shall be treated as one of substance unless otherwise decided by the Assembly by the majority required for decisions on the question of substance.[158]

The Assembly is the sole organ of the Authority which consists of all the members and is considered the supreme organ of the Authority to which the other principal organs shall be accountable as specifically provided in the Convention. The Assembly has the power to establish general policies in conformity with the relevant provisions of the Convention on any question or matter within the competence of the Authority. The Assembly has the power to elect the members of the Council, the Secretary-General from among the members proposed by the Council, the members of the Governing Board of the Enterprise and the Director-General of the Enterprise. The Assembly can establish subsidiary organs if it finds necessary for the exercise of its functions. The Assembly has the power to assess the contributions of members to the administrative budget of the Authority in accordance with an agreed scale of assessment based upon the scale used for the regular budget of the United Nations until the Authority shall have sufficient income from other sources to meet its administrative expenses.[159]

The first session of the Assembly was held at Kingston (Jamaica) in two parts. The second part of the first session was held from February 27 to March 17, 1995 but it failed

158. Article 159 of the U.N. Convention on the Law of the Sea, 1982.
159. Article 160.

to elect 36 member Council. Subsequently in March, 1996 the members of the Council were elected. India was elected as member of the Council for two years i.e. upto March, 1998 and then from 2000 to 2004. Other states elected in this category were China, France and Germany.

(2) The Council.—The Council consists of 36 members of the Authority elected by the Assembly in the following order :

(a) four members from among those State Parties, which during the last five years have either consumed more than 2 per cent of total world consumption or have had net imports of more than 2 per cent of total world imports of the commodities produced from the categories of minerals to be derived from the Area, and in any case one state from the Eastern European (Socialist) region, as well as the largest consumer ;

(b) four members from among the eight State Parties who have the largest investments in preparation for and in the conduct of activities in the Area, either directly or through their nationals, including at least one state from the Eastern European (Socialist) region ;

(c) four members from among State Parties which, on the basis of production in Areas under their jurisdiction are major net exporters of the categories of minerals to be derived from the Area, including at least two developing states whose exports of such minerals have a substantial bearing upon their economics ;

(d) six member from among developing State Parties representing special interests ;

(e) eighteen members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region shall have at least one member elected under this sub-paragraph. For this purpose the geographical regions shall be Africa, Asia, Eastern European (Socialist), Latin America and Western European and others.

A majority of the members of the Council shall constitute a quorum. Each member of the Council shall have one vote. Decisions on questions of procedure shall be taken by a majority of the members present and voting. Decision on questions of substance have been divided into several categories, some will be decided by a two-thirds majority, some by a three-fourth majority, while some others will be decided by consensus (i.e., the absence of any formal objection).[160]

The Council is the executive organ of the Authority.

It shall have the power to establish in conformity with the Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.[161]

Subsidiary organs of the Council.—Following are the two subsidiary organs of the Council.

(A) Economic Planning Commission.

(B) Legal and Technical Commission.

Each of the above commissions shall be composed of 15 members, elected by the Council from among the candidates nominated by the State Parties. However, if necessary, the Council may decide to increase the size of either commissions having due regard to economy and efficiency.[162]

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160. Article 161.
161. Article 162.
162. Article 163.

(3) The Secretariat.—The Secretariat of the Authority comprises a Secretary-General and such staff as the Authority may require. The Secretary-General shall be elected for four years by the Assembly from among the candidates proposed by the Council and may be re-elected. The Secretary-General shall be the chief administrative officer of the Authority, and shall act in that capacity in all the meetings of the Assembly, of the Council and of any subsidiary organ, and shall perform such other administrative functions as are entrusted to the Secretary-General by these organs.[163]

Other organs of the Authority

(1) Enterprise.—The Enterprise is the organ of the Authority which will carry out activities in the Area directly as well as the transporting, processing and marketing of minerals recovered from the Area. The Enterprise shall, within the framework of the international legal personality of the Authority, have such legal capacity as is provided for in the statute set forth in Annex IV. The Enterpise shall act in accordance with this Convention and the rules, regulations and procedures of the Authority, as well as the general policies established by the Assembly, and shall be subject to the directives and control of the Council. Its principal place of business shall be the seat of the Authority.[164]

(2) Sea-bed Disputes Chamber of the International Tribunal for the Law.—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 of Annex VI.[165]

International Tribunal for the Law of the Sea.—After the United Nations Convention on the Law of the Sea, 1982 came into force on November 16, 1994, vigorous efforts were made for the establishment of the International Tribunal for the Law of the Sea. It was established on October 21, 1996.

N.B.:—In view of its importance a separate chapter has been devoted in Part IV of the book. Please, therefore, see Chapter on International Tribunal for the Law of the Sea and Sea Disputes Chamber for a detailed discussion.

As per agreement that has been reached under the Convention Authority will comprise of the following organs : 1. Assembly; 2. Council; 3. Secretariat; and 4. Enterprise. The Assembly, Council and Secretariat shall be the principal organs of the Authority. The Enterprise will be established as an organ through which the Authority shall directly carry out activities in the Area. The Assembly, a policy-making organ, shall consist of all the members of the Authority. The Council shall consist of 36 members of the Authority elected by the Assembly. The Council shall establish its two organs—(i) An Economic Planning Commission; and (ii) A Technical Commission. The Secretariat shall comprise of a Secretary-General and such staff as the Authority may require. The Secretary General shall be appointed by the Assembly upon the recommendation of the Council. He shall be the Chief Administrative Officer of the Authority. In addition to the above-mentioned organs, it is also proposed to establish *the Sea-bed Disputes Chamber of the Law of the Sea Tribunal* for settlement of disputes.

The Convention on the Law of the Sea, 1982 having come into force on 16th November, 1994, the first meeting (three-day Kingston meeting which was mainly commemorative) was held on the same date *i.e.* 16th November, 1994. The Assembly decided to reconvene its first session from 27th February to 17th March, 1995. During this meeting it dealt with such substantive matters as election of members of the council of the Authority, its Secretary-General and members of other major organs.

As regards the first election of the judges of the International Tribunal, the State Parties to the convention decided on 21st November 1994 to defer this until August, 1996.

163. Article 166.
164. Article 170.
165. Article 186.

It may be noted here that on 27th March, 1996, India has been elected as a member of the Council of International Sea-bed Authority for six years under investor category. It will remain a member for two years till March, 1998 and then for four years from 2000 to 2004. Under investor category China, France and Germany were also elected as members.

Financial Arrangements

As regards the funds of the Authority, there is general consensus that they shall include : (a) assessed contributions made by State Parties; (b) funds transferred from the Enterprise; (c) receipts of the Authority arising from activities in the Area ; (d) loans received; and voluntary contributions made by State Parties or other entities. Further, the funds of the Enterprise shall include : (a) amounts received from the Authority; (b) voluntary contributions made by State Parties for the purpose of financing activities of the Enterprise; (c) amounts borrowed by Enterprise; (d) income of the Enterprise through its operations; and (e) other funds made available to the Enterprise to enable it to carry out its functions and to commence operations as soon as possible. Moreover, the Enterprise shall be provided with the funds necessary to explore and exploit one mine site, and to transport, process and market the metals recovered therefrom, namely, nickel, copper, cobalt and manganese and to meet its initial administrative expenses. The amount of the said funds, and the criteria and factors for its adjustment, shall be included by the Preparatory Commission in the draft rules, regulations and procedures of the Authority.

It may be noted here that according to the latest report of the Secretary-General, the annual administrative costs of all the organs to be established taken together might range from $41 million to $53 million. The totals for building and equipping their headquarters were given as a range of from $ 104 million to $ 229 million. As to the cost of an initial sea-bed mining venture, the report assumed three alternative amounts $ 700, $ 1,000 million and $ 1,400 million of those amounts, states would be called on to invest half.

The decision of U. S. and certain other Western Countries not to sign the Law of the Sea Convention and its implications.—As pointed out above, 22 States including U. S., U. K., West-Germany, Italy, Belgium and Japan—the States which really matter so far as capital and technology required for the purpose—did not sign the convention. Envisaging the situation that the U. S. might not join the convention and might prefer to persuade its industrial partners, Japan, U. K., Belgium and France to enact national legislation with reciprocating provisions—a "mini-treaty', Mr. T. B. Koh, President of the Third U. N. CLOS said in a Press Conference held in April 17, 1981, if that option become a reality, the developing and the socialist countries might proceed to adopt the draft convention, become partners to it, with the result that under international law there would be a mini-treaty signed by some five industrialized states and a "Maxi-treaty" signed by over 100 States. If the developing States decided to take the matter to the International Court of Justice, the court might rule in favour of the Maxi-treaty side holding that the national law in question was contrary to international law. In that event those who had developed the expensive sea-bed mining technology involving major economic investments would not obtain the kind of legal security which was necessary from risking venture capital.[166]

At the signing ceremony of the convention at Montego Bay (Jamaica) 10 December, 1982, the U. S. stated that under the circumstances, "alternative ways of preserving national access to deep sea-bed resources are necessary, just and permitted by international law." But many speakers challenged the notion that a nation could legally stake a claim to deep-sea minerals which the General Assembly before it had proclaimed as "the common heritage of mankind."[167] Obviously the U. S. was referring to the doctrine of the freedom of the high seas under which it preferred to stake the claim. The U. S. took this position in the Deep Sea-bed Hard Mineral Resources Act enacted by the U. S.

166. U. N. Monthly Chronicle, Vol. XVIII, No. 5 (May, 1981), p. 22.
167. U. N. Chronicle, Vol. XX, No. 2 (1983), p. 5.

Congress in June, 1980. Summing up the views on that point in the debate President Koh said in his final address on 10 December, 1982 that "speakers from every regional and interest group, expressed the view that the doctrine of the freedom of the high seas can provide no legal basis for the grant by any state of exclusive title to a specific mine site in the international area of the sea-bed." He added, "Any attempt by any State to mine the resources of the deep sea-bed outside the convention will earn the universal condemnation of the international community and will incur grave political and legal consequences.[168] Thus the decision of America and some other countries not to join the convention deserves condemnation by all alike, more so because America had taken very active and keen interest at all stages and made a significant contribution in evolving the 'package' on which the convention is based. This is good as far as it goes but the fact remains that without America and some other industrialized countries who possessed capital and technology required the convention could be expected to achieve objectives.

Some of the main reasons for the refusal of the U. S. to sign the convention were the provisions relating to (i) transfer of technology, (ii) production policies, (iii) decision making through majority rule, (iv) possibility that national liberation movements, such as P.L.O., may get share in the benefits, (v) creation of Enterprise a supra-national company, and (vi) pioneer investors to assume heavy financial obligations. Under the provisions, a pioneer investor has to pay a fixed annual fee of one million dollar to the Seabed Authority. The U. S. wants this provision to be scrapped. Thus countries like the U. S. have not signed because they feel Chapter XI of the Convention should be modified so that they have the least obligations.

It may be noted that India was also one of the countries who have not ratified the Convention. Being inspired by U. S. attitude India was adopting a wait and watch attitude. If U. S. did to renegotiate the Convention is successful, especially if the provision regarding payment of one million dollar by a pioneer investor is scrapped, India may gain a million dollar a year. Besides this, as pointed out by an Indian diplomat at the U. N. at the end of five day last round of closed-door negotiations in first week of September, 1993, "Things have changed since 80's" and now more or less India is "sitting on the fence". In sharp contrast to India's strong stand in favour of developing nations in the 1970's and 80's, the current negotiations indicate that the Indian position, though unclear at present may shift in favour of the affluent. But even India is concerned about some other moves initiated by the U. S. These moves include a bid seeking to abolish the pioneer investor's voting rights in the Council and to establish a powerful finance committee with overall control.

Obstacles to Universal Participation Removed

Objection to the convention's provisions relating to deep-seabed mining dealt mainly with the detailed procedures for production authorization from the deep seabed. Complex financial rules of contracts, decision making in the Council of the Seabed Authority, and mandatory transfer of technology.

With a view to overcome these objections, the U.N.-Secretary-General undertook informal consultations with all parties, lasting nearly four years. As a result, the General-Assembly adopted on 28 July, 1994 the Agreement Relating to the Implementation of Part XI.

The Agreement, in essence, removes the obstacles that had stood in the way of Universal acceptance by substituting general provisions for the detailed provisions contained in the convention and by leaving it to the Authority to determine at a future date the exact nature of the rules it would adopt with respect to the authorization of deep-seabed mining operations.

The Agreement also removed the obligation for mandatory transfer of technology and ensured the representation of certain countries, in the Council, while giving those countries powers over decision-making.[169]

168. Ibid.

169. U.N. Chronicle, Vol. XXXII No. 1 (March, 1995) p. 12.

Above all, it was agreed that the Agreement and Part XI would be applied together. In case of conflict between the two, the provisions of the Agreement would prevail.

Pioneer Investors.—In 1979, the U. S. made a proposal regarding the ways to protect investments made by states and private consortia but withdraw it early in 1981. Therefore, before the 1982 session, the conference had not discussed any proposal on the subject. During the first week of the 1982 session the issue was again raised on a proposal made by the U. S. and other western countries whose firms were already involved in deep sea exploration. Consequently, a scheme was devised by the conference and was set out in Resolution II (Resolution I is on the establishment of Preparatory Commission). It was adopted alongwith the convention although it was not part of it for it was intended to take effect before the convention entered into force. The convention had to be adjusted to the scheme, since many of the guarantees it afforded would extend into the first generation of sea-bed mining operations under the control of the Authority. The scheme will entitle states and private investors to qualify for registration by the Preparatory Commission as pioneer investors. This will entitle them to explore but not commercially exploit—a selected area of the seabed until the convention comes into effect. Further, it would guarantee them priority over all others except the Authority's own Enterprise—once the Authority permits commercial production from the deep sea-bed.

To qualify as pioneer investors, States and private consortia would have to spend at least $ 30 million on sea-bed activities by 1st January 1983, not less than 10 per cent of which must have been on a specific portion of the sea-bed. But for developing countries (other than India which was provided for separately) the said date was extended to 1st January 1985. As regards the number of pioneer investors, the revised draft limited it to eight plus an unspecified number from developing countries, the number of those who could qualify for pioneer status. These eight are divided into two groups of four each. The first, consists of France, Japan, India and the Soviet Union, including their State enterprises and corporations. The second group of four consists of entities made up of firms (namely, Kennecott Consortium, Ocean Mining Associates, Ocean Management Incorporated and Ocean Minerals Company) having the nationality of or controlled by any one or more of the following : Belgium, Canada, Federal Republic of Germany, Italy, Japan, Netherlands, United Kingdom and United States.

Under this scheme, each investor other than a State would have to be registered with the Preparatory Commission by a "certifying State" which had signed the convention. The pioneers would be confined during the prevention period to exploration and prospecting for polymetallic nodules in an allocated area, commercial exploitation would be excluded before the convention entered into force. Each applicant would receive only one site. Each pioneer would be required to pay $ 2,50,000 fee to the Commission for registration, plus $ 2,50,000 to the Authority when it applied for a plan of work (mining contract). There would be an additional fee of $ 1 million per year from the time the pioneer area was allocated, payable to the Authority when the investor's plan of work was approved. Before applications are submitted, certifying States would have to ensure that claims for particular areas do not overlap. Pioneer investors would be guaranteed entry into the sea-bed mining area under the convention once it enters into force. Only those pioneers certified by States which had ratified the convention would be entitled to have plans of work approved.[170]

The total reserves of nodules have been estimated at 3,000 billion tonnes. Unlike fossil, nodules are renewable and are widely distributed throughout the three major oceans of the world. Multinational Companies have already spent about Rs. 2,400 crores in developing capacity to mine the nodules. The economic potential of the metals found in the nodules is so great that even if ten per cent of estimated deposits turn out to be economic, sufficient supplies of many metals will be available from the sea for thousands of years at our present rate of consumption. India is short of many metals that nodules can provide.

170. U. N. Chronicle, Vol. XIX No. 6 (June 1982) pp. 9-12.

A large part of the demand of copper is met by imports as also more than half of zinc and lead, the entire requirement of nickle, cobalt and vanadium are imported. Nearly 15 laboratories all over the country are participating in the analysis of the nodules. The first haul of nodules from the sea-bed was lifted by Indian research vessel *"R. v. Ganeshani"*, a vessel owned by C.S.I.R. and run by the National Institute of Oceangraphy. Later on three more ships joined the fleet. According to Dr. T. K. S. Murthy, head of the Uranium extraction division, Bhabha Atomic Research Centre, the richest site discovered has a density of 21 kg. of nodules per square metre. Nodules are found at a depth of 3000 to 6000 metres in all oceans of the world. Nodules mining involves massive investment. The estimated cost of processing, transporting and exploring for one million tonnes of nodules per year will be between Rs. 200 and Rs. 800 crores.[171]

As noted above, India has been accorded pioneer status in sea-bed mining. On 26 August 1987, the then Prime Minister of India informed the Lok Sabha that the Preparatory Commission had allocated to India a site (of 1,50,000 square kilometres) in the sea-bed of Central Indian Ocean and that Indian claim has been registered. The General Committee of the Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea took this decision on August 17, 1987.[172]

It may be noted that France, Japan and the Soviet Union became pioneer investors in the International Sea-bed Area on 16 May 1988, joining India. It is indeed a significant step towards putting into practice the 1982 United Nations Convention on the Law of the Sea, by which the Area has been established. The above decision was taken by the Commission in its sixth session held at Kingston during 14 March—8 April 1988. In the resumed sixth session of the Commission held in Newyork from 15 August to 2 September 1988, the Commission held informal consultations on fulfilment of obligations of "pioneer investors" registered under Resolution II of the Third U. N. Conference on the Law of the Sea.

Apart from India, the Pioneer Investors Group now comprises of Japan, France, China and former Soviet Union (now Russia) plus a Consortium of Belgium, Canada, Germany, Italy, the Netherlands, Britain and the U. S.

Preparatory Commission.—Resolution I adopted by the U. N. Conference on the Law of the Sea in its 1982 session deals with the establishment of the Preparatory Commission. It defines powers and functions of the Commission which is to prepare for the establishment of the International Sea-Bed Authority and the International Tribunal for the Law of the Sea. The Commission would begin meeting between 60 and 90 days after 50 States signed or acceded to the convention. It would be financed from United Nations regular budget and serviced by the United Nations Secretariat. It would remain in existence until the end of the first session of the Assembly of the Authority. The Commission would prepare draft rules, regulations and procedures necessary to enable the Authroity to commense its functions, as well as perform the traditional preparatory functions of drafting agendas and a budget. It would also exercise the powers and functions assigned to it in the resolution on the treatment of preparatory sea-bed investments. The first session of the Preparatory Commission was held in Jamaica from 15 March to 8 April, 1983. During its first session the Commission established four special Commissios of equal status with the Plenary. It also established a General Committee consisting of the Chairman and other officers of the Preparatory Commission and of the Sepcial Commissions.

The first part of the second session of the Preparatory Commission was held in Kingston, Jamaica from 9 March to 13 April, 1984. The third session of the Preparatory Commission was held in Jamaica in March-April, 1985. The fourth session was held in Jamaica from 17 March to 11 April, 1986. The sixth session was held in two parts—the first part in Kingston from 14 March to 8 April, 1988 and the second part from 15 August to 2

171. See the Pioneer, dated 12 April, 1986, p. 10.
172. See I.J.I.L., Vol. 28 (1988), pp. 126-151.

September, 1988. The seventh session of the Commission was held in two parts. The first part of the session was held at Kingston from 27th February to 23rd March, 1989. The Commission discussed the matter relating to liabilities of pioneer investors in respect of exploration of Sea-bed. It also considered the matters relating to Land-based producer States, Enterprise, Mining Code and Sea Law Tribunal. The second part or resumed seventh session was held from 14 August, 1989 to 1st September, 1989 at Newyork. In this resumed session the Commission considered duties, training etc., of new pioneer investors. In the eighth session, which was held from 13 to 31st August, 1990, the Commission approved the understanding on the fulfilment of obligation by the Registered Pioneer Investors and their certifying States. The ninth session of the Preparatory Commission was also held in two parts—(i) from 25 February to 22nd March, 1991 at Kingston, and (ii) 12 to 30th August, 1991 at Newyork. In the first part of the session China was welcomed as the fifth new pioneer investor. The tenth session was also held in two parts—(i) 24th February to 13th March, 1992 at Kingston; and (ii) 10th August to 21st August, 1992 at Newyork. In this session, an agreement was reached in respect of the Registration of exploitation of minerals from Sea-bed.

The eleventh session of the Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea was held at Kingstom from 22 March to 2nd April, 1993. In this session the Commission stressed the need for a framework agreement to deal with "hard core" issues that have so far eluded resolution. The "hard core" issues mainly involve provisions of Part XI of the United Nations Convention on the Law of the Sea which deal with mining of the Sea-bed in area outside the jurisdiction or sovereignty of States. The Commission also decided not to hold any more meetings in 1993. Instead, it decided to make provisions every year for a two-week annual session, until the entry into force of the Convention.[173]

The Preparatory Commission concluded its last session on 12th August, 1994 ending 12 years of work. In its final report, the Commission recommended approval of a $2.5 million expenditure to establish and operate the International Seabed Authority, starting on 16th November, 1994. The Authority is to be headed by a Secretary-General who started work on 1st June, 1995. The Commission also approved the registration of the Republic of Korea as a pioneer investor and waived the $1million annual fee provided for in the convention for the pioneer investors.[174]

Provisional Understanding Regarding Sea-Bed Matters.—As referred in the beginning, on 3rd August, 1984, eight developed countries, namely, Belgium, France, Federal Republic of Germany, Italy, Japan, Netherlands, the U. K. and the U.S.A. entered into a Provisional Understanding Regarding Sea-bed Matters. It aims to resolve conflicts arising out of possible overlapping in the areas claimed by pioneer investors. It provides that no party shall issue an autorization in respect of such areas. Further without such authorization or registration, no party shall itself engage in deep sea-bed operations. It also provides that no party shall authorize, or itself engage in, exploitation of the hard mineral resources of the deep sea-bed before 1 January, 1988. Thus eight developed countries established some form of a 'Mini Treaty' to facilitate the exploitation of deep sea-bed resources in terms of unilateral legislation.[175] As indicated earlier, such a Treaty will be void in view of Article 137 (3) and the Declaration adopted by the Preparatory Commission on 30 August, 1985.

It is significant to note that Article 15 of the Provisional Understanding provides that the agreement is without prejudice to, nor does it affect, the position of the parties, or any obligations assumed by any of the Parties, in repect of the U. N. Convention on the Law of the Sea. It may be noted here that France, Japan, Belgium and Italy have signed the 1982 Convention on the Law of the Sea. Thus half of the States Parties to the Provisional Understanding have signed the Convention. Federal Republic of Germany has given an

173. U. N. Chronicle, Vol. XXX. No. 2 (June 1993), p. 71.
174. U.N. Chronicle, Vol. XXXI, No. 4 (December 1994), p. 42.
175. See Bhimsen Rao, "Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea", I.J.I.L., Vol 25 (1985) p. 226 at p. 234.

indication that it may also join the Convention if the Preparatory Commission could accommodate its deep sea-bed mining interests under the pioneer investors.[176] The position of U. K. is, though not as good, nearly same. It has been pointed out :

> "What has been called 'the convoluted compromise' over prospective community participation will certainly be widely interpreted as an attempt of the Federal Republic of Germany and the U. K. to secure eventually a form of limited accession with major accession.[177] If such a trend continues, the U. S. may be left alone in the field. It may therefore, be hoped that it will not be long before the U. S. also joins the U. N. Convention on the Law of the Sea, 1982." [178]

The world consesus will ultimately triumph and the 1982 Convention will provide an effective legal regime over nearly 70 per cent of the surface of our globe. Thus the Provisional Understanding between eight Developed Countries, rather I will prefer to call it 'Provisional Misunderstanding' will be null and void because of the 1982 Convention which is backed by world Consensus.

Thus, one major difficulty which has stood in the way of the treaty's universal acceptance was that the majority of the industrialized States are opposed to provisions governing the International regime for deep Sea-bed mining. As remarked by U. N. Secretary-General, Boutros-Boutros Ghali, a comprehensive solution would have to safeguard the principle of the common heritage of mankind. He added that it was the U. N.'s duty to ensure that the Convention "enters fully into force at last and really becomes the corner stone of tomorrow's international maritime law."[179]

Agreement Relating to the Implementation of Part XI of the convention (28 July 1994).

With a view to overcome the objections of the industrial states, the U.N. Secretary-General undertook informal consultations with all interested parties, lasting nearly four years. As a result, the General Assembly adopted on 28 July 1994 the Agreement Relating to the Implementation of Part XI, thus removing the obstacle that stood in the way of universal participation of states to the U.N. Convention on the Law of the Sea, 1982. The General Assembly adopted this resolution (48/263) by a vote of 121 to none, with 7 abstentions.

XIII. PROTECTION AND PRESERVATION OF MARINE ENVIRONMENT

One of the main achievements of the Third U. N. Conference on the Law of the Sea is to adopt generally agreed provisions relating to protection and preservation of the marine environment. These provisions which will govern nearly three-fourth of the surface of the earth are contained in Part XII of the 1982 Convention on the Law of the Sea. In view of the increasing realization of the environment in general and that of marine environment in particular, these provisions are very important, nay, must for the survival of mankind.

The Convention provides that States have the obligation to protect and preserve the marine environment.[180] States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.[181] The Convention imposes duty on States, individually or jointly as appropriate, to take measures to prevent, reduce, and control pollution of the

176. Ibid,at p. 244.
177. K. R. Simmonds. "The Status of the United Nations Convention on the Law of the Sea" I.C.L.Q., Vol. 34, p. 359 at p. 368.
178. See also R. P. Anand, "U. N. Convention on the Law of the Sea and the United Sates", I.J.I.L., Vol. 24 (1984) p. 153 at pp. 198-199.
179. U. N. Chronicle, Vol. XXX No. 2 (June, 1993) p. 71.
180. Article 192
181. Article 193.

marine environment.[182] States shall co-operate on a global basis and, as appropriate on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional centres.

The Convention provides for detailed International rules and national legislation to prevent, reduce and control pollution from land based sources.[183] sea-bed activities subject to national jurisdiction,[184] activities in the area[185] by dumping,[186] vessels[187] from or through the atmosphere.[188] States are responsible for the fulfilment of their international obligations, concerning the protection and preservation of the marine environment. They shall be liable in accordance with International law.[189]

XIV. MARINE SCIENTIFIC RESEARCH

Part XIV of the Convention deals with marine scientific research.[190] According to the Convention, all States and competent International organizations have the right to conduct marine scientific research subject to the rights and duties of other States as provided under the Convention.[191] States and competent international organizations have been enjoined to promote and facilitate the development and conduct of marine sientific research in accordance with the Convention.[192] The Convention lays down general principles for the conduct of marine scientific research.[193] Detailed provisions relating to conduct and promotion of marine scientific research.[194] Scientific research installations or equipment in the marine environment,[195] responsibility and liability[196] and settlement of Disputes and Interim Measures[197] have been made.

XV. SETTLEMENT OF DISPUTES

Since the Convention on the Law of the Sea would have been incomplete without provisions relating to Settlement of Disputes, Part XV of the Convention is devoted to such provisions. These provisions may broadly be divided into two parts—(i) General Provisions, and (ii) Compulsory Procedures Entailing Binding Decisions.

As regards the General Provisions, Art. 279 imposes obligation upon State Parties to settle disputes by peaceful means. According to Article 280, State Parties may agree to settle a dispute concerning the interpretation or application of the Convention by any peaceful means of their own choice. The Convention also provides for procedure where no settlement has been reached by the Parties.[198] Provisions relating to obligation to exchange views[199] and conciliation[200] have also been made.

As regards Compulsory Procedures Entailing Binding Decisions, the Convention has made "a significant departure from the traditional principle of International law under which

182. Article 194. See also Articles 195 and 196.
183. Article 207.
184. Article 208.
185. Article 209.
186. Article 210.
187. Article 211.
188. Article 212.
189. Article 235.
190. See Articles 238-278.
191. Article 238.
192. Article 239
193. Article 240.
194. See Articles 245 to 257
195. See Articles 258 to 262.
196. Article 263.
197. Article 264 and 265.
198. Article 281.
199. Article 283
200. Article 284.

a State has the sovereign right to refuse to submit a dispute to an independent body."[201] Article 286 of the Convention provides that any dispute concerning the interpretation or application of the Convention *shall*, where no settlement has been reached by recourse to Section 1 (*i.e.*, provisions referred above), be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction. This is however, subject to certain limitations contained in Section 3 comprising of Articles 297, 298 and 299. As regards choice of procedure, Article 287 (1) provides that when signing, ratifying or acceding to this 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;

N.B.—The International Tribunal for the Law of Sea referred to in Article 287 was finally established on 21 October, 1996. This has been discussed in detail in the next chapter, *i.e.* Chapter 20.

(b) the International Court of Justice;

(c) an arbitral tribunal constituted in accordance with Annex. VII;

(d) a special arbitral tribunal constituted in accordance with Annex. VIII for one or more of the categories of disputes specified therein.

Further, a declaration made under the above provision 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, Section 5.[202]

Article 288 which deals with the jurisdiction of a court or tribunal referred to in Article 287 also provides that in the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.[203] As regards applicable law, Article 293 provides the following :

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.

Lastly, Article 296, provides that any decision rendered by a court or tribunal having jurisdiction under Section 2 shall be *final and shall be complied with by all the parties to the dispute.* But any such decision shall have no binding force except between the parties and in respect of that particular dispute. Article 297 is on the lines of Articles 59 and 60 of the Statute of the International Court of Justice and combines both these articles. Article 296 is however, conspicuous by its silence in respect of the power of the court or tribunal to construe its judgment at the request of any party in the event of dispute as to the meaning or scope of the judgment.

Nevertheless, "the New Convention contains a number of innovative and very significant provisions involving the settlement of international disputes. While the provisions are limited only to disputes arising from the Convention on the Law of the Sea, they can be considered as a significant break through for the peaceful settlement of international disputes with more effective and binding effect."[204] To achieve the desired effect, these provisions should be fully implemented.

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201. Jorge R. Coquia, "Settlement of Disputes in the U. N. Convention on the Law of the Sea",I.J.I.L., Vol. 25 (1985) p. 171 at p. 190.
202. Article 287 (2).
203. Article 288 (4).
204. Jorge R. Coquia, note 193 p. 171.

Prompt Release of vessels and crews

Article 292 of the U.N. Convention on the Law of Sea, 1982 deals with the prompt release of vessels and crews. It provide the following :

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and if it is alleged that the detaining state has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties, or failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining state under Article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

2. The application for release may be made only by or on behalf of the flag state of the vessel.

3. The court or tribunal shall deal without delay the application for release and *shall deal only with the question of release,* without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining state remain competent to release the vessel or its crew at any time.

4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining state shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

The above provisions were invoked by Saint Vincent and the grenadines against Guinea in *The M/v. Saiga case* which was decided by the International Tribunal for the Law of the Sea on 4th December, 1997. The facts this case are as follows :

On 13 November, 1997, the Agent of Saint Vincent and the Grenadines filed in the Registry of the Tribunal an application under Article 292 of the United Nations Convention on the Law of the Sea instituting proceedings against Guinea in respect of a dispute concerning the prompt release of M/v. "Saiga" and its crew. According to Saint Vincent and the Grenadines M/v. "Saiga" did not enter the territorial waters of Guinea. While the ship was drifting in the exclusive economic zone of Sierra Leone it was attacked by two customs patrol boats of Guinea. It was alleged that the Guinean authorities had no jurisdiction to take such action. At the time of the incident, the M/v. "Saiga" served as a bunkering vessel supplying fuel oil to the fishing vessel and other vessels operating off the coast of Guinea. In the early morning of 27 October, 1997, the M/v. "Saiga" having crossed the maritime bounder between Guinea and Guinea Bissau, entered the exclusive zone of Gunea approximately 32 nautical miles from the Guinean island of Alcatraz. On 28th October, 1997, the M/v. "Saiga" was arrested by Guinean customs patrol boats. The arrest look place at a point south of the maritime boundary of the exclusive economic zone of guinea. In the course of action, at least two crew members were injured on the same day the vessel was brought into Conakry where the vessel and its crew were detained. Subsequently, the two injured crew members were allowed to leave and the cargo was discharged in Conakry upon the orders of local authorities. No bond or other financial security was requested by Guinean authorities for the release of the vessel and its crew or offered by Saint Vincent and the Grenadines.

Guinea contended that the Application had not been submitted in conformity with Article 110 of the Rules of the Tribunal and Article 292 of the Convention on the Law of the Sea was not applicable to the case. Guinea further stated that M/v. "Saiga" was involved in smuggling, an offence under the customs Code of Guinea and that the detention had taken place after the exercise by Guinea of the right of hot pursuit in accordance with Article 111 of the convention.

Before proceeding with the facts, the Tribunal held that it has jurisdiction.

While relying upon Article 292 of the Convention Saint Vincent and the Grenadines also refered to Articles 73, 220 and 226. Guinea, on the other hand, urged that reference

made by Saint Vincent and Grenadines to Article 73[205] of the Convention is unfounded because a bond has been posted and Article 292 is not applicable to the case which, in its opinion concerns smuggling. Guinea further stated that the arrest of the M/v Saiga was in conformity with International Law and its release cannot be claimed on the basis of Article 292 of the Convention. According to Guinea : (a) the bunkering must be qualified its an infringement of its customs legislation; (b) the bunkering took place in its contiguous zone (less than 24 nautical miles from the island of Alcatraz); and (c) the arrest was justified because it was effected following the exercise of the right of hot pursuit according to Article 111 of the Convention.

Before proceeding to decide substantive issues, the Tribunal observed that it is not called upon to determine whether true detention of the M/v "Saiga" was legitimate. It was called upon to determine whether the detention consequent to the arrest is in violation of a provision of the Convention "for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security".

From the pleadings and documents submitted by Guinea there also emerged inductions that the violation of which the M/v Saiga was accused was seen as the violation concerning its rights in the exclusive economic zone while discussing the applicability of Article 73 to the present dispute, the Tribunal observed that in the light of the independent character of the proceedings for the prompt release of vessels and crews, when adopting its classification of the laws of the detaining state, the Tribunal is not bound by the classification given by such state. The Tribunal can, on the basis of the arguments made, conclude that, for the purposes of the present proceedings, the action of Guinea can be seen within the framework of Article 73. The Tribunal then proceeded to consider the submission of Guinea that Article 73 of the Convention cannot form a basis for the application because a bond or other security has not been offered, or posted.

The Tribunal pointed out that in the case under consideration Guinea has not notified the detention as provided for in Article 73, paragraph 4, of the convention. Guinea has refused to discuss the question of bond and the ten day time-limit relevant for the application for prompt release has elapsed without the indication of willingness to consider the question. The Tribunal, therefore, observed that in the circumstances, it does not seem possible to the Tribunal to hold that Saint Vincent and the Grenadines responsible for the fact that a bond has not been posted. The Tribunal further held that taking into consideration the commercial value of the gasoil discharged and the difficulties that be incurred in restoring the gasoil to the holds of the *M/v "Saiga"*, it is reasonable that the discharged oil shall be considered as a security to be held and as case may be, returned by Guinea, in kind or in its equivalent in United States dollars at the time of judgement.

After having unanimously decided that the Tribunal has jurisdiction under Article 292 of the United Nations Convention on the Law of the Sea to entertain the Application filed by Saint Vincent and the Grenadines on 13th November, 1997, the Tribunal decided the following by 12 votes to 9 :

(i) that the Application is admissible.

(ii) that Guinea shall promptly release the *M/v. Saiga* and its crew from detention.

(iii) that the release shall be upon the posting of a reasonable bond or security; and

(iv) that the security shall consist of : (1) the amount of gasoil discharged from the *M/v. Saiga;* (2) the amount of 400,000 United States dollars, to be posted in the form of a letter of credit or bank guarantee, or, if agreed by the parties, in any other form.

Subsequently on 22nd December, 1997 Saint Vincent and Grenadines instituted proceedings for provisional measures in accordance with Annex. VII of the Convention in respect of the dispute concerning the *M/v. Saiga.* In this case *i.e.* the *M/v "Saiga" No. 2*

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205. ' For the provisions of Article 73, see matter earlier discussed under Exclusive Economic Zone.

(*Saint Vincent and the Grenadines* v. *Guinea*), the Tribunal gave its orders on 11th March, 1998 on 13th January, 1998, Saint Vincent and the Grenadines filed with the Registry of the Tribunal a request for the prescription of provisional measures in Convention with the arrest by Guinean authorities of a vessel, the *M/v Saiga,* flying the flag of Saint Vincent and the Grenadines on 20th February, 1998 the Tribunal was informed that the Government of Guinea and the Government of Saint Vincent and the Grenadiners had agreed to transfer to the Tribunal the arbitration proceedings instituted by Saint Vincent and the Grenadines. The Tribunal was also informed by the parties that the *M/v Saiga,* its Master and crew had been released in execution of the Tribunal's judgement of 4th December, 1997. The Tribunal unanimously prescribed the following provisional measure under Article 290, paragraph 1, of the Convention :

"Guinea shall refrain from taking or enforcing any judicial or administrative measure against the *M/v Saiga,* its Master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel on 28th October, 1997 and to the subsequent prosecution and conviction of the Master."

Further, the Tribunal unanimously recommended "that Saint Vincent and the Grenadines and Guinea endeavour to find an arrangement to be applied pending the final decision and to this end the two states should ensure that no action is taken by their respective authorities or vessel flying flag which might aggravate or extend the dispute submitted to the Tribunal."

The U.N. Convention on the Law of the Sea, 1982 has already entered into force. By 31 January, 1995, it had been ratified, acceded or succeeded by 72 states. As pointed out by U.N. Secretary-General Boutros Boutros Ghali, addressing the first meeting of the Assembly of the International Seabed Authority on 16th November, 1994, the entry into force of the U.N. Convention on the Law of the Sea has turned the dream of a comprehensive law for the oceans into a reality and is one of the greatest achievements of this century.[206]

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206. U.N. Chronicle, Vol. XXXII, No. 1, (March, 1995), p. 8.