CHAPTER 31

THE LEAGUE OF NATIONS

Origin.—As aptly pointed out by Philip Noel Baker, "The League of Nations is the first attempt in history to furnish the international society of nations with a permanent and organic system of International Political Institution. This attempt was an outcome of the "world war." The devastating effects of the first world war compelled all right-thinking men of the world to make endeavours to establish an International Organisation which might be able to establish peace and security in the world. During the First World War certain committees relating to shipping, raw materials, food materials, fuel, etc., were formed by the allied nations. The successful working of these committees encouraged the concept of international co-operation among the states. The League of Nations is often termed as 'A Child of War'. Although to a great extent this statement is correct, yet the nature of the Covenant of the League of Nations was to some extent, influenced by certain movements which had already started before the war. The first of such movements began with the Concert of Europe. The Concert of Europe was in itself the product of long and continuous development of international organisation. The framers of the Covenant of League of Nations found the Concert of Europe as a model for establishing League Council on more or less similar lines. The second of such movement was precipitated by Hague Conferences of 1899 and 1907. The framers of the Covenant found these Conferences as a model for the League Assembly. It was their conviction that League Assembly could further develop its legislative functions or to put it more precisely the developments of legislative functions was further possible by the Assembly of League of Nations. The third movement appeared in the form of administrative and technical unions. Universal Postal Union is a glaring example of such unions. These movements or tendencies which had been developing for some time back before the start of the First World War, greatly influenced the nature of the League of Nations.

Although the desire for the establishment of an effective international organisation had been expressed long before the First World War, yet it took the real form in the treaty of Versailles, 1919. During the War, a lot of propaganda was going on in Europe and America in official as well as unofficial fields to establish an effective International Organisation. Many proposals were being put forward in this connection. By the end of the First World War, the Statesmen of the World had finally decided to establish the League of Nations. Although their ideas were uptil now not clear yet they were at least definite about their desire to establish an organisation which might prevent further war and save the people of the world from the scourge and devastating effects of wars. In 1918 Lloyed George, the Prime Minister of Britain in one of his important speeches said, "We must seek by the creation of some international organisation to limit the burden of armaments and diminish the probability of war." Robert Cecil, after assuming the office of Minister proposed the formation of a Committee to prepare draft for establishing mutual co-operation among the nations and to maintain peace in the world. This proposal was accepted and a committee was formed under Chairmanship of Lord Phillimore.

Similarly, the French Government also established a Committee to study the plan for the establishment of League of Nations. The report of this Committee was much more clear and certain than that of Phillimore Committee. In the meantime, a significant event took place in America. On January 8, 1918, President Wilson of America put forward his famous 14-point programme for the establishment of League of Nations. This 14-point programme included the proposals for the establishment of a conference of the representatives of the Great Powers, a permanent Secretariat, Disarmament, Compulsory Arbitration and for military action against the members resorting to war and violating provisions of the proposed League of Nations. President Wilson gave an impetus and encouragement for

the establishment of League of Nations. It would not be wrong to contend that much of the credit for the establishment of League of Nations goes to President Wilson.

By the end of 1918, Lord Robert Cecil had prepared a draft which was known as 'Cecil Draft.' In December 1918 General Smutts also put forward his proposals for the establishment of League of Nations. His proposals included the establishment of a General Conference, Council and Arbitration Court. Thereafter, the President of America also put forward his second and third drafts for the same purpose. An official British draft was also prepared for the purpose. Ultimately the American and British proposals were compiled in joint draft known as 'Hirst-Millar Draft.' This joint draft was presented before the League of Nations Commission of the Peace Conference. On April 21, 1919, the Peace Conference accepted the draft which was given the final shape by the Commission and thus the Covenant of the League of Nations was adopted. It is significant to note that the Covenant was kept as a part of the Treaty of Versailles, 1919. Thus finally the League of Nations was established on January 10, 1920.

Principal Organs of the League of Nations.—Following were the principal Organs of the League of Nations .

(1) *Assembly.*—All members of the League of Nations were represented in the Assembly. Each member could send its three representatives in the Assembly, although each member was entitled to have only one vote. Sir A. E. Zimmern has rightly remarked : "The Assembly was 'not a Parliament' of any other organ of a system of world government. It is simply the first outward and visible manifestation of the authority of the Rule of Law in the world." It may, however, be noted that one defect of the Covenant of the League of Nations was that the functions of the Assembly and the Council were not properly and specifically demarcated. However, they were certain functions which were exclusively performed by the Assembly. For example, it admitted new members by two-thirds majority, nominated the non-permanent members of the Council and approved or ratified the appointment of the Secretary-General.

(2) *Council.*—The principal allied and associated powers were the members of the Council. That is to say, America, Britain, France, Italy and Japan were the permanent members of the Council. Besides this, four other members were elected by the League Assembly. It was, however, unfortunate and certainly detrimental for the future of League of Nations that America could never join it although President Wilson inspired and encouraged the establishment of League of Nations. Therefore, the place of America was filled by a smaller State which was elected by the Assembly. As noted earlier, the functions of the Council and the Assembly were not clearly demarcated, the Council performed functions along with the Assembly, but there were certain functions which were exclusively performed by the Council. These functions included the nomination of additional members of the Council, preparation of plans for reduction of armaments, to advise the members in regard to the defence and external aggression and for maintaining territorial integrity of the members.

(3) *The Secretariat.*—Although neither the idea of International Secretariat nor the concept of international civil service was entirely new, yet the League of Nations deserves credit for establishing an international civil service in the real sense of the term and it was a League experiment which was further developed and perfected by the United Nations. The Secretariat of the League of Nations comprised of 600 officers and subordinate officials. It was headed by the Secretary-General who was appointed by the unanimous decision of the Council.

Withdrawal of Membership.—[*N. B.* For this please see matter discussed under the heading 'Is withdrawal of a member State from the U. N. possible ?" under the Chapter "Origin, Purposes, Principles, Membership, etc., of the U. N."]

Functions of League of Nations.—The League of Nations performed following main functions : (1) The "Reduction of National Armaments to the lowest point consistent with national safety." (Article 8). (2) To 'preserve as against external aggression, the territorial integrity and existing political independence of all members of the League.' (Article 10). (3) The third important function performed by the League of

Natics was to settle international disputes peacefully. (Articles 12 and 16). (4) Yet another important function of the League of Nations was to bring about peaceful change in international relations. (5) Last but probably the most important function performed by the Leage of Nations was to maintain international peace and security. Thus "The Covenant of th League of Nations was a multilateral treaty.....with two-fold objectives of preserving international peace and security and promoting international co-operation." [1]

Weakness and defects of the League of Nations.—Following were the maindefects and weaknesses of the Covenant of the League of Nations :

(1) One of the main defects of the Covenant of the League of Nations was that all the decisions of the Council were taken unanimously. Since the nations were divided among grops, it was not possible to decide many matters by unanimous decisions. Thus the unaimity principle which was incorporated to improve the efficiency of the working of the Leaue of Nations proved to be detrimental and obstructed its day-to-day working.

(2) Yet another important defect of the League of Nations was that it did not completely prohibit war. The Covenant of the League of Nations permitted member-States to nsort to war under certain circumstances. The Covenant provided that at the first instance members were under obligation to settle their international disputes through arbitation, judicial settlement or enquiry by Council. But if the problem was not resolved throtgh these means they could go to war after the lapse of 3 months. That is to say, the main restriction imposed by the Covenant was that after the failure of the settlement of disputes through the above means, the nations had to wait for three months before resoring to war. That is to say, war was not completely prohibited. Jurists have, therefore, rightly remarked that this was the main constitutional defect of the Covenant.

(3) Although President Wilson of America contributed much for the establishment of League of Nations, yet it was unfortunate that America could never become its member. The obvious reason for this was that the Covenant of the League of Nations was a multilateral international treaty, and, therefore, before America become its member, it was necessary (in accordance with the provisions of American Constitution) that the consent or ratification of American Senate should have been obtained. The American Senate never ratified and, therefore, America could never become the member of the League of Nations.

(4) Yet another defect of the League of Nations was in regard to the constitutional provisions for the amendment of the covenant. It provided that if any amendment of the Covenant was not acceptable to any State, then it would mean that, that member ceased to be a member of the League of Nations. This provision proved to be fatal because in the course of time a number of States ceased to be members of the League of Nations.

(5) The League of Nations also provided for the withdrawal of the members. The members could withdraw from the League of Nations by giving a two-years' notice. This provision also proved to be detrimental. In the beginning the League of Nations had as many as 62 members which in the course of time were reduced to only 32. It was perhaps for this reason that in San Francisco Conference in 1945 when the matters relating to withdrawal of the States from the United Nations was being debated, majority of the members wanted that there should be no provision for the withdrawal of members. It was on account of this reason that the Charter of the United Nations contains no provision regarding withdrawal of members from the Organisation.

(6) The Council of League of Nations did not have the capacity to settle the international dispute peacefully.

(7) The League of Nations was also not capable to prevent great powers from attacking and exploiting smaller States.

(8) The League of Nations could not be termed as a universal International Organisation. In the beginning it had 62 members which were later on reduced to 32 members.

(9) It was based on the policy of discrimination between great powers and small States.

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1. Stephen S. Goodspeed, The Nature and Functions of International Organisation, p. 33.

(10) Yet another cause for the failure of the League of Nations was that the great powers always considered their selfish interest over and above all things. As remarked by P. B. Potter, "The ultimate culprits in the failure of the League of Nations were the member-States. It was not the League of Nations but the Nations of the League which failed, insofar as there was failure."

(11) Last but not the least one of the main defects of the League of Nations was that it failed, and failed miserably, to perform its main and primary function of establishing peace in the world.

Factors and Events leading to the Dissolution.—In addition to the above defects and weaknesses of the League of Nations, certain events which took place, also led to the decline and ultimate dissolution of the League of Nations. Following are some of such main events :

(1) In 1923, Italy attacked an Island named Corfu belonging to Greece. Greece raised this matter in the League of Nations. The League of Nations, instead of providing any assistance to Greece to resist the Italian invasion, gave its advice in favour of Italy.

(2) In 1931, Japan attacked and conquered Manchuria. The League of Nations failed to take any effective action in this connection.

(3) One of the important functions of the League of Nations was, as noted ealier, the reduction of national armaments to the lowest point consistent with national safety. It was, therefore, under the auspices of the League of Naions that Disarmament Conference was held in 1932. It was a landmark event insofar as the holding of such a Conference was concerned, but no targible success could be achieved and this also proved to be detrimental for the existence of the League of Nations.

(4) In 1935 Italy attacked Ethopia. The League of Nations could not take any action against Italy.

(5) In 1939 Russia invaded Finland. In this case also the League of Nations remained simply as a spectator and failed to take any action at all.

Conclusion.—It is clear from the above mentioned defects and weaknesses of the League of Nations that it was a weak International Organisation and could not maintain or establish International peace and security. Despite this, it could not but be admitted that the League of Nations ultimately failed not because of the constitutional defects of its Covenant, but because of the members who failed to fulfil the obligations assumed by them under the Covenant. Professor Goodspeed has rightly remarked : "The League of Nations was abandoned by those who failed to abide by their solemn obligations." In April 1946, the League of Nations was ultimately dissolved by a resolution of the Assembly. Fortunately, due to the untiring efforts of the Statesmen of the World, United Nations Organisation was established in 1945. The United Nations Organisation which succeeded the League of Nations not only took the place of the League of Nations, but proved to be a much more effective and successful Organisation. According to Goodspeed, "The League of Nations pioneered in practically all aspects of International Organisation. Undoubtedly one of the novel innovations was the adoption for the first time of a truly International Civil Service." [2]

Although it is not correct to say that the League of Nations pioneered in all aspects of international organisation because as noted in earlier chapter it was indebted to the developments in the field of international organisation which has preceded it yet it cannot but be admitted that it made the first important attempt to establish a general and comprehensive-global international organisation. The experiment made by the League of Nations was further developed and perfected by the United Nations.

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2. Ibid., at p. 364; see also Percy E. Corbett, The Growth of World Law (1971), p. 86.

CHAPTER 32

ORIGIN, PURPOSES, PRINCIPLES, MEMBERSHIP, ETC., OF THE UNITED NATIONS

Factors and events leading to the establishment of the United Nations.*

The twentieth century witnessed the two devastating World Wars. The League of Nations was established after the First World War and was, therefore, often called the Child of War. The main function and objective of the League of Nations was to establish peace and security in the world. The League of Nations failed to achieve its objective. The causes of the failure of the League of Nations have already been discussed in detail in earlier Chapter. It is sufficient to note here that the Second World War was the ample proof of the utter failure of the League of Nations to establish peace in the world. The Second World War compelled the nations of the world to endeavour to establish an International Organisation so that mutual disputes could be resolved peacefully and that peace and security could be established in the world. Consequently, even when war was going on, the Great Powers of the world had started making their efforts in this direction. Their untiring efforts led to the holding of the Sanfrancisco Conference on January 26, 1945, wherein the United Nations Charter was adopted and signed by 51 nations of the world.[1] However, the United Nations Charter did not come into force immediately because it was necessary to have been ratified by the prescribed number of nations. This requirement was fulfilled on October 24, 1945, and consequently on October 24, 1945, the United Nations was ultimately established. 24 October every year is therefore celebrated as United Nations Day.

As pointed out earlier the nations of the world had started making efforts even during the war to establish an International Organisation. A brief discussion of the endeavours and events which led to the establishment of the United Nations will not be out of place here. A brief discussion of such events and efforts is being made below :

(*1*) *The Declaration of St James Palace* (*June 12, 1941*).—By June 1941, London had become the home of nine exiled governments. The representatives of the exiled governments of Greece, Belgium, Czechoslovakia, Luxemburg, Netherlands, Norway, Poland and Yugoslavia, the representatives of Britain, Canada, Australia, New Zealand and South Africa and Gen De Gualle of France assembled at James' Palace London. They signed a declaration on June 12, 1941, wherein they expressed their desire to establish peace.

(*2*) *The Atlantic Charter.*—After the declaration of St. James' Palace, the next important event was the adoption of Atlantic Charter of August 14, 1941. This was in fact the meeting of the two Great Statesmen of the World—Winston Churchill, the Prime Minister of Britain and President Franklin Roosevelt of America. These two statesmen met in a ship in the Atlantic Ocean. That is why, the agreement entered into by them is called the Atlantic Charter. In this Charter they undertook to make joint efforts to end Nazism and expressed their faith in the principles of equality of nations, universal peace, collective co-operation, and prohibition of acquiring territories through conquest.

(*3*) *The United Nations Declaration* (*January, 1, 1942*).—The next important event was the United Nations Declaration signed by President Roosevelt of America, Winston Churchill of Britain, Maxim Litvinov of Russia and T.V. Soong of China on January 1, 1942.

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* See also for I.A.S. (1973), Q. No. 9 ; I.A.S. (1969), Q. No. 10.

1. As pointed out by P. E. Corbett : "The world has been pledged by solemn treaties for half a century to creation of an organized world community. When the first sustained effort to create such an organizaed World Community foundered with the collapse of the League of Nations, the pledges of Covenant were solemnly renewed in the Charter of the United Nations." Social Justice in the Law of Nations the I.L.O. Impact After Fifty Years. (Hersch Lauterpacht Lectures, (1969), p. 1.

Subsequently, the representatives of 20 other States also signed this declaration. In this declaration States pledged to render co-operation to each other and undertook the obligation that they would not enter into any agreement or armistice, agreement or treaty separately with the enemy. This declaration is very important because in this declaration, for the first time, the words "United Nations" were used.

(*4*) *Moscow Declaration* (*October 30, 1943*).—On October 30, 1943, the representatives of Britain, America, Russia and China assembled at Moscow and signed a Declaration known as "Moscow Declaration." In this declaration they undertook to take joint action against the enemy. Yet another important thing in the declaration was that signatories of the declaration emphasised the urgent need of the establishment of World Organisation which should be based on the principle of equality of nations, should be open for all the States of the world and should be able to maintain international peace and security.

(*5*) *The Tehran Conference* (*December 1, 1943*).—The next important event was holding of Tehran Conference on December 1, 1943, wherein Churchill, Roosevelt and Stalin signed a declaration which further emphasised the urgent need of the establishment of an International Organisation which should be capable of maintaining international peace and security.

(*6*) *Dumbarton Oaks Conference* (*1944*).—The Dumbarton Oaks Conference occupies very important place so far as the establishment of the United Nations is concerned. This Conference took place in two phases. In the first phase the representatives of Russia, Britain and America took part in the Conference. In the second phase, China, Britain and America took part in the Conference. This Conference occupies a significant place because in this Conference all the matters relating to the composition, functions, principal organs; etc., of the proposed, organisation to be established were discussed in detail. Moreover, Britain, China, Russia and America finally gave their approval that the proposed Organisation should be named. "The United Nations." After prolonged discussions, there was agreement on a number of points and these were referred as "The Dumbarton Oaks Proposals." These proposals formed the basis of the Charter of the United Nations representated the principal views of the participants. It was agreed that the primary function of the Organization would be to maintain international peace and security. The Organization was to be based on sovereign equality of all peace-loving States. It was also agreed that organs of the Organization would include a General Assembly, comprising of all the member States, a Security Council, entrusted with the primary responsibility to maintain international peace and security, an Economic and Social Council, a Secretariat and a Court. It may, however, be noted here that there were still important questions which remained unsolved and were to be resolved in later negotiations. For example, it was yet to be decided as to whether the Permanent Court of International Justice was to be continued or there should be a new court. So was the question of initial membership of the Organization because the Soviet Union wanted all the sixteen Soviet Republics to be included as full fledged original members. Last but not the least, it was also to be decided as to what will replace the mandate system of the League of Nations. All these questions were finally resolved at the Sanfrancisco Conference.

(*7*) *The Yalta Conference* (*February 11, 1945*).—The next important conference that took place is known as Yalta Conference. In this Conference besides the Foreign Ministers and Military Heads of Britain, America and Russia, Churchill from Britain, Roosevelt from America and Stalin from Russia, also participated. This Conference occupies an important place because it gave final shape to the proposed world Organisation. It also resolved certain matters which were left unsettled in the Dumbarton Oaks Conference. It was also decided in this Conference that for the preparation of the Charter of the United Nations, the next Conference would be held on April 25, 1945.

(*8*) *Sanfrancisco Conference.*—Sanfrancisco Conference was held on June 25, 1945. It was attended by a large number of States and was presided over by Lord Halifax. In this Conference, the U. N. Charter was voted and was ultimately unanimously adopted. As noted earlier, the Charter did not come into force immediately after its adoption. It was

provided that the Charter would come into force only when China, France, Britain, America and Russia signed and ratified it and the majority of the other States also signed and ratified it. This requirement was completed on October 24, 1945, and consequently the Charter of the United Nations came into force from that date. Sanfrancisco Conference was attended by 51 States. These 51 States were original members of the United Nations. The membership of the United Nations has since then been more than trebled and at present the United Nations has as many as 189 members. Thus we may say that the United Nations has now achieved near universality. As compared to the League of Nations it would not be wrong to say that the United Nations is an universal International Organisation in the real sense of term.

Preamble of the United Nations Charter.—[For text of the Preamble see Appendix I].

The Preamble indicates that the Charter of the U. N. is born as a result of the experiences of a devastating war and that it holds out hope for a lasting peace based on recognition of fundamental human rights which have been the casualties of war, on a recognition of sovereign equality of all States and on better economic and social conditions for the millions who have been victims of oppression and exploitation.[2] It is significant to note that as compared to the words, "The High contracting parties" used in the covenant of the League of Nations the Charter uses the words "We the peoples of the United Nations." It is pointed out, and rightly too, that it is not by accident that these words occur in the Preamble. It is up to the staesmen and the people they represent to make a success of the United Nations.[3] In the view of Schuman, the use of these words in the Charter is misleading because "those who drafted it spoke for governments, not peoples and established not a federation of peoples, but a league of States. Fulfilment of the hopes of its founders required continuing co-operation among great powers. With the advent of 'cold war' these hopes faded.[4] The preamble itself later on uses the words "our respective governments". "But it must be conceded that there is a vast difference between the attitudes and concepts of the Covenant and the Charter about individuals. While emphasis and prominence have been given to the 'High Contracting Parties' in the covenant, the Charter has given a place of significance to human rights and fundamental freedoms. Moreover it has also been rightly pointed out whatever might be the interpretation given to the Preamble, it has to be admitted that the teeming millions all over the world opined for a world Organisation which would ensure peace and security and that the Charter reflects the prevailing mood of mankind in spite of many failures and frustrations which the Organization suffered from time to time." [5]

Legal Character of the United Nations.—Ordinarily, the United Nations is considered to be an association or organisation of States. But it should be noted here that the United Nations also has a distinct legal personality of its own apart from those of its members. It has its Headquarter and officials. According to Article 104 of the Charter, the Organisation shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purpose. Article 105 further provides that the Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes. Similarly, representatives of members of the United Nations and officials of the Organization shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization. Thus the United Nations is a legal person and is a subject of International Law. The United Nations is capable of holding and disposing of property and can enter into contract. In this connection, the General Assembly of the United Nations adopted the covention on the Privileges and Immunities of the United Nations in 1946. Article I of the Covention provides : "The United Nations shall possess juridical personality. It shall have the

2. Niranjan Bhuinya, International Organisations, p. 64.
3. Eichelberger, The United Nations : First Twenty Years, p. XII.
4. International Politics, p. 227.
5. See supra note 2.

capacity (a) to contract; (b) to acquire and dispose of immovable property; (c) to institute legal proceedings." With a view to give effect to this Convention in India, the Parliament of India enacted the United Nations (Privileges and Immunities) Act, 1947 (Act No. XLVI of 1947). The Schedule to the Act describes in detail the Juridical personality,[6] rights in respect of property,[7] facilities in respect of communication,[8] and representatives of Members etc.,[9] of the United Nations.

It is clear from the above discussion that the United Nations is a legal person and a subject of law. This was confirmed by the International Court of Justice in its advisory opinion *Reparation for Injuries suffered in the Service of the United Nations.*[10] The world Court said that the United Nations is an international legal person which has rights and duties under international law. It can claim compensation for injuries suffered by persons in its service. But it may be noted here that under the Charter, power to enter contract, generally has not been conferred on the United Nations. On behalf of the organization it can enter into those contracts or agreements which are mentioned in the specific provisions of the Charter.[11] For example, it can enter into agreements with specialized agencies.[12]

Purposes of United Nations.*

The purposes of the United Nations are enshrined in Article 1 of the Charter. According to Article 1, following are the purposes of the United Nations :

(*1*) *To maintain International Peace and Security*[13].—The most important purpose of the United Nations is to maintain International Peace and Security. After having expressed their determination in the preamble *"to save the succeeding generations from the scourge of war,"* it was quite natural and appropriate for the framers of the United Nations Charter to have enlisted "Maintenance of International Peace and Security" as the first and foremost purpose of the United Nations. Article (1) provides that one of the purposes of the United Nations is to "maintain International Peace and Security" and to that end : "to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of peace, and to bring about by peaceful means, and in conformity with the principles of justice and International Law, adjustment or settlement of international dispute or situation which may lead to a breach of the peace." This purpose is so important that it led Prof. Hans Kelsen to remark : "The purpose of the United Nations is world peace."

(*2*) *To develop friendly relations among nations.*—The second purpose of the United Nations is to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of people and to take other appropriate measures to strengthen universal peace.

The Principle of Self-Determination**.—The principle of self-determination has been incorporated in Articles 1 [(2)], 55 and 56 of the United Nations Charter. Article 55 deals with the promotion of International Economic and Social Cooperation "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal right and self-determination of peoples ....."It is further provided that "All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the

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6. Article 1 of the Schedule.
7. Article II.
8. Article III.
9. Article IV.
10. I.C.J. Reports (1949) p. 174.
11. See Stephen S. Goodspeed, The Nature and Function of International Organisation, Second Edition, p. 108.
12. For this see Article. 57 and 63 of the U. N. Charter.

* See also I.A.S. (1974), Q. No. 9 ; P.C.S. (1977), Q. No. 9(d).

13. For detailed discussion on International Peace and Security please see Chapter on "The Security Council"; See also S. K. Kapoor. "The Maintenance of International Peace and Security." Lawyer (November, 1972), p. 170.

** See also for P.C.S. (1966), Q. No. 3 ; C.S.E. (1991) Q. 5(a).

achievement of the purposes set fourth in Article 55." [14] These provisions have direct and particular relevance for non-self-governing territories, which are dealt with in Chapter XI of the Charter.[15]

Thus the principle of self-determination has been incorporated in the United Nations Charter. There is, however, great controversy as to whether the principle of self-determination has become a binding principle of International Law (including the law of the United Nations). In this connection, several contentions have been put forward. In the first place it is pointed out that the self-determination had become a principle of International Law even before the adoption of the United Nations Charter. It is contended that it was incorporated in the Charter because it had already become principle of International Law. This view has been expressed by several Soviet authors.[16] This contention is far from convincing and cannot be accepted. Secondly, Article 1 (2) simply states the concept of sovereign equality of States. It does not introduce a new principle of self-determination. It is simply a warrant for enforcing the principle of democratic government on these States. It is argued that this view is in accordance with the principle of sovereign equality of the members of the United Nations mentioned in Article 2 (1) as well as the restriction put on the United Nations by Article 2 (7) which prohibits intervention in the matters essentially with the domestic matters of a State.[17] Thirdly, the Charter of the United Nations introduces the principle of self-determination as a rule of International Law and as such parties to it are under a legal obligation to accord self-determination to their peoples. This conclusion is derived from the provisions of Articles 1 (*2*), 55 and 56.[18] Fourthly, the United Nations Charter has not made the principle of self-determination as a rule of International Law. It is simply a political principle for building a community of States.[19]

In the view of an eminent author, "It is clear that Articles 1 (2) and 55 of the Charter being the provisions of treaty under International Law are binding upon the States parties to it. However, the legal value of self-determination under these Articles, is considerably diminished by three major limitations.[20] The three limitations he points out are—(i) There is a lack of an adequate measure of the definition of self-determination in the United Nations Charter.[21] (ii) The principle of self-determination in Article 1 (2) is only subservient to certain purposes of the United Nations such as "to maintain International Pace and Security," "to develop friendly relations among nations" and "to be a centre for harmonizing the actions of nations." [22] Sri Sinha[23] states, "Accordingly, if, in a particular case, self-determination results in undermining either the friendly relations among nations or universal peace, it cannot be upheld within the meaning of this Article"[24], and (iii) Article 2 (7) of the United Nations Charter which prevents intervention in matters essentially within the domestic affairs of a State is also a great limitation for the issue of self-determination, can arise only within a existing State.[25] Thus the principle of self-determination, it is

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14. Article 56.
15. Advisory Opinion of the International Court of Justice in the Western Sahara Case, I.C.J. Rep. (1975), para 54.
16. See for example : V. V. Lyubomudrova, "The Self-Determination of Nations as one of the Basic Conditions for International Co-operation and Peaceful Co-existence" in Symposium. The International Law Norms of the Peaceful Co-existence of States and Nations (1957); I.V. Speranskaya. The Principle of Self-Determination in International Law (1961).
17. See H. Kelsen, The Law of United Nations, pp. 51-53 (2nd Impression, 1951) : N. Bentwich and A. Martin, A Commentary on the Charter of the U. N. (1950), p. 7. See also George Steven Swan, "Self-Determination and the United Nations Charter," I.J.I.L., Vol., 22 (1982), p. 264 at 273.
18. Q. Wright, "Recognition and Self-Determination," Proc. A.S.I.L., Vol. 48 (1958), p. 27, note 11.
19. L. C. Green, "Self-Determination and the Settlement of Arab-Israeli Conflict', Proc. A.S.I.L. (1971), p. 40; R. Y. Zennings, "The Acquisition of Territory in International Law" (1963), p. 78.
20. S. Prakash Sinha, "Has Self-Determination Become a Principle of International Law" Today ?" I.J.I.L., Vol. 14 (1974), p. 332 at pp. 335-36.
21. Ibid, at p. 336.
22. Ibid.
23. Ibid., at pp. 336-37.
24. Cf. A. Somewhat Similar Interpretation of this Article in M.A. Shukri. The Concept of Self-Determination in the U.N. (1965), pp. 50-51.
25. I.J.I.L. vol. 14 (1974), p. 337.

argued, "does not stand out as a solid principle binding on the States which are parties to it. Of course, for binding principle to exist it is not necessary that it be absolute and unlimited by other principles. Also there is a differene between urging that the legal character of rule is destroyed as result of the absence of a full measure of definition and admitting that its affectiveness is diminished thereby.[26] Nevertheless, the three factors mentioned above do diminish significantly a State's obligation under the Charter with respect to self-determination." [27]

In order to arrive at any conclusion, it will not only be desirable but also necessary to discuss the development of International Law (especially through the resolutions of the General Assembly of the United Nations and opinions of the International Court of Justice, after the adoption of the Charter of the United Nations). The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the *Declaration on the Granting of Independence to Colonial Countries and Peoples.*[28] In this resolution the General Assembly proclaims the necessity of bringing to a speedy and unconditional end of colonialism in all forms and manifestations. To this end the resolution provides *inter alia* : "All peoples have the right of self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural developmnt. Immediate steps shall be taken in Trust and non-Self Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions, or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom. Any attempt aimed at the partial or total disruption of the national unity and territory integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

The above provisions, thus confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.[29] The International Court of Justice referred this resolution in the Advisory Opinion of 21st June, 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276, 1970.*[30] With reference to the development of International Law in regard to non-self governing territories, the Court there stated : "A further important stage in this development, was the Declaration on the Granting of Independene to Colonial Countries and Peoples (General Assembly) Resolution, 1514 (XV) of 14th December, 1960 which embarces all peoples and territories which "have not yet attained Independence.[31] It further stated : "The Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law through the Charter of the United Nations and by way of customary law." [32] The World Court then concluded : "In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus juris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions may not ignore it.[33] In Advisory Opinion in the Western Sahara Case, the International Court of Justice rightly remarked :

26. L. Oppenheim, International Law (Ed. by H. Lauterpactht), Vol. 1, 1948 (8th Edition, 1955).
27. I.J.I.L., Vol. 14 (1974), p. 337.
28. General Assembly Resolution 1514 (XV) of 14th December, 1960.
29. Advisory Opinion of the International Court of Justice in the Western Sahara Case, I.C.J. Rep. (1975), para 55.
30. I.C.J. Reports (1971), p. 16
31. Ibid. at p. 31.
32. Ibid.
33. Ibid, at p. 31.

"General Assembly Resolution 1514 (XV) provides the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations." [34]

The principle of self-determination was re-affirmed by the General Assembly in 1961." [35] It was further re-affirmed in the General Assembly Declaration on Non-Intervention,[36] and Declaration of Principles of International Law Concerning Friendly Relations Among States in accordance with the Charter of the United Nations. The latter[37] resolution [i.e., Res. 2625 (XXV)] reiterates the basic need to take into account the wishes of the people concerned : "The establishment of sovereign and independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." Resolution 2625 (XXV) further provides : Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the implementation of the principle in order : To bring a speedy end to colonialism having regard to the freely expressed will of the peoples concerned. The resolution further stated : 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 and resistance 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. The General Assembly further declared that the "principles of the Charter which are embodied in the Declaration constitute basic principles of International Law" and appealed to all States (and even 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." [38]

It has been aptly stated, "The fact that 28-million peoples are still denied their inalienable right of self-determination and independence can leave no room for complacency. Today the majority of Member States are more than ever convinced that the perpetuation of colonial rule is not only contrary to the purposes and principles of the Charter, but is an anachronism in the modern world and an impediment to the promotion of the world peace and co-operation." [39]

The resolution 1514 (XV) and other resolutions on self-determination, have not only assumed legal implication but have assumed binding force in the process and context of colonialism. In the first place, they have been passed by overwhelming majority States. Secondly, they may be deemed to interpret and implement the provisions of the Charter. Thirdly, their recitation in numerous resolutions shows the international standard of States on the principle of self-determination. Last but not the least, this has been consistently supported by the International Court of Justice in its advisory opinions referred earlier. Thus the provisions of the Charter read in the light of numerous United Nations General Assembly resolutions make it clear that "all peoples under alien subjection have the right of self-determination." [40] Thus, ".....within the context of colonialism, self-determination

34. I.C.J. Reports, para 57; It has been aptly stated : ".....against the heavy background of colonialism, the Declaration was not a mere statement of principle. It was in fact a Universal Magna Carta of Liberty and a bill of emancipation for all nations and peoples fighting for liberty and dignity.....The Declaration must be taken to represent the wishes and beliefs of the Community of nations", P. K. Menon, "United Nations Special Committee and Decolonization", I.J.I.L., Vol. 9 (1969), at pp. 24 and 27.
35. See Resolution 1654 (XVI) of Nov. 27, 1961.
36. Resolution 2131.
37. G.A. Res. 2625 (XXX) of 24th October, 1970; G.A., Official Records, Twenty-fifth Sessions (Suppl.) No. 28 (1971).
38. Louis B. Sohn. "The Development of the Charter of the U. N. ; The Present State" in The Present State of International Law and other Essays (1973), p. 52.
39. I. S. Djermakoye, "The U. N. and Decolonization", U. N. Monthly Chronicle, Vol. (VII) No. 3, (March, 1970), p. 37 at pp. 44-45.
40. Rupert Emerson, "Self-determination, Revisited in the Era of Decolonization", Occasional Papers in International Affairs, No. 8 (December, 1964).

has become a peremptory norm of International Law whereby a State's title to a territory having colonial status is void." [41] It cannot be applied to established States in their territorial disputes. This is clearly prohibited by General Assembly Resolution 1514 (XV) of 14th December, 1960.[42] It may be noted here that India acceded to the Two International Covenants on Human Rights on 27 March, 1979. While acceding to the said Covenants India made, *inter alia,* the following reservation : "With reference to Article 1 of the International Covenant on Economic, Social and Cultural Rights and Article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words 'the rights of self-determination appearing in those Articles apply only to the peoples under foreign domination and that these words do not apply to sovereign independent states or to a section of peoples or nation which is the essence of national integrity." It need not be overemphasized here that this is in conformity with the international law as discussed above.

A study prepared by the U.N. Human Rights Commission has said that the principle of self-determination which is often invoked to challenge the territorial integrity of sovereign states, does not include a unilateral right to independence, or secession. According to the study, while prevention of discrimination is essential and equality in participation and respect for minority groups must be ensured, it must be simultaneously recognised that identity of different groups or minorities does not mean a right for the members of these groups to dismember the state or disobey the fabric of multi-cultural society. The inference drawn by the study is in conformity with international law and has been reiterated time and again by the U.N. Human Rights Commission.

The Question of Self-Determination in Kashmir

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

(3) *International co-operation in solving international problem of economic, social and humanitarian character.*—The third purpose of the United Nations is to achieve international co-operation in solving international problems of economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedom for all without distinction as to race, sex, language or religion.

(4) *To make the United Nations a centre for the attainment of the above common ends.*—The last purpose of the United Nations is to make it a centre for harmonising the actions in the attainment to those common ends.

Principles of the United Nations.*

Article 2 of the United Nations provides that the Organisation and its members, in persuit of the purposes enshrined in Article 1, shall act in accordance with the following principles :

(*1*) *The principle of the sovereign equality of all members***.—The first principle of the United Nations is that the organisation is based on the principle of the sovereign equality of all its members. According to this principle, all the members of the United Nations are equal in the eye of law irrespective of their size or strength. They are all equal in the eye of law and no discrimination can be made on any basis. Undoubtedly it is an important principle and the framers of the Charter deserve credit for having included this principle in the Charter. The fact, however, remains that it is not an absolute principle and admits certain exceptions. There are certain provisions in the Charter which are inconsistent with this principle. In the Charter permanent members (Great Powers) have been conferred upon some special privileges and rights. According to Article 27, for the decision on all important matters in the Security Council, the affirmative vote of all the

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41. A. Rigo Sureda, The Evolution of the Right of Self-Determination, (A. W. Sijthoff, Leiden, (1973), p. 353.
42. Paragraph 6 of the Operative part of the resolution clearly provides : "Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the United Nations." For detailed study see also 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 for I.A.S. (1974), Q. No. 9 ; P.C.S. (1977), Q. No. 9(d).

** See also for I.A.S. (1975), Q. No. 8(a).

permanent members is essential. In accordance with this provision all members are not in fact equal. Besides this, the amendment of the Charter cannot be made until and unless the permanent members give their affirmative concurrence. For the amendment of the Charter it is necessary that it should be adopted by two-thirds majority of the members of the United Nations and subsequently the governments of these members should ratify it, but the majority of two-thirds members must include the five permanent members of the Security Council (Article 108). Besides, there are several other provisions in the Charter which provide some special rights to the permanent members. Thus the United Nations Organisation is based on the principle of sovereign equality of States but the great powers are legally and actually unequal to the smaller States.[43] In fact, the great powers were given the special powers in the Charter under the presumption and with the hope that they would co-operate in the same way as they did during the Second World War and would thereby establish peace and security in the world. But unfortunately, immediately, after the establishment of the United Nations, conflicts started among the permanent members and they did not fulfil their responsibilities and obligations which the Charter imposed upon them. Besides this "Several of the principles must be understood as mere exhortion to decent international behaviour and the principle of sovereign equality may be singled out as the one most likely to frustrate the purposes of the United Nations altogether.[44]

(2) The second principle of the United Nations is that all members, in order to ensure to all of them, the rights and benefits resulting from the membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

(3) *Peaceful settlement of international disputes.*—All members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

(4) *Principle of non-intervention.*—According to the fourth principle of the United Nations, all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or any other manner inconsistent with the purposes of the United Nations.[45]

(5) The next principle is that all members shall give the United Nations every assistance in common action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.

(6) The Organisation shall ensure that States which are not members of the United Nations act in accordance with these principles so far as may be necessary, for the maintenance of international peace and security.

(7) *Non-intervention in domestic matters of State**.—The seventh and the last principle of the United Nations states that nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter. There is, however, an exception to this general principle because Article 2 (7) also provides that this principle shall not prejudice the application of enforcement measures under Chapter VII. This principle is a great restriction upon the powers of the United Nations. It may, however, be noted that the term 'domestic jurisdiction' is not clear. Its meaning and implications are dependent upon the facts and circumstances. Some matter which were considered to be within domestic jurisdiction of the States at the time of the establishment of the Charter are now considered matters of international concern. They have, therefore, ceased to be matters within domestic jurisdiction of the States. With the growth of international community and inter-dependence of the States, the scope of 'domestic jurisdiction' is constantly diminishing. It

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43. See P. A. Sorokin, The Reconstruction of Humanity, pp. 12-17.
44. Werner Levi, Fundamentals of World Organization, p. 31; For more details and consequences of the equality of States see Chapter on "Nature of State and different kinds of States and Non-State Entitlies.
45. Article 2 (4); For detailed study of this principle see Chapter on "Intervention".

* See also for P.C.S. (1974), Q. No. 10(e) ; P.C.S. (1973), Q. NO. 10(e) ; P.C.S. (1967), Q. No. 8. See also for P.C.S. (1981) Q. 5(b) ; For answer please see also matter relating to "domestic jurisdiction" discussed in the Chapter on "Intervention" ; C.S.E. (1991) Q., 7 (b).

is possible that the matters which are now considered to be within domestic jurisdiction of States, may in future be treated as matter of international concern and the United Nations may become entitled to intervene in those matters. Judge Lauterpacht has rightly remarked : "That any matter which is regulated by International law may not be a matter within the domestic jurisdiction of any State."

Membership*

According to the Charter of the United Nations, there may be two types of members : (i) Original members, and (ii) States which may be admitted to the United Nations in accordance with the provisions of Article 4 of the Charter. As regards the original members, Article 3 of the Charter provides that the original members of the United Nations shall be States which, having participated in the United Nations Conference on International Organisation at San Francisco, or having previously signed the declaration of the United Nations on January 1, 1942 signed the present Charter and ratified it in accordance with Article 110. As regards admission of the members of the United Nations, Article 4 provides that States may be admitted to the United Nations on the affirmative recommendations of the Security Council and by the election of the General Assembly by two thirds majority. Since the admission of States to the United Nations is an important matter, affirmative votes of 9 members of the Security Council including 5 permanent members are necessary. Moreover, Article 4 provides the five requirements or conditions for a State, to become a member of the United Nations. They are : (1) It must be a State : (2) It must be peace-loving; (3) It must accept the obligations of the Charter; (4) It must be willing to carry out these obligations; and (5) It must be able to carry out these obligations.

At present, there are 189 members of the United Nations.

Whether the practice of the United Nations or of the States voting on the question of membership of States is consistent with the provisions of the Charter ?

The practice of the Organisation and those of the States while voting on the question of the admission of a State to the United Nations is inconsistent with the provisions contained in Article 4 of the Charter. Often States while voting give utmost importance to their national interests and impose certain conditions not at all mentioned in the Charter. After the establishment of the United Nations, Russia exercised its power of veto to prevent new States to become the member of the United Nations. It imposed certain conditions which were not at all in conformity with the provisions of the Charter. For example, on the question of membership of Italy and Finland, it imposed a condition while voting that it would give its affirmative vote only when Bulgaria, Hungary and Rumania were also admitted as members of the United Nations. The General Assembly of the United Nations, therefore, referred this matter in 1948 for the advisory opinion to the International Court of Justice. The General Assembly referred the following two questions for the opinion of the Court :

(1) Is a member of the United Nations, when casting its vote in the Security Council of Assembly on an application for membership juridically entitled to make its consent dependant upon conditions not expressly provided in the Charter ?

(2) Can a member subject to its affirmative vote to the additional conditions that other States must be admitted along with the State which is being voted upon ?

In reply to these questions, the International Court of Justice in its advisory opinion on *Admission of States to Membership in the U.N.*[46] by a majority held that Article 4 lays down five-conditions by way of exhaustive enumeration and not merely by way of illustration, namely, that any new applicant must —(a) be a State; (b) be a peace-loving; (c) accept the obligations of the Charter; (d) be able to carry out these obligations; and (e) be willing to do so.

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* See also for I.A.S. (1974), Q. No. 10(e) ; I.A.S. (1973), Q. No. 9 ; P.C.S. (1964), Q. No. 2.

46. I.C.J. Reports (1948), p. 4.

Further, "The Court also ruled that a State member voting on the admission of a new State (whether on the Security Council recommendation or on the General Assembly decision) is not entitled to make its consent to the admission of an Applicant dependent on the fulfilment of conditions other than those prescribed in Article 4, and in particular is not entitled to make such consent dependent on the admission of other applicants." [47] While it is thus clear that no State has a right to be admitted as a member, the members of the General Assembly and the Security Council must exercise their judgment in good faith in reaching the decision whether a State is Peace loving, and whether it is able and willing to carry out the obligations of the Charter. This was, in effect, the view of the Court as a whole and of dissenting minority of the Judges in the advisory opinion given in 1948 on the question of the interpretation of Article 4 of the Charter." [48] Despite this legal opinion given by the Court the Security Council found itself unable and helpless on the application of the membership of certain States because of the exercise of vetos by the Great Powers. The next question that arose was exercise of General Assembly by only its decision can admit a member in the United Nations ? The General Assembly, therefore again asked the advisory opinion, of the International Court of Justice on this point. On November 22, 1949, the General Assembly requested the Court to give an advisory opinion on the following question :

> "Can the admission of a State to the membership of the United Nations.....be effected by a decision of the General Assembly when the Security Council had made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of the permanent member upon a resolution so to recommend ?

In its advisory opinion *competence of the General Assembly Regarding the Admission of State to the U.N.*,[49] the International Court of Justice on March 5, 1950, declared that "it was necessary to have an affirmative recommendation of the Security Council as well as that of the Assembly before a member could be admitted in the Organisation."

Question of the representation of Communist China in the United Nations :*

As pointed out by Jerome Alan Cohen, the topic of China and the U. N. has spawned a vast literature over the years, and the scholars have had the field day with its legal and political complexities.[50] When the U. N. was established in 1945, China was one of the permanent members of the Security Council. At that time, Chiang Kai Shek was the head of the Nationalist Government of China. In 1949, the Communists established their authority over the main-land of China. Chiang Kai Shek fled to Farmosa and established his government over there. America and many other Western Countries continued to recognize the Nationalist Government of China as *de jure* Government of China. Since the representatives of the Nationalist Government of China were hitherto representing China in the U. N. they continued to do so. Since 1950, the matter relating to Chinese representation in the U. N. had been discussed every year in the General Assembly. Ever since 1950, there had been widespread agreement that General Assembly, the only organisation in which all the U. N. members have a vote should assume initial and primary responsibility for dealing with the Chinese representation question. As stated by McDougal and Goodman, it would appear to be too late in the day to argue as scholars have said that the matter should first be decided by the Security Council.[51] In 1961, however, for the first time, General Assembly decided that proposal for change of Chinese

47. J. G. Starke, Introduction to International Law, tenth Edition (1989) p. 635.
48. L. Oppenheim, International Law, Vol. I, pp. 408-9.
49. I.C.J. Reports (1950), p. 4.
* See also I.A.S. (1957), Q. No. 3.
50. Jerome Alan Cohen, "Changing Realities and the Imperatives of New Policy" A.J.I.L., Vol. 65 (1961), p. 1 at p. 2.
51. McDougal and Goodman, "Chinese Participation in the U. N.; The legal significance of a Negotiated Settlement", A.J.I.L., Vol. 60 (1966), p. 671 at p. 718.

representation was an important matter within the meaning of Article 18 of the Charter, requiring 2/3 majority vote of members present and voting. In 1971, the General Assembly reversed, and rightly too, its earlier decision and rejected the draft resolution which stated that the question was an important matter. The General Assembly went a step ahead and on 25th October, 1971, it adopted resolution 2728 (XXVI) to the effect that the representatives of the Government of People's Republic of China are the only lawful representatives of China to the U. N. and Peoples Republic of China is one of the five permanent members of the Security Council. It further decided "to restore all its rights to the representatives of its Government as the only legitimate representatives of China to the U. N. and to expel forthwith the representatives of Chiang Kai Shek, from the place which they unlawfully occupy at the U. N. and in all the organisations related to it." This resolution was passed by 76 votes in favour to 35 against with 17 abstentions.

There was no question of admitting or expelling a member (which undoubtedly is an important matter requiring 2/3 vote of members present and voting) but of expelling the unlawful representatives and recognising the lawful representatives of China. Michael Akehurst has aptly remarked : "The correct analysis is that States not governments, are members of the United Nations; the State of China is and always has been a member of the United Nations, the question is which government should represent it at the United Nations?"[52] "If China was either being admitted as a 'new member' or alternatively China was expelled as new 'Member' then it would require a 2/3 majority vote of the General Assembly. Resolution 2728 does not deal with either of these two questions. Rather what it deals with are the questions of representation of rights of the People's Republic of China and the expulsion of the representatives of Chiang Kai Shek. None of these two questions is an 'important' question within the meaning of Article 18, para 2 because they do not belong to the enumerated questions, therefore enumeration can be considered exhaustive rather than, illustrative." [53]

Byelorussia and Ukraine as U. N. Members*.—It has been noted earlier that the practice of State is not consistent with the criteria for admission fixed by the Charter. This is true in respect of original members as well as those States which have been admitted as members under Article 4 of the Charter. According to Article 4, membership in the United Nations is open *to all peace loving States which accept the obligations contained in the present charter and in the judgment of the Organization, are able and willing to carry out these obligations.* The term 'States' here would presumably mean sovereign States. But Byelorussia and Ukraine were not completely sovereign States, yet they were made the members of the U. N. During the Dumbarton Oaks discussions, the Soviet Union had demanded fulfledged membership for all of the sixteen Soviet Republics. On this, basis, America could claim admission for each of her 48 States. But America did not do so. At the Yalta Conference, the U. S. and U. K. agreed to support the Russian claim for the original membership of the Ukraine and Byelorussia, two of the Soviet Republics. This privilege was not granted to any other federal State. As remarked by Prof. Goodspeed, "The Charter provides some criteria for admission but they are difficult to determine objectively and the practice of observance has not been consistent. An applicant must be a State and presumably sovereign, if the accepted tests of recognition under International law are to be followed. However, several original members were not sovereign at the time they signed the Charter. Certainly India, the Commonwealth of the Philippines, the Ukrainion and Byelorussian Soviet Socialist Republics did not possess the degree of independence expected of sovereign State under International Law. While India and the Philippines now possess full independence, the same cannot be said of the two Soviet Socialist Republics. The presence of the latter in the United Nations

52. Micheal Akehurst, A Modern Introduction to International Law (1970) p. 250; See also Rosalyn Higgins. The Development of International Law Through the Political Organs of the United Nations (1963), pp. 150-8.

53. M. K. Nawaz, "Chinese Representation in the U. N.", I.J.I.L., Vol. 11 (1971), p. 459.

* See also for I.A.S. (1975), Q. No. 10(e) ; For answer See also matter discussed earlier under the heading ; "Whether the practice of the State Voting on the Question of Membership of States is consistent with the Provisions of the charter ?"

cannot be justified on any legal grounds whatsover. Although the Soviet Satellites-Bulgaria; Chechoslovakia, Hungry, Poland and Rumania—are technically independent, their freedom of action is analogous to the two Soviet Republics just noted and membership as Sovereign States can be questioned. Certainly the Status of the Republic of China is doubtful in many respects. The responsible character of the new African and Asian nations also leaves much to be desired.[54] So far as Byelorussia and Ukraine are concerned Prof. Goodspeed's observation seems to be correct and justified.

Question of Membership of Yugoslavia

On 19th September, 1992, the Security Council passed resolution 777 (1992) recommending that the General Assembly decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should not participate in the work of the Assembly and should apply for the membership of the U. N. It considered that the Federal Republic could not automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the organisation. The Council passed this resolution by 12 vote. No one opposed the resolution but three States (China, India and Zimbabwe) abstained from voting.

Acting on the recommendation of the Security Council, on 22nd September, 1992,[55] decided that the Federal Republic of Yugoslavia could not automatically continue the U.N. Membership of the former Socialist Federal Republic of Yugoslavia and that it should apply for membership and "shall not" participate in the work of the Assembly.

This is for the first time that the General Assembly has explicitly decided that a Member State may not participate in its work. In 1974, the General Assembly upheld a ruling by its President, interpreting the Assembly's rejection of South Africa's Credentials, which had the effect of barring South African representatives from participating in the work of that session.

With regard to membership of Yugoslavia, introducing the draft resolution, Sir David Hannavy of the United Kingdom said, conditions for admission were clear. The applicant must be a peace-loving State, it must accept obligations contained in the Charter and it must in the organization's judgment, be able and willing to carry out those obligations. The authorities in Belgrade should convince the U. N. that they have met those admission requirements. The resolution was neither a punitive measure nor was it designed to undermine the peace process.

During the debate, a number of speakers questioned the resolution's legal basis, stating that it by passed the Charter, set a dangerous precedent which could be used against other Member States in the future and posed a threat to ongoing peace negotiations.[56] It also deserves mention that this test was not applied in case of Russia after the breaking up of the Soviet Union.

Is withdrawal of a member-State from the United Nations Possible ?*

The Covenant of the League of Nations contained the following provisions in regard to the withdrawal of members :

(1) Any member could withdraw from the League of Nations by giving a two years' notice; and

(2) If any amendment was opposed by member or was not otherwise acceptable to it, then it meant that the particular member ceased to be member of the League of Nations.

It was *inter alia,* due to this provision that the membership of the League of Nations, which at one time was 62, was reduced to 32. The Charter of the United Nations is conspicuous by the absence of any provisions in regard to the withdrawal of members. It was a matter of heated debate and discussions at San Francisco Conference, 1945. Some States wanted that the withdrawal of members should be completely prohibited; on the

54. Stephen S. Goodspeed, The Nature and Function of International Organization Second Edition, p. 137.
55. See Resolution 47/1 which was adopted by 127 votes in favour, 6 against and with 26 abstentions.
56. See U. N. Chronicle, Vol. XXIX, No. 4 (December, 1992) p. 45.

* See also for P.C.S. (1964), Q. No. 2.

other hand, some States expressed the view that if the amendment of the Charter was such as was not acceptable to members then the members should be entitled to withdraw from the organization. Ultimately it was decided that no express provision should be inserted in the Charter regarding the withdrawal of members. However, a statement of 'special circumstances' was formally issued according to which the members could withdraw from the organization under special circumstances. Fenwick[57] has expressed the view that the members can withdraw from the United Nations under following two circumstances :

(1) "Withdrawal of or some form of dissolution would be obviously inevitable if the Organization was revealed to be unable to maintain peace or could do so only at the expense of law, and justice."

(2) If any State did not give its consent for any amendment of the Charter or gave its vote against the amendment or found itself unable to accept the amendment, then such a situation may entitle him to withdraw from the Organization.[58]

The question of withdrawal of membership has arisen only once in the history of the U. N. Indonesia declared her withdrawal from the U. N. because Malaysia has been elected as one of the non-permanent members of the U. N. Indonesia claimed a part of the territory, under the occupation of Malaysia. But in 1966, Indonesia again joined her seat in the U. N. as if nothing had happened. "If her withdrawal had really been effective, she would have had to seek readmission under Article 4; instead, she simply resumed her seat, as if nothing had happened, which suggests that her withdrawal had been void." [59]

Expulsion of a member from the United Nations*.—The provision regarding the expulsion of the member from the United Nations is contained in Article 6 of the Charter. It provides that a member of the United Nations which had persistently violated the principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council. Since expulsion of a member is a substantial question under the Charter, a decision on it will require nine affirmative votes of Security Council including those of the permanent members and a decision by General Assembly to two-thirds majority.

Suspension of members.**—The provision relating to the suspension of a member finds mention in Article 5 of the Charter. Article 5 provides that member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly, upon the recommendation of the Security Counil. It further provides that the exercise of these rights and privileges may be restored by the Security Council. It is clear from the above provision that although a member may be suspended by the General Assembly upon the recommendations of the Security Council, the Security Council has been conferred upon with the power to restore rights and privileges of such members even without the concurrence of the General Assembly. Suspension of members is also a substantial question and hence the same procedure will be followed as in the case of expulsion of members.

Principal Organs of the United Nations*.**—Following are the six (6) principal organs of the United Nations :—

(1) The General Assembly,
(2) The Security Council,
(3) The Economic and Social Council,
(4) The Trusteeship Council,

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57. Charles G. Fenwick, International Law, pp. 209-10.
58. "This Statement as opinion forms part of the Travaux preparatories of the charter, and may therefore be used to interpret the charter", Michael Akehurst, A Modern Introduction to International Law (1970), p. 249.
59. Ibid, at p. 250.

* See also for P.C.S. (1964), Q. No. 2.
** Ibid.
*** See also P.C.S. (1975), Q. No. 3.

(5) The International Court of Justice, and
(6) The Secretariat.

N.B.—The composition, functions and powers of the above six principal organs have been discussed in detail in separate Chapters.

COMPARISON BETWEEN LEAGUE OF NATIONS AND UNITED NATIONS

League of Nations	United Nations
1. The Covenant of the League of Nations was a part of Treaties of Versailles, 1919.	1. The birth of the United Nations Organization does not owe to any peace treaty imposed upon the vanquished nations.
2. The League of Nations was an organization of the States as is clear from its preamble which uses the words "High Contracting Parties of the Covenant."	2. The United Nations may be said to be the organisation of the people because its preamble uses the words "We, the people of the United Nations."
3. The League of Nations had 3 principal organs : (a) Assembly, (b) Council and (c) The Secretariat.	3. The United Nations has 6 principal organs : (a) The General Assembly; (b) The Security Council; (c) The Economic and Social Council; (d) The Trusteeship Council; (e) The Secretariat; and (f) The International Court of Justice.
4. The functions of the League were ordinarily limited to the political activities.	4. As compared to the League of Nations, the United Nations besides performing the chief functions of the maintenance of peace and security in the world, also performs important functions relating to social, economical, educational and cultural matters. Even if we leave aside its functions for the performance of peace and security, the United Nations has become an organization of inescapable importance for the functions that it has performed in social, economical, educational, cultural and humanitarian fields.
5. The League of Nations was based on the principle of unanimity. For decision on all important matters, unanimous concurrence of the members was necessary.	5. As compared to the League of Nations, the United Nations is much more a democratic organisation. Even important matters of the United Nations are decided on the basis of majority vote. All the important matters are decided in the Security Council with the concurrence of 9 members including the affirmative votes of 5 permanent members. All other matters, namely—procedural, are decided by the majority of 9 members of the Security Council. As regards the General Assembly, all important matters are decided by two-thirds majority of the members present and voting. Other matters are decided by simple majority.

6. In the League of Nations, great powers did not possess veto power.	6. The Charter of the United Nations has conferred upon the permanent members of the Security Council the power of veto.
7. The Covenant of League of Nations provided for the withdrawal of members. The members of the League of Nations could withdraw from the League after giving a two-years notice. Besides this, if an amendment of the Covenant was not acceptable to any member or if he voted against it, it meant that particular member ceased to be the member of the League of Nations. This provision proved to be fatal because in the course of time members one by one withdraw from the League. In the beginning it comprised of 62 members which was later on reduced to 32.	7. The Charter of the United Nations is conspicuous by the absence of any provision in regard to the withdrawal of members from the Organization. This was due to the unhappy experience of League of Nations. However, as pointed out by Fenwick, the members of the United Nations may also withdraw from the Organization, if any amendment of the Charter is not acceptable to them and they vote against the said amendment. Moreover, they may also withdraw from the organization in case organization fails to achieve its chief objective. While the membership of League of Nations was reduced considerably in the course of time, the membership of U. N. is constantly increasing. Starting from 51, membership of the U. N. has now swelled to 191
8. The powers of the Assembly and the Council of the League of Nations were not clearly demarcated.	8. The powers of the General Assembly and the Security Council of the United Nations have been clearly demarcated. Under the Charter Security Council has been entrusted the primary responsibility for the maintenance of peace and security in the world. On the other hand, the General Assembly is deliberative body.
9. Under the League of Nations, actions could be taken against the members only when they resorted to war in violation of the provisions of the Covenant. To put it more precisely, war was not completely prohibited in the League of Nations and the members under certain circumstances had the right to go to war.	9. Under the United Nations Charter, an enforcement or preventive action can be taken against the members even before they resort to war. Action can be taken against them under the Charter if there is a threat or danger to international peace and security.
10. The League of Nations lacked armed forces and its decisions were mere recommendations.	10. The United Nations is empowered to use armed forces for the maintenance of peace and security. For this purpose the Member-States are bound to provide armed forces to the United Nations. For this purpose there is a provision for the establishment of the Military Staff Committee. However, it must be conceded that because of the mutual conflict and non-cooperation among the major powers, these provisions have not been properly implemented. Nevertheless, United Nations is much more effective than the League of Nations in regard to the maintenance of peace and security.

11. Under the League of Nations the procedure of enforcement action was decentralised and Members of the League had no obligation to give armed forces to the League on its request.	11. Under the Charter the primary responsibility for the maintenance of peace and security is that of the Security Council and the States have undertaken the obligation to respect and carry on the decisions of the Security Council.
12. There was no provision in regard to self-defence in the Covenant of League of Nations.	12. The Charter under Article 51 confers on States the right of individual or collective defence.
13. The Covenant of League of Nations did not have any provision in regard to the regional agreements on agencies.	13. Under the Charter there is a Chapter (Chapter VIII) for regional arrangements. Articles 52 to 54 of the said Chapter make clear provision in regard to the regional arrangements which are permitted for the solution of regional problems and also for assisting the United Nations Security Council for the maintenance of world peace.
14. The League of Nations did not give much attention for encouraging human rights and fundamental freedoms.	14. The United Nations has performed commendable functions in regard to human rights and fundamental freedoms.
15. The League of Nations was European in character and was greatly influenced by the Concert of Europe of 19th century.	15. As compared to the League of Nations, the United Nations is much more a representative organization. At present it has as many as 184 members and has become nearly universal.
16. The League of Nations deserves credit for starting the experiment of mandate system under which the territories snatched from the enemy States were brought under the control of the Mandatory Commission and were entrusted to certain developed countries for their administration and development.	16. The United Nations is undoubtedly indebted to the League of Nations so far as the beginning of the experiment of the mandatory system was concerned. However, the United Nations deserves credit for improvement and perfection of this system. It has almost completed the work of its trusteeship system.
17. The League of Nations also deserved credit for giving to the world an International Tribunal known as the 'Permanent Court of International Justice' which performed creditable and commendable work in the judicial field. But it was neither an integral part of the Covenant nor was the chief judicial organ of the League of Nations.	17. Under the Charter of the United Nations, International Court of Justice is the principal judicial organ of the United Nations and the Statute of the International Court of Justice is an integral part of the Charter. (Article 92).
18. The League of Nations deserves credit for starting an international civil service in the real sense of the term.	18. Although the U. N. is indebted to the League of Nations yet it deserves credit for enlarging and further improving the system.

19. The League of Nations did not prohibit war. It simply put certain restrictions upon Member States to resort to war.	19. The Charter of the U. N. prohibits war. However, it permits resort to war in self-defence.
20. The League of Nations aimed to restrict the right to go to war. It did not prohibit use of force.	20. The Charter of the U. N. prohibits use of force in International relations [Art. 2 (4)].
21. The Covenant of the League of Nations aimed to regulate relations of only parties to the Covenant.	21. The Charter of the U. N. goes a step ahead and aims to regulate even the relations of non-members in respect of international peace and security. Article 2 (6) provides that the organisation shall ensure that States which are not members of the U. N. act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.

It is clear from the above discussion that as compared to the League of Nations, the United Nations is much more effective, powerful and successful organisation. It has attained near universality. Despite its weakness and failures in the field of peace and security, it has performed commendable functions in the social, economic, cultural, educational and humanitarian fields. It has become an organisation of inescapable importance. It would not be wrong to contend that the United Nations has now become an indispensable organisation. As remarked by Finkelstein, "The United Nations.....demonstrated its usefulness to point where it would be difficult to see a world which did not have a United Nations."

CHAPTER 33

THE GENERAL ASSEMBLY OF THE UNITED NATIONS

Composition.—The General Assembly is one of the principal organs of the United Nations.[1] The General Assembly consists of all the members of the United Nations. Each member may have not more than five representatives in the General Assembly.[2] At present the General Assembly comprises of 191 members.

Voting Rights*.—Each member of the General Assembly has one vote. Decisions on important questions are made by a two-thirds majority of the members present and voting. Such questions include the matters relating to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council and Trusteeship Council, the admission of new members of the United Nations, the suspension of the rights and privileges of membership, the expulsion of members, questions relating to the operation of the trusteeship system, and budgetary questions. Decisions on other questions, including the determination of additional categories of questions to be decided by a two thirds majority, shall be made by a majority of members present and voting.[3]

Functions and powers**

Professor Leonard has classified the powers and functions of the General Assembly under the five headings (I) Deliberative functions; (II) Supervisory functions; (III) Financial functions; (IV) Elective functions; and (V) Constituent functions.

(I) Deliberative Functions.—By deliberative functions we mean the functions of the General Assembly regarding discussion, studies and recommendations and passing of resolutions on different matters. The General Assembly performs the following deliberative functions :—

(i) The General Assembly may discuss any question or matter within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter.[4] There is however, an exception to this. Article 12 provides that while the Security Council is exercising functions (in respect of any dispute or situation) assigned to it in the present Charter, the General Assembly shall not make any recommendation with respect of that dispute or situation unless the Security Council so requests. It is clear from the above provision that Article 10 confers upon the General Assembly very wide deliberative functions except in respect of those matters which are being considered by the Security Council. The General Assembly, under this Article, has been empowered to discuss any question or any matter within the scope of the Charter.

(ii) The General Assembly may consider general principles of cooperation in the maintenance of international peace and security including the principles governing disarmaments and regulations of armaments and may make recommendations with regard to such principles to the members or to the Security Council or to both.[5]

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1. Article 7 of the Charter of the U. N.
2. Article 9.

* See also for P.C.S. (1978) Q. No. 6(a).

3. Article 18.

** See also for P.C.S. (1972), Q. No. 7 ; P.C.S. (1977), Q. No. 4 ; P.C.S. (1984), Q. 7 : For answer see also matter discussed under the heading "Expanding Role of General Assembly—Uniting for Peace Resolution, 1950", in this Chapter.

4. Article 10.
5. Article 11 (1).

(iii) The General Assembly may call the attention of the Security Council to situations which are likely to endanger International Peace and Security.[6]

(iv) The General Assembly is also entitled to consider those matters or problems which are likely to endanger International Peace and Security and may make its recommendations in this connection.

(v) The General Assembly has also been entrusted important responsibilities under Article 13 which provides that the General Assembly shall initiate studies, and make recommendation for the purpose of—(a) promoting international co-operation in the political field and encouraging the *progressive development of International law and its codification* and (b) promote international co-operation in the economic, social, cultural, education and health fields, and assist in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

It is clear from the above powers and functions of the General Assembly that the General Assembly is a very powerful principal organ of the United Nations. It may also be noted that after the establishment of the United Nations, the powers and functions of the General Assembly have constantly increased and it has performed important functions. However, there are certain limitations of the General Assembly.

Limitations of the General Assembly.—(1) The resolutions or declarations of the General Assembly are not binding upon the States. They are merely recommendations. Therefore, the General Assembly cannot be said to be a world parliament because it cannot legislate for the States of the world and its declarations and resolutions do not have binding force upon the States. However, with the growth of the interdependence of States and the concept of international community, some changes have come in regard to the significance of resolutions of General Assembly. Under certain circumstances, these declarations and resolutions may create legal implications.

(2) Yet another great limitation of the General Assembly in particular and United Nations as whole is contained in Article 2 (7) of the Charter which provides : "Nothing contained in the present Charter shall authorise 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....." However, it may be noted that the meaning of the term "domestic jurisdiction" has not been clarified in the Charter. As a matter of fact, its meaning and scope depend upon the factors of time and circumstances. When discussions were going on in San Francisco Conference, the intention of the members was that the General Assembly would not consider any matter which was within the domestic jurisdiction of States. They clearly intended that the General Assembly would not pass any resolution on matters which were the internal affairs of the State. As pointed out by Prof. Gilmour, "it is now generally agreed that a great change has come in this respect and that the scope of the 'domestic jurisdiction is constantly lessening." [7] According to Judge Lauterpacht, "any matter which is regulated by international law cannot be matter within the domestic jurisdiction of a State." Q. Wright has also expressed the view that the discussion or passing of resolutions by General Assembly on general matters does not amount to intervention in the domestic affair of any States.[8] As a matter of fact, some matters which were thought to be matters within the domestic jurisdiction of States when the United Nations was established are now considered matters of international concern. It is quite possible that some matters which are now considered within the sphere of domestic jurisdiction, may become matters of international concern in future. Despite this it cannot but be admitted that Article 2 (7) is an important limitation of the powers of the General Assembly in particular and the United Nations as a whole in general.

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6. Article 11 (3).
7. D. R. Gilmour, "The Meaning of 'Intervene' within Article 2 (7) of the U. N. Charter", I.C.L.Q. (1967), p. 330 at p. 351.
8. Q. Wright, "Is discussion Intervention ?", A.J.I.L. (1956), 102.

LEGAL SIGNIFICANCE OF U.N. GENERAL ASSEMBLY RESOLUTIONS*

It may be noted at the outset that the General Assembly is not a world legislative body. It cannot legislate in regard to most political matters; it can only recommend.[9] It is clear both from a reading of the U. N. Charter (Article 18) and its historical background that the General Assembly has not been conferred any law-making power over States.[10] Although the General Assembly is not a legislative body in the ordinary sense of the term, its law-making powers have, however, generally been recognised in two special contexts (i) in respect to most of the internal operations of the U. N. and (ii) in relation to the rules of International law which govern the conduct of Member-states outside the U.N.[11] As regards the latter, the case of the admission of Israel to the U. N. may be cited. But the legal significance of such precedents is not due to the content of the resolution but due to a practical decision reached by the community of nations. Hence the crucial question still remains as to whether a General Assembly resolution announcing in abstract form a rule governing State conduct is capable of law-making effect by virtue of its consent.

Prof. W. Friedmann has aptly pointed out : "A declaration of principles is fine as far it goes but it does not commit anybody to any specific section." [12] But, "there are several ways in which a resolution, by being linked to one or more of the traditional sources of international law, can serve as a law-creating mechanism. A resolution can interpret the United Nations Charter or other treaty, accelerate the development and clarify the scope of a customary rule or identify and authenticate a general principle of law recognised by civilised nations. A resolution tied in this way to a traditional sources of international law."[13] In one of his dissenting opinions, Judge Abjandro Alvarez of the International Court of Justice remarked that the declarations by and resolutions of the General Assembly, though not of binding character in themselves, may acquire a binding force on receiving the support of public opinion.[14] In this connection Prof. Krzys of Skubisewsk has remarked that since the resolutions of the General Assembly are addressed to member, States and Governments, their effectiveness naturally depends upon the backing and compliance of the member-States.[15] But as remarked by Prof. Roger Fisher, the member-States in their domestic as well as foreign operations are under heavy pressure from various sources to conform to accepted standards of behaviour. He has also identified four sources of pressure : (i) likelihood of direct retaliation by the Government directly affected; (ii) the possibility of an adverse reaction among allies; (iii) political criticism by Government's own constituents, and (iv) the deeply rooted moral nature of the individual decision-makers.[16] Prof. Lande has also remarked that "the danger of external resources, the reaction of other States, and the pressure of domestic and world opinion are thus important factors influencing government compliance with the Assembly's resolutions." [17]

Moreover, a General Assembly resolution may sometimes focus, crystallise, formulate and express world opinion. As remarked by F. Blaine Sloan, "The judgment made

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* See also for P.C.S. (1977), Q. 4 ; For more details and recent developments see also matter discussed under the heading "Resolutions and Declaration of General Assembly of the U.N. as a source of Universal International Law" at pp. 80-82, ante ; see also S.K. Kapoor, "Significance of U.N. General Assembly Resolutions". II, S.C.J. (December, 1972) p. 68.

9. Gabrielle Rosner Lande, "The Changing Effectiveness of General Assembly Resolutions" Proc. A.J.I.L., April, 23-25, 1964 at p. 162.
10. Krzys of Skubisewki, "The General Assembly of the U. N. and its power to influence National Action" Proc. ASIL, April 23-25, 1964 at p. 153.
11. Samuel A. Bleicher, "The Legal Significance of Recitation of General Assembly Resolution", AJIL Vol. 63, No. 3 (July 1969), p. 444 at p. 445.
12. Seldon Redivivus—Towards A Partition of the Seas", A.J.I.L., Vol. 65, (October, 1971), p. 757.
13. See note 11, See also Brownlie, "Principles of Public International Law", p. 11.
14. "They have not yet acquired a binding character, but they may acquire it if they receive, which in several cases has condemned an act contrary to a declaration with more force than if it had been a breach of a convention of minor importance", Reservations to the Convention on Genocide, Dissenting opinion of Alvarez, J., (1951) I.C.J. Rep. cited in Proc. A.S.I.L., April 23-25, 1964 p. 153.
15. "The General Assembly of the U.N., and its Power to Influence National Action", Proc. A.S.I.L., April 23-25, 1964, p. 153.
16. "Bringing Law to Bear on Governments", 74, Harvard Law Review (1961), pp. 1134-35.
17. Proc. A.S.I.L. April 1984, p. 165.

by the General Assembly as a collective world conscience is itself a force internal to the individual conscience of any given States." He further remarked that the Assembly's moral force," is in fact a nascent legal force which may enjoy in the rounded words of Justice Cardozo, a twilight existence hardly distinguishable from morality and justice until the time when the 'imprimatur' of the world community will attest its jural quality.'[18] But Prof. Gabriella Rosner Lande has rightly remarked that, the nascent legal force of the Assembly has already begun to develop. In certain respects the distinction between the status of resolution as recommendation and resolution as legislation may have become rather thin.[19] He also cites six additional variables : (i) the time, (ii) vote, (iii) language, (iv) fundamental issues, (v) the method and means, and (vi) the expectations of members in regard to the resolution which influence the effectiveness of U. N. General Assembly resolution and member-States compliance with them.[20] While discussing effectiveness of resolution 1962—XVII relating to Legal Principles on Outer Space, J.E.S., Fawcett remarked : "We must wait on the future to see whether the requirement of the consent of States in international law-making can ever become independent of the treaty process and be satisfied by a vote in the General Assembly or an International Conference convened by it. In the law of the Sea conventions at least; the treaty form has already begun to seem like a grumbling appendix.[21] However, it may be noted that the "continual recitation by the General Assembly of certain principles that are described as binding obligations because of their roots in the established sources of international law does serve to reinforce the claim that the paticular resolution enunciates binding principles." [22]

It is probably due to these considerations that one of the most remarkable judicial decisions on international law of recent years, an Italian Court did not hesitate to test the Iranian Oil Industry Legislation for its consistency with the General Assembly Resolution—(1803-XVII) on Permanent Sovereignty Over Natural Resources.[23] Lastly, as pointed out by Rosalyn Higgins the key issue is not the non-binding character of Assembly resolution but the cumulative effect of such resolutions taken as an indication of the emergence of the rules of general customary law. She writes : "What is required is an examination of whether resolutions with similar content, repeated through time, voted for by overwhelming majorities giving rise to general *opinio juris*, have created the norm in question." [24] As aptly remarked by Prof. Inis L. Claude, Jr. : "States are more inclined to deny their violations than to proclaim them as acts of defiance and the very fact that they make strenuous efforts to influence Assembly resolutions means that they are reluctant to go against the grain of majority sentiment in that body." [25] Prof. Leo Gross has also remarked that, "Some resolutions such as those dealing with Outer Space may derive special significance from the fact that they represent the consensus of two powers which have a virtual *duopoly taat* in that original field.[26] The same can be said about the resolution relating to the Deep Sea Floor. It has been rightly remarked that resolutions of the General Assembly purporting to be of a law-making character are certainly "an important link in the continuing process of development and formulations of new principles of International Law." [27]

It is relevant to note here what Prof. J.F.S. Fawcett has remarked about Resolution 1962 (XVIII) which declared Legal Principles on Outer Space. He has said that Resolution 1962 (XVIII) "may fairly claim to have furthered the progressive development of

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18. "The Binding Force of a Recommendation of the General Assembly of the U. N." 25 BYBIL (1948), pp. 32, 33.
19. The Changing Effectiveness of General Assembly Resolutions", Proc. ASIL., April 1961, p. 162 at p. 165.
20. Ibid.
21. International Law and the Uses of Outer Space, p. 14.
22. Samuel A. Bleicher, "The Legal Significance of Recitations of General Assembly Resolutions", AJIL, Vol. 69 (July 1969), p. 444 at p. 454.
23. Anglo Iranian Oil Co. v. S. U. P. O. R., (1955) I.L.R. 40.
24. Rosalyn Higgins "The U.N. and Law Making : Political Organs", 64 A.J.I.L. (Sep. 1970), p. 43.
25. "Some Implications and Questions for the Future", Int. Organ. Vol. XIX (Summer 1965), p. 835 at p. 845.
26. "The United Nations and the Rule of Law", Int. Orgn. Vol. XIX (Summer 1965 p. 537 at p. 556.
27. Wolfgang Friedmann, "The Changing Structure of International Law", p. 139.

International Law called forth by Article 13 (1) because it has formulated general principles of law of international conduct or authoritatively interpreted the United Nations Charter....."[28] So is the case with the Resolution 2749 (XXV) relating to the Deep Sea Floor. Regarding such type of resolutions Mc Nair has said that, "while it is unsafe to generalise upon them there is no reason or principle why they should not establish obligations,"[29] Prof. C. Wilfred Jenks has also remarked that "they are much more than a programme of desirable objectives; they are, an attempt to deduce some of the implications for International Law." [30] Before the conclusion of the Outer Space Treaty, Prof. Jenks aptly remarked : "The authority of the Declaration of legal principles may be expected to grow with the passage of years. While it is somewhat less than a treaty, it must already be regarded a rather more than a statement of custom." [31]

It may, therefore, be concluded that a General Assembly resolution announcing in abstract form a rule governing State conduct is capable of creating obligations and implications of international law. As noted earlier, by being linked to one or more of the traditional sources of international law, it can serve as a law creating mechanism. Lastly, a resolution which has formulated general principles of law or international conduct or authoritatively interpreted the United Nations Charter may fairly claim to have furthered the progressive development of international law called forth by Article 13 (1) of the United Nations Charter.

II. Supervisory functions.—The General Assembly supervises the functions of other principal organs and specialised agencies of the United Nations. The General Assembly particularly exercises sufficient control over the two principal organs of the United Nations, namely, the Economic and Social Council and Trusteeship Council. The Economic and Social Council, in fact works as a subordinate organ of the General Assembly. Similarly excepting the strategic areas which are under the direct supervision and control of the Security Council, the Trusteeship Council also acts like a subordinate organ of the General Assembly. The General Assembly exercises control over these organs and performs many supervisory functions in this connection. Moreover, the Security Council and other organs of the United Nations have to submit annual reports to the General Assembly. The General Assembly considers and discusses these reports. The General Assembly also exercises some control over the Secretary-General of the United Nations. In fact, the annual session of the General Assembly begins with the discussion and consideration over the report of the Secretary-General on the work of the organisation.[32] Thus we see that the General Assembly is one of the potent principal organs of the United Nations. Besides performing certain functions which have been allotted exclusively to it, it supervises the functions of other organs and specialised agencies of the United Nations.

III. Financial Functions.—The General Assembly also performs important financial functions. It considers and approves the budget of the United Nations. Article 17 provides that the General Assembly shall consider and approve the budget of the organisation. Article 17 further provides that the expenses of the organisation shall be borne by the members as apportioned by the General Assembly. Further, the General Assembly shall consider and approve any financial and budgetary arrangements with specialised agencies and shall examine the administrative budgets of such specialised agencies with a view to making recommendations to the agencies concerned. As pointed by Prof. Leonard, "This is an important provision as it involves the power to review the work of other organs and to exercise a degree of control by deciding which activities will receive financial reports." He further adds, "As General Assembly controls purse strings, it is a potent power."

The Powers of the General Assembly reached their zenith with the passing of the Uniting for Peace Resolution, 1950. This resolution conferred upon the General Assembly

28. J.E.S. Fawcett, "International Law and the Uses of Outer Space", p. 13.
29. Ibid., p. 7.
30. Law, Freedom and Welfare, p. 33.
31. C. W. Jenks, "Space Law" (Stevens, 1965), p. 185.
32. Article 98 of the Charter.

important powers relating to international peace and security. Under this resolution the General Assembly has been empowered to send the Emergency Forces of the United Nations for the supervision of cease-fire of conflict areas or to maintain international peace and security. It was under this resolution that the United Nations Emergency Forces (UNEF) were sent to Egypt during Suez Crisis of 1956. Later on United Nations Forces were sent to Congo in 1960 to maintain law and order in that State. Since the passing of the Uniting for Peace Resolution, Russia has been opposing the said resolution on constitutional and other grounds. According to Russia, it is contrary to the provisions of the Charter. In the view of Russia, the primary responsibility of maintaining peace and security has been conferred upon the Security Council under the United Nations Charter. Therefore, sending the United Nations Forces and thereby incurring huge expenditure upon them by the General Assembly is contrary to the United Nations Charter. Consequently, Russia has refused to pay any expenses incurred by the United Nations for sending Emergency Forces to Egypt in 1956, and to Congo in 1960-61. France also adopted the same attitude. This created a financial crisis before the United Nations because huge amount of money of the United Nations was spent on the said operations. In order to resolve this dispute and to ascertain true legal position, the General Assembly of the United Nations requested the International Court of Justice to give its advisory opinion on the matter and to interpret para 2 of Article 17 which lays down, "The expenses of the organisation shall be borne by the members as apportioned by the General Assembly."

The obvious reason which necessitated the reference of this matter for legal opinion of the International Court of Justice was the question of validity of the expenses incurred by the United Nations under the Uniting for Peace Resolution in Congo and Egypt. On July 20, 1962, the International Court of Justice in its advisory opinion *on certain expenses of the organisation*,[33] ruled that the General Assembly of the United Nations is entitled to perform all those functions which are not prohibited under the Charter and which are performed for the fulfilment of the purposes of the Charter as laid down in Article 1. The International Court of Justice had also to make it clear whether the expenses incurred in sending United Nations Emergency Forces to Egypt in 1956 and to Congo in 1960, were to be considered, "the expenses of the Organisation" within the meaning of Article 17 (2). The International Court of Justice gave its affirmative reply that such expenses were the expenses of the organisation and could, therefore, be apportioned by the General Assembly among the members of the United Nations.[34] In other words, it held that Russia was bound to pay the expenses incurred by the United Nations in the said operations and as apportioned by the General Assembly among the members particularly Russia. Thus indirectly the International Court of Justice upheld the validity of the Uniting for Peace Resolution, 1950, and made it clear that the General Assembly can do all that which is not prohibited under the Charter.

Despite the above decision by the International Court of Justice, the problem could not be resolved because Russia and France refused to pay their shares of expenses

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33. I.C.J. Reports (1962), p. 151.
34. The International Court of Justice observed : "By Article 17; paragraph 1, the General Assembly is given the power not only to 'consider' the budget of the organisation but also to 'approve' it. The decision to 'approve' the budget has a close connection with paragraph 2 of Article 17, since thereunder the General Assembly is also given the power to apportion the expenses among the Members and the exercise of the power of apportionment creates the obligation, specifically stated in Article 17, paragraph 2, each Member to bear that part of the expenses which is apportioned to it by the General Assembly. When those expenses include expenditures for the maintenance of Peace and Security, which are not otherwise provided for, it is the General Assembly which has the authority to apportion the latter amounts among the Members. The provisions of the Charter which distribute functions and powers to the Security Council and to the General Assembly give no support to the view that such distribution excludes from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security.....The Court accordingly finds that the argument which seeks by reference to Article 11, paragraph 2, to limit the budgetary authority of the General Assembly in respect of the maintenance of international peace and security, is unfounded."

incurred in sending the United Nations Emergency Forces in Egypt and Congo.[35] Consequently, on September 1, 1965, a resolution was passed wherein it was provided that in cases of sending the forces to Egypt and Congo by the United Nations and expenses incurred thereby by the United Nations, the provisions of Article 19, shall not apply. Article 19 provides, "A member of the United Nations which is in arrears in the payment of its financial contribution to the Organisations shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of contributions due from it for the preceding two full years." The General Assembly Resolution of 1965, was necessitated because of the fact that America adamant to see that Russia was deprived of its vote in General Assembly because of being in arrears in payment of its financial contributions to the Organisation. The said resolution, in order to revolve the financial crisis with which the Organisation was confronted, also recommended that expenses incurred by the United Nations in the said operations shall be met by requisite voluntary contributions from different Member-States of the United Nations.

Financial crisis faced by the U. N.

The U. N. at present is facing a financial crisis. The unprecedented financial crisis is due to the reason that some 18 members of the U. N. have been withholding portions of their annual contributions for some or the other reason. Besides this, 72 members have been in arrears for a long time. Moreover, the expenditure of the U. N. has been constantly increasing. To quote only one example, starting with 1,566 employees in 1945 now it has as many as 11,400 people on its payrole.

The U. N. is owed $ 450 million in arrears and the U. S. threatened heavy cuts unless it (*i.e.*, the U. N.) changed the voting system. The U. S. is required to pay 25 per cent of the regular budget of around $ 800 million annually. The main reason for the present financial crisis is the U. S. decision to impose cuts and deferments on its assessed contribution to the U. N. The U. S. attitude towards international organisations in general and the U. N. in particular has become very rigid for sometime. It withdrew from the I.L.O. and the UNESCO. It stopped its contribution to the U. N. Fund for Population Activities. It has been pointed out in some studies at the U. S. that the basic character of the U. N. has radically changed due to the emergence of the non-aligned bloc as a factor in the affairs of the organisation. It is pointed out that the 'automatic' majority of the third world is proving to be a great hindrance to the U. N. making itself effective.[36]

According to Article 17 (2) of the U. N. Charter, the expenses of the organisation shall be borne by the members as apportioned by the General Assembly. Therefore, withholding assessed contribution by member nations is certainly a violation of the Charter. On 24 October 1987, the U. N. celebrated its 42nd anniversary but at that time it was passing through an acute financial crisis. In 1987 the U. N. is owed 450 million dollars in arrears from its members. The U. S. alone owed more than 340 million dollars.

It may, however, be noted that there is something unrealistic about the way the expenses of the organisations are apportioned among the members. The system which started in 1945 continues even today though the membership of the U. N. has more than trebled since then. In the beginning western countries especially the U. S., agreed to the system because they commanded the majority. With some modifications this position continued upto 1960. But due to the emergence of large number of Asian and African countries in the 1960s the position changed altogether. As aptly pointed out by Mr. Rikhi Jaipal, India's ambassador to the U. N. 1974-79 and U. N. Assistant Secretary-General 1979-84, "It is essentially a conflict over the voting power of the western minority and that of the Third World majority. Decisions on budgetary questions require a two-thirds majority

35. In his dissenting opinion Judge Winiaski of Poland observed that the purposes set forth in the Charter are very vast and therefore in very uncertain terms. This does not mean that any means may be resorted to achieve these purposes. An act of any organ does not become valid simply because it is done to achieve the purposes of the United Nations (I.C.J. Reports (1962), p. 151 at p. 2301. The opinion is in conformity with the Russian view. But the majority of the Court rejected this view.

36. See T.J.S. George, "Glooms at the United Nations", Indian Express, 8 October 1986.

vote in the General Assembly. This creates a problem for a minority of some 15, mainly western countries which contribute nearly 85 per cent of the U. N. budget, and resent being outvoted by a majority of some 110 countries that together contribute only 1.95 per cent." [37] He has, therefore, rightly suggested, "Some form of pragmatic and realistic collaboration among States is urgently needed to make a reality of a voluntary organisation of sovereign nations that has limited finance, no enforcement machinery and restricted powers.[38] It may be added that the problem is not merely legal, it is a more financial and political problem.

To break the deadlock, a group of 27 countries was set up. Later on its strength was reduced to 16 and finally 6 comprising of the Indian ambassador, Mr. C. R. Gharekhan, and ambassadors of the U. S., the Soviet Union, Chaina, Brazil and Cape Verde. After scores of meetings, the six members group reached a consensus, accepting a formulation proposed by India. Under the formula, General Assembly's procedure of voting on the budget is reconfirmed, but the committee on programme co-ordination, which does the ground work for the budget, has been urged to take decisions by consensus without prejudice to its right to decide issues by voting. Before winding up its 41st annual session on Thursday 18 December 1986 night, the General Assembly adopted new guidelines co-sponsored by India and 18 other countries for deciding programme budget. While India hailed it as a "historic decision", the U. S. called it "hope for (U. N.'s) future." The General Assembly President, Humayun Rashid Chaudhury of Bangladesh said, "You are going to have financially reviewed, leaner, efficient, credible U. N." However, he warned, "we cannot afford to be complacent. The result of our efforts still needs to undergo the acid test of implementability." [39] Though the above-mentioned formula may ease the present crisis for the time being, it will be wrong to be complacent and to think that the crisis has been averted for ever.

On 22 December 1988, the General Assembly passed the budget for next three years. In the history of the Organisation, for the first time the budget was passed unanimously. The modified budget of 1988 and 1989 was passed and the budget passed for the years 1990 and 1991 was comparably less than that of the last two years. This is indeed good as far as it goes but since the U. N. is an indispensable organization and there is no alternative to it, it will be in the interest of international community to make sufficient money to the U. N. to perform its functions properly.

On 16th January 1992, Member States owed the organization over $ 1 billion. The United States, the largest contributor, was over $ 400 million in arrears. To meet the financial crisis proposals were made such as : interest should be charged on amounts of assessed contribution not paid on time. Organization's financial regulations should be suspended to permit the retention of budgetary surpluses ; and the working capital should be increased to a level of $ 250 million from 1 January 1992. A proposal was also made for the establishment of a temporary Peace Keeping Reserve Fund at a level of $ 50 million, to meet initial expenses of peace-keeping operations.

The then Secretary General of the U. N. Mr. Boutros Ghali, announced on 8 February, 1992 the discontinuation of 12 U. N. departments and the assignment of their functions to other existing units. The departments include those dealing with political and Security Council affairs, special political questions, regional co-operation, decolonisation and trusteeship, disarmament affairs, international economic and social affairs and technical co-operation for development. The U. N. centres for science and technology for development, transnational corporations, ocean affairs, the law of the sea and disarmament affairs are being abolished. According to the entire plan, the staff reduction may be in the neighbourhood of 20 to 25 per cent, thus effectively cutting down expenditure on employees and making the U. N. more efficient.

Reference may also be made here to the report of the 11-Member panel convened by the Ford Foundation in consultation with the office of the U. N. Secretary-General, in

37. The U. N. Crisis", Indian Express, 24 October 1986.
38. Ibid.
39. Indian Express, 21 December 1986.

response to growing concerns about U.N.'s financial problems. In a 34-page report entitled "Financing an Effective United Nations," the group outlined a comprehensive and detailed series of recommendations to place the organization on sounder financial footing. The group noted that as compared to 15,000 peace-keepers deployed around the world two years ago, it has now nearly 55,000. The panel called for the establishment of a $ 400 million revolving fund for peace-keeping, financed by three annual assessments on Member States, that would assure reliable funding in the critical start up phase of operations. The panel suggested that the U. N. consider a unified peace-keeping budget financed by a single annual assessment, to replace the current system under which each mission is financed separately. It affirmed that a unified budget would enable the U. N. to create an ongoing infra-structure for managing operations and providing them with common services.

With regard to U.N.'s persistent budget short fall, the group called on all countries to pay their assessed dues on time and in full. Governments should also pay their dues in four quarterly instalments rather than current single payment due in January. The U. N. should be able to charge interest on late payments. These suggestions, especially the one regarding charging of interest on late payments merit serious consideration.[40]

Despite the efforts of the Secretary-General of the United Nations and others, the financial crisis of the United Nations still persists. On 15th January, 1996, there were $ 3.3 billion arrears out of which $1.6 billion was against the regular budget and $ 1.7 million against peace keeping operations. Out of the total arrears $ 1.5 billion is owed by the United states. It may be noted that United States is assessed 25 per cent of the regular U.N. budget and 31 per cent of peace keeping costs. For several years the U.S. Congress has refused to fund these obligations in full. Last year the U.S. Congress reduced the U.S. peace keeping contributions to 25 percent. Time and again the U.S. has been impressing upon the U.N. to effect substantial cuts in the budget and U.N. staff. It was due to such pressure that the General Assembly has adopted a no-growth budget of $ 2.6 billion for 1996-97. The Management experts have proposed sweeping personnel cuts so as to reduce spending by $ 1.8 billion. Secretary-General Boutros Boutros Ghali has proposed several steps to pull the U.N. out of the edge of insolvency. His steps include giving the U.S. Congress a greater incentive to pay America's back dues by cutting U.S. share of five to 15 or 20 per cent. Though not specifying the exact number, he has also agreed to make drastic personnel cuts. About ten per cent or around 1,100 persons will lose their job in the U.N.

The financial crunch is so grave that the U.N. has been using contributions made for peace-keeping operations to run its day to day operations to keep the U.N. afloat. The financial crunch has hurt especially the countries contributing troops and equipment to peace-keeping operations because the U.N. has failed to pay them for their equipment and services. India is a major contributor and has claims between $ 50 and $ 70 million. Other major contributors include Britain, France and Canada.

Though 26 member states, including India, paid their contributions in full in 1996 financial position of the U.N. did not change as the U.S. did not clear its debts.

A bipartisan panel of the United Nations Association of the United States has reached the shocking conclusion that lack of funds will lead to the collapse of the United Nations. Even if this may not be accepted as true the situation remains to be grim.

In July 1997 American Senators proposed a plan to solve financial crisis of the U.N. The plan included the following points :

(1) Payment by America of $819 millions in next three years ; (2) reduction of the total percentage of U.N.'s budget paid for by the U.S. from the pre sent 25 percent to 20 per cent; (3) reimbursement to Washington for "costs incurred" during U.N. peace keeping operations ; (4) having an American Inspector General within U.N. as well as its three largest agencies—ILO, FAO and WHO to look after financial matters.

40. See U. N. Chronicle, Vol. XXX No. 2 (June, 1993) p. 73.

The American proposal could receive only frosty response. If American proposal for reduction of total per cent from 25% to 20% is accepted, similar claim may be made by European Union and other developed states. It will prove to be counter productive. America is indebted to the U.N. for the non-payment of its contributions. It is not entitled to impose condition for payment of its debts. Already, there is a feeling among the large number of countries that the U.N. acts at the dictates of the U.S. If American demand for the presence of American Inspector General in U.N. to oversee financial matter is accepted there will be great resentment by these countries. It will almost amount to a veto by U.S. in financial matters of the U.N.

It may also be noted that America is talking of payment of $819 million in next three years and subsequently it was raised to $930 million whereas it was $1.5 billion to the U.N. which is more than half of $2.6 billion currently owed to the U.N. by member States.

In October 1997, U.N. Secretary-General, Kofi Annan presented a slimmed-down budget of $2.583 billion for the two year period 1998-1999. In December, 1997, the General Assembly of the U.N. rejected American demand of lowering its contribution from the current 25 per cent but agreed to hold new negotiation next year. This was on the recommendation of the U.N. Finance Committee which resolved to consider reviewing the scale of assessment for the years 1999-2000 during the 52nd session in the light of all relevant factors, contributions and to make a determination in this respect.

In March, 1999, U.N. Secretary General Kofi Annan once again appealed to the political leaders of America to pay more than one billion of arrears. In October, 1999, Deputy Secretary General Joself E. Conore declared in clear words that if America does not pay 350 million dollars to the U.N. by 31st December, 1999, America will lose the right of voting in the General Assembly. According to the U.N., America owe 1.7 billion dollars of arrears but according to the U.S. only 1 billion 25 million dollars are due because for the rest being peace keeping costs are in dispute.

In the first fortnight of November, 1999, the Republican Leaders in White House arrived at a compromise to end the stalemate over payment of U.S. arrears to the United Nations. In return for Clinton Administration had to accept certain conditions. According to the said compromise the U.S. would pay $100 million subject to the conditions mentioned in Helms-Biden legislation of the U.S. congress. Probably the most arrogant conditions was that the U.N. members must accept the amount in the legislation ($ 926 million) as full payment of what the U.S. owes. But the amount of U.S. past due was $1.6 billion according to the U.N. Yet another important condition was that the U.N. members must agree to reduce the U.S. share of the U.N. dues from 25 per cent to 22 per cent and the U.S. share of peace-keeping from 31 per cent to 25 per cent.

The position of the payment of member's contribution to the U.N. is very unsatisfactory. In the beginning of year 2000, as many as forty five countries had lost their vote in the General Assembly. The Assembly had exempted seven other countries from the non-vote rule due to special circumstances, such as civil war and natural disasters. They are : Bosmia, Comoros, Tajikistan, Republic of Congo, Guinea-Bissau, Nicaragua and Georgia. Thus 52 countries whose debts exceed contributions of two full years is the biggest number in recent years. Last year 42 countries were in this category compared to 39 in 1998, 43 in 1997, 39 in 1996 and 25 in 1995.

The United States just escaped being classified in this group, Washington owes the United Nations more than 1-2 billion dollars.

A great set back to the U.S. has been in the defeat and consequent removal from the United Nations Human Rights Commission.

In June, 2001, U.N. Secretary General Kofi Annan once again appealed member States to contribute more money for the proper functioning of the United Nations.

The financial position of the U.N. thus continues to be grim. Great statemanship and reconciliation between competing claims will be imperative to save the U.N. from utter collapse..

On 29th October, 2003, United Nations Secretary-General recommended 0.5% growth in the organization's budget for the year 2004-2005 including small extra expenditures on programmes for Africa, crime prevention and human rights. Such a recommendation has been made after nearly a decade of no growth in U.N. budget. Giving the reasons for his recommendations, Mr. Kofi Annan said that the security of UN mission staff would require more funds than presently requested. The results based budget reflects a major effort to align the activities of the organisation with priorities agreed on at the Millennium Summit of 2000 and major world conferences. His proposed budget also provided for more staff training as it proposed hiring 117 new young professionals.

IV. Elective Functions

The General Assembly perform two types of elective functions : (*A*) Regarding admissions of new States to the United Nations; and (*B*) Election of members for other organs.

(A) *Regarding admission of new Sates to the United Nations.*—The General Assembly performs important functions in respect of admission of new States to the United Nations. The Charter of the United Nations uses the term 'admission' in this respect. But, as pointed out by Prof. Leonard, it is in fact 'election' and therefore, comes under the elective functions of the United Nations. A new State is admitted to U. N. by decision of the General Assembly by two-thirds majority of the members present and voting upon the recommendations of the Security Council.[41] Besides this, the General Assembly also possesses certain powers in respect of suspension and expulsion of members. In this connection following may be noted :

(*a*) A member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of rights and privileges of membership by the General Assembly upon the recommendations of the Security Council.[42] Since the suspension of the rights and privileges of the membership is an important and substantial matter, it can be done only when the General-Assembly passes resolution by two-thirds majority of the members present and voting upon the recommendation of the Security Council.

(*b*) A member of the United Nations which has persistently violated the principles as contained in the Charter may be expelled from the Organisation by the General Assembly upon the recommendation of the Security Council.[43] Since the expulsion of members is also a substantial matter, the same procedure is followed as has been mentioned above in the case of suspension of members.

(*c*) A member of the United Nations which is in arrears of the payment of its financial contribution to the organization may be deprived of its vote by the General Assembly by resolution passed to that effect by two-thirds' majority of the members present and voting.[44]

(B) *Regarding election of members of other organs.*—The General Assembly performs important functions in regard to the election of members for other organs'of the United Nations. In this connection the General Assembly performs the following functions :

(*a*) It elects 10 non-permanent members of the Security Council.[45]

(*b*) It elects 54 members of the Economic and Social Council.[46]

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41. See Article 4 of the Charter.
42. Article 5.
43. Article 6.
44. Ibid 19.
45. Ibid 23.
46. Ibid 61.

(*c*) It also elects some members of the Trusteeship Council.[47] For this, Article 86 (c) provides that the General Assembly shall elect as many members of Trusteeship Council for a period of three years as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those members of the United Nations which administer trust territories and those which do not.

(*d*) It also takes part in the election of the Judges of the International Court of Justice.[48]

(*e*) The General Assembly also takes part in the appointment of the Secretary-General. In this connection, Article 97 provides that the Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council.

V—Constituent Functions[49].—The General Assembly performs important constituent functions also. It takes part in the amendment of the Charter. The Charter provides that amendments to the present Charter shall come into force for all members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the members of the United Nations including all the permanent members of the Security Council.[50] So far there have been only a very few (three) amendments to the Charter. Amendments to Articles 23, 27 and 61 were adopted by the General Assembly on 17th December, 1963 and came into force on 31st August, 1965. A further amendment to Article 61 was adopted by the General Assembly on 20 December, 1971, and came into force on 24 September, 1973. An amendment to Article 109, adopted by the General Assembly came into force on 12 June, 1968.

A persual of the above-mentioned powers and functions of the General Assembly leads to the irresistible conclusion that General Assembly is a very important and potent principal organ of the United Nations. As noted earlier, its powers reached their zenith on the passing of the Uniting for Peace Resolution, 1950, which conferred upon it important powers in respect of maintenance of International Peace and Security.

Expanding role of General Assembly—Uniting for Peace Resolution, 1950.[51]

Since the establishment of the United Nations the powers and functions of the General Assembly have constantly increased. In this connection a brief discussion of the Uniting for Peace Resolution of November 3, 1950, is not only desirable but necessary. A brief discussion is, therefore, being given below :

*Uniting for Peace Resolution 1950**.—On account of mutual conflict and non-operation among the permanent members of the Security Council, the Security Council has failed miserably to perform its primary responsibility for the maintenance of world peace. The provisions enshrined in Article 48 for the contribution of armed forces to the United Nations by member States, could not be enforced because special agreements were necessary for this but they could not be entered into because of the conflict among the major powers. Consequently, the Security Council proved to be a very weak organ so far as the maintenance of peace and security was concerned. The first important achievement of the Security Council was that of action taken in Korean Conflict of 1950,

47. See Article 86 of the Charter.
48. Article 8 of the Statute of International Court of Justice.
49. For detailed study, see Chapter on "The Amendment of the U. N. Charter."
50. Article 108 of the Charter.
51. See also S. K. Kapoor, "The Maintenance of International Peace and Security", Lawyer (November 1972), p. 170; L. H. Woolsey, "Uniting for Peace", A.J.I.L., Vol. 45 (1951), p. 129.

* See also for P.C.S. (1976), Q. No. 10(8) ; I.A.S. (1968), Q. 9 ; P.C.S. (1984), Q. 7 ; P.C.S. (1983), Q. 9 ; See also for P.C.S. (1991), Q. 10(a).

when it decided that North Korea was an aggreessor and ordered for action to be taken to repel the aggression. This decision by the Security Council could be possible because when this matter was being considered by Security Council, the Russian representative was not present. On August 1, 1950, when the Russian representative returnd to the Security Council, the Security Council became incapable of taking any action because of the exercise of veto by Russia. America, therefore, took initiative with the support of France, Britain and other Western countries to equip United Nations with necessary and adequate machinery to deal with the matters relating to International peace and security. Due to the initiative of America, supported by Western countries, the General Assembly of the United Nations passed Uniting for Peace Resolution on November 3, 1950. This resolution provided the following :

(1) A special emergency session of the General Assembly can be called by the 9 affirmative votes of the Security Council to that effect or by the majority of the members of the General Assembly.

(2) If the Security Council fails to prevent any aggression or to take any action in respect of any breach of peace, the General Assembly may consider this matter.

(3) This resolution empowered the General Assembly to take collective measures including the use of the armed forces for the maintenance of peace and security.

(4) A 14-member Peace Observation Commission established to supervise conflict areas and to submit report to the General Assembly in that regard. It may, however, be noted that this Commission could go to the conflict area when the State concerned gives its consent in this connection.

(5) Each member was asked, under the resolution, to maintain certain elements within its armed forces fully equipped so that the same could be available to the United Nations at its demand.

(6) A 14-member Collective Measures Committee was also established under the resolution so as to study and report the matters relating to International Peace and Security.

"The objective of the resolution was to improve the machinery of the United Nations for preserving peace." [52] Josef L. Kunz has also pointed out, "It was an attempt to transfer the sanctioning competence from the Security Council to General Assembly in order to evade veto and to revise the task of the United Nations to maintain and restore International Peace and Security." [53]

Validity of the Uniting for Peace Resolution.—Validity of the Uniting for Peace Resolution, 1950, has been challenged and criticised by some jurists and Communist countires, particularly Russia.[54] Russia opposed this resolution from the very beginning on the ground that it is inconsistent with the provisions of the Charter. In her view, Charter conferred upon the Security Council the primary responsibility for the maintenance of peace and security and only the Security Council is empowered to use armed forces for this purpose. The view of Russia can be criticised because under Article 10 of Charter, the General Assembly is empowered to consider any matter within the scope of the Charter. Besides this Article 24 referred to by Russia simply provides that the *primary responsibility* for the maintenance of International Peace and Security will be that of the Security Council. But the term 'primary responsibility' does not mean that if Security Council fails to perform its responsibility, the responsibility of the United Nations

52. Juraj Andrassy, "Uniting for Peace", A.J.I.L., Vol. 50 (1956), 563.

53. See also Nagendra Singh, Recent Trends in the Development of International Law and Organisation Promoting Inter-State Co-operation and World Peace (1969), p. 1.

54. See Kazimierz Grzybowski, "International Organization from the Soviet Point of view" in The Soviet Impact on Inernational Law (1965), pp. 50-51.

Organisation as a whole ends. "No provision of Charter, not even Article 24 would allow the conclusion that the responsibility of the Organisation as a whole is ended in case of inability or unwillingness of the Council to take prompt and effective action." [55]

Another eminent jurist, Miss Gutteridge, has expressed the view that the United Nations is capable of legal development in accordance with the needs and circumstances. In her view the United Nations can do so if it fulfils two tests. (1) It should not be against the provisions of the United Nations Charter; and (2) It should be for the attainment of the purposes contained in Article 1 of the Charter.[56]

On the basis of the above discussion it would not be wrong to say that Uniting for Peace Resolution is a resolution which fulfils the above two tests. In short, Uniting for Peace Resolution is a valid resolution and is not inconsistent with the provisions of the Charter. As pointed out by Prof. Leonard, "The remarkable development in United Nation's brief career has been the place assumed by the General Assembly." "The decline of the Security Council and the consequent rise of the General Assembly to the role of prominent organ of the United Nations is probably the most striking constitutional change that has been experienced by the organisation." [57] With the successive failures of the Security Council to perform the functions entrusted to it under the Charter there was constant growth of the powers of the General Assembly. The main cause for the inability of the Security Council to perform its functions was the exercise of veto by the permanent members. Besides this, General Assembly perform certain functions which were approved by the International Court of Justice thereby leading to the enhancement of the powers and functions of the General Assembly. A brief reference of establishment of the Administrative Tribunal by the General Assembly as a subsidiary organ and the opinion of the International Court of Justice on the validity of the decisions given by this tribunal may be made. Some members of the United Nations criticised the establishment of the administrative tribunal and particularly the effect that its decisions were to be binding upon the members of the organisation as a whole. Some members criticised it on the ground that it was *de facto* amendment of the Charter because the General Assembly is only one of the principal organs of the United Nations. It is, therefore, not empowered to establish an Organisation whose decisions may be binding upon the other organs, members or the organisation as a whole. But the International Court of Justice rejected this criticism altogether and upheld the validity of the establishment of administrative tribunal as well as the binding force of its decision upon the members of the United Nations.[58]

Similarly, in regard to the validity of the expenses incurred by the General Assembly for sending United Nations Emergency Force (UNEF) in Egypt in 1956 and for sending United Nations Emergency force in Congo (United Nations Operation in Congo) in 1961, the International Court of Justice in its advisory opinion in 1962 upheld the validity of the expenses incurred by the General Assembly on both the said operations. In its advisory

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55. Juraj Andrassy, "Uniting For Peace", A.J.I.L., Vol. 50 (1956), p. 563 at p. 574; In its advisory opinion on Certain Expenses of the U. N. (1962), the International Court of Justice observed : "The responsibility conferred is 'primary' not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, 'in order to ensure prompt and effective action." To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement or coercive action against an aggressor. The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. Article 14 authorises the General Assembly to 'recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations.' The word 'measures' implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so....."

56. J. A. C. Gutteridge, The United Nations in a Changing World (1969), p. 8 : see also Castaneda, Legal Effects of United Nations Resolution (1969) at p. 33 : Mc Cullock V. Maryland, 4 Wheat, 316 (1819); Rahmatullah Khan, Implied Powers of the United Nations (1959), p. 3; I.C.J. Rep. (1949) at p. 182.

57. Stephen S. Goodspeed, the Nature and Functions of International Organization, p. 158.

58. See Effects of Awards of Compensation made by the United Nations Administrative Tribunal, I.C.J. Reports (1954), p. 47; see also S. Engel, The Changing Character of the United Nations (1969), p. 3.

opinion delivered on July 20, 1962, the International Court of Justice clarified the powers of the General Assembly under Article 17 to apportion the Expenses of the Organisation among the members and thereby indirectly upheld the validity of the Uniting for Peace Resolution, 1950.[59]

Besides the performance of the important functions for the maintenance of peace and security, since the passing of the Uniting for Peace Resolution, the General Assembly has also performed important functions in respect of human rights and fundamental freedoms. It has made proper use of the powers conferred on it under the Charter and thereby has performed important functions in the social, economic and cultural fields. These functions of the General Assembly have naturally enhanced the prestige and power of the General Assembly as one of the principle organ of the United Nations.

Despite the fact that Uniting for Peace Resolution equipped the General Assembly with necessary powers for the performance of important functions in respect of maintenance of peace and security, the Congo experience has made it clear that it can succeed only when there is co-operation among the permanent members of the Security Council. In Congo, the United Nations has in fact performed commendable functions and has been able to maintain law and order in that conflict area. But because of the refusal of France and Russia to pay their part of the expenses as portioned by the General Assembly in the said operation, the United Nations was confronted with financial crisis. Professor Goodrich has rightly remarked that even for the successful functioning of the General Assembly, the co-operation among the permanent members of the United Nations is very essential.

Procedure.—The annual sessions of the General Assembly may be convened either by the Security Council or by the majority of the members.[60] The General Assembly is entitled to formulate its own rules and procedures.[61] The General Assembly is also empowered to establish subsidiary organs for the performance of its functions. The session to the General Assembly begins with the discussion on the report of the Secretary-General on the work of the Organization. As pointed out earlier, each member is represented in the General Assembly and can send 5 representatives. Consequently, the General Assembly is a big body. It has, therefore, formed certain main and other committees through which it performs its major functions. The Committees of the General Assembly are of following types : (1) Main Committees; (1) Procedural Committee; (3) Standing Committee; and (4) *Ad-hoc* Committees.

The main Committees of the General Assembly generally consider the agenda of the General Assembly and prepare recommendations for the General. Each member of the United Nations is entitled to have its representative in the main committees. Following are the main Committees of the General Assembly : (i) Political and Security Committee; (ii) Economic and Financial Committee; (iii) Social, Humanitarian and Cultural Committee; (iv) Trusteeship Committee including non-self governing territories; (v) Administrative and Budgetary Committee; and (vi) Legal Committee. In addition to these there is a *Special Political and Security Committee.*

General Assembly resolutions as a source of Universal International law

N. B.—For this please see Chapter on "Sources of International Law."

Establishment of Subsidiary Organs by the General Assembly.—Under Article 22 of the Charter of the United Nations the General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions. From the beginning the General Assembly has made use of the power conferred on it under

59. See Certain Expenses of the U. N., I.C.J. Rep. (1962), p. 151; In his separate judgment, Sir Percy Spender of the International Court of Justice observed that it was the aim of the Charter to adopt itself to the Changing circumstances which were neither contemplated nor could be foreseen at the time of the framing the Charter. The purposes of the Charter should be given the prime consideration in any interpretation of the Charter. [Ibid, at p. 185].

60. Article 20 of the Charter.

61. Article 21.

Article 22 and has established several subsidiary organs. For example through a resolution[62] in 1947, it established International Law Commission. In 1963 through another resolution[63] it established the United Nations Institute for Training and Research (UNITAR). Earlier it established the United Nations Administrative Tribunal. In 1954 the International Court of Justice upheld its validity and held that its decisions were binding upon the Member States.[64] The decision of the Tribunal has also been upheld by the International Court of Justice in *Application for Review of Judgement No. 158 of the U. N. Administrative Tribunal*[65] and *Application for Review of Judgment No. 273 of the U. N. Administrative Tribunal*.[66] In recent years the General Assembly has utilized this power in establishing semi-autonomous institutions. For example in 1964, it established United Nations Conference on Trade and Development (UNCTAD). Similarly in 1966 it established U. N. Industrial Organization. Thus the old view that new institutions can be established only by international treaty, is no more tenable. Now new institutions can be established by resolutions of the General Assembly unanimously passed by Member States.[67]

Evaluation of the work of the General Assembly.—The General Assembly has performed important functions in the social, economic and cultural fields and in the fields of human rights. Besides this Uniting for Peace Resolution, 1950 conferred upon the Assembly important powers relating to the maintenance of International Peace and Security. There has been a constant development of the powers and functions of the General Assembly. "Thus the United Nations General Assembly.....has not only assumed for itself a position of the pre-eminence among the organs of the United Nations, but has become the symbol of democratisation in the world community of States inasmuch as the Security Council with its veto system and permanent seat for the Great Powers has yielded place in many respects to the democratic organ of the General Assembly which is based on the egalitarian principle of 'one State one vote.[68] In *Effects of Awards of Compensation made by the United Nations Administrative Tribunal*[69] the International Court of Justice held that the General Assembly can establish an administrative tribunal whose decisions may be binding upon itself. Some jurists have opined that it was nothing but a *de facto* amendment of the United Nations Charter. As pointed out by D. W. Bowett. ".....by and large, the Assembly has sought to regulate its action by reference to those purposes and principles and has been understood by the narrower questions of legal interpretation of specific Article of the Charter." [70] In the words of Judge Alvarez:".....the Assembly.....is tending to become an international legislative power. In order that it may actually become such a power, all that is needed is that Governments and public opinion should give it support. Public opinion is an important factor which comes into play in the new international law." [71] The Gulf War (1991) and the breaking up of the Soviet Union are likely to bring about revolutionary changes in the U N. In the present Uni-polar world (with U. S. as the sole

62. Gen. Ass. Resolution 174 (II of 21st Nov., 1947, which was amended in 1950, 1955 and 1961).
63. Gen. Ass. Resolution 1934 (XVII) of December 11, 1963.
64. See Effects of Awards of Compensation made by the U. N. Administrative Tribunal, I.C.J. Reports (1954), p. 47.
65. Advisory Opinion of 12 July, 1973.
66. Advisory Opinion of 20 July, 1982.
67. Louis B. Sohn, "The Development of the Charter of the U. N. :The Present State' in the Present State of International Law and other Essays (1973), p. 58.
68. Nagendra Singh, Recent Trends in the Development of International Law and Organization Promoting Inter-State Co-operation and World Peace (1969), p. 15.
69. I.C.J. Rep. (1954), p. 47.
70. D. W. Bowett, the Law of International Institutions (1970), p. 51.
71. Reservations to the Genocide Convention, I.C.J. Rep. (1951), p. 15 at p. 49: In the words of an Indian author, "The G. A. (i.e., General Assembly) resolutions constituted the 'joint action' and the 'process through which states and peoples' pursued their ojective. The point is, it would be native to ignore such law-creating resolutions." Rahmat Ullah Khan, "International Law—Old and New," I.J.I.L., Vol. 95 (1975) p. 371 at p. 374; see also Richard Falk, "On the Quasi-legislative competence of the General Assembly", A.J.I.L., Vol. 60 (1966), pp. 782-791; P. Chandrasekhara Rao, Charter of Economic Rights and Duties" I.J.I.L., Vol. 15 (1975), p. 351 at p. 370; For contra see N. G. Onuf, "Professor Falk on the Quasi-Legislative competence of the General Assembly" A.J.I.L., Vol. 64 (1970), p. 349 at pp. 354-355 : M.K Nawaz, "International Law : Old and New", I.J.I.L., Vol 15 (1975), p. 380.

super power), majority of the member-States are now demanding greater democratization of the world body. If their demands succeed, and succeed it must, General Assembly is the only organ of the organisation which can best represent the wishes, hopes and aspirations of the over-whelming majority of the member States of the U. N, may the "people of the United Nations." The procedure and functions of the General Assembly should therefore be revised suitably to meet the new situations.

Before suspending the 14-week 47th session of the General Assembly, on 23rd December, 1993, Assembly President Stoyan Gavev of Bulgaria asserted, "The General Assembly is facing an historic challenge to truly become a *functional world Parliament* on the basis of the United Nations Charter." Further, "The countries of the world have assigned to the United Nations the Heavy responsibilities of maintaining international peace and security, as well as of addressing a wide range of global, regional and local problems." [72]

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72. See U. N. Chronicle, Vol. XXX No. 1 (March, 1993) p. 29.

CHAPTER 34

THE SECURITY COUNCIL

Composition.—The Dumbarton proposals emphasized the establishment of an executive organ, whose membership might be limited and which could be entrusted the 'primary responsibility' for the maintenance of International Peace and Security. In San Fancisco Conference, it was finally decided to establish such an organ in the form of the Security Council.[1] In accordance with the provisions of Article 7 of the United Nations Charter, the Security Council is one of the principal organs of the United Nations. It comprises of 15 members (5 permanent members and 10 non-permanent members). China, Russia, America, France and Britain are the permanent members of the Security Council.[2] The first Security Council came into being on 12th January, 1946, when the General Assembly elected its 6 members. Before 31st August, 1965, the Security Council consisted of eleven members. On 17th December, 1963 amendment to Article 23 of the Charter was adopted by the General Assembly. It provided that the Security Council would consist of 15 members—5 permanent and 10 non-permanent members. This amendment came into force on 31st August, 1965. Before the amendment, even without exercising veto, the permanent members could prevent the Security Council from taking decision on any matter because the Security Council then consisted of 11 members and decision on ordinary or non-substantial matters required seven affirmative votes. If five permanent members voted against the proposal, Security Council could not take any decision on it. But this is no more possible because now the Security Council consists of 15 members—5 permanent and 10 non-permanent members and decision on non-substantial or procedural matters 9 affirmative-votes are required. Thus on non-substantial matter, the Security Council can take a decision on the basis of the affirmative votes of non-permanent members. Ten non-permanent members are elected by the General Assembly for a period of 2 years.

Need for Enlargement of the Security Council

After the Gulf War (1991) and the breaking of the Soviet Union the need for enlargement of the Security Council is being greatly felt in view of the changed situation. Since the breaking of the Soviet Union, we are living a Unipolar World with the United States of America as the sole Super power. In the Non-Aligned two day Foreign Ministers Conference held at Larnaca (Cyprus) in the first week of February 1992, the need for democratisation of the U. N. system emerged as a recurrent theme. For example, Indian Foreign Affairs Minister, Mr. Madhav Singh Solanki, who was the first to address the delegates during the closed-door deliberations, stressed that with a view to reflect the increased strength of the General Assembly and the new power configuration in the world, one way of democratising the U. N. would by reviewing the membership of the Security Council. There seems to be much force in the view expressed by Indian Foreign Affairs Minister. When the membership of the Security Council was increased from 11 to 15 in 1965 the membership of the U. N. was 113. Since then the membership of the U. N. has increased to 191 'at present' but the membership of the Security Council remains the same. Besides this, there are other imbalances in the existing composition of the Security Council. Africa and Latin America are unrepresented. China is the sole representative of Asia, the largest continent from the point of area and population. Then two economic super powers—Germany and Japan are not the permanent members. Moreover, India also ought to be made a permanent member. In view of these reasons, the membership of the Security Council ought to be increased from 15 to 25 including 10 permanent members.

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* See also for P.C.S. (1995) Q. 10 (b).

1. See D. W. Bowett, the Law of International Institutions (1970), p. 25.
2. Article 23 of the U. N. Charter.

** See also for C.S.E. (1992) Q. 8(c); P.C.S. (1995) Q. 10 (b).

The new five permanent members should be chosen from amongst the countries such as Japan, Germany, India, Egypt, Brazil and Nigeria. Besides this 5 new non-permanent members should be elected on Geographical basis to make the Security Council more representative.

According to the World-watch Institute, a Washington think Tank, the Security Council should be expanded to include India and other countries, saying that the current permanent members have usurped the Council's authority and have relegitimised wars an arbitor of conflict. In its tenth annual report entitled, "State of the World", World-watch says, "If the United Nations is to move towards a more activist and interventionist stance, it needs not only greater financial backbone, but all the political legitimacy it can muster. This concerns in particular the Security Council." Further, "Leaving decision making relating to international peace and security exclusively to the Security Council will always carry with it a certain danger of usurpation by the great powers, as the Gulf War demonstrated when the Coalition led by the United States was given a blank cheque for driving Iraq out of Kuwait.

The United States favoured using military force and never showed any intention of placing the coalition's military operations under the control of the Security Council."

The report added that instead of nurturing the growth of international norms constraining the use of force, the episode helped relegitimise war as an arbitor of conflict. According to the report, "Making the Security Council more representative and democratic may help curb such abuse." The World-watch further says, "Just because war is a social institution does not mean it is inevitable : created by humans, it can be abolished by them given sufficient will and perseverance." Finally, the report has suggested that the criteria for permanent membership should include, on addition to traditional 'big power' factors like military powers and economic muscle, population, size and financial and other support for the U. N. perhaps with the stipulation that permanent members jointly represent at least 50 per cent of the world's regions.[3]

There is no denying the fact that for any amendment of the Charter, affirmative votes of five permanent members is essential. Further, while consenting to increase of membership in past, the five permanent members retained their privileges. Even in the present situation the five permanent powers would not like to share their power with those outside the said five. It is therefore necessary to build public opinion and to put pressure on the existing five permanent members and especially on the U. S. because in the present Unipolar world much will depend on the attitude adopted by the U. S. the sole super power. The developing countries should continue to put pressure, through forums such as Non-Aligned Movement (NAM), until their objectives are achieved.

The target date for enlarging and reforming the Security Council was 50th anniversary of the U.N. in 1995. The target date having already passed, there is great uncertainty in this connection. According to the U.S., it would not agree to any proposal for enlargement of the Security Council if Germany and Japan were not given permanent seats. But developing countries including India are not willing to give up their claims. In view of these uncertainties, Secretary-General Boutros Boutros Ghali has said that it will take a considerable time before the Security Council is enlarged and reformed.

A major shift in U.S. policy came in the latter part of the year 1997. In October, 1997 the U.S. advocated seats for developing nations in the Security Council. But it advocated regional or rotational basis for selecting new permanent members for the expanded Council in order to provide representation to the regions which are unrepresented among the five permanent members. The U.S. proposed that Asian countries should select a regional candidate for a permanent seat on Security Council adding that the criteria for inclusion should be decided first on global, non-discriminatory and equitable basis. This proposal was not at all acceptable to India. Rejecting the American proposal, India said that rotation is not possible. Moreover, the terms rotation and permanent are

3. See the Hindustan Times, Dated 10 January, 1993.

contradictory. India has already declared its candidature for a permanent seat in the Security-Council. Japan has recently offered to increase its contribution to the U.N. if it gains a permanent seat in the Security Council.

Voting Rights*.—According to Article 27, each member of the Security Council shall have one vote. The decisions of the Security Council on procedural matters shall be made by affirmative votes of 9 members. But decision on substantial matters requires affirmative votes of 9 members including the affirmative votes of 5 permanent members. There is, however, an exception to this rule—for any decisions under Chapter VI and under paragraph 3 of Article 62, a party to a dispute shall abstain from voting. A negative vote cast by a permanent member on a substantial matter is called a *'veto'* For casting a veto it is necessary that the representative of the permanent member desiring to exercise this right must be present and cast his vote in the meeting of the Security Council. Absence of the representative of a permanent member from the meeting of the Council is not considered as *'Veto'*. In 1950 on the question of Korea, the Security Council could take a decision because the representative of Soviet Union was not present in the meeting of the Council. Later on it was argued on behalf of Soviet Union that absence of its representative constituted *'Veto'* but other members of the Council did not accept this argument. Since then it has become a custom that absence of the representative of a permanent member from the meeting of the Council does not constitute a *'Veto'*. Before a matter is put to vote, the President of the Council gives a ruling as to whether the matter is important or procedural. This decision can be challenged by a veto which makes it important. Since the matter now becomes important, the possibility of 'double veto' arises.

Function and powers of the Security Council **

Functions and powers can be conveniently discussed under the following heads :

(I) Maintenance of International Peace and Security; (II) Elective Functions; (III) Supervisory Functions; and (IV) Constituent Functions.

I. Maintenance of International Peace and Security.[4] ***—It has been rightly remarked, "The purpose of the United Nations Organisation is world peace." The Preamble of the U. N. Charter says "We the People of the United Nations determined.....to unite our strength to maintain international peace and security.....". The very first purpose of the United Nations is *"to maintain international peace and security."* [5] Then one of the principles of the Charter emphasises the concern of the organisation in respect of world peace by providing, "All members shall settle their international disputes by peaceful means in such a manner that *international peace and security,* and justice are not endangered." [6] Further, the principle of non-intervention by the U. N. in domestic jurisdiction of member states provides an exception in respect of enforcement measures under Chapter VII.[7] It need not be over-emphasized that said enforcement measures are taken to maintain or restore international peace and security.[8] Besides this, though the Charter does not "impair the inherent right of individual and collective self-defence" of the members of the U. N., even this right is subordinated to 'world peace' for the Charter clearly provides that "Measures taken by members in the exercise of this right to self-defence.....shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time

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* See also for P.C.S. (1978), Q. No. 6 ; C.S.E. (1985), Q. 5 (c) ; For answer see also matter discussed under the heading "Double Veto" discussed later on in this Chapter.

** See also for I.A.S. (1959), Q. No. 5 ; P.C.S. (1982), Q. 9 ; P.C.S. (1987), Q. 10(a).

4. For detailed study see also : S. K. Kapoor, "The Maintenance of International Peace and Security." Lawyer (November, 1972), p. 172.

*** See also for C.S.E. (1984), Q. 6—For answer see also Chapter on "The General Assembly"; P.C.S. (1988), Q. 2(a).

5. Article 1, paragraph 1 of the Charter.
6. Article 2, paragraph 3.
7. Article 2, paragraph 7.
8. See Article 39.

such action as it deems necessary in order to *maintain or restore international peace and security."* [9] In order to ensure prompt and effective action by the United Nations, Member States have conferred upon the Security Council the *'primary responsibility'* for the maintenance of international peace and security. The members have also agreed that in carrying out its duties under this responsibility, the Security Council acts on their behalf.[10] The members of the United Nations have also agreed to accept and carry out the decisions of the Security Council.[11] With the least diversion for the armaments and the world's human and economic resources, the Security Council is responsible for formulating, with the assistance of the Military Staff Committee,[12] plans to be submitted to the members of the United Nations for establishment of a system of regulation of armaments. The Security Council is so organised as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at all seats of Organization.[13] It is further provided that the Security Council shall hold periodic meeting at which each of its members may, if it so desires, be represented by a member of the Government or by some other specially designated representative.[14] Thus the Charter envisages periodic meetings of the Security Council but this provision has not been utilised and no such meeting was held for twenty years since the inception of the Charter.[15] The Security Council held its first periodic meeting on 21st October, 1970 with an agenda containing the item. 'Review of the International situation'.[16] The Charter further provides that the Security Council hold meetings at such place other than the seat of the Organization as in its judgment will best facilitate its work.[17] In pursuance of this provision the Security Council held a session in Panama in March, 1973 wherein it was decided to prepare a Charter of the important resolutions passed by the United Nations.

Pacific Settlement of disputes.*—Chapter VI of the United Nations Charter deals with the pacific settlement of disputes. Article 33 of the Charter provides that the parties to any disputes, continuance of which is likely to endanger the maintenance of International Peace and Security shall, first of all, seek a solution by negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Further, the Security Council, shall when it deems necessary, call upon parties to settle their disputes by such means. It is also provided in the Charter that if the parties to a dispute fail to settle it by the means mentioned in Article 33 they shall refer it to the Security Council. It is further provided that if the Security Council deems that the continuance of disputes is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action or to recommend such terms of settlement as it may consider appropriate.[18]

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation which is likely to endanger the maintenance of International Peace and Security.[19] Any Member of the United Nations may bring any disputes, or any situation of the nature referred above, to the attention of the Security Council.[20] The Security Council may, at any stage of a dispute of the nature referred to in

9. Article 51.
10. Article 24 of the Charter.
11. Article 25.
12. Article 26
13. Article 28, paragraph 1.
14. Article 28, paragraph 2.
15. B. S. N. Murti, "Periodic Meeting of the Security Council Article 28, Paragraph 2 of the U. N. Charter", I.J.I.L., Vol. 10 (1970), p. 283 at p. 284.
16. Ibid, at p. 298.
17. Article 28, paragraph 3.

* See also for P.C.S. (1983) Q. 9(i) ; P.C.S. (1991) Q. 10(a) ; See also Chapter on General Assembly, ; C.S.E. (1991) Q. 7(a).

18. Article 37.
19. Article 34.
20. Article 35.

Article 33 or of a situation of like nature, recommend appropriate procedures of methods of adjustment. In making recommendations under this provision, the Security Council should also take into consideration that legal disputes as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the statute of the Court.[21] Lastly, without prejudice to the provisions of Articles 33 to 37, the Security Council may if all the parties to any dispute so request, make recommendations with a view to a pacific settlement of the dispute.[22]

Sanctions against aggressor or action with respect to threats to peace, breach of peace and acts of aggression.**—Chapter VII of the Charter deals with the action with respect to threats, breach of peace and acts of aggression and confers upon the Security Council wide powers in this respect. The Security Council possesses the following powers in this respect :

(1) The Security Council first determines whether there exists any threat of peace, breach of peace or an act of aggression has taken place, and then it may recommend what measures shall be taken to maintain or restore international peace and security.[23]

(2) The Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions and may call upon the members of the United Nations to apply such measures which include complete or partial interruption of economic relations and of rail, sea, postal, telegraph, radio and other means of communication and the severance of diplomatic relations.[24]

(3) If the measures mentioned above (*i.e.*, in Article 41) prove to be inadequate, the Security Council may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operation by sea, or land forces of the members of the United Nations.[25]

(4) It is further provided that the Security Council may ask the members of the United Nations to contribute to the maintenance of International Peace and Security and to make available on its call armed forces, etc., for the purposes of maintenance of International Peace and Security (Article 43). However, it may be noted that Article 43 also provided that for the contribution of the armed forces special agreement or agreements were to be entered into. Due to conflict among major powers, no such agreements have been entered into. Thus, although the Security Council has been empowered to make use of armed forces and to ask the member-States to contribute them, this provision has not been implemented because of the mutual fears and suspicions, non-co-operation and conflict among the permanent members of the Security Council.[26]

(5) There is also a provision for the establishment of a Military Staff Committee to advise and assist the Security Council on all questions relating to its military requirements for the maintenance of International Peace and Security, the employment and command of the forces, placed it on its disposal, the regulation of armament, and possible disarmament.[27] But this provision also

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21. Article 36.
22. Article 38.
** See also I.A.S. (1960), Q. No. 11; I.A.S. (1954), Q. No. 7; P.C.S. (1969), Q. No. 9. For provisions of the Covenant of the League of Nations see matter discussed under the heading "Covenant of the League of Nations and Collective Security, in Chapter entitled "Collective Security" and also the matter discussed under the heading "Legal Regulation of War, its Legal Charter and Effects"; P.C.S. (1983), Q. 9 (ii); C.S.E. (1983), Q. 7(a)—For answer see also Chapter on "Intervention".
23. Article 39 of the Charter.
24. Article 41.
25. Article 42 of the Charter.
26. See also Leland M. Goodrich and Anne P. Simons, The United Nations and Maintenance of Peace and Security, pp. 398-405.
27. Article 47.

have not been implemented and there are no military forces at the disposal of the Security Council.

It is clear from the above provisions that the Security Council possesses wide powers in respect of the maintenance of International Peace and Security but the Security Council has not been able to make use of these powers because of the conflict and non-co-operation among the permanent members. The whole structure of the maintenance of International Peace and Security in the United Nations was based on the assumption that the permanent members of the United Nations would co-operate in the same manner as they did during the Second World War. As remarked by Lawrence S. Finkelstein, "It did not take long for San Francisco hopes of Great Power unity to fade. Bitter disillusionment rapidly replaced cautious optimism of the spiring of 1945. Irreconcilable conflict over German settlement; the harsh disagreement over other peace treaties; the clash of interest over Trieste; guerrilla war in Greece; and the continuance of Soviet forces in Iran beyond the agreed deadline rapidly produced an atmosphere of distrust and hostility. In United Nations itself the Security Council was the scene of bitter clashes and within a year Soviet Union had cast several vetos and staged the famous walk-out over Iranian affair." [28] As pointed out by Prof. Goodrich, while the frequent use of veto was not inconsistent with the provisions of the Charter, the Western countries alleged that it was an abuse. Confrontation between the East and the West and frequent use of the veto by Soviet Union accelerated the Cold War.[29] This proved to be detrimental to the smooth functioning of the Security Council. It also resulted in the failure of the Security Council from equipping itself to exercise the full powers conferred on it by the Charter.[30]

Definition of 'Aggression'.—Since Chapter VII of the Charter deals with sanctions against aggressor and before taking action under this chapter the Security Council first decides whether there exists any threat of peace or an act of aggression has taken place, it is very necessary to know the meaning and definition of the term 'aggression'. It need not be overemphasized that the definition of the term 'aggression' has been considered most urgent for consideration of international security and world peace.[31] After 51 years of work by jurists and political experts, the term 'aggression' has been finally defined. Attempts in this direction began as early as in 1923 under the League of Nations. After the dissolution of the League, work in this connection was continued under the United Nations. The United Nations special committee on the question of defining aggression, submitted the draft definition of 'aggression' (containing 8 Articles) to the General Assembly on April 1974 which are as follows[32] :

Article 1.—Aggression is the use of armed forces by a State against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the U. N., as set out in this definition.

Explanatory note.—In this definition the term 'state'—(a) is used without prejudice to questions of recognition or to whether a state is a member of the U. N., and (b) includes the concept of 'a group of states' where appropriate concept of.

Article 2.—The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may in conformity with the Charter conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity.

Article 3.—Any of the following acts, regardless of a declaration of war, shall,

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28. Lawrence S. Finkelstein, "The United Nations : Then and Now", Int. Orgn., Vol. XIX, No. 3 (1965), p. 367 at p. 382.
29. L. M. Goodrich, "The Maintenance of International Peace and Security", Int. Orgn., Vol. XIX, No. 2 (1965), p. 429 at p. 432.
30. "..... any failure is due more to the attitude of its members than to any constitutional defects in the Charter provisions." D. W. Bowett, "The Law of International Institutions" (1970), p. 25.
31. See the statement of Dr. Nagendra Singh, representative of India in the Sixth Committee on the definition of aggression, 3 November, 1971 appearing in I.J.I.L., Vol. II (1971), p. 724.
32. See I.L.M. Vol. XIII, No. 3 (May, 1974), pp. 710-714.

subject to and in accordance with the provisions of Article 2, qualify as an act of aggression : (a) The invasion or attack by the armed forces, of a State of the territory of another State, or any military occupation, however, temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof ; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, marine and air fields of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 4.—The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Article 5.—No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility. No territorial acquisition or special advantage resulting from aggression are or shall be recognised as lawful.

Article 6.—Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter including its provisions concerning cases in which the use of force is lawful.

Article 7.—Nothing in this definition and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration of Principles of International Law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination : nor the right of these peoples to struggle to that end to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8.—In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

The above definition was finally adopted by the United Nations General Assembly on December 14, 1974 without a vote.[33] It is undoubtedly a significant achievement. It may, however, be wishful thinking to contend that the above definition is exhaustive and perfect and that it has no loop holes. What is still more important is as to how the United Nations will ensure that aggression is not committed against any country or people or how it will ensure the punishment of the guilty.[34] Further, "From a formal point of view, this labourious exercise in achieving an acceptable form of definition of aggression and its adoption by the General Assembly in a formal declaration appears hardly to put rest the quest to establish a definition of aggression once and for all." [35] The U. S. representative, however, claimed, "The text is inevitably of a compromise, what is remarkable is that we have

33. General Assembly Resolution 3314 (XXIX), December 15, 1974.
34. See also Quincy Wright. "The Prevention of Aggression", A.J.I.L., Vol. 50 (1956), pp. 514, 527; Q. Wright, "The Concept of Aggression in International Law" 29 A.J.I.L., 373 (1935); J. Stone Aggression and World order ; A critique of U. N. Theories of Aggression (1959).
35. K. Venkat Raman, "Aggression" A Description to serve as a Definition" India Quarterly, Vol. XXXII (1969), p. 42 at p. 47.

succeeded at all when previous generation have failed." [36] The Soviet representative also said that the definition has "accomplished its main purpose of depriving a potential aggressor of the possibility of using juridical loopholes and pretexts to unleash aggression." [37] But these claims have been refuted by Prof. Julius Stone. He points out : "This is so far, from the realities disclosed by an examination of the definition that remarkable text rather appears to have codified into itself (and in some respects extended) all the main 'juridical loopholes and pretexts to unleash aggression' available under pre-existing international law, as modified by U. N. Charter. Ambitions of delegations to narrow some major loopholes were usually balanced by the inclusion of provisions demanded by other states which efficiently neutralized the clarification proposed and often produced new obstruction to boot. This is true even for the more concrete problems surrounding 'armed aggression' and the legal liberty of self-defence against it. It is even truer as to the less concrete problems of 'indirect' and 'economic' aggression which though not expressly mentioned in the definition, may often be affected (and further complicated by implications) from its text and from its very silences. The status of extreme economic coercion in the form, for example, of the 1973 oil boycott and of legitimate responses to it under Article 2 (4) of the Charter remains as legally problematic as ever." [38] Further, "As to some of the 'loopholes' and 'pretexts' indeed even apart from saving clauses and the question of constitutional power, the very text of the consensus definition embodied in Resolution 3314 remains besieged by many mutually conflicting interpretations among the states concerned, at least as grave those which it was the ostensible object of the definition exercise to remove. So we face the paradox that the closing off of 'loopholes' and 'pretexts' hailed by the Soviet Union as the great achievement is precisely what the definition did not achieve." [39] Besides this, "To have substance, the claims made for the consensus definition (for instance, as to deterring aggressors, enlightening states or guiding U. N. organs) world require the elimination, or at least substantial reductions, of the many chronic doubts and uncertainties concerning the Charter provisions as to the limits of lawful use of force and powers of U. N. organs in relation thereto. The doubts and uncertainties, according to him, are in respect of Articles 2 (4), 10-12, 24, 25, 39 and 51.[40] It may therefore be concluded that the definition of aggression has a number of loopholes and weaknesses. The only matter of satisfaction is that in the form of consensus definition a beginning has been made. Even though it is a partial success it is welcome in the context that previous generation had failed.

Illustration.—Armed internal conflict takes place in State *A*. The rebel factor has bases in neighbouring states and is given necessary arms by State *B*. Has the State *B* committed aggression against State *A*. ?*

State *B* has not committed aggression within the meaning of the definition of aggression noted above. According to Article 1 of the definition, "Aggression is the use of armed forces by a State....." State *B* has not made use of armed forces against State *A*. For aggression, the use of armed forces of a state is necessary. Since State *B* has not made use of armed forces against State *A*, it cannot be held guilty of aggression.

Consequences of the failure of the Security Council.—The failure of the primary achievement of the maintenance of International Peace and Security had the following three consequences :

(a) The General Assembly started performing those functions which were entrusted to the Security Council such as the determination of the breach of peace or act of aggression and to recommend action (including the use of armed forces) by members.

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36. Adopted from Ibid., at p. 48.
37. U. N. Doc. A/c 6/SR 1472 at page 2 (1974).
38. Julius Stone, "Hopes and Loopholes in the 1974 Definition of Aggression", A.J.I.L., Vol. 71 (1977), p. 224.
39. Ibid. at p. 225.
40. Ibid at pp. 243-44.

* C.S.E. (1989), Q. 7 (a).

(b) As an alternative there developed a strong regional security system outside the United Nations such as NATO and Warsaw Pact.
(c) Peace keeping operations (including use of armed forces voluntarily contributed by Member States) were evolved under Chapters VI and VII.[41]

Veto and its effect on the efficiency of the Security Council*

In accordance with the provisions of Article 27 of the Charter, the affirmative vote of 9 members of the Security Council (including the permanent members) is necessary for all important matters. In other words we may say that China, Russia, America, Britain and France, (the permanent members of the Security Council) have been conferred upon the veto power. The veto power was conferred upon them because the framers of the Charter assumed that these Great Powers shall fulfil their responsibility and shall co-operate among themselves for the maintenance of peace and security.[42] This assumption proved to be wrong. The conflict among the Great powers started immediately after the establishment of the United Nations. The right of veto given to the permanent members of the Security Council has greatly impaired the efficiency of Security Council. Because of this, the Security Council has become a weak organ of the United Nations and has not been able to perform functions entrusted to it under the Charter. It is often claimed that the Security Council was responsible for stopping the North-Korea from over-running South-Korea in 1950. But "Nothing could be more misleading since the United States was able to obtain United Nations blessing for military action on that occasion because the Soviet delegate had absented himself from the Security Council and could not interpose his veto in time.[43] When Soviet representative returned to the Security Council the Security Council became unable to make any further action in Korea. Similarly in other important matters the Security Council is not able to perform its functions of maintenance of peace and security because of the exercise of veto power. Recent example of this is the Indo-Pak War of 1971. In the beginning the Security Council could not take any decision because Russia exercised its veto in favour of India. Thus, the veto has greatly impaired the efficiency of the Security Council. As aptly remarked by Prof. Julius Stone, "The Security Council entered upon its tasks for the maintenance of peace, endowed with theory with powers to bind United Nations members by its decision and crippled in practice by the power of each permanent member to prevent by its veto any substantial decision at all."

According to the Soviet view, "The well-known clause providing for unanimity of the permanent members of the Security Council when major decisions are to be taken is also a reflection of the principle of co-existence.....[44] In the words of another Russian writer, "As the unanimity principle in its United Nations version is the only platform on which socialist and free economy countries can establish working relations, it assures the Universal Charter of the United Nations. As it is absolutely necessary to preserve this universal character, the unanimity principle is the corner stone of the present public order of the world. It must be adhered to, come what may." [45] Thus in the present circumstances, veto system is inevitable and it has no alternative. But it should be remembered that it is not necessary that its use be made in the same way as was made in the first decade of the United Nations. When the Security Council is unable to take any decision because of veto used by any permanent member, the responsibility of the U. N. as a whole does not come to an end and the General Assembly can then take necessary action in the matter.[46] While it cannot be denied that the veto system is inevitable it must be added that it is a necessary evil. Since it is very difficult rather impossible to remove this necessary evil

41. Bowett, note 30, at p. 37.
** See also for P.C.S. (1964), Q. No. 3(e) ; I.A.S. (1966), Q. No. 8 ; C.S.E. (1985) Q. 5(c).
42. See Tarlok Singh Batra, 'Veto Power of the Security Council", I.J.I.L., Vol. 18 (1974), p. 76 at p. 78.
43. Stephen S. Goodspeed, The Nature and Functions of International Organization, Second Edition, p. 648.
44. Victor P. Karpov, "The Soviet Concept of Peaceful Co-existence and Its Implications for International Law", In the Soviet Impact on International Law, Edited by Hans W. Baade, (Dobbes Ferry,New York, 1965), p. 14 at p. 17.
45. Kazimierz Grzybowski, "International Organisations from the Soviet Point of view", Ibid. p. 38 at p. 50.
46. See J.E.S. Fawcett, The Law of Nations (London, 1968), p. 144.

efforts should be made to find out procedures and methods through which the abuse of this right may be checked or at least restricted.

The "right of veto enjoins upon the permanent members to exercise the right in accordance with the principle of good faith which means that the right must be exercised reasonably, honestly, in conformity with spirit of law, and with due regard to the interests of others by not exercising it in good faith, the user not only deprives the aggrieved member of the benefit of redress but also the other members of the organisation of some of the benefits envisaged under the Charter. (Violation of Article 2 (2) of the Charter implies this conclusion).[47] Further, "the responsibility to maintain international peace and security was conferred upon the Security Council as a whole and not upon any member individually, even a permanent member of the Council; and since Article 27 (3) does not speak of 'all' permanent members, it is submitted that it becomes legal obligation of the Security Council (as a body) to take collective action even against the permanent member/members guilty of Charter violation by the use of armed forces; none of the members, permanent or non-permanent, has the right to paralyse the whole organisation to suit its own interest." [48] Though quite useful, such an interpretation of the U. N. Charter is not likely to be accepted by any permanent member of the Security Council and in the present set up collective action against a permanent member is not possible.

It may be noted here that power of the permanent members to cripple the Security Council from taking any action in respect of maintenance of peace and security has been greatly affected by Uniting for Peace Resolution.*

Indian view on veto system.—India regards veto as a necessary 'evil' with which states have to learn to live with because in view of existing state of international affairs, and in present circumstances, there is no alternative to it.

Contribution of the Security Council in the maintenance of Peace and Security.—As pointed out earlier, the veto has greatly affected the efficiency of the Security Council. Some jurists have pointed out that the only achievement which the Security Council can claim is that of Korea. But it has been made clear earlier that even in that case the Security Council could take decision in the beginning only because the Soviet representative was not present to exercise his veto. But it would be wrong to contend that the Security Council has not made any contribution for the maintenance of International Peace and Security. As a matter of fact, the Security Council has been able to perform its functions properly in cases where the interests of the permanent members were not directly involved. In such cases the Security Council has performed creditable functions. The Security Council has made significant contributions for the cause of world peace in Korea (1948), Indonesia (1949), Indo-Pak-Conflicts (1949, 1965 and 1971), Congo (1960-61), Cyprus (1964), Arab-Israeli-Conflict (1973), Palestine etc.

Gulf War (1991)

N. B.—For this please see Appendix II.

Evaluation.—It would be wrong to say that the Security Council has proved to be a complete failure. As a matter of fact, it has been able to perform its functions in cases wherein the direct interests of the permanent members were not involved or where they agreed.[49] United Nations Secretary-General Kurt Waldheim said that the Security- Council had proved its value time and again as an indispensable means of defusing critical conflict situations where a major confrontation threatened. It had been less successful in pre-

47. See note 41-ante, at p. 80.

48. Ibid, at p. 82.

* See for P.C.S. (1983), Q. 9 ; For the Provisions of Uniting for Peace Resolution, 1950 see Chapter on "General Assembly".

49. But as pointed out by Prof. Q. Wright, "The United Nations has been more successful in stopping hostilities than in preventing them by setting the underlying problem. This is witnessed by the ceasefire lines allegedly temporary, which remain as inadequate barriers to hostilities in Germany, the Order Neisse Line, Kashmir, the Straits of Formosa, Korea, the Middle East Cyprus and specially Vietnam." The Foundations for a Universal International System", in Asian States and the Development of Universal International Law, Edited by R. P. Anand, (1972) p. 145 at p. 167.

empting conflict by early consideration of potentially dangerous situations. Potential threats to international peace and security and even actual wars were not automatically referred to the Council. In fact, there had been, and were, conflict situations which Member States were very reluctant to have considered by the Security Council.[50] It cannot be denied that the provision of veto has greatly affected its efficiency and it has not been able to perform those functions which are entrusted to it under the Charter and this led to the constant expansion of power and functions of the General Assembly. The powers and functions of the General Assembly reached their zenith in 1950 with the passing of the Uniting for Peace Resolution. Under this Resolution the General Assembly has started performing some of those functions which were entrusted to the Security Council under the Charter and should have been performed by it. But it may be noted that the General Assembly has certain limitations. It is a big body and cannot take as quick and immediate action, as a smaller body like Security Council can. Moreover, the Congo experience has shown that even for the successful functioning of the General Assembly, the cooperation among Great Powers is necessary.

It has been rightly pointed out that the 5 Great Powers (permanent members of the Security Council) have responsibility for world security. But because of the conflict among them the prospects for a workable system of collective security and world peace seem to be fragile. "Some, who originally thought law would work, because it would be enforced by the dominant powers through the Security Council of the United Nations changed their views when the cold war destroyed illusions of Great Powers co-operation to maintain peace.....".[51] Further, "International Security is not possible not for transient or remediable reasons but because the concept is self-contradictory. Thus the myth of International Security ; the persistent belief, contrary to historic evidence as well as to logical demonstration, that States can continue to be sovereign and independent while at the same time it is nevertheless possible to work a system of security among them, International Security.[52] It is, therefore, clear that International Security is not possible unless and until the States of the world are prepared to surrender a part of their sovereignty and to submit to the control and supervision of International body in the real sense of the term. In the view of Prof. Levontin, "There is a need to explode dangerous myth; if not explode atleast expose—for as the myth continues, time is liable to be misspent on it and we have no time to misspend.[53]

It is clear from the foregoing discussions that the Charter's provisions for keeping the peace are unrealistic. The maintenance of International Peace and Security cannot be ensured unless there is a superior authority with physical force greater by far than that of any potential aggressor. It is also clear, "that any failure (on the part of the Security Council, is due more to the attitude of its members than to any constitutional defect in the Charter provisions." [54] This is clearly evident from the vacation of Iraqi occupation and aggression as a result of the Gulf War (1991) and the role played by the Security Council. The U. N. cannot be effective in the absence of the assumption in which it was found. Last, but not the least, International law must clearly state what is illegal and must provide the penalties for its defiance. These are the principal requisites for an effective and dependable enforcement machinery of the United Nations.

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50. U. N. Monthly Chronicle, Vol. XV (April, 1978), p. 54.
51. Louis Henkin, How Nations Behave (1968), pp. 134-155; Prof. Lincoln P. Bloomfield has aptly remarked : "When the U. N. Charter was drafted in 1945, the provisions for keeping the peace had to be drawn up to the abstract. There was no tangible enemy, crises were in the future, and commitments were to be made in vacuum. It was only when it became clear what the world was really like that 'peace-keeping' was invented. It turned out that in most conflict situations there was no definable aggressor or victim, that the danger was uncontrolled escalation of local conflicts into the nuclear realm and that the real enemy was a fantastically complex set of instabilities, inequities and passions to which 1945 international ground rules were inadequately related.....the prospects for the workable system of multilateral Peace-keeping remain fragile." "The U. S., the Soviet Union and the Propsects for Peace-keeping." Int. Orgn., Vol. XXIV, No. 3 (Summer 1970), pp. 548, 562.
52. A. V. Levontin, The Myth of International Security, pp. xvii and xviii.
53. Ibid, at p. xviii.
54. D. W. Bowett. The Law of International Institutions (1970), p. 25.

(II) Elective Functions.—The Security Council also performs some elective functions. For example, Security Council and the General Assembly separately elect the judges of the International Court of Justice.[55] In this way the Security Council participates in the election of Judges of the World Court. Besides this the Security Council also recommends the appointment of the Secretary-General of the United Nations. Article 97 provides that the Secretary General shall be appointed by the General Assembly upon the recommendation of the Security Council. Although the word 'election' has nowhere been used in this Article, but in fact it is the election because the appointment of the Secretary-General is a substantial matter under the Charter and, therefore affirmative votes of 9 members including 5 permanent members are necessary.

(III) Supervisory Function.—The Security Council also performs some supervisory functions. That is to say, it supervises the functions of the Organization as a whole although its supervisory functions are not as wide as that of the General Assembly. But since it has been conferred upon some very important functions in regard to the expulsion and suspension of members it may not be wrong to contend that through this it exercises supervision upon the United Nations as a whole. Article 5 provides that a member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. This Article further provides that the exercise of these rights and privileges may be restored by the Security Council. That is to say, in respect of the restoration of rights and privileges of the members, concurrence of General Assembly is not required. The Security Council has been given exclusive power in this connection. Moreover, Article 6 provides that a member of the United Nations which has persistently violated the principles contained in the Charter, may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council. These powers enable the Security Council to exercise supervision over the Organisation as a whole. Last, but not the least, the Security Council is responsible for control and supervision of the strategic areas of the Trust territories, under the Trusteeship System of the United Nations.

(IV) Constituent Functions.—The constituent powers of the Security Council are very important. Article 108 of the Charter provides that amendments to the present Charter shall come into force for all members of United Nations when they have been adopted by a vote of two-thirds of members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the members of the United Nations, including all the permanent members of the Security Council. It is clear from this that no amendment of the Charter is possible unless and until all the permanent members of the Security Council give their affirmative votes on it and it is subsequently ratified by their respective governments.[56] In respect of the constituent powers, the Security Council is certainly a more important organ than the General Assembly.

Double Veto*—The importance of veto power has been discussed earlier in detail. It has also been pointed out that it has greatly affected or impaired the efficiency of the Security Council. Article 27 provides that the decisions of the Security Council on all important matters shall be made by an affirmative vote of 9 members including the concurring votes of permanent members. That is to say, no important decision can be taken by the Security Council unless and until 5 permanent members give their affirmative votes. Whenever a question arises whether a matter is procedural or substantial, double veto may be used. By 'double veto' we mean that the permanent members of the Security Council can use their veto two times. Whenever a matter or resolution is to be voted, the President of the Security Council determines the procedure of voting and rules whether only 9 affirmative votes are required or whether these 9 affirmative votes should include the affirmative votes of 5 permanent members. In other words in the first place, it is the

55. See Articles 4 and 8 of the Statute of the International Court of Justice.
56. Article 109 of the Charter.
* See also for P.C.S. (1964), Q. No. 3(e) ; I.A.S. (1964), Q. No. 12

President of the Security Council which gives his decision as to whether the matter is substantial or procedural. The decision of the President of the Council can be challenged. If any permanent member of the Security Council challenges the said decision of the President of the Council or it gives negative vote or veto against such decision the matter which the President rules as procedural becomes substantive. This is the first time when a permanent member can use his veto. That is to say, the permanent member of the Security Council can by the use of first veto make a procedural matter substantive. Once a matter is declared or becomes substantive, decision on it can be vetoed by any permanent member of the Security Council. This is the second time when a permanent member can use his veto. Thus a permanent member can use his veto two times and this is generally known as 'double veto'. Russia used double veto on the question of Greece, Czechoslovakia and Spain. The essence of double veto has been aptly summed up by Prof. Goodspeed in the following words : "The essence of veto is to manoeuver the Council in voting whether a question is substantive or not. The veto is possible on such a vote which thereby guarantees that the question will become substantial if so desired. Once declared substantive, the question itself can be vetoed.[57]

Relationship between Security Council and the General Assembly* .— n accordance with the provisions of Article 7 of the Charter both Security Council and General Assembly are the principal organs of the United Nations. These two organs occupy a place of prominence in the whole set-up of the United Nations. Many matters under the Charter require recommendations of the Security Council and a decision of the General Assembly. That is to say, no decision can be taken on such matters unless the Security Council has recommended and the General Assembly has also concurred with that decision. For example, the Security Council and the General Assembly separately elect the Judges of the International Court of Justice. Besides this their participation is necessary for admitting a new State to the United Nations. A new State can be admitted to the United Nations only when the General Assembly elects it by two-thirds majority upon the recommendation of the Security Council. Similarly both participate in the suspension and expulsion of members. All these matters can be decided only when there is an affirmative recommendation of the Security Council and concurring decision of the General Assembly. Similarly, the Secretary-General is appointed by the General Assembly on the recommendations of the Security Council.

Moreover, there are certain other provisions under which the Security Council and the General Assembly are connected with each other. The Security Council sends its annual report to the General Assembly. The Budget of the Security Council is also passed by the General Assembly. So far as the maintenance of world peace and security are concerned, its 'primary responsibility' rests upon the Security Council (Article 24) but if Security Council fails to perform its functions or fails to make its affirmative recommendation in regard to any conflict, the General Assembly may step in and perform certain functions relating to peace and security. These powers have been conferred upon the General Assembly under the Uniting for Peace Resolution, 1950. Thus we see that the General Assembly and Security Council are intimately connected with each other. In fact, the United Nations can achieve its objective only when these two principal organs of the United Nations co-operate with each other in solving the problems confronting the Organisation.

Comparison of the League Council with the Security Council** .—The originators of the Covenant expected the Council to be the pivotal organ of the League, a sort of revitalized yet disguised Concert of Europe operating under the majority will of the United States, Great Britain, France, Italy and Japan. It was to perform the role of a modified executive committee and, as such to administer League policy.....As the League system developed, however, the Council failed to measure up to some of the

57. Stephen S. Goodspeed, The Nature and Functions of International Organization. Second Edition, p. 147; see also Alexander W. Rudzinski, "The So-called Double Veto", A.J.I.L., Vol. 45 (1951), p. 443.

* See also for I.A.S. (1959), Q. No. 5.

** See also for P.C.S., (1965), Q. No. 5.

hopes for it. Its life was handicapped from the start by the defection of the United States.....The repeated failure of all the permanent Council members to accept their responsibilities under the Covenant weakened the position of the Council and eventually destroyed the League." [58] The Security Council was also envisaged as the executive of the United Nations by the framers of the U. N. Charter. They conferred upon it the 'primary responsibility' for the maintenance of International Peace and Security, the basic purpose of the United Nations. But because of the conflict among the major powers, the Security Council has failed to fulfil the expectations of the framers of the Charter. But as compared to the League Council, it has proved to be more active and potent and has many a times prevented the escalation of armed conflicts. While the League Council's greatest failure was its inability to prevent the Second World War, the United Nations has been so far successful to prevent the breaking out of the Third World War and much of the credit for this must be given to the Security Council. The Security Council is certainly more potent and effective than the League Council because, *inter alia*, it is represented both by the U.S. and the U.S.S.R.

The Covenant did not make clear demarcation of the functions of the Assembly and the Council. The powers of the Council were scattered throughout the provisions of the Covenant. On the other hand, the Charter of the U. N. made clear demarcation of the functions of the Security Council and General Assembly. Decisions on all substantial matters in the League Council required "the agreement of all the Members of the League represented at the meeting." [59] Thus "the unanimity rule prevailed during Council meetings which permitted any member, large or small, the right of veto." [60] Obviously, on most of the matters it was found difficult to obtain the concurrence of all the members. Procedural matters could, however, be decided by a majority of the Members of the League represented at the meeting. Having benefitted from the experiences of the League, the framers of the Charter modified and diluted the Unanimity Rule. The right of veto was conferred on only five permanent members—the U. S., the U. K., France, China and U.S.S.R. Decision on substantial matters required a majority of seven votes including those of permanent members. Procedural matters required any seven votes. When it was realized that even on procedural matters, decision could not be taken without the help of permanent members, Charter was amended. The number of members of the Security Council was increased from 11 to 15 and it was provided that substantial matters would require nine votes including those of five permanent members. Procedural matters, would require any nine votes. Since Security Council now consists of 15 members, 5 permanent and 10 non-permanent, decision on procedural matters can now be effected by affirmative votes of non-permanent members of the Council. This modified or diluted unanimity rule has proved to be much more effective than that of the League.

The League Council did not possess armed forces or effective sanctions to enforce its decisions. The sanctions at the disposal of the Security Council are certainly more effective. The framers of the Charter envisaged armed forces at the disposal of the Security Council to ensure the maintenance of International Peace and Security and they provided accordingly.[61] But it required special agreements which could not be materialized because of the conflict among major powers. The Security Council also does not possess the permanent armed forces although the Charter envisaged it. Thus the Security Council also depends upon the Member States in this connection. However, Article 54 of the Charter provides that the Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council. Moreover, it is provided that the Members of the United Nations agree to accept and carry out of the decisions of the Security Council in accordance with the present Charter.[62] Under Article 42, it can take such action by air, sea or land forces as may be necessary to maintain or

58. Goodspeed, see supra note 57, at pp. 38-39.
59. Article 5 of the Covenant of the League Council.
60. Goodspeed, see supra note 57, at p. 40.
61. See Articles 43 and 47 of the Charter.
62. Article 25.

restore International Peace and Security. There was no such provision under the Covenant and here lies the vital difference between the two. In 1950 when North Korea attacked South Korea, the Security Council did take armed action although the fact remains that most of the armed forces were contributed by America and they fought under the banner of the U. N.

The Covenant did not clearly define the limits of self-defence. Article 51 of the Charter only clearly defines the limits of individual and collective self-defence but places the whole matter subject to the review, control and supervision of the Security Council.

Under Chapter VI of the Charter, the Security Council possess wide powers in respect of pacific settlement of disputes. These powers are far greater and wider than those possessed by the League Council.

In view of the above discussion, it may be concluded that the Security Council is definitely a more potent, effective and more representative organ than its predecessor, the League Council, and it has made positive contributions in maintaining or restoring International Peace and Security in a number of conflicts.

Limitations of the Security Council

The first great limitation of the Security Council is the right of veto possessed by the permanent members. It has been discussed earlier in detail as to how veto has impaired the efficiency of the Security Council. Even apart from veto, the Security Council suffered from its inception by other disabilities; some of which were open while others were concealed. These disabilities which threatened its paralysis as an executive organ of International Community were as follows :[63]

(1) The first was the inherent right of individual and collective self-defence against armed attack provided under Article 51 of the Charter.[64]

(2) Secondly, Articles 52 to 54 give the Members liberty of action to enter into regional arrangements.[65]

(3) Thirdly, Articles 53 (1)[66] and 107[67] give the Members liberty of action against former enemy States.

(4) Last but not the least, the exclusion from U. N. jurisdiction of matters essentially within the domestic jurisdiction of States as expressly provided under Article 2 (7) of the Charter and by implication under various Articles of Chapters VI and VII.[68]

Binding Character of the Resolutions of Security Council

The resolutions of the Security Council are binding upon the Members. This is evident from Article 25 of the Charter which provides that the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. There is no controversy in respect of the binding effect of the resolutions of the Security Council relating to enforcement measures under Chapter VII of

63. See Julius Stone, Legal Control of International Conflicts, p. 243.
64. This has been discussed in detail in Chapter entitled "Intervention."
65. For detailed study of this see Chapters on "Collective Security" and Regionalism."
66. Article 53 (1) provides: The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy State, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such State, until such time as the Organization may, on the request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a State. Article 53 (2) further provides that the term enemy State as used in paragraph 1 of this Article applies to any State which during the Second World War has been an enemy of any signatory to the present Charter.
67. Article 107 provides: Nothing in the present Charter shall invalidate or preclude action; in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action. It may be noted here that for practical purposes both Articles 53 and 107 have almost become redundant.
68. This has also been discussed in detail in Chapter on "Intervention."

the Charter. But there is some controversy in respect of the binding character of other decisions of the Security Council, especially those made under the provisions of the Charter relating to international disputes and dangerous situations. In its *advisory opinion concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West-Africa). Notwithstanding Security Council Resolution 276* (1970),[69] the International Court of Justice laid these doubts to rest.[70] The World Court observed : 'It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. *Article 25 is not confined to decisions in regard to enforcement action but applies to 'the decisions of the Security Council' adopted in accordance with the Charter.* Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that Part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement actions under Articles 41 and 42 of the Charter that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since the effect is secured by Articles 48 and 49 of the Charter." [71]

But this was an advisory opinion of the Court and some States, particularly France, pointed out that it was a consultative opinion and not a decision. Italy approved Court's opinion in respect of Namibia but disagreed with the Court's interpretation on Articles 24 and 25 of the Charter. After detailed discussion on the Court's opinion, the Security Council adopted by 13 votes to the Court's opinion *vide* resolution 301 (1971). As pointed out by an author,[72] "However, this was perhaps not conclusive of the matter. The abstaining States, for instance, explained that they had abstained because they could not support a resolution which implicitly accepted the advisory opinion of the International Court of Justice." Further, "In conclusion, it should be observed that the controversy as to the scope of Article 25 persists, at least in the attitudes of several States, and that the majority view in the Namibia Advisory opinion has not been accepted as a definite disposal of the issue." [73]

The correct legal position seems to be as stated by the International Court of Justice. The decisions of the Security Council in respect of enforcement measures under Chapter VII as well as other decisions are binding upon the Member States by virtue of the provisions enshrined in Article 25 of the Charter.

First Ever U. N. Council Summit

N.B.—For this please see chapter on "Maintenance of International Peace and Security : Appraisal and New Trends."

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69. I.C.J. Reports (1971), p. 16.
70. See Louis B. John, "The Development of the Charter of the U. N.; Present State" in The Present State of International Law and other Essays, (1973), 39 at p. 56.
71. I.C.J. Reports (1971), p. 16 at pp. 52-53.
72. S. Azadon Tiewal, "Binding Decisions of the Security Council within the Meaning of Article 25 of the United Nations Charter," I.J.I.L., Vol. 15 (1975), p. 195 at p. 213.
73. Ibid.

CHAPTER 35

THE ECONOMIC AND SOCIAL COUNCIL

Composition.—The Economic and Social Council (ECOSOC) consists of 54 members which are elected by the General Assembly, one-third of its members are elected each year by the General Assembly for a term of 3 years.[1] Before 31st August, 1965, the Economic and Social Council consisted of 18 members. This number was increased to 27 by an amendment of the Charter in 1963 which came into force on 31st August, 1965. A subsequent amendment to Article 61, which entered into force on 24th September, 1973, further increased the membership of the Council from 27 to 54.[2] Since the membership of the U.N. has now swelled to 191, a plea can be made for further increase in the membership of the Economic and Social Council to make it more representative. Each member of the Economic and Social Council is entitled to have only one representative in the Council. At present India is one of the members of the Council.

Voting.—Each member of the Economic Social Council is entitled to have one vote. The decisions of the Economic and Social Council are made by a majority of the members present and voting.[3]

Powers and Functions.—The Economic and Social Council performs the following functions :—

(1) The Economic and Social Council may make or initiate studies and reports with respect to economic, social, cultural, educational, health and related matters and may make recommendations with respect to any such matters to the General Assembly, to the members of the United Nations and to specialised agencies concerned.[4]

(2) It may make recommendation for the purposes of promoting respect for and observance of human rights and fundamental freedoms for all.[5]

(3) It may prepare draft conventions for submission to the General Assembly with respect to matter falling within its competence.[6]

(4) It may call, in accordance with the rules prescribed by the United Nations, International Conference on matters falling within its competence.[7]

(5) The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.[8]

(6) The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out the recommendations of the General Assembly.[9]

(7) It may, with the approval of the General Assembly, perform services at the request of the members of the United Nations and the specialised agencies.[10]

(8) It shall also perform such other functions as are specified elsewhere in the present Charter or may be assigned to it by the General Assembly.[11]

The Economic and Social Council helps in the establishment of world peace by

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1. Article 61 of the United Nations Charter.
2. See also Egon Schwelb, "Entry into Force of the Second Amendment to Article 61 of the United Nations Charter." A.J.I.L., Vol. 68 (1974), p. 30.
3. Article 67.
4. Article 62, paragraph 1.
5. Article 62, paragraph 2.
6. Ibid., paragraph 3.
7. Ibid., paragraph 4.
8. Article 65.
9. Article 66, paragraph 1.
10. Article 66, paragraph 2.
11. Ibid., paragraph 3.

improving the lot of the poor, wounded, and illiterate people. It endeavours to improve the life of the people in many respects. Besides the above-mentioned functions, the Economic and Social Council performs important functions of effecting co-ordination in the works of different specialised agencies. The Economic and Social Council co-ordinates the works of the specialised agencies so as to avoid duplication of a similar work by more than one specialised agencies and to make them more efficacious in the performance of the special functions for which they have been established.[12]

The Economic and Social Council is responsible for improving the standard of living of the people, to provide full employment and to develop social and economic conditions of the people of the world. In order to perform its functions more effectively it has established the four Regional Commissions : (1) Economic Commission for Europe (ECE), (2) Economic Commission for Asia and Far East (ECAFE); (3) Economic Commission for Africa (ECA); and (4) Economic Commission for Latin America (ECLA).

Economic and Social Progress.—The attainment of the economic and social progress is one of the important functions of the United Nations and it was probably with this thing in mind that the framers of the Charter of the United Nations inserted a separate Chapter (Chapter IX) entitled 'International Economic and Social Co-operation.' It is one of the important duties of the United Nations to improve the standard of living of the people, to provide opportunities of full employment and to encourage social and economic development. It is the duty of the United Nations to encourage the achievement of international co-operation in solution of social, economical, educational, cultural and problems relating to health. Article 55 of Chapter IX provides that with a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among the nations based on respect for the principle of equal rights and self-determination of the people, the United Nations shall promote :

(a) higher standards of living, full employment and conditions of economic and social progress and development;

(b) solution of international economic, social, health and related problems; and international, cultural and educational co-operation ; and

(c) universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Under Article 56, all members *pledge* themselves to take joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in Article 55.

For the attainment of these objectives, the General Assembly in 1961, declared the United Nations Development decade. In order to achieve appropriate and balanced economic and social development and for the proper utilisation of economic material and human resources, the United Nations prepares plans and tenders advice to the members. For the attainment of these objectives, the United Nations has convened conferences, many conventions, and has launched many programmes. It has also established certain institutions, the more important of which are given below :

(1) *The United Nations Conference on Trade and Development* (UNCTAD).[13]—It was established as a permanent subsidiary organ of the General Assembly in 1964. Its first conference was held in Geneva in 1964 and the second conference was held in 1968 at Delhi. The main objective of UNCTAD is to encourage international trade for economic development.

(2) *The United Nations Development Programme.*[14]—The United Nations Development Programme performs the important function of assisting the under-developed and developing countries in the stage prior to the investment of capital and provides technological facilities.

12. See Article 57.
13. For detailed study see Chapter on 'The UNCTAD."
14. In short called UNDP.

(3) *The United Nations Industrial Development Organisation.*[15]—It was established by the General Assembly on January 1, 1967. Its function is to establish co-ordination among the works of industrial agencies.

(4) *The United Nations World Food Programme* (UNWFP).—The United Nations World Food Programme was started in 1963 in collaboration of the United Nations and Food and Agricultural Organisation (FAO). It performs the important task of encouraging social and economic development by giving assistance in the form of food-stuffs, etc.

(5) *United Nations Children Emergency Fund* (UNICEF).—It was established by the General Assembly on December 11, 1961. Its chief objective is to improve the lot of children all over the world.

(6) *United Nations High Commissioner for Refugees.*—It was established by the General Assembly on January 1, 1961. Its main function is to give legal protection to the refugees and to provide them material assistance.

The above list is not exhaustive but is simply illustrative of the varied and manifold functions which are performed by United Nations, particularly with the assistance of the General Assembly in collaboration with Economic and Social Council.

Council of the Twenty-first Century

The Economic and Social Council at its first restructured substantive session, held at Newyork from 29th June to 31st July 1992 at New York, adopted more than 130 resolutions and decisions on human rights, social development, crime, narcotic drugs, the acquired immune deficiency syndrome (AIDS), women, international economic co-operation, humanitarian aid and other issues. The diversity of matters addressed by the Council was interwoven by strong common threads ; that poverty is the biggest challenge facing the international community; that peace and security are inextricably linked to economic and social development; and U.N. activities must be reshaped to achieve the integrated approach mandated by the interdependence of those issues. Stressing these important linkages, Secretary-General Boutros Boutros Ghali said he hoped "the Economic and Social Council will become an active and important organ as the Security Council and will become *the Council of the twenty-first century.*"[16]

As pointed out by Under-Secretary-General for Economic and Social Development, Ji Chaozhu, "Future peace and security and global stability will depend on world's collective ability to improve the living standards and economic and social prospects for the majority of men and women throughout the world." Secretary-General, Mr Boutros Boutros Ghali also aptly remarked, "All humanity's hopes—for peace and security, for health and prosperity, for justice and opportunity—rest upon sustainable, equitable and dynamic development."[17]

In this session, the Economic and Social Council took following important decisions and works :—

(i) Convening a World Summit on Social Development in 1995;
(ii) Adoption of a draft declaration on the Rights of Persons belonging to national, ethnic, religious and linguistic minorities;
(iii) Recommendation to the General Assembly that 1993 be proclaimed a Third Decade to combat Racism and Racial Discrimination; and
(iv) Acceptance of the offer of Egypt to hold International Conference on Population and Development at Cairo from 5th to 13th September, 1994.[18]

World Summit on Social Development, 1995.

N.B.—For this please see Appendix II

Agenda For Development

On 25th May, 1994, Secretary-General of the U.N. Boutros Boutros Ghali released "Agenda for Development", conceived as a counterpart to his 1992 report "An Agenda for

15. In short called UNIDO.
16. U.N. Chronicle, Vol. XXIX, No. 4 (December, 1992) p. 68.
17. Ibid.
18. Ibid.

Peace"[19] which addressed organization's peace keeping and peace-making activities. "An Agenda For Development" was prepared in response to Assembly resolution 47/181 of 22 December 1992 *vide* which the Assembly had asked for analysis and recommendations on ways to enhance the U.N. role in promoting international cooperation for development. As pointed out by the Secretary-General, "Development, is still the major activity of the United Nations." He hoped the new "Agenda" would serve "to correct a distorted perception" that the U.N. was dealing only with peace-keeping operations, and to underscore the integral linkage between development and peace.

In an introduction to the "Agenda for Development", Secretary-General maintained, "The concept of development, and decades of effort to reduce poverty, illiteracy, disease and mortality rates, are great achievements of this century." However, he warned that "development as a common cause is in danger of fading from the forefront of our agenda" in the post-cold war era. In section II entitled "Dimensions of Development", the Agenda sets out five major and interlinked dimensions of development : peace, economic growth, environmental protection, social justice and democracy. In Section IV entitled, "Conclusion," The Promise of Development, Secretary-General states that the U.N. as a "key mechanism" for international cooperation, possesses flexibility, legitimacy and a universal range of action. However, that mechanism is caught in a conflicting cycle, caused by a resistance to multilateralism, a reluctance to provide financial means to achieve agreed ends, and an unwillingness to engage in difficult operations. The only way to progress is with a "new and compelling collective vision."

The 54-member Economic and Social Council discussed, "An Agenda for Development" at a high level meeting held from 27 to 29 June, 1994, including a policy, dialogue on important developments in world economy between council members and the heads of International Monetary Fund, the U.N. Conference on Trade and Development, International Labour Organisation and the World Bank.[20]

Evaluation*

By launching the above programmes and by establishing different types of institutions, the United Nations has rendered commendable work for the social and economic development of the people of the world. Those who criticise vehemently the United Nations and allege that it has proved to be unsuccessful organization, mainly concentrate on the functions of the United Nations for the maintenance of international peace and security.[21] There is no denying the fact that the United Nations has not achieved the success which was expected from it in regard to the maintenance of world peace. Nevertheless, it cannot also be denied that peace is not simply the negation of war. For establishment of lasting peace, social and economic progress is also necessary. It will be relevant to quote here a few words from the preamble of the United Nations Educational, Scientific and Cultural Organization (UNESCO): "Since wars begin in the minds of men, it is in the minds of men, that the defences of peace must be constructed."

It has been aptly pointed out, "The United Nations Charter is the first document of international status which concepts the major function of the maintenance of international peace with the function of removal of economic, social and cultural inequalities and the promotion of respect for human rights and fundamental freedoms. It emphasises thereby that international harmony is founded on the material welfare of all peoples, and that wars

19. For this please see chapter on "Maintenance of International Peace and Security-Appraisal and New Trends."

20. U.N. Chronicle, Vol XXXI, No. 3 (September 1994) pp. 58-60.

* See also for C.S.E. (1980), Q. 11(a)—for answer See also Chapter on "Security Council".

21. As remarked by an eminent author, "During the last couple of Decades, the emphasis in the work of the United Nations has shifted from the maintenance of international peace and security to concern with the problems of major interest to the new and developing countries of the world, the most recently, to a set of problems highlighted by technological developments. This trend will most certainly continue..... What is true of problems in the field of development is equally valid in dealing with other and related global problems that have recently came to be recognized. This includes access to raw materials, population problems, food shortages, environmental protection, and uses of the resources of the sea and outer space."

are the consequence of international political, economic and social inequalities." [22] In this context the ECOSOC and the functions performed by it assume great significance.

The Economic and Social Council (ECOSOC) performs wide variety of economic and social function. It deals with varied functions such as Decolonization, Natural Resources, Transitional Corporations, Industrial Development, Food Problems, Regional Cooperation, Sustainable Development, Reduction of Desertification, human rights etc. It prepares ground for holding of world conferences on subjects such as Welfare of women, Social Development, Prevention of crime and Treatment of offenders, Small Island developing states, Natural Disaster reduction etc. As pointed out by Under-Secretary-General for Policy Coordination and Sustainable Development, "A commitment by the International community to the goals of all of the conferences implies a new vision and a new priority attached to human-centred development."[23]

Thus it is clear that those who are critical of the functions of the United Nations completely ignore its successful functioning in the social and economic fields. Even if we take into account the functions that it has perfored and is still performing in social and economic fields, the United Nations has become an institution of inescapable importance and indispensation.[24] As regards ECOSOC, it may be noted that it works as a subordinate organ of the General Assembly. This is evident from Article 60 of the Charter which provides that responsibility for the discharge of the functions of the organisation set forth in the chapter relating to "International Economic and Social Cooperation" (*i.e.* Chapter IX) shall be vested in the General Assembly and under the authority of the General Assembly in the Economic and Social Council which shall have for this purpose the powers set forth in Chapter X (*i.e.* dealing the ECOSOC)." [25]

The growing importance and recognition of human rights has further enhanced the importance of ECOSOC.

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22. R.S. Pathak, "The Functioning of International Law in the International System", I.J.I.L., Vol. 24 (1984) p. 1 at p. 9.
23. U.N. Chronicle Vol. XXXII, No. 1 (March, 1995) p. 82.
24. Leland M. Goodrich, "The Changing Role of the United States in the United Nations," India Quarterly, Vol. XXXII, No. 1 (January—March, 1976), p. 49 at pp. 65-66, See also "Experts say United Nations System Must Reflect World Realities; 'Call Major Structural Reforms,' U.N. Monthly Chronicle, Vol. XII (June 1975), pp. 40-43.
25. See also Article 66.

CHAPTER 36

THE INTERNATIONAL TRUSTEESHIP SYSTEM AND THE TRUSTEESHIP COUNCIL*

The International Trusteeship System.—Article 75 of the Charter of the U. N. provides that the U. N. shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are referred as trust territories. As regards the basic objectives of the trusteeship system, the Charter provides that in accordance with the purposes of the U. N. laid down in Article 1 of the Charter shall be (a) to further international peace and security; (b) to promote the political, economical, social and educational advancement, of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular or each territory and its peoples and the freely expressed wishes of the peoples concerned and as may be provided by the terms of each trusteeship agreement ; (c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the independence of the peoples of the world ; and (d) to ensure equal treatment in social, economic, and commercial matters for all members of the U. N. and their nationals and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.[1]

The Trusteeship system applies to such territories in the following categories as may be placed thereunder by means of trusteeship agreements : (a) Territories held under mandate; (b) Territories detached from enemy States as a result of the Second World War, and (c) Territories voluntarily placed thereunder the system by States responsible for their administration.[2] The trusteeship however, does not apply to territories which become members of the U. N., relationship among which shall be based on respect for the principle of sovereign equality.[3] There may be designated in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies.[4] All functions of the U. N. relating to strategic areas including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by tne Security Council.

The 11 Territories placed under the Trusteeship system (and their administering powers) were : New Geneva and Nauru (Australia); Rwanda-Urundi (Belgium); Cameroons and Togoland (France); Somaliland (Italy), Western Samva (New Zealand); Cameroons, Togoland and Tanzanyika (U. K.) and the Pacific Islands Trust Territory (United States). It may be noted that the U. N. has also assumed responsibility for South West Africa (Namibia). In 1966 the General Assembly terminated South Africa's mandate over Namibia and in 1967 the Assembly established an 11 member Council for South West Africa to administer the territory until independence. In 1968, the General Assembly declared that the territory of South West Africa would henceforth be known as Namibia and the council was redesignated the U. N. Council for Namibia. Namibia thus became a unique responsibility of the U. N. the only non-self-governing territory for which the U. N. rather than a Member State, assumed responsibility through the Council as the Administering Authority.

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* See also for I.A.S. (1967), Q. No. 5; P.C.S. (1982), Q. 10 (f).

1. Article 76 of the U. N. Charter.
2. Article 77 (1).
3. Article 78.
4. Article 82.

Since the independence of Papua New Guinea in September 1975 the Trust Territory of the Pacific Islands has been the only remaining U. N. territory. The Trust Territory of the Pacific Islands covers some three million square miles of the Western Pacific Ocean, situated above the Equator. It encompasses some 2100 Islands and islets, which are located in three major archipelagos—the Carolines, the Marshalls and the Marianas. The whole area is called *micronesia* although Guam in the Marianas and Gilbert Islands in the South of the Marshalls are not part of the Trust Territory. It was the only one of the original 11 Territories under the trusteeship system to be designated a "strategic area" under the U. N. Charter. The Trusteeship Council therefore reports on it annually to the Security Council. The 50th session (16th May to 10th June, 1982) of the Trusteeship Council was devoted to examining the conditions in the Trust Territory of Pacific Islands, as well as the question of termination of the Trusteeship Agreement under which the United States governs the territory.[5]

Trusteeship Council

Composition.—As provided under Article 86 of the Charter, Trusteeship Council comprises of the following members of the United Nations : (a) Those members who are administering Trust Territories; (b) The permanent members of the Security Council as are not administering Trust Territories; and (c) As many other members elected for three years' term by the General Assembly as may be necessary to ensure that the total number of Members of the Trusteeship Council is equally divided between those members of the United Nations which administer Trust Territories and those which do not. At present, trusteeship Council members are the United States as the Administering Authority and China, France, the Russian Federation and the United Kingdom serving as permanent members of the Security Council.

Voting.—Each member of the Trusteeship Council possesses one vote. The decisions of the Trusteeship Council are made by a majority of the members present and voting.[6] That is to say, no member possesses veto power in the Trusteeship Council.

Functions and powers.—Trusteeship Council performs the following functions under the authority of the General Assembly :

(1) It may consider reports submitted by the Administering Authority.[7]
(2) It may accept petitions and examine them in consultation with the Administering Authority.[8]
(3) It may provide for periodic visits to the respective Trust Territories at times agreed upon with the Administering Authority.[9]
(4) It may take these and other actions in conformity with the terms of the Trusteeship Agreements.[10]
(5) The Trusteeship Council shall formulate a questionnaire for each Trust Territory within the competence of the General Assembly and shall make annual report to the General Assembly upon the basis of such questionnaire.[11]
(6) The Trusteeship Council may avail itself of the assistance of the Economic and Social Council and of the specialised agencies in regard to matters with which they are respectively concerned.[12]

Problem of the Independence of Trust Territory of the Pacific Islands or Micronesia[13].—Micronesia is one of the original Trust Territories under the Trusteeship System and is designated a "strategic area" under the U. N. Charter. Article 83 of the Charter provides that all functions of the U. N. relating to strategic areas,

5. See U. N. Chronicle Vol. XX. of 1983, pp. 17-19.
6. Article 89 of the U. N. Charter.
7. Article 87 (a).
8. Article 87 (b).
9. Article 87 (c).
10. Article 87 (d).
11. Article 88.
12. Article 91.
13. See U. N. Chronicle, Vol. XXV, No. 3 (September 1988), pp. 49-51.

including the approval of the terms of the trusteeship agreements and of their alteration or amendment shall be exercised by the Security Council. Trusteeship Council therefore reports to the Security Council about conditions in the Territory.

The Trust Territory of Micronesia consists of three archipelagos—the Marshalls, the Carolines and the Marianas. The Trust Territory consists of 2,100 Islands and atolls which are scattered over an area of about 7.8 million square kilometres of the Western Pacific, North of Equator. Its combined land area is 1,854 square kilometres.

In 1986 population was estimated at 1,68,431 (Federated states of Micronesia 94,534; Marshall Islands 30,060; Northern Mariana Islands 21,065; and Palau 13,772). The Territory has four administrative entities—the Federated States of Micronesia consisting of islands of Yap, Truk, Ponape and Kosrae (within the carolines); the Marshall Islands; Palau; and the Northern Mariana Islands—which in 1976 were administratively separated from the Government of the Trust Territory of the Pacific Islands.

On 27th May, 1988, the Trusteeship Council recommended that the process of the approval of the compact of Free Association for Palau be completed at the earliest possible. The Council noted that the people of Micronesia in exercise of their right to self-government, as set out in the U. N. Charter, had elected to assume full responsibility for administration in the economic, social and educational fields. The Council also noted with satisfaction the assurances given by the Administering Authority (*i.e.*, the United States of America) that it would continue to fulfil its responsibillties under the Charter and the Trusteeship Agreement.

The Trusteeship Council considered it "appropriate" for the Trusteeship Agreement to be terminated on entry into force of the compacts of Free Association for the Federated States of Micronesia, the Marshall Islands and Palau, and the Commonwealth Covenant in respect of the Northern Mariana Islands. While the Marshall Islands compact entered into force on October 21, 1986, the Federated States of Micronesia Compact and the Northern Mariana Islands Covenant both entered into force on November 3, 1986. Thus only the entry into force of the Compact of Free Association of Palau remains.

The Compact of Free Association for Palau provides for the U. S. to exercise defence responsibilities for the entity. However, because the Palau Constitution prohibits nuclear activity in the area, local courts ruled that the compact must be approved by the same margin as required for the Constitutional amendment (*i.e.*, 75%). A Visiting Mission was sent by the Trusteeship Council to observe a plebiscite on the Compact in June 1987. It reported that 67.59% of the voters favoured the Compact. Palau subsequently enacted legislation authorizing a referendum on a Constitutional amendment to permit adoption of the Compact by a simple majority. The Constitution amendment was approved on 4 August. A second Visiting Mission was sent to observe a 21 August plebiscite on Compact Approval. It reported that 73.04 per cent of the voters voted in favour.

Eight months later, *i.e.*, on 22 April 1988, the Supreme Court of Palau declared null and void the Constitutional amendment permitting approval of the Compact by a simple majority, thus invalidating the 21 August plebiscite results. The Government of Palau has appealed against the said Supreme Court ruling.

It may be noted here that on 28 March, 1988, the U. S. Senate authorized entery into force of the Compact as soon as Palau had completed Constitutional procedure to approve the Compact. Similar legislation was then introduced before the U. S. House of Representatives.

The U. S. reported to the Council that the Office of the High Commissioner for the Trust Territory of Pacific Islands had been abolished and its functions trasferred to the Office of Territorial and International Affairs in the U. S. Department of Interior. The Soviet Union has criticized U. S. action and said that the U. S. was trying to impose its internal legislation over the Territory and replace the Trusteeship Agreement with domestic regulations. The once united territory had been divided into island entities, while the Micronesian Congress which had tried to preserve the Territory's unity had been dissolved. According to Article 83 of the Charter all the functions of the U. N. relating to strategic areas should be exercised by the Security Council and naturally that included

the question of termination of the trusteeship. Until there was a corresponding decision by the Security Council, the U. S. was obliged to supply the U. N. with all the information required on the situation in the entire Trust Territory. Though the U. S. repudiated all the criticism, there seems to be much force in the criticism of the Soviet Union.

Trusteeship mandate of Palau ends

The people of the last Trust Territory, namely the Trust Territory of Palau, freely exercised their right of self-determination in a 9th November, 1993 plebiscite and had chosen, by a 68 per cent majority vote free association with United States of America, the Administering Authority of the Territory. On 17th October, 1994 the United States informed the U.N. Secretary-General that its compact of Free Association with Palau came into force on 1st October, 1994. On 15th December, 1994 the General Assembly through an unanimous resolution (49/63), admitted the Republic of Palau to the U.N. as its 185th member state. On 1st November, 1994 the Trusteeship Council formally suspended operation after nearly half a century. It would henceforth meet only on extraordinary basis, as the need arose.

Independence of South-West Africa (*i.e.*, Namibia)* — The problem of Namiba has been a concern of the U.N., since the early days of the organisation. Namibia is a vast territory in the South Western part of the continent of Africa bordered by the Atlantic ocean on the west, by Angola on the north, by Zambia on the north-east, by Botswana on the east and south Africa on the South. It covers, an area of 824,269 square kilometres and has a population of about 1.5 million. It was under German administration from 1884 to 1915. After the outbreak of World War I South African forces invaded and occupied the territory. In 1920, the territory was brought under the mandate system to be governed by South Africa. In 1946, the General Assembly recommended Trusteeship status for South West Africa and invited South Africa to propose agreement. In 1947 South Africa submitted report on the Territory for consideration by Trusteeship Council but in 1949 it informed the U. N. that it would no longer transmit information on the territory. The General Assembly, therefore, referred the matter to the International Court of Justice. In its advisory opinion on *the International Status of South West Africa,*[14] the Court found that South West Africa was still a territory under International mandate and that South Africa continued to have international obligations under the League of Nations covenant and mandate, including the obligation to submit reports on and transmit petitions from the territory, the court further declared that the supervisory functions of the League were to be exercised by the U. N. that the General Assembly was the organ legally qualified to exercise those functions previously entrusted to the Council of the League and that South Africa was bound to submit to the supervision and control of the Assembly. The International Court of Justice ruled that under the mandatory system of the League of Nations, the territory of the South West Africa was conferred upon an international status which could not be modified unilaterally by South Africa. Despite this clear verdict of International Court of Justice, South Africa has been defying all resolutions, directives, etc., of the Trusteeship Council, General Assembly and above all Security Council of the United Nations. Nevertheless it may be noted that so far as the legal position is concerned South-West Africa still has international status, and its status cannot be modified unilaterally by South Africa. Its status can be modified only with the concurrence of the United Nations which has succeeded to the functions and powers of the mandatory system of the League of Nations.

In order to implement the above opinion of the World Court, the General Assembly appointed a committee in 1953 and directed it to examine the petitions, as far as possible, according to the mandate system. In this connection the General Assembly once again in 1955 requested the International Court of Justice to give its opinion as to whether or not the said committee had the power to hear oral petitions. In its advisory opinion in 1956, the

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* See also for I.A.S. (1955), Q. No. 3.

14. I.C.J. Reports (1950), p. 128. The facts of the case have been discussed in Chapter "State Succession."

Court by a majority of 8 to 5 votes, opined that the said committee had power to hear oral petitions.[15]

In 1960, Liberia and Ethiopia filed a case in the International Court of Justice requesting the Court to declare that the policy of *apartheid* pursued by South Africa was a violation of the mandate. In a judgment regarding preliminary objections of 21 December, 1962, the Court rejected the plea of Liberia and Ethiopia. In 1966, the Court rejected the request on the ground that Ethiopia and Liberia were not directly concerned with the matter and hence they could not claim such rights to be enforced as they do not belong to them.[16] This decision has been subjected to severe criticism. When the decision of the International Court of Justice and the resolution of the General Assembly did not have any effect upon South Africa, the Security Council in 1970, passed a resolution against South Africa. But even this resolution was disregarded by South Africa. Consequently the International Court of Justice was again requested to give its advisory opinion. In its *advisory opinion concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia South-West (Africa). Notwithstanding Security Council Resolution,* 276 (1970),[17] the International Court of Justice held the following :

(1) That the continued presence of South-Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the territory.

(2) That States members of the United Nations are under obligation to recognise the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia and refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to its presence and administration.

(3) That it is incumbent upon States which are not Members of the United Nations to give assistance in the action which has been taken by the United Nations with regard to Namibia.[18]

Thus the presence of South Africa in Namibia is completely illegal and cannot be justified on any grounds. Delay in the solution of the problem is due to the attitude of Western Powers.[19] Therefore, the problem of Namibia is not the problem of pressurising South Africa alone to secure the independence of the territory, or to threaten it with dire consequences in case of its non-compliance, on the contrary, it poses the paradoxical question of how to pressurise the group of western powers who in their turn are able to pressurise South African Government to free Namibia.[20]

General Assembly's Ninth Special Session on Namibia.—From 24th April to 3rd May, 1978, the General Assembly held its ninth Special Session on Namibia. The General Assembly expressed full support for the armed struggle to the Namibian people under the leadership of the South-West People's Organization (SWAPO), its sole and authentic representative, and stated it was imperative that any negotiated settlement be arrived at with the agreement of SWAPO and within the framework of the resolutions of the U. N. The General Assembly adopted resolution S 9/2 containing the Declaration on Namibia and Programme of Action in support of self-determination and national independence for Namibia. The Assembly reiterated that Namibia was the direct responsibility of the U. N. until genuine self-determination and national indepedence were achieved and called for South Africa's complete, immediate and unconditional withdrawal from the entire territory.

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15. See I.C.J. Reports (1956), p. 23.
16. See South West Africa cases I.C.J., Reports (1966), p. 6.
17. I.C.J. Reports (1971), p. 16.
18. Ibid, at pp. 315-16.
19. See S. C. Saxena, "Namibia and the Western Powers", F.A.R. Vol. XXVII, No. 4 (April 1978), p. 58.
20. Ibid, at pp. 76-77. See also Henry J. Richardson III, "Constitutive Questions in the Negotiations For Namibian Independence." A J.I.L., Vol. 78 (1984) p. 76 at p. 119.

South Africa Debarred from 35th Session of the General Assembly.—On 2nd March, 1981, the General Assembly resumed its 35th session to take up the question of Namibia, and voted on the same day to debar the delegation of South Africa from attending the session. The Assembly took this decison on the report of its credential committee which recommended that the Assembly reject the credentials of the delegation of South Africa to the thirty-five session. The Assembly approved it by 112 votes in favour to 22 against, with 6 abstentions. Since then South Africa has not been allowed to attend the session of the Assembly.

General Assembly's call for total sanctions against South Africa.—On 6th March, 1981, the General Assembly condemned South Africa for its continued illegal occupation of Namibia and called upon the Security Council to convene urgently to impose comprehensive mandatory sanctions against South Africa in order to ensure its immediate compliance with United Nations resolutions realting to Namibia. At the same time, the Assembly decided to consider whatever action was necessary in accordance with the United Nations Charter in the event of the Council's inability to adopt concrete measures to compel South Africa to end its illegal occupation by withdrawing from Namibia.

Paris Declaration on Sanctions against South Africa.—On 2nd May, 1981, the International Conference on sanctions against South Africa declared that the Security Council should recognize that the situation in Southern Africa, arising from the policies and actions of the racist regime of South Africa, was characterised by constant breaches of the peace and a growing threat to international peace and security, and hence measures under Chapter VII of the United Nations Charter must be taken. The International Conference was organized by the United Nations in co-operation with the organization of African Unity (OAU) and was held at the Paris headquarters of the UNESCO from 20 to 27 May, 1981.

The International Conference in support of the Struggle of the People for Independence (Paris, 25-29, April, 1983).—The Paris Declaration on Namibia was adopted by acclamation on 29 April as the International Conference in support of the struggle of the Namibian People for Independence completed its five-day meeting in Paris. The conference affirmed the inalienable right of the peoples of Namibia to self-determination and national independence in a United Namibia in accordance with the purposes and principles of the Charter of the U. N., the Declaration on the Granting of Indepenedence to Colonial Countries and Peoples, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the U. N., and other relevant resolutions of the General Assembly and the Security Council. It noted with deep concern that sixteen and a half years after the termination of South Africa's Mandate over Namibia and twelve years after the advisory opinion of the International Court of Justice of 21 June, 1971, South Africa continues its illegal occupation of Namibia in disregards of the wishes of the international community expressed in numerous resolutions of the General Assembly and of the Security Council. The persistent refusal by South Africa to comply with its obligations under the Charter constitutes a challenge to the international legal system. The repeated use of the veto by the western permanent members of the Secutiry Council to prevent the adoptions of sanctions against South Africa has not only encouraged the South African regime in the lawlessness but has provoked increased acts of defiance to the authority of the U. N. The Conference called upon all States as well as the specialised agencies and other international organizations associated with the U. N., to render increased material assistance to the oppressed people of Namibia and to SWAPO in the struggle for liberation. The conference expressed its dismay at the failure of the Security Council to discharge effectively its responsibilities for the maintenance of international peace and security owing to the opposition of western permanent members of the Security Council. It considered that sanctions under Chapter VII of the Charter, if universally and effectively implemented were the only available means to ensure South Africa's compliance with the

decisions of the U. N. and to prevent the intensification of the armed conflict in the region.[21]

Namibia Day.—It may be noted that with a view to draw the attention of the international community to the responsibility of the U. N. for the territory as well as the struggle of the Namibian people for self-determination, freedom and independence in a United Namibia, 26 August is observed at the U. N. every year as Namibia day. Under a 1973 General Assembly decision, the U. N. Council for Namibia was requested to observe annually Namibia Day until Namibia became free and genuinely independent.[22]

Emergence of Namibia as an Independent State.—On 14 July, 1988, the U. S., Angola, South Africa and Cuba reached an agreement to free Namibia from 73 years of South African rule and to provide for the withdrawal of Cuban troops from neighbouring Angola. The U. S. acted as a mediator. The agreement contained a basic set of principles for black majority rule in Namibia. The Secretary-General of the U. N. set 1990 as the year of final independence of Namibia.

On 14 December, 1988, the Protocol on the independence of Namibia was signed at the capital of Congo, Braziville. This Protocol was signed by Angola, Cuba and South Africa. The Protocol provided for withdrawal of Cuban Troops from Angola and the beginning of the first phase of the independence of Namibia on 1 April, 1989. It also provided for the establishment of a Joint Commission in which both the U.S. and U.S.S.R. would be represented. According to the Protocol a tripartite treaty would be signed at Newyork on 22 December, 1988. On the said date, Angola, Cuba and South Africa signed on the treaty. This was indeed an historical day.

As noted above, the first phase of the independence of Namibia began on 1 April 1989. The roots of imperialism in Namibia were so deep that conflict was inevitable in uprooting them. Despite the presence of U. N. observers, conflicts continued between troops of South Africa and SWAPO. Even the U. N. expressed over the bloodshed thus caused. The situation however improved through the mediation of the U. N. and paved way for elections in Namibia. The second phase of the independence of Namibia began on 22 May, 1989. The third phase began on 1 July, 1989. Under it elections were to be held in November 1989. Though ten parties were fighting elections, SWAPO was expected to emerge victorious.

On 30 August, 1989, the United Nations Security Council voiced unanimous concern at the harrassment of Namibian voters by the racist South African forces and demanded Pretoria's strict compliance with its independence plan for South West Africa (*i.e.*, Namibia). SWAPO urged the international community and the Security Council to help in holding elections without intimidation or interference to enable people to determine their own destiny.

Finally, the elections were held and as expected SWAPO emerged victorious but its hope of winning a two-thirds majority could not be realized. Out of the 72 seats of the Constituent Assembly SWAPO won 42 seats and 21 seats were won by Democratic Turnhalla Alliances, a party of white settlers and black chieftains. The elections were held under the U. N. Speaking at his first Press Conference after South West African People's Organisation (SWAPO) leader, Mr. Sam Nujoma, committed his party firmly to a "mixed economy, emulating Indian example and translating the inspirations received from India during its liberation movement.

Thus on the midnight of 21st March, 1990 Namibia became an independent country. U. N. Council on Namibia held its first session in the Capital of Namibia *i.e.*, Windhoek from 9 to 11 April, 1990 and passed resolution recommending the dissolution of the Council.

Difference between mandatory system and trusteeship system.*—"The trusteeship system is the successor of the League experiment but it would be a

21. See U. N. Chronicle, Vol. XX, No. 6 of 1983, pp. 55-58.
22. U. N. Chronicle, Vol. XX, No. 9 of 1983, p. 81.

* See also for P.C.S. (1970), Q. No. 2(e) ; I.A.S. (1958), Q. No. 4 ; I.A.S. (1955), Q. No. 3.

mistake to consider it as simply a prolongation of the mandate system." [23] In the history of the International Organisation, the mandatory system of the League of Nations, through which certain territories which were under-developed and backward were entrusted to some developed countries for their administration and development, was the first experiment of its kind. The chief objective of this system was to improve the lot of inhabitants of such territories so that in the course of time they might become capable of governing their territories by themselves and might achieve eventual independence. It was clearly provided in Article 22 of the Covenant of the League of Nations that the best way of improving the lot of such people was to entrust such territories for administration and development, to certain developed countries. Consequently certain territories which were brought under the control of mandatory system of the League of Nations were entrusted to some developed countries for their administration and development.

So far as the comparison between the mandatory system of the League of Nations and trusteeship system of the United Nations is concerned, it may be noted that the scope of the trusteeship system is much wider than the former. The trusteeship system exercises more effective control over the territories under its control. So far as strategic areas or territories of the trusteeship system are concerned, the Security Council of the United Nations exercises effective control over them. It is clearly provided in the trusteeship system of the United Nations that the inhabitants of such territories cannot be recruited in the armed forces of the administering countries, *i.e.*, countries which administer such territories. The administering authority has, in this respect, to act in accordance with the provisions of the collective security of the United Nations.[24] So far as functions and achievements of two systems are concerned, as compared to mandatory system, the trusteeship system has done commendable work. The greatest proof of its success is that it has almost finished its work. It is the only principal organ of the United Nations which may be said to have almost completed its work. Most of the trust territories under the trusteeship system have now attained independence. Leaving aside the case of South-West Africa, it has achieved signal success in respect of all other territories.

The basic objectives of the mandatory system were not clearly defined under the Covenant of the League of Nations. The basic objectives of the trusteeship system are far more advanced than that of the mandatory system and have been described in Article 76 of the Charter. Last, but not the least, "With the League, actual administration was in the hands of mandatory States"; under the U. N. while the direct administration is commonly in the hands of States singly or jointly as 'administering authorities', the U. N. itself may take direct control as it did in Eritrea.[25]

It may, therefore, be concluded that the Trusteeship system of the U. N. is much better and more effective than the mandatory system of the League of Nations.

Evaluation.—The Trusteeship Council has done commendable work. It is the only principal organ of the U.N. which has successfully completed its work. On 15th December 1994, the last Trust Territory, namely the Trust Territory of Palau, was admitted to U.N. as its 185th member. On 1st November, 1994 the Trusteeship Council suspended its operations after nearly half a century. On 10th November, 1994 the Security Council, through an unanimous resolution, terminated the Trusteeship Agreement of Palau. Thus the objective of the Trusteeship Council have been fully achieved. Since the work of the Trusteeship Council is now almost completed, it should now be dissolved. It is suggested that the U.N. Charter be amended and with the dissolution of the Trusteeship Council simultaneously a new Principal organ entitled "Human Rights and Environment Council" be established.

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23. Stephen S. Goodspeed, "The Nature and Functions of International Organisation", Second Edition, p. 529.
24. Article 83.
25. Norman D. Palmer and Howard C. Perkins, International Relations—The World Community in Transition (Third Indian Edition), 1970, p. 374.

CHAPTER 37

THE SECRETARIAT

As pointed out by Prof. L.M. Goodrich,[1] "The concept of International Civil Service is not new. It was started by the League of Nations. The United Nations has expanded and perfected the League of Nations."

Composition.—The Secretariat is one of the principal organs of the United Nations.[2] The Secretariat comprises of a Secretary-General and such staff as the Organisation may require. The Secretary-General is appointed by the General Assembly upon the recommendation of the Security Council. He is designated as "The Chief Administrative Officer of the Organisation."[3] He is thus not only the Chief Administrative Officer of the Secretariat, but of the whole Organization. The practice of the United Nations shows that the Secretary-General is appointed from a smaller and neutral State. As pointed out earlier, the recommendation of the Security Council is necessary before the General Assembly is able to appoint a Secretary General. The appointment of Secretary-General being a substantial matter, the concurrence of the 5 permanent members is, therefore, necessary for the appointment of the Secretary-General. Only that eminent person of a neutral State may be appointed who can be acceptable to all the five-permanent members of the United Nations. Trigve Lie was the first Secretary-General of the United Nations. He was succeeded by Dag Hammarskjold. Dag Hammarskjold proved to be the most powerful and influential Secretary-General that the United Nations has ever had. He was succeeded by U. Thant of Burma. After Mr. U. Thant, Mr. Kurt Waldheim of Austria became the next Secretary-General of the United Nations. Mr. Kurt Waldheim of Austria was succeeded by Mr. Avier Perez De Cuellar of Peru. He took up the charge of his post on January 1, 1982. His term expired on 31 December, 1986. He was re-elected for another term. On 11 August, 1988, India bestowed upon him the Jawaharlal Nehru Award for international understanding for 1987. After U. Thant, he is the Second U.N. Secretary-General to be chosen for this prestigious Award. The second term of Mr. Avier Perez De Cuellar ended on 31 December, 1992. He was succeeded by Mr Boutros Boutros Ghali of Egypt who took over as the Secretary General of the U.N. on 1st January, 1992. The seventh and the present Secretary-General of the U.N. is Kofi Annan of Ghanna aged 59 years. Kofi Annan has become Secretary-General when the U.N. is confronted with formidable problems and challenges. The most formidable problem that he has to confront with is the financial crisis of the U.N. within a short period. Kofi Annan has demonstrated his diplomatic skills and capability. He was instrumental in preventing the Gulf War between the United States of America and Iraq over the participation of American Inspectors to search weapons in Iraq. Kofi Annan was selected the U.N. Secretary General for the second term also. His second term started from January 1, 2002. In Order to maintain the international character of the Secretariat and to make it impartial, the Charter clearly provides that the Secretary-General and his staff shall not take direction from any Government and the member-State of the United Nations shall also respect the exclusively international character of the responsibilities of the Secretary-General and the staff and shall not seek to influence them in the discharge of their responsibilities.[4] Asked for his view on the belief of international commentators that in him, third world had acquired a standard-bearer at the U.N., the Secretary-General, Mr. Perez De Cuellar replied : "I am very gratified that that is being said, but at the same time I want to make it clear that the Secretary-General of the United Nations is an international figure who must stand apart from any causes, however noble they may be. This means that, although I am, of course, at heart a member of the third world, my work will consist essentially of trying to maintain

1. L.M. Goodrich, The United Nations, p. 131; see also Stephen S. Goodspeed, The Nature and Functions of International Organisation, pp. 364-366.
2. Article 7 of the U.N. Charter.
3. Article 97.
4. Article 100; see also S.M. Schwebel "International Character of the Secretariat of the United Nations", B.Y.B.I.L., Vol. XXX (1953), p. 71.

the dialogue between the third world and the second and first worlds, since the function of the United Nations is precisely to be the major forum for understanding and consultation among the parties." The staff of the Secretariat is appointed by Secretary-General in accordance with the rules determined and established by the General Assembly. According to the Charter, the paramount consideration in the employment of the staff and in the determination of the condition of service shall be the necessity of acquiring the highest standards of *efficiency, competence and integrity.*[5] The Charter provides only these guidelines. The terms and conditions of service of staff are governed by the rules established by the General Assembly. Article 101 further provides that due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible. That is to say, the first thing that is to be ensured is the highest standards of *efficiency, competence and integrity.* Thereafter as far as possible the staff should be recruited on geographical basis so as to make the International Civil Service, International in the real sense of the term.

The International Civil Service Advisory Board, an 11-member body was established in 1949. The decision to replace it with the International Civil Service Commission was taken by the General Assembly in 1972.[6] The Commission was to have been set up on 1st January, 1974, but in December, 1973, the General Assembly decided to defer action and to have the draft Statute referred to Governments for comment. Thereupon, the General Assembly adopted the Statute of the Commission in December 1974. The Commission held its first Session at Headquarters from 19th to 30th May, 1975. It is concerned with a wide range of salary and of other questions affecting the nearly 40,000 staff members of the United system of Organisation.[7]

As pointed out above, the Secretary-General is appointed by the General Assembly on the recommendation of the Security Council. In 1961 Soviet Union refused to contribute her share in the expenses incurred by the U.N. in Congo operations. She doubted the independence and impartiality of the Secretary-General. The Soviet Union demanded that instead of one, there should be three Secretary-Generals—one from Communist States, one from Western States and one from the neutral States. This is known as 'Troika' demand. If Soviet Union had succeeded in her design she would have procured the right of veto in respect of U.N. Forces and administrative matters. But other States did not agree with this and rejected the Soviet demand.[8]

Functions of the Secretary-General[9]

The Secretary-General performs the following functions :

(1) The Secretary-General is the Chief Administrative Officer of the Organisation.[10]

(2) The Secretary-General acts in the capacity of the Chief Administrative Officer of the Organisation in all meetings of the General Assembly, the Security Council, the Economic and Social Council and of the Trusteeship Council and performs such other functions as are entrusted to him by these organs.[11]

(3) Secretary-General makes annual report to the General Assembly on the work of the Organisation. In fact, the Annual Session of the General Assembly begins with the discussion of the report of the Secretary-General on the work of the Organisation as a whole.

(4) The Secretary-General may bring to the notice of the Security Council any matter which in his opinion threatens the maintenance of International Peace and Security.[12]

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5. Article 101.
6. See Gen. Ass. Resolution 3042 (XXVII).
7. See U.N., Monthly Chronicle, Vol. XII, No. 6 (June, 1975), p. 39.
8. Richard N. Gardner, "The Soviet Union and the United Nations", in the Soviet Impact on International Law (Dobbs Ferry, New York, 1965), edited by Hans W. Baade, p. 1 at p. 4.
9. For detailed study see also S.K. Kapoor, "Constitutional and Legal Norms Governing the Role of Secretary-General and His Functions", (1973) S.C.J. 1st March, 1973, p. 5.
10. Article 97.
11. Article 98.
12. Article 99.

(5) The Secretary-General gets collected all the statistics in regard to the economic condition of the whole world and submits those datas to the Economic and Social Council.

The Report of the Preparatory Commission listed the functions of the Secretary-General under the following six headings : (i) general administration; (ii) technical functions; (iii) financial function; (iv) the organisation and administration of the secretariat; (v) political functions; and (vi) representational functions.[13] Thus the office of the Secretary-General "was presented as one demanding qualifications of a high order, political as well as technical." [14]

The constitutional basis for the role of the Secretary-General is contained in Articles 97 to 101 of the Charter, Article 97 deals with the composition of the Secretariat, designation of the Secretary-General and his appointment.

Article 98 is the first of the two articles which lay down the political responsibilities of the Secretary-General. It provides that the Secretary-General shall act as the Chief-Administrative Officer of the Organisation in all the meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and the Trusteeship Council, and "shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make annual report to the General Assembly on the work of the Organisation." As pointed out by the former Secretary-General, U. Thant, "this is a radical departure from the non-political concept of Secretary-Generalship to be found in the Covenant of the League of Nations. Article 98 by providing that the Security Council; the General Assembly and other organs may entrust the Secretary-General with unspecified other function has brought him and the Secretariat into the arena of political conflict." [15] Prof. Goodspeed has also remarked, "Much more significant has been the use of an unheralded clause of Article 98 of the Charter which directs the Secretary-General to perform such other functions as are entrusted to him by the major organs of the United Nations. In addition to carrying out routine assignments within this grant of authority, the Secretary-General has been invested with political tasks never foreseen by the framers of the Charter." [16] It was probably on this basis that the Uniting for Peace Resolution which was adopted by the General Assembly on 3rd November, 1950, established a Collective Measures Committee and directed it in consultation with Secretary-General and with member States as the Committee finds appropriate, to study and make a report to the Security Council and the General Assembly on methods which might be used to maintain and strengthen International Peace and Security. The establishment of UNEF, ONUC and UNFICYP are other examples of the grant of powers to the Secretary-General in the politico-Military field. In its advisory opinion on *Certain Expenses of the United Nations*, the International Court of Justice on 20th July, 1962 "voiced the opinion that the Organisation may do what it is not prohibited from doing. It lent great strength to the role of the Secretary-General and construed his powers under Article 98 in a most comprehensive manner." [17]

Article 99 of the Charter gives the Secretary-General political responsibility in his own right. As aptly remarked, "The opportunity for political initiative by the Secretary-General of the United Nations is seen as founded upon Article 99 of the Charter, which empowers the Secretary-General to bring to the attention of Security Council any matter which in his opinion may threaten the maintenance of international peace and security." [18] While elaborating on Article 99, the Preparatory Commission of the United Nations stated, it is impossible to foresee how this article will be applied; but the responsibility it confers upon the Secretary-General will require the exercise of the highest qualities of judgment, tact and integrity.[19] This is the only official guidance which is available to the Secretary-

13. Report of the Preparatory Commission of the U.N. (PC/20, 23rd December, 1945), pp. 81-103.
14. H. Leland M. Goodrich, "The United Nations". p. 136.
15. "The Role of Secretary-General", U.N. Monthly Chronicle, Vol. VIII, No. 9 (October, 1971), p. 178 at 182.
16. The Nature and Function of International Organisation, page 374.
17. Ibid. p. 357.
18. Robert W. Cox, "The Executive Head : An Essay on Leadership in International Organisation". International Organisation, Vol. XXIII (1969), p. 205 at 208.
19. Report of the Preparatory Commission of the U.N. (PC/20, 23rd December 1945) pp. 81-103.

General on the implications of Article 99. It is really surprising to note that it was adopted with very little debate at San-Francisco. As pointed out by former Secretary-General, U. Thant, "The right to bring matters to the attention of the Security Council implies a watching brief and a broad discretion to conduct inquiries and to engage in informal diplomatic activity in regard to matters relating to the maintenance of international peace and security." [20]

Article 99 is thus vague as well as of far-reaching significance. "It has been specifically invoked only once. Nothing could be more divisive and useless than for the Secretary-General to bring a situation publicly to the Security Council when there is no practical possibility of the Council agreeing on effective or useful action. On the other hand, a quiet approach which avoids a public confrontation may often hold some hope of success." [21] While explaining the reason as to why he did not act under Article 99 when he convened the Security Council to hear one appeal from Laos to halt aggression, Dag Hammarskjold said that to have done so, "would necessarily involve a judgment as to the facts on which in the prevailing situation, he did not have a sufficient basis." [22] A similar observation was made by him in 1961 with respect to the dispute between France and Tunisia.

In the view of former Secretary-General, U. Thant, "The drafters of the Charter were over-obsessed with political and military conflict." [23] He, therefore, suggested that in the world of today, it might be useful to add an Article 99 (a) which would authorise the Secretary-General to bring to the attention of the membership global threats to human well-being other than those to peace and security." [24] That is to say, the Secretary-General's obligations under Charter must include any humanitarian action that he can take to save the lives of large number of human beings." [25] The unprecedented and gigantic humanitarian problem arising from the cruel, calculated and cold-blooded genocide in Bangla Desh committed by the Pakistani Military regime headed by General Yahya Khan clearly illustrates that the said suggestion merits consideration and that there is an urgent need to give serious thought to it so as to adopt the desired amendment in the Charter.

The Charter also provides that in the performance of their duties the staff shall not seek or receive instructions from any Government or other authority external to the Organisation, and that each member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.[26] Last but not the least, Article 101 confers upon the Secretary-General the power to appoint the staff under regulations established by the General Assembly. Thus "the independent international character of the Secretariat is specially safeguarded by the provisions of Articles 100—101 of the Charter, which are expressed to bind both member States and officials of the Secretariat." [27]

The Secretary-General of the United Nations has assumed an increasingly active and influential diplomatic role because of the three major factors : (i) the legal norms governing the office ; (ii) certain practices of the member States; and (iii) the political attitudes of the members towards the office.[28] It may be noted here that the most important factor which has led the States to use the Secretary-General as an agent for peaceful settlement has been the legal authority granted to him under Articles 98-100. Besides this, "A legal norm which has encouraged the mediator activities of the Secretary-General but which is not related to any specific provision of the Charter is that resolution

20. "The Role of the Secretary-General". U.N. Monthly Chronicle, Vol. VIII, No. 9 (October, 1971), p. 178.
21. Ibid, p. 184, Recently it was invoked for the second time for Iran-American conflict.
22. Stephen Bailey, "The Secretariat of the U.N.", p. 35.
23. "The Role of the Secretary-General", U.N. Monthly Chronicle, Vol. VIII, No. 9, p. 178 at 185.
24. Ibid.
25. Ibid.
26. Article 100.
27. J.G. Starke, "An Introduction to International Law", Seventh Edition (1972), p. 622.
28. Mark W. Zacher. "The Secretary-General and U.N. Function of Peaceful Settlement". International Organisation, Vol. XX (1966), p. 724 at 727.

of the General Assembly and Security Council are binding on the Secretary-General." [29] It was on this assumption that the successive Secretary-General supported the resolutions of the General Assembly and Security Council. Dag Hammarskjold stated in unequivocal words that they were "law for the Secretary-General." [30] As regards another aspect of the legal norms that has been influential in changing member's attitude concerning the kinds of action that are politically desirable or acceptable, Prof. Mark W. Zacher, has aptly stated, "By their handling of the problems presented to them, the Secretary-Generals have changed those aspects of the international environment (the attitude of States which most crucially determined the activities and effectiveness of their office." [31] As a matter of fact, the office of the Secretary-General has been shaped by the character of its successive incumbents and especially by the outstanding achievements of Secretary-General Dag Hammarskjold.[32]

The responsibility for grappling with the initial administrative problems necessarily fell upon Trygve Lie, the first Secretary-General of the United Nations. His main contribution was that he established the expectations that his office would be a diplomatically active one. However, his major failure was that he failed to create for the office an image of an effective instrument of peaceful settlement. The appointment of Dag Hammarskjold as Secretary-General in 1953 "brought to that office a person who soon demonstrated a capacity for performance that won for him the confidence of Governments and led to their vesting unprecedented responsibilities in him." [33] The members recognised his superior diplomatic skills and his ability to achieve diplomatic success. His mediation of the dispute between the United States and Communist China over the imprisonment of a number of American fliers by the latter may be marked watershed in the development of the role of the Secretary-General. Later in 1956, his handling of the Suez Crisis further strengthened the Member's new outlook on the office. U. Thant also commanded high respect but was not regarded by most observers as having the unusual fitness and physical energy of Hammarskjold. Nevertheless he has been regarded as an influential diplomatic figure and has performed different kinds of activities which were originated by his predecessor.[34] Dr. Kurt Waldheim also proved to be an active Secretary-General. He offered to mediate in Vietnam but both sides indicated that they did not want to accept his good offices.[35] This however, illustrates that "Most frustrating to a Secretary-General is the failure of his continuing attempt to bring together the disputants in a truly serious conflict. The war in Vietnam is undoubtedly the best example of this type of problem which is a grave threat to peace." [36] The Secretary-General, Mr. Avier Perez De Cuellar of Peru who took up the charge of the Secretary-Generalship of the United Nations on January 1, 1982, has also been performed a wide variety of functions.

Two practices of the Members, *viz.* the creation of peace-keeping operation under the executive direction of the Secretary-General and the establishment of permanent diplomatic mission at the United Nations have made a significant impact on the peaceful settlement activities of the Secretary-General. As aptly remarked by Prof. Leland M. Goodrich and Anne P. Simons, "The Charter of the United Nations, although open to much justifiable criticism of its details, has generally shown a remarkable flexibility in practice and a capacity for being interpreted and applied in such a manner as to remedy its inherent weaknesses and deficiencies and to provide the basis for healthy institutional development." [37] The experience has shown that the United Nations is legally capable of

29. Ibid., p. 730.
30. Ibid., pp. 730-731.
31. Ibid., p. 731.
32. Charles Winchmore, "The Secretariat: Retrospect and Prospect", International Organisation, Vol. XIX, No. 3, (Summer 1965), p. 622.
33. Leland M. Goodrich, "The Maintenance of International Peace and Security", International Orgnisation, Vol. XIX, No. 3 (1965), p. 429 at 437.
34. See also K.P. Saxena, "The Secretary-General", India Quarterly (1975), p. 342.
35. The Poineer, dated 28th April, 1972.
36. Stephen S. Goodspeed, "The Nature and Function of International Organisation", p. 646.
37. The U.N. and the Maintenance of International Peace and Security, p. 627.

growth and development to meet needs which were unforeseen when the Charter was drawn up in 1945 and is legally competent to deal with situation which were either not envisaged or imperfectly appreciated. The failure or inability of the Security Council to implement Chapter VII of the Charter made it necessary for the United Nations to supplement the resources for the maintenance of peace. This was done by the establishment, on the one hand, of the United Nations Field Service as a permanent basis on the other hand, of special peace-keeping forces such as UNEF and ONUC. Secretary Generalships of both Dag Hammarskjold and U. Thant have demonstrated that members feel obliged to make use of the Secretary-General for any negotiations relating to the use of United Nations observers or peace-keeping forces in the settlement of disputes. Negotiations leading to the establishment of the United Nations Operations in Egypt, the Congo, West Iran, Yemen, and Cyprus are prominent examples. All these cases lent strength to the mediatory role of the Secretary-General.[38]

As regards the establishment of permanent delegation, Charles Winchmore has aptly stated, "It has become an essential function of the Secretary-General himself to act as a channel for communication and for consultation between delegations." [39] Moreover, "The establishment of permanent delegation has exercised considerable influence on the role of the highest officials of the Secretariat.[40] The presence of the permanent representatives of different countries at the Headquarter has enabled the Secretary-General to discuss alternative approaches to problems before the United Nations and to ensure that his own views are placed before the Governments. Consequently, a considerable responsibility has developed on the Secretary-General in the formation of consensus of views among delegations on specific issues which are under the considerations of the United Nations.[41] The Advisory Committees on UNEF and Congo evidence, the special relationship of the Secretary-General to the delegations. Thus the practice of Members relating to the establishment of permanent delegations has made the Secretary-General in a very real sense the "Chief Administrative Officer of the Organisation." [42]

It will not be out of place to make a brief reference to the devotion of the Secretary-Generals to the ideas of the Charter. While all the Secretary-Generals showed their devotion to the ideas of the Charter, Dag Hammarskjold has outshone all others in this respect. While offering to resign after the Anglo-French vetoes in the Security Council during the Middle East crisis in 1956, he remarked, "The principles of the Charter are, by far, greater than the Organisation in which they are embodied, and the aims which they are to safeguard are holier than the policies of any single nation or people..... He must also be a servant of the principles of the Charter, and its aims must ultimately determine what for him is right and wrong." [43] What followed was "a dramatic and unusual display of international unanimity as the members of the Security Council one by one, rose to express their support of the unsmiling Secretary-General." [44]

As regards the political attitudes of the members toward the office, it may be noted that "it has also become increasingly recognised that in most instances the mediatory functions could only be performed by an individual—not a committee or group." [45] For instance, "The Kashmir, Korea, Palestine and Balkan Commissions and the Indonesians" Good Offices Committee were slow, ponderous, indecisive, and sometimes inept..... There was the constant possibility of serious division of opinion within the commission

38. Mark W. Zacher, "The Secretary-General and the U.N. Function of Peaceful Settlement", International Organisation, Vol. XX (1966), p. 724 at 734.
39. "The Secretariat: Retrospect and Prospect", International Organisation, Vol. XIX, No. 3 (September 1965), p. 622 at p. 635.
40. Ibid.
41. Andrew Cordier, "The Role of the Secretary-General", Annual Review of U.N. Affairs, (1966) 61, pp. 1-14.
42. Article 97.
43. Referred in Stephen S. Goodspeed, "The Nature and Function of International Organisation", p. 376.
44. Ibid., p. 377.
45. Mark W. Zacher, "Secretary-General and the U.N. Function of Peaceful Settlement", International Organisation, Vol. XX (1966), p. 724 at 728.

which would render it incapable of firm and clear action." [46] Thus the States wanted an individual who would be viewed as politically impartial. Yet another factor that led to the development of the role of the Secretary-General was that the States wanted an agent who was always available to them and who was familiar with their problems.

The political responsibilities of the Secretary-General also include functions such as drawing up the provisional agenda for the Assembly, the Security Council and the Trusteeship Council and proposing items for inclusion in the agendas for such bodies. He also submits an annual report to the Assembly on the work of the Organisation. Apart from the political functions, he also performs technical functions such as the preparation of studies, reports, legal briefs, and surveys on different questions. In the meetings of the different organs of the Organisation, he answers question on technical matters.

The Secretary-General also performs important financial functions such as the preparation of United Nations budget, the allocation of funds, the collection of all contributions from members and the control over expenditure. Besides this, the Secretary-General performs various functions concerning the organisation and administration of the Secretariat. It is he, who is mainly responsible for creating and maintaining a team spirit in the body of officials who are recruited from many countries. Last but not the least, he performs representational functions. It is he who "represents the Organisation in all its negotiations with the Governments of members and non-members alike and with outside agencies. His press conferences, public addresses, and press releases speak authoritatively for the United Nations." [47]

The extensive use of the formal powers by the Secretary-General and the development of his role in peaceful settlement activities have had considerable effect on the United Nations as a whole. The most important procedural change that has taken place in the peaceful activities of the United Nations since its inception "has been the emergence of the Secretary-General as an active diplomatic agent." [48] The development of the role of the Secretary-General as an effective instrument of conciliation at the disposal of the Security Council and the General Assembly and the consent availability of his assistance to the members have been to a great extent instrumental in converting the United Nations into a more effective centre for the resolution of international disputes.[49] Yet another important effect ensuing from the development of the Secretary-General's role is that it has given the Organisation a certain nascent autonomy from its members. This is an indicator of the process of political integration in the international system.[50] Thus as remarked by a British Scholar, in the late 1950's there emerged "the growth of the notion of the United Nations not merely as a centre for the harmonization of conflicting interests but as an international person with authority over and above that accorded to it by its Members." [51]

There is every likelihood that the importance of the Secretary-General's position will continue to increase so long as the opposing groups within the United Nations tend to balance and neutralise each other.[52] Prof. Leland M. Goodrich has also aptly remarked, "there are factors present which make it almost inevitable that the office of the Secretary-General will continue to be important in the future and which if discreetly used will contribute to the continuing growth of the Secretary-General and his staff." [53] He points out three reasons for this. In the first place, "the Secretary-General is the only leading personality who is in a position to represent the United Nations continuously." Secondly,

46. Phillip E. Jacob and Alexine L. Atherton, "The Dynamics of International Organisation : The Making of World Order, p. 315.
47. Stephen S. Goodspeed, The Nature and Function of International Organisation, p. 372.
48. International Organisation, Vol. XX (1966), p. 724 at 735.
49. Ibid., p. 736.
50. Ernest B. Haas, Beyond the Nation State : Functionalism and International Organisation, p. 132.
51. Geoffery L. Goodwin, "The Political Role of the U.N. : Some British Views", International Organisation, Vol. XV (1961), No. 4, p. 59.
52. Elsmore Jackson, "The Developing Role of the Secretary-General", International Organisation, Vol. XI (1957), pp. 431-45.
53. The United Nations, p. 142.

with the exception of the President of the Assembly, "the Secretary-General is the only topline official who represents all the interests and activities of the United Nations, and who is, therefore in the position to represent the United Nations before the world." Thirdly, "the Secretary-General has at his command a trained and experienced staff which is familiar with the structure, procedures, and functions, of the Organisation."[54] Besides this, the main significance of the evolution of the role of the Secretary-General lies in the fact that it provided means for relatively smooth and fast action, which might otherwise not have been open to the Organisation. Lastly, the mediatory activities of the Secretary-General are bound to expand with the continued drift toward supernationality.

It may, however, be noted that even an outstanding Secretary-General is not an adequate substitute for agreement of the major powers on critical issues. This conclusion can fairly be drawn from the Congo experience." [55] In fact, "The combination of great powers failure to agree among themselves and the belief of the United Nations' majorities that it was necessary that the United Nations should intervene to prevent the deterioration of situation in the Middle East and Congo resulted in devolution of substantial political and administrative responsibilities on the Secretary-General." [56] Thus, it is evident that the Secretary-General is not an adequate substitute for agreements of the major powers on critical issues or the assumptions of the great powers unity upon which the whole fabric of International Peace and Security envisaged the Charter is based.

The Secretary-General is the servant of the principles of the Charter and its aims determine for him what is right and wrong. He should be impartial but not necessarily neutral.[57] He must have that political judgment, tact and integrity which the Preparatory Commission mentioned. Moreover, he must usually operate within highly realistic limits if he is to achieve any useful results at all for as the former Secretary-General, U. Thant has pointed out, "The United Nations as an Organisation is often an ideal recipient of the buck, and it follows that the Secretary-General can easily become a scapegoat in dangerous situations where no solution can be found." [58] In his view, "The Secretary-Generalship is at the same time an absorbing, a thrilling and a deeply frustrating task"[59] and it is the most varied, most interesting and most challenging political job on earth.[60] The Secretary-General is in fact, "the most highly qualified representative of international spirit..... he must proceed with caution. He must strike a sensitive balance between the ideal with which he is charged and the reality with which he is confronted. The ideal could not be higher nor the reality harsher." [61]

Thus the constitutional and legal norms governing the role of the Secretary-General along with certain practices of the Member States and the political attitudes of the members towards the office have led to the devolution of important responsibilities on the office of the Secretary-General of the United Nations. He considers the problems of peace and war and the problems of the present and the future of mankind. The United Nations has become a forum of inescapable importance and no problem of world-wide significance can be settled without its association in some way or other. With the constant increase of the importance of the United Nations as a world forum, the importance of the office of the Secretary-General is bound to increase. Though there are certain clear limitations the Secretary-General of the United Nations will continue to wield immense power and influence in respect of various activities associated with the United Nations, especially the United Nations function of peaceful settlement. Much will, however, depend upon the character of the individuals who hold the office and the political circumstances of the day. With the constant increase in the range of human problems in the social, economic and

54. Ibid.
55. Leland M. Goodrich, "The Maintenance of International Peace and Security", International Organisation, Vol. XIX, No. 3 (September, 1965), page 429 at 441.
56. Lawrence S. Finkelstein, "The United Nations; Then and Now", International Organisation, Vol. XIX, No. 3, p. 367 at 386.
57. Editorial entitled "Secretary-General", "Herald", 23rd December, 1972.
58. "The Role of Secretary-General", U.N. Monthly Chronicle, Vol. VIII, No. 9 (October, 1971), p. 178 at 186.
59. Ibid.
60. Ibid., p. 187.
61. Stephen M. Schwebel, "The Secretary-General of the United Nations", p. 47.

political area, it has become urgent to pursue effectively these problems on a global scale and hence the significance of the office of the Secretary-General must also grow correspondingly. Moreover, as an effective instrument of conciliation in the hands of principal organs of the United Nations such as the Security Council and the General Assembly and as a mediator for the member States, the office of the Secretary-General has become indispensable. The nuclear arms race, division of world into opposing groups and other facts of international politics are other factors which have added to the importance of his office.

It may be noted here that pursuant to Article 96 (2) of the U.N. Charter, the General Assembly has authorized the Trusteeship Council, ECOSOC, the Interim Committee of the General Assembly and the Committee on the Application for Review of Administrative Tribunal Judgements as well as 14 specialized agencies and the IAEA to request advisory opinions of the International Court of Justice. It has been suggested, and rightly too, that the Secretary-General should also be authorised to seek advisory opinions of the Court.[62]

Last but not the least, reference may be made to a special report entitled, "An Agenda for Peace" in which Secretary-General Boutros Boutros Ghali has offered a multi-faceted plan to enable the United Nations to take a wider mission in the pursuit and preservation of world peace. His plan includes proposals on 'Preventive diplomacy', 'Peace-making', 'Peace-Keeping' and 'Post-conflict peace-building'. His plan will undoubtedly require a greater and more active role of the Secretary-General. His plan relating to 'Preventive Diplomacy' deserves a special mention here. According to his plan, the most desirable and efficient use of diplomacy is to ease tensions before they result in conflict to foster preventive diplomacy. He proposed the following :

(i) Measures to increase fact-finding and build good faith between States;
(ii) Establishment of an early warning system for assessing possible threats to peace ;
(iii) Identification by the Council of economic and social situations that might pose a threat to international peace and security ;
(iv) Creation of a new technique—"preventive deployment"—whereby U.N. forces could be sent to an area to deter cross-border attacks or prevent hostilities within a country, rather than wait until after armed conflict had occurred; and
(v) Consideration of demiliarized zones in a preventive, rather than post-conflict, context to separate potential belligerents. Such zones would serve as "symbols of international community's concern that conflict be prevented".[63]

Whereas preventive diplomacy is to avoid a crisis "post-conflict peace-building is to prevent a recurrence." The plan of Secretary-General envisages various post-conflict measures designed to foster confidence between parties to an armed dispute. On 28 May, 1993, the Security Council concluded a nine-month review of Secretary-General Boutros Boutros Ghali's wide-ranging strategy. "An Agenda for Peace" and urged all States to make participation in and support for international peace-keeping a part of their foreign and national security policy.

The suggestions of the Secretary-General on Preventive Diplomacy, peace-making, peace-keeping and post-conflict peace building are really very useful and timely. Even though initial political decision will have to be taken by the Security Council and Secretary-General. Besides this, they will require sound financial position of the organisation. As remarked by Secretary-General, Boutros Boutros Ghali, "If the organization is to respond effectively to the hopes placed in it by the peoples of the world, the Member States have to be as innovative in devising new financial approaches as they are in devising new tasks for the organization to perform." [64]

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62. See also Stephen M. Schwebel, "Authorizing the Secretary-General of the U.N. To Request Advisory opinion of the I.C.J.", A.J.I.L., Vol. 78 (1984) p. 869 at p. 878.
63. U.N. Chronicle, Vol. XXIX, No. 3 (September, 1992) p. 3.
64. U.N. Chronicle, Vol. XXX, No. 3 (September, 1993) p. 2.

CHAPTER 38

THE INTERNATIONAL COURT OF JUSTICE*

Introduction.—As pointed out by late Dr. Nagendra Singh, who was one of the judges and also served as President of the International Court of Justice, "Two basic pillars are necessary for the establishment of public order : the existence of a proper law and the machinery for enforcing it, including the sanctions behind the law. In the Inter-State sphere, order can be maintained if there is no existence of a well-defined and well-codified International law and an effective agency to enforce it." [1] In the view of Nagendra Singh, the establishment of the rule of law in the world is necessary because it is only through this that peace and public order can be established in the international field. Consequently, in his view, besides the need to strengthen the United Nations, it is also necessary to strengthen the International Court of Justice.

The credit of beginning the system of settling international disputes through judicial decisions goes to the Permanent Court of International Justice which was established under the League of Nations. The Permanent Court of International Justice was based upon the Statute which was called, *The Statute of Permanent Court of International Justice.*

According to Article 36 of the statute the Court was competent to decide following cases : (i) which were entrusted by State Parties; and all matters specially provided for in the charter of the United Nations or in treaties and conventions in force ; (ii) States could also confer jurisdiction through a treaty or convention; and (iii) State Parties to the statute at any time, without special agreement, confer compulsory jurisdiction. The Court could also give advisory opinion on the request of the League Council and Assembly. Thus, ".....the idea of advisory opinions, designed to aid International Organisations on questions of international law was conceived and provided for in the same Article. They are now a permanent feature in international legal system." [2] The Permanent Court contributed much for the development of international law. For example, in *S. S. Wimbledon case,*[3] the Court developed the rule relating to strict interpretation of international instruments and their validity; in *Tunis and Morocco Nationality Decrees,*[4] the Court dwelt upon the change in the meaning and scope of domestic jurisdiction; in *Danzing Official Railway case,*[5] the Court developed the law relating to rights of individuals under International Agreements and in *Eastern Greenland case,*[6] the Court developed the law relating to occupation. Thus, "From its experimental beginning, it established the point that the permanent judicial organ is both feasible and necessary even without going so far as to be accompanied by any true compulsory jurisdiction." [7] The U. S.S.R. and the U.S.A. did not become parties to the statute of the Court. Even those States who became parties to its statute, did not submit their important disputes to it. But "the importance of its work is not to be measured by the gravity of disputes submitted to it. Legal precedents of lasting significance may be established in the adjudication of cases where the immediate stake is small, and the judgments and advisory opinions of the Permanent Court of International

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* *See* also for P.C.S. (1976), Q. No. 9; I.A.S. (1959), Q. No. 11.

1. Nagendra Singh, "International Court of Justice—Watchman of the World Peace and Order." Special Number of 'Yojna' (18 October, 1970), p. 87.
2. E. K. Nantawi, The Enforcement of International Decisions and Arbitral Awards in Public International Law (1967) p. 11.
3. P.C.I.J. (1923), Series A, No. 1 (IWCR 163).
4. P.C.I.J. (1923) Series B. No. 4.
5. P.C.I.J. (1928) Series B, No. 15.
6. P.C.I.J. (1933) Series A/B 53.
7. Shabtai Rosenne, The World Court—What it is and How it Works, Second Edition (1963) p. 27.

Justice, while not formally binding upon that or any other tribunal (Article 59 of the Statute), stand among the most authoritative statements of the Law of Nations." [8]

After the dissolution of the League of Nations, the Permanent Court of International Justice was also dissolved. But it was immediately succeeded by the International Court of Justice. As aptly pointed out by Prof. Goodspeed : "The new Court stepped into the shoes of the old and began its work in the same city, in the same place and in the same hall in which the previous Court delivered its high judgments." [9] The Permanent Court of International Justice performed commendable functions and therefore, its judgments and decisions contributed much to the progressive development of International Law. It broadened the scope of the rule of Law in the international field. Its advisory opinions rendered signal service in the development of international organizations. Probably the greatest proof of its creditable performance is the fact that the present International Court of Justice is based on the Statute of the Permanent Court of International Justice and the provisions of the Statute of the International Court of Justice are more or less the same as those of the previous Statute of the Permanent Court of International Justice. Under Article 92 of the United Nations Charter, it has been provided that the Statute of the International Court of Justice is based on the Statute of its predecessor, the Statute of Permanent Court of International Justice.

Composition*.—According to Article 7 of the United Nations Charter International Court of Justice is one of the principal organs of the United Nations. It is the chief judicial organ of the United Nations and is based upon a Statute which is an integral part of the United Nations Charter.[10] All members of the United Nations are *ipso facto* the members of the Statute of the International Court of Justice. Any State which is not a member of the United Nations may also become a party of the Statute of the International Court of Justice on the recommendation of the Security Council and on the conditions laid down by the General Assembly.[11] The International Court of Justice consists of 15 Judges which are elected by the General Assembly and the Security Council separately. These judges are elected for a term of 9 years and can also be re-elected after the expiry of their term.[12] It may be noted here that Dr. Nagendra Singh of India had been re-elected as one of the Judges of the International Court of Justice for a fresh term of nine years beginning from 6 February, 1982. On 14 February, 1985, the Court elected Dr. Nagendra Singh as its President. He remained President of the Court until February 1988. His term as a Judge of the Court was upto February, 1991. But unfortunately he could not complete his term for he died on 11 December, 1988 in the Hague. As remarked by Dr. Balram Jakhar, the then Speaker of the Lok Sabha, Dr. Singh was "one of the most distinguished jurists India produced" and that he "brought us international honour and recognition." On 18 April, 1989, the Chief Justice of India, Mr. R. S. Pathak, was elected to serve on the International Court of Justice till February 1991, filling a vacancy caused by the death of Dr. Nagendra Singh. Justice Pathak got absolute majority in the very first round of polling in the U. N. General Assembly and the Security Council, defeating rival judges from Pakistan, Sri Lanka and Thailand by wide margins. He secured 84 votes out of 154 votes cast in the General Assembly (*i.e.*, two more than the minimum required) for a win the first round. He obtained nine votes in the 15 nation Security Council. All the decisions of the Court are on the basis of the majority of the judges. The President of the Court is empowered to give casting vote in the case of a tie.

It has become a custom that five judges are from the five permanent members of the Security Council. The Court is constituted in such a way that Latin America, Europe, Africa

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8. P. E. Corbett, the Growth of World Law (1971) p. 45.
9. Stephen S. Goodspeed, The Nature and Functions of International Organisation, Second Edition, p. 329.
* *See* also for P.C.S. (1981), Q. No. 6 ; P.C.S. (1982), Q. No. 3 ; P.C.S. (1985), Q. 7 ; P.C.S. (1988), Q. 3(b).
10. Article 92 of the U. N. Charter; *see* also Shabtai Rosenene, The World Court—What it is and How it Works, Second Edition (1963), p. 31.
11. Article 93 of the Charter.
12. Article 13 of the Statute of the International Court of Justice.

and Asia are represented in it so as to represent 'the main forms of civilization and the principal legal systems of the world.'[13] The seat of the Court is at the Hague. This. however, does not prevent the Court from sitting and exercising its functions elsewhere whenever the court considers it desirable.[14] The Court remains permanently in session except during the judicial vacation, the dates and duration of which are fixed by the court.[15] Judge of the nationality of the each of parties shall retain their right to sit in the case before the court. If the court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge.[16] For example, in the case of *Pakistani Flights over Indian Territory,* 1972,[17] India appointed Dr. Nagendra Singh as *ad hoc* judges of the Court because at that time the Bench did not have any judge of Indian nationality.

Law applied by the International Court of Justice.—According to Article 38 of the Statute of the International Court of Justice, the Court shall decide the disputes submitted to it in accordance with International Law and shall use the sources of International Law in the following order :

(1) International Conventions;
(2) International Customs;
(3) General Principles of Law recognised by civilised nations;
(4) Judicial decisions, the works of jurists, etc., as a subsidiary means for determining the rules of international law. This is subject to the provisions of Article 59.[18]

Ex aequo et bono.—Article 38 (2) further provides : "This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto."* As pointed out by Manley O. Hudson,[19] "the phrase *ex aequo et bono* has its roots in Roman Law. In a case where the parties agreed that the Court may decide *ex aequo et bono,* the provision of the Statute enables the court to go outside the realm of law for reaching its decision. It relieves the court from the necessity of deciding in accordance with law. It makes possible a decision based upon considerations of fair dealing and good faith, which may be independent or even contrary to the law. Acting *ex aequo et bono,* the court is not compelled to depart from applicable law, but it is permitted to do so, and it may even call upon a party to give up legal rights. Yet it does not have a complete freedom of action. It cannot act capriciously and arbitrarily to the extent that it goes outside the applicable law, or acts where no law is applicable, it must proceed upon objective considerations of what is fair and just. Such considerations depend in legal measure, upon the judge's personal appreciation, and yet the court would not be justified in reaching a result which could not be explained on rational grounds. As rightly remarked by Ian Brownlie, "The exercise of the power, which has not yet occurred, may not be easy to reconcile with the judicial character of the tribunal."

Binding force of the decisions of the International Court of Justice*.—According to Article 59 of the Statute of the International Court of Justice, the decisions of the Court shall not have a binding force except upon the parties to a dispute, and only in respect of a particular dispute between them. This Article, therefore, means that the previous judgments of the court are not binding either upon the States or upon the court itself. In other words, they are not precedents yet it would be wrong to conclude that they have no value at all. In fact, the previous decisions influence the future

13. See J. E. S. Fawcett, the Law of Nations (1968)_, p. 118.
14. Article 22 of the Statute of the Court.
15. Article 23 of the Statute of the Court.
16. Article 31 of the Statute of the Court.
17. Appeal Relating to the Jurisdiction of the International Civil Aviation Organisation Council (*India* v. *Pakistan*), I.C.J. Reports (1972), p. 46.
18. For detailed study of each of the four sources *see* chapter on "Sources of International Law."
19. *See* Manley O. Hudson. The Permanent Court of International Justice, 1920-1942 (New York: The Macmillan Company, 1943).

* *See* also for P.C.S. (1988), Q. 3(b).

decisions of the Court.[20] States are under no compulsion to recognize its jurisdiction or confer the same on it, but once their consent to it has been established it is incumbent upon them to comply with its decisions. A judgment of the court is final and without appeal.

Jurisdiction*

It may be noted at the out-set that consent of the States is the basis of jurisdiction of the court. "By 'jurisdiction' we mean the power or authority of the court to render a binding decision on the substance, or merits, of a case placed before it. The International Court receives this power only from the consent of the States concerned that it should so act. Neither the Charter of the United Nations, nor any general rule of contemporary International Law, imposes on States the obligation to refer their legal disputes to the court." [21]

International Court of Justice is a World Court in true sense of the term because it is open for all States of the World. However, there is a great limitation as provided under Article 34 of the Statute that only States may make use of the court or file their cases in it. That is to say, individuals cannot be a party to a dispute and even the States can use the Court in only limited circumstances. It has been aptly pointed out by Dr. Nagendra Singh : "Individuals as such have no access to the Court. Only a sovereign State can make use of the International law and that too in very limited circumstances such as when the dispute arises or parties have already agreed by a treaty prior to the dispute." [22]

It may be noted here that in one respect at least individuals have acquired indirect access to the Court. In 1955 the General Assembly established a Committee on Applications for the Review of U. N. Administrative Tribunal's Judgments for presenting requests to the International Court of Justice for an advisory opinion of the Committee found that there was substantial basis for an objection to the judgment of the Tribunal by a member state. It was also provided that when necessary the Tribunal would be obliged to revise its judgments in conformity with the opinion of the court. "Thus this procedure has two novel features : it allows a *de facto* appeal from the judgments of the Tribunal and it gives individuals indirect access to the International Court of Justice." [23]

Besides the States, the organs of the International Organization and specialised agencies may also request the Court to give its advisory opinion on legal matters within the competence of such Organisation or specialised agencies as the case may be.

Method of conferring jurisdiction upon the Court.—According to Rosenne,[24] jurisdiction can be conferred upon the Court through any of the following four methods : (a) Two or more States may confer jurisdiction upon the Court through special agreements. (b) It may be provided in a multilateral treaty that the matters relating to the interpretation of the treaty shall be entrusted to the court. (c) Jurisdiction in respect of any specific matter may also be conferred upon the Court by a bilateral treaty. (d) Jurisdiction may also be conferred upon the court in an informal way after the proceedings have commenced in the court. For example, when the defendant contests the case on merits but does not accept the jurisdiction of the court, the court gets the jurisdiction since the defendant gets involved in the merits of the court and subsequently this argument cannot be accepted that the court has jurisdiction in the case.

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20. It has been rightly observed : ".....previous decisions of the Court are, as a matter both of legal principle and of actual experience, one of the enduring factors which influence its future decisions. They are evidence of what the Court considers to be are the law; they are reliable indication of the future attitude of the Court; for most practical purposes they show, therefore, what international law is. In fact they are to be a substantial degree incidental with the sources of law enumerated in the first three paragraphs of Article 38. In form they may be merely a subsidiary means for determining what these sources are. The effect is the same." Hersch Lauterpacht. The Development of International Law by the International Court (1958), p. 22.

* *See* also for I.A.S. (1961), Q. No. 7; P.C.S. (1985), Q. 7; P.C.S. (1988), Q. 3(a) ; C.S.E. (1990) Q. 5(a).

21. Shabtai Rosenne, The World Court—What it is and How it Works, p. 73.

22. Nagendra singh, *see* supra note 1, p. 87.

23. Louis B. Son, "Broadening the Advisory Jurisdiction of the International Court of Justice," A.J.I.L., Vol. 77 (1983) p. 124 at p. 126.

24. Rosenne, *see* supra note 21 at pages 76-80.

According to Brownlie,[25] jurisdiction may be conferred upon the court in any of the following ways :

(*a*) *Matters specially provided for in the Charter of the United Nations.*—"Article 36 (1) of the Statute includes within the jurisdiction 'all matters specially provided for in the Charter of the United Nations.' These words were inserted during the drafting of the present Statute in the expectation that the Charter would contain some special provision for compulsory jurisdiction." [26] But as pointed out by Rosenne (and noted earlier) that "Neither the Charter of the United Nations, nor any general rule of contemporary International law, imposes on States the obligation to refer their legal disputes to the court."

(*b*) *Consent ad hoc : Jurisdiction by special agreement and unilateral application.*—"The consent of the parties may be given *ad hoc* to the exercise of jurisdiction over a dispute which already exists.[27]

(*c*) *Consent ad hoc : Treaties and conventions.*—"Article 36 (1) of the Statute refers also to 'all matters specially provided for.....in treaties and conventions in force'.....Although the jurisdiction is by consent of the parties like all types of jurisdiction in the present context, it can be described as compulsory in the sense that agreement in binding form, is given in advance of the appearance of particular disputes. However, the label 'compulsory jurisdiction' is often used to describe simply jurisdiction arising under Article 36 (2) of the Statute." [28]

(*d*) *Transferred jurisdiction.*—This will be discussed in a little detail later on in this Chapter.

(*e*) *Consent ante hoc : declarations under the optional clause.*—This has also been discussed in detail later on in this Chapter under the heading "Optional Clause or Jurisdiction."

(*f*) *Consent post hoc : form proregatum.*—"Lauterpacht writes that exercise of jurisdiction by virtue of the principle of *form proregatum* takes place whenever, after the initiation of proceedings by joint or unilateral application, jurisdiction is exercised with regard either as to the entire dispute or to some aspects of it as the result of an agreement, express or implied..... The principle operates because the statute and rules of the Court as interpreted contain no mandatory rules as to specification of the formal basis on which the applicant founds jurisdiction nor as to the form in which consent is to be expressed." [29]

(*g*) *Jurisdiction to decide ex Aequo et bono.*—This has been discussed earlier under the heading "Law applied by the International Court of Justice."

(*h*) *Advisory opinion of the Court.*—This has also been discussed in detail later on in this chapter.

It need not be over-emphasized here that except the last (*i.e.*, advisory opinion which is not binding) in all other types of jurisdiction of the court consent of States is the basis of the jurisdiction.

Main Heads of Court's Jurisdiction

Broadly speaking, the jurisdiction of the court may be divided into the following two main heads :—

(*A*) *Contentious jurisdiction* ; and

(*B*) *Advisory Jurisdiction.*

(*A*) *Contentious Jurisdiction.*—Contentious Jurisdiction may be further divided into the following two heads :

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25. Ian Brownlie, Principles of Public International Law, Second Edition (Clarendon Press, Oxford, (1973), pp. 696-705.
26. Ibid at p. 696.
27. Ian Brownlie, "Principles of Public International Law, Second Edition (Clarendon Press, Oxford, 1973) at p. 696.
28. Ibid, at pp. 697-698.
29. Ibid, at p. 704.

(a) Voluntary Jurisdiction; and

(b) Optional Jurisdiction.

(*a*) *Voluntary Jurisdiction.*—According to Article 36 (1) of the Statute of the International Court of Justice, the jurisdiction of the court comprises of all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. Thus if the parties to the statute refer a dispute to the courts, the court gets jurisdiction and by virtue of Article 59, decision of the Court shall be binding upon the parties.

(*b*) *Optional Jurisdiction or compulsory Jurisdiction based on optional clause**.—Article 36 (2) of the Statute confers optional jurisdiction upon the Court which provides that the State parties to the Statute may confer compulsory jurisdiction upon the Court by making such declaration in respect of any other State which also accepts similar obligations. This can be done without any special agreement to the same effect. This is called optional jurisdiction of the Court. Under this provision, the State party to the Statute may confer compulsory jurisdiction upon the Court in respect of the following matters : (i) Interpretation of a Treaty; (ii) Any question of International law; (iii) The existence of any fact which if established would constitute a breach of international obligations; and (iv) The nature and the extent of the reparation to be made for the breach of an international obligation. Forty seven states have so far recognized the compulsory jurisdiction of the circuit.

Article 36 (3) further provides that the declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time. Thus the parties making declaration under Article 36 (2) (or option clause) may make certain reservations. But as remarked by Brownlie,[30].....reservations as to reciprocity in acceptances are superfluous, Article 36 (3), rather confusingly, refers to a condition of reciprocity which is optional and not a party of the statute; declarations may contain a suspensive condition referring to acceptance of compulsory jurisdiction by other States. An important point is that reciprocity applies when a case is submitted to the court and not before : Thus in the *Right of Passage* case (Preliminary objections),[31] India was unsuccessful in her contention that reciprocity applied so as to allow the respondent to take advantage of a reservation in the declaration of the applicant, Portugal, of a right to exclude any given category or categories of disputes, no notification to the Secretary-General. Portugal had filed her application only three days after depositing her declaration." The most common reservations which have been made by States parties to the statute while making declarations conferring compulsory jurisdiction upon the court are in respect of matters of domestic jurisdiction, time limits and reservations *ratione temporis* and reservations of past disputes.[32] As regards the reservation in respect of matters of domestic jurisdiction as determined by the State, Brownlie has very aptly remarked : "In principle this form of reservation is incompatible with the statute of the court, since it contradicts the power of the court to determine its own jurisdiction and is not a genuine acceptance of jurisdiction *ante hoc*.[33] This remark has been made with reference to the reservation made by the United States of America.[34] In her declaration dated 14th August, 1946, for acceptance of compulsory jurisdiction of the Court under

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* *See* also for P.C.S. (1968), Q. No. 10 (b) ; I.A.S., (1961), Q. No. 7 ; P.C.S. (1983), Q. 7(a) ; P.C.S. (1987), Q. 7(b) ; C.S.E. (1996) Q. 8(b).

30. Ian Brownlie, supra note 25, at p. 702.
31. I.C.J. Reports (1957), p. 125, at pp. 143-4, 147-8.
32. See Brownlie, supra note 25, at pp. 703-704.
33. Ibid, at p. 703.
34. As regards the reservation made by America with respect to "Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." Another writer has rightly remarked : "The automatic" or "self-determined" reservation introduced through the Connally amendment is said to have "smuggled a veto power into our acceptance of the compulsory jurisdiction of the Court which clearly runs counter to the clear provision contained in Article 36, paragraph 6, of the Statute. It has therefore, been persuasively argued that this reservation may be declared invalid and may, in fact, legally invalidate the United States' declaration itself." R. P. Anand, Studies in International Adjudication (1969) pp. 31-32.

Article 36 (2) of the Statute of the Court, America made the following reservations[35] :

".....Provided, that this declaration shall not apply to—

(a) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(b) disputes with regard to matters which are *essentially within the domestic jurisdiction of the United States as determined by the United States of America*; or

(c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court or (2) the United States of America specially agrees to jurisdiction[36] ; and

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration."

The reservation made by the U. S. that the court will not have jurisdiction over matters *"which are essentially within the domestic jurisdiction of the United States as determined by the United States"* is known as 'Connally Amendment" or "Connally reservation". It operates as a double-edged weapon because, in the first place, it limits the jurisdiction of the court by providing that the court shall have no jurisdiction in respect of matters which are essentially within the jurisdiction of the U. S., secondly it further limits the jurisdiction of the court by adding "as determined by the United States." It is incompatible with the statute of the court for Article 36 (6) clearly provides, "In the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the court."

As regards reservation relating to matters of domestic jurisdiction as determined by the United States, other States such as India, France, Liberia, Mexico, Pakistan, South Africa, U. K. and Sudan emulated America's example in their declaration under the optional clause of the Statute. However subsequently India, France, Pakistan and the U.K., withdrew this reservation.

It will be relevant here to refer India's declaration under the optional clause of the Statute of the International Court of Justice.

*India's Declaration Under the optional clause of the Statute of the World Court**.— India's declaration of the acceptance of compulsory jurisdiction of the court was filed on 15th September, 1974. The declaration[37] signed by the then Minister of External Affairs reads as follows :

"I have the honour to declare, on behalf of the Government of the Republic of India, that they accept in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate such acceptance, as compulsory, *ipso facto* and without special agreement and on the basis of reciprocity, jurisdiction of the International Court of Justice over all disputes other than—

1. disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement;

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35. *See* Year book of the International Court of Justice, (1963-1964), p. 225.

36. In respect of this reservation, Prof. Louis B. Sohn has proposed that the U. S. should confer compulsory jurisdiction on the court in all legal disputes relating to the interpretation or application of the U. N. Charter on the basis of reciprocity. (See A.J.I.L. Vol. 69 (1975), pp. 852-54; Strengthening the International Court of Justice—Hearings before the Senate Committee on Foreign Relation 93rd Congress, 1st Cess., at 188 (1973). For contra see Dan Ciobanu, "Could The Use of the Contentions Procedure of the International Court of Justice have any significant Impact upon the Practice of the United Nations ? A Reply to Professor Louis B. Sohn," A.J.I.L., Vol. 70 (1976), pp. 328-338.

* *See* for I.A.S. (1977), Q. No. 6 ; For answer see also matter discussed above and also that which follows this heading ; *see* also I.A.S. (1975), Q. No. 3(b). For answer of this question *see* also matter relating to domestic jurisdiction discussed in Chapter on "Intervention" : *See* also for I.A.S. (1967), Q. No. 4.

37. Adopted from I.J.I.L., Vol. 14 (1974), pp. 450-51.

2. disputes with the government of any State which is or has been a Member of the Commonwealth of Nations;
3. *disputes in rgard to matters which are essentially within the domestic jurisdiction of the Republic of India* ;
4. disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective action taken in self-defence or resistance to aggression, fulfilment of obligations imposed by international bodies and other similar or related acts, measures or situations in which India is, has been or may in future be involved;
5. disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for and in relation to the purpose of such disputes or which the acceptance of the court's compulsory jurisdiction on behalf of a party to a dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court;
6. disputes where the jurisdiction of the Court is or may be founded on the basis of a treaty concluded under the auspices of the League of Nations, unless the Government of India specially agree to jurisdiction to each case;
7. disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction;
8. disputes with the Government of any State with which, *on the date of an application to bring a dispute before the Court, the Government of India has no diplomatic relations or which has not been recognized by the Government of India;*
9. disputes with non-sovereign States or territories;
10. disputes with India concerning or relation to—
    (a) the status of its territory or the modification of delimitation of its frontiers or any other matter concerning boundaries,
    (b) the territorial sea, the continental shelf and the margins, the exclusive economic zone, and other zones of national maritime jurisdiction including the regulation and control of marine pollution and the conduct of scientific research of foreign vessels,
    (c) the condition and status of its islands, bays and gulfs and that of the bays and gulfs that for historical reasons belong to it,
    (d) the airspace superjacent to its land and maritime territory, and
    (e) the determination and delimitation of its maritime boundaries;
11. disputes prior to the date of this declaration, including any dispute, the foundations, reasons, facts, causes, origins, definitions, allegations, or basis of which existed prior to this date, even if they are submitted brought to the knowledge of the court hereafter;
12. this declaration revokes and replaces the previous declaration made by the Government of India on 14th September, 1959....."

It may be noted here that reservations 1, 2, 3, 5, and 8, of the above Declaration are similar to the reservations 1, 2, 3, 5 and 6 of the Declaration of 14th September, 1959, which has been revoked by this declaration. Five more reservations have been added and one has been modified. Commenting upon India's declaration of 14th September, 1959, it has been aptly observed : "there has been left wide freedom in the hands of Government to refuse to submit to the Court any dispute arising in the future, and her most important existing disputes have specifically been excluded from any such jurisdiction." [38] Further, "From the very beginning of her independence, India, like most other States of the world, has not shown much interest in arbitration and judicial settlement as peaceful means for settling international disputes. In general, she has preferred the less formal procedures of

38. R.P. Anand, *see* supra note 34, at p. 52.

negotiation, conciliation and mediation, which do not involve an element of compulsion, to any third party binding judgment as is involved in arbitration and judicial settlement..... But this, as we have seen, is the position with almost all the States in the present day world"[39] These remarks still hold good, nay, they are more relevant and true of India's Declaration of 15th September, 1974. Reservations 4 and 7 further show India's apathy in respect of acceptance of any obligation arising out of international judicial settlement. It will make the optional clause "an extremely weak instrument for judicial settlement and an institution very different from that envisaged by those who devised it." [40] While the Declaration of 14th September, 1959, was more progressive than the 1956 Declaration because in respect of reservation relating to the matters of domestic jurisdiction the latter Declaration did not use words *"as determined by the Government of India."* the present declaration may be termed as "retrogressive" for it has added several new reservations of sweeping range although in respect of reservation relating to domestic jurisdiction. it follows the 1959 Declaration.

Is the acceptance of jurisdiction under the optional clause really compulsory jurisdiction ?.— Under the optional clause *i.e.* Article 36, paragraph 2, States may accept the compulsory jurisdiction of the Court in following two ways :

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

(b) State Parties may accept compulsory jurisdiction under optional clause as discussed above.[41]

As pointed out by Prof. Kelsen, the jurisdiction conferred upon the Court under Article 36(2) is not, in fact "compulsory jurisdiction, because for the creation of such jurisdiction the prior consent of the party is necessary." Judge Hudson has also expressed the view that the term "compulsory jurisdiction" used in the Statute of the International Court of Justice is "misleading." Prof. Schwarzenberger has also remarked that it is in fact the limited jurisdiction. In the view of Judge Philip C. Jessup, the term "compulsory" is superfluous. As rightly pointed out by Corbett, "An international legal order without compulsory jurisdiction comes very close to being a contradiction in term.[42]

Transferred Jurisdiction.—In addition to the above types of jurisdiction, the court also has yet another type of jurisdiction, known as "transferred jurisdiction." According to Article 36(5) of the Statute of the Court, *"Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present statute, to be acceptance of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.* For example, if A and B States conferred jurisdiction upon the Permanent Court of International Justice of a period of 15 years and the Permanent Court was dissolved after the expiry of five years, the present Court would have the jurisdiction for the remaining period of 10 years.

In *Case Concerning Military and Para Military Activities in and against Nicaragua (Nicaragua* v. *United States of America)*,[43] the International Court of Justice has given in detail the interpretation of Article 36(5). This case concerned the dispute between Nicaragua and the U.S. regarding certain military and para military activities in and against Nicaragua. In the present phase the case concerned the jurisdiction of the court. Nicaragua contended that the Court has jurisdiction in terms of declaration of Nicaragua of 24 September, 1929 under Article 36(5) and the declaration of the U.S. of 14 August, 1946 under Article 36(2) of the Statute of the Court. The U.S.'s said declaration was "to remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate the declaration." On 6 April, 1984, the Government of the

39. R.P. Anand, *see* supra note 34 at p. 52.
40. *Ibid.*
41. Article 36(2) of the Statute of the court.
42. Percy E. Corbett, The Growth of World Law (1971), p. 30.
43. Judgment of the I.C.J. dated 26 November, 1984.

U.S. deposited with the Secretary-General of the U.N. a notification stating "the aforesaid declaration shall not apply to disputes with any Central American state or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree." Further, "Notwithstanding the terms of the aforesaid Declaration, this proviso shall take effect, immediately and shall remain in force for two years....."

It may be noted that Nicaragua, having failed to deposit its instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court, was not a party to that treaty consequently the Declaration made by Nicaragua in 1929 had not acquired binding force prior to such effect as Article 36, paragraph 5, of the Statute of the International Court of Justice. The International Court of Justice pointed out that while the declaration had not acquired binding force, at any time between the making of Nicaragua's declaration and the day on which the new court came into existence, if not later, ratification of the Protocol of Signature would have sufficed to transform the content of 1929 Declaration into a binding commitment. It follows that such a declaration as that made by Nicaragua had a certain potential effect which could be maintained indefinitely. In sum, Nicaragua's 1929 Declaration was valid at the moment when Nicaragua became a party to the Statute of the New Court; it had retained its potential effect because Nicaragua, which could have limited the duration of that effect, had expressly restrained from doing so.[44]

The Court then compared the characteristics of Nicaragua's declaration with the conditions of applicability of Article 36, paragraph 5, as laid down in that provision. In this connection, the Court observed the following—

(1) The first condition concerns the relationship between the declaration and the Statute. Article 36, paragraph 5, refrains from stipulating that declarations must have been made by State Parties to the Statute of the Permanent Court: it is sufficient for them to have been made under (in French, "en application de") Article 36 of the Statute. The chosen wording therefore does not exclude but, on the contrary, covers a declaration made in the circumstances of Nicaragua's declaration.[45] The court made clear that it must interpret Article 36, paragraph 5, on the basis of actual terms used, which do not include the word "binding".[46]

(2) Secondly, Article 36, paragraph 5, in no way excludes, a valid declaration of unexpired duration, made by a State not party to the Protocol of Signature of the Statute of the Permanent Court, and therefore not of binding character.[47] The court quoted its following observation in the case of *Aerial Incident of 27 July, 1955 (Israel* v. *Bulgaria)*[48] :

"the clear intention which inspired Article 36, paragraph 5, was to continue in being something which was in existence, to preserve existing acceptances to avoid that the creation of a new court should frustrate progress already achieved". The world court further observed[49]: The general system of devolution from the old court to the new thus lends support to the interpretation, whereby Article 36, paragraph 5, even covers declarations that had not previously acquired binding force. In this connection it should not be overlooked that Nicaragua was represented at the San Francisco conference, and duly signed and ratified the charter of the U.N. At that time the consent which it had given in 1929 to the jurisdiction of the Permanent Court of International Justice had not become fully effective in the absence of ratification of the Protocol of signature; but taking into account the interpretation given above, the court may apply what it stated in the case of the *Aerial Incident of 27 July, 1955,* "Consent to the transfer to the International Court of Justice of a declaration the

44. Para 27 of the Judgment of the I.C.J.
45. Para 28.
46. Para 30.
47. Para 31.
48. I.C.J. Reports 1959 p. 145.
49. Para 35 of the Judgment dated 26 Nov, 1984.

jurisdiction of the Permanent Court be regarded as effectively given by a state which, having been represented at the San Francisco conference, signed and ratified the charter and thereby accepted the statute in which Article 36, paragraph, appears." [50]

(3) It is difficult for the court not to consider that the U.S. letter of 6 April, 1984 implies that at that date the U.S., like other states, believed that Nicaragua was bound by Court's jurisdiction in accordance with the terms of its 1929 declaration.[51] The most important question relating to the 1984 notification is whether the U.S. was free to disregard the clause of six-month notice which, freely and by its own choice, it had appended to its 1946 Declaration. In this connection, the court held : In sum, the six-month notice clause forms an integral part of the U.S. declaration and it is a condition that must be complied with in case of either termination or modification. Consequently, the 1984 notification, in the present case, cannot override the obligation of the U.S. to submit to the compulsory jurisdiction of the Court *vis-a-vis* Nicaragua a state accepting the same obligation.[52]

Though Judge Nagendra Singh voted in favour of the above majority judgment, he also appended a separate opinion wherein he emphasized "that the jurisdiction of the Court as based on the Treaty of 1956 is clear, convincing and reliable." [53]

Besides this, Article 37 of the present Statute provides that whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present statute, be referred to the International Court of Justice. On the basis of this provision, the International Court of Justice acquired jurisdiction in *Ambatlelos (Preliminary Objections) case,*[54] *South-West African cases (Preliminary Objection) case,*[55] and *Bracelona Traction (Preliminary Objections) case.*[56] It will be relevant to refer here *Aerial Incident (Preliminary Objections) case,*[57] in connection with Article 37. In this case the main issue was whether or not the Declaration of Bulgaria made in 1921 for acceptance of compulsory jurisdiction under Article 36(2) of the statute of the Permanent Court was valid. It may be noted here that Bulgaria did not become the member of the present Statute of the Court in 1945. She became a party to the present statute in 1955. Israel argued that Bulgarian Declaration of 1921 became valid when she joined the United Nations in 1955 and consequently became the party to the present statute. But by a majority decision the Court held that Article 36(5) applies only in respect of those States who became parties to the present statute before the dissolution of the Permanent Court of International Justice. It will not apply to Bulgaria because she became the party to the present statute after a lapse of ten years. The International Court of Justice added that any other interpretation would be contrary to the principle that jurisdiction of the court is based upon the consent of States.[58] But in *Barcelona Traction* case, Spain had not become the party to the present statute before the dissolution of the Permanent Court yet the International Court of Justice, in its decision, considered the date on which a State became the party to the present statute as immaterial. The court distinguished the *Aerial Incident* case on the basis of following grounds : (a) there a different category of instrument was involved in Article 37 ; (b) the phrase 'in force' in Article 37 bore on the instrument containing the jurisdictional clause and not the clause; (c) the *Aerial Incident* case was *sui generis* and could have gone in favour of Bulgaria on

50. I.C.J. Reports 1959, p. 142.
51. Para 41 of the Judgment of the I.C.J., dated 26 November, 1984.
52. Paras 61 and 65.
53. *See* I.J.I.L., Vol. 25 (1985) p. 126.
54. I.C.J. Reports (1952) p. 28.
55. I.C.J. Reports (1962), p. 319 at pp. 334-335.
56. I.C.J. Reports (1959) p. 6.
57. I.C.J. Reports (1959), p. 127.
58. *Ibid.*, at p. 142.

other grounds.[59] Moreover, "as a further reason for not allowing the *Aerial Incident* decision, the Court pointed out that a decision concerning Article 37 must affect a considerable number of treaties and general multilateral Conventions, on the plane of formal logic the distinctions offered are not in all respects impressive, and the Court would seem to have tempered consistency with expediency.[60] Whatever may be controversy in a case or two, it may be concluded that on the basis of Article 36(5) and 37, the International Court of Justice has acquired jurisdiction over the declarations, treaties and conventions over which the predecessor Court exercised jurisdiction.

Interim Measures or Relief.—Article 41 of the Statute of the Court provides that the court shall have power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. Further, pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council. As pointed out by Author,[61] "The principle underlying the concept of interim or provisional measures of protection of the interests of litigant parties pending the final disposal of a suit has emerged from the very nature and function of courts of law as the chief bulworks of justice in all civilized legal order. A court, seized of a case should not precipitate injustice in consequence of the delay in pronouncing the final judgment, thereby leaving the legal interests involved in the case entirely at the mercy of unfavourable intervening circumstances.[62] Hence the device of interim measures of protection, evolved for the purpose of ensuring 'interim justice' pending the final judgment."

As pointed out by the International Court of Justice on September 11, 1976 in the *Aegean Sea Continental Shelf* case *(Greece* v. *Turkey)*,[63] the Court may not indicate interim measures where it finds that the alleged breach if established "is one that might be capable of reparation by appropriate means" and if the court is unable to find in that alleged breach "a risk of irreparable prejudice to right in issue before the court as might require the exercise of its powers under Article 41 of the Statute to indicate interim measures, for their preservation"[64] and "whereas it is not to be presumed that either State will fail to heed its obligations under the Charter of the United Nations or fail to heed the recommendations of the Security Council addressed to them with respect to their present dispute." [65] Further, "whereas, accordingly, it is not necessary for the Court to decide the question whether Article 41 of the Statute confers upon it the power to indicate interim measures of protection for the sole purpose of *preventing the aggravation or extension of a dispute."*[66]

The Court grants interim relief only when there is likelihood of such injury to the rights of the parties as cannot be compensated and the aim of granting such relief is to protect and secure the rights of the parties. The International Court of Justice is one of the Principal organs of the United Nations. Therefore, when two State Parties jointly file a case before the Court or its Chamber for peaceful settlement of disputes under Article 33 of the United Nations and thereafter incidents occur which may either aggravate the dispute or there is apprehension of the dispute becoming serious or grave, the Court may order interim measures or grant interim relief. For example, in *Case Concerning the Frontier Dispute (Burkina Faso* v. *Mali)*[67] the Upper Volta (which is now known as Burkina Faso) and Mali Republic entered into a special agreement on 16th September, 1983, to refer their boundary dispute to International Court of Justice and requested the Court to constitute

59. Ian Brownlie, *see* supra note 25, at p. 700.
60. *Ibid.*
61. V.S. Mani, "Interim Measures of Protection; Article 41 of the I.C.J. Statute and Article 94 of the U.N. Charter", I.J.I.L., Vol. 10 (1970), p. 359.
62. E. Dumbauld, Interim Measures of Protection in International Controversies (The Hague, 1932), p. 7.
63. Reported in I.J.I.L., Vol. 17 (1977) pp. 83-92.
64. Para. 33, Ibid. at pp. 89-90.
65. Para 41, Ibid. at p. 91.
66. Para 42, Ibid.
67. I.C.J. Reports (1986), decided on 10 January, 1986.

the present Chamber. The World Court accepted their request and by its order of 3rd April, 1985 constituted the present chamber. Thereafter, in the end of 1985 some incidents took place on the borders of the both the said states and there was apprehension that the conflict might not aggravate but cease-fire was made due to the mediation of some states. Therefore, Burkina Faso requested the Court to order interim relief subsequently. Mali also made a similar request.

On 10th January, 1986, the Court ordered following interim measures :

(a) Burkina Faso and Mali should not do any thing which may aggravate the dispute referred to Chamber or my adversely affect the decision of the Chamber.

(b) Both the Governments should not do any thing which may obstruct the collection of evidence for the present dispute.

(c) Both the Governments should comply with the agreement to not to fire.

(d) Both the Governments should withdraw within 20 days their armed forces to such a situation as may be determined by the said Governments.

(e) The situation which existed in the administration of the disputed areas before the request for grant of interim measures should not be modified or changed.

(f) The court also directed both the Governments to give information to the Court without delay about the agreement referred in (d) above.

In 1992, Libya filed a case before the world court requesting it to order as interim relief that the sanctions announced by the Security Council of the U.N. be not enforced. The International Court of Justice rejected the request of Libya.

Reference may also be made here to a recent case, namely *Case Concerning the Vienna Convention on Consular Relations (Germany* v. *United States of America).*[68] This case was filed by Germany against America alleging that America while launching prosecution against two German Nationals, Karl and Walter La Grand had violated Vienna Convention on Consular Relations by not informing them of their right to get consular assistance. In its Application Germany Stated that in 1982 the authorities of the State of Arizona detained two German Nationals, Karl and Walter La Grand. These individuals were tried and sentenced to death without having been informed as is required under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, of their rights under that provision; whereas it is specified that the competent authorities of a state party is required to advise "without delay" a national of another state party whom such authorities arrest or detain of the national is right to consular assistance guaranteed by Article 36. It was alleged that the failure to provide the required notification precluded Germany from protecting its national's interests in the United States under Articles 5 and 36 of the Vienna Convention at both the trial and the appeal level in the United States Courts.

It was further stated on behalf of Germany that Karl and Walter La Grand, finally with the assistance of German Consular officers, did claim violations of the Vienna Convention before the Federal Court of First Assistance. But the Court, applying the municipal law doctrine of "procedural default," decided that, because the individuals in question had not asserted their rights under the Vienna Convention in the previous legal proceedings at state level, they could not assert them in the Federal *habeas corpus* proceedings and whereas the immediate federal appellate court, last means of legal recourse in the United States available to them as of right, affirmed the said decision.

Whereas, the Federal Republic of Germany asked the World Court to adjudge and declare :

(1) that the United States, in arresting, detaining, as described in the preceding statement of facts, violated its international legal obligations to Germany, in its own right and its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention;

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68. Decided by the International Court of Justice on 3rd March, 1999.

(2) that Germany is therefore entitled to reparation;

(3) that the United States is under an international legal obligation not to apply the, doctrine of 'procedural default' or any other doctrine of national law, so as to preclude the exercise of the rights under Article 36 of the Vienna Convention; and

(4) that the United States is under an international obligation to carry out in conformity with the foregoing international legal obligations any future detention of or, criminal proceedings against any other German National in its territory whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that pursuant to the foregoing international legal obligations,

(1) the criminal liability imposed on Karl and Walter La Grand in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should provide reparation, in the form of compensation and satisfaction, for the execution of Karl La Grand on 24th February, 1999.

(3) the United States should restore the *status Quo ante* in the case of Walter La Grand, that is, reestablish in the situation that existed before the detention of, proceedings against, and conviction and sentencing of that German national in violation of the United States' international obligation took place; and

(4) the United States should provide Germany a guarantee of the non-repetition of the illegal acts.

Further, Germany pointed out that the date of execution of Walter La Grand in the State of Arizona has been set for 3rd March, 1999. Germany, therefore, requested the Court for urgent indication of provisional measures in the interest of Walter La Grand. Germany emphasized that :

"The importance and sanctity of an individual human life are well established in International Law. As recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law."

Germany requested the International Court of justice to indicate that :

"The United States should take all measures at its disposal to ensure that Walter La Grand is not executed pending the final decision in these proceedings, and it should inform the Court of all the measures which if has taken in implementation of this order."

The International Court of Justice found that the circumstances require it to indicate, as a matter of the greatest urgency and without any other proceeding provisional measures in accordance with Article 41 of its statute and with Article 75, paragraph 1, of its Rules. The World Court unanimously indicate the following provisional measures :

(a) The United States of America should take all measures at its disposal to ensure that Walter La Grand is not executed pending the final decision in these proceedings and should inform the Court of all the measures which it has taken in implementation of this order.

(b) The Government of the United States of America should transmit the order to the Governor of the State of Arizona.

The court also decided that, until the Court has given its final decision, it shall remain seized of the matters which form the subject matter of this order.

But in another recent case, namely, *Case Concerning the Legality of Use of Force (Yugoslavia* v. *United States of America)*[69] the World Court refused the request of Yugoslavia to indicate provision measures. It was alleged by Yugoslavia that alongwith

69. Decided by the International Court of Justice on 2nd June, 1999.

other allied member states of NATO, the United States of America used force against Yugoslavia in violation of international law. Yugoslavia claimed that in accordance with Article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 and Article 38, paragraph 5 of the Rules of the Court, the Court has jurisdiction over this matter on the other hand America claimed that the International Court of Justice has no jurisdiction over this matter because while rectifying the Genocide Convention America had made the reservation that the Court would have jurisdiction only if in the specified case if America consented to its jurisdiction. The Court does not possess jurisdiction because America has not consented to its jurisdiction in this specific case. America also invited the attention of the Court and reminded it that in accordance with the Charter of the U. N. and the Statute of the Court, it has responsibility to maintain international peace and security. The World Court accepted this argument of the United States of America and held that in the absence of the consent of America, it has no jurisdiction. Thus the Court rejected the request for indication of provision measures by its orders dated 2nd June, 1999.

However, the Court observed "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 the merits after having established its jurisdiction and having heard full arguments by both parties."

"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;

"Whereas in this content the parties should take care not to aggravate or extend the dispute"; "whereas, when such a dispute gives rise 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."

Reference may be made here to Article 94, paragraph 2, which provides that if any party to a case fails to perform the obligations incumbent upon it under a *judgment* rendered by the court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. Under Article 94, paragraph 1, members of the United Nations have undertaken to comply with the decision of the International Court of Justice in any case to which it is a party. As remarked by Rosenne, "since Article 94 (2), in distinction with from Article 94 (1), speaks only of *judgments*, it cannot be invoked directly in respect of decisions of the Court which are not judgments, such as, orders indicating interim measures of protection"[70] and "..... non-compliance with an interlocutory decision indicating provisional measures, of protection..... does not expose the recalcitrant State of any procedural disadvantages in so far as the court concerns." [71]

Preliminary objections.—"The procedure on preliminary objections is a peculiarity of international procedural law, not known in most municipal legal systems. It was first established in the court's practice, and later on written provisions of a very general character were enacted in the Rules of the Court. But the procedure continued to develop in the court's practice." [72] A party to a dispute before the court may make preliminary objections. For example, the defendant State may submit that the matter is within its domestic jurisdiction. In the *Interhandel case* (*preliminary objections* case),[73] the

70. Shabtai Rosenne, The Law and Practice of International Court (Leyden, 1965) Vol. I. p. 156.
71. Ibid, at p. 125; Further a decision of the Court not to exericise power under Art. 41 of the statute to indicate interim measures of protection "shall not prevent the party which has made (a request) from making a fresh request in the same case based on new facts",. Aegean Sea Continental Shelf case (*Greece* v. *Turkey*), I.C.J. Rep. (1976) reprinted in I.J.I.L., Vol. 17 (1977). pp. 83-92 at p. 91.
72. V. D. Degan, "Preliminary Objections in the Hague Court's Contentions Procedure : A Re-examination", I.J.I.L., Vol. 10 (1970), p. 425 at p. 456.
73. I.C.J. Reports (1959), p. 6.

International Court of Justice held that an international dispute relating to a treaty or custom cannot be regarded as matter within the domestic jurisdiction of a State. If the preliminary objection is such that requires detailed and full investigation into the case, the Court shall not decide it at that time and shall decide it at the time of final decision of the case.[74] It may also be noted here that while giving the final decision in a case, the court shall not be bound by its decision on preliminary objection in that case.[75]

Court's Power to Allow a State to intervene in case to which it is not a party.—Article 62 of the Statute of the Court of International Justice provides the following :

"1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the court to be permitted to intervene.

2. It shall be for the Court to decide upon this request".

In *Case concerning the continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*),[76] by a letter dated 28th January, 1981, Malta, invoking Article 62 of the statute, submitted to the International Court of Justice a request for permission to intervene in the case which concerned delimitation of the continental shelf between Tunisia and Libya. Malta contended that its legal interests might be affected by the court's appreciation of certain geographical and geomorphological features in the area and by its assessment of their legal relevance and value as factor in the delimitation of areas of the continental shelf which are adjacent to its own continental shelf. Malta, however, added, "it is not Malta's object, by way, or in the course of intervention in the *Libyan/Tunisia* case, to obtain any form of ruling or decision from the court concerning its continental shelf boundaries with either or both of those countries." As the court pointed out, "In effect, therefore, Malta in its request is asking the court to give a decision in the case between Tunisia and Libya which in some measure would prejudice the merits of Malta's own claims against Tunisia and against Libya, in its separate disputes with each of those states." [77] Further, "Yet Malta attaches to its request an express reservation that its intervention is not to have the effect of putting in issue its own claims with regard to those same matters *vis-a-vis* Tunisia and Libya. This being so, the very character of intervention for which Malta seeks permission shows, in the view of the court, that the interest of legal nature invoked by Malta cannot be considered to one 'which may be affected by the decision in the case' within the meaning of Article 62 of the statute." [78] Moreover, "To allow such a form of 'intervention' would, in the particular circumstances of the present case, also leaves the parties quite uncertain as to whether and how far they should consider their own separate legal interests *vis-a-vis* Malta as in effect constituting part of the subject-matter of the present case. A state seeking to intervene under Article 62 of the statute is, in the view of the court, clearly not entitled to place the parties to the case in such a position, and this is more so since it would not be submitting its own claims to decision by the court nor be exposing itself to counter claims. .....It follows that no conclusions of inferences may legitimately be drawn from those findings or that reasoning with respect to rights or claims of other states not parties to the case." [79] For these reasons the court unanimously held that permission to intervene in the proceedings under Article 62 of the statute cannot be granted to Malta.

It may be noted here that an application to intervene under Article 62 is required by Article 81, paragraph 1, of the Rules of court to be filed "as soon as possible, and not later than the closure of the written proceedings" and by Article 81, paragraph 2, to specify the case to which it relates and to set out :

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74. Right of Passage over Indian Territory case (Preliminary objection), I.C.J. Report (1957), p. 125.
75. South West Africa cases, (Second Phase), I.C.J. Reports (1966), p. 6 at pp. 36-37.
76. Judgment of I.C.J. of 14 April, 1981.
77. Para 31 of the Judgment.
78. Para. 33.
79. Paras 34 and 35.

"(a) the interest of legal nature which the state applying to intervene considers may be affected by the decision in that case ;

(b) the precise object of the intervention ;

(c) any basis of jurisdiction which is claimed to exist as between the state applying to intervene and the parties to the case."

Reference may also be made here to *case concerning continental Shelf (Libyan Arab Jahahiriya/Malta)*[80]. In this case, which concerned the delimitation of continental shelf between Libya and Malta, by application dated 23rd October, 1983, Italy, invoking Article 62 of the statute, submitted to the Court a request for permission to intervene. Both Libya and Malta opposed Italy's application on the ground that the absence of what the Court in 1981 called "a valid link of jurisdiction with the parties to the case"[81] constitutes a ground on which the Application of Italy for permission to intervene must be refused or found to be inadmissible.

Before proceeding further in the case International Court of Justice said[82] that it would emphasize, as it did in the Judgment of 14th April, 1981, on the application of Malta to intervene in the *Continental Shelf* case between Tunisia and Libya, that "it does not consider paragraph 2 (of Article 62 of the statute) to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy. On the contrary, in the view of the court the task entrusted to it by that paragraph is to determine the admissibility or otherwise of the request by reference to the relevant provisions of the statute." [83]

Italy contended that, so far as it was acquainted with the claims of Libya and Malta to the areas of continental shelf in the central Mediterranean, it was of the view that those claims extended to areas which would be found to appertain to Italy if a delimitation were to be effected between Italy and Libya and between Italy and Malta, on the basis of international Law. Further, "the Government of Italy, once permitted to intervene, will submit to decision as the court may make with regard to the rights claimed by Italy, in full conformity with the terms of Article 59 of the Statute of the Court." It was suggested that its status would be that of "intervening party" entitled to make submissions.

As pointed out by the court, the Italian Application to intervene tends inevitably to produce a situation in which the court would be seized of a dispute between Italy on the one hand and Libya and Malta on the other, or each of them separately, without the consent of the latter states ; Italy would thus become a party to one or several disputes which are not before the court at present. In this way the character of the case would be transformed.[84] The consequences of the Court's finding that to permit the intervention would involve the introduction of a fresh dispute, can be defined by reference to either of the two approaches to the interpretation of Article 62 of the statute, both of which result in the court being bound to refuse the permission to intervene requested by Italy, and both of which will give to Article 62, its full effectiveness. There are in effect two facets of a single reality, namely the basic principle that the jurisdiction of the court to deal with and judge a dispute depends on the consent of the parties thereto.[85]

The first way of expressing this reality would be to find that, having thus reached the conclusion that Italy is requesting it to decide on the rights which it has claimed and not merely to ensure that these be not affected, the Court must state whether it is competent to give, by way of intervention procedure, the decision requested by Italy. Italy contended, that once it is established that a state seeking to intervene has a legal interest which is *en cause*, "the operation of Article 62 itself suffices to create the basis of jurisdiction of the court to the extent necessary for the admission of an application for permission to

80. Judgment of the I.C.J. of 21st March, 1984.
81. I.C.J. Reports 1981, p. 20, para 36.
82. Para 12 of the Judgment of 21st March, 1984.
83. I.C.J. Reports 1981, p. 12, Para 17.
84. Para 41 of Judgment of I.C.J., dated 21st March, 1984.
85. Para 34.

intervene". To this contention, the court replied : It appears to the court that if it were to apply this argument to an intervention having the object as that of Italy, it would be admitting that the procedure of intervention under Article 62 would constitute an exception to the fundamental principles underlying its jurisdiction : primarily the principle of consent, but also the principle of reciprocity and equality of states. According to the court, an exception of this kind could not be admitted unless it were clearly expressed. Article 62 of the statute contains no such express derogation, and neither its position in the statute, nor the *travaux preparatories* of its adoption, serve to support an interpretation of the Article as intended to effect such derogation.[86] According to the second approach, Article 62 would not derogate from the consensualism which underlies the jurisdiction of the court, since the only cases of intervention afforded by that Article would be those in which the intervener was only seeking the preservation of its rights, without attempting to have them recognized, the latter objective appertaining rather to direct action.[87]

The court also observed that there can be no doubt that the court will, in its future judgment in the case, take account, as a fact, of the existence of other states having claims in this region.[88] On the basis of above reasons, the International Court of Justice held, by a majority of eleven votes to five, that permission to intervene under Article 62 of the statute of the court cannot be granted to Italy.

Judge Ago, who gave a dissenting opinion, observed : The Court had a unique opportunity to grant permission to intervene to country which was seeking to state its case in a proceeding in progress between two other countries and which is, in fact, physically common to all three. Further, the decision on the present case may well sound the knell of the institution of intervention in international legal proceedings, at any rate of this institution as it was intended and defined by the relevant texts. The court seems to prefer a prudent confinement within the sheltered precincts of a purely bilateral, and relativist, notion of its task.

But as aptly pointed out by Judge Nagendra Singh, who voted with the majority but also appended separate opinion that there are certain aspects of the case which need to be emphasized. They are :

(i) If the intention was to apprise the Court of the areas of Italian concern of which the court should be cautioned and warned, so that the Judgment does not trench on the sovereign rights and claims of Italy, such a purpose has been effectively served by the exercise of which the court has undertaken under Article 62 of the Statute by giving a hearing not only to Italy but also to the Parties to the dispute. The court has been made fully aware of Italian interests and where they lie so that there should be no possibility of it even inadvertently encroaching upon or undermining Italian claims and interests in the case.

The second aspect of the Italian pleading noted by the court related to the role of the court which Italy seemed to be asking the Court to undertake in "defining", "safeguarding", "protecting" and "recognizing" the rights of Italy which gives the appearance that the Court is required to undertake an exercise in adjudication. *This would certainly need a jurisdictional link between the intervener and the Parties to the dispute*, and he is in agreement with the Court's finding that this aspect of the object of the Italian intervention could not be met without a proper jurisdictional link between Italy and Malta and Italy and Libya.

(ii) *Secondly*, it is in the interests of justice that the would-be intervener should have access to the pleadings of the parties to a dispute.

(iii) *Lastly*, despite the two negative decisions of the court in 1981 and in this case, the institution of intervention which exists as enshrined in Article 62 of the statute is still very much available to the community, provided it is sought within the limits prescribed by that Article. The Court has now made it

86. Para 35.
87. Para 37.
88. Para 43.

> abundantly clear that if the intervener expects determination of any of its claims, which involves an exercise in adjudication, this would *necessitate a jurisdictional link between the parties to the dispute and the intervener.* However, as far as cautioning the court of the interests of the third party is concerned, this can always be achieved by an application under Article 62 without establishing any jurisdictional link. The said provision of the Statute has therefore a utility of its own, however limited it may be.[89]

In *Land, Island and Maritime Frontier Dispute case (El Salvador* v. *Honduras),*[90] the dispute was relating to the Gulf of Fovesca. This Gulf is an the coasts of these states—North-West coast is the territory of El Salvodor; South-East Coast is the territory of Nicaragua and the territory of Honduras is in between these two coasts. The present case had been brought before the Court by a special Agreement between El Salvador and Honduras. Nicaragua filed an application for permission of the Court to intervene in this case. While Honduras did not object, El Salvador objected to Nicaragua's intervention. The Chamber of the Court unanimously decided that Nicaragua can intervene in respect of the waters of the Gulf.

Clarifying the legal position, the Chamber observed that if a state satisfies the Court that it has an interest of the legal nature in the dispute, the Court may allow it to intervene in respect of its interests in dispute but such a state cannot intervene in other aspects of the case the Chamber also made it clear that the onus to prove the interest is of legal nature which may be affected is on the state which wants to intervene. The interest should be such as may be affected; it is not necessary that it must be affected. The Chamber also clarified that for intervention it is not essential that there must be some relation in respect of the jurisdiction of the Court between the state wishing to intervene and parties to the dispute.

(B) Advisory Jurisdiction.*—Besides contentions jurisdiction, the court also possesses advisory jurisdiction. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on legal question. Other organs of the U. N. and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.[91] It may be noted here that pursuant to the above provision, the General Assembly has authorized the Economic and Social Council, the Trusteeship Council, fourteen specialized Agencies of the U.N., the International Atomic Energy Agency, Interim Committee of the General Assembly and Committee on Application for Review of Administrative Tribunal Judgments to request advisory opinions of the Court. Thus among the principal organs only Secretariat has not been authorised to request advisory opinions of the court. It has therefore been rightly suggested that the Secretary-General should also be authorized to request advisory opinions on legal questions within the scope of his activities.[92] Several other suggestions have been made to widen the scope of advisory jurisdiction of the Court. Among such suggestions the suggestion to develop a procedure to allow national tribunals to refer complex issues of international law for advisory opinion of the court merits serious consideration. Building on the precedent of the establishment of a Committee on Applications for Review of Administrative Tribunal's Judgments in 1955, it has been suggested that the General Assembly should create *an organ of the U.N. specially for the purpose of requesting advisory opinions in defined circumstances.* It has been pointed out that while the International Court of Justice would provide a uniform interpretation of rules

89. *See* I.J.I.L., Vol. 24 (1984) pp. 435-437.
90. I.C.J. Reports (1990).
See also for P.C.S. (1983), Q. 7 (b).
91. Article 96 of the U.N. Charter.
92. *See* Stephen M. Schwebel, "Authorizing the Secretary-General of the U.N. To Request Advisory Opinions of the I.C.J.", A.J.I.L., Vol. 78 (1984) 869 at pp. 876-878.

of international law, it would be for the national tribunals to decide how to apply that rule, if at all, in a particular case before it.[93] This suggestion has been recently served by American Bar Association. As pointed out by Louis B. Sohn, "The novel feature of the procedure proposed by the American Bar Association is that requests from national courts would not go directly to the International Court of Justice but would be filtered through the special committee of the General Assembly. While entitled to submit the questions to the Court, the special Committee would not be obliged to do in every case. It does not seem desirable to give unrestricted access to the court to possibly hundreds or even thousands of national courts, as such access might overwhelm the court with 'trivial, inappropriate, needlessly involved, unripe and politically sensitive cases'..... The various issues raised by the ABA proposal are being explored now in Congress and at the U.N. Although there are obstacles to be overcome before this proposal is realized, the task is not impossible, it may however, take a while." [94] It may be noted that while in case of the Committee on Applications for Review of Administrative Tribunal's Judgments it has been agreed in advance that the U.N. Administrative Tribunal would be obliged to revise its judgments "in conformity with the opinion of the Court", the same might not be possible in case of national tribunal obviously on account of the concept of national sovereignty which the states continue to be jealously guarding.

According to Article 65 of the Statute of the International Court of Justice :

1. The Court may give an advisory opinion on any legal questions at the request of whatever body may be authorised by or in accordance with the charter of the U.N. to make such a request.
2. Questions upon which the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

The Statute of the Court further provides that the court shall deliver its advisory opinions in open Court, notice having ben given to the Secretary-General and to the representatives of Members of the U.N., of other states and of international organizations immediately concerned.[95] Besides this, in the exercise of its advisory functions the Court shall further be guided by the provisions of the present statute which apply in contentious cases to the extent to which it recognizes them to be applicable.[96]

In the *Interpretation of Peace Treaties case (First Phase)*[97], the International Court of Justice observed in its advisory opinion : "The consent of states to a dispute, is the basis of court's jurisdiction in the contentious cases. The situation is different in regard to an advisory proceedings even where the request for an opinion relates to a legal question actually pending between states. The court's reply is only of an advisory character as such, it has no binding force. It follows that no state, whether a Member of the U.N. or not can prevent the giving of an advisory opinion which the United Nations considered to be desirable in order to obtain enlightenment as to the course of action it should take. The court's opinion is given not to the states, but to the organ of the United Nations, represents its participation in the activities of the organization, and in principle should not be refused."

Thus the advisory opinion itself does not constitute *"per se* a "decision" with which anyone is legally bound to comply"[98]. According to Corbett, "Advisory opinions are of course not binding but they do embody the most authoritative possible statements of existing norms ..... To disregard them is not outright defiance of the principal judicial organ of the U.N. ..... it does however, diminish the prestige of tribunal, and that it is a

93. *See* Louis B. Sohn, "Broadening the Advisory Jurisdiction of the International Court of Justice", A.J.I.L., Vol. 77 (1983) 124 at p. 127.
94. *Ibid.*, at pp. 128-129.
95. Article 67 of the Statute of the Court.
96. Article 68.
97. I.C.J. Rep. 1950 p. 65.
98. Shabtai Rosenne, The World Court—What it is and How it Works, p. 89.

disservice to the cause of world law." [99] According to Judge Nagendra Singh of the ICJ, advisory opinions are authoritative statements of the existing law and their disregard will lower the prestige of the court. They are of great value in building public opinion.[100] In his view the statute of the Court should be amended to broaden the advisory jurisdiction for it will contribute immensely to the development of international law.

If the provisions of Article 96 of the U.N. charter are strictly interpreted, the ICJ is not bound to give an advisory opinion. But as noted above since the court itself is an organ of the U.N., the reply of the court *i.e.* advisory opinion "represents its participation in the activities of the organization, and in principle, should not be refused". But the court can be requested to give advisory opinion "on any legal question" only and hence if the question referred to it is not "legal", the court may refuse to give its opinion. The Court may also refuse to give advisory opinion if the provisions of the U.N. charter and the statute of the court referred above are not complied with. In its advisory opinion concerning the *Interpretation of the Agreement of 25th March, 1951 between the WHO and Egypt,*[101] the International Court of Justice observed :

> "..... if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request.[102] ..... Furthermore, ... a reply to questions of this kind posed in the present request may, if incomplete, be not only ineffectual but actually misleading as to the legal rules applicable to the matter under consideration by the requesting organization. For this reason, the court could not adequately discharge the obligation incumbent upon it in the present case if, in replying to the request, it did not take into consideration all the pertinent legal issues involved in the matter in which the questions are addressed."

Court's competence in respect of determination of its own Jurisdiction.—In the event of a dispute as to whether the Court has jurisdiction, matter shall be settled by the decision of the Court.[103] For example, in *case concerning the Aerial Incident of 4th September,* 1954 (US v. USSR),[104] the Court held : "..... it has not before it any acceptance by the Government of Union of Soviet Socialist Republic of the jurisdiction of the court to deal with the dispute which is subject of the application submitted to it by the Government of the United States of America and that, therefore, it can take no further steps upon this application." Similarly, in *Anglo Iranian Oil Company case,*[105] the court held that it had no jurisdiction to decide the case as it was related to territorial sovereignty of Iran. In a more recent case, *Fisheries Jurisdiction (U.K. v. Iceland) case,*[106] the Court, by majority of 14, held that it had jurisdiction to decide the case. This case concerns the declaration of Fisheries jurisdiction by Iceland. Britain filed the case against Iceland but the latter had contended that the court had no jurisdiction to decide the case.

In a recent case, namely, *Fishories Jurisdiction case (Spain v. Canada),*[107] the International Court of Justice pointed out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking

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99. P.E. Corbett, The Growth of World Law, (1971) pp. 104-105.
100. Dr. Nagendra Singh, note 1.
101. I.C.J. Reports 1980 p. 88, para 35. *See* also Advisory Opinion on Application For Review of Judgment No. 273 of the U.N. Administrative Tribunal of 20th July, 1982, paras 46-48.
102. Cf. Admissibility of Hearings of Petitions by the Committees on South West Africa, Advisory opinion, I.C.J. Reports 1956 p. 26 and *see* also p. 37 ; Certain Expenses of the U.N. (Art. 17, para 2 of the Charter), Advisory opinion, I.C.J. Reports, 1962, pp. 156-158.
103. Article 36, paragraph 6.
104. I.C.J., Reports (1958), p. 158.
105. I.C.J. Reports (1952), p. 93.
106. I.C.J. Reports (1973), Interim Measures Order of 12th July, 1973.
107. Decided by the ICJ on 4th December, 1998.

to assert a fact must bear the burden of proving it,[108] and this has no relevance for the establishment of the Court's jurisdiction, which is a question of law to be resolved in the light of the relevant facts"[109]

That being so, there is no burden of proof to be discharged in the matter of jurisdiction. Rather it is for the Court to determine from all the facts and taking into account all the arguments advanced by the parties, "whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an' intention on the part of parties exists to confer jurisdiction upon it."[110]

In the instant case, *i.e. Fisheries Jurisdiction case (Spain* v. *Canada)*, [decided by the World Court on December 4th, 1998], Spain had filed the case on 28 March 1995 instituting proceedings against Canada in respect of a dispute relating to the amendment, on 12th May, 1994, of the Canadian coastal Fisheries Protection Act, as well as to specific actions taken on the basis of the amended Act and its regulations, including the pursuit, boarding and seizure on the high seas, on 9th March, 1995, of a fishing vessel—the *Estai* —flying the spanish flag—Spain invoked as the basis of the jurisdiction of the Court the declarations whereby both states have accepted its compulsory jurisdiction in accordance with Article 36, paragraph 2, of its statute. Canada, on the other hand, took the stand that the Court lacked jurisdiction to entertain the application because the dispute was within the plain terms of the reservation in paragraph 2 (d) of the Canadian declaration of 10th May, 1994. The International Court of justice accepted the stand of Canada and held that "it has no jurisdiction to adjudicate upon the dispute brought before it by application filed by the Kingdom of Spain on 28th March, 1995.

Problem of the enforcement of the Judgments of the International Court of Justice.—As noted earlier under Article 94 of the United Nations Charter, the Security Council is empowered to implement the judgments of the World Court in case one of the parties fails to implement it and other party to the dispute brings the matter to the Security Council. The problem of enforcement of judgment of the International Court which came before the United Nations was not experienced by the League of Nations.[111] That is to say, States refused to accept obligations arising out of the judgment of the Court. This happened particularly in the *Corfu Channel case.*[112] A recent case in which also this problem arose was the *Nuclear Test case.*[113] The framers of the Charter were of the view that this was not the function of the Court and hence they entrusted this work to the Security Council. According to Fawcett, except in the *Corfu Channel case*, the problem of the enforcement never seriously arose and even in that case on the refusal of Albania to pay compensation England had confiscated Albanian money in England.[114] A brief reference may be made here to the case of *Monetary Gold Removed from Rome in* 1943 (*Italy* v. *France, U.K. and U.S.*). In 1943 a certain quantity of monetary gold was removed by the Germans from Rome. Later on it was recovered in Germany and found to belong to Albania. The 1946, agreement on reparation from Germany provided that monetary gold found in Germany should be pooled for distribution among the countries entitled to receive a share of it. The U.K. claimed that the gold should be delivered to it in partial satisfaction of the Court's judgment of 1949 in the *Corfu Channel case*. But Italy claimed that the gold should be delivered to it in partial satisfaction for the damage which it alleged it had suffered as a result of an Albanian law of 13th January, 1945. In the Washington statement of 25th April, 1951, the Governments of France, the U.K. and the U.S. decided that the gold should be delivered to the U.K. unless within a certain time limit, Italy or

108. *See* military and Paramilitary Activities in and against *Nicargua* v. *United States of America (Jurisdiction and Admissibility Judgment*, I.C.J. Reports 1984, p. 437, para 101.

109. Border and Transborder Armed Actions (*Nicaragua* v. *Honduras*) Jurisdiction and Admissibility Judgment, ICJ Reports 1988 p. 76, para 16.

110. *Ibid* at p. 76, para 18; *see* also Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, PCIJ Series A, No. 9, p. 32.

111. Shabtai Rosenne, "The Court and Judicial Process", Int. Organ. Vol. XIX, No. 3 (1965), 518 at p. 530.

112. I.C.J. Reports (1949), p. 4.

113. *See* I.C.J. Reports (1973), p. 106.

114. J.E.S. Fawcett, "The Law of Nations (1968), p. 122.

Albania applied to the Court requesting it to adjudicate on their respective rights. No action was taken by Albania. Italy, however, made an application to the court. But later on, Italy raised the preliminary question as to whether the court had jurisdiction to adjudicate upon the validity of the Italian claim against Albania. In its judgment of 15th June, 1954, the court held that without the consent of Albania, it could not deal with a dispute between that country and Italy and that it was, therefore, unable to decide the questions submitted. Thus we see that there was partial enforcement of the judgment of *Corfu Channel case*[115] against Albania. In the words of an Author, "there are not more than a few cases out of many hundreds which have involved the refusal by the losing party to give effect to an award rendered." [116] According to Michael Akehurst,[117] "Most judgments by International Courts and arbitral tribunals have been obeyed by the States concerned; a few cases of disobedience have received a lot of publicity, but the cases in which judgments have been obeyed, although receiving less publicity, are far more numerous. Sometimes States reject a judgment at first, but obey it later." "The basis of International Adjudication is thus, the consent of States parties to a dispute. This consent gives rise to certain obligations of a legal character which constitute the basis of the obligation to comply with the resultant judgments of international tribunal. Thus refusal to comply with the judgments of an international tribunal is *ipso facto* a breach of an international legal obligation." [118] It may also be noted that the problem of Sovereignty of States does not come in the way of the enforcement of judgments of the Court.[119] Recently, the problem of the enforcement of judgments of the court has once again assumed serious magnitude in the case *Concerning Military and Para-military Activities in and against Nicaragua (Nicaragua* v. *U.S.*). The U.S. has refused to compel with the decision of the court.

Contribution of International Court of Justice in the codification and progressive development of International Law[120]—It is one of the functions of the United Nations to make the progressive development of International Law and its codification. The International Court of Justice as the principal Judicial Organ of the United Nations has done commendable work in this connection. The World Court has contributed much in the progressive development of International Law.[112] The International Court of Justice has been able to make the progressive development of International Law in the following 3 ways :

(i) When there is no international treaty or convention on a particular point in dispute, the Court, as provided under Article 38 of the Statute of the International Court of Justice, can apply the general principles of law recognised by the civilised States and thereby contribute to the progressive development of International Law.

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115. I.C.J. Reports (1949), p. 4.
116. Oscar Schachter, "The Enforcement of International Judicial and Arbitral Decisions," A.J.I.L., Vol. 54 (1960), p. 2 : *see* also C.W. Jenks' The Prospects of International Adjudication (New York, 1964), p. 664; Philip C. Jessup, "The International Court of Justice and Legal Matters," Illinois Law Review, Vol. 42 (1947), pp. 273-274.
117. Nicaragua v. United States of America", I.J.I.L., Vol. 27, No. 4 (Oct.-Dec. 1987), p. 357, p. 383.
118. E.K. Nantwi, The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law (1967), p. 188.
119. *Ibid.*, As remarked by Lauterpacht, "The true relation between the exercise of jurisdiction by the Court and the Sovereignty of States is expressed by the fact that as a result of such jurisdiction the rights of are determined not by a unilateral assertion of their adversaries but by arbitrament of the law. However, in so far as the Sovereignty is, inaccurately, identified with the traditional legal right of States to be judged in their cause : submission to the jurisdiction of the Court does imply a surrender of Sovereignty". Hersch Lauterpacht, The Development of International Law by the International Court (1958), p. 394.
120. "Even within the limited sphere of its activity, hedged in by the sacrosanct limits of consent and curbed by the absence of any execution machinery, the International Court has none a remarkable job in building up a body a case law which is evidence of existing International Law of the highest value. Its role in the development of International Law, though limited, has been important ..... It is of course not denied that Courts are not always the most suitable agencies for developing the law in the present dynamically changing times, and we must establish some other agencies for this purpose. Any such times, and we must establish some other agencies for this purpose. Any such agencies, however, even if established, will not exhaust the usefulness of the Courts." R.P. Anand, Studies in International Adjudication (1969), pp. 189-190.

(ii) It clarifies the vague rules of International Law. "The International Court of Justice has directly contributed towards ensuring respect for International Law ; it has gone a long way to remove lacunae and to clear up obscurities and doubts, and to say the least the merit of many of its decisions has been to fully emphasise the role of law in present day international relations." [121] In the *Reparation for injuries case,*[122] the court said : "it is here faced with a new situation. The questions which it gives rise to can only be solved by realizing that the situation is dominated by the provisions of the Charter considered in the right of the principles of International Law." In another case the court observed : "In seeking to determine the law applicable to this case, the court has to bear in mind the continuous evolution of international law." [123] In *Fisheries Jurisdiction case,*[124] it observed, "The possibility of the law changing is ever present." In *Western Shahara case*[125] the World Court observed more emphatically : "The reference in those questions to a historical period cannot be understood to fetter or hamper the Court in the discharge of its judicial function. That would not be consistent with the Court's judicial character : for in the exercise of its functions it is necessarily called upon to take into account existing rules of international law." Similarly in its judgment of 3 June 1985 *in case concerning* the continental shelf (Libyan Arab Jamahiriya/Malta) the court observed "..... that convention (*i.e.* 1982 Convention on the Law of the Sea) has not yet come into force, and therefore not operative as treaty law ..... 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 as a rule of customary* international law." [126] In an earlier case, the court held "that the exclusive economic Zone may be regarded as part of modern international law."[127] This was quoted with approval in the above case.[128]

(iii) Although Article 59 of the Statute of the International Court of Justice undermines or even prohibits doctrine of precedent by providing that the decisions of the Court shall not be binding except upon the parties to a dispute and only in that dispute, yet the Court does not ordinarily deviate from its past decisions.

In order to understand properly the progressive development of International Law by International Court of Justice it will be necessary to discuss briefly some of the cases decided by the Court. A brief discussion of those cases is given below :

Cases decided under contentious jurisdiction

Following are the main cases decided by the Court under its contentious jurisdiction :—

(i) *Anglo-Norwegian Fisheries case.*[129]—In this case the Court held : "A Norwegian decree of 1935 delimiting an exclusive Norwegian fishing zone by reference to a straight base line drawn through 48 selected points on the main line or Island or rock at a considerable distance from the coast, from which base line, of the breadth of the territorial sea was to be measured was not contrary to International Law." Thus the Court clarified

121. Judge Nagendra Singh, "Codification and Progressive Development of International Law. The Role of the International Court of Justice," I.J.I.L., Vol. 18 (1978) p. 1 at p. 8.
122. I.C.J. Reports (1949), p. 182.
123. Barcelona Traction case, I.C.J. Rep. (1970), p. 33.
124. I.C.J. Reports (1974), p. 19.
125. I.C.J. Reports (1975), p. 30.
126. Paras 26 and 27 of the Majority Judgment.
127. I.C.J. Reports 1982, p. 48, para 47 and p. 74, para 100.
128. Note 17, para 31.
129. I.C.J. Rep. (1951), p. 116. For more details *see* also Appendix II.

the law relating to the determination of fisheries zone by the States. In this case the Court also made it clear that it is not bound by the past decisions and precedents and is free to make the progressive development of International Law.

(ii) *The Corfu Channel Case.*[130]—In this case the court clarified law relating to self-defence, intervention and innocent passage.

N.B.—For details of the case see chapter on "Intervention".

(iii) *The Asylum (Colombia* v. *Peru) case.*[131]—In this case the court clarified the law relating to asylum.

(iv) *Minquiers and Ecrehos (France* v. *U.K.)*[132].—In this case, the court emphasized that for acquisition of territory through occupations 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.*

(v) *Nottebohm (Liechtentein* v. *Guatemala).*—In this case the court propounded the principle of effective nationality.

N.B.—For the facts and principles laid down in this case see chapter on "Nationality".

(vi) *North Sea Continental Shelf Case.*[133]—In this case, the court interpreted Article 6 of the Geneva Convention on continental shelf and held that the principle of equidistance was not obligatory in all cases of delimitation of continental shelf. The court also clarified the general concept of continental shelf which made a great impact on state practice and development of international law in this respect.

(vii) *Nuclear Tests case (June 22, 1973).*[134]—In this case court clarified law relating to state responsibility in respect of conduct of nuclear tests. (For details of the case see chapter on "Laws of Aerial Warfare".)

(viii) *Fisheries Jurisdiction (Merit) case (U.K. and Northern Ireland* v. *Iceland.*[135]—In this case the Court clarified the law relating to validity of the establishment of the fisheries jurisdiction by Iceland, and the concept of preferential rights. The Court held : "The concept of preferential rights is not compatible with the exclusion of all fishing activities of other States. A coastal State entitled to preferential rights is not free, unilaterally and according to its own uncontrolled discretion, to determine the extent of those rights. The characterization of coastal State's rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of other States and particularly a State, which like the applicant, has for many years been engaged in fishing in the waters in question, such fishing activity been important to the economy of the country concerned. The coastal State has to take into account and pay regard to the position of such other States, particularly when they have established an economic dependence on the same fishing grounds. Accordingly, the fact that Iceland is entitled to claim preferential rights does not suffice to justify its claim unilaterally to exclude the applicant's fishing vessels from all fishing activity in the waters beyond the limits agreed to in the 1961 exchange of Notes." [136]

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

131. I.C.J. Reports 1950, p. 266 ; for facts of the case *see* Chapter on "Asylum".

132. I.C.J. Reports 1953, p. 47.

133. I.C.J. Reports (1955) p. 4.

134. I.C.J. Reports (1969), p. 3.

135. In this case the Court had indicated interim measures. Subsequently on the assurance of France not to conduct atmospheric tests, the case was removed from the list of the Court. [See Nuclear Text case (*Australia* v. *France*) Judgment of December 20, 1974, I.C.J. Rep. (1974), p. 233 ; Nuclear Test case (Newzealand v. France). Judgment of December 20, 1974, I.C.J. Rep. (1974), p. 457].

136. I.C.J. Reports (1974), p. 3, para 62 of the Judgment ; The International Court further observed : "that Iceland's extension of its exclusive fishery jurisdiction beyond 12 miles is not opposable to the United Kingdom, that Iceland may on the other hand claim preferential right in the distribution of fishery resources in the adjacent waters; that the United Kingdom also has established rights with respect for the fishery resources in question ; and that the principle of reasonable regard for the interests of other States enshrined in Article 2 of the Geneva Convention on the High Seas 1958 requires Iceland and the United Kingdom to have due regard to each other interests, and to the interests of other States, in those resources" *Ibid.*, para 68.

(ix) *Aegean Sea Continental Shelf Case (Greece* v. *Turkey)*[137] *decided on September 11, 1976.*—In this case the Court clarified law relating to grant of interim measures of protection. This has been referred earlier under the heading *"Interim Measures or Relief."*

(x) *Case concerning United States Diplomatic and Consular Staff in Tehran.*—In this case, the court interpreted and applied Vienna Convention on Diplomatic Relations, 1961 and Vienna Convention on Consular Relations, 1963. This case related to the taking of employees of American Embassy and Consular in Tehran by Iran. The court held Iran guilty of violation of the above-mentioned conventions and directed Iran to pay compensation to America. The world court reaffirmed the cardinal importance of international law relating to privileges and immunities of diplomatic envoys.

(xi) *Case Concerning the Continental shelf (Tunisial-Libyan Arab Jamahriya) Judgment dated 24th February, 1982*[138]—This case dealt with the delimitation of continental shelf between adjacent states. The court clarified the law in this connection, principles to be applied, relevant circumstances to be taken into account and the practical method for the application of the principles.[139]

(xii) *Case Concerning Military and Para--military Activities in and against Nicaragua (Nicaragua* v. *U.S.)*[140]—In this case the court on 10th May, 1984 indicated provisional measures asking the U.S. to 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 court also dwelt upon the principles of non-use of force and non-intervention.[141]

(xiii) *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya-Malta), Judgment dated 21st, March, 1984.*—In this case the court clarified the law relating to application to intervene under Article 62 of the Statute of the court. This case has been discussed in a little detail earlier in this chapter.

(xiv) *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada* v. *U.S.) Judgment of 12th October, 1984.*—In this case the court clarified the law relating to delimitation of continental shelf between two states. This case has also been discussed in detail in chapter on "The Law of the Sea".

(xv) *Case Concerning Military and Para-military Activities in and Against Nicaragua (Nicaragua* v. *United States of America) Judgment of 26th November, 1984.*—In this case the court interpreted Article 36, paragraphs 2 and 5 and clarified law relating to admissibility of application. This case has been discussed earlier in this chapter under the heading "Transferred Jurisdiction."

(xvi) *Case Concerning the Continental Shelf (Libva* v. *Malta) Judgment of 5th June, 1985.*—This case deals with the delimitation of continental shelf between opposite coasts and has been discussed in a little detail in chapter on "The Law of the Sea."

(xvii) *Case concerning Military and Para-Military Activities in and Against Nicaragua (Nicaragua* v. *United States of America) [ICJ Reports 1986 p. 14].*—In this case the Court clarified rules relating to intervention and collective self-defence. This case has been discussed in Chapter on "Intervention".

(xviii) *Case concerning Electronica Sicula S.P.A. (Elsi) [United States of America* v. *Italy], Judgment of 20th July, 1989.*—In this case the World Court expounded the principles relating to the applicability of the Rule of Exhaustion of Local Remedies. This case has been discussed in detail in Chapter on "Treatment of Aliens."

It may be noted that the *Case Concerning Military Activities in and Against Nicaragua* is the fifty-second contentious case brought before the court.

N.B.—For facts and details *see* also Appendix IV.

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137. I.C.J. Reports (1980) p. 3. For the facts and decision please *see* also chapter on "Diplomatic Agents."
138. I.C.J. Reports (1982) p. 21.
139. For details of the case *see* Chapter on "The Law of the Sea".
140. I.C.J. Rep. (1984) p. 169.
141. For details, *see* Appendix II.

(xix) *Land, Island and Maritime Disputes case (El Salvador* v. *Honduras)*[142].—This case deals with the right of a third state which is not a party to the dispute to intervene in dispute in which its interests may be affected. This has been discussed earlier in this chapter.

(xx) *Fisheries Jurisdiction case (Spain* v. *Canada)*[143].—This case deals with "Interim Measures or Interim Relief" and has been discussed in this chapter.

(xxi) *Case Concerning the Vienna Convention on Consular Relations (Gurmany* v. *United States of America)*[144].—This case deals with the competence of the Court to determine whether it has jurisdiction in the case or not.

(xxii) *Case Concerning the Legality of Use of Force (Yugoslavia* v. *U. S.)*[145].—This case also deals with the competence of Court to determine whether it has jurisdiction or not.

Advisory opinions of the Court

The advisory opinions of the International Court of Justice have greatly encouraged the progressive development of International Law and have helped the functions and development of the International Organisation.[146] Between 1946 and 1984, the court dealt with 17 requests for advisory opinions, delivering 18 opinions and making 24 orders in the cases concerned. Following advisory opinions of the court deserve special mention in this connection :

(1) *Conditions of admission of a State to the United Nations (1948).*[147]—In its advisory opinions *on the Conditions of Admission of a State to the United Nations,* the World Court ruled that a member State of the United Nations while casting its vote either in the General Assembly or in Security Council, cannot make its consent or vote depending upon the conditions which are not mentioned in the Charter. Thus in view of the Court, in regard to the admission of the State, essential conditions mentioned in the Charter are exhaustive and no other conditions can, therefore, be validily imposed.

(2) *Competence of General Assembly regarding Admission of a State to United Nations (1950)*[148].—After the repeated failure of the Security Council to make its affirmative recommendation in respect of the applications of certain States for the membership of the United Nations, some States expressed the opinion that in such a situation the General Assembly can by its decision admit a State to the United Nations. But in its advisory opinion given in 1950, the World Court ruled that for a State to be admitted to the United Nations both the affirmative recommendations of the Security Council as well as the decision of the General Assembly are necessary. The Court also made it clear that it is competent to interpret the provisions of the Charter.

(3) *Reparation of the injuries suffered in the service of the United Nations (1949).*[149]—In this advisory opinion the International Court of Justice ruled that the United Nations is a legal person and has capacity to claim compensation for injuries suffered by the persons who are in the service of the United Nations.[150]

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142. I.C.J. Reports (1990).

143. Decided on 4th December, 1998.

144. Decided on 3rd March, 1999.

145. Decided on 2nd June, 1999.

146. "By several of its Advisory opinions the Court has made an important contribution to the development of the legal status of international organizations and international civil servants." Nagendra Singh, note 12, at 14.

147. I.C.J. Rep. (1948), p. 4.

148. I.C.J. Rep. (1950), p. 4.

149. I.C.J. Rep. (1949), p. 174.

150. The Court also observed, "Under International Law the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as essential to the performance, of its duties.", *Ibid.,* at p. 182.

(4) *International Status of South West Africa (1950).*[151]—In this case the Court helped the development of International law relating to succession of International Organisation. The Court ruled that the succession of International Organisation takes place if the objects and nature of the predecessor and successor International Organisations are same. In this case the Court ruled that the trusteeship system of the United Nations succeeded to the rights and duties of the mandatory system of the League of Nations.

(5) *Reservations to the convention on the Prevention and Punishment of the Crime of Genocide.*—In this opinion the court propounded compatibility test relating to reservations to a multilateral treaties which was later on adopted in the Vienna Convention on the Law of Treaties, 1969.

N.B.—For this please see chapter on 'Treaties'.

(6) *Effects of Awards of Compensation made by the U.N. Administrative Tribunal.*[152]—In this case, the court held that though established by the General Assembly, the U.N. Administrative Tribunal was an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions and not merely an advisory or subordinate organ. Its judgments were therefore binding on the U.N. Organization and thus also on the General Assembly. Later in *Application for Review of Judgment No. 158 of U.N. Administrative Tribunal*[153] *and Application for Review of Judgment No. 273 of the U.N. Administrative Tribunal*[154] also, the court upheld the decision of the Tribunal.

(7) *Certain expenses of the United Nations (1962)*[155].—In this case the Court had to decide whether the expenses incurred by the United Nations Suez Crisis 1956 and Congo operations (1960-61) apportioned by the General Assembly among the members were to be regarded the expenses of the Organisation, in accordance with the provisions of Article 17(2). The Court answered in affirmative. The Court also made it clear that the United Nations is capable of doing anything which is not prohibited under the Charter and if done to achieve the purpose contained in Article I of the Charter. Thus the Court indirectly sustained the validity of Uniting for Peace Resolution, 1950.

(8) *Advisory opinion concerning the legal consequences of the continued presence of South Africa in Namibia (i.e. South West Africa), notwithstanding Security Council Resolution* 276 (1970).[156] In this case, the World Court held the following :

(a) That the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the territory.

(b) That State Members of the United Nations are under obligation to recognise the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia and refrain from any acts and in particular any dealings with the government of South Africa implying recognition of the legality of lending support or assistance, to, such presence and administration.

(c) That it is incumbent upon States which are the Members of the United Nations to give assistance in the action which has been taken by the United Nations with regard to Namibia.[157]

(9) *Advisory opinion of the International Court of Justice in the Western Sahara Case.*[158]—In this case the Court dealt with, *inter alia,* the question of decolonization and

151. I.C.J. Rep. (1950), p. 128.
152. I.C.J. Rep. (1954), p. 47.
153. Advisory opinion of 12th July, 1973.
154. Advisory opinion of 20th July, 1982.
155. I.C.J. Rep. (1962), p. 151.
156. I.C.J. Rep. (1971), p. 16.
157. Ibid, at pp. 315-16.
158. I.C.J. Rep. (1975) reprinted in I.J.I.L., Vol. 15 (1975), pp. 390-441.

the principle of self-determination. During, the course of judgment, the Court made it clear that in consequence of General Assembly Resolution 1514 (xv) of 14th December, 1960 and other resolutions, the principle of self-determination has become a binding principle in the context of colonialism. The court concluded : "..... the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the court has not found legal ties of such a nature as might affect the application of Resolution 1514 (xv) in the decolonization of Western Sahara and, in particular of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory (of paragraphs 54-59 above.)[159] The court also clarified its own competence to give advisory opinion.[160] The court observed : "its competence to give an opinion did not depend on the consent of the interested States, even when the case concerned a legal question actually pending between them. However, the Court proceeded not merely to stress its judicial character and the permissive nature of Article 65, paragraph 1 of the statute, but to examine, specifically in relation to the opposition of some of the interested States, the question of the judicial propriety of giving the opinion. *In short, the consent of an interested State continues to be relevant, not for the court's competence, but for the appreciation of the propriety of giving an opinion.*[161] *Further, "In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the court's judicial character.* An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent." [162] But according to the court, in the present case the object of the request was "to obtain from the Court an opinion which the General Assembly deems of assistance to for the proper exercise of its functions concerning the decolonization of the territory." [163] Further the court observed : [164] "What the Court said in a similar context, in its advisory opinion on *Reservation to the Convention on the Prevention and Punishment of the crime of Genocide,* applies also to the present case : 'The object of this request for an opinion is to guide the United Nations in respect of its own action." [165]

(10) *Interpretation of the Agreement of 25th March, 1951 between the WHO and Egypt.* Judgment of 20th December, 1980.

In this case the court clarified the legal position relating to determination by the court of the meaning and implications of question submitted for advisory opinion and the need to ascertain and formulate legal questions really in issue.

(11) *Application for Review of judgment No. 273 of the U.N. Administrative Tribunal* [Advisory opinion of 20th July, 1982]:—

In this case the Court dwelt upon the competence and propriety of Court's giving advisory opinion, nature and scope of opinion, requested and the need for Court to ascertain and state legal questions really in issue.

(12) *Advisory opinion on Applicability of the obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 23rd June, 1947 (Advisory Opinion of 26th April, 1988):—*

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159. I.C.J. Rep. (1975) reprinted in I.J.I.L., Vol. 15 (1975), para 162 at p. 441.

160. *See Ibid.*, paras 18, 23, 28, 32, 33 and 39 ; see also Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950, p. 72 ; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports, 1971, p. 27 ; Application for Review of Judgments No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports (1973), p. 172.

161. *See Ibid.*, para 32, emphasis added.

162. *See Ibid.*, para 33, emphasis added.

163. *See Ibid.*, para 39.

164. *See Ibid.*, para 41.

165. *See* I.C.J. Reports 1951, p. 19.

In this advisory opinion the World Court interpreted Section 21 of the Headquarters Agreement in the context of U.S. decision to close down PLO Observer Mission at Newyork and unanimously held that the U.S. is under an obligation, in accordance with Section 21 of the Headquarters Agreement of 26th June, 1947, to enter into arbitration for the settlement of the dispute between itself and the U.N. This case has also been discussed in Chapter on "Definition, Nature, Functions and Evolution of International Organisation."

(13) Legality of the use by a state of Nuclear Weapons in Armed conflict (Decision dated 8th July, 1996) [Request for advisory opinion by WHO]

By a letter dated 27th August, 1993, filed in the Registry of the International Court of Justice on 3 September 1993, the World Health Organisation requested the World Court to give an advisory opinion on the following question :

"In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under International law including the WHO's Constitution ?

Certain nuclear powers, especially United States of America and U. K. contended that the above question is essentially political and is also beyond the scope of the WHO's proper activities, the World Court should, therefore, decline to give an advisory opinion. The International Court of Justice accepted this argument partly and held that the request by the WHO does not relate to a question which arises 'within the scope of activities' of that orgnaisation in accordance with Article 96, paragraph 2 of the U.N. Charter and thus an essential condition of founding the Court's jurisdiction in the present case is absent and that it cannot, accordingly, give the opinion requested. Thus the International Court of Justice declined to give the advisory opinion which was requested of it by the World Health Organisation.

The World Court's reason for declining to give its advisory opinion does not seem to be convincing and sound. The effect of use of nuclear weapons falls on environment and effect on environment falls on health. Radio-activity emanating from use of nuclear weapons affects environment and jeopardises health of people. WHO is directly concerned with these. It is true that disarmament is a topic with which the General Assembly and the Security-Council are more concerned but WHO is also concerned with the effects of the use of nuclear weapon. It is, therefore, not just and proper to say that the question referred by WHO is not within the scope of proper activities of WHO.

However, it may be noted that on the same date the International Court of Justice gave its advisory opinion on a similar question referred by the General-Assembly of the U.N.

(14) Advisory opinion on Legality of the Threat or use of Nuclear Weapons—Request for advisory opinion by the General Assembly of the U.N. (Opinion dated 8th July, 1996)

The General Assembly *vide* Resolution 49/75 dated 15th December, 1994 requested the International Court of Justice to give its advisory opinion on the following question :

"Is the threat or use of nuclear weapons in any circumstance permitted under International law ?" The General Assembly made this request pursuant to Article 96, paragraph 1 of the Charter of the United Nations.

The International Court of Justice unanimously held that there is no specific authorisation for the threat or use of nuclear weapons under customary or conventional law. Secondly, a threat or use of force by means of nuclear weapons is unlawful as it is contrary to Art. 2(4) of the U.N. Charter and not vindicated by the requirement of Article 51 of U.N. Charter. Thirdly, a threat or use of nuclear weapons ought to be compatible with the requirement of the International law applicable in armed conflict, especially international humanitarian law including specific obligations under treaties expressly dealing with nuclear weapons. Lastly, there is an obligations of the members of the United Nations to

pursue in good faith and conclude negotiations leading to nuclear disarmament under effective International Control.

However, as regards the specific question, "Is the threat or use of nuclear weapons in any circumstance permitted under International law?" the World Court observed :

"Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainity that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

Furthermore, the Court cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self defence, in accordance with Article 51 of the Charter, when its survival is at stake."

After holding that in view of the unique characteristics of nuclear weapons the use of such weapons in fact seems scarcely reconcilable with the rules of law applicable in armed conflict, the above observation does not seem to be just and proper. As pointed out by Judge Shahabuddeen in his separate opinion : If International law has nothing to say on the subject of the use of nuclear weapons this necessarily means that international law does not include a rule authorising such use. Due to absence of such authorisation, states do not have a right to use nuclear weapons. As regards right of every state to use nuclear weapons under Article 51 of the Charter, when its survival is at stake, it has to be noted that imperative needs of survival of a state cannot prevail over even more imperative needs of survival and preservation of the entire human race.

50th Anniversary of the International Court of Justice.—On 18 April 1996, the International Court of Justice celebrate 50 years of is establishment. While the 50th Anniversary of the United Nations was celebrated with jubilation all over the world, the 50th Anniversary of the World Court failed to attract much attention. This is despite the fact that the World Court has rendered signal service in developing, interpreting and applying the rules of international law. All these years during 50 years of existence, the International Court of Justice has delivered more than sixty judgments and twenty-one advisory opinions. It is indeed a significant achievement. The decisions of the World Court have helped in clarifying, interpreting, applying and developing the rules of International Law.

Evaluation :— It is clear from the above decisions and advisory opinions that the International Court of Justice has contributed much to the progressive development of International Law. But as pointed out earlier, the Court has weaknesses and limitations. "Inspite of its competency, the Court functions today in a world society which is not yet ready to entrust it with disputes of major proportions or even to accord it the role envisaged by the Charter".[166] Unquestionably, then application of the judicial process in the international sphere is highly politicised ..... To blame the I.C.J. for not resolving

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166. Stephen Goodspeed. The Nature and Functions of International Organisation p. 359; In his article "Step-by step Acceptance of the Jurisdiction of the International Court of Justice, Proc. A.S.I.L., (1964), p. 131 Prof., Louis B. Sohn has also written : "It is a tragic fact of international life that the International Court of Justice" is sidestepped in most international disputes and is consequently under-employed." He has suggested that "Instead of adopting an all or nothing attitude, we might explore a step-by-step approach which would gradually increase the Court's permanent jurisdiction Four lines of approach might be explored in this connection :

    1. Acceptance of the jurisdiction of the International Court of Justice over disputes relating to the interpretation and application of treaties.
    2. Acceptance of the jurisdiction of the International Court of Justice over specified areas of International Law.
    3. Acceptance of the jurisdiction of the Court through regional arrangements.
    4. Granting to the United Nations the power to make a binding request that parties to a dispute refer the matter to the International Court of Justice. He further added, "In conclusion, it might be useful to emphasize that the proposals made here are purely illustrative and that many other ways of fractioning the obligation to go the Court can probably be devised.

the basic international conflicts of the day is to level unfair charges and to reveal ignorance of its operations.[167] Further, "if the Court has not been too successful in solving disputes because of the policies and views of its clients actual and potential, *it has contributed to the development of legal principles.* This law-making function on a case method approach is all the more important in a community of Sovereign States in which a legislative organ does not exist. In this regard the Court has not been remiss since it handed down the first judgment in the *Corfu Channel case,* and similar observation may be drawn about its advisory opinions. Again while few in number the Court has employed the opportunities presented by the opinions to *participate actively and rather substantially in the development and clarification of international law in general and international constitutional and administrative law in particular. It has exercised its role as the principal judicial organ of the United Nations with dedication and diligence and in this sense has become both a United Nations Court and an International Judiciary.* Further, "In terms of the judicial process the distrust of third party settlement and the manner in which States view their national interest together with the rather poor over all record of the United Nations on settling disputes have been of considerable significance in failing to employ the International Court".[168]

Some writers have expressed the view that the present Statute of the Court, is defective and should, therefore, be amended to increase the jurisdiction and functions of the Court." [169] For example, Prof. Leo Gross has remarked, 'Unless we begin to think in terms of some rather drastic reform, the outlook for the court is very dim." [170] For the amendment of the statute he has made the following suggestions :

(1) The relevant articles of the Statute should be amended to make it possible for States to include in a treaty a new form of jurisdictional clause whereby the States would agree that any of the contracting parties could ask the court for an advisory opinion on any question relating to the application on interpretation of that treaty. States should agree in advance to accept the advisory opinion of the Court as binding.

(2) Yet another type of jurisdictional clause which might be included in treaties or conventions which provide for a procedure of conciliation as the Vienna Convention on the Law of Treaties does. The new feature for such a commission would be to include a clause whereby the contracting parties could agree that the conciliation commission may ask the International Court of Justice for an advisory opinion on the legal aspect of the issues pending before the commission.

(3) The third suggestion relates to jurisdictional clause that States may include in a treaty whereby they would agree to allow their domestic tribunals to refer questions of international law to International Court of Justice for preliminary binding decision on the interpretation of the law." [171]

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167. Guenter Weissberg, "United Nations Movements Towards World Law", I.C.L., Vol. 24, Part 3 (July 1975, p. 460 at pp. 518-19 ; emphasis added : see also Rosene The International Court of Justice (Leyden, 1957), p. 13.

168. *Ibid.*, at p. 519. according to Brownlie, "The following factors explain the reluctance of States to resort to the Court : the political fact that hauling another State before the Court is regarded as an unfriendly act ; the greater suitability of other tribunal and other methods of review the both regional and technical matters : the general conditions of international relations, preference for the flexibility of arbitration in comparison with a compulsory jurisdiction; the lack of representation of Afro-Asia on the Court ; and the distrust of the Court on the part of Communist and other States. [Principles of Public International Law (1973), p. 708].

169. For the process of amending the Statute of the Court and the reform thereof, *see* : Egyn Schwelb, "The process of Amending the Statute of the International Court of Justice, A.J.I.L., Vol. 64 (1970), p. 880 ; See also Forest L. Grieces, Reform of the Method of Rendering Decisions to the International Court of Justice, A.J.I.L., Vol. 64 (1970), p. 144.

170. "What Future of the I.C.J." A.J.I.L., Vol. 65 (1971), p. 279.

171. *Ibid., see* also Leo Gross. "The I.C.J. : Consideration of Requirements for Enhancing its Role in the International Legal Order", A.J.I.L.(1971), p. 253 ;

The last suggestion to broaden the advisory jurisdiction has been discussed earlier in the chapter and merits serious consideration.

It has also been suggested that the Statute should be amended to enable even individuals to bring their cases before the Court. But in view of the present states of international politics and international relations, suggestions for the amendment of the statute of the Court do not seem to be practicable. It has been made clear earlier while discussing the reservations of the Declarations by States of the acceptance of compulsory jurisdiction of the court that the trend is to restrict the jurisdiction of the court rather than to enhance it.[172] As rightly pointed out by the judge Philip C. Jessup, 'The Court is what the States of the world choose to make it. The court can indeed improve its procedure but it is the States which must take advantage of the potentialities which already exist in the court Statutes.[173] "Further, court under its existing statute is an entirely flexible instrument. There are advantages in making use of it.[174] In his view, therefore, the defect is not of the Statute but the need is that the States should make more use of it. Prof. Leo Gross has also conceded that the flexibility built in the statute have not been sufficiently explored." [175]

As pointed out by Mr. Shigeru Oda, (Judge, International Court of Justice) "in the whole history of the International Court of Justice in only eight cases were the disputes to be settled by the immediate and unconditional will of both parties to appear before the Court. In addition, it should be noted that in four recent cases which were filed by unilateral application *i.e.* the case of *Trial of Pakistani Prisoners of war* which was finally removed from the list in 1973, *the Fisheries Jurisdiction cases of* 1974 and *the Nuclear Tests cases of 1974* and *the Aegean sea continental shelf case* of 1978, all the defendant states declined even to appear before the court. In spite of various allegedly justifiable reasons behind these non-appearances these negative attitudes, which constitute a new phenomenon, appear more disquieting to the eyes of those who are more concerned with the rule of law in the international community." [176]

It may be noted here that by December, 1988, since its inauguration in 1946, the court has delivered 50 judgments, 20 advisory opinions and 247 orders. Seventy-five cases have been presented to the court in its 42 years of existence ; 16 of them have been subsequently withdrawn.[177]

As written by Shabtai Rosenne, "It is the international Court, more than any other organ of the United Nations, which has infused new dynamism into the International law of today." [178] Judge Nagendra Singh has rightly remarked : "Humanity would, therefore, always lie in the right path so long as it survives to strengthen the International Court of Justice and the United Nations with a view to building up both these institutions for the purpose of maintenance of public order in international community." [179] Thus despite several weaknesses and limitations, the International Court of Justice has performed its functions with distinction and has made a significant contribution for the development and

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172. Jenks has also aptly remarked : Judicial process is unhappily at a discount in a world in which the width and depth of divergences of ideology and interest have impaired faith in objectivity and narrowed the acceptance of Third party judgment". C.W. Jenks, Social Justice in the Law of Nations—The I.L.O. Impact After Fifty Years (1970), p. 47.
173. Philip C. Jessup, "Do New Problems Need New Courts?", A.J.I.L., Vol. 65 (1971), p. 261 at p. 262.
174. Ibid, at p. 263.
175. Leo. Gross, see Supra note 56 ; Prof. Goodspeed has also remarked : "As long as the members of the United Nations are unable to resolve their basic differences, the Court will continue in a limited role, performing it with distinction but with little effect upon the course of international politics". Supra note 2 at p. 359.
176. Shigeru Oda, "The Role of the" International Court of Justice, I.J.I.L., Vol. 19 (1979) p. 157 at p. 160.
177. U.N. Chronicle, Volume XXV, No. 4 (December, 1988), p. 75.
178. The World Court—What is and How it Works (1963) p. 174 ; Corbett has also written, "The Permanent Court of International Court of Justice and the present International Court of Justice, may fairly be regarded as major steps in the development of a world legal system" P. E. Corbett, The Growth of World Law (1971), p. 23.
179. Recent Trends in the Development of International Law and Organisation Promoting Inter-State Co-operation and World Peace (1969), p. 52.

classification of International law in general and international constitutional and administrative law in particular. "The Court is indeed a *sine qua non* for the establishment of Rule of Law in inter-State relations." [180]

To conclude in the words of Judge Shigeru Oda, "..... it can hardly be doubted that the International Court of Justice has contributed a great deal to the development of International law. The content of the actual rules may sometimes be inadequate in international community where customary law rather than written law plays a more important role, so much so that the role of the judiciary in the international community cannot be over-emphasized. The International Court of Justice has played an important role in the past in ascertaining existing customary law and in formulating adequate rules of international law, and it cannot be accused of having failed to keep abreast of the current of times..... the International Court of Justice has been in the van of the development of International Law." [181]

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180. Judge Nagendra Singh, "Codification and Progressive Development of International Law : The Role of The International Court of Justice" I.J.I.L., Vol. 18 (1978) 1 at p. 14.
181. *See* note 176 at p. 162.

CHAPTER 39

THE SPECIALISED AGENCIES*

The specialised agencies are based on inter-governmental agreements and perform vast international functions in the economic, social, cultural, educational and health fields. Article 57 of the United Nations Charter provides that the various specialised agencies established by inter-governmental agreement and having vide international responsibility, as defined in their basic instruments, in economic, social, cultural, educational, health and related fields, shall be brought into relationship with the United Nations in accordance with Article 63. Such agencies thus brought into relationship with the United Nations are called specialised agencies of the United Nations. Article 63 provides that the Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations, such agreements shall be subject to the approval by the General Assembly. The Economic and Social Council may co-ordinate the activities of the specialised agencies through consultation with and recommendation to such agencies and through recommendations to the General Assembly and to the members of the United Nations. Article 59 further provides that the Organisation shall, where appropriate, initiate negotiations among the States concerned for the creation of any new specialised agencies required for the accomplishment of the purposes setforth in Article 55.

The United Nations thought it proper not to take full responsibility in the various fields and to allow the specialised agencies to perform functions in the Economic, Social, Cultural, Health and related fields. Following were the three reasons for this decision : (i) The framers of the Charter of the United Nations were of the view that it was neither possible nor proper for the United Nations to take full responsibility in these fields. If the United Nations had taken the full responsibility in these fields, the Organisation would have become a very complex, complicated and unwieldy; (ii) Since most of the functions in the Economic and Social fields are technical, it was thought to be a wise decision that small (smaller than the U.N.) specialised agencies comprising of the skilled and trained technical experts, should be allowed to perform these functions; (iii) Much of the work of the specialised agencies is administrative which some such agencies had very successfully performed in past for several years.[1] The examples of International Labour Organisation and Universal Postal Union deserve a special mention in this connection.

It was also thought proper that these inter-governmental agencies should remain independent of the United Nations, but may be brought into relationship with the United Nations through special agreements. The experience has shown that the above decision was correct for the specialised agencies are now successfully performing manifold functions in the various social, cultural, educational, health and related fields.

The General Nature of the Specialised Agencies.—All the specialised agencies have the following common features :

(i) Their legal existence is the result of inter-governmental agreements and most of the States are the members of these specialised agencies.

(ii) All the specialised agencies have been brought in relationship with the United Nations through special agreements.

(iii) Each specialised agency has a Constitution or Charter of its own which describes the duties, functions, constitution, etc., of the Organisation.

(iv) Each specialised agency has almost the same general constitution. For example, each specialised agency has an Assembly or Conference which has

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* See also for P.C.S. (1967), Q. No. 7.

1. Stephen S. Goodspeed, The Nature and Function of International Organisation, Second Edition (1967), p. 420.

the representation of all the members ; each has an Executive Council or Committee which performs executive or supervisory functions, and each has a Director or Secretary General whose functions are same to that of the Secretary-General of the United Nations.

(v) Each specialised agency has a Secretariat of its own.[2]

While there are abovementioned common features in all the specialised agencies, there are also some dissimilarities on the basis of their nature and the functions which they perform.[3]

Some specialised agencies

At present there are sixteen specialised agencies. A brief discussion of each of these specialised agencies is being given below :—

(I) International Labour Organisation (I.L.O.) [4*]

International Labour Organisation was established in 1919 as an autonomous partner of the League of Nations. Its Head Office is situated in Geneva. It was brought into relationship with the United Nations in 1946 through a special agreement. This special agreement was approved by the General Assembly on 14th December, 1946. International Labour Organisation functions in close collaboration, with the United Nations.

Composition and Functions.—Its membership is open for all the States. Following are the main organs of the International Labour Organisation :

(a) *General Conference.*—Each member-State gets representation in the General Conference. Each State has 4 representatives in the General Conference—two representatives of the State Government and one each representative of the workers and employers. Each representative has one vote. Most of the decisions of the Conference are in the form of Conventions and recommendations and they require the majority of two-third members present and voting.

It is the obligation of the member-State to implement through their State Legislatures the Conventions adopted by the General Conference.[5] All the conventions and recommendations combined together are called International Labour Code which indicates the International standards of policy.[6] It comprises of 130 Conventions and 134 recommendations. As it is made clear in the Code itself, "The International Labour Code is primarily a Code of Internationally approved standards, certain of which are capable of becoming, and have in many cases become, binding upon the States of the relevant International Labour Conventions and in respect of all of which members of the organisation have an obligation to report on the position of their national law and practice at appropriate intervals as requested by the governing body." [7]

(b) *Governing body.*—The Governing body comprises of 54 members and it is a tripartite body and includes the representatives of Governments, workers and employers. The Governing Body appoints the Director-General and supervises the functions of the organisation. The permanent seats are reserved for 10 States of chief industrial importance. In its last spring session which ended on 4 March, 1983 in Geneva made provision for China's expected

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2. Stephen S. Goodspeed, The Nature and Function of International Organisation, Second Edition (1967), p. 420.
3. For dissimilarities in different specialised agencies see Ibid. pp. 423-25.
4. For text of the constitution of I.L.O. see: Basic Documents in International Law (1972), Edited by Ian Brownlie, pp. 45-47; see also Jenks, The International Protection of Trade Union Freedom (1957); Jenks, Human Rights and International Labour Standards (1960), Mc Nair, The Expansion of International Law (1962) and Jenks, Social Justice in the Law of Nations—The I.L.O. Impact After Fifty Years (1970).

* See also for I.A.S. (1972), Q. No. 10(d).

5. See M.K. Nawaz and N. Vaidyanathan, "Ratification of I.L.O. Conventions By India", I.J.I.L., Vol. 11 (1971), p. 610 at pp. 610-12.
6. Goodspeed, see note 1, p. 442.
7. International Labour Code, (1951) (1952), ilxx adopted from C.W. Jenks, Social Justice in the Law of Nations (1970), p. 9.

return to active participation in the ILO next June by granting it one of the permanent seats reserved for the 10 states of chief industrial importance.

(c) *International Labour Offices or Secretariat.*—The head of the International Labour Office is a Director-General. Its head-office is situated in Geneva and its branches are in New York and in several-countries of Europe and Asia. Its main function is to collect informations related to industrial life and labour and to assist the members to make laws in accordance with the decision of the General Conference.

Objects.—The General Conference of the International Organisation held in 1944 in Philadelphia clarified its objectives through a declaration. According to Article 3 of the Declaration following are its main objectives : (i) Full employment and rise in living standards; (ii) Minimum living wage ; (iii) Recognition to the rights of collective bargaining ; (iv) Social Security ; (v) Proper security of the health of the workers ; (vi) Child welfare ; (vii) Proper arrangements of housing, entertainment etc., (viii) Assurance of equal opportunity in education and employment.

Evaluation.—The I.L.O. standards are conventions and recommendations designed to improve working and living conditions, to safeguard human rights such as freedom of association and to encourage job creation.[8] International Labour Organisation is a very successful inter-governmental institution and specialised agency. It has done a commendable work to achieve social justice for the workers. In the field of international legislation, International Labour Code is a significant achievement. In the words of C.W. Jenks, "The International Labour Code has become for labour lawyers throughout the world what *corpus juris civiles* is for the civilians or works of authority of the Common Law for the common lawyers." [9] The most significant thing in the constitution of the International Labour Organisation is that this Organisation has the representation of not only the States, but also of the workers and employers. This tripartite partnership has made this Organisation the most representative and democratic in the real sense of the term. Besides this, as pointed out by Jenks, "No less redical and unprecedented an innovation was the obligation to submit Conventions adopted by International Labour Conference by a two-thirds majority for parliamentary consideration, irrespective of the attitude towards the convention of the representatives of the Government concerned." [10]

It may be noted here that the I.L.O. received a setback because the United States of America withdrew from the I.L.O. The U.S.A. had been contributing 25% of the expenses (*i.e.* $ 20 million per year) of the annual budget. Probably American withdrawal from the Organisation was because, according to the U.S. the I.L.O. had become a forum for Communist and anti-Israel propoganda. While withdrawing U.S.A. from the I.L.O. on 1st November, 1977, President Carter told that the U.S.A. would rejoin the Organisation if the I.L.O. ended its involvement in political issues. U.N. Secretary-General, Dr. Waldheim rightly described the U.S. decision as a "retrogressive step." [11]

(II) World Health Organisation (W.H.O.)

As pointed out by Prof. Stephen S. Goodspeed, the World Health Organisation "is typical of the specialised agency with multipurposes functions and well defined objectives.[12] For the establishment of the World Health Organisation, the Economic and Social Council called an International Health Conference in New York in July 1946. Representatives of 46 States participated in this Conference. On 22nd July, 1946, the World Health Organisation adopted its Constitution. In July, 1948, this organisation was brought into relationship with the United Nations finally on 1st September, 1948, it started functioning as a permanent organisation. At present, it has 179 member States and a multinational staff numbering 4,500.

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8. U.N. Monthly Chronicle, Vol. XIII, No. 7 (July, 1976), p. 41.
9. C.W. Jenks, Social Justice in the Law of Nations—The I.L.O. Impact after Fifty years (1970), p. 80.
10. Ibid, at p. 25.
11. The Statesman, Dated, 3 November, 1977.
12. Goodspeed, note 1, at p. 426.

Objectives and functions.—The main function of the World Health Organisation is to raise the standard of health of the people. Preamble of the World Health Organisation's Constitution defines health as a state of complete physical, mental and social being and not merely the absence of disease or infirmity. According to the Article 1 of W.H.O. Constitution, the objective of the W.H.O. shall be the attainment by all peoples of the highest possible level of health. In order to achieve its objective this Organisation performs many functions such as to assist the State Governments in strengthening their health service ; to give them technical assistance and advice in emergency ; to make plans to eradicate diseases and to implement them ; and to propose international conventions and agreements on matters of health. W.H.O. promotes research, generates and disseminates information and ensures valid and productive technical cooperation. It also serves as a global clearing-house on health matters. It is the "internationally pipeline" for medical and health information of all kinds. It alerts the world's scientists and Governments about new drugs and treatment, new ways to organise health care and train nurses and doctors, safe levels of chemicals in food and water, and high standards of drug and manufacturing practices.

Composition.—The membership of the World Health Organisation is open for all States who accept its Constitution. In addition to sovereign States, some other territories and entities as are not States, may also become its members. It may be noted that Bangla Desh became the member of the World Health Organisation long before it became the member of the United Nations. The World Health Organisation comprises of the following three main organs :—

(a) *Assembly.*—It comprises of all the members. Its session is held every year and each member has one vote. However, each member is entitled to have three representatives in the Assembly. The Assembly lays down the general policy and passes the budget of the Organisation.

(b) *Executive Board.*—This is a technical and non-political organ. It comprises of 24 members who possess high technical education in the field of health and who are elected by the Assembly. It holds its session twice in a year and implements the decision taken by the Assembly.

(c) *Secretariat.*—The chief of the Secretariat is a Director who is appointed by the Assembly. He is also the Chief and the Technical Officer of the Organisation.

The World Health Organisation has rendered signal services by its endeavours to eradicate diseases and to raise the standards of health of the people of the world. It performs both advisory and technical functions. It has performed commendable work in checking diseases as Malaria, T.B. and Influenza. This Organisation also gets research work done for the solution of world-wide problems relating to health.[13] It performs very vast functions and has contributed in the development of International Law.[14] W.H.O. has the credit of eradication of smallpox which was responsible for killing, blinding and disfiguring millions of people since the dawn of civilization. Thus, smallpox became the first ever disease to be eliminated by vaccination and its conqueror undoubtedly is W.H.O. Last but not the least, the global strategy to achieve "Health for All by the year 2000" was formulated by W.H.O. member States at the thirty-fourth World Health Assembly in 1981. The strategy aims to provide continuous, progressive improvement of health status of populations through national health systems that provide health promotion, disease prevention, and curative and rehabilitative services to all.

(III) United Nations Educational, Scientific and Cultural Organisation (UNESCO) *

For the establishment of the United Nations Educational, Scientific and Cultural Organisation a Conference was held in London, in November 1945. It was finally

13. For a detailed and criticial study see L. Oppenheim, International Law, Vol. I, Eighth Edition, pp. 977-86 and Stephen S. Goodspeed, The Nature and Functions of International Organisation, Second Edition, at pp. 426-40.

14. See George A. Codding, Jr., "Contribution of the World Health Organisation and International Civil Aviation Organisation to the development of International Law", Proc. ASIL (1965), p. 147; see also pp. 17-23 ante of this book.

* See also for I.A.S., (1961), Q. No. 6(b).

established on 14th November, 1946. Thereafter it was brought into relationship with the United Nations through a special agreement which was approved by the General Assembly on 14th December, 1946.

Objectives and functions.—Preamble of the Constitution of the United Nations Educational, Scientific and Cultural Organisation provides, "Since wars begin in the minds of men, it is in the minds that the defences of peace must be constructed." It aims to contribute for the maintenance of international peace and security by creating respect for the rule of law, human rights and fundamental freedoms through the medium of education, science and culture. The United Nations Educational, Scientific and Cultural Organisation has laid a great emphasis on the development of basic education. It also encourages research work in the field of science. It has rendered signal services for the development of knowledge and its dissemination. In order to achieve these objectives, it assists State and non-State institutions.

Composition.—Each member of the United Nations can become its member. Other States may be made the member of the United Nations Educational, Scientific and Cultural Organisation through two-thirds majority of general conference. Following are the main organs of the United Nations Educational, Scientific and Cultural Organisation :

(A) *General Conference.*—All the member-States get representation in the General Conference which holds its sessions twice in every year. It is the policy-making organ of the United Nations Educational, Scientific and Cultural Organisation. For adopting International Conventions two-thirds majority is required, but only simple majority is required for adopting recommendations. The General Conference elects the members of the Executive Board and appoints the Director-General of the Secretariat.

(B) *Executive Board.*—It comprises of 24 members who are elected by the General Conference for a term of four years. Its chief function is to implement the decisions of the General Conference.

(C) *Secretariat.*—The Chief of the Secretariat is a Director-General who is elected by the General Conference on the nomination of the Executive Board. The Director-General participates in the meetings of the General Conference, the Executive Board's meetings and the meetings of the Technical Committees and performs routine functions of the Organisation.

In the beginning of 1984, the U.S. State department announced that the U.S. would withdraw from the UNESCO at the end of 1984. The U.S. accused UNESCO of anti-western and anti-US-bias. The U.S. Congress started an investigation into UNESCO through its investigative arm, the general accounting office.

Britain followed the suit. The withdrawal of U.S. and U.K. has caused the loss of 30 per cent of its revenues. Japan is also thinking of withdrawing from the UNESCO. If Japan also withdraws, this will account for loss of another 10 per cent of its revenues. But one of the significant development that has taken place recently is the announcement by Mr. Amadou Mahtar M'bow not to try for a third term. Mr. Bow who enjoys the backing of Afro-Asian countries, has been one of the main cause of irritation to countries such as U.S., U.K., and Japan. It may therefore be hoped that conducive environment may be created to ensure the return of U.S. and U.K. to this august organisation. Federico Mayor was elected as the next Director-General and on 18 October, 1987, the Executive Board of the UNESCO approved his nomination.

For sometime the question of admission of Palestine as a full member of the UNESCO is under consideration of the Executive Board. On 27 May, 1991 this question was postponed with a view to await the result of middle east peace negotiations. Over a 3 year period ending in early 1991 UNESCO reduced its staff by 5.2 per cent. Regarding UNESCO's financial position Director-General Federico Mayor said, it was obliged to borrow funds during the past six months because the contributions from its member states were at a level entirely insufficient to cover its programme of work approved by the last general conference.

Mr. Mayor has reduced politicisation and poor management. Now even the former sceptics such as the U.S. recognize that the UNESCO is back on track. But because of

financial constraints and amid a struggle in Washington over budget cuts, the U.S. cannot afford to rejoin. The U. K. has however rejoined and has become 186th member of the U.N.E.S.C.O.

The UNESCO has completed 50 years of successful working and during this period it has rendered signal service in the educational, scientific and cultural fields. During the last eight years the Director-General of the UNESCO has considerably improved its credibility. Even America now admits that the Organisation is moving toward the right path even now the Organisation is beset with financial crisis only America owes 63 million dollars to UNESCO. However, the possibility of America rejoining the Organisation is quite bright.

(IV) Food and Agricultural Organisation (F.A.O.)

It was established on 16th October, 1945 when its Constitution was adopted. Thereafter, it was brought into relationship with the United Nations and this agreement was approved by the General Assembly in December, 1946.

Objectives and Functions.—It aims to raise the living standards ; to increase the production of food-stuffs and to enhance the capacity of their distribution ; to improve the conditions of the rural population and thus to improve the economic systems of the world. In order to achieve these objectives the Organisation performs various types of technical and non-technical functions. It collects informations related to food and agriculture and disseminates them. It also assists the member-States in their endeavours to increase the production of food-stuffs.

Composition.—The following are the three main organs of Food and Agricultural Organisation : (A) Conference ; (B) Council ; and (C) Director-General. The Conference is representative body and is represented by the member-States. It lays down the general policy of the Organisation. The Council comprises of 27 members which are elected by the Conference. The Council elects its President. The Director-General is appointed by the Conference.

(V) International Civil Aviation Organisation (I.C.A.O.)

From November 1 to December 7, 1944, an International Civil Aviation Conference was held in Chicago. In this Conference it was decided to establish an International Civil Aviation Organisation. It was finally established on 4th April, 1947. The chief aim of this Organisation is to encourage and develop international civil aviation. This Organisation has the following main organs : (A) Assembly and (B) Council.

The Assembly is the representative-body and all the member-States are its members. The Council comprises of 27 members which are elected by the Assembly for a term of 3 years. The Council collects information for the development of international civil aviation ; conducts investigations and publishes information relating to civil aviation. It also makes recommendation in regard to the standards and practices of the international civil aviation. If on account of certain circumstances there are obstructions in International Civil Aviation, the Council conducts investigations and acts as an Arbitration Council to decide the disputes amongst the States. A leading case relating to International Civil Aviation Organisation is, *I.C.A.O. Jurisdiction case (India* v. *Pakistan).*[15]

At present, the I.C.A.O. has as many as 180 member nations. The I.C.A.O. sets the basic international standards which apply world-wide to virtually all aspects of civil aviation. These are contained in the 18 Annexes to the Convention on International Civil Aviation signed at Chicago on 7 December, 1944, each one of these dealing with a particular aspect of aviation.[16] It may be noted that a specific ban on the use of weapons against civil aircraft was called for unanimously by the Assembly of the I.C.A.O. at its 25th extraordinary session which ended on 10 May, 1984, in Montreal. The weapons ban is the first significant amendment to the convention on International Civil Aviation signed in Chicago in 1944. It must be ratified by 102 or two thirds of I.C.A.O.'s contracting states

15. I.C.J. Reports (1972), pp. 46ff. For Facts of the case see chapter on "Air-Law (Including Aircraft Hijacking)."
16. U.N. Chronicle, Vol. XIX, No 5 of 1982, p. 71.

before it comes into force. The text of weapons-ban amendment *inter alia*, provides that every state "must refrain from resorting to the use of weapons against civil aircraft in flight and in case of interception, the lives of persons on board and the safety of aircraft must not be endangered." [17]

On 7th December, 1994 the ICAO celebrated its golden jubilee. As a specialized agency of the U.N., ICAO is not only working to strengthen the international civil aviation scene through greater understanding among its member (*i.e.* 180 sovereign states) but has also been consistently working to take the world into an era where aviation technology is likely to be revolutionized with the turn of the century.

The ICAO is setting up International Financial Facility for Aviation Safety (IFFAS). As pointed out by ICAO Secretary General, R.C. Costa Pereira in March 2001, "The organisation aims at generating $ 800 million towards IFFAS by levying an additional cess of one dollar on every airline ticket sold globally, out of this $ 50 million is required immediately to correct safety related deficiencies in developing countries who make minimum contribution to the ICAO."

ICAO has asked India to take up leadership role in establishment of IFFAS.

The necessity to promote IFFAS was felt for attainment of enhanced standards in global aviation safety which till date remains a low priority area for major international institutions. According to the Secretary General, it was also imperative to improve safety related aviation infrastructure in all countries including those identified by the United Nations as least developed countries which may not have the requisite funds to invest in upgrading of civil aviation infrastructure for safety.

(VI) International Bank for Reconstruction and Development (World Bank).

It was established on 27th December, 1946. Thereafter, it was brought into relationship with the United Nations through a special agreement which was approved by the General Assembly on 15th November, 1947. Its main objective is to assist the member-States in re-construction and development by investing capital. It also encourages investments of foreign capital by giving guarantee for the same. It also aims to encourage the balanced development of International trade. Its membership is open for all those States who were the members of International Monetary Fund before 31st December, 1945. Other States may be admitted as members through the majority decision of the Board of Governors.

The Bank has the following main organs : (A) Board of Governors: (B) Executive Directors; and (C) President. The Board of Governors comprises of a Governor and an alternate member. It is constituted for a term of 5 years and holds its session once in a year. All the powers of the Bank are concentrated in the Board. The Board has delegated its owners to 18 Executive Directors who perform the general functions of the Bank. The Executive Directors elect a President who is responsible to the Organisation and presides over the meetings of the Executive Directors.

The Bank lends funds for development of economic facilities. Thus it promotes the flow of capital internationally for productive purposes. The loans may be made to member countries, to their political sub-divisions or to private business enterprises in their territories. In case the borrower is not a Government, the guarantee of the member Government concerned is required. The Bank's aid is not limited to granting of loans. It also provides a wide range of technical assistance services to member countries. The Bank is one of the specialized agencies of the United Nations. The membership of the Bank is open to States who were the members of the International Monetary Fund before December 31, 1945. Others may be admitted by majority vote of the Board of Governors but the membership of the IMF is a pre-requisite for membership to the Bank. If a member of the Bank ceases to be a member of the IMF, it will lose its membership in the Bank unless the Board of Governors decides otherwise by a three-fourths vote. This provision has been made to ensure the observance of the Articles of Agreement of the IMF by the members of the Bank. The Bank has been instrumental in channelling of developmental

17. U.N. Chronicle, Vol. XXI (1984) p. 54.

assistance from individual developed countries to the developing countries. Several consortia, such as, aid consortium to India, have been formed to achieve this purpose.

On 28th April, 1992 Russia and 12 former Soviet republics won entry into the World Bank and IMF, thus gaining access to billions in western aid to help rescue their shattered economies. Though their admissions were approved, yet it was Russia who on 17th June, 1992 became the first of the republics of former Soviet Union to officially join the World Bank. Earlier, in June 1992, Russia had joined the IMF.

(VII) International Monetary Fund (IMF)

In the Bretton Woods Conference held in July 1944 at Bretton Woods (New Hampshire, USA), Statutes of two institutions—International Monetary Fund (IMF) or Fund and the International Bank for Reconstruction and Development (IBRD) or the World Bank—were adopted to promote international financial cooperation and economic development. The International Monetary Fund[18] aims 'to promote international monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems,' 'to facilitate the expansion and balanced growth of international trade.....,' 'to promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation,' and 'to assist in the establishment of multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade'.

The capacity of a member-State to cast votes is in accordance with the money deposited by it in the Fund. Besides 250 votes, each State may get one additional vote for $100,000,00 deposited by it in the Fund. International Monetary Fund has the following main organs : (A) Board of Governors ; (B) Executive Directors, and (C) Managing Director. All the powers of the International Monetary Fund are concentrated in the Executive Directors who elect one Managing-Director from amongst themselves. There are 18 Executive Directors and the Executive Directors are responsible for the general functions of the Organisation. The Managing-Director acts as the Chairman of the Executive Directors. The head-office of the International Monetary Funds is situated in Washington.

International Monetary Co-operation, as conceived by the IMF, has following three fundamental aspects : (i) harmonization of the national economic interests with those of other members of the international community; (ii) provision of financial assistance on a temporary basis, so that countries may restore balance of payments equilibrium without hurting the economies of other member-countries, and (iii) the promotion of economic growth and high employment.[19]

Each member of the Fund is assigned a quota provided in the original Articles of Agreement or subsequently established by a four-fifths vote and the consent of the members. Originally it was provided that twenty-five per cent would be paid in gold and the remainder would be paid in the currency of the member. Any change in the par value of a member's currency can be proposed only if it is necessary to correct a fundamental disequilibrium. It was also provided that the gold value of the assets of the Fund would be maintained irrespective of changes in the par or foreign exchange value of the currency of any member. In its annual meeting at Manila in October 1976, Surinam and Guinea-Bissau were admitted as members. This raised the members of the IMF to 131 nations. In June 1992 Russia formally became the member of IMF. Similarly 12 other republics of former Soviet Union have become of its members. Thus at present there are as many as 165 member of the IMF. As per Articles of the Fund, each member has two hundred and fifty votes *plus* one additional vote for each part of its quota equivalent to, 100,000,00. A total quota of 8,800 million was fixed in the beginning. Later on, quotas were increased three

18. Hereinafter referred as "the Fund" or IMF.

19. S.L.N. Sinha, "Three Decades of International Monetary Co-operation", India Quarterly, Vol. XXXII, No. 2 (April, June, 1976), p. 121 at p. 122.

times, 50 per cent, 25 per cent and 25 per cent in 1959, 1966 and 1970, respectively. Recently, it has been decided to raise the quotas of 126, member-countries including substantial increases for the oil-exporting countries.

Previously the member-countries had to pay 25 pr cent of their quotas in gold and the remainder in their respective currencies. Recently, a significant change has taken place in this respect. Now the members have been given the option to pay 25 percent of the increase in quotas in SDRs (*i.e.* Special Drawing Rights), the currencies of other members or in the member's own currency. The obligation of the members to make up the deficiency in gold subscriptions for the original quota payments has also done away with.[20] The members of the IMF have decided to eliminate gold from the international monetary system. Although the love and lure of gold have not totally disappeared, the relative importance of gold has declined. One of the reasons for this is that while the official price of gold is 42.22 per ounce, the free market price is about three times this figure. Obviously, the central banks are reluctant to dump the gold any further. The IMF decided to sell a part of its own gold holding and distribute the profit on equitable basis.

Special Drawing Rights (S.D.Rs.)—Gold, foreign exchange, reserves and credit as international reserves corresponding to the growth in the volume of international trade having been found inadequate, the IMF in 1967 issued international money called Special Drawing Rights. Hitherto the IMF was functioning like a co-operative society. By issuing international money in the form of Special Drawing Rights (SDRs), it assumed the role of a central bank. A unit of SDR has been defined to "equivalent to one-thirty-fifth of an ounce of fine gold, or the same gold equivalent as that of the pre. 1972 U.S. dollar and could be held only by official agencies. SDR allocations and transactions are only recorded in the books of the IMF. A proposal for issuing SDRs can be made only by the Managing Director of the IMF. It has to be approved by the Board of Executive Directors and the Board of Governors; in the latter case, a 85 per cent majority of votes is required to make the decision to issue international money near unanimous.[21] Further, "the issue of SDRs to the member-countries is strictly in proportion to quotas in the IMF. While SDRs are assets to the holders, they do not represent the liability of the IMF. There is no backing for the SDRs, but only the undertaking by member countries to abide by the regulations concerning SDRs. This constitutes international financial co-operation, *par excellence*. Holders of SDRs experiencing balance of payments difficulties can demand from other member-countries convertible currencies in exchange for SDRs. A member is obliged to accept, from other members, SDRs, up to a maximum of 200 per cent of the allocation made to it and in exchange give convertible currencies. Thus, the obligation is twice as large as the right." [22]

In order to prevent excessive use of SDRs by member-countries, it is provided that each member is required to maintain an average holding of 30 per cent of the initial allocation during a five year period. SDRs have been issued thrice, 3414 million units on 1st January, 1971, 2949 million units on 1st January, 1971 and 2952 million units on 1st January, 1972. Thus so far 9315 million units of SDRs have been issued. Previously the rate of interest charged was only 1.5 per cent but with a view to cope up with the sharp increase in money market rates it has been increased to 5 per cent. The developing countries have demanded that there must be a link between the issue of SDRs and flow of development aid.

Oil Crisis.—In between October 1973 and January 1974, the world witnessed 300 per cent increase in oil prices which caused balance of payments difficulties to countries, particularly non-oil developing countries. In August 1974, the IMF set up the oil facility of SDR 3 billion with a view to help the member countries to tide over the balance of payment

20. For further detailed study on this point see S.L.N. Sinha, "Gold subscription for IMF Quotas. "The Banker (London), July, 1964.

21. S.L.N. Sinha, "Three Decades of International Monetary Co-operation", India Quarterly. Vol. XXXII (1976), p. 121 at p. 126.

22. Ibid.

difficulties. Canada and some other European countries contributed to this fund. The IMF agreed to pay an interest of 7 per cent per annum to the lenders. Out of this Fund IMF provided loan to developing countries.

IMF loan of $ 5.68 billion for India.—On 9 September, 1981, the IMF gave its tentative approval to 5.68 billion loan to India which is its largest loan in history. This loan of five billion Special Drawing Rights—computed between $5.6 billion and $5.7 billion at current SDR value has been given to India to meet its balance of payments problems created by higher import costs of oil and other items.

Charge of surrender of India's Economic Sovereignty to IMF.—Recently, India has once again taken loans of large amount of money due to her balance of payment problem arising out of rise in price of petrol due to Gulf War. Opposition parties have charged the Indian Government of surrendering 'Economic Sovereignty' to IMF by accepting its conditionalities and adopting its budget accordingly. But as pointed out by Indian Finance Minister, Dr Manmohan Singh, any member of IMF taking loan has to accept certain conditions and that there was no question at all of surrendering economic sovereignty of the country. As a matter of fact, sovereignty is a problematic concept. In theory, each country jealously guards its sovereign and is not prepared to surrender even an iota of it. But in practice, each state to surrender its sovereignty in international transactions. As pointed out by Judge Lauterpach, International law, whether codified or not, implies restrictions upon sovereignty of nations. Indeed this is a truism because of inter-dependence of States.

Russia joins IMF.—On 2nd June, 1992, Russian Federation was formally accepted as a member of IMF, thus raising its membership to 165.

(VIII) The International Development Association (I.D.A.)

An affiliate of the World Bank, IDA was established on 24th September, 1960. Membership of the IDA is open to all member countries of the Bank. An initial subscription of 1 billion was provided for in IDA's Articles of agreement. The World Bank is responsible for the administration of the IDA. The IDA was established to promote economic development, increase productivity and thus raise standards of living in the less developed areas of the world. It provides finance on terms which are more flexible and bear less heavily on the balance of payments than conventional loans. The IDA thus furthers the developmental objectives of the Bank and supplements its activities.

The IDA has become popular for providing soft-loans to the developing countries. The loans made by it mature after a period of 50 years and there is a grace period of 10 years. Yet another attractive feature of IDA loans is that they are interest-free. Only a service charge of 3 per cent is taken on the outstanding loan amount. Moreover, they are not tied to specific projects.

(IX) The International Finance Corporation (I.F.C.)

For providing equity capital for the private sector without any Government guarantee, the International Finance Corporation (IFC) was established in July 1956. It became a specialised agency of the U.N. on 20th February, 1957. While closely associated with the World Bank, IFC is a separate legal entity, and its funds are distinct from those of the Bank. IFC was established to further economic development by encouraging the growth of productive private enterprise in its member countries, particularly in the less developed areas. To achieve this purpose, IFC invests in productive private enterprises in association with private investors and without Government guarantee of repayment, in cases where sufficient private capital is not available on reasonable terms. It also serve as a clearing-house to bring together investment opportunities, private capital (both foreign and domestic) and experienced management. Thus it helps to stimulate the productive investment of private capital, both domestic and foreign.

The World Bank, IDA and IFC together form a group known as the World Bank Group. This Group has rendered signal service in the field of international monetary co-operation and has been greatly instrumental channelising flow of developmental assistance from the

developed to the less developed countries. Although the flow of developmental assistance to the developing countries has been far from adequate, the world Bank Group deserves the credit for rendering significant services in the field of international monetary co-operation.

(X) Universal Postal Union (U.P.U.)

It was established in 1857. In 1947, its Constitution was amended and it was brought into relationship with the United Nations through a special agreement which was approved by the General-Assembly in 1947. Thus the Universal Postal Union which was established in 1857 became a specialised agency of the United Nations in 1947. The main objective of the Universal Postal Union is to encourage international co-operation among the different Postal Services and to ensure regular postal services in the world. Any sovereign State may become a party to the Convention of the Universal Postal Union and thereby its member. For admission of a new State two third majority of the existing members is required. The Universal Postal Union has the following main organs :—(A) The Congress ; (B) Executive Committee; and (C) Bureau.

The Congress holds its session once in every five years. Each State-Member is represented in the Congress and is entitled to have one vote. During the term of five years, the responsibility to carry on the work of the Organisation is that of the Executive Committee. Its office is situated in Berne. It comprises of 20 members who are elected by the Congress. The Bureau is the Secretariat of the Universal Postal Union and is also situated in Berne.

(XI) International Tele-Communication Union. (I.T.U.)

It was established through a Convention held in 1947 and started functioning since January 1, 1949. Following are the three main aims of this Union—(a) To achieve international co-operation for the development of and proper use of all types of international tele-communications ; (b) to ensure technical facilities in order to raise efficiency in tele-communication services and to increase their utility; and (c) to harmonise activities of the member-States to achieve the above mentioned objectives.

The I.T.U. has 157 member countries and its headquarters, in Geneva, comprises four permanent organs : (A) General Secretariat; (B) the International Frequency Registration Board (I.F.R.B.), (C) the International Radio Consultative Committee ; and (D) the International Telegraph and Telephone Consultative Committee. In its plenipotentiary conference of the I.T.U. the 12th to be held since the I.T.U. was found in 1865, at Nairobi (Kenya) from 28 September to 6 November, 1982, International Tele-communication Convention was revised. In revising the convention (its Basic Provisions and General Regulations), the plenipotentiaries emphasized the principles of the universality of the Union, rotation and geographical distribution for high level posts, both at conferences and at Union headquarters, and the problems of technical co-operation and assistance.[23]

(XII) World Meteorological Organisation.—(W.M.O.)

According to Article 2 of the Convention, the purposes and functions of the World Meteorological Organisation are the following :

(I) To facilitate world-wide co-operation in the establishment of networks of Constitution for making of meteorological observations or other geo-physical observations related to meteorology and to promote the establishment and maintenance of meteorological centres charged with the provision of meteorological service ;

(II) To promote the establishment and maintenance of the systems for the rapid exchange of weather information ;

(III) To promote standardisation of meteorological observations and to ensure the uniform publication of observations and statistics ;

23. U.N. Chronicle, Vol. XX, No. 1 of 1983, p. 119.

(IV) To further the application of meteorology to aviation, shipping, agriculture and other human activities; and

(V) To encourage research and training in meteorology and to assist in co-ordinating the international aspects of such research and training.

Following are the main organs of the World Meteorological Organisation :—(A) World Meteorological Congress ; (B) An Executive Committee ; (C) Regional and Technical Commissions created by the Congress ; and (D) A Secretariat headed by a Secretary-General located at Geneva.

(XIII) International Maritime Organization (I.M.O.)

On the initiation of the Economic and Social Council of the United Nations the U.N. Maritime Conference which met in February-March, 1948, drafted the Conference of Inter-Governmental Maritime Consultative Organisation. After having received the requisite number of signatories, the Convention of Inter-Governmental Maritime Consultative Organisation came into effect in March, 1958. Subsequently, its name was charged from IMCO to I.M.O. The function and purposes of Inter-Governmental Maritime Consultative Organisation as mentioned in the Convention are as follows :

(A) To provide machinery for co-operation among governments in the field of governmental regulation and practice relating to technical matters, including those concerning safety at sea ;

(B) To encourage the removal of discriminatory action and all unnecessary restrictions by governments ;

(C) To consider matters concerning shipping that might be referred to it by any organ or specialised agency of the United Nations ;

(D) To provide for the exchange of information among governments on matters for consideration by the Organisation.

It also drafts Conventions and Agreements in the field of shipping and maritime travel.

Following are the main organs of Inter-Governmental Maritime Consultative Organisation : (A) Assembly ; (B) Council; and (C) Secretariat.

The Assembly comprises of all the member-States and lays down the general policy of the Organisation. The Council consists of 16 members. It meets in between the sessions of Assembly and performs the functions of the Organisation. The Secretariat of Inter-Governmental Maritime Consultative Organisation is situated in London and is headed by a Secretary-General.[24]

Among other organs IMCO (now IMO) comprises of an Assembly and a *Maritime Safety Committee.* Under the provisions of Article 28 (a) of the Convention for the establishment of the organization, this committee consist of 14 members elected by the Assembly from members of the organization having an important interest in maritime safety, "of which not less than eight shall be the largest ship-owning nations". When, on 15 January, 1959, the IMCO Assembly, for the first time proceeded to elect the members of the Committee, it elected neither Liberia nor Panama, although those two States were among the eight members of the organization which possessed the largest tonnage. The General Assembly, therefore, referred this matter for the advisory opinion of the Court and asked the Court whether the Maritime Safety Committee was constituted in accordance with the convention for the establishment of the organisation. In its Advisory opinion in the case of *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*[25] the Court replied to this question in the negative *i.e.* the Committee was not constituted in accordance with the convention.

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24. For Comments on the Composition of the IMCO see : Robert 1 McLaren. "Equitable Geographical Distribution—IMCO; A Case-study". India quarterly Vol. XXIX, No. 2 (April-June, 1973), p. 151.

25. Advisory opinion of 8 June, 1960.

(XIV) The International Fund for Agricultural Development (IFAD)

A United Nations Conference, meeting from 10 to 13 June, 1976 in Rome, adopted and initialled an agreement establishing an International Fund for Agricultural Development (IFAD). Thus the Conference cleared the way for setting up of a new United Nations specialised agency (*i.e.* IFAD). The Fund will help to solve one of the worst problems in the world food situation, the slow growth rate of food production in many developing countries. The Fund's proposed initial target of 1,000 million is more than the total concessional assistance available every year for agricultural or food production. The Conference took the decision to establish an 18-nation preparatory commission to work out the machinery of the Fund and enable it to become a UN specialized agency.

Under the main concept of the Fund, it was concerned of a development Fund to disburse resources, partly through grants and mainly in the form of concessional loans to increase food production in developing countries. The organizational structure of the Fund is to be innovative, with the votes shared equally by three category of countries : developing donor (OPFC), developing recipient and developed. Thus, two-thirds of votes lie with developing countries, who will have a major influence on the investment decisions of the Fund at the same time two-thirds of the votes held by donor countries.[26]

The Agreement establishing the IFAD, a specialized agency in the U.N. system, was concluded on 13 June, 1976. It entered into force on 30 November, 1977. One hundred and thirty-seven States have expressed their consent to be bound by the Agreement through ratification, acceptance of accession.

(XV) World Intellectual Property Organization (WIPO)

It was established in 1967 succeeding the United International Bureau for the Protection of Intellectual Property which was founded in 1893. It became a specialized agency of the U.N. in 1974.

It aims to promote the protection of intellectual property throughout the world. A General Assembly, a Conference and International Bureau or Secretariat are the main organs of WIPO. Its headquarters are in Geneva, Switzerland.

(XVI) The United Nations Industrial Development Organization (UNIDO)

The constitution of the U.N. Industrial Development Organization was adopted by consensus on 8 April, 1979 by a Conference of Pleni-potentiaries. It will enter into force when at least 80 of the States that have deposited instruments of ratification, acceptance or approval have agreed that it should do so. By September, 1983, 107 States have expressed their consent to be bound by the convention through ratification, acceptances or approvals. When it enters into force, UNIDO will be the 16th specialized agency of the U.N. According to the constitution of the UNIDO, the primary objective of the organization will be to promote industrial development in the developing countries with a view to assist the establishment of a new international economic order.

Conclusion.—The specialised agencies of the United Nations have done commendable work in various fields. They have proved to be greatly helpful in achieving the objectives mentioned in the Charter of the United Nations. Among the most important specialised agencies the International Labour Organisation, Food and Agriculture Organisation, World Health Organisation and the United Nations Educational, Scientific and Cultural Organisation deserve a special mention. It may, however, be noted that there are certain limitations on these Organisations in respect of implementing their decision. In the words of Prof. Goodspeed, "All of the specialised agencies are restricted in the methods available for implementing the decisions. They cannot compel their members to do anything but must be content with making recommendations, offering assistance and stimulating interest and action. In this regard they are typical of all forms of international organisation where the membership unit is the sovereign State. The employment of sanctions by International Labour Organisation and the Fund have proved to be ineffective. One significant feature is the power of W.H.O. and I.C.A.O. to adopt technical

26. U.N. Monthly Chronicle, Vol. XII, No. 7 (July, 1976), p. 38.

regulations which are binding unless rejected within a given time limit." [27] To conclude in the words of Prof. Goodspeed, "The wide functions and objectives of the specialised agencies represent a broad attempt to cope with the basic social and economic problems facing the world. It is just a beginning, however, and the success achieved by the agencies will depend primarily upon the political climate in which they must work." [28]

As remarked by Mr. Bruno Kreisky, former Chancellor of Austria, while addressing the first consultation on the second replenishment of the IFAD held in Rome in July, 1983. "In the long run peace can be preserved if we are able to overcome hunger and poverty on the international level." The specialised agencies related to the U.N. deserve credit for not only making endeavours to overcome hunger and poverty but also trying to cope with other basic, social and economic problems confronting the world."

Development of International Law by Specialised Agencies.—For discussion of this please see "Introduction" (Chapter 1).

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27. Goodspeed, note 1, p. 465.
28. Ibid.

CHAPTER 40

WORLD TRADE ORGANIZATION

Background.—Bretton Woods conference held in 1944 was the starting point for a new world order. It was envisaged that the new world economic order would be organised around three international institutions—(i) The International Bank for Reconstruction and Development (IBRD also called the World Bank); (ii) International Monetary Fund (IMF); and (iii) International Trade Organisation (ITO). While the first two institutions came into existence and exist even today, the third institution *i.e.* ITO never came into existence. After having been approved by the Governments of the U.S. and the U.K., proposals for the establishment of ITO were discussed at an International Conference on Trade and Employment first in London in 1946, then at Geneva and finally in Havana in 1947-1948. A Charter for an ITO was signed by 53 nations. To come into force it was required to be ratified by the member nations. The ITO never came into existence as the U.S. Senate did not ratify it so was the case of other countries who failed to ratify it. The main reason for the non-ratification by the U.S. Senate was that it was not prepared to accept a formal structure like the ITO.

However, despite the non-adoption of the Charter of ITO, U.S., U.K. and some other developed nations were keen to ensure reduction of trade barriers. Some of the participants in the London Conference on Trade and Employment requested that simultaneously with the continuing discussions of Trade Charter at Geneva, extensive trade tariff negotiations be started. 23 nations participated in these negotiations and as a result of this an extensive set of bilateral trade concessions were then extended to all participants and were incorporated in a General Agreement on Tariff and Trade, 1947. Since the ITO charter had not come into existence, the U.S. and other countries wanted to have the General Agreement on Tariff and Trade (GATT) implemented as early as possible. Since the implementation of some of the clauses of GATT required parliamentary approval in some of the countries the GATT itself could not be applied. To overcome this difficulty a "Protocol of Provisional Application" (PPA) was signed in late 1946 by 22 original members of GATT. This protocol came into effect on January 1, 1948 and GATT was applied through this Protocol.

As per preamble of the GATT the main objectives were to—(i) raise the standard of living; (ii) ensure the full employment, to increase the volume of real income and effective demand; (iii) ensure better utilization of resources of the world and (iv) ensure expansion of production and international trade. Since the establishment of the GATT, eight rounds of negotiations to reduce the tariffs and trade barriers in the trade in goods have been held. These rounds of negotiations are being summarised below :

1. The Geneva Round (1947).—Participated by 23 countries Geneva Round of negotiations were held between 10 April to 30 October, 1947. These negotiations resulted in exchange of tariff cuts for 45000 products worth $10 billion of trade on annual basis.

2. The Amnesty Round, 1949.—The second round was held at Amnesty (France) in 1949. In this round nine new countries joined bringing the membership of GATT to 32. In this round custom duties were reduced in respect of 5,000 items of goods.

3. The Torguay Round, 1950-1951.—The third round was held at Torguay (Britain) in 1950-51. 38 countries participated. The European countries with low tariff levels were not satisfied and felt that the negotiations were disadvantageous to them.

4. The Geneva Round 1955-56.—The Fourth Round was held at Geneva (Switzerland) in 1955-1956. European Countries were again disappointed and withdrew from negotiations and thus the number fell down to 22.

5. The Dillon Round (Geneva) 1960-61.—The Fifth Round was held at Geneva (Switzerland) in 1960-61. In this Round EEC joined negotiations as a trade block. The U. S. Government obtained the authority under Trade Agreements Extension Act, 1958 to draw maximum advantage and participate in multilateral trade.

6. The Kennedy Round, 1964-67.—The Sixth Round, known as the Kennedy Round of negotiations was attended by 48 countries. About 35 developing countries also participated under special procedures. Fifty per cent reduction offer in industrial tariffs was announced by eleven industrialized countries.

7. The Tokyo Round, 1973-1979.—The Tokyo Round of negotiations were attended by as many as 99 countries coming from different levels of development and economic systems. During the Tokyo Round, a number of agreements in specific non-tariff measures and on agricultural products were reached.

8. The Uruguay Round, September 1986 to December, 1993.—The Uruguay Round of negotiations began in Uruguay in September, 1986 and culminated on December 15, 1993. Delegations from 117 countries accepted by consensus a GATT world trade treaty to open international markets and to ensure global economic growth into the twentieth century. The Dunkel Draft Text or Dunkel Package or the Dunkel Draft Act embodying the results of Uruguay Round of Multilateral Trade Negotiations was released on 20 December, 1991. The Unuguay Round of Multilateral Trade Negotiations were concluded on 15th December, 1993. As many as 125 countries including India signed the Final Act on April 15, 1994 at Marrakesh (Morocco). The General Agreement on Tariffs and Trade (GATT) 1994 more popularly known as the Dunkel Agreement, finally emerged as World Trade Organisation (WTO) in 1995.

Established and nurtured by the industrialized countries, the GATT continued to serve their interests though some special and preferential treatment to developing countries was provided in GATT rules, by and large they were discriminated under the garb of clauses such as "escape clauses" "safeguard" rules "voluntary export restraints". "orderly agreements". These clauses and safeguards allowed large scale version of GATT rules especially by the industrialised countries. Moreover, there were certain reasons which enabled countries to conduct most of trade outside the GATT rules.

In the first place, agriculture was treated as a special case from the beginning and thus escaping GATT rules. Secondly, though developed countries removed majority of tariff barriers yet some other still remained affecting developing countries. Thirdly, the U.S. and the EEC had concluded several bilateral, discriminatory and restrictive arrangements outside the GATT rules. Fourthly, GATT was also side-tracked due to the increasing use of subsides. Fifthly, "safeguards" rules under Article XIX of the GATT undermined the effective working of GATT. Sixthly, customs union and free-trade areas permitted under Article XIX of the GATT had been distorted and abused. Seventhly though GATT was a mandatory body, it lacked enforcing mechanism. Last but not the least with the emergence of more and more of new developing countries, it was felt by and large that the GATT rules devised half a century ago had outlined their utility.

Establishment of WTO.—As a result of the culmination of Uruguay Round of GATT negotiations for more than seven years at Marrakesh (Morocco) on April 15, 1994, as many as 125 countries including India agreed to the establishment of World Trade Organisation (WTO). The new World Trade Organisation (WTO) which came into effect on January 1, 1995 with the backing of 85 founding members including India replaced the General Agreement on Tariff and Trade (GATT).

The four-day ministerial meeting to usher in liberalised world trade started on 12th April, 1994 at Marrakesh. The Director-General of GATT, Mr. Peter Sutherland, stated that the WTO would play an active role, setting the trade policy agenda, working on consensus and basing itself on the fundamental principles of non-discrimination. The world treaty signed by 125 countries including India is estimated to add an annual $ 235 billion to the World Economic income within a decade. The treaty is expected to boost world trade by $ 755 billion each year by 2005 *i.e.* decade after it takes effect on 15th April, 1994, 125 countries signed the historic pact creating a new multilateral system slashing tariffs upto

40 per cent in the biggest package of market access concessions ever negotiated the developed and the developing countries participating in the historic trade conference at Marrakesh signed six major agreements running into 500 pages of final act and about 20,000 pages of individual national concessions on market access for goods and services culminating eight years of Uruguay Round of GATT talks. The four day Ministerial meeting at Marrakesh culminated in signing of six documents (as part of Marrakesh Declaration) including agreements in the establishment of the Preparatory Committee for the WTO, acceptance of the agreement establishing WTO as well as the pacts of trade and environment and organisational and financial consequences following from setting up of WTO. These agreements led to the replacement of the GATT by WTO. The WTO is thus the world body to oversee a comprehensive set of rules and disciplines covering every aspect of world commerce including trade in services and intellectual property protection. The Marrakesh Declaration calls for common action on the trade front with no retaliatory measures till the establishment of WTO in January, 1995.

The WTO is in fact the main organ for implementation of Multilateral Trade Agreements. It is the negotiating forum for the members. It can be regarded as the third economic pillar of world wide trade and commerce dimensions alongwith the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (World Bank)

Membership

There are two types of members—(i) original; and (ii) other members. The original members comprise of (a) the members to the GATT as on the date of entry into force of this agreement and (b) the European Communities which accept this Agreement and the Multilateral Trade Agreements and which schedules of concessions and commitments are annexed to the GATT 1994 and for which schedules of specific commitments are annexed to the General Agreement on Trade in services.

Besides the original members, other States may accede to this Agreement and the Multilateral Trade Agreements annexed thereto. The decision on accession is taken by the Ministerial conference by a two-thirds majority of the members. The WTO is tending to become Universal Organisation. China has already become its member. Russia may also follow the suit in near future.

Withdrawal from Membership

Any member may withdraw from this agreement by giving a written notice to the Director General of the WTO. The withdrawal takes effect upon the expiry of said six months.

Structure

The WTO consists of the following bodies :

(1) The Ministerial Conference.—The Ministerial Conference, which is the highest body, is composed of the representations of all the members. It is the executive of the WTO and carries out the functions of the WTO. It meets atleast once every two years. It has the authority to take decisions on all matters under any of Multilateral Trade Agreements on the request of the members.

(2) The General Council.—In between the meetings of the Ministerial Conference (MC) its functions are carried out by the General Council which is composed of representatives of all the members. It can meet as many times as is appropriate and necessary. It is thus an executive forum of the WTO. The General Council has three functional council working under its supervision and guidance. These functional commissions are following :

(i) Council for Trade in Goods;

(ii) Council for Trade in Services; and

(iii) Council for Trade Related Aspects of Intellectual Property Rights (TRIPS).

Subsidiary bodies.—The above three council may establish subsidiary bodies. Subject to the approval of their respective councils, these subsidiary bodies shall make their respective rules of procedure

(3) The Dispute Settlement Body.—The disputes settlement understanding envisaged a Disputes Settlement Body. The Disputes Settlement Body is empowered to have its own chairman and to frame rules of procedure as it deems necessary for the discharge of its responsibilities.

(4) Trade Policy Review Body.—As envisaged in TPRM Trade Policy Review Body shall be convened by the General Council. The Trade Policy Review Body may have its own chairman and may frame such rules of procedure as are necessary for the discharge of its responsibilities.

(5) The Committee on Trade and Development the Committee on Balance of Payment Restrictions and Committee on Budget Finance and Administration.—These committees were to be established by the General Council to carry out the functions assigned to them by the Agreement and by the Multilateral Trade Arguments and additional functions assigned to them by the General Council. The General Council may also establish such additional committees with such functions as it may deem appropriate. The representatives of all members shall be the members of these committees.

(6) Bodies provided under the Plurilateral Trade Agreements.—These bodies shall carry out the functions provided to them under those agreements and shall operate within the institutional framework of the WTO. The General Council shall be kept informed of the activities of these bodies on a regular basis.

(7) The Secretariat.—The WTO provides for a Secretariat headed by a Director General. The Director General shall be appointed by the Ministerial Conference. The Ministerial Conference shall also adopt regulations setting the powers, functions, conditions of services and terms of office of the Director General. The members of the staff of the Secretariat shall be appointed by the Director General who shall also lay down their duties and conditions of service in accordance with the regulations adopted by the Ministerial Conference.

Functions of WTO.—As per Article III of the Agreement establishing WTO, the main functions of the WTO are :

(i) to facilitate the implementation operation, administration and the promotion of the agreement (i.e. of 1994) and the Multilateral Trade Agreements and also of the Plurilateral Trade Agreements;

(ii) to provide the forum for negotiations among its member in respect of multilateral trade relations regarding their matters under the agreements of GATT and also to provide a forum for further negotiations among its members regarding their multilateral trade relations and a framework for implementation of the result of such negotiations;

(iii) to administer the rules and procedures governing the settlement of disputes.

(iv) to administer the Trade Policy Review Mechanism (TPRM);

(v) to co-operate with the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD) or World Bank) and its affiliated agencies to bring about greater coherence in global economic policy making.

Decision-Making.—As in the GATT, the decision-making shall be by consensus. But where the consensus cannot be arrived at or is not possib'e the decision shall be arrived at by voting. Decisions in Ministerial Conference and the General Council shall be taken by a majority of the votes cast, each member of the WTO having one vote. This is however, subject to any other provision in the agreement or in the relevant Multilateral Trade Agreement.

The Ministerial Conference and the General Council possess the exclusive authority to adopt interpretations of this agreements as well as the Multilateral Trade Agreements. The decisions regarding the said interpretations shall be made by a three-fourths majority of the members. In exceptional circumstances an obligation of a member may be waived by the Ministerial conference provided that such a decision is taken by a majority of three-

fourths of the members. Decisions under Plurilateral Trade Agreements shall be governed by the provisions of the such agreements.

Dispute Settlement Mechanism.—The WTO provides for a Disputes Settlement Body (DSB) which is responsible for settlement of disputes. The Disputes Settlement Body (DSB) may establish panels for specific investigations, may constitute appellate body, may adopt reports of panels and Appellate Body and may exercise surveillance to ensure compliance with rules and recommendations and if necessary may also authorize retaliatory measures in cases of non-implementation of recommendations. For the purpose of investigation, the (DSB) has four subsidiary bodies —(i) Working groups; (ii) Panels; (iii) Permanent Expert Group; and (iv) Arbitration.

There are following main stages in settling disputes under the WTO :

(a) Consultation.—The first stage in the settling of disputes is consultation among the members concerned. The purpose of holding consultation is to arrive at mutually agreed and satisfactory solution. The holding of consultation does not prejudice the rights of the members. Any request for consultation ought to be notified to the DSB in writing specifying the reason for the request. When a member makes a request for consultations, it has to be replied promptly within ten days and to hold consultation within 30 days from the date of the request by the other member. Many a disputes are thus settled at this initial stage.

However, if a dispute is not solved through consultation within sixty days from the date of request the party may request the DSB for the establishment of a panel.

(b) Establishment of a Panel.—If the dispute is not settled through consultations, the member who sought the consultations may request the DSB to establish a panel. Such a request ought to be accompanied with full particulars of the dispute, details of consultations and the reasons for their failure. After considering the request, the DSB decides the establishment of a panel. The panel is composed of three or five panelists. The panel is established in consultation with the parties to the dispute. The panel functions as an expert team to help the DSB to arrive at a finding. If the dispute is between a developing and developed country and if the country so desires, one panelist ought to be from a developing country. The panelists are selected by the Secretariat. The panelists serve in their individual position and not in their official position.

(c) Report of the Panel.—After examining the complaint, the Panel prepares its report containing the findings and recommendations. The Panel has to submit its report within six months and in case of urgency within three months. In any case the maximum time which the panel can take to circulate the report to the members is nine months.

(d) Adoption of Panel Report.—The DSB then adopts the report within 60 days but not earlier than 20 days. The members having objections may state their reasons in writing for circulation before DSB meeting at which report will be considered.

(e) Appellate Review before Standing Appellate Body (SAB).—The WTO provides for a Standing Appellate Body (SAB) to hear appeals. The panel's decision can be challenged in the SAB by either party to the dispute. It is provided that the Appeal proceedings must not generally exceed 60 days and in no case 90 days. The Standing Appellate Body (SAB) comprises of seven persons who have distinguised themselves in the field of law and international trade.

(f) Implementation.—There is provision for prompt compliance of the rulings or recommendations of the Standing Appellate Body (SAB). Thirty days after the adoption of the report by the panel or the decision of the Appellate Body, it is the obligation of the party concerned to inform DSB its willingness or otherwise to implement the rulings or recommendations. If the member concerned fails to implement within the reasonable time it is obliged to start the negotiations with the complainant. If the negotiations fail or satisfactory compensation is not agreed, the complainant may approach the DSB to suspend concessions or obligations against the other party. This is the last remedy available to an aggrieved member.

Acceptance, Entry into force etc.—The acceptance of the agreement could be made by signature or otherwise by members of GATT, 1947 and the European communities, which were eligible to become members of WTO as per Article XI of the agreement. A member accepting this agreement after its entry into force would be required to implement those concessions and obligations in the Multilateral Trade Agreement which would be required to be implemented over a period of time beginning with the entry into force of this agreement as if it accepted this agreement on the date of entry into force. In case of Plurilateral Trade Agreement shall be governed by the provisions of that agreement.

WTO in Action.—Since Ministerial Conference is the highest body of WTO, it will be worthwhile to discuss first the Ministerial Conferences held so far.

The First Ministerial Conference, 1996 (Singapore).—As noted above the Ministerial Conference, the highest body of the WTO meets atleast once in every two years. After the WTO came into existence on January 1, 1995, the First Ministerial Conference was held at Sunetec city of Singapore from December 9, to December, 13, 1996. Trade Ministers of 128 Member countries and observer representatives from 28 countries who were seeking to become members participated the conference. At the end of the conference declaration of 23 paragraph was made. This declaration was not a new treaty, it was simply a political statement negotiated by Trade Ministers. The statement dealt with six problem areas—(i) labour standards; (ii) Investment; (iii) Competition policies; (iv) Government procurement; (v) textiles; (vi) agriculture, while the first four were new issues, the last two were old issues. Yet another issue mentioned in the declaration was relating to Information Technology in which the U.S. was very much interested. But a trade agreement on information technology could not be materialised.

The Second Ministerial Conference, 1998 (Geneva).—The Second Ministerial Conference was held at the headquarters of the United Nations from May 18, to May 20, 1998. This conference was attended by 132 member nations. There were three main features of this Ministerial Conference—(i) celebrations on 50th anniversary of Multilateral Trading Year; (ii) a ministerial declaration; and (iii) a new agreement on some commercial transactions on the internet.

1998 being the 50th anniversary of the GATT which came into existence in January 1948 after a signing of an interim agreement by 23 countries including India, a day long commemoration of the event was made on May 19, 1998. The second feature was the adoption of a declaration laying the foundation for next year for a new set of global talks in certain areas such as TRIPs, TRIMs, the dispute settlement process, Technical Barriers to Trade (TBT), the improvement of the trading powers of the least developed countries including the poorest nations of the world located mainly in Africa and trade issues.

The third main feature of the second ministerial conference was the conclusion of an agreement on duty free trade in electronic commerce. Though e-commerce being very much in infancy, it was likely to rapidly develop and the US having the largest number of internet users was to gain most from keeping this trade duty free.

The Third Ministerial Conference, 1999 [Seattle (US)] and November, 2001.—The Third Ministerial Conference of the WTO was held at SEATTLE in the State of Washington from November 30, 1999 to December 3, 1999. This conference was attended by 135 Member nations and observers from about 30 nations. Prior to the conference consultations of Ministers were held at LAUSANNE on October 25 and 26, 1999 for evolving a consensus among the major participating members but no consensus could be arrived at. The ministers were not expected to take any decision on a further opening of national markets of trade, their task was limited to evolve a consensus on an agenda for negotiations to start in the year 2000.

The Seattle Conference had to decide which of the following main issues ought to be taken from January 2000 and also what broad scope of negotiations ought to be :

(i) Agricultural products;

(ii) Services;

(iii) Tariffs on industrial products;

(iv) Implementation of TRIPs, textiles and anti-dumping duties and subsidies;

(v) New issues such as foreign investment, competition policies, transparency in government and e-commerce;

(vi) Non-trade issues such as linkage between trade and labour and linkage between trade and development.

Different stands were taken. While the US preferred on the agenda of WTO core labour standards, environment protection, industrial tariffs, e-commerce, transparency in government procurement practices the European Union, Japan and few other industrialized countries wanted comprehensive discussions on all new issues such as investment rules, competition policy, government procurement, labour and environmental standards, industrial tariffs. On the other hand, developing countries including India wanted the future work programme of the WTO confined to the 'built in' agenda of the existing agreements. They wanted negotiation for the liberalisation in the agricultural and service sectors as well as the reviews of the existing agreements.

The Seattle Ministerial Conference was marred by protests and demonstrations by NGDs and organised labour under the American Federation of Labour and congress of Industrial Organisations. About 50,000 people from different parts of the world staged demonstration against anti-people policies of the WTO and against its secretive, unaccountable supra-national nature and interference in national regulations. The conference collapsed on December 3, 1999 following the united protests of the members of the developing nations against lack of transparency and imposition of the view of the rich and the developed countries on the poor countries in the negotiation process. The four-days talks of the 135 members of the WTO was finally suspended by the chairperson stating that 135 nation members were raising too many complex issues in too short a time. He added that talks would resume as soon as the conditions became ripe. As a matter of fact, the four-day conference in Seattle had begun with a complex ominous note as 50,000 trade unionists, environmentalists, feminists and students staged protests and demonstrations which disrupted the conference, It was the imposition of curfew which helped the session get off the ground. However, ultimately the session had to be suspended because of the reasons mentioned above.

Doha (Qatar) Ministerial Conference (November, 2001).—During the Doha Ministerial Conference, rich and poor nations were locked in a bitter battle on 11/11/2001 over World Trade Organisation to launch new global trade expanding talks. Earlier while criticizing the draft for not reflecting the concerns and objections of large number of 142 member countries, India demanded a covering letter to the draft listing differences and options on such critical issues if revision of the text was not possible at that stage. According to India, "the language suggested for 'trade and investment' and 'trade and competition' in the draft was extremely disturbing. "These two issues had been included despite the fact that there was no consensus on starting 'negotiations on them. India also shared the view or well known position that the WTO rules are sufficient to address all legitimate concerns relating to environment its inclusion in the latest draft was unsatisfactory. India was also disappointed with the draft declaration relating to outstanding implementation.

A major breakthrough, however, was reached by 142 WTO members when they reached a compromise deal at the Ministerial Conference on 12/11/2001 on Intellectual Property Rights (IPR) which was regarded as one of the contention and difficult implementation issues pertaining to access to medicine and public health concerns in poor and developing countries. The accord, known as TRIPs, however, made it clear that it "shall not prevent members from taking measures to protect public health."

Cancun (Mexico) Ministerial Conference (September, 2003).—Cancun (Mexico) Ministerial Conference started in the city of Cancun on 10th September, 2003 amidst protests and rallies. It may be noted here that before the start of the Cancun Summit, on 4th September, 2003, Indian Prime Minister, Sri Atal Bihari Bajpai had suggested that developing States should form a front.

The Cancun Summit was attended by 146 member Countries. Indian delegation of 60 members was led by Commerce Minister, Sri Arun Jaitley. India, Brazil, China and 18 other developing countries issued a joint statement alleging that that the prices of agricultural products of America and European countries were adversely affecting them. In fact, the Ministerial Conference started with disagreement on almost all issues. The leader of Indian Delegation, Mr. Arun Jaitley led the group of developing countries in expressing the concerns of developing countries. By then it had become clear that the Cancun Conference would also meet the same fate as the Doha Summit had done earlier. The main reason for this was that America and European countries were disregarding the interests and concerns of the developing countries. After talks of four days, Fifteen pages WTO draft that was presented was clearly in favour of America and European countries and further served their interests. Under the leadership of India, Brazil and China, the Group of G-20 countries insisted on the abolition of subsidies and concessions of farm products of developed countries. This was not acceptable to the developed countries. In view of the opposition of India and other developing countries no draft could be accepted and passed. However, the most remarkable achievement of the Cancun Conference was the unity and forming of a joint front by the developing countries.

WTO Director-General Supachai Panitchpakdi was, however, optimistic of putting global talks back on track after the setback at the Cancun Ministerial meet in September, 2003. He remarked, "Cancun was disappointing but we need to move forward with the co-operation of all the member countries to salvage WTO.....We may not get everything but we shall have to make the best of the situation.

Six months after Cancun Ministerial Conference of WTO broke up in disarray in March 2004, the member States were making efforts to resume global trade liberalisation talks by solving one of the toughest issues: agriculture.

It may be noted here, as remarked by Celine Charveriat of Oxfan International, "The failure (of Cancun Ministerial Conference) was probably a necessary evil, which held rich countries understand that the era when they could make developing countries swallow anything is over." Further, in her view, the "G-20" is resolute and united. Developing countries have now a louder voice in the "G-20" group they formed last year around India and Brazil, which opposed farm subsidies.

Soon after the failure of negotiations at Cancun, senior U.S. trade representative, Robert Zoellick, announced that U.S. would favour bilateral and regional trade deals with individual block or countries instead of the multilateral accords bartered with all the WTO's members. But in the course of time, U.S. attitude was mellowed and the U.S. turned back on that attitude. This is evident from the fact that despite the fear that U.S. Presidential elections would undermine efforts to bridge the divide this year it was reported by the negotiators that the climate was improving. Giving a strong boost to the revival effort at the beginning of the year Zoellick sent a letter to 145 counterparts assuring them that the U.S. did not want to make 2004 a "lost year" for world trade. Further, the U.S. distanced itself from a joint position concluded with the European Union last summer, in saying now that it now backed attempts to fix a deadline for elimination of subsidies for agricultural exports, a key demand of the developing countries which had been turned down in Cancun.

The WTO and India

Though the Government of India all along maintained that India would definitely benefit by joining the WTO, critics have severely opposed this view. The assertion of the government that the new GATT agreement *i.e.* GATT 1994 Agreement is "the only hope for an equitable and just international order on trade" does not seem to be correct. As pointed out by former Commerce Secretary Mr. S.P. Shukla, "Even a cursory acquaintance with the origin and operation of GATT the history of pressure and arm twisting that surrounded the beginning, the middle and the end of the Uruguay Round and the unashamed pursuit of more extraneous issues such as environment labour standards and human rights by the United States and the European Union even before the new regime was adopted—should

be adequate for any being of ordinary intelligence to perceive the inequitous unjust, intermidatory and G-7 biased character of new regime and its instruments. "Further to pretend that the new regime is something benign and just is to live in a fool's paradise."

Some of the aspects of the new agreement, for example, TRIPs agreement have gone to such extent that they read more like a municipal law and not international law, which it was supposed to be or ought to have been. A pertinent question, therefore, arises as to what is the legal position of the Final Act *vis-a-vis* the Constitution of India with a view to ascertain this, an independent judicial commission consisting of three retired judges of the Supreme Court—Justice D.A. Desai, Justice O. Chinappa Reddy and Justice V. R. Krishna Iyer examined the question whether the GATT, 1994 Final Act has breached the basic structure of the Constitution of India in any way and whether it is violative of Fundamental rights in any manner. Set up at the initiative of the National Working Group of Patent Laws and the independent initiative, the Commission is known as the "People's Commission on Dunkel Text". However, as made clear by Justice Iyer in a Press statement, "we agree that we have no authority in any sense to make the pronouncement. Indeed, we do not want to claim the capacity and wish to emphasise that we propose to do so in the way of a report should be meant for people's better understanding of the legal facets of the Final Act *vis-a-vis* India the Constitution and its people. Among those who deposed to before the Commission were Mr. George Fernandes of the Janata Dal, Mr. T. N. Chaturvedi of the Bhartiya Janata Party and Mr. S. P. Shukla, the former Commerce Secretary and Finance Secretary to the Government of India. The Commission gave its decision (rather opinion) in the last week of March, 1996. According to the Commission the new International Trade Treaty (*i.e.* GATT, 1994) would be violative of the basic structure of the Constitution because this would violate the rights of people to medicine, food articles and living standards. The Commission also pointed that before signing the treaty States and the Parliament were not consulted. This would also lead to unprecedented increase in the prices of medicines. Thus Dunkel Proposal and ultimately GATT, 1994 were against the interests of India. It is also significant to remember that in September, 1991 as many as 250 Members of Parliament of prominent political parties of the country had requested the government to refuse to accept proposals relating to patents and not to be pressurised by the western countries in this respect.

On 13th December, 1997, the developed and the developing countries entered into a 'historic' accord to remove international barriers to the expansion of banking, insurance and securities. Though termed 'historic', there was in fact no cause for jubilation. It was clearly an accord for the rich. So far as India was concerned it might be bonanza for some of the U.S. companies who were keen to enter Indian markets in those fields. The accord was negotiated and concluded at Geneva by 132 countries. Following the accord, India was required to allow opening of 12 branches of foreign banks in a year as against 8 at present in a "rationale and non-discriminatory" basis *i.e.* on most favoured nation basis. Though India did not make any commitment to open the insurance sector, according to experts, it seemed certain that as in the case of banks, India would not be able to withstand U.S. pressure for a long time in this sector also.

As regards intellectual property rights and patents also India's stands are crumbling under the U.S. pressure and India finds herself in an unenviable position. The U.S. stand was confirmed by the WTO which asked India to make the desired changes in her law in respect of intellectual property rights and patents. India could have benefited by joining the WTO if she was successful in increasing her share in world trade. But unfortunately that has not taken place due to *inter alia,* political instability and rampant corruption, especially at high levels. Since it is now too late to retract her steps, the only option left is to mend her domestic fences with all vigour and strength at her command and compete with other countries to increase her share in the world trade.

On 18th May, 1998, India's Commerce Minister, Ram Krishna Hegde told the opening session of WTO's Second Ministerial Conference at Geneva that India remained deeply committed to the success of the multilateral trading system but the imbalances in the existing system must be corrected keeping in perspective the interests of the "most under privileged amongst us." India took at a proactive stand at the WTO meeting demanding

amendments to the trade related intellectual properties agreement (TRIPs), improved market access in services and better deal in agriculture. As regards the TRIPs agreement, the Indian Commerce Minister pointed out that the transition period of ten years allowed to the developing countries to introduce product patent had been effectively neutralized by another clause in the agreement that requires these countries to grant exclusive marketing rights much before the deadline. He also underlined the need for reviewing TRIPs for providing improved protection to indigenous know-how of which there is abundance in India.

Further, the Indian Commerce Minister also pointed out the double standards followed in the WTO agreement on trades in agriculture and said that while the majority of the developing countries were prohibited from using export subsidies, the same was permitted to the developed countries provided their budgetary outlays on these subsidies were within their reduction commitment. This, he pointed out, was obviously unfair because the countries which have been distorting the market in the past continued to maintain the subsidy regime while others have been prohibited from using such measures. He also expressed concern on the general agreement on trade in services (GATS) because while India's comparative advantage in providing services by professionals was not being allowed to be exploited, there was unabating pressure on India to open up markets to services where the developed world has an advantage.

Since the joining of the WTO, India's experiences have been far from satisfactory, rather they have been bitter. For example, in the first week of November, 2001 at Doha meeting of the Ministerial Conference India strongly opposed the second draft of the Ministerial meeting and termed as "extremely disturbing" attempts to bring in new issues like investment and competition into the work programme of the WTO. India criticised the draft for not reflecting concerns and objections of large number of 142 member countries and demanded a covering letter to the draft listing differences and options on such critical issues of revision of the text was not possible at that stage. Indian delegation led by Commerce Secretary, Mr. Prabir Sen Gupta said that the language suggested for 'trade and investment' and trade and competition in the draft was extremely disturbing. Indian delegation was surprised and upset to find that the earlier paras giving options on investment and competition had been dropped and the draft contained only the option of negotiations. What upset India most was that these two issues had been included despite the fact that there was no consensus on starting negotiations on them.

India and several other developing countries voiced strong opposition to the negotiating option as well as the so-called "option/options" approach on investment and competition. According to Indian delegation the latest draft with regard to environment was also unsatisfactory as it expressed desirability on negotiations after the fifth ministerial Conference. India's position with regard to this was that WTO rules were sufficient to address all legitimate concerns relating to environment. As regards transparency in government procurement and trade facilitation Indian delegation said "the draft clearly proposes negotiations while, we have all along been urging for continuation of the study process, inasmuch as there is no consensus as yet even on elements like scope and definition". The four issues—(i) competition; (ii) investment; (iii) trade facilitation and transparency; and (iv) government procurement; have come to be known as the, Singapore issues. India was also disappointed with the draft declaration relating to outstanding implementing issues.

Doha meeting of Ministerial Conference, which was attended by 2600 delegates from 142 WTO members achieved a major breakthrough with regard to Intellectual Property Rights (IPR) which was hitherto a contentious and implementation issue pertaining to access pertaining to medicine and public health concerns in poor and developing countries. It was provided in the accord that known as TRIPs that it "shall not prevent members from taking measures to protect public health" The developing countries including India had opposed the U.S. and Switzerland over the right to override patents and have open access to cheaper generic drug in times of epidemics. India, Brazil and other developing countries wanted the right to produce or import cheaper generic version of which even though may be violative of international trade rules.

The Cancun Ministerial Conference in September, 2003 for the first time demonstrated that with the emerging unity among the developing countries the rich countries must realize that the era when they could make developing countries swallow anything is over. The greatest achievement of Cancun Conference for the developing countries has been the unity and joint front of G-20 countries around India, Brazil and China. It is imperative now in their own interests to remain united.

Thus, India's experience so far after joining the WTO has been far from satisfactory. Since it is now too late to retract her steps, the only remedy left to her is increase its exports and share in world trade. But alas! that goal seems to be too far and elusive.