CHAPTER 17

THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA AND SEA-BED DISPUTES CHAMBER

Introduction.—Article 287 of the U.N. Convention on the Law of the Sea provides that when signing, ratifying or acceding to the convention or at any time thereafter a state shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention :

(a) The International Tribunal for the Law of the Sea established in accordance with Annex VI.
(b) The International Court of Justice ;
(c) an arbitral tribunal constituted in accordance with Annex VIII;
(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.[1]

It is further provided that a declaration made under paragraph 1 of Article 287 shall not affect or be affected by the obligation of a state party to accept the jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI of the Convention, section 5.[2] Further, a State Party, which is a party to the dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.[3]

The United Convention on the Law of the Sea, 1982 having come into force on November 16, 1994 vigorous efforts were made to establish the International Tribunal for the Law of the Sea. The seat of the Tribunal is in the Free and Hanseatic city of Hamburg in the Federal Republic of Germany. The Tribunal may, however, sit and exercise its functions elsewhere whenever it considers this desirable. In August, 1996, 21 Judges of the Tribunal were elected. In accordance with the Law of the Sea convention, they were elected on the basis of 'equitable geographical distribution'. Dr. P.C. Rao of India was also elected as one of the Judges of the Tribunal. After all formality were completed, the Tribunal was finally established on 21 October 1996.[4]

Composition.—The International Tribunal for the Law of the Sea comprises of a body of 21 members, elected from among persons enjoying the highest reputation of fairness and integrity and of recognized competence in the field of the law of the sea. In the Tribunal as a whole the representation of the principal legal system of the world and 'equitable geographical distribution' shall be assured.[5]

No two members of the Tribunals may be the nationals of the same State. There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations.[6] On August 1996, twenty one members of the Tribunal were elected on the basis of 'equitable geographical distribution' out of these

1. Article 287, paragraph 1.
2. Article 287, para 2.
3. Ibid., para 3.
4. Article 1 of the Statute of the International Tribunal for the Law of the Sea, Annexe VI of the U.N. Convention on the Law of the Sea, 1982.
5. Article 2 of the Statute.
6. Article 3.

21 members, 5 are from Asia, 5 from Africa, 4 from Western Europe 4 from Latin America and, Caribbean States and 3 from Eastern Europe.

The members of the Tribunal are elected for nine years and may be re-elected; provided however, that the of the members elected at the first election, the terms of seven members shall expire at the end of three years and the terms of seven more shall expire at the end of six years. The members of the Tribunal whose terms are to expire at the above-mentioned initial period of three and six years shall be chosen by lot to be drawn by the Secretary-General of the United Nations immediately after the first election.[7]

Access to the Tribunal.—All the State Parties to the U.N. Convention on the Law of the Sea have access to the Tribunal. The Tribunal shall be open to entities other than State Parties in any case expressly provided in Part XI of the Convention or in any submitted persuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.[8]

Applicable Law.—The Tribunal shall decide all disputes and applications in accordance with Article 293 of the Convention on the Law of the Sea. According to Article 293, the Tribunal shall apply the Convention and other rules of international law not incompatible with the Convention. However, this will not prejudice the power of the Tribunal to decide a case *ex acquo et bono,* if the parties so agree.

Any decision rendered by the Tribunal shall be final and binding and shall be complied with by all parties to the dispute. But any such decision shall have no binding force except between the parties and in respect of that particular dispute.[10]

Jurisprudence.—According to Article 288 of the Convention on the Law of the Sea, 1982, the Tribunal shall have jurisdiction over any dispute concerning the interpretation or application of the Convention which is submitted to it in accordance with Part XV of the Convention. The Tribunal shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes to the Convention, which is submitted to it in accordance with the agreement.

In the event of a dispute as to whether the tribunal has jurisdiction, the matter shall be settled by decision of the Tribunal.

Thus the Tribunal exercises jurisdiction over all disputes and all applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.[11] As regards reference of disputes subject to other Agreements, Article 22 of the Statute of the Convention provides that of all the parties to a treaty or convention already in force and concerning the subject matter covered by the Law of the Sea Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal.

Thus the jurisdiction of the Tribunal is not compulsory. It is optional and voluntary and based on the consent of parties to the dispute.

Sea-Bed Disputes Chamber

Composition.—Article 186 of the Convention on the Law of the Sea provides that the establishment of the Sea-Bed Disputes Chamber and the manner in which it shall exercise its jurisdiction shall be governed by the provisions of section 5 of Part XI, Part XV and Annex VI of the Convention. Article 14 of the Statute (Annex VI) provides that a Sea-Bed Disputes Chamber shall be established in accordance with the provisions of

7. Article 5.
8. Article 20. See also Article 291 of the Convention.
10. Article 296 of the Convention.
11. Article 21 of the Statute.

section 4 of Annex VI containing Articles 35 to 40. Article 35, of the Statute, which deals with the composition of Sea-Bed Disputes Chamber, provides that the Sea-Bed Disputes Chamber shall be composed of 11 members, selected by a majority of the elected members of the Tribunal from among them. In the selection of the members of the Chamber, the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.

The members of the Chamber shall be selected every three years and may be selected for a second terms. The Chamber shall elect its President from among its members, who shall serve for the terms for which the Chamber has been selected.

The Sea-Bed Disputes Chamber may form *ad hoc* chamber, composed of three of its members, for dealing with a particular dispute submitted to it in accordance with Article 188, paragraph 1(b).

Special Chambers.—The Tribunal may form such chambers, composed of three or more of its elected members, as it consider necessary for dealing with particular categories of disputes. This is provided in Article 15, paragraph 1 of the Statute of the Tribunal. Acting pursuant to this provision the Tribunal at a meeting on 14 February 1997 formed Special Chamber for Fisheries Disputes. The Tribunal at its meeting on 20 February 1997 selected seven members of the Tribunal to serve in the **chamber for Fisheries Disputes.** The seven members selected are : Hugo caminos, Soji Yamamoto, Paul Bamela Engo, P. Chandrasekhara (India), David H. Anderson, Edward A. Laing and Gudmundur Eiriksson. The term of office of these members will end on 30th September 1999. The Tribunal also decided that the Chamber for Fisheries Disputes will be available to deal with disputes which the parties agree to submit to it concerning the interpretation or application of any provision of :

(a) U.N. Convention on the Law of the Sea concerning the conservation and management of marine living resources ; and

(b) any other agreement relating to the conservation and management of marine living resources which confers jurisdiction on the Tribunal.[12]

On the same date *i.e.* on 14 February 1997, the Tribunal formed a **standing special chamber for Marine Environment Disputes** on 20 February 1997, the Tribunal selected seven members to svine on this special chamber. The members selected are : Rudiger Wolfruom (President of the Chamber), Alexander Yankov, Soji Yamamoto, Antoly L. Kolodkim, Choon-Ho Park, Joseph S. Warioba and Mohamed Mouldi Marsit. The term of the office of the members will end on 30 September 1999. The Tribunal also decided that the Chamber will be available to deal with disputes which the parties agree to submit to it concerning the interpretation or application of any provision of :

(a) the United Nations Convention on the Law of the Sea concerning the protection and preservation of marine environment.

(b) special convention and agreements relating to the protection and preservation of the marine environment referred to in Article 237 of the convention; and

(c) any agreement relating to the protection and preservation of the marine environment which confers jurisdiction in the Tribunal.[13]

Advisory opinions.—According to Article 191 of the U.N. Convention on the Sea, the Sea-Bed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council of the International Sea-Bed Authority on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.

12. See Doc. ITLOS/1997/Res/of 30 April 1997.
13. See ; Doc. ITLOS/1997/Res. 2 of 30 April 1977.

Finality and Binding Force of Decisions.—The decision of the Tribunal is final and shall be complied with by all the parties to the dispute. But the decision of the Tribunal shall have no binding force except between the parties and in respect of that particular dispute. In the event of dispute as to the meaning or scope of the decision, the Tribunal shall construe it upon the request of any party.[13a]

Cases Decided by the International Tribunal for the Law of the Sea.—Following are the cases which have been decided by the Tribunal :—

(1) *The M/v. "Saiga" case (Saint Vincent and the Grenadines* v. ***Guinea***)[14]

(2) *The M/v. "Saiga" case (Saint Vincent and the Grenadines* v. *Gunia)*[15].—Request for Provisional measures.

N.B.—These cases have been discussed in the preceding chapter on "the Law of the Sea".

Agreement on Cooperation and Relationship between the U.N. and the International Tribunal for the Law of the Sea

On 18th December, 1997 the U.N. and the International Tribunal for the Law of the Sea (ITLOS) entered into an Agreement on Cooperation and Relationship for the Law of the Sea.[16] Under the agreement the U.N. recognizes ITLOS as an autonomous international judicial body with jurisdiction as provided for in the relevant provisions of the Convention and the statute of International Tribunal annexed thereto.[17] As regards cooperation and coordination, Article 2 of the agreement provides that the U.N. and the International Tribunal with a view to facilitating the effective attainment of their objections and the coordination of their activities, will : (a) consult and cooperate, whenever appropriate, on matters of mutual concern; and (b) pursue whenever appropriate, initiatives to coordinate their activities.

The agreement also provides for reciprocal representation,[18] exchange of information and documents,[19] Personnel arrangement,[20] Administration cooperation,[21] Budgetary and Financial matters,[22] Financing of Services[23] etc. As regards reports to the U.N., Article 5 provides that the International Tribunal shall keep the U.N. informed of its activities that may require the attention of the U.N. For this purpose, the International Tribunal may, when it deems it appropriate : (a) Submit reports to the U.N. through the Secretary General of the U.N. (b) Notify the Secretary General of the U. N. whenever in its opinion, a question within the competence of the security, in particular relating to the application of Article 298, paragraph 1(c) of the Convention arises in connection with the work of the International Tribunal. As regards Conference services, the Agreement provides that upon the request of the International Tribunal on a reimbursable basis, such facilities and services as may be required for the sessions of the International Tribunal including translation and interpretation services, documentation and conference services.[24]

The agreement has already entered into force because as required under Article 14, both the General Assembly of the U.N. and the International Tribunal have approved it.

13a. Article 33 of the Statute.
14. Decided on 4th December, 1997.
15. Decided on 11th March, 1998.
16. See ITLOS/INF 29 dated 12th March, 1998.
17. Article 1 of the agreement.
18. Article 3.
19. Article 4.
20. Article 6.
21. Article 8.
22. Article 10.
23. Article 11.
24. Article 7(1).

Conclusion.—The establishment of the International Tribunal for the Law of the Sea is a great landmark in the development of the Law of the Sea. In some circles its establishment has been criticised on the ground that it was not necessary in the presence of the International Court of Justice. This criticism does not seem to be justified. The codification of the entire law of the sea which covers nearly 71.4% of the earth's space, would have been incomplete if it did not provide dispute settlement mechanism. A right without a remedy is meaningless and contradiction in terms. Law of the sea has its own special problems and may involve special disputes and can be better dealt with by a Law of the Sea Tribunal, rather than by a general tribunal such as the International Court of Justice. Though it is true that the International Tribunal of the Law of the Sea is only one of the means of for the settlement of disputes relating to the Law of the Sea including the interpretation or application of the U.N. Convention on the Law of the Sea and the Jurisdiction of the International Court of Justice has been left intact, yet the importance of the International Tribunal for the Law of the Sea cannot be undermined because it is best suited to deal with the disputes relating to the Law of the Sea. The dispute relating to the Law of the Sea requires special dealing by men who are well versed and are of recognized competence in the field of Law of the Sea. This is manifest from the fact that alongwith the establishment of the International Tribunal for the Law of the Sea, provision has been made for the establishment of Sea-Bed Disputes Chamber, Special Chambers and ad hoc chamber for dealing with special problem and disputes relating to the Law of the Sea, yet another reason which justifies the establishment of the International Law of the Sea and adds to its significance is that the International Sea-Bed Authority is an unique International organization. It will not only grant licences and contracts for sea-bed mining but will itself undertake the exploration and exploitation of the sea-bed of the International Sea-Bed Area. For such an undertaking of commercial nature it is necessary that the disputes arising in the process must be settled promptly. The International Tribunal for the Law of Sea is best suited to perform these tasks.

CHAPTER 18

PIRACY*

Definition.—There has been a great controversy in respect of the definition of the term 'piracy'.[1] According to traditional international law, navigation in the high seas with the object of committing violent acts against other persons and property for private (or their own) interests and without being authorised or permitted by any State, is called 'piracy'. Different jurists have given different definitions of the term 'piracy'. But as remarked by Story, J., in *United States* v. *Smith*[2] , "Whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea *animo furandi,* is piracy." In an American case[3] , the Federal Court expressed the view that the armed ship in the sea should be under the authority of some State and if such a ship is not under the authority of any State, it would be treated in the category of pirate ships, irrespective of the fact whether it has committed piracy or not. The law relating to piracy was codified in the Geneva Convention on High Seas, 1958. Article 15 of the Convention defines 'piracy' in the following words : Piracy consists of any of the following acts :

(1) Any illegal act of violence, detention or any act of depredation committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed (a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft ; (b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft.

(3) Any act of inciting or of internationally facilitating an act described in sub-paragraph (1) or sub-paragraph (2) of this article.[4]

"The only clear innovation in the provision ..... is the reference to aircraft, a sensible application of analogy. The essential feature of the definition is that the acts must be committed for private ends. It follows that piracy cannot be committed by warships of other government ships, or government aircraft, except where the crew has mutinied and taken control of the ship or aircraft (Article 16). Acts committed on board a ship by the crew and directed against the ship itself, or against persons or property on the ship, are not within the definition." [5]

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty to that act.[6]

Essential elements of 'piracy'.—Following are the essential elements of piracy :

(1) Violence or robbery at high seas must be for private ends. Such acts committed by warships, Government ships or aircraft cannot be called

---

* See also for I.A.S. (1973), Q. No. 3(d) ; I.A.S. (1961), Q. No. 2 ; I.A.S. (1958), Q. No. 3 ; P.C.S. (1969), Q. No. 3(e) ; C.S.E. (1994) Q. 5(c).

1. See Ian Brownlie, Principles of Public International Law, Second Edition (1968), p. 238 ; see also Serhassan Pirates (1845), 2 Wm. Rob. 354 ; The Magellam Pirates (1853), 1 Sp Fcc. Ad. 81 ; In re Piracy Jure Gentium, (1934) A.C. 586.
2. (1820) 5 Wheat 153, 161.
3. The Ambrose Light, (25 Fed. Rep. 408).
4. The definition noted above has been retained without any change in Article 101 of U.N. Convention on the Law of the Sea, 1982.
5. Brownlie, see supra note 1, at p. 239.
6. Article 17 of the 1958 Geneva Convention on the High Seas. This provision has been retained in 1982 Convention on the Law of the Sea.

'piracy'. For example, in the Second World War German U-Boats sank enemy ships in the area of long-distance blockade in the high seas without any prior intimation. This act cannot be called 'piracy' because it was committed under the authority of the State of Germany. In fact, this act is violation of the laws and custom of war and is a war crime.

(2) Illegal acts of violence, detention or any act of depredation committed for private ends must be against the crew or passengers of a private ship or private aircraft. The only exception of this is recognised in Article 16 which provides that the acts of piracy committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

(3) Illegal acts of violence, detention or any act of depredation may be either on the high seas or in a place outside the jurisdiction of any State.

(4) Such acts must be directed against a ship, aircraft, persons or property.

(5) Violence, detention or any act of depredation may constitute piracy provided that above elements are satisfied.

(6) Committing of actual robbery is not essential for piracy. Even an unsuccessful attempt to commit robbery at high seas will constitute piracy. This was held in *Re Piracy Jure Gentium.*[7] The facts of this case are as follows :

In 1931, some Chinese citizens were arrested on the charge of piracy. They were tried in Hong Kong and held guilty. In this case accused had made an unsuccessful or abortive attempt to commit robbery at high seas. The Court was confronted with the question as to whether actual robbery was essential for piracy. The Hong Kong Court referred this question to the Privy Council for its opinion. The Privy Council held that for an act to constitute piracy, actual robbery is not essential. Even if an accused is guilty of making an unsuccessful attempt to commit robbery, he will be guilty of having committed piracy and will be punished.

(7) Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or aircraft will also constitute piracy.[8]

(8) Any act of inciting or of intentionally facilitating any illegal act described above will also constitute piracy.

Piracy by a war ship, government ship or government aircraft whose crew has mutinied.—According to Article 102 of the U.N. Convention on the Law of the Sea, the acts of piracy committed by a war ship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

Piracy committed by unrecognised insurgents.*—One of the important legal effects of the recognition of insurgency is that insurgents are not treated as pirates. But so long as they remain unrecognised, they can be apprehended and punished as they commit piracy. This can be understood with the help of following illustration : *P* and *A* are vessels owned by unrecognised insurgents against the established Government of Chile. Their purpose is to blockade and besiege the port. They carry arms and soldiers. For example *A*, in the course of her voyage, stops *X*, a French merchantman. By force *A* takes from *X* an official in the employment of the Government of Chile, as also a large quantity of coal without payment. *Y*, a British man-of-war appears on the scene. *Y* captures *P* and *A* both the vessels and their crew. *Y* condemns them as pirates.[9] Here *Y* is justified in capturing *P* and *A* and condemning them as pirates because acts of *P* and *A* constitute piracy in view of the definition and essentials of piracy discussed above. According to Article 21 of the Geneva Convention on the High Seas a Seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government

7. (1934) A.C. 586.
8. Article 15(2) of Geneva Convention on the High Seas.
* Asked in I.A.S. (1958) Q. No. 3.
9. See J.G. Starke, Introduction to International Law, Eighth Edition (1977), p. 307.

service authorized to that effect. Thus, *Y*, a British warship is justified in capturing *P* and *A*. As regards the jurisdiction to capture such vessels, Article 19 of the Convention on the High Seas propounds the theory of Universal jurisdiction whereby every State may seize a pirate ship or aircraft. The principle of Universal jurisdiction in respect of piracy is being discussed below in a little greater detail. *Y* was, therefore, justified in capturing *P* and *A* and condemning them as pirates.

Concept of universal jurisdiction in respect of the crime of piracy.—By universal jurisdiction in respect of a crime, it is generally meant that all States exercise jurisdiction in respect of that crime. When a crime is against the interests of international Community (*i.e., Delict Jure Gentium*) then all the States are entitled to apprehend and punish persons accused of such crimes.[9] The principle of universal jurisdiction applies in respect of the crime of piracy, war crimes,[10] and to some extent the crime of aircraft hijacking.[11] Persons accused of committing crime of piracy may be apprehended and punished because they are regarded as enemies of the whole mankind. In the words of Judge Moore : "A pirate is treated as an outlaw, as the enemy of mankind —*hostes humane generis*—whom any nation may in the interest of all capture and punish."[12] The concept of Universal jurisdiction has been accepted and adopted in the 1958 Geneva Convention on the High Seas. Article 19 of the Convention provides that on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The Courts of the State which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third pirates acting in good faith. This provision has been retained without any change in Article 105 of the 1982 U.N. Convention on the Law of the Sea.

There is a great controversy in respect of the property of the ship thus seized. According to the practice of States in the seventeenth century, the property of such a ship became the property of the State which seized the ship. But in the eighteenth century, it was generally accepted that the seized ship and its property should be returned to the real owners. This rule is called *pirata non mutat dominium.* It is still a prevalent rule. But if it is not clear as to who is the owner of the ship and its property, they become the property of the State which seized them.[13]

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.[14] As noted above, a seizure may be carried out by warships or military aircraft or other ships or aircraft on government service authorised to that effect.[15] A warship which encounters a foreign merchant ship on the high seas may board her on the ground suspecting that the ship is engaged in piracy.[16] This may be done on other grounds also if permitted by treaty.[17] In case, however, the suspicions prove to be unfounded, and provide that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.[18]

Piracy under Municipal law.—There is difference in the concept of piracy under International Law and Municipal Law. Some States may declare crimes those acts of violence, detention or depredations, which are not crimes under international law. On the

---

10. See the Eichman Case, (1926) 136 I.L.R. 277 where the Supreme Court of Israel upheld the exercise of Universal jurisdiction in respect of War Crimes.
11. See also Chapter on "State Jurisdiction".
12. The Lotus Case, P.C.I.J., Series A, No. 10 (1927), p. 70.
13. L. Oppenheim, International Law, Vol. I, Eighth Edition, pp. 616-617.
14. Article 20 of the Geneva Convention on the High Seas. See also Article 106 of the 1982 Convention on the Law of the Sea.
15. Article 21 ; See also Art. 107 of 1982 Convention.
16. Article 22 (1) (a).
17. Article 22 (1)
18. Article 22 (3).

other hand, States may also declare crimes lesser acts of violence than those declared by international law. For example, in England every British citizen who assists the enemy of the King or Queen or transports slaves in the high seas, is treated as a pirate. But foreigners can be treated as pirates only in accordance with the rules of International law.[19] Thus the concept of piracy in municipal law is different from that of international law.

19. To put it in the words of Oppenheim : "..... Since a State cannot enforce its Municipal laws on the open sea against others than its own subjects it cannot treat foreigners on the open sea as pirates unless they are pirates according to the Law of Nations. Thus, when in 1958, before the abolition of slavery in America, British men-of-war molested American vessels suspected of carrying slaves, the United States rightly complained", see supra Note 13 at p. 617.

CHAPTER 19

AIR LAW (INCLUDING AIRCRAFT-HIJACKING)

Air space : Various theories regarding air space*

As pointed out earlier each State exercises complete sovereignty over its territory which comprises of lands, waters, maritime belts, air space, etc. According to the old view each State exercises sovereignty over its complete air space. In the modern times, this view is subjected to criticism and has been criticized by the jurists. There are several views or theories prevalent in this connection. According to the first view, air space is available for each State and the aircrafts of each State may pass through it without any obstruction. This view has been vehemently criticised because it is contrary to many international treaties. Each State exercises control over its air space and the aircrafts of another State can enter in its air space only after seeking its prior permission. In accordance with the second view, each State exercises control over its air space up to unlimited height. It is entitled to exercise complete control over it and may not permit the entry of the aircrafts of other States in this area. This view also does not seem to be correct because in view of the rapid scientific and technological developments aircrafts can go to a very high attitude. It is not possible for each State to exercise control over unlimited height. Since it is not possible to exercise control over unlimited air space, this view has lost much of its relevance. According to third view, a State exercises control over the lower strata of the air space and its sovereignty is limited only to that extent. This view seems to be better than the other two views mentioned earlier because sovereignty can be effective only when the State can exercise control over it. However, the greatest difficulty in the general acceptance of this theory is that no State is prepared to accept it affirmatively. According to the fourth view, the State concerned can make rules in regard to the outer space so as to ensure its security. But only a few States of the world have capability to enforce such rules. Lastly, each State has sovereignty over air space extending to the unlimited height subject only to the providing of innocent passage to the aircrafts of other States. Only a few States of the world can effectively exercise such sovereignty.

Thus there is a great controversy in respect of law relating to airspace. But there is general agreement regarding certain matters. There is general agreement that each State exercises over the airspace over its territory. This sovereignty is essential for the defence and security of the State. But at the same time there is need for the freedom of aerial navigation for commercial, scientific and humanitarian purposes. With a view to reconcile these conflicting needs, the concept of functional sovereignty has been suggested. There is also the urgent need of evolving the legal regime of air space as new branch of international law. In view of the great significance of the subject, a separate chapter has been devoted to "Air Law". However, due to paucity of space, it is proposed to discuss in this chapter only the following two aspects of Air Law—

I. Aerial Navigation.
II. Aircraft Hijacking.

I. Aerial Navigation**

A number of international conventions have been concluded to regulate aerial navigation. The more important of them are given below—

(*1*) *Paris Convention of Aerial Navigation 1919.*—This convention framed certain rules regarding aerial navigation during peace time. According to the convention, each State exercises complete sovereignty over its air space. Further, during peace, parties to

---

* See also for C.S.E. (1991) Q. 6(b).
** See also for I.A.S. (1957), Q. 7.

the convention will give innocent passage to the other State parties to the convention. The convention did not frame rules for the period of war.

(*2*) *Havana Convention.*—This convention was adopted mainly by the States of American continent. Several rules regarding aerial navigation were adopted under the convention.

(*3*) *Warsaw Convention, 1929.*—This convention framed certain rules relating to international transport of traffic and goods.

(*4*) *Chicago Convention on International Civil Aviation, 1944.*—Chicago convention is the most important of all treaties and conventions relating to aerial navigation. It was signed by 53 States. Five Freedoms of air were for the first time declared under this convention. Some of the important provisions of the Chicago Convention on International Civil Aviation, 1944 are as follows :

(i) The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.[1]

(ii) For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.[2]

(iii) The Convention shall be applicable only to civil aircraft, and shall not be applicable to State aircraft used in military, customs, and police services. No State aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement otherwise and in accordance with the terms thereof.[3]

(iv) Each contracting State agrees that all aircrafts of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observances of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission and subject to the right of State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights. Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions, of Article 7, have the privilege of taking on or discharging passengers, cargo or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations or limitation as it may consider desirable.[4]

(v) Last but not the least important provision runs as follows : No scheduled International Air Service may be operated over or into the territory of a contracting State, except with the special permission or other authorisation of that State, and in accordance with the terms of such permission or authorization.[5]

(vi) Aircrafts have the nationality of the State in which they are registered.[6]

(vii) An aircraft may be validly registered in more than one State, but its registration may be changed from one State to another.[7]

Thus aerial navigation is generally controlled by several international treaties. Besides these multilateral treaties and conventions, many States have concluded

1. Article 1 of the Chicago Convention on International Civil Aviation, 1944.
2. Article 2.
3. Article 3.
4. Article 5.
5. Article 6.
6. Article 17.
7. Article 18.

bilateral treaties which govern their relations to aerial navigation.[8]

*Five Freedoms of Air**.—Before and after the First World War many problems relating to international air transport arose. Because of the increase in the transport through airways, the need for definite rules of international law was felt. In order to evolve definite rules of international law regarding this a Conference was held at Chicago in 1944. This Conference is known as International Civil Aviation Conference, Chicago, November, 1944. This Conference declared the following five freedoms of air :—

(1) freedom to fly across foreign territory without landing ;

(2) freedom to land for non-traffic purposes ;

(3) freedom to disembark in foreign territory traffic originating in the State of the origin of the craft ;

(4) freedom to pick up in any foreign country traffic destined for the State of origin of aircraft ; and

(5) freedom to carry traffic between two foreign countries.

In order to give concrete shape to the above five freedoms two agreements were concluded. They are as follows :

(*1*) *Chicago International Air Services Transit Agreement, 1944.*—This agreement incorporated the first two freedoms.[9]

(*2*) *Chicago International Air Transport Agreement, 1944.*—This agreement incorporated the last three freedoms. But this agreement was signed by a very few countries.

Thus most of the States of the world agreed to provide the first two freedoms to each other. "The International Air Services Transit Agreement" or 'the two freedoms Agreement' has been widely accepted ..... The International Transport Agreement or the "five freedoms" Agreement on the other hand has had a few adherents and that its effect is minimal at best." [10] It may be noted here that in the absence of multilateral treaties most of the States regulate their relations through bilateral treaties. A brief reference may also be made here to the International Civil Aviation Organisation which was established in 1947. A large number of the States are its members. This Organisation has made many rules relating to International Air Transport and International Air Traffic. The ICAO has been discussed in a little greater detail under the chapter "Specialized Agencies". Following are the treaties which have been adopted under this Organisation :

(1) Convention of 1948 on the International Recognition of Rights in Aircraft.

(2) Rome Convention of 1952 on damage caused by foreign aircraft to their party on the service.

(3) Protocol of amendments of the Warsaw Convention, 1959 concerning the liability of the Air Carrier to passengers and Cargo concluded at Hague in 1955.

II. Aircraft-Hijacking**

Meaning and definition of 'Hijacking':—"Aircraft hijacking is a contemporary addition to the roster of international and national crimes and the necessity for its control at international and national level is only beginning to be recognised by States." [11] In its wide sense hijacking is an act against the safety of civil aviation and resembles piracy.[12]

---

8. For detailed study see also Bin Cheng and R.H.F. Austin, "Air Law" in The Present State of International Law and other Essays, Edited by Prof. Dr. Maarten Bos. (1973), pp. 183-200 ; S. Bhat, "Safety in Air—Recent Developments", I.J.I.L., Vol. 14 (1974), pp. 386-399.

* See also for I.A.S. (1973), Q. No. 11 (e) ; I.A.S. (1954), Q. No. 12 ; P.C.S. (1976), Q. No. 10(f) : P.C.S. (1969), Q. No. 4 : P.C.S. (1984), Q. 6; see also matter discussed above under the heading "Chicago Convention on International Civil Aviation, 1944".

9. Article 1 of the Agreement provides that each party to the Agreement grants to the other contracting States the following freedoms of the air in respect of scheduled international air services : The privilege to fly across its territory without landing ; (ii) The privilege to land for non-traffic purposes.

10. Edward Collins, International Law in a Changing World (1969), p. 173.

** See also I.A.S (1972), Q. No. 10(i) ; P.C.S. (1984), Q. No. 10(d)

11. Alone E. Evans, "Aircraft Hijacking : Its Causes and Cure", A.J.I.L., Vol. 63 (1969), p. 695.

12. See Dr. Sami Shubber, "Is Hijacking of Aircraft Piracy in International Law,"? BYBIL, Vol. XLIII (1968-69), p. 193 ; see also S.C. Chaturvedi, "Hijacking and the Law", I.J.I.L., Vol. 11 (1971), p. 89.

According to Article 11 of Tokyo Convention, 1963, when a person on board has unlawfully committed by force or threat thereof, an act of interference, seizure or wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve its control of the aircraft. Further, the contracting State, when the aircraft lands, shall permit its passengers and crew to continue their journey as soon as practicable and shall return the aircraft and its cargo to the persons lawfully entitled to the possession. Article 13 further provides that any contracting State shall take the delivery of any person whom the aircraft commander delivers and that it shall immediately make a preliminary enquiry into the facts. It is clear from the above provisions that an attempt to define the term 'hijacking' has not been made, but it simply imposes certain obligations upon a contracting State and lays more emphasis on the return of the hijacked aircraft and its passengers to those persons who are entitled to its possession and to permit its passengers and crew to continue their journey as soon as practicable.

Article 1 of the Hague Convention of 1970, provides that "Any person who on board an aircraft in flight : (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of that aircraft or attempts to perform any such act, or (b) is an accomplice of a person who performs or attempts to perform any such act, commits an offence ....." This provision also does not define the term 'hijacking', but simply mentions its essential elements which are following :

(i) Unlawful use of force or threat thereof or any other form of intimidation ;
(ii) To do above-mentioned acts with a view to seize that aircraft or to exercise control over it ;
(iii) The said acts should have been committed on board an aircraft in flight ;
(iv) Accomplice of person who performs or attempts to perform the above-mentioned act is also guilty of the offence of hijacking.

The above-mentioned essential elements are similar to those mentioned in Article 11 of the Tokyo Convention, 1963. The only innovation in 'Hague Convention, 1970' is that it includes an accomplice of a person who performs or attempts to perform any such act.[13] The wider concept of the offence of hijacking has been incorporated in the Montreal Convention, 1971.[14] Article I of the Montreal Convention, 1971, provides that any person commits an offence if he unlawfully and intentionally—(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft ; (b) destroys an aircraft in service or causes damages to such an aircraft which renders it incapable of flight or it is likely to endanger its safety in flight ; or (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it, which is likely to endanger its safety in flight; or (d) destroys or damages air navigation facilities or interferes with that operation if any such information which he knows to be false, thereby endangering the safety of an aircraft in flight. Besides this, it is further provided that any person also commits an offence if he attempts to commit any of the offence mentioned earlier or if he is an accomplice of a person who commits or attempts to commit any such offence.

Development of law relating to hijacking.—The increase in number of incidents of hijacking and increase in the dangers against the safety of the flights of aircraft presented grave problems before the international community and particularly before the International Civil Aviation Organisation. (I.C.A.O.). In order to solve this problem and to punish the hijackers a Convention was adopted in 1963, known as the Tokyo Convention, 1963. Despite the adoption of this Convention the number of incidents continued to increase and this Convention failed to solve the problem.[15] India also

13. See Sami Shubber, "Aircraft Hijacking under the Hague Convention, 1970—A New Regime", I.C.L.Q., Vol. 22, Part 4 (1973), p. 687 at p. 690.
14. For the text of the Montreal Convention : see A.J.I.L., (1971), pp. 742-48.
15. For shortcomings of Tokyo Convention see Sushma Malik, "Legal Aspects of the Problems of Unlawful Seizure of Aircraft", I.J.I.L., (1969), p. 61 at pp. 65-71 ; see also A. Samuel, "Crimes Committed on Board Aircraft", BYBIL, Vol. XLII (1967), p. 1.

acceded to the Tokyo Convention and with a view to give effect to the provisions of the Convention Parliament of India, enacted the Tokyo Convention Act, 1975.[16] Increase in the number of Incidents relating to hijacking and the shortcomings of the Tokyo Convention compelled the States to think and take some effective measures to solve the problem and to give deterrent punishment to the hijackers. This process started in September, 1968, when the International Civil Aviation Organisation Council was asked to study the problem of hijacking. In December, 1968, the Council entrusted this matter to a Legal Sub-committee. This Legal Sub-committee prepared a draft for Convention. In order to consider this draft and to adopt a Convention, a Conference was called in December, 1970. The Convention was finally adopted and was known as the Hague Convention, 1970. After having been ratified by the prescribed number of States, Hague Convention came into force on October, 1971.

Main provisions of the Hague Convention, 1970.—Hague Convention is a significant milestone for suppressing the crime of hijacking.[17] As pointed out earlier, the Hague Convention further developed the concept of hijacking. As compared to the Tokyo Convention, it further widened the net to apprehend the hijackers and to ensure the safety of flights of civil aircraft's. The State parties may have jurisdiction over the hijackers in some or other way and it will become difficult for hijackers to escape the process of law. As pointed out by Sami Shubber; "These features of jurisdiction have brought the offence of hijacking very near to piracy under International Customary Law. Thus it is not without justification that the 'Aerial Piracy' has been applied to this new regime in the field of International Civil Aviation." [18] Yet another special feature of the Hague Convention is that the offences shall be deemed to be included as extraditable offences in any Extradition Treaty existing between contracting States. The contracting States undertake to include the offences as extraditable offences in every Extradition Treaty to be concluded between them. It is further provided that each of the offences shall be treated, for the purpose of extradition between the contracting States, as if it had been committed not only in the place in which it occurred, but also in the territories of the States required to establish their jurisdiction in accordance with the provisions contained in Article 5 of the Convention. Thus, "the Hague Convention, 1970, may be considered as a big step forward in the endeavour of the international community to suppress hijacking of aircraft and remove the threat caused by it to international civil aviation." [19] Further, "The Hague Convention borrows heavily from the Tokyo Convention, which may lead one to wonder whether or not its adoption, as a protocol to the Tokyo Convention would have been more desirable, as there would have been some advantage to be gained from the link between the two instruments, for example, rights of aircraft commander and crew members to take measures, protection of such persons, arrest and delivery of hijackers, simplicity of arrangements and so forth." [20] With a view to give effect to the provisions of the Hague Convention, 1970, the Indian Parliament enacted the Anti-Hijacking Act, 1982.[21]

Montreal Convention, 1971.—Undoubtedly, Hague Convention is a great milestone in the field of suppressing the offence of hijacking yet it is subject to some criticism so far as certain provisions relating to jurisdiction of States and extradition of offenders or hijackers are concerned. Moreover, it may also be noted that despite the provisions of Hague Convention, the incidence to hijacking continued to increase. Consequently, a Conference was called at Montreal from 8th to 23rd September, 1971. As a result of this conference, a Convention (known as Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971) was adopted. Under Article 1 of the Convention, the concept of the offence of hijacking was further

16. For Text of the Act see I.J.I.L., Vol. 15 (1975), pp. 274-279.
17. Sami Shubber, "Aircraft Hijacking under the Hague Convention, 1970—A New Regime". I.C.L.Q., Vol. 22 (1973) p. 687 at p. 725.
18. Ibid.
19. Ibid.
20. Ibid, at p. 726.
21. Act No. 65 of 1982. The Gazette of India, Extraordinary, Part II, Section 1, November 8, 1982. See also I.J.I.L., Vol. 22 (1982), pp. 484-486.

widened. Under this Convention, the State parties have undertaken that they will provide deterrent punishment to the hijackers. Other provisions are similar to that of the Hague Convention. It would not be wrong to say it is simply an improvement of the Hague Convention. As a matter of fact, it would have been better if the provisions of Montreal Convention had been adopted as protocol to the Hague Convention.[22] With a view to give effect to the Montreal Convention, 1971, the Parliament of India passed, "The Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982.[23]

Montreal Convention, 1991 or the Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991

As noted above, there are several international conventions against unlawful interference with civil aviation. Among such conventions following are more important :

(i) Tokyo Convention (1963);
(ii) Hague Convention (1970);
(iii) Montreal Convention (1971);
(v) Protocol for the Suppression of Unlawful Act of Violence at Airports Serving International Civil Aviation, 1988.

Despite the above conventions the incidents of unlawful acts against the safety of International Civil Aviation could not be reduced. In such incidents the plastic bombs or explosives have been prominently used. For example, on 21 December, 1988, Pan Am Flight 103 while flying over Lockerbie (Scotland) was blowen by a plastic bomb. This resulted in the death of 270 passengers. From 12, February to March 1, 1991 a conference was held at Montreal. In this conference the representatives of 79 countries adopted a convention known as Montreal Convention, 1971 or the convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991. The parties to this convention undertook to prevent the manufacture and going outside their territories plastic explosives without commercial markings. It was also agreed that plastic explosives or bombs which are not necessary for army or police be destroyed within a period of three years. As regards plastic bombs and explosives the Convention provides that they are to be destroyed within a period of 15 years. The Convention provides for the establishment of International Explosives Technical Commission. Both the Security Council and the General Assembly have supported and approved this Convention. As remarked by the then Secretary General of the U.N., Perez de Cuellar, "nothing perhaps activates corporation like a universally shared sense of danger of the threat of terrorism that spares few countries or individuals is indeed practically a universal one." .

By March, 1991, 41 countries had signed the Convention. The Convention will come into force after 35 States have ratified it.

Hijacking of Indian Aircraft and I.C.A.O.—Jurisdiction case (India v. Pakistan)[24]—On 30th January, an Indian Aircraft was hijacked and taken to Lahore (Pakistan). Instead of apprehending the hijackers and to ensure that they get proper punishment, the Government of Pakistan indirectly encouraged them. As a result of which the hijackers burnt the aircraft. This act on the part of Pakistan was a clear violation of

22. As remarked by Cheng and R.H.F. Austin, "As anticipated, the Hague Convention and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation which was signed on 23 September, the following years are couched in a most identical terms, except for the definition of the offence. The Hague Convention is directed against the Hijackers who on board an aircraft in flight, by force or intimidation, unlawfully takes over control of the aircraft. The Montreal Convention is aimed at the person who unlawfully, and intentionally (i) commits any act which is likely to endanger the safety of an aircraft in flight, (ii) destroys an aircraft in service or places a device or substance on board an aircraft in service which is likely to destroy such an aircraft, or (iii) causes damage to aircraft in service renders it incapable of flight, or places a device substance on board an aircraft in service which is likely to cause such damage." "Air Law", in The Present State of International Law and other Essays (Kluwar—The Netherlands—(1973), p. 183 at p. 197.
23. Act No. 66 of 1982. The Gazette of India, Extraordinary, Part II, Section 1, Nov. 8, 1982. See also I.J.I.L., Vol. 22 (1982), pp. 486-490.
24. I.C.J. Rep. (1972), pp. 46 ff.

Tokyo Convention.[25] It was also against the resolution of Security Council (Resolution 286, 1970) in which the States were asked to take all possible steps to prevent the interference of hijackers in the international civil aviation. As a reprisal the very next day India suspended with immediate effect the overflight of all Pakistan aircrafts— civil and military over Indian territory till the issue was satisfactorily resolved. India demanded extradition of hijackers. But Pakistan rejected this demand. Pakistan on the other hand, complained to the International Civil Aviation Organisation that the suspension of overflights by India was a violation of international and bilateral commitments and requested the I.C.A.O. Council on March 3, 1973, to declare that India's decision to suspend the overflights was illegal. India raised certain preliminary objections and contended that the Council has no jurisdiction to hear and decide Pakistan's complaint. The contention of India was, however, overruled by the President of the Council. India's preliminary objections were rejected by the Council on July 29, 1971. India appealed to the International Court of Justice on August 30, 1971, against the said decision. Pakistan objected to the jurisdiction of the International Court of Justice to hear and decide India's appeal. The International Court of Justice by a majority of 13 votes to 3 rejected the Government of Pakistan's objection on the question of its competence and held that it had jurisdiction to entertain India's appeal. The Court, however, held by a majority of 14 to 2, that the Council of International Civil Aviation Organisation was competent to entertain the application and complaint laid before it by the Government of Pakistan on March 3, 1971, and in consequence rejected the appeal made to the Court by the Government of India against the decision of the Council assuming jurisdiction in those respects. Thus the case again went to the International Civil Aviation Organisation, who could decide it on merits.

It may be noted here, that India and Pakistan entered into Simla Agreement and agreed to settle all their disputes through bilateral negotiations and through peaceful means. Subsequently, Delhi, Agreement, 1973 and Delhi Tripartite Agreement, 1974 were entered into to resolve matters relating to the repatriation of Pakistani Prisoners of War. The representatives of India and Pakistan also held several round of talks relating to the resumption of flights of aircraft by both countries over the territory of each other but with no success, so far. The main stumbling block in the solution of this problem was Pakistan's persistent refusal to withdraw her case pending in the Council of the I.C.A.O. India, on her part made it clear that she would not entertain any proposal for resumption of Pakistani overflight through her territory unless and until Pakistan first withdrew her case from the Council of the I.C.A.O. This stand was in conformity with the letter and spirit of the Simla Agreement between the two countries. In view of India's insistence, Pakistan withdrew its case from the Council of the I.C.A.O. and subsequently Pakistani overflights over Indian territory were resumed.

In 1976, one more Indian aircraft was hijacked and taken to Lahore. This time Pakistan arrested the hijackers and returned the aircraft and passengers to go back to India. Pakistan assured India that deterrent action would be taken against the hijackers but subsequently released them on the ground that there was no sufficient evidence to prosecute them. Thus Pakistan once more, although not guilty of aiding and abetting the crime of hijacking, was guilty of appeasing the crime of hijacking.

Two cases of hijacking took place in September 1981 and July 1984, yet another case of hijacking took place on 5th Sept. 1986 when four armed terrorists seized a Pan American Jumbo jet with 399 passengers and cabin crew on board at Karachi airport. Later on Pakistan commandos engaged the four hijackers. In the terrible shoot out that ensued, 18 persons were killed and over a 100 injured. Indian Prime Minister blamed Pakistani authorities for Karachi killings. The U.K. press backed India's accusation. It was due to wrong handling of the situation and blunder committed by Pakistani authorities that the Karachi tragedy occurred.

---

25. For details of the incident see also, "Hijacking—An International Crime", 1971 (1) S.C.C., p. 36.

Hijacking of an Indian Airlines' Plane (IC 814) [Dec. 1999].—A recent incident of hijacking of an Indian Airlines, air bus IC 814 took place in mid-air over Lucknow on 24th December, 1999. The ill-fated plane was on flight from Kathmandu to New Delhi with 187 passengers. Before landing at Kandhar at 8.33 P.M. the next day, the air craft flew from Kathmandu to Amritstar, Lahore and Dubai. At Dubai the hijackers earlier released 27 hostages and off loaded the body of a victim, Ripon Katyal, who was killed on board the hijacked Indian Airlines' Airbus. The greatest problem faced by Indian Government in respect of the hijacking of Indian Airlines' airbus IC 814 was that the hijacked plane landed at Kandhar (Afghanistan) because India has not recognised the Taliban Government of Afghanistan and as such India has no diplomatic relations with Taliban Government. India had to seek the help of Taliban Government to rescue the passengers and secure the release of the aircraft. It is well known that Afghanistan is the breeding ground of terrorists. It has given refuge to and is protecting the dreaded and most wanted terrorist Chief Osama Bin Laden. But India had no option left except to request Taliban Government for help. Though the latter secured to have more sympathy with the hijackers. In the beginning the Taliban officials expressed resentment with Indian Government for not initiating negotiations with the hijackers rather they compelled Indian Government to start negotiations otherwise they would force the hijackers to leave Kandhar.

India's longest hijack crisis ended on the night of 31st December, 1999 as the 155 passengers and crew reached New Delhi after being freed by the five hijackers in exchange of three dreaded militants, namely, Maulana Masood Azhar, Mushtaq Ahmad Zarkar and Ahmed Ummer Sayed Sheikh. The circumstances were such that the Indian Government had no option left but to release the said three militants to save the lives of 155 passengers. According to the information and evidence gathered by the Indian Government, the hijacking was planned and executed by Pakistan. The conduct of Taliban Government of Afghanistan was also not above the board. The Taliban Government not only expressed resentment against India for not starting the negotiations with the hijackers but also directly or indirectly compelled the Indian Government to agreement to a settlement agreeable to the hijackers. The subsequent events confirmed that they had more sympathy with the hijackers than with the trapped passengers and the Indian Government.

Under International Law, it was the obligation of the Taliban Government, to rescue the passengers, and crews and return the aircraft to India. Even if it is admitted that they could not take any action against the hijackers keeping in view the safety of the passenger their conduct was certainly questionable after the passengers had been freed and the hijackers had come down the aircraft. At that stage, the hijackers could have been apprehended and could be either tried in Afghanistan for the crime of hijacking or could have been returned to the country against which they committed the crime. But contrary to the norms of International law they allowed the hijackers to go scot-free and declared that they gave the hijackers a few hours time to leave Afghanistan. But subsequently it was found that even this statement of Taliban officials was wrong. The five hijackers and the three freed militants were in fact were driven away by the Taliban Government under heavy security to some undisclosed destination, Later on it was found that they were allowed to stay and avail the hospitality of Taliban Government in the place where the Indian negotiators had stayed. Hijacking has been described as aerial piracy and any state, whether bound by any international convention or not, can apprehend, assume jurisdiction over then, and can try and punish them. The Taliban Government did not, therefore, act according to the rules of International Law.

Moreover, Taliban Government of Afghanistan is guilty of following double standards. While it forced the Indian Government to negotiable with the hijackers, in case of hijacking of Ariana Airline Boeing 727 of Afganistan with 160 passengers which landed at Stansted Airport of U.K. on Monday, 7th February, 2000. The Taliban ruler took the stand that they would neither negotiate nor cede to the demands of the hijackers as

terrorism is strongly condemned by them. In case of Indian hijacked plane and its passengers they had conducted themselves most irresponsibly. But contrary to their conduct, the British officials not only negotiated with the hijackers but ultimately got freed all the passengers without the loss of a single life and also apprehended the hijackers.

The stand taken by Indian Government throughout the hijacking drama has been appreciated by U.K. and U.S.A. On 3rd January, 2000, the Indian Prime Minister, Atal Behari Vajpayee urged the major nations of the would especially America to declare Pakistan a terrorist state. This demand is most genuine and the sooner it is accepted the better. In recent months, it has become increasingly clear that both Pakistan and Afghanistan are the breeding grounds of terrorists. They are notarious in organising camps for training terrorists and sending them to India and far-off places as mercenaries. Even Russia has accused Pakistan for its hand in Chenchenya and Degestan war. U. N. sanctions are already continuing against Afghanistan for its refusal to hand over Osama Bin Laden. It is time that Pakistan should be declared a terrorist state.

It is heartening to note that America has taken a serious note of Pakistan's involvement in terrorist acts. The U.S. has given a stern warning to Pakistan on terrorism after a threatening speach by Masood Azhar, who was got freed by hijackers of ill-fated Indian aircraft. After reaching Karachi, Masood Azhar had declared that Muslims "should not rest in peace until we have destroyed America and India". America has warned Pakistan and has asked it to take stern action against such extremist groups who carry out acts of violence and terrorism. It is significant to note that Masood Azhar during his said speech had also called on all Muslims to "join the *jihad* for the people of Kashmir, Bosnia and Chechnya." Both the U. S. and U. K. are reported to have asked Pakistan's army ruler General Pervez Musharraf to curb militant groups operating from Pakistan and as a first step ban the Harkat-Ul-Mujahideen and disband its organisational presence in Pakistan. Last but not the least on 8th February, 2000 at the inaugural meeting of the recently set up joint working group on counter terrorism by India and America, the two sides have agreed to intensify their joint cooperation to ensure that the perpetrators of the hijacking of Indian Airlines flight IC-814 are brought to justice. India has also agreed to take U.S. assistance in tackling the menace of terrorism in general and hijacking in particular.

Principle of universal jurisdiction in respect of the crime of the hijacking.*—The principle of universal jurisdiction is recognised in respect of the crime of piracy and war crimes. Since hijacking is generally described as aerial piracy, the principle of universal jurisdiction should apply in respect of the crime of hijacking. By universal jurisdiction in respect of a crime, it is meant that the crime is against the interests of international community and in order to suppress such a crime, all States can exercise jurisdiction in respect of the crime. The Hague Convention, 1970, and the Montreal Convention 1971 on hijacking have gone a long way to confer universal jurisdiction, to a great extent, on all States. "If an offender or alleged offender is within the territory of a State, both conventions contain provisions for him to be taken into custody and if he is not extradited, for his case to be placed before the prosecution authorities. Although neither Convention creates a duty to extradite or an inescapable duty to prosecute authorities are nevertheless under a duty "to take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. If the decision is in the affirmative, the above mentioned universal jurisdictional clause ensures that the courts will be competent to hear the case." [26]

Evaluation.—The greatest difficulty in the field of suppression of the offence of hijacking is the extradition of hijackers. Under International Law extradition is based on bilateral treaties. Thus, "By its very nature extradition is not a matter regulated by

---

* See also for C.S.E. (1991) Q. 5(c).

26. Bin Cheng R.H.F. Austin, "Air Law, in The Present State of International Law and other Essays" (1973), 183 at p. 197 ; See also Chapters on "State Jurisdiction" and "Piracy".

International Law..... The duty to surrender cannot arise except under a treaty." [27] An attempt was made under Hague Convention to solve this problem. Article 8 of the Hague Convention provided that offence shall be deemed to be included an extraditable offence in the common extradition treaty existing between contracting States. The contracting States further undertook to include the offence as extraditable in every extradition treaty to be concluded between them. The obvious effect of this provision is that the offence of hijacking may not be treated as a political crime. It is undoubtedly a great achievement of the Hague Convention.

The Montreal Convention, 1971 has tried to improve upon the provision of Tokyo Convention. Thus it may be said that at present there is no lack of adequate law for the suppression of the offence of hijacking. The need is to properly implement the existing provisions. The Hague Convention and Montreal Convention have enhanced the jurisdiction of State parties in respect of hijackers. It may, however, be admitted that despite those Conventions the number of incidents has not decreased ; one of the reasons is that these Conventions have not been ratified by a number of countries. Tokyo Convention which entered into force on 4 December, 1969, has upto now been ratified by 88 State parties. Hague Convention which entered into force on 14 October, 1971 has upto now been ratified by 79 States. Lastly, the Montreal Convention which entered into force on 26 January, 1973 has upto now been ratified by 75 States.[28] Yet another reason is that these Conventions have not ended the criminal jurisdiction of the States. For example Article 5(iii) of the Montreal Convention provides : "This Convention does not exclude any criminal jurisdiction exercised in accordance with national law." Moreover, these Conventions have not fixed the punishment for this crime. For example, Montreal Convention under Article 3 simply, provides that each contracting State undertakes to make the offences mentioned in Article 1 punishable by severe penalties. As a matter of fact, the need is to establish an International Criminal Court which may try and punish international offences such as hijacking. "The greatest hurdle in the establishment of an International juridical Organ to try persons guilty of hijacking and other crimes is the concept of national sovereignty." [29] As pointed out by Prof. Agrawala : "..... mere municipal legislation by certain interested States providing for compulsory prosecution and punishment of hijackers landing in its territory or escaping to it, could not be a complete answer to the problem, since the States most willing to punish hijackers are not the ones wherein the hijackers generally land or escape to.

Therefore, only the imposition of an international obligation on all States and to extradite or to punish, and consequent national legislation and action by all giving effect to such an obligation, could prove really fruitful." Further, "It is not as easy to put into effect a fool-proof legal framework and create an international regime for preventing and deterring acts of unlawful interference with civil aviation, as it is to commit such acts. Many factors, political and economical, play their part, and the efforts of nations with divergent interests have to be co-ordinated. If the concern with the problem continues with an unceasing interest and enthusiam of the aviation community, and efforts are not given up in despair, better results might come forth in not to distant a future."

Yet another shortcoming in the existing law is in respect of extradition of the hijackers. "Extradition of alleged offenders is obligatory only when there is a treaty to that effect and hijacking is not included as an extradition offence, in some extradition treaties. Moreover, extradition treaties often provide that State is under no obligation to extradite its own nationals, or persons who have committed crimes of political nature.[30] Further, "The reluctance of States to extradite hijackers who have acted for political motives is understandable, hijacking an aircraft is often the only way in which an individual can escape from a country where he is liable to political, social or religious persecution and it would be undesirable to require other State to send him back to a country where he faces such persecution. But unless such an individual is punished, there is danger that other

27. Oppenheim, International Law, Vol. II, 2nd Edition, p. 720.
28. U.N. Monthly Chronicle, Vol. XIV, No. 10 (November, 1977), pp. 13-14.
29. S.C. Chaturvedi, "Hijacking and the Law", I.J.I.L. (1971), p. 89 at p. 101.
30. Michael Akehurst, "Hijacking", I.J.I.L., Vol. 14 (1974), p. 81 at p. 85.

people with less excusable motives will be tempted to imitate him. It is therefore a matter of regret that the Hague and Montreal Conventions stopped short of requiring States to prosecute hijackers, who are not extradited." [31] As regards actions against States which refuse to extradite or prosecute, it may be suggested. "An amendment to the Chicago Convention which empowered the Council of I.C.A.O. to order the suspension of all services to or from member States of I.C.A.O. which refused to extradite or prosecute hijackers would override air service treaties previously concluded between member States. If member States were forced to choose between accepting such an amendment and ceasing to be members of I.C.A.O., they would probably accept the amendment, because they would not want to lose the advantage of membership of I.C.A.O." [32] It was unfortunate that such an amendment when presented to the I.C.A.O. Assembly in 1973, could not be adopted as it failed to secure the requisite 67 votes. It could secure only 65 votes, *i.e.*, only two votes less than the requisite number.

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

Conclusion.—Despite the steps that have been taken so far to suppress the crime of hijacking, there has been no reduction in the number of incidents of hijacking. Rather the incidents of hijacking have increased recently. "……..while much has been achieved much more remains to be done to effectively deal with hijacking. The process is continuing but still the fact comes out clear : nation States are not prepared to fetter their sovereignty, therefore the aircraft users seem to be condemned to rely on co-operation between States which seems to be more an outcome of convenience and more diplomacy than the result of any sense of obligation." [33]

Efforts to induce States to prosecute or extradite hijackers presuppose that criminal sanctions against hijackers are an effective means of preventing hijacking. This assumption is not necessarily true. Indeed, there is a danger of that imprisoning hijackers who are the members of an organised gang may increase rather than reduce the number of future hijackings; the other membrs of the gang will seize other airliners and threaten to destroy them and kill the passengers and crew unless their comrades are released from prison." [34] There is need to tackle the problem of suppressing the crime of hijacking afresh. With this in view, a special Session of the U.N. General Assembly should be convened and united effort should be made to plug the loopholes in the existing law. In the meantime preventive measures such as search of all passengers and their luggages, etc. before they board aircrafts should be tightened. [35]

---

31. Ibid, ; Jessup has rightly remarked : "One may still recognise the reason for the usual rule in the ex-traditional treaties that an accused will not be surrendered if the crime with which he is charged is a 'political' one ; given the difference in political systems and ideologies, this rule is not likely to be forsaken. But it has spawned the unfortunate thesis that aerial hijacking cannot be subject to uniform standards of punishment because "territoristic" activities may be inspired by political motives with which the State of refuge may be sympathetic even though it does not advocate the methods used to advance such interests. One may note that in the history of the law of piracy, the defence of political motivation did not loom large and piracy was (and is) an offence against the law of nations. Aerial piracy which even more seriously and directly endangers the lives of innocent persons, should be similarly characterised. The philosophy of transnational law leads to that conclusion." "The present State of Transnational Law", in The Present State of International Law and other Essays (Kluwer—The Netherlands—1973), p. 339 at pp. 341-342.

32. Michael Akehurst, see supra note 30 at p. 87.

33 ' Damodar Wadegaonkar, "Hijacking and International Law", I.J.I.L., Vol. 22 (1982) p. 360 at p. 374.

34. Michael Akehurst, "Hijacking", I.J.I.L., Vol. 14 (1974), p. 81 at pp. 87-88.

35. To quote Michael Akehurst again : "The best solution would be to search all passengers and their handluggage before they board an aircraft, in order to make sure that they are carrying no weapons. Such searches are carried out at many airports and are usually very effective, but they need to be applied rigorously to all passengers at all airports. It would be undesirable to lay down detailed rules of international law on the subject ; much depends on local conditions, and the form and intensity of the search are best left to the discretion of national authorities. But there is much to be said in favour of the adoption by I.C.A.O. of the principle of such searches as an international standard under Article 37 of the Chicago Convention, because such searches provide the most effective means of preventing hijacking". Ibid, at pp. 88-89.

Since many States do not still seem to be prepared to take stringent measures against hijackers and in view of the present state of international relations and affairs, preventive measures comprising of thorough searches of all passengers, and their luggage constitute the best means to prevent or at least minimise the incidents of hijacking.

CHAPTER 20

OUTER SPACE

It has been aptly pointed out : "We live on the shores of this tiny world, the third planet of nine, circling an average star, the Sun. This star is just among billions in a great city of stars, the Milky way, itself just one among a billion other stellar cities stretching on perhaps forever. This Universe is more vast than all imagining, and filled with wonders more than we can dream, is a heritage for all mankind." [1]

So far as the question of air space is concerned it has been made clear earlier that the State concerned exercise complete control over it. The other States can get some rights over it only through some agreements or treaties.* There is no customary rule of International law in regard to giving innocent passage through the territorial air space. As aptly pointed out by Edward Collins, "States have complete legal control over the airspace over their territory, other States have only rights in it as are acquired of treaty. There is no customary right of innocent passage through territorial airspace...."[2]

As remarked by Greek Philosopher Socrates in the 5th Century B.C., "Man must rise above the earth—to the top of the atmosphere and beyond—for only thus will he fully understand the world in which he lives." [3] Views are divided about the definition and delimitation of air space and outer space. It need not be overemphasized that there is practical and legal necessity to define the legal boundaries between the two.

At one time it was believed that the States exercised sovereignty over its outer space to the unlimited extent. The rapid progress of science and technology has made this view meaningless. Many efforts have been made to conclude international agreement in regard to the outer space. The first phase of the space developments started on 1st October 1957, when the Soviet Union launched its first sputnik. Since then efforts have been made to achieve international co-operation in this field. The early perspectives were provided by jurists and intellectuals. Subsequently the United Nations through various resolutions crystallized these speculations into legal principles.[4] As early as on 13 December, 1958, the General Assembly of the United Nations passed a resolution,[5] wherein it recognized "the common interest of mankind in outer space" and "that it is the common aim that outer space should be used for peaceful purposes only." The General Assembly established an *ad hoc* Committee on the Peaceful Uses of Outer Space to report to it, *inter alia.* "The nature of legal problems which may arise in the carrying out of programmes to explore Outer Space, "On 12 December, 1959, another resolution[6] entitled 'International Co-operation in the Peaceful Uses of Outer Space", was passed by the General Assembly. It established a Committee on the Peaceful Uses of outer space. On December 1977, the Assembly decided to enlarge the membership of the Committee on the Peaceful Uses of Outer Space from 37 to 47 (Resolution 32, 196B). On the same subject, the Assembly passed other resolutions on 20 December, 1961,[7] 14 December, 1962,[8] and on 13 December, 1963.[9] The last resolution *i.e.*, dated 13 December, 1963, entitled "Declaration of Legal Principles Governing The Activities of States in the

---

1. See U. N. Chronicle, Vol. XXIX, No. 4 (December, 1992), p. 49.
* See also for I.A.S. (1960), Q. No. 6; P.C.S. (1974) Q. No. 3 ; P.C.S. (1964) Q. No. 7 ; I.A.S. (1964), Q. No. 12(d) ; P.C.S. (1978) Q. 9(a).
2. Edward Collins, International Law in a Changing World, p. 173.
3. See note 1, at p. 57.
4. S. Bhatt, Legal Controls of Outer Space, (1973), p. 273.
5. Resolution 1348 (XIII).
6. Resolution 1471 (XIV) 11.
7. Resolution 1721 (XVI).
8. Resolution 1902 (XVII).
9. Resolution 1962 (XVIII).

Exploration and Use of Outer Space" which was unanimously adopted by the General Assembly is very important, particularly because most of its principles were incorporated in the *Treaty of Principles Governing the Activities of States in the Exploration and Use of outer space including the Moon and other celestial bodies,* 1966[10] (hereafter referred as "the Outer Space Treaty"). Thus during the decade from 1957 to 1967 the legal regime of Outer Space was in a continuous state of Development.

The Committee on the Peaceful Uses of Outer Space is concerned with questions such as remote sensing, nuclear power sources, geostationary orbit, definition and delimitation of outerspace, arms race in outerspace. These matters were discussed in its sub-committees—(i) the Scientific and Technical Committee from 13 to 24 February, 1984 in Newyork and (ii) the Legal Sub-committee from 19 March to 6 April 1984 in Geneva. The term, "remote sensing" refers to the detection and analysis of the earth's resources and phenomena by sensors carried in aircraft and spacecraft. Four main types of remote sensing are—meteorological ocean observation ; military surveillance and reconnaissance, and land observation. The Scientific and Technical Sub-Committee reaffirmed that remote sensing from outer space should be carried out with the greatest possible international corporation and participation and that developing countries should receive aid to meet their needs in the area." [11] As regards Nuclear Power sources, both the Committees expressed concern for the safe use of space vehicles and objects powered by nuclear sources. The "nuclear-safe orbit of space vehicles carrying nuclear reactors was also discussed in the working group. It was suggested that the orbit lifetime of such vehicles should be 300 to 600 years after reactor shut down. Others felt a specific minimum life-time was not desirable.[12]

Both the Sub-committees continued consideration of aspects of geostationary orbit, the orbit 22,300 miles directly above the equator, where Satellites circle at the same speed as the earth rotates. It is the only orbit capable of providing continuous contract with ground stations via a single satellite. Satellites in this orbit appear to be stationary in the sky because they circle the earth at the same speed as the earth rotates. Because of problems of interference among radio frequencies, the orbit can be occupied by a limited number of satellites at any one time. So far, with less than 150 satellites occupying the orbit, there have been few problems in finding space. There may, however, be conjestion in the future if its use continues to grow at the present rate of 18 per cent annually.

As regards definition and delimitation of outer space, the Legal Sub-committee established a working group to deal with this problem. The subject of arms race was discussed in both the sub-committees.

The U. N. Committee on the Peaceful Uses of outer space met in the Vienna International centre from 12 to 21 June 1984 to consider questions relating to the militarization of outer space. But there was an impasse and the committee failed to reach any agreement on the question of future treatment of the item on the militarization of outer space.[13]

In 1989, the General Assembly asked the U. N. Committee on the Peaceful Uses of Outer Space to continue to give priority to considering ways and means of maintaining outer space for peaceful purposes.[14] The Outer Space Committee considered in 1989 the advisability of the Assembly declaring 1992 as International Space Year. In 1989 session theme was "Space technology as an instrument for combating environmental problems, particularly those of developing countries." On 8th December, 1989, the General Assembly endorsed the initiative to designate 1992 as International Space Year.

In 1990 NASA launched Hubble Space telescope to study distant galaxies as well as ESA-built ulysses space craft on a five-year journey to explore the Sun. In 1991 Japan launched the Yohkoh Solar-observing spacecraft. Further, the ESA launched a new

10. See U. N. Doc. A/6621, 17 December, 1966, pp. 11-18.
11. U. N. Chronicle, Vol. XXI, No. 4 of 1984, p. 32.
12. Ibid, at p. 34.
13. U. N. Chronicle, Vol. XXI, No. 6 of 1984, p. 98.
14. See Resolution 43/56.

microwave remote sensing satellite—the Earth Resources Satellite (ERSI)—which can create accurate radar images of the Earth, regardless of cloud, fog or darkness. Moreover, NASA launched a remote sensing satellite—the Upper Research Satellite (UARS)—to spearhead a long term, space-based investigation.

1992 having been declared as the International Space Year (ISY), yearlong and worldwide celebration of humanity's future in the new space age were organised under the aegis of 29 national space agencies and 10 international organisations including the U. N. It may be noted that 1992 is the thirty-fifth anniversary of the birth of the space age for in 1957, the first man-made satellite (Sputnik) was launched by the former Soviet Union during the International Geophysical year, which highlighted Scientific inquiry and international cooperation. Addressing the World Space Congress on 28th August, 1992 at Washington D.C. Secretary-General Boutros Boutros Ghali said, "one of the central goals of International Space Year is to highlight the importance of understanding the Earth as a single complex, interdependent system and to stress the unique role that space science and technology can play in promoting that understanding." [15] While commemorating International Space Year (ISY) during thirty-fifth session in June, 1992, Peter Hohenfeller of Australia, Chairman of the U. N. Committee on the Peaceful Uses of Outer Space, the primary international policy making forum on space affair, said, "I can see no better use to be made of the rapid advances in space science and technology can play in promoting that understanding." [16]

In its 37th Session held at Vienna from 6 to 16 June, 1994 the Committee on the peaceful uses of outer space, proposed for a Third U. N. conference on the exploration and peaceful uses of outer space. In its 38th Session held from 12 June to 22 June, 1995, the Committee approved two texts on the debris of outer space and crafts in space (which include transportation crafts). The Committee also asked the scientific and Technological Committee to consider in 1996 all the proposals for convening the Third U. N. conference on outer space by the end of the 20th century.

Following are some of the landmarks in the field of Outer Space :

(1) The Outer Space Treaty*

Outer Space Treaty, 1967 is a landmark event in this connection. Some of the important provisions of the Outer Space Treaty of 1967 are as follows—

(1) Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, there shall be free access to all areas of celestial bodies. There shall be freedom of scientific investigation in outer space.[17]

(2) Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by an other means.[18]

(3) State parties to the treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kind of weapons of mass destruction, install such weapons on celestial bodies or station such weapons in outer space in any other manner.[19]

15. U. N. Chronicle, Vol. XXIX, No. 4 (December 1992) p. 50.
16. Ibid.

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

17. Article I of Outer Space Treaty of 1966.
18. Article II; Therefore if a State X lands craft on the moon and claims to have acquired an inchoate title to territory, the claim will be invalid. If the State concerned is a party to the outer space Treaty, the claim will be invalid by virtue of Article II noted above. The answer will be the same even if the State concerned is not a party to the Treaty because of General Assembly Resolution, 1962 (XVIII), entitled "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space which was adopted unanimously by the United Nations General Assembly on December, 1963.
19. Article IV; see also General Assembly Resolution, 1884 (XVIII) dated 17 October, 1963.

(4) The moon and other celestial bodies shall be used by all States parties in the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden.[20]

(5) States parties to the Treaty shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance in the event of accident, distress or emergency landing on the territory of another State Party or on the high seas. When astronauts make such a landing they shall be safely and promptly returned to the State of registry of their space vehicle.[21]

(6) States Parties to the Treaty shall bear international responsibility for national activities in outer space.[22]

(7) Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the earth, in air space or in outer space, including the moon and other celestial bodies.[23]

(8) A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object and over any personnel thereof, while in outer space or on a celestial body.[24]

Several of the above provisions, particularly Nos. 5 to 8 impose limitation on the national sovereignty of States Parties to the Treaty. It has been rightly remarked, "There are, however, in space developments two factors, namely, the extraordinary interdependence in space activities and the growing convergence of interests, which have radically changed the dimensions and objectives of the purely national interest. The immense potentialities of practical space applications were bound to lead to ever-increasing international co-operation without which the full benefits of these applications cannot be obtained.[25] Further, "The United Nations, recognising the revolutionary developments to be expected in this new dimension, has started to plant trees. As the space era is an era of space speed, there is very reason to expect that notwithstanding the obstacles to be overcome, these trees will grow at a faster rate than the human mind can at this juncture visualise." [26] Thus the Outer Space Treaty is a significant landmark in the evolution of international law relating to outer space.[27]

As regard national sovereignty in regard to outer space, it may be noted that some States have recently declared the extension of their sovereignty to include segments of the geostationary orbit. But such an extension is inconsistent with Outer Space Treaty which has been signed by 69 States by 1977 and which prohibits national appropriation of outer space by claims of sovereignty. Article 1 of the Outer Space Treaty no doubt proclaims freedom of the exploration and use of outer space but this freedom in fact suggests equal access by all States to outer space and non-appropriation of any part of outer space and this freedom can be exercised only with certain conditions and

20. Article IV.
21. Article V.
22. Article VI.
23. Article VII.
24. Article VIII.
25. D. Goedhuis, "The Present State of Space Law" in the Present State of International Law and other Essays (1973), p. 201 at p. 243.
26. Ibid, at p. 244.
27. For the detailed study of the Treaty and its Provisions see M. Chandrasekharan "The Space Treaty", I.J.I.L., Vol. 7 (1967), p. 61; Piradev and Rybakov, "First Space Treaty", International Affairs, (Moscow, March, 1967), p. 21; Damodar Wade, Goankar, "Legal Problems of Outer Space", I.J.I.L., Vol. 9 (1969), p. 47.

restrictions mentioned in the Treaty. As rightly pointed out by a Soviet author[28] "the extension of State sovereignty to outer space and its component parts is prohibited by international space law with freedom of space being its major principle." However, non-extension of State sovereignty to outer space and its component parts does not mean that the principle of respect for State sovereignty is alien to international space law. To be sure, relations between States with regard to their space activities are governed by international space law with strict compliance with the principle." Further, freedom of space should not be interpreted as an unrestricted right to any type of space activities. Numerous conditions and restrictions are embodied in the 1967 Treaty and other sources of international space law. Freedom of space should not be used as a pretext for violating sovereign rights of other States on earth." [29]

As remarked by an eminent author,[30] "The Space Treaty is a landmark in the process of development of space law. It represents the common interests of mankind. It has ended the mere speculative phase. It enshrines certain principles of space law which took a decade to form and crystallize. If represents in more specific and more binding terms the rules of customary law such as contained in various U. N. resolutions.

A major failure of Space Treaty is that it does not provide any international control machinery to look after the larger interests of the international community.....The treaty does not provide for compulsory jurisdiction of the International Court of Justice (I. C. J.) for the settlement of disputes." Moreover, "the treaty has not resolved the boundary between air space and outer space." [31]

(2) The agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 1967

Yet another landmark in the development of space law is the *Agreement on the Rescue of Astrcnauts, The Return of Astronauts and the Return of Objects Launched into outer space* which was commended upon by the General Assembly on December 10, 1967. The Agreement provides that each contracting party which receives information or discovers that the personnel of a space craft have suffered accident or are experiencing conditions of distress or have made an emergency, or unintended landing in territory under its jurisdiction or on the high seas or in any other place not under the jurisdiction of any State shall immediately, (a) notify the launching authority or, if it cannot identify and immediately communicate with the launching authority, immediately make a public announcement by all appropriate means of communication at its disposal; (b) notify the Secretary-General of the United Nations, who should disseminate the information without delay by all appropriate means of communication at his disposal.[32] If owing to accident, distress, emergency or unintended landing, the personnel of a spacecraft land in territory under the jurisdiction of a contracting party, it shall immediately take all possible steps to rescue them and render them all necessary assistance. It shall inform the launching authority and also the Secretary-General of the U. N. of the steps it is taking and of their progress.[33] If owing to accident, distress, emergency or unintended landing, the personnel of a space craft land in territory under the jurisdiction of a contracting party or have been found on the high seas or in any other place not under the jurisdiction of any State, they shall be safely and promptly returned to representatives of the launching authority.[34] Expenses incurred in fulfilling obligations to recover and return a space object or its component parts shall be borne by the launching authority.[35]

---

28. V. Vereshchetin, "On the Importance of the Principle of State Soveriengty In International Space Law", I.J.I.L., Vol. 17 (1977) p. 203 at p. 208.
29. Ibid.
30. S. Bhatt, note 4, at pp. 276-277.
31. Ibid, at p. 278.
32. Article 1 of the Agreement.
33. Article 2.
34. Article 4.
35. Article 5 (5).

(3) The Convention on International Liability for Damage caused by Space Objects, 1971

The third great landmark in the development of international space law is the *Convention on International Liability for Damage caused by Space Objects,* which was agreed on and commended by the General Assembly on November 29, 1971.[36] The convention provides that a launching State shall be absolutely liable to pay compensation for damage caused by the space object on the surface of the earth or to aircraft or to aircraft in flight.[37] In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.[38] Whenever two or more States jointly launch a space object, they shall be jointly and severally liable for any damage caused.[39] The convention provides for the establishment of a Claims Commission in case there is no settlement between the State which suffers damage and the launching State.[40]

The falling of "Skylab" in July 1979, raised the question of applicability of Liability Convention of 1971. Put in orbit in 1973 by NASA of America, it was expected to re-enter earth's atmosphere in 1980. It fell well in advance in July 1979. Though causing panic in India and abroad, it in fact fell in the sea causing no damage to any country. Moreover, irrespective of the fact whether a state was a party to the convention or not, American President had offered well in advance to pay compensation for any damage caused by the falling of 'Skylab'. Even the absence of such an offer America would have been internationally liable under the customary international law for any damage caused.

(4) The Convention on Registration of Objects Launched into Outer Space, 1974

The fourth landmark is Convention on Registration of Objects Launched into Outer Space which was adopted by the U. N. General Assembly on 12 November, 1974 as an annex to Resolution 3235 (XXIX).[41] Article II of the Convention provides that when a space object is launched into earth orbit or beyond, the launching State shall register the space object by means of an entry in an appropriate registry which it shall maintain. Each launching State shall inform the Secretary-General of the U. N. of the establishment of such a registry. Under Article IV each State or registry is under an obligation to furnish certain information concerning each space object carried on its registry to the Secretary-General of the U. N. The Convention on Registration of Objects Launched into Outer Space entered into force on 15th September, 1976, after its ratification by the U. S., Bulgaria, Canada, France and Sweden were the four countries who had ratified it earlier.[42]

(5) The Agreement Governing the Activities of States on the Moon and other Celestial Bodies, 1979

The fifth landmark is the Agreement Governing the Activities of States on the Moon and other Celestial Bodies which was adopted by the General Assembly on 5th December, 1979 as an annex of Resolution 34/68. The main provisions of this agreement are following :

(1) All activities on the moon, including its exploration and use, shall be carried out in accordance with international law, in particular the charter of the U. N. and taking into account the Declaration on Principles of International law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations adopted by the General Assembly on 24 October, 1970, in the interest of maintaining international peace and security

36. See General Assembly Resolution 2777 (XXVI).
37. Article II of the Convention.
38. Article III.
39. Article V.
40. See Articles XIV-XX.
41. For the text of the Convention, see I.J.I.L., Vol. 14 (1974), pp. 446-449.
42. U. N. Monthly Chronicle, Vol. XIII, No. 9 (October 1976), p. 35.

and promoting international cooperation, and mutual understanding and with due regard to the corresponding interests of all other States Parties.[43]

(2) The moon shall be used by all States Parties exclusively for peaceful purposes.[44]

(3) The exploration and use of the moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development.[45]

(4) There shall be freedom of scientific investigation on the moon by all States Parties without discrimination of any kind on the basis of equality and in accordance with international law.[46]

(5) The moon and its resources are the common heritage of mankind.[47]

(6) The moon is not subject to national appropriation by any claim of Sovereignty by means of use or occupation, or by any other means.[48]

(7) States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible.[49]

(8) The main purposes of the international regime to be established shall include :

(a) The orderly and safe development of the natural resources of the moon;

(b) The rational management of those resources;

(c) The expansion of opportunities in the use of those resources;

(d) An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration.[50]

(9) States Parties shall retain jurisdiction and control over their personnel, space vehicles, equipment, facilities, stations and installations on the moon. The ownership of space vehicles, equipment facilities, stations and installations shall not be affected by their presence on the moon.[51]

(10) States Parties to this Agreement shall bear international responsibility for national activities on the moon, whether such activities are carried out by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions of this Agreement. States Parties shall ensure that non-governmental entities under their jurisdiction shall engage in activities on the moon only under the authority and continuing supervision of the appropriate State Party.[52]

(6) Vienna Conference on the Exploration and Peaceful Uses of Outer Space (or UNISPACE-82)

The UNISPACE-82 was held at Vienna from August 9 to August 22, 1982. The Conference reviews the developments in the field of outer space taking place since 1968. The conference appealed the States not to increase arm race beyond earth. This appeal was specially directed to States having nuclear capability. A report adopted by consensus asked the States to follow outer space Treaty, 1967 which has prohibited the use of

43. Article 2.
44. Article 3, paragraph 1.
45. Article 4, paragraph 1.
46. Article 6, paragraph 1.
47. Article 11, Paragraph 1. See also K. Narayana Rao, "Common Heritage of Mankind and the Moon Treaty", I.J.I.L., Vol. 21 (1981), p. 275.
48. Ibid, paragraph 2.
49. Ibid, paragraph 5.
50. Ibid, paragraph 7.
51. Article 12, paragraph 1.
52. Article 14, paragraph 1.

weapons of mass-destruction in outer space. It is unfortunate that the two great powers—U.S.A. and the U.S.S.R.—are lying each other in production of most advanced weapons of destruction instead of establishing peace in the outer space. To quote only one example, U. S. President Reagan's recent "Star War" Missile defence project is most likely to endanger peace in outer space. Besides being violative of 1972-Anti-Ballistic Missile Treaty (ABM), this would accelerate the arms race and jeopardise efforts being made to ensure peaceful uses of outer space. The UNISPACE-82 also considered the question of monopoly of some industrialized countries in the field of science and technology and recommended increased cooperation between the developed and developing countries in this respect.

As noted above, the Committee on the Peaceful Uses of Outer Space in its 37th Session held from 6 to 16 June, 1994 proposed the convening of the Third U. N. Conference on the Exploration and Peaceful Uses of Outerspace (UNI SPACE—III) by the end of this century. The UNI SPACE—III may consider the following subjects :

(i) Future of Exploration of Planets;
(ii) Use of Micro-wave systems or micro-satellites in the exploration of outer space;
(iii) Security of future outer space programmes in respect of debris of outer space;
(iv) Maintenance and supervision of outer space based environment; and
(v) Use of Mobile Satellite Communication.

The above-mentioned five major treaties and UNISPACE-82 constitute the highlight of the development of space law.[53] To safeguard the common interests of mankind and to ensure the establishment and the maintenance of a viable, co-operative public order of the outer space, the moon and other celestial bodies, it is most important that full recognition be given to inclusive interests of States in outer space.[54] "The policy of inclusive access to and use of outer space resources means that each State must take full advantage of opportunities in space, subject to the limitation that activities must be peaceful and unharmful to common interest. This highlights the significance of freedom and equality of access to the outer space resources. The protection of exclusive interest is called for only in one single case, when it is reasonably, necessary for the protection of the security of the State.....However, the inclusive exploitation of space resources takes place in a sort of unorganized arena. Proposals concerning the establishment of a special enterprisory organization of space has not found much favour among States. Therefore, the future of public order of space is heavily dependent upon cooperation among States, both at the multilateral and bilateral level. The United Nations plays a very important role in coordinating the activities of different States in outer space, ensuring a uniform and progressive economic and technological development of the entire world." [55]

To conclude in the words of an author,[56] there is need for a global policy for the Space Age. This need has arisen, especially in recent years, on account of the common destiny and common survival of mankind. For carrying out of the programme of a united policy there is need of an international organization. Such a policy, in the context of the contemporary period, shall guide States in the discharge of their responsibilities, provide a workable means for future progress, and establish a stable system of law and order."

(7) International Space Year (ISY), 1992

N.B.—This has already been discussed earlier in this Chapter.

---

53. See also Surya P. Sharma, "International Law of the Outer Space : A Policy Oriented Study", I.J.I.L., Vol. 17 (1977) p. 185 at p. 190.
54. See also Surya P. Sharma, "International Law of the Outer Space : A Policy—Orinted Study", I.J.I.L., Vol. 17 (1977) p. 185 at p. 201.
55. Ibid.
56. S. Bhatt, note 4 at p. 289.

CHAPTER 21

NATIONALITY

Definition and meaning.—Nationality may be defined "..... as the legal status] of membership of the collectively of individuals whose acts, decisions and policy are vouchsafed through the legal concept of the State representing those individuals".[1] Fenwick defines the term 'Nationality' in the following words : "'Nationality' may be defined as the bond which unites a person to a given State which constitutes his membership in the particular State, which gives him a claim to the protection of that State and which subjects him to the obligation created by the laws of that State".[2] In the famous case of *Re Lynch* the British Mexican Claims Commission defined the term 'Nationality' in the following words : "A man's nationality forms a continuing state of things and not a physical fact which occurs at a particular moment. A man's nationality is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. The fundamental basis of a man's nationality is membership of an independent political community. This legal relationship involves rights and corresponding duties upon both on the part of the citizens no less than on the part of the State".[3] A similar definition was given by the International Court of Justice in *Nottebohm* case (second phase).[4] According to the World Court under International Law, nationality is "a legal bond having as its basis a social fact of attachment, genuine connection of existence and sentiments together with the existence of reciprocal rights and duties. It may be said to constitute a juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of State conferring nationality than with that of any other State." Thus the basis of nationality is the membership of an independent community. In *U.S.* v. *Wong Kum Ark,*[5] Justice Gray held that the State may determine as to what type or class of people shall be entitled of citizenship. It is for the internal law of each State to determine as to who is, and who is not its national. This is, however, subject to particular international obligations. Although, nationality is determined by the internal law of a State, it cannot claim that its determination must be acceptable to other States unless and until its determination is in conformity with the rules of international law. In *Nottebohm* case[6] the World Court observed :

"A State cannot claim that the rules (relating to acquisition of nationality) which it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's *genuine connection* with the State which assumes the defence of its citizens by means of protection as against other States."

Development of the Law of Nationality and its Importance.* —The rules of nationality are determined by State law. But due to the lack of uniformity in State laws in regard to the nationality, many difficulties were experienced. Consequently, difficult problems of Statelessness, double nationality, etc. arose. In Hague Conference of 1930, endeavour was made to end the conflicts arising out of divergent State laws in respect of nationality. Consequently a convention on the conflict of Nationality Law was signed and adopted. In this connection, an attempt was made to resolve the problems relating to nationality and Statelessness. Besides this, Convention of the Nationality of

---

1. J.G. Starke, Introduction to International Law, Tenth Edition (Butterworths, Singapore, 1989) p. 340.
2. Charles G. Fenwick, International Law (Third Indian Reprint, 1971), pp. 301-302.
3. Annual Digest of Public International Law Cases, 1929-1930, p. 221 at p. 228.
4. I.C.J. Rep. (1955), at p. 23.
5. (1898) 169 U.S. 649 at p. 668 ; see also *Stoeck* v. *Public Trustee,* (1921) 2 Ch. 69.
6. I.C.J. Rep. (1955) p. 4 at p. 23.

* See also for P.C.S. (1986), Q. 7.

Married Women was adopted in 1957. Last but not the least, Convention on the Reduction of Statelessness was adopted in 1961.

International Importance of Nationality.*—Nationality is often determined by State laws. "Nationality is the principal link between an individual and International Law." [7] Under International Law, nationality has often been used as a justification for the intervention of a Government to protect another country.[8] It may, however, be noted that international law does not create a correlative right in favour of the individuals. It creates rights only in favour of the States whose nationals they are. In *Paneyezys Saldutiskis* case[9] the Permanent Court of International Justice observed : "..... in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals, respect for the rules of international law.[10] The right is necessarily limited to intervention on behalf of its own nationals because, in the absence of special agreement, it is the bond of nationality between the State and individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and ensures respect for the rules of International law must be envisaged."

As pointed out by Starke,[11] the laws relating to nationality have following importance under International law :

(1) The protection of rights of diplomatic agents are the consequence of nationality.

(2) If a State does not prevent offences of its nationals or allows them to commit such harmful acts as might affect other States, then that State shall be responsible for the acts committed by such a person.

(3) Ordinarily, States do not refuse to take the persons of their nationality. By nationality we may mean loyalty towards particular State.

(4) Nationality may also mean that the national of a State may be compelled to do military service for the State.

(5) Yet another effect of nationality is that the State can refuse to extradit its own nationals.

(6) According to the practice of large number of States during war, enemy character is determined on the basis of nationality.

(7) States frequently exercise jurisdiction over criminal and other matters over the persons of their nationality.

In a number of cases, the Permanent Court of International Justice has held that State may by agreement take matters, such as nationality, out of domestic jurisdiction and make them of international concern and subject to international jurisdiction.[12]

Distinction between Nationality and Domicile.**—It has been pointed out earlier that the basis of nationality is the membership of a man with an independent community. On the other hand, domicile denotes the residence of the person. Thus there is a great difference between 'nationality' and 'domicile'. While nationality denotes the relation of man with his nation which protects him and the person is bound to follow the

---

* See also for I.A.S (1973), Q. No. 4 ; I.A.S. (1938), Q. No. 2 ; P.C.S. (1985), Q. 4.

7. Oppenheim's International Law, Ninth Edition, Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, (1992) p. 857.
8. Ralston, International Arbitral Law and Procedure, (1926), pp. 137, 160 ; see also Hyde, International Law (1945) Vol. II, p. 479 ; Brown's Claim case, Annual Digest, 1923-24, Case No. 35.
9. (1939) P.C.I.J. Reports, A/B No. 75 at p. 76.
10. See Mavrommatis Palestine Concessions (Jurisdiction) case, (1926) P.C.I.J., Series A. No. 2, p. 12 ; Brazillian and Serbian Loans case, (1929) P.C.I.J., Series A, Nos. 20-21, p. 17.
11. Starke, see supra note 1 at pp. 342-343.
12. See Tunis Morocco Nationality Decrees, P.C.I.J., Series B, No. 4 (1923) ; see also German Settlers in Poland, P.C.I.J., Series No. 7, 16 (1923) ; case Concerning certain German Interests in Upper Silesia, P.C.I.J., Series A, No. 6, 14, 16 (1925) ; Treatment of Polish Nationals in Danzing Territory, P.C.I.J., Series B, No. 44, 121.

** See also for I.A.S (1958), Q. No. 2.

rules enacted by that State, on the other hand, domicile denotes the residence of the person. Consequently, a person may acquire nationality through domicile. In different countries there are different rules and processes in regard to the acquisition of nationality through domicile. In *D.P. Joshi* v. *State of Madhya Bharat,*[13] the Supreme Court of India explained the meaning of domicile in the following words : "Domicile has reference to the system of law by which a person is governed, and when we speak of domicile of country, we assume that the same system of law prevails all over that country. But it might well happen that laws relating to succession and marriage might not be the same all over the country and that different areas in the State might have different laws in respect of those matters. In that case each area having a distinct set of laws would itself be regarded as a country for the purpose of domicile. Domicile of a person means his permanent home. Domicile of origin of a person means 'the domicile received by him at his birth." [14] Further, "the domicile of origin, though received at birth, need not be either the country in which the infant is born, or the country in which his parents are residing, or the country to which his father belongs by the race or allegiance or the country of the infant's nationality." [15]

Distinction between Nationality and Citizenship*.—Often nationality and citizenship are considered to be synonymous of each other. But the fact is otherwise. There is a great difference between nationality and citizenship. By nationality under international law, we mean the legal relationship which exists between the nation and the individual. Citizenship, on the other hand, denotes the relations between the person and the State law. In other words we may say through nationality the civil and natural rights of a person may come under international law whereas the rights of citizenship are the sole concern of the State law. It is possible that all the citizens may possess the nationality of a particular State, but it is not necessary that all the nationals may be the citizens of that particular State. Citizens are those persons, who possess full political rights in that State. But a person who possesses only nationality in a particular State may not possess all political rights.

Modes of Acquisition of Nationality**.—Following are the modes of acquisition of nationality :—

(1) *By Birth.*—A person acquires nationality of the State where he is born. He also acquires the nationality of his parents at the time of his birth.

(2) *Naturalisation****.—Nationality may also be acquired by naturalisation.

When a person living in a foreign State for a long time acquires the citizenship of that State then it is said to be state of nationality acquired through naturalisation. In *Nottebohm case,*[16] International Court of Justice held that in respect of grant of nationality there is no obligation of the States if that man has no relationship with the State of Naturalisation. In this case, the court applied the principle of effective nationality. A brief reference of this case may be made here.

Nottebohm's case***.—Born in 1881 in Germany Friedrich Nottebohm went to Guatemala in 1905. He had German nationality by birth and remained a German national until 1939. Since 1905 he resided in Guatemala where he carried on the business of banking, commerce and plantation. But he continued his business relations with Germany and went to Germany several times. After 1931 he visited his brother who resided in Leichtenstein. In 1938 he left Guatemala. After reaching Leichtenstein, he through his attorney, submitted an application for naturalisation as a citizen of Leichtenstein, and the same was granted on 13 October 1939. Thereafter he conducted himself exclusively as a

---

13. A.I.R. 1955 S.C. 334 at p. 338 ; see also *Somerville* v. *Somerville,* (1801) 5 Ves. 750 at p. 786 ; *Winans* v. *Attorney-General,* (1904) A.C. 287 at p. 290 ; *Whicker* v. *Hume,* 28 L.J. Ch. 396 at p. 400.
14. Dicey on Conflict of Laws, 6th Edition, p. 87.
15. Ibid, at p. 88.

* See also for P.C.S. (1974), Q. No. 2(c) ; P.C.S. (1973), Q. No. 2(a).

** See also for P.C.S. (1971), Q. No. 7(a) ; P.C.S. (1968), Q. No. 8 ; P.C.S. (1981), Q. No. 8(a) ; P.C.S. (1988), Q. 7 ; C.S.E. (1993) Q. 8(b).

*** See also for P.C.S. (1975), Q. No. 2(c) ; C.S.E. (1985), Q. No. 5 (a).

16. I.C.J. Rep. (1955), p. 4.

**** See also for I.A.S. (1964), Q. No. 5 ; C.S.E. (1983), Q. No. 5(c).

national of Leichtenstein, particularly with regard to Guatemala. He returned to Guatemala at the beginning of 1940 on Leichtenstein passport and in Guatemala his change of nationality was enrolled on the register of Aliens. As a result of war measures his property was seized in 1943 and he was arrested by Guatemalan authorities and handed over to the armed forces of the U.S. in Guatemala. Later on, he was deported to the U.S. and interned there for more than two years. In 1944, as many as 57 legal proceedings were started against him in Guatemala obviously to confiscate all his properties. After his release from internment in the U.S. he wanted to go to Guatemala to oppose cases filed against him but he was refused readmission to Guatemala. In 1946 he went to Leichtenstein and lived there thereafter. In 1949 his properties in Guatemala were confiscated under the law of Guatemala.

After having been domiciled in Leichtenstein for five years, Leichtenstein espousing his case, filed a case in the International Court of Justice on 11 December 1951. By its judgment dated 18 November 1953, the court rejected the preliminary objection of Guatemala against the jurisdiction of the Court. In the second phase the court considered only the admissibility of claims (of reparation summing into ten millions Swiss Frances) and held by a majority of eleven to three that Leichtenstein was not entitled to extend its protection *vis-a-vis* Guatemala. Thus the International Court of Justice rejected the claims made by Leichtenstein espousing the case of Nottebohm to be inadmissible. Further, the World Court had to decide whether by the fact of grant of nationality by the naturalisation to Nottebohm by Leichtenstein would directly entail an obligation on the part of Guatemala to recognise Leichtenstein's right to exercise its protection over Nottebohm. Propounding the principle of effective nationality, the World Court observed :

> "It must ascertain whether the factual connection between Nottebohm and Leichtenstein in the period preceding, contemporaneous with and following his naturalisation appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective as the exact juridical expression of a social fact, of a connection which existed previously or came into existence thereafter." [17]

The Court noted that Guatemala was the main centre of Nottebohm's business and he remained there for as many as 34 years. Even after his removal in 1943 as a result of war measures Guatemala remained the main seat of his business. As compared to this, in connection with Leichtenstein were extremely tenors. At the time of his application for naturalisation, he had neither any settled abode nor had resided in that country for a long time. Nor did he intend to transfer his business activities to Leichtenstein. Applying the above principle the Court held that Nottebohm did not enjoy the nationality of Leichtenstein. The Court said that it was the bond of nationality between a State and an individual which alone conferred upon the State the right to put forward claim on his behalf on the international plane, the grant of nationality was entitled to recognition by other States only if it represented a genuine connection between the individual and the State granting its nationality. Nottebohm's nationality was not based on any genuine prior link with Leichtenstein and the object of his naturalization was to enable him to acquire the status of a neutral national in time of war. On the basis of these reasons, the Court held that Leichtenstein was not entitled to espouse his case and put forward an international claim on his behalf against Guatemala.

(3) *By resumption.*—Sometimes it so happens that a person may lose his nationality because of certain reasons. Subsequently, he may resume his nationality after fulfilling certain conditions.

---

17. The Court further observed : "In order to decide upon the admissibility of the application, the Court must ascertain whether the nationality conferred on Nottebohm by Leichtenstein by means of a naturalization which took place in circumstances which have been described, can be validly invoked as against Guatemala, whether it bestows upon Leichtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala ..... what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the application and secondly, that what is involved is not recognition by all States but only by Guatemala." Ibid., at pp. 16-17, see also p. 20.

(4) *By subjugation.*—When a State is defeated or conquered, all the citizens acquire the nationality of the conquering State.

(5) *Cession.*—When a State has been ceded in another State, all the people of the territory acquire nationality of the State in which their territory has been merged.

In addition to the above-mentioned modes, there may be some other modes whereby a person may acquire nationality. For example, if a person is appointed in the public service of another State, he acquires the nationality of that State.

Loss of Nationality.* —Following are the modes of loss of nationality :—

(1) *By Release.*—In some States law provides that the citizens may lose nationality by release. In the loss of nationality by release it is necessary to submit an application for the same. If the application is accepted, the person concerned is released from the nationality of the State concerned.

(2) *By deprivation.*—In certain States law may provide that if the national of that State without seeking prior permission of the government obtains employment in another State, he will be deprived of his nationality.

(3) *Long Residence Abroad.*—Yet another mode of the loss of nationality is the long residence abroad. State laws of many States contain provisions in this connection that if a person resides for a long period abroad, his nationality ends.

(4) *By Renunciation.*—A person may also renounce his nationality. The need for renunciation arises when a person acquires nationality of more than one State. In such a condition, he has to make a choice as to of which country he will remain the national. Consequently, he has to renounce the nationality, of one State.

(5) *Substitution.*—Some States provide for the substitution of nationality. According to this principle, a person may get nationality of a State in place of the nationality of another State. This is called nationality by substitution whereby he loses the nationality of one State and acquires the nationality of another State.

Double Nationality and Nationality of Married Women.**—Because of the conflict of the laws of nationality of different countries, a situation often arises when a person possesses nationality of more than one State. For example a woman, who after her marriage acquires the nationality of her husband may continue to possess her original nationality. Double nationality may also be acquired by birth such as by the parents who are at the time of birth in a Foreign State.[18] Treaties may provide that persons may by their will select their nationality. The Hague Conference of 1930 made an attempt to remove the difficulty arising out of double nationality in consequence of war. Articles 3 to 6 to the Hague Convention contain the provisions in this connection. For example Art. 5 provides that such a person shall be treated in third State as if he has only one nationality. The third State will either recognize the nationality of the State where he often resides or will recognize the nationality which is more relevant in accordance with the facts and circumstances of each individual case. Articles 8 to 11 provide for the nationality of married women. In these provisions, an endeavour has been made to remove difficulties arising out of double nationality. According to the principles contained in these provisions if a woman marries then she will automatically acquire the nationality of her husband. In the recent times the Convention on the Nationality of Married Women is yet another

---

* See also for P.C.S. (1971), Q. No. 7(b) ; P.C.S. (1988), Q. 7.

** See also for I.A.S. (1968), Q. No. 12(b) ; I.A.S. (1958), Q. No. 2 ; I.A.S. (1956), Q. No. 6 ; P.C.S. (1973), Q. No. 10(b) ; P.C.S. (1969), Q. No. 3(d) ; P.C.S. (1968), Q. No. 8 ; C.S.E. (1983), Q. No. 5(c) ; For answer see also Nottebohm case discussed earlier ; P.C.S. (1988), Q. 7.

18. As pointed out by an Indian author, "An individual may possess dual or multiple citizenship with or without intent and with or without knowledge. It may arise either from concurrent application of the principles of jus soli and jus sanguinis at birth or from the conflict of citizenship laws as to naturalization and expatriation. A person enjoying dual nationality would be subject to claim from both the States. He may be subjected to taxes by both of them ; he is not entitled by one of the two States of which he is national while in the territorial jurisdiction of the other ; both the States can insist on military service by him in case of a war ; one State could be suspicious of his loyalty to it and subject him to the disabilities of an enemy alien including sequestration of his property while the other holds his conduct treasonable". S.K. Agrawala, International Law, Indian Courts and Legislature (1965), p. 105.

significant attempt to remove the difficulties and problems arising out of the double nationality.

Reference may also be made here to the Universal Declaration of Human Rights, 1948. Article 15(1) of the Declaration provides that every one has the right to nationality. Article 15(2) further provides that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. It is very unfortunate that the International Covenant on Civil and Political Rights, 1966 has not incorporated the right of everyone to a Nationality and the right not to be deprived of one's nationality. The Covenant however affirms the right of every child to acquire a nationality.[19]

On 7th November, 1967, the General Assembly of the U.N. adopted the declaration on elimination of discrimination against women.[19a] Subsequently, on 18th December, 1979 the Assembly adopted the Convention on Elimination of All Forms of Discrimination Against Women.[19b] This Convention came into force in 1981 and at present it has 163 State Parties under Article 9 of the convention, States Parties agreed to grant to women equal rights with men to acquire, change or retain their nationality. They also underlook to ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality to the wife, render her stateless or force upon her the nationality of the husband. State Parties shall also grant women equal rights with respect to nationality of their children.

Statelessness* .—Sometimes it so happens that a person does not possess the nationality of any State.[20] Such a state is referred to as the state of Statelessness. At present this is one of the burning problems of international law. A person who does not possess the nationality of any nation cannot exercise the rights conferred upon him by international law.[21] In *Stoeck* v. *The Public Trustee,*[22] it was held that if a person is not a citizen of any State, he will be called Stateless. The facts of this case are as follows :—

Under the Treaty of Versailles, 1919, the allied nations had reserved the right to retain and liquidate the property of German citizens. Some property of the appellant (Stoeck) also came under the said provisions, Stoeck filed a case contending that he was not a German citizen and hence his property could not be seized under the said provisions. When the case was proceeding, Stoeck was living in Germany. He was born in 1872 in Prussia, but in 1895 he left Prussia to live in Belgium. In 1896 he obtained release from the citizenship of Prussia, in accordance with the law of Germany. Thereafter, he never applied for German citizenship. In November, 1896, he left Belgium and came to England. He made England his permanent residence but could not get English citizenship through naturalisation. In 1916 he was interned and in 1918 he was deported from England. The Court held that Stoeck was not a German citizen.

Russell, J. observed "the question of what state a person belongs to must ultimately be decided by the municipal law of the state to which he claims to belong or to which it is

---

19. See "After 30 years, an International Bill of Human Rights", U.N. Monthly Chronicle, Vol. XIII, No. 4 (April 1976), p. 50.

19a. Sea G A Resolution 2263 (xxii) of 7th November, 1967.

19b. See U.N. Doc. No. A/Res/34/180.

* See also for I.A.S. (1956), Q. No. 6 ; I.A.S. (1958), Q. No. 2 ; I.A.S. (1973), Q. No. 4 ; P.C.S. (1975), Q. No. 2(b) ; P.C.S. (1968), Q. No. 8.

20. In the words of an Indian author, "..... Since the municipal laws of different States differ in many points concerning this matter, as a consequence an individual sometimes comes to possess more than one nationality and sometimes none at all" ; see supra note 17.

21. "Stateless persons are not only without the diplomatic protection of any State, they are also refused enjoyment of rights dependent on reciprocity. Nationality is important to the individual not only with regard to political rights and privileges but also because his civil status and capacity may be dependent upon it. There are many essential rights, such as, personal capacity (attainment of majority, capacity of the married women), family rights (marriage, divorce, adoption of children), matrimonial regime (in so far as this is not regarded as part of the law of contract), and succession to movable (and in some cases to immovable) property which an individual cannot enjoy in a normal way so long as his personal State which determines these rights, is in doubt". Ibid, at pp. 105-106.

22. (1921) 2 Ch. 67.

alleged that he belongs[23]." The above rule has been followed in *Oppenhimer* v. *Cattermole.*[24] The same principle has been incorporated in Hague Convention of 1930. Article 2 of the convention provides that any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

The situation of Statelessness is recognized under German Law, English Law and under International Law. In International Law, it is generally agreed that whether a person is a citizen of a particular State is determined by the law of that State. Oppenheim has compared such persons with the ships floating in the open sea without the flag of any country. A serious attempt to remove the difficulties arising out of Statelessness was made in the Hague Convention of 1930. Later on after the establishment of United Nations attention was given to remove the difficulties arising out of this problem. According to Art. 15 of the Universal Declaration of Human Rights, each person is entitled to have nationality and the nationality of any person cannot be taken away or snatched arbitrarily. Statelessness "is a condition which not only means great hardship and lack of security for individuals, but involves the existence of a serious gap in the application of International Law.[25]

Convention on the Reduction of Statelessness, 1961.—The International Law Commission considered the subject of Statelessness together with the question of nationality between 1952 and 1954. In 1954, the General Assembly decided to convene a Conference to conclude a Convention on reduction of Statelessness. The conference was called in 1959 and adopted in 1961 the Convention on the Reduction of Statelessness. Following are the main provisions of the Convention:—

(i) A party to the Convention shall grant its nationality to a person born in its territory who would otherwise be Stateless. Such a nationality shall be granted either by birth or by operation of law.[25]

(ii) A child born in wldock in a territory of a party to the Convention, and whose mother is national of that State, shall get that nationality in case the child would otherwise be Stateless.[27]

(iii) A contracting State shall grant its nationality to a person who is born in its territory and who would be otherwise Stateless and on account of certain reasons he is unable to acquire the nationality of the Contracting State. But this is subject to certain conditions including the condition that at the time of the person's birth the nationality of one of his parents was that of the Contracting State.[28]

(iv) A State party to the Convention shall also grant its nationality to a person who was although not born in the territory of such State party yet at the time of his birth, one of his parents was the national of that State party. Such a grant of nationality may be subject to certain conditions and may be granted either upon application or by operation of law.[29]

(v) Loss of nationality as a result of any change in the personal status of a person such as marriage, termination of marriage, and adoption, shall be conditional upon possession or acquiring of another nationality.[30]

(vi) A person shall not be deprived of his nationality, so as to become Stateless, on the ground of departure, residence abroad or failure to register.[31]

---

23. Ibid., at p. 78.
24. (1973) Ch. 264, pp. 270, 273.
25. Starke, see supra note 1 at p. 346.
26. Article 1 of the Convention.
27. Ibid.
28. Article 1.
29. Article 4.
30. Article 5.
31. Article 7.

(vii) Naturalisation abroad or renunciation shall not result in loss of nationality unless the person concerned acquires another nationality.[32]

(viii) Except in the circumstances provided in Art. 7, normally a person shall not lose the nationality of the State party to the Convention if such loss renders him Stateless.[33]

Following steps may be taken to solve difficulties arising out of Statelessness :—

(1) It should be the duty of the States either to regard definite nationality of the person or not to recognise it. In this connection, Hague Convention is the first important step to remove the difficulties arising out of Statelessness and to lessen the number of persons who do not possess the nationality of any State. In recent times, Convention on the Reduction of the Statelessness, 1961 is a significant improvement on the provisions of the Hague Convention and goes a long way to remove the number of such persons, who do not possess the nationality of any other State.

(2) It should also be the duty of the States not to deprive the nationality of persons unless and until there is sufficient cause for it.

(3) Stateless persons liberally be granted nationality.

(4) Stateless person should be conferred upon some rights through international treaties. In this connection, Geneva Convention of the Status of Refugees, 1951 and Status of Stateless Persons, 1954 deserve a special mention.[34]

Thus we see that efforts have been made to remove the number of Stateless persons under international law but still there are many difficulties in this connection. Much has been done in this connection but much still remains to be done. Regarding the deprivation of nationality of Ugandan-Asians, *Justice V.K. Krishna Iyer* has aptly remarked, "By this Convention (*i.e.*, the Convention of the Reduction of the Statelessness, 1961), Statelessness is sought to be minimised and grant of nationality liberalised and obligated. And if nationality is ensured to a person, he acquires political rights which stand four square between the offending State and the expelled. The Ugandan Asians, for instance, without complete disregard of the Convention of the Reduction of Statelessness cannot be deported. Nor can any particular racial groups be deported on the arbitrary fiat of any rule." [35]

---

32. Article 7.
33. Article 7.
34. Ibid., at pp. 346-347.
35. "Mass Expulsion as Violation of Human Rights", I.J.I.L., Vol. 13 (1973), p. 169 at p. 171.

CHAPTER 22
EXTRADITION*

Basis of the principle of extradition.—Ordinarily each State exercises complete jurisdiction over all the persons within its territory. But sometimes there may be cases when a person after committing crime runs away to another country. In such a situation, the country affected finds itself helpless to exercise jurisdiction to punish the guilty person. This situation is undoubtedly very detrimental for peace and order. In such a situation peace and order can be maintained only when there is international co-operation among the States. There is social need to punish such criminals and in order to fulfil this social necessity the principle of extradition has been recognised. "The inability of a State to exercise its jurisdiction within the territory of another State would seriously undermine the maintenance of law and order if there were no cooperation in the administration of justice. The awareness among national decision-makers of the social necessity of jurisdictional co-operation is illustrated by the widespread practice of returning a person who is accused or who has been convicted of a crime to the State in which the crime was committed." [1]

Meaning and definition of the term extradition.**—Extradition is the delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed or to have been convicted of a crime, by the State on whose territory the alleged criminal happens to be for the time being." [2] According to Starke, "The term 'extradition' denotes the process whereby under treaty or upon a basis of reciprocity one State surrenders to another State at its request a person accused or convicted of a criminal offence committed against the laws of the requesting State, such requesting State being competent to try the alleged offender.[3] In the view of eminent jurist Grotius, it is the duty of each State either to punish the criminals or to return them to the States where they have committed crime. In practice, however, States do not accept such obligation. Under International Law, extradition is mostly a matter of bilateral treaty. In principle, each State considers it a right to give asylum to a foreign national. "States have always upheld their right to grant asylum to foreign individuals as an inference from their territorial supremacy, those cases where a treaty imposes an obligation to extradit them." [4] Thus there is no universal rule of customary international law in existence imposing the duty of extradition.

Is there a general duty of States in respect of extradition ?—International Law does not recognise any general duty of States in respect of extradition. Extradition depends on the provisions of the existing extradition treaties. In *Factor* v. *Laubenheimer,*[5] the Court held : "The principles of International Law recognize no right to extradition apart from treaty while a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he fled.....the legal right to demand his extradition and the correlative duty to surrender him to the demanding State exist only when created by treaty." But as pointed out in Wheaton's *International Law,*[6] there is no universally recognised practice that there

---

* See also for I.A.S. (1973), Q. No. 11 (f); P.C.S. (1974), Q. No. 10(d); P.C.S. (1981), Q. No. 9 (b); P.C.S. (1982), Q. No. 6(a); C.S.E. (1988), Q. 7 (a).

1. Edward Collins International Law in a Changing World (1969), p. 216.

** See also for P.C.S. (1972) Q. No. 4 ; P.C.S. (1968) Q. No. 3 ; C.S.E. (1992) Q. 6(b).

2. L. Oppenheim, International Law, Vol. I, Eighth Edition, p. 696; See also Oppenheim's International Law, Ninth Edition, Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group U. K. Ltd. and Mrs. Tomoko Hudson, 1992, pp. 948-949.
3. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 352.
4. Oppenheim's International Law, note 2, p. 950.
5. (1993) 280 U.S. 276.
6. Edn., 4, Ss. 116 (a) to (d), pp. 186 to 189.

can be no extradition except under a treaty, for, some countries grant extradition without a treaty. Reference may be made here to the Extradition Act, 1962, which governs the law relating to extradition in India. Chapter III of the Act deals with the return of fugitive criminals from Commonwealth countries with extradition arrangements. Chapter II deals with extradition of fugitive criminals to foreign States and to Commonwealth countries to which Chapter III does not apply. Under Section 4 of the Act, a requisition for the surrender of a fugitive criminal of a foreign State can be made to the Central Government. The Central Government may, if it thinks fit, order for magisterial inquiry.[7] Under sub-section (4) of Section 7, if the magistrate is of the opinion that a *prima facie* case is made out in support of the requisition of the foreign State or Commonwealth country, he may commit the fugitive criminal to prison to await the orders of the Central Government, and shall report the result of his inquiry to the Central Government. If on the receipt of the said report and statement, the Central Government is of the opinion that the fugitive criminal ought to be surrendered to the foreign State or Commonwealth country, it may issue a warrant for the custody and removal of the fugitive criminal and for his delivery at a place and to a person to be named within the warrant.[8] Thus, extradition treaty is not the only basis for extradition of a fugitive criminal.[9] Further, definition of the words "extradition offence" in section 2 (c) includes "(ii) in relation to a foreign State other than a treaty State.....an offence which is specified by notification under the second Schedule": Thus the second Schedule enumerates offence in relation to foreign States other than treaty States or in relation to Commonwealth countries.[10]

It may, therefore, be concluded that although there is no universal rule of customary international law imposing a general duty of States in respect of extradition and generally extradition is granted on the basis of a treaty, it would be wrong to say that there can be no extradition apart from a treaty. As remarked by the Supreme Court of India, "Extradition with foreign States is, *except in exceptional cases,* governed by treaties or arrangements made." [11]

Distinction between 'expulsion' (under Foreigners Act, 1946) and Extradition

In *Hans Muller of Nuremburg* v. *Superintendent, Presidency Jail, Calcutta and others,*[12] the Supreme Court clarified the distinction between 'expulsion' and 'extradition'. The Supreme Court observed that the Foreigners Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains. The law of extradition is quite different. Because of treaty obligations it confers a right on certain countries (not all) to ask the persons who are alleged to have committed certain specified offences on the territories; or who have already been convicted of those offences by their courts, be handed over to them in custody for prosecution or punishment. But despite that the Government of India is not bound to comply with the request and has an absolute and unfettered discretion to refuse.[13] The Extradition Act is really a special branch of the law of criminal procedure. It deals with criminals and those accused of certain crimes. The Foreigners Act is not directly concerned with criminals or crime though the fact that a foreigner has committed offences or is suspected of that may be a good ground for regarding him as undesirable. Therefore, under the Extradition Act warrants or summons must be issued ; there must be

7. Section 5, of the Extradition Act, 1962 (34 of 1962).
8. Section 8, ibid.
9. See also Section 31, ibid.
10. The Second Schedule enumerates offences of the Indian Penal Code (45 of 1860) and other offences. Such as culpable homicide (Sections 299 to 304); Attempt to murder (Section 307); kidnapping abduction, slavery and forced labour (Ss. 360 to 374), rape and unnatural offences, theft, extortion, robbery and dacoity (Ss. 378 to 402) ; cheating (Ss. 415 to 420) and damaging or destroying an aircraft in the air or attempting or conspiring to do so.
11. *The State of Madras* v. *C. G. Menon,* A.I.R. 1954 S.C. 517 at p. 518.
12. A.I.R. 1955 S.C. 367.
13. A.I.R. 1955 S.C. 367 at p. 374.

magisterial enquiry and when there is an arrest it is penal in character and this is most important distinction of all when the person to be extradited leaves India he does not leave the country as a free man. The police in India hands him over to the police of the requisitioning State and he remains in custody throughout. In the case of expulsion, no idea of punishment is involved, at any rate, in theory, and if a man is prepared to leave voluntarily he can ordinarily go as and when he pleases. But the right is not his under the Indian Law, the matter is left to the unfettered discretion of the Union Government.[14] Finally, the Supreme Court held that the Foreigners Act is not governed by the provisions of the Extradition Act. The two are distinct and neither impinges on the other. Even if there is a requisition and a good case for extradition, Government is not bound to accede to the request. It is given an unfettered right to refuse for section 3 (1) of the Extradition Act says, "the Central Government may, if thinks fit." Therefore, if it chooses not to comply with the request, the person against whom the request is made cannot insist that it should. The right is not his; and the fact that a request has been made does not fetter the discretion of Government to choose the less cumbrous procedure to the Foreigners Act when a foreigner is concerned.[15]

In the present case, the petitioner, Hans Muller, who was not a citizen of India and was said to be a West German subject, was arrested by Calcutta Police on 18-9-1954 and was placed under preventive detention "with a view to making arrangement for his expulsion from India." On 9-10-1954, the West German Government wrote to the West Bengal Government saying that a warrant of arrest was issued against the petitioner in West Germany in connection with a number of frauds and that legal proceedings in connection with those warrants were still pending. The West German consul told the Government of West Bengal that his government would apply for extradition of the petitioner and requested that in the meantime the petitioner be detained up to the date of his extradition to Germany. The Government of West Bengal accepted the request. But the order to deport the petitioner could be passed by the Central Government only. No such order having been made by the Central Government up till the 20th of October, 1954, the petitioner applied to the High Court of Calcutta for a writ in the nature of *habeas corpus*, under Section 491, Cr. P.C. The High Court dismissed the petition on 10-12-1954. The petitioner thereupon preferred the present petition on the basis of the above observations (and on other grounds also) but the Supreme court dismissed the petition.

Essential conditions of granting extradition or restrictions on surrender. —As pointed out earlier, under International Law extradition mostly depends on treaties among the States. However, the courts have also established certain principles and rules in regard to law of extradition. In other words, we may say that following are some restrictions on surrender of fugitive criminals or essential conditions for extradition :

(1) Non-extradition of Political Criminal.**—It is a very important principle of International Law that extradition for political crimes is not allowed. "Most States refuse to commit themselves to extradite...any person charged with 'political crimes' that is to say crime committed for political purposes or crimes that are politically motivated. The difficulty of applying political exception is obviously a problem that regularly plagues the courts." [16] The practice of non-extradition for political crimes began with the French Revolution of 1789. Later on other States also subscribed to this view. In the present period, almost all the States subscribe to this view although many difficulties arise in the enforcement of this principle. The most difficult problem is of the definition of the term

14. Ibid, at p. 375.
15. Ibid, at pp. 375-376.
* See also for C.S.E. (1992) Q. 6(b) ; P.C.S. (1995) Q. 6(a).
** See also for P.C.S. (1970), Q. No. 2(b) , P.C.S. (1982), Q. 6(a) ; P.C.S. (1984), Q. No. 4. ; C.S.E. (1993) Q. 7(b).
16. Edward Collins International law in a Changing World (1969), p. 216. See also Sections 29 and 31 (a) of the Extradition Act, 1962 referred earlier.

'political crimes'.[17] "Although the principle is now widely accepted that political criminals should not be extradited, there is probably no rule of customary international law which prevents their extradition. However, serious difficulties exist concerning the concept of 'political crimes'." [18] Many attempts have been made to define the term 'political crime', but success has so far eluded.

"A crime is sometimes considered 'political' if committed from a political motive or if committed both from a political motive and for a political purpose or the term 'political crime' may be confined to certain offences against the State only, such as high treason, *lese majeste* and the like. So far all attempts to formulate a satisfactory and generally agreed definition of the term have failed." [19]

Further, "Since a political offence will usually be at the same time an ordinary crime such as murder, arson, theft and the like, the practical difficulty in any particular case is to determine whether the alleged political element is sufficient to give the ordinary crime a sufficient political colour to ensure to the perpetrator protection from extradition. This balance is, in the first place, to be struck by the State from which extradition is requested, in applying its laws to non-extradition of political offender." [20]

Reference may be made here to *Re Castioni,*[21] which is a leading case on non-extradition of political crimes. In this case the Swiss Government requested for the extradition of Castioni who was charged with murdering a member of the State Council of the Canton of Ticinio. Political dissatisfaction was prevailing in the said Canton for some time. An armed crowd including Castioni attacked the Municipal Palace and killed a member of the State Council. There was evidence that the shot was fired by Castioni. The Queen's Bench of England held that Castioni was guilty of a political crime and therefore he could not be extradited. Another important case on the point is *Re Meunier.*[22] In this case, the accused was an anarchist and was charged with causing two explosions in a Paris Cafe and two barracks. After committing the offence, he fled to England. France demanded his extradition. The accused contended that the nature of his crime was political and therefore he could not be extradited. The Court held that for an offence to be political, it is necessary that there should be two or more than two parties in the State, each wanting to establish its Government in the State. If an offence is committed with this objective, it will be called a political offence. In the present case, the offence committed was not a political offence.

Because of different political systems and ideologies, this rule is not likely to be forsaken.[23] Oppenheim has also pointed out, "Up to the present day all attempts to formulate a satisfactory conception of the term have failed, and the reason of the thing will probably, for ever exclude the possibility of finding a satisfactory definition." He further points out that with a view to deal with complex crimes without violating this principle, following three practical attempts have been made.

(i) *The Attentat clause.*—The so-called Belgian Attentat clause was enacted by Belgium in 1856 after the case of Jacquin in 1854. This case related to the attempt to murder the Emperor Nepolean III by Jacquin, a French manufacturer domiciled in Belgium, and a person named Celestin Jacquin who was a foreman in his factory by trying to cause

17. Oppenheim, see supra note 2, at p. 707, He adds : ".....Whereas many writers consider a crime 'political' if committed from a political motive, others call 'political' any crime committed for a political purpose ; again others recognise such a crime only as 'political' as was committed both from a political motive and at the same time for a political purpose; and thirdly, some writers confine the term 'political crime' to certain offences against the State only, such as, high treason, lese majeste and the like."
18. Oppenheim's International Law, note 2, p. 963.
19. Ibid at p. 964.
20. Ibid at pp. 964-965.
21. (1891) 1 Q.B. 149.
22. (1894) 2 Q.B. 415; For more recent case on extadition regarding the ground of 'political crimes' see *Jimenez* v. *Aristeguieta,* 311 F. 2d. 547 (1962); Sucha Singh's case, *R.* v. *Governor of Brizton Prison,* Exparte Kolcynski, (1955) 1 Q. B. 540; *R.* v. *Governor of Brizton Prison,* Exparte Shtraks, (1963) 1 Q.B. 55.
23. Philip C. Jessup, "The present State of Transnational Law" in the Present State of International Law and other Essays (1973) p. 339 at p. 342.

explosion on the railway line between Lilla and Calais. The extradition of the said two criminals was sought by France but the same was refused by the Belgian Court of Appeal which prohibited the extradition of political criminals. With a view to deal with such case the so-called Belgian *Attentat* clause was enacted. It provided that murder of the Head of a foreign Government, or of a member of his family, should not be considered a political crime. Britain and many other European States also adopted such *attentat* clause.

(ii) *The Russian Project of 1881.*—In 1881, Emperor Alexander II was murdered. Influenced by the murder in the same year (*i.e.*, 1881) Russia invited other States to hold an international conference at Brussels to consider the proposal that murder or attempt to murder should not be considered as a political crime. But the Russian project failed to materialize because both Great Britain and France refused to participate in the proposed conference.

(iii) *The Swiss Solution to the Problem in 1892.*—In 1892, Switzerland enacted extradition law. Article 10 of the said law recognised the principle of non-extradition of political criminals. Article 10 also recognised that if the chief feature of the offence contained more aspect of an ordinary rather than a political crime, then political criminal would not be surrendered and decision as to whether such criminal could be extradited or not was left with the *Bundesgericht*, i.e.—the highest Swiss Judicial Court.

(2) Extradition is not allowed for military criminals also.

(3) Similarly, for religious crimes also persons are not extradited.

(4) *The Rule of Speciality**.—An accused is extradited for a particular crime, and the country which gets back the criminal is entitled to prosecute that person only for the crime for which he was extradited. This is known as the rule of speciality. In *U. S.* v. *Rauscher,*[24] America got Rauscher extradited from Britain on the ground that he had fled to Britain after murdering a fellow servant in an American ship. In America, Rauscher was tried not for murder but for causing grievous hurt to a man named Janssen. The Supreme Court of the United States of America held that when a person is brought under the jurisdiction of the Court under the extradition treaty, he may be tried only for such offence for which his extradition was sought.** The same law prevails in India.[25]

(5) *Double criminality****.—The crime for which extradition is claimed should be crime in both the countries (the country claiming the extradition and the country extraditing). This is called the rule of Double criminality.

(6) There should be sufficient evidence for crimes relating to extradition. In other words, the crime should be such that it should appear to be a crime *prima facie.*[26]

(7) For extradition it is also necessary that certain other prescribed formalities should be fulfilled.

(8) The conditions and the terms mentioned in the Extradition Treaty should be generally fulfilled. In this connection, a leading case is that of *Savarkar (1911).* Savarkar was an Indian revolutionary who was being brought to India

---

* See also for I.A.S. (1978) Q. 4(b).

24. (1886) 119 U.S. 407.

** See also for P.C.S. (1971), Q. No. 10.

25. See Section 31 (a) of the Extradition Act, 1962; contents of Section 31 (a) have been referred later on in this very Chapter under the heading "Restrictions on the Surrender of fugitive Criminal."

*** See also for I.A.S. (1978), Q. 4 (a).

26. In the Tarashov Extradition case (1963), the accused was discharged by the court because no *prima facie* case was made out against him. The evidence adduced was inadequate to establish a *prima facie* case against the fugitive criminal. The Court observed that to constitute a *prima facie* case in extradition cases following requirements are essential : (a) the witness should be entitled to a reasonable degree of credit ; (b) the degree of proof should be higher than in ordinary criminal prosecutions ; and (c) the evidence must be incontrovertible leading to the probable and strong presumption of the offence against the accused. For the facts of this case see Appendix III ; see also A.I.R. 1958 S.C. 98; (1962) 3 All E.R. at p. 455.

to be prosecuted on the ground of crimes which he was alleged to have committed. When the ship was in the port of Marcelese, Savarkar escaped, but later on he was apprehended by French police. But the Captain of the French ship returned Savarkar to the Captain of the British ship under the wrong impression that it was his duty to do so. Later on the Government of France requested the British Government to return Savarkar on the ground that the rules relating to his extradition were not strictly observed. This case was entrusted to the Permanent Court of Arbitration, Hague for its decision. The Court decided that International Law does not impose any obligation upon the State whereby on the above ground the criminal may be returned. That is to say, once a person is extradited, even though it was done in irregular way, the country receiving the fugitive or the criminal is not bound under international law to return the accused. This decision has been severely criticized by the jurists. In their view, it was not based on the sound principle of justice.

(9) When a person is charged with having been an accessory in a crime committed in a foreign State which seeks his extradition, it is not necessary that at the time of offence the said person must be present in the said foreign State. This was held in *Rex* v. *Godfrey*.[27] In this case Godfrey was a member of the firm which traded in England. The said firm obtained some goods in Switzerland on false assurances. At that time Godfrey was in England. On the request of Switzerland, the court ordered the extradition of Godfrey. The same view was taken by the Supreme Court of India in *Mobarak Ali Ahmad* v. *State of Bombay*.[28] In this case the Supreme Court held, "The fastening of criminal liability on a foreigner in respect of culpable acts or omissions in India which are judicially attributable to him notwithstanding that he is corporeally present outside India at that time, is not to give any extra-territorial operation to the law : for it is in respect of an offence whose locality is in India, that the liability is fastened on the person and punishment is awarded by the law, if his presence in India for the trial can be secured." In this case, Mobarak Ali Ahmad, who was undergoing trial for forgery and fraud in the Court of Sessions Judge at Bombay, fled to Pakistan and thereafter he went to England. The Government of India got him extradited under the Fugitive Offender's Act.[29] He was brought to Bombay to face the resumed Session trial. When he was in Bombay Jail a person filed a complaint against the accused for the offence of cheating. A warrant was issued by the Presidency Magistrate against the accused and he was brought before the Court to face trial. It was argued on behalf of the accused that he was a Pakistani national and was out of India during the period when the offence was alleged to have been committed. But this argument was rejected by the Supreme Court. The Court held that the Indian Courts would have jurisdiction over a case in which a person committed an offence although not being present in India at the time of the commission of the offence.[30]

---

27. (1923) 1 K.B. 24.
28. A.I.R. 1957 S.C. 857 at p. 868.
29. *The Government of India* v. *Mobarak Ali Ahmad*, (1952) 1 All E.R. 1060.
30. The Supreme Court observed : ".....once it (i.e., offence) is treated as committed within the State the facts that he is a foreigner corporeally present outside at the time of such commission is no objection to the exercise of municipal jurisdiction under the Municipal Law. This emphasises the principle that exercise of criminal jurisdiction depend on the locality of the offence and not on the nationality of the alleged offender (except in a few specified cases such as Ambassdors, Princes etc." (A.I.R. 1957 S.C. 857 at p. 869). Further, "We have, therefore, no doubt that on a reading of Sec. 2 of the Penal Code the Code does apply to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside." (Ibid, at p. 870]. The Court finally held : ".....even on the assumption that the appellant has ceased to be an Indian citizen and was a Pakistani national at the time of the commission of the offence, he must be held guilty and punished under the Indian Penal Code notwithstanding his not being corporeally present in India at the time." (Ibid. at p. 871).

(10) As pointed out earlier, extradition is generally a matter of bilateral treaty.* It has been held that there must be a *'formal treaty'* not simply an agreement or notification. This was held by the First class Magistrate in new Delhi in the *Tarashov Extradition* case on 29-3-63.[31] The Court made this observation while interpreting Section 31 (c) of the Extradition Act, 1962. The Court discharged the accused on the ground no *prima facie* case was made out against the accused. The facts and decision in this case may be summarised as follows :

On 7th January, 1963, the Minister Counsellor of the Embassy of the U.S.S.R. in India made a requisition under section 4 of the Indian Extradition Act, 1962, requesting the Government of India to institute proceeding against V. S. Tarashov, a Soviet citizen who was alleged to have committed theft on high seas on 17-11-1962 on a board of a Soviet oil tanker "Tchernovci" in which he was employed as a Electrician and Mechanic. The fugitive criminal denied these allegations and stated that he had been arrested on 28th November 1962 on the complaint of the Soviet Vice-Consul in Calcutta implicating him with the said offence but the Presidency Magistrate, Calcutta had discharged him for want of evidence. He further contended that the Soviet Government had fabricated the said charge against him because he had sought political asylum from American Government. The Magistrate discharged the fugitive on the ground, *inter alia,* that the requirements of Section 31 (c) of the Act are not complied. Section 31 (c) of the Act required a formal treaty and not an agreement. The notification issued by the Government (extending the provisions to U.S.S.R.) could in no case be called a formal treaty.

(11) Generally States do not allow the extradition of their own citizens.** In *Regina* v. *Wilson,*[32] it was observed that where the high contracting parties expressly provide that their own subject shall not be delivered up as in the case of treaty between England and Switzerland, the power to arrest does not exist. Thus what was observed by Cockburn, C.J., in that case was a "serious blot" on the British system of extradition and the Royal Commission on extradition of which he was the Chairman recommended in their report that "reciprocity in this matter should no longer be insisted upon whether the criminal be a British subjet or not. If he has broken the laws of a foreign country his liability ought not to depend upon his nationality.....The convenience of trying crimes in the country where they were committed is obvious. It is very much easier to transport the criminal to the place of offence than to carry all the witnesses and proofs to some other country where the trial is to be held." [33] Evidently, similar consideration led to the passing of the Extradition Act (1903) by the Indian Legislature providing for the surrender of criminals including Indian subjects for a variety of offences.[34] The Extradition Act, 1962 also provides for the surrender of criminals including Indian subjects.

Restrictions on Surrender under Indian Law.—Section 31 of the Extradition Act, 1962, provides certain restrictions on surrender of fugitive criminals. These restrictions are as follows :

(1) *Offence of political character.*—A fugitive criminal shall not be surrendered or returned to a foreign State Commonwelath country if the offence in respect of which his surrender is sought is of a *political character* or if he proves to the satisfaction of the magistrate or court before whom he may be produced or of

---

* See also for P.C.S. (1976) Q. No. 5 ; For answer see also matter discussed under the heading "Is there a general duty in respect of Extradition ?"

31. See I.J.I.L., Vol. 3 case No. 3 (July 1963), pp. 323-325 at p. 325.

** See also for P.C.S. (1972), Q. No. 4 (Problem).

32. (1878) 3 Q.B.D. 42 : 37 L.T. 354.

33. Wheaton, S. 120 (a), pp. 197, 198.

34. *Dr. Ram Babu Saxena* v. *The State,* A.I.R. 1950 S.C. 155 at p. 157.

the Central Government that the requisition or warrant for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character.[35]

(2) *Prosecution for offence being barred by time.*—A fugitive criminal shall not be surrendered if prosecution for the offence in respect of which his surrender is sought is according to the law of that State or country barred by time.[36]

(3) *Extradition treaty or provision by law of Foreign State that Fugitive Criminal shall not be tried or detained in that State for any offence committed prior to his surrender or return.*—A fugitive criminal shall not be surrendered or returned to a foreign State or Commonwealth country unless provision is made by the law of the foreign State or Commonwealth country or in the extradition arrangement with the Commonwealth country that the fugitive criminal shall not, until he has been restored or has had an opportunity of returning to India, be detained or tried in that State or country for any offence committed prior to his surrender or return other than the extradition offence proved by the facts of which his surrender or return is based.[37]

(4) *If accused of some offence in India other than offence for which extradition is sought.*—A fugitive criminal shall not be surrendered or returned if he has been accused of some offence in India, not being the offence for which his surrender or return is sought or is undergoing sentence under any conviction in India until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise.[38]

(5) *After expiration of 15 days after being committed to prison.*—Lastly a fugitive criminal shall not be surrendered or returned until after the expiration of fifteen days from the date of his being committed to prison by the magistrate.[39]

Unfettered power or discretion of Central Government to discharge any fugitive criminal.—Despite the provisions of the Extradition Act, 1962, particularly section 3 and section 12,[40] The Central Government has unfettered powers or discretion to discharge any fugitive criminal. If it appears to the Central Government that by reason of the trivial nature of the case or by reason of the application for the surrender or return of a fugitive criminal not being made in good faith or in the interests of justice or for political reasons or otherwise it is unjust or inexpedient to surrender or return the fugitive criminal, it may, by order at any time stay any proceedings under this Act and direct any warrant issued or endorsed under this Act to be cancelled and the person for whose arrest the warrant has been issued or endorsed to be discharged.[41] It is further provided that notwithstanding anything to the contrary contained in section 3 or section 12 the provisions of section 29 and 31 shall apply without any modification to every foreign State or Commonwealth country.[42]

---

35. Section 31 (a) of the Extradition Act, 1962.
36. Section 31 (b).
37. Section 31 (c).
38. Section 31 (d).
39. Section 31 (e).
40. Section 3 provides that the Central Government may, by notified order, direct that the provisions of this Act other than Chapter III shall apply—(a) to such foreign State or part thereof or (b) to such Commonwealth country or part thereof to which Chapter III does not apply as may be specified in the order. Section 12 runs as follows : Chapter III shall apply only to any such Commonwealth country to which, by reason of an extradition arrangement entered into with that country it may seem expedient to the Central Government to apply the same. Further, every such application shall be by notified order, and the Central Government may, by the same or any subsequent notified order, direct that this Chapter and Chapters I, IV and V, shall in relation to any such Commonwealth country apply subject to such modifications, exceptions, conditions and qualifications as it may think fit to specify in the order for the purpose of implementing the arrangement.
41. Section 29
42. Section 32.

Case relating to refusal to grant of extradition of two Burmese students

In November 1990, two Burmese students were persuaded to land at Calcutta airport. They had hijacked Thai International Airbus with 205 passengers and 16-member to highlight the cause of restoration of democracy in their country. Their six-point Charter of demands, written in blood, included restoration of democracy in Burma, ending military rule, release of all political prisoners and a direct dialogue with the Burmese Government. The Indian Government refused to hand them over to Burmese or Thai authorities. However, the Indian Government have charged them under Anti-Hijacking Act, 1982 and for criminal conspiracy.

Some Indian Cases on extradition

(1) *Savarkar's case.*—The facts and the decision of the Savarkar's case has been referred earlier while explaining the essential conditions of extradition.

(2) *Ram Babu Saxena* v. *State*[43].—This case deals with section 7 of Indian Extradition Act, 1903. Dr. Ram Babu Saxena was an employee under U. P. Civil Service and was deputed to the Tonk State. Tonk was an Indian State and it had an Extradition Treaty with the British Government according to which both States were bound to extradite certain persons who were accused of certain specified crimes. Dr. Ram Babu Saxena was later on living in the district of Nainital. It was contended that while serving in Tonk State, he committed crimes of Extortion under section 383 and cheating under section 420. Dr. Ram Babu Saxena argued in defence that British Government had an extradition treaty with the Tonk State and that treaty did not provide for crimes for which his extradition was being claimed. Hence he could not be extradited under section 7 of the Extradition Act, 1903. In this connection he made specific reference of section 18 of the Extradition Act, 1903, which provided that no extradition could be made against the provisions of the treaty. Since the treaty did not mention the specific crimes for which his extradition was sought, he contended that it will beyond the jurisdiction of the court and whole proceedings were illegal. But the Supreme Court of India held that section 7 of Indian Extradition Act was rightly applied and he could be extradited. The Supreme Court held : ".....the Act does not derogate from any such treaty when it authorises the Indian Government to grant extradition for some additional offences, thereby enlarging, not curtailing, the power of the other party to claim surrender of criminals. Nor does the Act derogate in the true sense of the term from the position of an Indian subject under the treaty of 1869." [44] B. K. Mukherjee, J., observed : "When as a result of amalgamation or merger, a State loses its full and independent power of action over the subject-matter of a treaty previously concluded the treaty must necessarily lapse." [45] His Lordship concluded : ".....The Extradition Treaty between the Tonk State and the British Government in 1869 is not capable of being given effect to in the present day in view of the merger of the Tonk State in the United State of Rajasthan. As no treaty rights exist, Section 18 of Extradition Act has no application and as Section 7 of the Act has been complied with there is no ground upon which we can interfere." [46] Thus the Supreme Court dismissed the appeal.

(3) *State of Madras* v. *C. G. Menon.*[47]

N.B.—For the facts and decision of the case, please see Chapter on "Relationship between International Law and Municipal Law."

(4) *Hans Muller of Nurenburg* v. *Supdt., Presidency Jail, Calcutta and others.*[48] The facts and principles laid down in this case have been discussed in detail earlier in this Chapter under the heading "Distinction between "Expulsion" (under Foreigners Act, 1946) and "Extradition."

---

43. A.I.R. 1950 S.C. 155.
44. Ibid, at pp. 157-158.
45. Ibid, at p. 163; see also Hyde on International Law, Vol. III, p. 1535.
46. Ibid.
47. A.I.R. 1954 S.C. 517.
48. A.I.R. 1955 S.C. 367.

(5) *Mobarak Ali Ahmad* v. *State of Bombay, 1957* [49].—The fact and principles laid down in this case have also been discussed earlier in this Chapter.

(6) *The Tarasov Extradition case, 1963*[50].—This case has been discussed earlier in this Chapter.

(7) *Sucha Singh's case.*—Sucha Singh was accused of murdering Pratap Singh Kairon, the former Chief Minister of Punjab and had fled away to Nepal and on the request of the Government of India, the Government of Nepal after starting proceedings against him in accordance with the law of Nepal, extradited him.

(8) *Dharam Teja's case.*—Dharam Teja, who was the Managing Director of Jayanti Shipping Corporation, committed embezzlement and bungling of crores of rupees and had fled away from India. He fled from one country to another to escape his arrest. When he was in Ivory Coast, the Government of India requested the Government of Ivory Coast to extradite Dharam Teja so that proceedings against him could be started in India. The Government of Ivory Coast refused to extradite Dharam Teja on the ground that there was no extradition treaty with India. Later on, when DharamTeja was in London the Government of India came to know about his whereabouts and informed the British Government and requested it to apprehend Dharam Teja and to start proceedings of extradition against him. India has an Extradition Treaty with the Government of Britain under which both the countries are bound to extradite the accused of each other who run away after committing crimes in either country. Government of England accepted the request of India and proceedings were started against Dharam Teja in the court of law in England. The Court of law in England came to the conclusion that Dharam Teja could be extradited. Consequently, Dharam Teja was extradited to India. The Government of India started proceedings against him and Dharam Teja was convicted for having committed embezzlement and bungling of crores of rupees of Jayanti Shipping Corporation, while he was Managing Director of that Corporation.

(9) Naval Officer Extradition case (July, 1975).—Commander Elijah Ebrahim Jhirhad of Indian Navy was charged by the Government of India with misappropriating Rs. 13 lakhs of the Naval Prize Fund while he was functioning as the Judge Advocate-General of the Indian Navy in the early 1960. The matter was referred to the C.B.I. (*i.e.*, Central Bureau of Investigation) in 1966. Jhirhad had the responsibility of administering Rs. 70 lakhs of the prize fund. An ex-sailor made a complaint that he had not received his share of the prize money. On enquiry the Naval Headquarters discovered that the fund was never subjected to audit and that Commander Jhirhad had destroyed all records. A charge-sheet was filed by C.B.I. against him in 1968. But Jhirhad could not be apprehended as he fled from the country along with his family. Since then the Indian authorities were trying to find out his whereabouts. The C.B.I. then got in touch with the Interpol which had arrested him in April 1972 in New York. Proceedings for his extradition were then launched but Commander Jhirhad went in appeal. In July 1975, the New York Judge passed the extradition orders after accepting the Indian Government pleas in this regard. Thus Commander Jhirhad has been extradited to India and will now face trial of the charge of misappropriation of Rs. 13 lakhs of the Naval Prize Fund.

(10) *Narang Brothers Extradition Case (October 1976).*—In October 1976, the Government of India successfully concluded extradition proceeding in London against Manohar Narang and his brother Om Prakash Narang who were wanted in India on charges of cheating, forgery and smuggling in connection with two stolen antique pillars known as Amin pillars in a village near Kurukshetra in Haryana. A London Magistrate held that there

49. A.I.R. 1957 S.C. 867.
50. Order of First Class Magistrate, (New Delhi) dated 29-3-1963.

was a *prima facie* case for their trial and allowed the extradition application of the Government of India. Manoharlal Narang who was said to be financial adviser to the Liberian Embassy in Paris was arrested in May by the British Police for handling the stolen 2nd century B. C. Antique pillars valued at 250,000 pounds. The pillars were recovered from a local warehouse in London. The Magistrate rejected Manoharlal's plea for diplomatic immunity. On January 10, 1979, the Supreme Court of India dismissed an appeal filed by Narang brothers (Manu Narang and Omi Narang) questioning the legality of the warrants issued by a Delhi Court for their extradition from London in a case of breach of trust involving two antique pieces which were recovered from London. The Court also turned down a similar appeal by Ram Lal Narang, challenging the issue of process by a Delhi Magistrate requiring the three brothers to appear before him in the case which is pending for trial. The appeal filed by the Narang brothers was directed against the order of the Delhi High Court rejecting their applications for quashing the trial court orders. The Division Bench of the Supreme Court consisting of Mr. Justice N. L. Untwalia and Mr. Justice O. Chinnappa Reddy dismissed the two appeals and ruled that the investigating agency had not acted out of any malice nor did it commit any illegality in the investigations.[51]

S.A.A.R.C. Accord on Extradition

On 16th June, 1987, the Foreign Secretaries of South Asian Regional Countries entered into an agreement on extradition. The draft of the Agreement and recommendations were presented before the Standing Committee of Foreign Affairs Ministers. The Agreement provided for the extradition of persons accused of terrorist acts but not including acts of political nature. Later on a three-day Summit of South Asian Association of Regional Countries (SAARC), the Conference adopted a Convention on Terrorism on 4th November, 1987. The Convention was to be ratified within six months. The Convention provides for the extradition of person accused of terrorist acts. However, Article 11 of the Convention provides, that if the State concerned thinks that it is not proper and expedient to extradit the accused, there shall be no obligation to extradit. Similarly, there shall be no obligation to extradit if the matter is very ordinary and the request for extradition has not been made in good faith and is not in the interest of justice. But under the Convention it is the obligation of the member States to ensure the presence of the accused for prosecution under national laws. Under the Convention following six crimes shall not be considered as political crimes or crimes inspired by political motives :

(a) Crimes relating to aircraft hijacking under the Hague Convention of 16 December, 1970 on Hijacking ;
(b) Crimes relating to aircraft hijacking under the Montreal Convention of 23 September,1971 on Hijacking;
(c) Crimes under the Convention of 14 December, 1973 relating to Prevention and Punishment of crimes against Internationally Protected Persons;
(d) Crimes under any Convention of which SAARC States are parties and under which State parties are under obligation to prosecute or extradit the accused;
(e) Crimes relating to murder, assault ; making hostage etc. ; and
(f) Attempt to aid and advise the crimes etc., mentioned in (a) above.

The convention also provides that the Member States shall not consider political crimes the crimes concerning violence.

India—U.K. Pact on Extradition

In the first week of January, 1992 during his visit to India, British Home Secretary Kenneth Baker offered to sign an extradition treaty with India regarding extradition and confiscation of funds of terrorists and drug traffickers operating from Britain. This step is being taken to deter drug traffickings and terrorists in Punjab and Kashmir. The Treaty is subsequently signed. The treaty was ratified on 15th November, 1993. Earlier India had

51. The Times of India, 11 January, 1979.

entered into in 1986 an extradition treaty with Canada. India is also making endeavours to enter into a similar treaty with the United States of America.

Extradition Treaty between India and Canada.—Desiring to make more effective the cooperation of the two countries in the suppression of crime by making provision for the reciprocal extradition of offenders, and recognising that concrete steps are necessary to combat terrorism the Government of India and the Government of Canada signed an extradition treaty on the 6th of February, 1987. According to Article 1 of the treaty, each contracting state agrees to extradite to the other, subject to the conditions of this treaty any person who being accused or convicted of an extradition offence as described in Article 3, committed within the territory of one state, found in the territory of the other state, whether or not such offence was committed before or after the coming into force of this treaty.

According to Article 3 of the treaty, an extradition offence is committed when the conduct of the person whose extradition is sought constitutes an offence punishable by the laws of both contracting states by a term of imprisonment for a period of more than one year.

India, Hongkong Pact on Extradition.—Before Hongkong became a part of China, Hongkong and India entered into a treaty on extradition in the mididle of June 1997. Since China has announced that China will abide by international treaties signed during the British rule, it is hoped that China will abide by this treaty.

Indo-U.S. Treaty on Extradition.—India and America have been cooperating with each other for a long time for curbing extremism and terrorism. In several cases in past, America has cooperated with India in respect of extradition of criminal who after committing crime had fled away to that country. Recently America extradited Daya Singh Lahoria at the request of the Government of India. A couple of more extraditions are expected soon. On 25th June, 1997 India and America entered into a treaty on extradition. It is a modern treaty containing exhaustive provisions relating to new trends on extradition.

In accordance with Article 23 of the treaty, instruments of ratification were exchanged at New Delhi on 21st July, 1999. Thus the treaty came into force immediately because Article 23 provides that this treaty shall enter into force upon the exchanges of the instruments of ratification.

Article 1 of the treaty provides that the contracting states agree to extradite to each other, pursuant, to the provisions of this treaty, person who, by the authorities in the Requesting State are formally accused of, charged with or convicted of an extraditable offence, whether such offence was committed before or after the entry into force of the Treaty.

Article 2 of the Treaty states that an offence shall be an extraditable offence if it is punishable under the laws in both the contracting states by deprivation of liberty, including imprisonment, for a period of more than one year or by more severe penalty. Further, an offence shall also be an extraditable offence if it consists or an attempt or a conspiracy to commit, aiding, or abetting, counselling or procuring the commission of or being an accessory before or after the fact to, any offence described above.

Article 3 provides that extradition shall not be refused if on the ground that the person sought is a national of the requested state. But extradition shall not be granted for political offence (Article 4) and military offence (Article 5). Extradition shall also not be granted when the prosecution has become barred by lapse of time according to the laws of the Requesting time (Article 7).

In case of urgency, a contracting state may request the provisional arrest of the person sought pending presentation of the request for extradition. A request for provisional arrest may be transmitted through the diplomatic channel. The facilities of the International Criminal Police Organisation (Interpol) may be used to transmit such a request. (Article 12)

Article 17 of the Treaty incorporates the Rule of speciality. Article 17 provides :

1. A person extradited under this Treaty may not be detained, tried or punished in the Requesting State except for :—

(a) the offence for which extradition has been granted or a differently denominated offence based on the same facts on which extradition was granted provided such offence is extraditable or is a lesser included offence;

(b) an offence committed after the extradition of the person; or

(c) an offence for which the executive authority of Requested State consents to the person's detention, trial or punishment. For the purpose of this sub-paragraph :

(i) the Requested State may require the submission of the documents called for in Article 9; and

(ii) the person extradited may be detained by the Requesting State for 90 days or such longer period of time as the Requested State may authorize, while the request is being processed

2. A person extradited under this treaty may not be extradited to a third state for an offence committed prior to his surrender unless the surrendering state consents.

3. Paragraphs 1 and 2 of this Article shall not prevent the detention, trial or punishment of an extradited person, or the extradition of that person to a third state if;

(a) that person leaves the territory of the Requesting State after extradition and voluntarily returns to it; or

(b) that person does not leave the territory of the Requesting State within 15 days of the day on which the person is free to leave.

Last but not the least, Article 18 provides for 'Waiver of Extradition'. According to it if the person sought consents to surrender to the Requesting State, the Requested State may, subject to its laws, surrender the person as expeditiously as possible without further proceedings.

Extradition Treaty Between India and Germany.—With a view to combat crime, India and Germany signed an extradition treaty at Berlin on 27th June, 2001. The treaty will enable the two countries to extradite a person wanted in "extraditable offences." Under the treaty extraditable offences are the offences which are punishable under the laws of both the states and are punishable by a term of imprisonment of not less than one year. Extradition shall also be granted in respect of an attempt or conspiracy to commit, or aiding, abetting, inciting or participating as an accomplice in the commission of an extraditable offence.

Case of Extradition of Famous Music Director, Nadeem

Famous Music Director, Saifi Nadeem Akhtar, popularly known as 'Nadeem' is accused of in the murder of music baron Gulshan Kumar. Before the police in India could arrest him, he fled to England. The Government of India has sought his extradition. India and Britain had signed an extradition treaty in 1992. This treaty came into effect from 15th November, 1993 after having been ratified by the Parliaments of both countries. The Mumbai Police has filed the chargesheet of the case in the British Crown Prosecution Office which would outline the details of the extradition case before the Bow Streets Court. Mere submission of chargesheet or arrest warrant is not sufficient. The Mumbai Police will have to provide sufficient corroborating evidence of Nadeem's involvement for extradition to take place that is to say, it will have to be established that Nadeem was *prima facie* involved in the murder of Gulshan Kumar. Taking advantage of the complex British process for extradition Nadeem is getting the decision in the case delayed. However it is clear that by refusing to go back to India voluntarily, Nadeem has probably lost the chance of returning to India. Even if he is successful in blocking the extradition, he may have to seek political asylum in Britain or shift to a third country.

Case of Extradition of Pinto

London based Brazilian business man A-E Pinto is accused of having played the middleman between the Turkish firm Karsan and Indian agent Sumbasiva Rao in Urea Scam. Pinto has been under arrest in London for more than a year pending his extradition as the Indian Government has sought his extradition. The CBI filed the charges against Pinto alleging that the National Fertilizers (NFL) Executive Director (Marketing) D. S. Danwar unauthorisedly signed the contract for the supply of urea with Karsan on behalf of NFL in July, 1995 and Tuncay Alankus was the signatory from the Karsan side. But the deal could not materialise and Karsan accused the NFL of failing to issue the "block find papers" . Subsequent to the fiasco of the first deal, another contract was signed between NFL and Karsan on October, 1995.

The entire amount of 38 million dollars was paid in advance but not a single grain of urea was received till the last date of fulfilling the contract immediately after the said expiry date, CBI registered the case and accused Pinto of having received 1. 2 million dollars out of 38 million dollars remitted to Karsan. The CBI also claims to have recovered several incriminating documents from Pinto's residence in London during the raids conducted there. Besides Pinto, Karsan executives Tuncay Alankus and Cihan Karance and some former NFL officials are also facing prosecution.

The Bow Street Magistrate has already issued the order allowing the CBI plea for Pinto's extradition to India. Pinto's appeal against the said order of the Magistrate has also been rejected. Pinto has filed a revision petition against the order. According to legal experts his extradition is only a matter of time.

Extradition Treaty Between India and Russia

India and Russia also signed an extradition treaty. This treaty was approved and ratified by Russia on 15th April, 2000.

Extradition Treaty Between India and Spain

India and Spain have also signed an extradition treaty. It was signed in June, 2002.

Extradition Treaty Between India and France

India and France signed an extradition treaty on 24th January, 2003. Prior to the signing of the treaty France had apprehensions that the terrorists or criminals to be extradited to India might get death penalty. India removed such apprehensions by giving an undertaking that terrorists extradited to India would not be given death penalty. The treaty was signed by Deputy Prime Minister L.K. Advani on behalf of India and Dominique Perben, Minister for Justice of France, on behalf of France.

Extradition Treaty Between India and Bulgaria

India and Bulgaria signed an extradition treaty on 23rd October, 2002. This treaty aims to ensure that terrorists are not able to seek sanctuary abroad.

Thus India has so far signed extradition treaties with twenty-five countries.

Case Relating to Extradition of Quattroechi

Quattrochi, a man of Italian origin, is accused of Bofors' Commission Bribery case. Presently he is living in Malaysia. India made a formal request to Malaysia to extradite Quattrochi so that he could be tried in India. The lower Court of Malaysia rejected the request for extradition and set Quattrochi free. He had been on bail since his arrest in September 2000. India filed an appeal against this order in the High Court there. India sent an advocate to argue the case and sought the permission of Attorney-General there for the appearance of the advocate on behalf of India. But the High Court did not allow the Indian advocate to appear.

The problem of extradition of Quattrochi became difficult because India had no extradition treaty with Malaysia.

However, to pursue the case further, a two member CBI team was sent to assist Malaysian lawyers. Recently, *i.e.*, the second week of May, 2004, the two-member CBI team came back home, was rather asked to return, without completing its work. This was because of the fact that after the General-Elections of 2004, it became clear on 13th May,

2004 that Sonia Gandhi, a lady of Italian origin would become the new Prime Minister. Therefore, it would not be wrong to conclude that this case would never come to its final and logical conclusion. Though subsequently Dr. Man Mohan Singh became the Prime Minister but Sonia Gandhi remained the leader of Congress-led party in the Parliament thus retaining the remote control in her hand.

CHAPTER 23
ASYLUM*

Meaning and Definition.—By asylum we mean whelter and active protection extended to a political refugee from another State by a State which admits him on his request. Asylum involves following two elements—(1) a shelter which is more than a temporary refuge; and (2) a degree of active protection on the part of the authorities which have control over the territory of asylum.[1] The institute of International Law has defined asylum as "the protection which a State grants on its territory or in some of her place under the control of certain of its organs to a person who comes to seek it."

Right to Asylum.**—According to Article 14 of the Universal Declaration of Human Rights : "Every one has a right to seek and enjoy in other countries asylum from prosecution." It may however, be noted that the Declaration simply recognises the right of asylum, it does not grant right to receive asylum. "The so-called right of asylum is probably nothing but the competence of every State to allow a prosecuted alien to enter and to remain on, its territory under its protection. Such fugitive alien enjoys the hospitality of the State which grants him asylum ; but it might be necessary to place him under surviellance, or even to intern him at some place to make his entry subject to condition. For it is the duty of every State to prevent individuals living on its territory from endangering the safety of another State by organising hostile expeditions or by preparing common crimes against its Head, members of its Government or its property." [2]

In 1967, United Nations Declaration on Territorial Asylum was unanimously adopted by the General Assembly. Among its most important provisions, it called on Governments to refrain from measures such as rejection at the frontier of persons seeking asylum. Being a declaration, it lacked binding force, and it was considered necessary to strengthen the legal basis for granting asylum by means of a convention. With this aim in view the United Nations Conference of Plenipotentiaries on Territorial Asylum was held in Geneva from 10th January to 4th February, 1977. It recommended in its report that the General Assembly in 1977 consider reconvening a further session of the Conference at the appropriate time. The draft text, which was before the conference prepared by the legal experts also intended to reinforce to some extent Article 14 of the 1948 Universal Declaration of Human Rights but makes no mention of any obligation by States to grant asylum.[3] Thus although every one has a right to seek asylum yet there is no corresponding duty of States to grant asylum. "The only international legal right involved is that of the State of refuge itself to grant asylum." [4]

Types of Asylum and distinction between Territorial and Extra-territorial Asylum.***—Asylum may be classified into two categories (1) Territorial and (2) Extra-territorial. in the Asylum Case (*Colombia* v. *Perus*)[5] the International Court of Justice explained the distinction between territorial asylum and diplomatic asylum in the following words : "In the case of extradition (territorial-asylum), the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from

---

* See also for I.A.S. (1974), Q. No. 3 (e); I.A.S. (1971), Q. No. 11 (e); I.AS. (1969), Q. No. 3; P.C.S. (1970), Q. No. 2 (e).

1. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 358.

** See also for C.S.E. (1982), Q. 5 (b) ; C.S.E. (1984), Q. 5 (d).

2. Oppenheim's International Law, Vol. 1, Edited by Sir Robert Jennings and Sir Arthur Watts, Ninth Edition Longman Group UK Ltd. and Mrs. Tomoko Hudson, 1992,p. 903.
3. U. N. Monthly Chronicle, Vol. XIV, No. 3 (March, 1977), p. 81.
4. Starke's International Law, Eleventh Edition (1994), Edited by I.A. Shearer, p. 324.

*** C.S.E. (1993) Q. 6 (c).

5. I.C.J. Reports (1950), p. 266.

the sovereignty of that State. In the case of diplomatic asylum the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in such particular case." "The differences between the principles applying to the two kinds of asylum flow from the fact that the power to grant territorial asylum is an incident of territorial sovereignty itself, whereas the granting of extra-territorial asylum is rather a derogation from the sovereignty of the territorial State in so far that State is required to acquiesce in fugitives from its authorities enjoying protection from apprehension." Further each State "has a plenary right to grant territorial asylum unless it has accepted some particular restriction in this regard, while the right to grant extra-territorial asylum is exceptional and must be established in each case." [6]

Territorial Asylum.—Territorial asylum is granted by a State in its own territory and is considered as an attribute of the territorial sovereignty of the State. On 28th March, 1945, a Convention on Territorial Asylum was adopted at Caracas. Article 1 of the said Convention provided, "Every State has right in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable without, through the exercise of the right, giving rise to complaint by any other State." Besides this, Article 1 of the Draft Declaration of Asylum as adopted by the United Nations Human Rights Commission, provided : "Asylum granted by a State in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights, shall be respected by all other States." Article 3 of the said Draft Declaration further provided, "No one seeking or enjoying asylum in accordance with the Universal Declaration of Human Rights, should except for overriding reason of the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is well founded fear of prosecution endangering his life, physical integrity or liberty in that territory.....". Articles 31, 32 and 33 of the Refugee Convention of 1951 have incorporated the above principle.

In its resolution of 14th December, 1967 the General Assembly of the United Nations recommended that in practice the States should do the following :—

(a) When a person requests for asylum, his request should not be rejected or if he enters the territory of such State, he should not be expelled but when a large number of people request for asylum, it may be rejected on the basis of the national security of its own people.

(b) If any State feels difficulty in granting asylum, it should consider the appropriate measures with the feeling of international unity through the medium of individual States or the United Nations.

(c) When a State grants asylum to the fugitives, other States should respect it.

A State is free to grant asylum to the people of other States but this freedom can be restricted or regulated through treaties.

Reference to be made here to the United Nations Conference of Plenipotentiaries on Territorial Asylum which was held at Geneva from 10th January to 4th February, 1977. The Conference, which was attended by 92 countries, held its session in accordance with General Assembly Resolution 3456 (XXX) of 9th December, 1975 for the purpose of considering and adopting a Convention on Territorial Asylum. However, it did not reach a consensus on the matter. The Conference recommended for holding one more session at the appropriate time. The conference was the culmination of more than five years of preparatory work. In April 1971, a group of independent legal experts meeting in Bellgio, Italy, under the auspices of the Carnegie Endowment for International Peace, in consultation with the United Nations High Commissioner for Refugees, began to draw up a

6. Starke, see supra note 1, p. 358.

draft convention on Territorial Asylum and concluded its work in Geneva in January of 1972.[7]

The International Protection of Refugees*.—The instruments for the international protection of refugees are the 1951 U. N. Convention Relating to the Status of Refugees and its 1967 Protocol. So far 96 states have ratified or acceded to one or both of these instruments. Besides these, there is U. N. High Commissioner for Refugees (UNHCR) established on 1 January, 1961 to give legal protection to the refugees and to provide them material assistance. The convention is based on two principles—(i) non-discrimination, as far as possible between nationals and refugees; and (ii) no discrimination based on race, religion or country or origin amongst refugees. It may be noted here that Article 31 of the 1951 U.N. Refugee Convention exempts refugees directly from a country of prosecution from punishment on account of their illegal entry or presence provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. Further the contracting states parties shall not apply to the movements of such refugees restrictions other than those which are necessary and that any restrictions shall only be applied until their status is regularized or they obtain admission into another country. According to Article 2 of the Convention refugees should respect the laws and regulations of their host country and refrain from activities which are inconsistent with their refugees status. Reference may also be made to the principle of non-refoulement incorporated in the Convention. This principle is fundamental to the entire structure of international action in favour of refugees. The observance of this principle is closely related to the determination of refugee status. The corollary to the principle of non-refoulement is that the repatriation of refugees must be voluntary.

It may be noted that until 1967, the Convention applied to persons who had become refugees before January 1, 1951. Under its Protocol adopted in 1967 which came into force on October 4, 1967, new groups of refugees are afforded the same protection. The 1967 Protocol which has widened the scope defines a refugee as someone who is outside his or her former house owing to a well-founded fear of persecution "because of reasons of race, religion, nationality, membership in a particular social group or political opinion".

In its note on International Protection of Refugees,[8] the U. N. High Commission on Refugees highlighted the problems faced by refugees. There are problems in regard to admission of refugees and to the standards of treatment accorded to them. States have a tendency to view asylum and the refugee concept in a restrictive manner and to resort to measures of "deterrence" including unjustified detention of refugees, sometimes under harsh conditions. In addition, there is intractable problem of violations of the physical safety of refugees through armed attacks on refugee camps and settlements, forced conscription, piracy attacks on the failure of passing ships to rescue asylum-seekers in distress on high seas.

A UNHCR Panel in Geneva on, 11 April, 1984 expressed concern about 'xenophobic attitudes' towards refugees and appealed to the public the media and Governments to combat xenophobic trends and to treat refugees according to recognized humanitarian standards.[9] Last but not the least, since 1985, UNHCR has launched the U. N. Campaign to break down mounting barriers erected against the tide of refugees worldwide and to treat refugees as assets.

Example of Dalai Lama and his Tibetan Followers.—Being oppressed from the repressive policies of China, Dalai Lama and some of his followers fled away from Tibet and sought political refuge in India. India granted asylum to Dalai Lama and his followers. It was an indication of territorial sovereignty of India. China made a great hue and cry over it and alleged that India was interfering in the internal affairs of China. But as a matter of fact and in accordance with the principles of territorial asylum, India as a

7. See supra note 3.
* See also for C.S.E. (1991) Q. 7(a).
8. See U. N. Doc. A/AC. 96/643, 9 August, 1984.
9. U. N. Chronicle, Vol. XXI No. 4 of 1984, p. 54.

sovereign State, was within her right to grant asylum to Dalai Lama and his followers. "A State being at liberty to do whatever it chooses within its own territory, without reference to the wishes of other States, so long as its acts are not directly injurious to them, it has the right of receiving and giving hospitality of asylum to emigrants or refugees, whether or not the former have violated the laws of their country in leaving it and whether the latter are accused of political or of ordinary crimes." [10]

Example of the Influx of Refugees from Bangla Desh*.— The repressive policies followed by the Military Regime of General Yahya Khan and the deliberate and calculated genocide committed by the military personnel of Pakistan forced millions of refugees to seek political refuge in India. India not only liberally granted political refuge to these oppressed people but also fed them and set the example of providing hospitality which is unprecedented in the annals of the world. It was in keeping with Article 1 and 3 of the Draft Declaration on Asylum adopted by Human Rights Commission as referred earlier. Moreover, it was in accordance with Articles 31, 32 and 33 of the Refugee Convention of 1951. If India had not granted refuge to the said refugees, their return or expulsion would have resulted in compelling them "to return to or remain in a territory where there was well-founded fear of prosecution endangering their lives or physical integrity." Thus the action of India in granting political refuge to millions of Bangalee refugees from erstwhile East Pakistan (now Bangladesh) was not only commendable on moral grounds but also in keeping with the norms and principles of International Law. India's action was also in accordance with Universal Declaration of Human Rights, 1948. Article 14 (1) of the Declaration provides that everyone has the right to seek and enjoy in other countries asylum from persecution. Article 14 (2) further provides that this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. Obviously in case influx of refugees from Bangaladesh, Article 14 (2) does not apply. The influx of refugees from Bangladesh was due to political crimes and the refugees concerned were not guilty of violating the purposes and principles of the United Nations. Rather, the Military Regime of Pakistan was guilty of violating the purposes and principles of United Nations.

Extra-territorial or Deplomatic Asylum.**—Extra-territorial asylum is granted by the State outside its territory, *e.g.,* its embassy or public vessels. Extra-territorial asylum may be classified and discussed under the following heads :—

(a) Asylum in Foreign Embassies.***—International Law does not recognise a general right of a head of mission to grant asylum in the premises of the legation for the obvious reason that such a step would prevent territorial law taking its own course and would involve a derogation from the sovereignty of that State where the legislation or mission is situated. In the Asylum case the International Court of Justice observed, "A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively with in the competence of that State. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case." The facts of the *Asylum* (*Colombia* v. *Peru*)[11] *case* are as follows :

A political leader named Victor Raul Haya Dela Torre was accused of having instigated a military rebellion. He was a Peruvian national and was granted asylum in the Colombian Embassy at Lima on 3 January 1949. The granting of the said asylum was a subject of a dispute between Peru and Colombia. Both the parties agreed to refer the case to the International Court of Justice. According to the Pan-American Havana Convention on Asylum (1928), subject to certain conditions, asylum could be granted in a foreign

10. Hall, International Law, Eighth Edition, p. 749.
*- See also for I.A.S. (1972), Q. No. 7.
** See also for P.C.S. (1975), Q. No. 2(d), P.C.S. (1977), Q. 5.
*** P.C.S. (1983) Q. 10 (b) : C.S.E. (1988), Q. 7 (a) P.C.S. (1990) Q. 8(b).
11. I.C.J. Reports (1950), p. 266.

embassy to a political offender who was a national of the territorial State. The question in dispute was whether Colombia, as the State granting the asylum, was entitled unilaterally to "qualify" the offence committed by the refugee in a manner binding on the territorial State that is to decide whether it was a political offence or a common crime. The Court was also asked to decide whether the territorial State was bound to afford the necessary guarantee to enable the refugee to leave the country in safety. In its judgment of 20 November 1950, the Court answered both these questions in the negative, but at the same time specified that Peru had not proved that Haya de la Torre was a common criminal. Lastly, the Court found in favour of a counter claim submitted by Peru that Haya de la Torre had been granted asylum in violation of the Havana Convention. On the day on which the Court delivered this judgment, Colombia filed a request for interpretation, seeking a reply to the question whether the judgment implied an obligation to surrender the refugee to the Peruvian authorities. In a judgment delivered on 27 November, 1950, the Court declared the request inadmissible.

Reference may also be made here to *Haya Dela Torre case.*[12] This case, a request to the above case, was instituted by Colombia by means of a fresh application.

Immediately after the judgment of 20 November 1950, Peru had called upon Colombia to surrender Mr. Haya Dela Torre. Colombia refused to do so, maintaining that neither the applicable legal provisions nor the Court's judgment placed it under an obligation to surrender the refugee to the Peruvian authorities. This view was confirmed by the Court in its judgment of 13 June 1951. The Court, added that asylum to Haya Dela Torre had been irregularly granted because three months had passed after the suppression of the military rebellion which clearly showed that the urgency prescribed by Havana Convention as a condition for the regularity of asylum ceased to exist. But since Haya Dela Torre was a political offender, the Court held that despite the fact that asylum had been irregularly granted, Colombia was not bound to surrender Haya Dela Torre. The International Court of Justice held : "to infer.....an obligation to surrender a person to whom asylum has been irregularly granted would be to disregard both the rule of the extra legal factors involved in the development of asylum in Latin America and the spirit of the Havana Convention."

The Court further added that although the Havana Convention expressly prescribed the surrender of common criminals to the local authorities, no obligation of the kind existed in respect to political offenders while confirming that asylum had been irregularly granted and that on this ground Peru was entitled to demand its termination, the Court declared that Colombia was not bound to surrender the refugee. These two conclusions were not contradictory because there were other ways in which the asylum could be terminated besides the surrender of the refugee.

Under international law, a general right of States to grant asylum in foreign legations is not conceded. Asylum may be granted in legation premises in the three exceptional cases—(i) Asylum may be granted, for a temporary period, to individuals who are physically in the danger from mob violence or in case of a fugitive who is in danger because of political corruption in the local State; (ii) Asylum may also be granted where there is a well-established long recognised and binding local custom; and (iii) Asylum may also be granted if there is a special treaty between the territorial State and the State of the legation concerned.[13]

Illustration

A national of country *X* on a visit to India was given asylum in his embassy by the ambassador of country *Y* in India. He was secretly sent away by plane to country *Y*.*

As noted above, international law does not recognise a general right of states to grant asylum in foreign legations. Asylum may, however, be given under exceptional

12. I.C.J. Reports (1951), p. 71.
13. Starke, see *supra* note 1, at p. 361.
* C.S.E. (1988), Q. 7(b).

circumstances. In the present, none of the exceptions mentioned above applies. Therefore the conduct of ambassador of country *Y* in secretly sending the national of country *X* to country *Y* is not proper because it involves derogation of the sovereignty of India. India can make a diplomatic protest. But no other remedy is available to India. *Y* is under no obligation to return the national of country *X* to India.

(b) *Asylum in Consular Premises.*—The general principles relating to legation premises are also applicable to the grant of asylum in Consular premises.

(c) *Asylum in the Premises of International Institutions.*—International law does not recognise any rule regarding the grant of asylum in the premises of International Institutions. Temporary asylum may, however, be granted in case of danger of imminent violence. There is no general right to International Institutions "to grant asylum or even refuse asylum in their premises to offenders as against the territorial State, and semble not even a right of protection on humanitarian grounds. It is difficult to conceive, however, that a right to grant temporary refuge in an extreme case of danger from mob rule would not be asserted or conceded." [14]

(d) *Asylum in War Ships.*—Some writers are of the view that the individuals, not being the members of the crew, who board the vessel to take refuge after committing a crime on shore, cannot be arrested by the local authorities and removed from the vessel in case the commander of the ship refuses to hand over the fugitive. On the other hand some other writers have expressed the view that such fugitives should be handed over to the local police. Even such writers, however, concede that asylum may be granted only on humanitarian grounds in case where there is extreme danger to the life of the individuals seeking asylum. Asylum may also be granted to political offenders. In this connection, Fenwick has pertinently remarked : "While asylum is no longer granted to ordinary criminals, it is still granted quite frequently to political refugees." [15] Reference may also be made here of a Convention adopted at the Sixth International Conference of American States held at Havana in 1928 which forbids the grant of asylum on war ships to persons accused of or condemned for crime. The Convention, however, lays down certain conditions under which asylum may be granted to political offenders.

(e) *Asylum in Merchant Vessels.*—Merchant vessels do not enjoy immunity from the local jurisdiction and consequently asylum cannot be granted to local offenders in merchant vessels.

*Asylum and Extradition are Mutually Exclusive or Asylum stops, as it were, where Extradition begins**.—As noted earlier, asylum is the protection which a State grants in its territory or in some of her place under control of certain of its organs to a person who comes to seek it. On the other hand, extradition is the surrender or delivery of the fugitive criminal to the State on whose territory he is alleged to have committed a crime, by the State on whose territory the alleged criminal happens to be. The institution of asylum confers right upon the State to bring the person concerned within its jurisdiction. In case of territorial asylum, the person is in the territory of the territorial State and hence under its jurisdiction. By granting asylum, it grants protection to the person concerned in its territory. In case of diplomatic asylum, the person is not under the jurisdiction of the State granting asylum and by granting asylum protection is granted to the person concerned and he is brought under the jurisdiction of the granting State. It, therefore, involves derogation from the sovereignty of the territorial State or through the institution of asylum the person concerned is withdrawn from the jurisdiction of the territorial State.

In both types of asylum, however, the ultimate purpose is to accord protection to the refugee or person concerned and to bring him under the jurisdiction of the granting State.

---

14. Ibid, at p. 391.
15. Charles G. Fenwick, International Law (Third Indian Reprint, 1971), p. 387.

* See also for I.A.S. (1963), Q. No. 12 (a); P.C.S. (1967), Q. No. 9; for elaboration of the answer : see also matter discussed earlier under the heading "territorial asylum"; C.S.E. (1988), Q. 7 (a); C.S.E. (1988), Q. 7 (d); C.S.E. (1992) Q. 6(b) ; P.C.S. (1994) Q. (a) ; P.C.S. (1995) Q. 6(a).

The institution of extradition does just the reverse. In case of extradition the fugitive criminal is in the territory and under the jurisdiction of the territorial State and either under an extradition treaty (or arrangement) or otherwise, it surrenders or returns the fugitive criminal to the State where he is alleged to have committed the crime. Thus the fugitive criminal which is under the jurisdiction of the territorial State is transferred to the jurisdiction of the State where he is alleged to have committed the crime. Thus asylum and extradition are mutually exclusive. Once the territorial State decides to extradite the fugitive criminal, the question of asylum does not at all arise, that is to say, asylum stops where extradition begins. On the other hand once the State concerned decides to grant asylum to a person the question of his extradition at least for the time being does not at all arise. But after a State has granted asylum to a refugee or fugitive criminal it may subsequently decide to extradite him at the request of the State where he is alleged to have committed the crime or to which State he belongs.

To conclude in the words of Starke, "The liberty of a State to accord asylum to a person overlaps to a certain extent which is its liberty to refuse extradition or rendition of him at the request of some other State, an overlapping best seen in the grant, commonly, of asylum to political offenders, who correspondingly are not as a rule extraditable. Asylum stops, as it were, where extradition or rendition[16] begins and this interdependence makes it convenient to consider the two subjects together."

---

16. Rendition has been defined by Starke as a more generic term covering "instances where an offender may be returned to a State to be tried there, under *ad hoc* Special arrangement in the absence of an extradition treaty, or even if there be such a treaty between the States concerned and irrespective of whether or not the alleged offence is an extraditable crime. A deportation or refusal of asylum may have the effect of a rendition although from the point of view of the deporting State or State of purported entry it is not of this mature stricto sensu."

CHAPTER 24

TREATMENT OF ALIENS*

Admission of Aliens—The reception or admission of aliens is a matter of discretion and every State is competent to exclude aliens from its territory. This discretion and competency flow from the territorial supremacy of every Sate over its territory.[1] The International Law does not impose any duty upon States to admit aliens[2]. "The absence of any duty at International Law to admit aliens is supported by an examination of State immigration laws, showing that scarcely any States freely admit aliens." [3] Similarly, in the absence of treaties providing the contrary, no State is under any obligation to refuse admission to aliens. On the contrary, as noted in earlier chapter, States are fully competent to grant asylum to the aliens in their territory. But no alien has right to receive asylum. It is the discretion of the State whether to grant or refuse the request of asylum. Although each State is fully competent and has discretion to exclude aliens, in practice States do not exercise this discretion to the fullest extent.[4] For example, States generally admit tourists, students, etc. A distinction is made between aliens who intend to visit the country for a temporary period and those who intend to settle down in the country. No alien is permitted to settle down in a country without its specific authorisation.

Position of Aliens after admission.—After being admitted into the territory of a State, the alien becomes subject to the laws of the State in the same way as citizens are. Since the alien is subject to laws of the admitting State, the "alien can only expect equality of treatment under the local law because he submits to local conditions with benefits and burdens and because to give the alien a special status would be contrary to the principles of territorial jurisdiction and equality." [5] The alien remains under the jurisdiction of the State in which he stays and is responsible to it for all the acts he commits on its territory. During his residence he owes allegiance to the State within the territory of which he resides.[6] He will also be responsible for illegal acts which he commits during the period when the territory concerned is temporarily occupied by the enemy.[7] The aliens who reside either permanently or for a long time may also be required to pay rates and taxes and may be compelled to serve in the local police and local fire-brigade for the purpose of maintaining public order and safety. But since the alien does not fall under the personal supremacy of the local State, he cannot be compelled to serve in its army, navy, or air force.

The standard of treatment of aliens, which is generally followed, is that they are to be treated in the same way as citizens are treated. There should be no discrimination between aliens and citizens. It does not, however, follow that if a State treats its own citizens badly, it can do the same with aliens. Therefore, there should be an international minimum standard. This view was supported by majority of States which participated in the Hague Codification Conference. Later on, this view was affirmed in the United Nations General Assembly Declaration on Permanent Sovereignty over Natural Resources

---

* See also for I.A.S. (1976), Q. No. 5 ; I.A.S. (1964), Q. No. 6; P.C.S. (1972), Q. No. 6 ; P.C.S. (1970), Q. No. 6 ; P.C.S. (1966), Q. No. 2 ; P.C.S. (1964), Q. No. 8 (a) and 9(e) : I.A.S. (1970), Q. No. 7 : P.C.S. (1987), Q. 3: C.S.E. (1991) Q. 6(a).

1. L. Oppenheim, International Law, Vol. I, Eighth Edition, at pp. 675-676.
2. See also Oppenheim's International Law, Ninth Edition, Vol. I., Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group UK Ltd. and Mrs. Tomoko Hudson, 1992, p. 897.
3. J.G. Starke, Introduction to International Law, Tenth Edition (1989) p. 348.
4. As remarked by Fenwick, "The right of total exclusion is, however, more theoretical than real". International Law (Third Indian Reprint, 1971), p. 319.
5. Ian Brownlie, Principles of Public International Law, Second Edition (1973) p. 509.
6. Oppenheim, see supra note 1, at p. 679-680.
7. See *De Lager* v. *The Attorney-General* for Natal, (1907) A.C. 326.

(1962).[8] It was also recommended by many tribunals and claims commissions. For example in the *Neer Claims*[9] the General Claims Commissions set up by America and Mexico observed : "..... the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of *international standards* that every reasonable and impartial man would readily recognize its insufficiency."

As pointed out by author,[10] "It is universally agreed that the jurisdiction of States is limited to the extent that International Law protects aliens and alien property situated within their territory.[11] Whenever treatment of an alien constitutes a violation of international customary or treaty law, the State of which the injured alien is a national has a legal *right* to make a diplomatic protest against, and submit a claim for damages to, the State responsible for the wrong which in turn has legal *duty* to make reparation. International Law does not require a State to take up the claim of its national and it does not allow a State to take up the claim unless the injured alien is its national.[12] A State incurs international responsibility for an injury suffered by an alien only if some fault of commission or omission can be attributed to its own officials ; if, for example, State officials fail to exercise reasonable diligence to protect an alien from a harmful action by private persons or if they fail to take remedial steps after such an action, the State may be held responsible by the home State of the alien." [13] Further, "What are the international rights of aliens, the deprivation of which constitutes a delict for which the alien's home State has a right to demand reparation ? It is with regard to the content of these rights, not their existence or the processes by which they are protected, that international controversy has often erupted. It is agreed that each State may determine for itself whether or not to admit aliens into its territory and that once admitted, aliens must obey local laws. It is also agreed that certain rights and privileges that are possessed by nationals, such as, the franchise may be denied to aliens. But International Law requires that in matters of fundamental importance to the individual, such as the right to life and personal liberty—a State must treat aliens at least as well as it treats its own nationals. If a State imprisons its own nationals only after a jury trial, for example, it must accord aliens the same right.[14] But as pointed out earlier many States (mostly western States) contend and claim that International law requires that States treat aliens in accordance with an 'international standard' or an international minimum standard of justice, regardless of how they treat their own nationals.

Protective Jurisdiction of a State over Foreigners :

N.B. :—For a discussion of this please see Chapter on *"State Jurisdiction"*.

'Exhaustion of Local Remedies' Rule*—As noted above, whenever treatment of aliens constitutes violation of international customary or treaty law or otherwise damages or injury is caused to the person or property of the alien, the alien can approach his home State and the State of which the injured alien is a national has a legal right to make a diplomatic protest against or claim reparation, from the State responsible for the wrong or injury. But for a claim to be made at an international level it is a condition precedent that local remedies available to the alien in the territorial State must be exhausted first. This is popularly known as *'Exhaustion of Local Remedies'* rule. Thus, "one of the anomalies in the law of international responsibility is the procedural

8. General Assembly Resolution 1803 (XVII), dated 14, December, 1962.
9. (1926) R.I.A.A., IV, 60 ; emphasis supplied.
10. Edward Collins, International Law in a Changing World (1969), p. 253.
11. An alien is a person who is not a national of the State in which he is present, whether or not he is there permanently or temporarily. Alien property is the property in a State that is owned by non-nationals.
12. ".....it is the bond between the State and individual which alone confers upon the State the right of diplomatic protection ..... " Panevezys— Soldertiskis Railway case (1939), Permanent Court of International Justice, Series A/B 76, p. 16.
13. See also matter discussed under the heading 'State responsibility for the act of aliens' in the Chapter on 'State Responsibility'.
14. Collins, see supra note 10 at p. 253.

* See also for I.A.S. (1977) Q. No. 10(b), P.C.S. (1987), Q. 3.

requirement that before a State can espouse a claim at the international level for injury to her national all the remedies available according to the municipal law of the respondent State must have been exhausted." [15] "Domestic jurisdiction and non-exhaustion of local remedies have been two of the most frequently raised pleas in international litigation ; by means of the former, the respondent State attempts to impede consideration of a matter at international level on the ground that it falls essentially within its jurisdiction, by means of the latter, the respondent State objects to consideration of a matter at international level on the ground that local remedies have not been exhausted and international action is thereby only warranted after the State has had a chance to redress the alleged wrong within the frame-work of its own legal system." [16] Further, "although both pleas of domestic jurisdiction and exhaustion of local remedies are meant to safeguard State sovereignty, they differ from each other in that the former is a substantive bar precluding any action at international level, while the latter stresses the subsidiary character of international jurisdiction. The plea of domestic jurisdiction has been raised before judicial organs either as an automatic reservation to compulsory jurisdiction or as a preliminary objection of incompetence, both forms—particularly, the former—being open to criticism. But political organs have proved more suitable to deal with pleas of domestic jurisdiction, while objections of non exhaustion of local remedies have been more often lodged, with judicial (and arbitral) organs. In practice, paradoxically as it may at first seem, the local remedies rule, apparently the less ambitions of the two pleas, has proved to be a far more effective and successful device for rejecting international claims and safeguarding State sovereignty. By contrast States raising the objection of domestic jurisdiction have thereby failed so far to achieve the proposed goal and have not been able to its discussion at international level." [17]

The application of the rule is subject to following conditions[18] :—

(1) The exhaustion of local remedies should involve using such local procedures as are available to protect interests which correspond *as closely as may be and in practical terms* with the interests involved in a subsequent international claim.

(2) The rule only applies when effective remedies are available in the national system.

(3) Remedy available will not be deemed to be effective if the local courts do not have jurisdiction in relation to the matter in issue *in terms of local law.*

(4) It is sometimes said that the rule does not apply when the issue arises from measures taken by the constitutional or legislative power or the highest executive organs. But this view is too dogmatic and the real test is whether or not there is responsible possibility of an effective remedy.

(5) Last but not the least, the rule applies only in connection with State responsibility for an unlawful act.

As pointed out by the Commission of Arbitration in *Ambatielos Arbitration,*[19] 'local remedies' available to the alien include 'not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test....." The rule concerning the exhaustion of local remedies has also been recognised by the International Court of Justice in *The Interhandel case.*[20] The facts of this case are as follows :

Under the provisions of the Trading with the Enemy Act, 1917, America declared the assets of a Swiss company as enemy property and vested the shares. The majority of the

15. B.O. Iluyomade, "Dual Claims and the Local Remedies Rule in International Law", I.J.I.L., Vol. 16 (1976), p. 489.
16. A.A. Cancado Trindate, "Domesic Jurisdiction and Exhaustion of Local Remedies : A. Comparative Analysis", I.J.I.L., Vol. 16 (1976), p. 187.
17. Ibid, at p. 216.
18. Brownlie, see supra note 5, at pp. 484-487.
19. Int. L.R. 23 (1956) ; (1956), R.I.A. A. xii, 83 ; see also Finnish Ships Arbitration (1934), R.I.A.A. iii.
20. I.C.J. Reports (1959), p. 6.

shares were owned by Interhandel, another Swiss firm. In accordance with the procedure laid down by the Washington Accord of 1946 (Between France, the U.K. and the U.S. and on the other side Switzerland) the Swiss Authority of Review annulled an order provisionally blocking the assets of Interhandel in Switzerland. The Swiss Government claimed that America was bound by the said decision and consequently assets vested in the U.S. should be restored or the matter be referred to 'a conciliation procedure' as provided in the accord. But the U.S. Government contended that the majority of the shares were owned by Interhandel, another Swiss firm, and the decision of the Swiss Authority of Review did not apply to the property vested in the United States. In 1957 the Swiss Government filed an application in the International Court of Justice invoking the optional clause of the Statute of the Court. One of the preliminary objection raised by the U.S. against the admissibility of the application by the Court was that the local remedies available had not been exhausted.

The International Court of Justice upheld the objection raised by the U.S. and held : "This is one of the very cases which give rise to the application of the rule of exhaustion of local remedies." [21] As regards the rule that local remedies must be exhausted before international proceedings may be instituted, the Court observed that "it is a well-established rule of customary International law ; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of International law. Before resort may be had to an International Court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means within the framework of its domestic legal system." [22] Applying the rule in the instant case the World Court observed : "The court has indicated in what conditions the Swiss Government basing itself on the idea that Interhandel's suit had been finally rejected in the United States Courts, considered itself entitled to institute proceedings by its application of 2nd, October 1957. However, the decision given by the Supreme Court (on 14th, October 1957)..... granted a writ of *certiorari* and readmitted Inerhandel into the suit. The judgment of that court on 16th, June 1958, reversed the judgment of the Court of Appeals dismissing Interhandel's suit and remanded the case to the District Court. It was thenceforth open to Interhandel to avail itself again of the remedies available to it under the Trading with the Enemy Act, and to seek the restitution of its shares by proceedings in the United States Courts. Its suit is still pending in the United States Courts. The Court must have regard to the situation thus created.[23] The Court also made clear that the rule will apply only when private interest is involved, in case of public interest the rule will be inapplicable. Thus the rule of exhaustion of local remedies "serves some very useful purposes and has become generally accepted. The significant role it now plays in the determination of issues before the European Commission on Human Rights testifies to this".[24] Under Article 26 of the European Convention on Human Rights, 1950, the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of International law.[25]

Reference may also be made here to the decision of the International Court of Justice dated 20th July, 1989 in *case concerning Electronica Sicula S.P.A. (Elsi) (U.S. v. Italy)*[26] which involved the question, *inter alia,* whether the rule of Exhaustion of local remedies was applicable to a claim under the treaty which does not mention the rule. The Court was also requested to consider the allegation whether the objection that the local remedies had not been exhausted was barred by estoppel. The facts of case, in brief, were as follows :—

---

21. Ibid, at pp. 28-29.
22. I.C.J. Reports (1959), at p. 27.
23. Ibid. at pp. 26-27.
24. B.O. Illuyomade, see supra note 14, at p. 498.
25. See also Article 41(1) (c) of the International Covenant on Civil and Political Rights, 1966 ; Kevin Boyle and Hurst Hannum, "Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice : The Donnelly case", A.J.I.L., Vol. 68 (1974), p. 440 at pp. 447-451.
26. Para 50 of Judgment dated 20 July, 1989.

The United States of America transmitted to the International Court of Justice an Application instituting proceedings against the Republic of Italy in respect of a dispute arising out of the requisition by the Government of Italy of the plant and related assets of Raytheon-Elsi S.P.A., previously known as Electronica Sicula S.P.A. (Elsi), an Italian Company which was stated to have been 100 per cent owned by two United States Corporations. The Government of the U.S. also requested the Court, pursuant to Article 26 of the Statute of the Court, that the dispute be resolved by a Chamber of the Court. The Government of Italy also accepted this proposal. It was argued on behalf of the U.S. that the Government of Italy has violated the treaty of Friendship Commerce and Navigation (F.C.N. Treaty) between the U.S. and Italy and hence Italy is responsible to pay compensation to the U.S. The Government of Italy took the defence, *inter alia* that the Application filed on 6 February, 1987 by the U.S. Government is inadmissible because local remedies have not been exhausted and requested the Court to dismiss the claim.

It was argued on behalf of the U.S. Government that the rule of exhaustion of local remedies could not apply to a case brought under XXVI of F.C.N. Treaty. It was pointed out that the said Article is categorical in its terms, and unqualified by any reference to the local remedies rule ; and it seemed right therefore, to conclude that the parties to the F.C.N. Treaty, had they intended the jurisdiction conferred upon the Court to be qualified by the local bodies rule in cases of diplomatic protection, would have used express words to that effect ; as was done in an Economic Co-operation Agreement between Italy and the U.S. of America also concluded in 1948. The Chamber of the World Court held :

"The Chamber has no doubt that the parties to a treaty can therein either agree that local remedies rule shall not apply to claims based on alleged breaches of that treaty ; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law, should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so. This part of the United States response to the Italian objection must therefore be rejected."

The U.S. further agreed that the local remedies rule would not apply in any event to the part of the U.S. claim which requested a declaratory judgment finding that the F.C.N. Treaty had been violated. The Chamber of the World Court held :

"The argument of the United States is that such a judgment would declare that the United States own rights under the F.C.N. Treaty had been infringed ; and that such a direct injury the local remedies rule, which is a rule of customary international law developed in the context of the espousal by a State of the claim of one of its nationals, would not apply. The Chamber, however, has not found it possible in the present case to find a dispute over the alleged violation of F.C.N. Treaty resulting in direct injury to the United States, that is both distinct from and independent of, the dispute over the alleged violation in respect of Raytheon and Machlett. The case arises from a dispute which the parties did not 'satisfactorily adjust by diplomacy' ; and that dispute was described in the 1974 United States claim made at the diplomatic level as a 'claim of the Government of the United States of America on behalf of Raytheon Company and Machlett Laboratories, Incorporated." [27]

The Chamber of the World Court also referred the *international* case[28] and observed :

"In the present case, likewise, the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett, said to have resulted from the actions of the Respondent. Accordingly the Chamber rejects the argument in the present case there is a part of the Applicant's claim which can be severed so as to render the local remedies rule inapplicable to that part." [29]

After having decided that "the local remedies rule does apply in this case", the Court proceeded to answer the question whether local remedies were or were not exhausted by

27. Para 51.
28. I.C.I., Reports (1959) p. 28.
29. Note 26, Para 52 of the Judgment.

Raytheon and Machlett. After going through the facts and circumstances of the case the Chamber held :

It is never easy to decide, in a case where there has in fact been much resort to the municipal Courts, whether local remedies have truly been 'exhausted'. But in this case Italy has not been able to satisfy the Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of Elsi, and of Elsi's trustee in bankruptcy, ought to have pursued and exhausted." [30]

However, the Chamber of the Court finally held that Italy "has not violated the F.C.N. Treaty in the manner asserted by the Applicant", and hence "the Chamber rejects also the claim for reparation made in the submission of the Applicant." [31]

Expropriation of property of Aliens.—This has been discussed earlier under the heading 'Expropriation of Foreign Property' in chapter entitled "State Responsibility".

Protection of Human Rights to Aliens.—This has been discussed in Chapter on "Human Rights".[32]

Departure of Aliens from the Foreign Country.—As pointed out by Oppenheim, "Since a State holds only territorial and not personal supremacy over an alien within its boundaries, it can never, in any circumstance, prevent him from leaving its territory, provided he has fulfilled his local obligations, such as, payment of rates and taxes, fines, private debts and the like." [33] This right of alien has been recognised under Article 13(2) of the Universal Declaration of Human Rights, 1948, which provides that every one has the right to leave any country, including his own, and to return to his country. Article 12 of the International covenants on Civil and Political Rights also asserts this right.

Expulsion of Aliens.—Like the power to refuse admission, State can expell aliens as and when it desires. This is regarded as an incident of State territorial sovereignty. But this right must not be abused by proceeding in an arbitrary manner. "The *power* to expell and the *manner* of expulsion are, however, two distinct matters. Expulsion (or reconduction) must be effected in a reasonable manner and without unnecessary injury to the alien affected ..... Detention prior to expulsion should be avoided unless the alien concerned refuse to leave the State or is likely to evade the authorities. Also an alien should not be deported to a country or territory where his person or freedom would be threatened on account of his race, religion, nationality, or political views. Nor should he be exposed to unnecessary indignity." [34] Further, "..... it cannot be denied that, especially in the case of expulsion of an alien who has been residing within the expelling State for some length of time, and has established a business there, the home State of the expelled individual is, by its right of protection over citizens abroad justified in making diplomatic representations to the expelling State, and asking for reasons for the expulsion." [35] Moreover, expulsion must always be based on 'just causes'.[36] The law relating to protection of aliens from expulsion finally culminated in the International Covenant on Civil and Political Rights, 1966. Article 13 of the covenant provides : "An alien lawfully in the territory of a State Party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before the competent authority or a person or persons especially designated by the competent authority".

---

30. Para 63 of the Judgment.
31. Para 136.
32. See Chapter on "Human Rights".
33. See supra note 1, at p. 690.
34. Starke, see supra note 3 at pp. 350-351.
35. Oppenheim, see supra note 1, at p. 692.
36. See ibid, at p. 693.

Mass expulsion of aliens.—According to Starke, "International law does not prohibit the expulsion *en masse* of aliens, although this is resorted to usually by way of reprisals. It may, however, be treated as an unfriendly act and certainly would represent a breach of human rights." [37] The general proposition that International law does not prohibit the expulsion of aliens does not appear to be correct in view of the recent developments in the field of human rights and elsewhere. Article 1 of the European Convention on Human Rights provides : "The high contracting parties shall secure to *everyone* within their jurisdiction the rights and freedoms defined in section 1 of this Covention." As aptly remarked by Fawcett, "This marks the great departure taken by the Convention from traditional forms of International protection of individuals, for *it dispenses with nationality as a condition of protection.*" [38] Article 1 of the American Convention on Human Rights prohibits discrimination on the ground of national or social origin. Article 22(6) of the American Convention permits expulsion of aliens only pursuant to a decision reached in accordance with law. Article 22(8) is almost similar to Article 13 of the Covenant on Civil and Political Rights, 1966, referred earlier. The most important provision, for the purpose of present discussion, is enshrined in Article 22(9) which says : *"The collective expulsion of aliens is prohibited"*.

In view of these developments, it would be wrong to say that International law does not prohibit the expulsion *en masse* of aliens. The correct statement of law would rather be that expulsion *en masse* of aliens is not justified.[39] In exceptional cases, it may be justified provided it is not contrary to international customary and treaty law (including the law of the United Nations) and norms and principles developed in the field of human rights. Moreover in the exercise of this right, there must be no discrimination against the citizens of a particular foreign State as such.[40]

Human Rights

N.B.—In view of the growing significance of human rights, it is proposed to further develop and elaborate the subject of Human Rights. It is therefore shifted from here to a separate *i.e.* Part VII of the book where a detailed discussion of the subject has been made. Please, therefore, see it in Part VII, *i.e.* after Part VI entitled "The Law of Neutrality".

---

37. Starke, see supra note 3, at p. 351.
38. Fawcet, The Application of the European Convention on Human Rights (1969), p. 18.
39. For example—Mass expulsion of Ugandan Asians has generally been regarded as violation of law. For details see Appendix III.
40. See ibid : see also Charles G. Fenwick, International Law (Third Indian Reprint, 1971), p. 321.

CHAPTER 25

INTERNATIONAL CRIMINAL LAW AND THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

There is controversy regarding the question as to whether there exists International Criminal Law or not. While on the one hand, it is argued that there is a small body of penal rules which can be said to be constituting International criminal Law and that "International Law has reached a stage of development when contrive of criminal international law has emerged distinctly"[1] on the other hand, it is asserted that international criminal law in the material sense of the term does not exist.[2] According to Prof. Schwarzenberger[3] six meanings can be given to the term International criminal Law—(a) in the sense of territorial scope of municipal criminal law—it covers those cases when criminal jurisdiction is exercised by a state either within its own territory or in places assimilated in it; (b) in the sense of internationally prescribed municipal criminal law—this is based on treaties and international customary law and covers cases such as piracy and slave trading ; (c) in the sense of internationally authorised municipal criminal law—it is an extension of the earlier category and covers cases such as piracy *Jure Gentium* and war crimes ; (d) in the sense of municipal criminal law common to civilized nations—it covers cases such as forgery of foreign currency; (e) in the sense of international co-operation in the administration of justice ; and (f) *in the material sense of the term.* The categories (a) to (e) can not be classified as 'international criminal law' in the real sense of the term.

The primary object of criminal law is to preserve and maintain public order. Crime has been defined as an offence against the society or community. According to Salmond, "A crime then is an act deemed by law to be harmful to society in general, even though its immediate victim is an individual"[4] the purpose or end of punishment "is the protection of the society or else that punishment is looked as an end in itself..... the aim of protecting the society is sought to be achieved by deterrence, prevention and reformation." [5] Thus broadly speaking, a crime is prohibited by law or the omission to do an act commanded by law and the remedy for which is sanction or punishment by the state. The function of criminal law is, therefore, to protect fundamental social interests of the community. What is true of municipal criminal law should also hold good about the international criminal law. The function of international criminal law should be to preserve the public order of the world and to punish the conduct which attempts to disrupt such public order or which is intolerable to the community of nations. According to Prof. Quincy Wright, "A crime against international law is an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest, and which may not be adequately punished by the exercise of the normal jurisdiction of any State." [6]

International criminal law in the material sense of the term can exist only when some pre-conditions are satisfied namely, (a) some external authority to enforce sanctions of international criminal law; (b) a code of criminal law, (c) an international criminal court; and (d) State as well as individuals should be amenable to international criminal responsibility.[7] In the absence of requisites such as these, Prof. Schwarzenberger has remarked that

1. D.N. Saraf, "Theory and Reality of International Quasi—Criminal Law", in New Horizons of International Law, and Developing Countries, (1983), p. 87 at p. 101.
2. S.K. Agarwala, "The Concept of International Criminal Law", p. 71 at p. 76.
3. G.Schwarzenberger, The Problem of International Criminal Law, p. 263; See also note 2, at pp. 74-76.
4. Salmond on Jurisprudence, Twelfth Edition by P.J. Fitzerald (1966) p. 92.
5. Ibid, at p. 351.
6. "The Law of Nuremberg Trial", A.J.I.L., Vol. 41 (1947) p. 55 at p. 56.
7. See Prof. S.K. Agrawala, note 2, at p. 78.

unless there is the transformation of "the present system of world power politics in disguise[8] into at least a world federation,[9] it is futile to conceive the idea of international criminal law. Before coming to a conclusion, let us first examine each of the above mentioned pre-conditions for the existence of international criminal law and also see how far international law has progressed towards the attainment of these goals.

As regards the first pre-condition *i.e.* some external authority to enforce sanctions, it must be noted that international law operates in a decentralized system and sovereign equality of all states is the well established rule of international law. In view of this, it is neither relevant nor proper to compare sanctions operating in municipal law with those that operate in international law. It has been aptly pointed out, "International order, far from perfect though it has, its own sanctions seldom imposed by force or command but as it were, natural sanctions slow to mature and gradual in effect but made compelling by *the growing* interdependence of the world." Further, in fact, "there exist among states rules imposing obligations upon them." [10] Moreover, "The sanctions to enforce such norms need not necessarily be confined to deprivations of personal liberty or imposition of fine, these may include other measures such as deprivation of privileges of the group life, expulsion or suspension from membership of the group, reprisals etc. In all cases, however, it is essential to establish that the act complained of is universally condemned and payment of damages would not constitute adequate remedy for the wrong done.[11] Further the practice of states shows that there are certain acts against the community of nations which are universally condemned and if such acts are committed by individuals they are liable to be visited upon by the sanctions of criminal law. International Law has now reached a stage wherein international crime can be clearly distinguished from international delinquency.[12]

In this connection, reference may be made to some important International Treaties entered into after the establishment of the U.N. It may be noted here that one of the first tasks performed by the General Assembly in 1946 was to adopt the principles of Nuremberg charter and Tribunal thereby enlarging the jurisdiction of belligerent states in future wars to crimes against peace and crimes against humanity. Later on in 1947 the General Assembly requested the International Law Commission to "draft a code of offences against Peace and Security of Mankind". Unfortunately the task entrusted to the Commission is not yet complete. The work is going on at snail speed and the comments of the states are still being received.

In 1950, the General Assembly asked, the International Law Commission to take account of observations made by delegations on the formulations of Nuremberg principles while preparing a draft code of offences against the peace and security of mankind. The commission submitted final draft of code in 1954. In 1974 when the draft definition of aggression was submitted before the General Assembly, the Secretary General of the U.N. proposed resuming consideration of the draft code of offences against the peace and security of mankind as well as the issue of the establishment of an international criminal court. In 1977, the International Law Commission suggested that the 1954 draft be reconsidered. In 1980, seven nations asked for the item of "Draft Code of Offences against Peace and Security of Mankind to be included in the agenda of the General Assembly." It may be noted here that Eric Suy, U.N. legal advisor pointed out that following legal documents should be regarded as connected with the code. International convention on the Elimination of All Forms of Racial Discrimination, 1966 ; the convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968, convention on the Prevention and Punishment of crime against Internationally Protected Persons, including Diplomatic Agents, 1973, Definition of Aggression; Declaration on the Granting of Independence to colonial countries and

8. G. Schwarzenberger, The Frontiers of International Law, p. 209.
9. J.E.S. Fawcett, The Law of Nations (1961) p. 18.
10. H.L.A. Hart, The Concept of Law (1961) p. 226 ; See also Rahmatullah Khan, "International Law—Old and New",'I.J.I.L., Vol. 15 (1975) p. 371 at p. 372.
11. D.N. Saraf, note 1, at p. 90.
12. Ibid.

peoples; and Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the charter of the U.N.

Next important landmark is the Genocide convention, 1948. Article I of the convention, declares 'Genocide' as 'a crime under international law.' Article IV provides that persons committing Genocide shall be punished whether they are constitutionally responsible rulers, public officials or private individuals. Article VI provides that they shall be tried by a competent tribunal of the state in the territory of which the act was committed or by an international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction. Though nearly four decades have passed since then such an international penal tribunal has remained a dream to be realized. The Convention on Narcotic Drugs, 1961 and its Amending Protocol of 1972 impose obligations upon states. Article 14 of the convention provides that if a party fails to carry out the provisions of the convention, the International Narcotics Control Board may call for explanations and if the explanation is unsatisfactory, the Board may call the attention of other competent U.N. organs and may even recommend a stoppage of drug imports or exports or both to and from the country or territory in default.

The next conventions that deserves mention are the *1970 Hague Convention for the Seizure of Air Craft and 1971 Montreal Convention* on the same subject. Under these conventions, states have undertaken to provide deterrent punishment to hijackers. Under these conventions, State Parties may have jurisdiction over hijackers in some or other way and these features of jurisdiction have made the offence of hijacking "very near to piracy under international customary law." [13] Reference may also be made to the *International Convention on the Suppression and Punishment of the crime of Apartheid,* 1973 which came into force on 18 July 1976. Article I of the convention declares *apartheid* as a crime against humanity, violating principles of international law and constituting a serious threat to international peace and security. Article V provides that persons charged with *apartheid* may be tried by a competent tribunal of any State Party to the convention *which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those State Parties which shall have accepted its jurisdiction.* Thus 1973 convention on Apartheid is "nearest to universalising the offence." [14] Yet another significant achievement made is the adoption of the definition of 'Aggression'[15] after 51 years of work by jurists and political experts.

A brief reference may also be made here to the 1973 *Convention on the Prevention and Punishment of crimes against Internationally Protected Persons including Diplomatic Agents*[16] which under Article 2 declares certain acts enumerated in the same article as crimes. Article 7 of the convention provides that the state party in whose territory the alleged offender is present shall, if it does not extradit him, submit, without an exception whatsoever and without delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that state. A similar provision has been made in the *International Convention Against the Taking of Hostages, 1979.*[17]

A perusal of the above conventions makes it clear that serious attempts have been made to evolve a body of International criminal law. Provisions for the establishment of international penal tribunal have also been made in several conventions. Though sanctions in some or the other form exist, there is no code of international criminal law addressed directly to the subjects and objects of international law. The failure to adopt the "Code of offences Against the Peace and Security of Mankind" is a sad commentary of the efforts made in this connection. Although the normative bases of international criminal law have already been established, it would not be correct to say that there exists a body of

13. Shami Shubber, "Aircraft Hijacking under the Hague Convention, 1970—A New Regime", I.C.L.Q., Vol. 22 (1973) p. 687 at p. 725.
14. S.K. Agrawala, note 2, at p. 80.
15. For the definition of 'Aggression' see chapter on "The Security Council".
16. See Annen to Res. 3166 (XXVIII).
17. See Article 8 of the Convention ;See U.N. Doc. A/34/819.

international criminal law. The utmost that can be said is that it is in the offing. The need is to make sincere efforts in this direction. If and when evolved, both the state and the individuals should be amenable to international criminal responsibility. As regards the establishment of an international penal tribunal, though efforts have been made for more than 50 years, success has so far eluded. It has been aptly remarked, "If the essence of international criminal law lies in the existence of an international judicial authority with power to enforce mandatory rules of social conduct such a law does not exist." [18] It may be noted here that the Seventeen-member Committee established by the Seventh Session of the General Assembly to consider the draft statute of an International Criminal Court pointed out that some members of the Committee felt that at the present time "the substantive law to be applied by the court was not sufficiently mature to make the creation of an international criminal jurisdiction practicable" one of the main hurdles in the establishment of an international penal tribunal is the concept of national sovereignty.[19]

Proposals for the Establishment of an International Criminal Court.—Proposals for the establishment of an international criminal court have been under consideration for more than 50 years. The Advisory Committee of Jurists which was given the task of preparing plans for the establishment of Permanent Court of International Justice also had before it a draft relating to the constitution of a High Court which could take cognizance of "crime committed against international good order and Universal law of nations." The Advisory Committee of Jurists met at the Hague in June, 1920 and drew up a Draft scheme for the Institution of the Permanent Court of Justice. The final draft of the Committee also included the recommendation that a High Court of International Justice be established and be given the jurisdiction to try offences against "international public order" or against "Universal law of nations" which might be referred to it by the Council or Assembly of the League of Nations. But this recommendation was rejected by the Assembly of the League of Nations on the ground that for the trial of criminal cases a special chamber of the Permanent Court of International Justice would be more practicable.

Alongwith the convention for the prevention and punishment of Terrorism, the League of Nations, drafted, in 1937, a Convention for the Establishment of an International Criminal Court. The proposed court was to consist of five judges and five deputies belonging to different nations to be elected by the Permanent Court of International Justice. The League of Nations requested the members to adopt the convention for the creation of International Court on 16 November 1937. Although it was signed by Belgium, Bulgaria, Spain, France, Greece, the Netherlands, Romania, Czechoslovakia, Turkey and Yugoslavia, the convention never came into force as there were no ratifications. Though the said attempt proved to be a failure, this experience should be used in devising the modes of approach to the present solution of the issue. It should likewise be noted that this issue is a part of larger problem that of the evolution and development of international criminal law." [20]

After the establishment of the U.N., proposals for the establishment of an international criminal court were once again considered and the matter was further pursued. In 1948, the General Assembly requested the International Law Commission to study the desirability of establishing an international criminal court to try persons charged with genocide and other crimes. It was pointed out that jurisdiction over such crimes would be conferred by international conventions. In its Fifth Session, the General Assembly established a Committee (called the Geneva Committee) on International Criminal Jurisdiction. It submitted a draft statute of an International Criminal Court in the seventh session but instead of taking any decision on it, the General Assembly established a new Committee, called Seventeen-member Committee which submitted a revised draft statute of an International Criminal Court to the Ninth Session of the General Assembly. Though a

18. D.N. Saraf, note 1, at p. 89.
19. See also Proposal for the Establishment of an International Criminal Court in chapter on "Aircraft Hijacking".
20. I. Blishchenko and N. Zhdanov, Terrorism and International Law (Progress Publishers, Moscow, 1984) pp. 254-255.

large amount of work towards drafting the statute of the Court has been done by both the said committees, its consideration has been postponed several times by General Assembly pending the adoption of the definition of Aggression and the finalisation of the Draft Code of Offences against Peace and Security of Mankind. Thus the draft statute has neither been recommended to, nor accepted by any state.

A number of problems such as the competence of the court, attribution of jurisdiction, the law of the court and access to the court arise in connection with the establishment of international criminal jurisdiction. Yet another problem is that of the way the Court is to be established. The Seventeen-Member Committee discussed four methods—(a) By Amendment of the charter of the U.N.; (b) by Multilateral convention ; (c) by General Assembly Resolution ; and (d) by a General Assembly Resolution to be followed by Convention. Most of the members of the committee favoured the establishment of the court by a multilateral convention and this seems to be the best of the said four methods.[21]

Apart from the U.N., the issue of the establishment of an International Criminal Court has attracted the attention of other institutions and persons. In this connection, reference may be made to the two conferences on international criminal law held in Racine, Wisconsin, U.S.A. in 1971-72 and in Bellagio, Italy in 1972 under the auspices of the International Foundation for the Establishment of an International Criminal Court. The Third International conference on International Criminal Law and fourth conference for the establishment of an International Criminal Court under the auspices of the Foundation were held at Dacca (Bangladesh) and at San Juan (Pureto Rico) in December, 1974 and January 1976 respectively. Besides this, representatives of 30 countries attended an international conference of experts on international criminal law and jurisdiction and major violations of international law in May, 26-31, 1977 in Boston (U.S.A.). Last but not the least, a draft International Criminal Code prepared by eminent lawyer, Cherif Bassiouni, Secretary-General of the International Association of Penal Law was discussed at the International Institute of Higher Studies in Criminal Sciences. Despite all these efforts "the establishment of an International Criminal Court and a system of international criminal jurisdiction is still an object of scientific investigation and discussion." [22]

U.N. Commission on Crime Prevention and Criminal Justice

Realization has dawned on the international community that new breeds of criminality, including sophisticated computer crime, terrorism, illicit drug-trafficking, money laundering and violent street crime, are creating a pervasive feeling of insecurity throughout the world. Indeed growing crime rates threaten to become a Universal phenomenon comparable to ecological disaster. As many as 114 State Ministers met at Versailles (France) in November 1991 and voiced these concerns and considered the creation of an effective U.N. crime prevention and criminal justice programme. These concerns were affirmed by General Assembly of the U.N. on 18th December, 1991. The General Assembly unanimously called for the creation of a new commission—Commission on Crime Prevention and Criminal Justice as a functional body of the Economic and Social Council.[23] The General Assembly dissolved the existing Committee on Crime Prevention and Control and decided that its funds would be made available for the new Commission.

The General Assembly also approved a Statement of Principles and Programme of Action of the U.N. Crime Prevention and Criminal Justice Programme devoted to providing States with practical assistance, such as data collection, information and training to help prevent crime within and among States. According to the new Statement of Principles, it is the belief of the Member States that : justice based on the rule of law is the pillar on which civilized society rests; lowering the world crime rate is related to the improvement of social conditions of the population; rising crime is impairing the process of development; and the growing internationalization of crime must generate new and commensurate responses.[24]

---

21. Ibid, at p. 261.
22. Ibid., at p. 276.
23. See Resolution 46/152.
24. U.N. Chronicle, Vol. XXIX, No. 1 (March 1992) p. 87.

As pointed out by the then Secretary-General of the U.N., Perez de Cuellar, in a message to the Versailles Summit, nowhere was the transnationalism of crime more evident than in the problem of illicit drug trafficking and drug abuse. It has been estimated that 40 million peoples throughout the world consume illicit drugs. There is hardly a nation, a social group, an age group which has been spared.[25] According to the Director-General, Margaret J. Austee to the Third Committee (Social, Humanitarian and Cultural), the new Commission will consider establishing a foundation for crime prevention and formulating an international convention on crime prevention and criminal justice.

The inaugural session of the Commission on Crime Prevention and Criminal Justice—the newest functional body of the Economic and Social Council—was held at Vienna from 21st to 30th April, 1992. It approved an omnibus draft resolution which could serve as a blueprint for the future activities of the U.N. Crime Prevention and Criminal Justice Programme. It also accepted the recommendation of the Ministerial Meeting on the creation of an Effective U.N. Crime Prevention and Criminal Justice Programme held at Versailles (France) from 21st to 23rd November, 1991 and decided to consult Member States on the desirability of a convention on crime prevention and criminal justice. A review of the U.N. activities in the field of crime prevention and criminal justice revealed that crime was increasing at a global rate of 5 per cent, far greater than the rise in population growth. Speaking before the Commission on 21st April, 1992, Director-General of U.N. Office at Vienna, Giorgio Gia Comella; although U.N. cannot be a "world policeman", it could help mitigate conflicts and protect victims, particularly by providing technical assistance.

Priority areas of the Commission will include : national and transnational crime ; organized crime ; economic crime including money laundering. The role of criminal law in the protection of the environment; crime prevention in urban areas; and juvenile and violent criminality.[26] It may also be noted that the Ninth U.N. Congress on the Prevention of Crime and the Treatment of Offenders was held in 1995.

World Conference on Organized Crime

In its second session held at Vienna from 13 to 23 April, 1993, the Commission on Crime Prevention and Criminal Justice (now a 40-member body) accepted an offer by Italy to host a world conference on organized crime in the second half of 1994. It also welcomed the convening of an international conference on money laundering, also to be hosted in Italy.

Attended by the representatives of 142 nations, the world conference on organized Transnational Crime was held at Naples (Italy) from 21 to 23 November, 1994. The conference discussed in detail the new style criminal organizations of the 1990s or 'crime multinational' as termed by U.N. Secretary-General Boutros Boutros Ghali. It focussed attention the rapid growth, increasing financial sophistication and predominantly international character of present day crime syndicates. Estimated to bring in as much as $750 billion annually, the major transnational crime groupings are disrupting economic development in key countries and the entire regions, and often contend with Governments for political power.

The Naples Conference adopted the Naples Political and Global Action Plan and thus a step towards realizing the idea of a legally binding international convention on transnational crime. At the close of the conference, Italy announced plans to fund an international centre for training law enforcement personnel to combat transnational crime.

The conference endorsed : greater use of bilateral and multinational agreements on extradition and exchange of witnesses and evidence ; personnel exchanges between national enforcement agencies ; and international aid to criminal justice systems in developing countries. Further, the Naples Declaration said that states should consider :

25. Ibid.
26. U.N. Chronicle Vol. XXIX, No. 3 (September 1992) p. 73.

making money laundering a crime ; requiring greater transparency of banks and other financial enterprises; and establishing laws providing for the seizure of organized crime assets.[27]

Adoption of the Statute of International Criminal Court

The General Assembly, in its resolution 44/39 of 4 December, 1989, requested the International Law Commission to address the question of establishing an International Criminal Court. Through its resolution 45/41 of 28 November, 1990 and 45/54 of 9 December, 1991 the Assembly invited the Commission to consider further and analyse the issues concerning the question of an international criminal jurisdiction, including the question of establishing an International Criminal Court. Further, in resolutions 47/33 of 25 November, 1992 and 48/31 of 9 December, 1993, the General Assembly requested the Commission to elaborate the draft statute for such a court as a matter of priority.

The International Law Commission considered the question of establishing an International Criminal Court from its forty second session to its forty sixth session in 1994. At the latter session, the commission completed a draft statute for an International Criminal Court, which was submitted with General Assembly.

The General Assembly on its part, passed resolution 51/207 on 17th December, 1996 through which it decided to hold a diplomatic conference of plenipotentiaries in 1998 with a view to finalizing and adopting a conventions on the establishment of an International Criminal Court. In its resolution 52/160 of 15th December, 1997, the General Assembly accepted the offer of Italy to act as host to the conference and decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June to 17 July, 1998. On 17 July, 1998, the conference adopted the statute known as the Rome Statute of the International Criminal Court. Besides the Preamble, there are 128 Articles in the statute which are divided into following 13 parts :

(i) Establishment of the Court;
(ii) Jurisdiction, Admissibility and Applicable Law;
(iii) General Principles of Criminal Law;
(iv) Composition and Administration of the Court;
(v) Investigation and Prosecution;
(vi) The Trial;
(vii) The Penalties;
(viii) Appeal and Revision;
(ix) International Cooperation and Judicial Assistance;
(x) Enforcement;
(xi) Assembly of States Parties;
(xii) Financing; and
(xiii) Final clause.

The Rome Conference or the U.N. Diplomatic Conference of plenipotentiaries on the establishment of International Criminal Court was attended by 162 countries. Besides adopting the statute the Conference, through a resolution in its Part F (of Annex. I) established the preparatory commission for the International Criminal Court to prepare proposals for practical arrangements for the establishment and coming into operation of the Court.[28]

According to Article 126 of the statute, the statute shall enter into force on the first day of the month after the 60th day following the date of deposit of the 60th instrument of ratification acceptance, approval or accession with the Secretary General of the United Nations. For each state ratifying, accepting, approving or acceding to the statute after the

27. U.N. Chronicle, Vol. XXXII, No. 1 (March 1995), p. 89.
28. See Part F Annex I of U.N. Doc. A/Conf./83/10, 17 July, 1998.

deposit of the 60th instrument of ratification, acceptance, approval or accession, the statute shall enter into force on the first day of the month after the 60th day following the deposit by such state of its instrument of ratification acceptance, approval or accession.

International Criminal Court

The main features of International Criminal Court to be established according to the above-mentioned Rome Statute are as follows :—

Establishment of the Court.—Article 1 of the Statute which establishes the International Criminal Court provides that it shall be a permanent institution and shall have power to exercise jurisdiction over persons for the most serious crimes of international concern, as referred to in this statute and shall be complimentary to national criminal jurisdiction. It is further provided that the court shall be brought into relationship with the U.N. through an agreement to be approved by the Assembly of State Parties to this and thereafter concluded by the President of the Court on its behalf.[29] The seat of the Court shall be established at the Hague in the Netherlands.[30] .

Jurisdiction.—The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this statute with respect to the following crimes :

(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.[31]

The Court has jurisdiction only with respect to crimes committed after the entry into force of the statute.[32] A state which becomes a party to the statute thereby accepts the jurisdiction of the Court with respect of the crimes referred to in Article 5.[33] However, the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.[34] The statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person.[35]

Applicable Law.—According to Article 21 of the statute :

(1) The Court shall apply :

(a) In the first place, this statute elements of crime and its Rules of Procedure and Evidence;
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of international law, including the established principles of the international law of armed conflict.
(c) Failing that, general principles of law derived by Court from national laws of legal systems of the world including, as appropriate the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with the statute and with international law and internationally recognized norms and standards.

29. Article 2 of the Statute.
30. Article 3.
31. Article 5.
32. Article 11.
33. Article 12.
34. Article 26.
35. Article 27.

(2) The Court may apply principles and rules of law as interpreted in its pervious decisions.

(3) The application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion, or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

General Principles of Criminal Law

(1) Nullum crimen sine lege.—A person shall not be criminally responsible under this statute unless the *conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court:* The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.[36]

(2) Nulla Poena Sine lege.—A person convicted by the court may be *punished, only in accordance with this statute.*[37]

(3) Non-retroactively ratione personal.—No *personal shall be criminally responsible under this statute for conduct prior to the entry into force of the statute.* In the event of a change in the law applicable to a given case prior to final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.[38]

(4) Individual Criminal responsibility.—Article 25 of the statute which deals with individual criminal responsibility provides the following :

(1) The Court shall have jurisdiction over natural persons pursuant to this statute.

(2) A person who commits a crime within the jurisdiction of the court shall be individually responsible and liable for punishment in accordance with this statute.

(3) In accordance with this statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person;

  (a) Commits such a crime; whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

  (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

  (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission, including providing the means for its commission;

  (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.

  (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide.

(4) No provision in this statute relating to individual responsibility shall affect the responsibility of states under international law.

Composition.—According to Article 34 of the statute, the Court shall be composed of following organs :

(a) The Presidency;

(b) An Appeal Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor; and

36. Article 22.
37. Article 23.
38. Article 24.

(d) The Registry.

There shall be 18 Judges of the Court, to be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective states for appointment to the highest judicial offices nominations of candidates for election to the court may be made by any State Party to the statute every candidate for election to the Court shall (i) have established competence in Criminal Law and Procedure, and the necessary relevant experience, whether as a Judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or (ii) have established competence in relevant areas of international law such as international humanitarian law and the law of human rights extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court. Further, every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the court (i.e. Arabic, Chinese, English, French, Russian and Spanish). No two judges may be nationals of the same state. The Judges shall hold office for a term of nine years. But at the first selection, one third of the Judges elected shall be selected by lot to serve for a trem of three years; one third of the judges shall be elected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.[39]

Place of Trial.—Unless otherwise decided the place of the trial shall be the seat of the Court.[40]

Penalties.—Article 77 of the statute provides the following :

(1) Subject to Article 110 (which deals with review by the Court concerning reduction of sentence), the court may impose one of the following penalties on a person convicted of a crime under Article 5 of the Statute :
   (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
   (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

(2) In addition to imprisonment the court may order :
   (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
   (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties.

Appeal and Revision.—A decision under Article 74 may be appealed in accordance with the Rules of Procedure and Evidence.[41] Appeal against other decisions may also be made in accordance with the Rules of Procedure and Evidence.[42] The convicted person or, after death, spouses, children, parents or one person alive at the time of accuser's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeal's Chamber to revise the final judgement of conviction or sentence on the grounds specified in the Statute.[43]

Compensation to an arrested or convicted person.—Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.[44]

General obligation to cooperate.—States Parties shall in accordance with the provisions of the statute, cooperate with the court in its investigation and prosecution of crimes within the jurisdiction of the Court.[45]

---

39. Article 36.
40. Article 62.
41. Article 81.
42. Article 82.
43. Article 84.
44. Article 85.
45. Article 86.

Enforcement.—A sentence of imprisonment shall be served in a state designated by the Court from a list of states which have indicated to the Court their willingness to accept sentenced persons.[46]

Assembly of State Parties

The Rome Statute also establishes an Assembly of States Parties. Each State Party shall have one representative in the Assembly who may be accompanied by alternative and advisers. Other states which have signed the statute in or the Final Act may be observers in the Assembly.[47]

The Assembly shall :

(a) consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) provide management oversight to the Presidency, the Persecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget of the court;

(e) Decide whether to alter, in accordance with Article 36, the member of judges;

(f) To consider pursuant to Article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this statute or the Rules of Procedure and Evidence.[48] The Assembly shall have a *Bureau* consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three year term.[49]

The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the court, in order to enhance its efficiency and economy.[50] Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the statute :

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.[51]

The Assembly shall adopt its own rules of procedure.[52]

Settlement of Disputes.—Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.[53] Any other dispute between two or more States Parties relating to the interpretation or application of the statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the statute of the Court.[54]

---

46. Article 103 (1) (a).
47. Article 112(1).
48. Article 112 (2).
49. Article 112 (3).
50. Article 112 (4).
51. Article 112 (7).
52. Article 112 (9).
53. Article 119 (1).
54. Article 119 (2).

Reservations.—A unique feature of the Rome Statute of the International Criminal Court is that it does not provide for any reservations.[55]

Review of the Statute.—Seven years after the entry into force of this statute the Secretary General of the United Nations shall convene a Review Conference to consider any amendments to this statute. Such review may include, but is not limited to, the list of crimes contained in Article 5. The Conference shall be open to those participating States Parties and on the same conditions.[56] Besides this, at any time thereafter at the request of a State Party and for the purposes set forth above, the Secretary General of the United Nations, upon approval by a majority of States Parties, convene a Review Conference.

Withdrawal.—Last but not the least a State Party may, by written notification addressed to the Secretary General of the United Nations withdraw from this Statute. The withdrawal shall take effect one year after the date of the receipt of notification, unless the notification specifies a later date.[57]

Conclusion.—The adoption of the Rome Statute of the International Criminal Court is a great achievement. There are, however, certain glaring shortcomings. For example, the crimes of hijacking and terrorism which pose a great menace to the international community, especially to the innocent men, women and children, have not been included in the list of crimes over which the International Criminal Court shall have jurisdiction. Similarly, the enforcement mechanism devised is far from satisfactory. The statute shows that states are yet not prepared to establish a strong Court having compulsory jurisdiction over international crimes. The Statute represents the maximum agreement which could be reached in the present circumstances. A welcome features of the Statute is the provision of review of the Statute seven years after the entry into force of this Statute. Let us hope that when a Review Conference is held the present shortcomings will be removed. A good and auspicious beginning has been made with the adoption of the Statute. It is rightly said that well begun is half done, so be it.

U.N. War Crimes Commission to Investigate war crimes in former Yugoslavia

On 6th October, 1992, the Security Council of the U.N. through a resolution authorised Secretary General, Boutros Boutros Ghali to establish U.N. War Crimes Commission to investigate war crimes committed in former Yugoslavia. Though the scope of this Commission is very limited it is very significant landmark in the history of the United Nations. It is not a permanent Commission yet it is significant because it will definitely establish an important precedent.

The Security Council, on 6th October, 1992, asked States, relevant U.N. bodies and other organizations to provide within 30 days any substantial information concerning violations of humanitarian law. It may be noted here that two months before, on 13th August, 1992, in resolution No. 771, the Council had asked States and international organizations for such information on the former Yugoslavia.

On 6th October, 1992, the Council took the decision for the establishment of War Crimes Commission as it had been alarmed by reports of mass killings and "ethnic cleansing" in former Yugoslavia.[58] The Commission reported that it had several thousand pages of documentation, as well as video information on allegations of grave breaches of the 1949 Geneva Conventions and violations of international humanitarian law and was preparing a database on all reported crimes.

Establishment of an International Tribunal for Prosecution of Violators of International Humanitarian Law in former Yugoslavia.—Investigation of war crimes by U.N. War Crimes Commission would have been futile if the persons guilty of war crimes and violation of humanitarian law were not prosecuted and

55. See Article 120.
56. Article 123 (1).
57. Article 127 (1).
58. See U.N. Chronicle, Vol. XXX, No. 1 (March, 1993) p. 7.

punished. Consequently as the natural next step, the Security Council, on 22nd February, 1993, decided[59] that an international tribunal "shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." It will be reckoned as a great landmark in the history of the U.N. because it is for the first time that U.N. has established an International Criminal Court with jurisdiction to prosecute crimes committed during armed conflict. The above-mentioned resolution was unanimously passed by the Security Council. The Council asked the U.N. Secretary-General Boutros Boutros Ghali to make specific proposals within 60 days for the organization and operation of such tribunal.[60]

On 3rd May, 1993, the Secretary-General reported[61] that the tribunal would operate as a subsidiary organ of the Security Council performing its functions, independently of political considerations and would "not be subject to authority and control" of the Council with regard to the performance of its judicial functions. Its life span would be "linked to the restoration and maintenance of international peace and security" in the former Yugoslavia.

The tribunal would consist of Trial Chambers, an Appeals Chamber, the Prosecutor and a Registry, servicing both Chambers and the Prosecutor. With regard to competence, the Tribunal will apply those rules of international humanitarian law which are "beyond any doubt part of customary law", such as international conventions relating to the protection of war victims, respective laws and customs of war on land and prevention of the crime of genocide. The tribunal will also deal with "crimes against humanity—first recognized in the Charter and judgment of the Nuremberg Tribunal—which include "inhuman acts of a very serious nature" committed as part of a "widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds". In the case of the former Yugoslavia, such inhuman acts took the form of so-called "ethnic cleansing" and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.[62]

On 25th May, 1993, the Security Council decided to establish an International Tribunal for the purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[63] The Council unanimously endorsed a 34-article draft statute of the tribunal annexed to the Secretary-General's report (S/25704). Under its statute, the Tribunal is to deal with "crimes against humanity", such as murder, extermination, enslavement, imprisonment, torture, rape, persecution on political, racial and religious grounds and other inhuman acts. Also acting upon an order of a Government or a superior would not relieve the perpetrator of criminal responsibility and should not be a defence. Obedience to superior orders could, however, be considered a mitigating factor should the Tribunal determine that justice so requires.

The Secretary-General was asked to made practical arrangements for effective functioning of the Tribunal, which would be located at the Hague.

It may also be noted here that on 28th May, 1993, too two items on the tribunal's financing and on election of its judges were added to the agenda of the General Assembly's forty-seventh session.

On 17th November, 1993, the 11 member International Tribunal for Crimes in the former Yugoslavia was inaugurated at the Peace Palace in the Hague, Netherlands. The two-week first session of the Tribunal was held from 17th to 30th November, 1993. Judge Antonio Cassese of Italy was elected President of the Tribunal. During its two week session, the Tribunal also considered proposed rules of procedure and evidence. Earlier, Roman Escvar Salom of Venezuela was appointed Tribunal Prosecutor by the Security Council vide its resolution 877 (1993) of 21st October, 1993.

59. See Resolution 808 (1993).
60. See U.N. Chronicle, Vol. XXX, No. 2 (June, 1993) p. 5.
61. vide document (S/25704).
62. See U.N. Chronicle, Vol. XXX, No. 3 (September, 1993) p. 13.
63. See resolution 827 (1993).

The first extraditions of suspected was criminals from former Yugoslavia were made on 12th February 1995. A Bosnian Serb General and Colonel spent their first day in Dutch Jail on 13th February, 1995 after NATO, acting on the request of U.N. War Crimes Tribunal for former Yugoslavia, flew them out of Sarjeevo on 12th February, 1995. They had been detained two weeks ago by Muslim led government and accused them of committing war crimes on the other hand the Serbs were annoyed and pointed out that their names were not among the 52 indicted by the Tribunal. Prosecutors could not decide within weeks whether to indict or release General Djordje Djukic and Colonel Aleksa Krasmanovic.

Establishment of the International Tribunal for Rwanda.—Expressing its grave concern at the reports indicating that genocide and other systematic widespread and flagrant violations of international humanitarian law have been committed in Rwanda and determined to put an end to such crimes and take effective measures to bring to justice who are responsible for them, the Security Council on November 8, 1994, decided to establish an International Tribunal for Rwanda for the sole purpose of prosecuting persons responsible for genocide and other such violations of International humanitarian law committed in the territory of Rwanda and neighbouring states between 1st January 1994 and 31st December 1994 and to adopt the Statute of the International Criminal Tribunal for Rwanda. The Security Council established the Statute under Chapter VII of the U.N. Charter.

After the establishment of the International Tribunal for Prosecution of Violators of International Humanitarian Law in former Yugoslavia, it is the second tribunal of its kind and will not only contribute to the process of national reconciliation and to the restoration and maintenance of peace but will also prove to be a deterrent and an eye-opener for others.

On November 8, 1994, the Security Council decided to adopt the Statute of the International Tribunal for Rwanda. Prior to this the Security Council had received the request of the Government of Rwanda to establish the said Tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of neighboring states between January 1, 1994 and December 31, 1994. The Security Council established the Statute acting under Chapter VII of the U.N. Charter. The Tribunal delivered its first judgement in September 1998. It found Jean Paul Akayesu, the former Mayor of Taba, guilty of genocide and crime against humanity the Tribunal also found Jean Kambananada, former Prime Minister of Rwanda, guilty of genocide and crimes against humanity and sentenced him to life imprisonment.

United Nations Convention against Transnational Organized Crime.—This convention was adopted by the United Nations in November, 2000.[28] The purpose of this convention is to promote cooperation to prevent and combat transnational organized crime more effectively.[29] Defining the term "organized criminal group", Article 2(a) of the Convention states that it shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. As regards scope of application, Article 3 of the Convention provides the following :

"1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of :
   (a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention and ;
   (b) Serious crimes as defined in article 2 of this Convention where offence is transnational in nature and involves an organized criminal group.
2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if—
   (a) it is committed in more than one State ;

28. *See* U.N.G.A. Doc. A/55/383.
29. Article 1 of the Convention.

(b) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another state ;

(c) it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State;

(d) it is committed in one State but has substantial effects in another State.

Articles 5, 6, 8 and 23 referred to above deal with criminalization of participation in an organized crime, criminalization of laundering of proceeds of crime, criminalization of corruption and criminalization of obstruction of justice respectively.

It is also provided in the Convention that States Parties shall cooperate closely with one another, consistent with respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention.[30]

The Convention provides for the establishment of a conference of the Parties to the Convention to improve the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of the Convention.[31] As regards the Secretariat, it is provided that the Secretary-General of the United Nations shall provide the necessary Secretariat services to the conference of the Parties to the Convention.[32]

The Convention shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Head quarters in New York until 12 December 2002.[33] The Convention shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession.[34]

Protocol to Prevent, Suppress and Punish Trafficking Persons, Especially Women and Children.—The above-mentioned convention against Transnational Organized Crime (2000) in its Article 37 provided that this Convention may be supplemented by one or more protocols. In order to become a party to a protocol, a State or a regional economic integration organization must be a party to this Convention. A State Party is not bound by a protocol unless it becomes a party to the protocol in accordance with the provisions thereof. Further, any protocol to the Convention shall be interpreted together with this Convention, taking into account the purpose of the protocol.

The purposes of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children are—

(a) to prevent and combat trafficking in persons, paying particular attention to women and children ;

(b) to protect and assist the victims of such trafficking with full respect for their human rights ; and

(c) to promote cooperation among State Parties in order to meet those objectives.[35]

As regards the scope of application, the Protocol shall apply, except as otherwise stated herein, to the prevention and prosecution of offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group as well as to the protection of victims of such offences.[36]

The Protocol remained open all States for signatures from 12 to 15 December, 2000 in Palermo, Italy, and thereafter at United Nations Head quarters in New York until 12 December, 2002. The Protocol is subject to ratification, acceptance or approval which shall be deposited with the Secretary-General of the United Nations.[37] The Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of

30. Article 27.
31. Article 32.
32. Article 33.
33. Article 36.
34. Article 38.
35. Article 2.
36. Article 4.
37. Article 16.

ratification, acceptance, approval or accession but it shall not enter into force before the entry into force of the Convention.[38]

Protocol Against the Smuggling of Migrants by Land, Sea and Air.— Relation of this Protocol with the U.N. Convention against Transnational organised Crime, its entry into force, binding effect on State Parties and interpretation are similar to that of the above Protocol *i.e.* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

The purpose of the Protocol Against Smuggling of Migrants by Land, Sea and Air is to prevent and combat the smuggling of migrants, as well as to promote co-operation among States Parties to that end, while protecting the rights of smuggled migrants.[39]

As regards scope of application of the Protocol, it is provided that the Protocol shall apply, except otherwise stated in the Protocol, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well to the protection of the rights of the persons who have been the object of offences.[40]

As with the above earlier Protocol, this Protocol also was opened to all States for signature from 12 to 15 December, 2000 in Palermo, Italy, and thereafter at the United Nations Head quarters in New York until 12 December 2002.[41] This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession except that it shall not enter into force before the entry into force of the U.N. Convention Against Transnational Organized Crime.[42]

---

38. Article 17.
39. Article 2 of the Protocol.
40. Article 4.
41. Article 21.
42. Article 22.

CHAPTER 26

INTERNATIONAL ECONOMIC CO-OPERATION AND THE EVOLUTION OF A NEW INTERNATIONAL ECONOMIC ORDER

Introduction.—"Since war begins in the minds of men, it is in the minds of men that the defence of peace must be constructed." [1] Order and peace require a certain degree of economic and social stability. "Economic and social inequalities are in part responsible for the failure to preserve peace and that economic and social factors are interwoven in the whole fabric of international relationships....." [2] Thus, to ensure world peace it is necessary to solve the economic and social problems of the world. It is well known that poverty breeds insecurity. It also breeds envy and provokes tensions. A combination of these elemental urges can jeopardise the efforts to maintain international peace and security.[3] Many of the tensions in the world are the outcome of fundamental economic maladjustments and conditions of economic disequalibrium. The ever-widening gap between the few developed countries and the numerous developing countries constitutes a major source of tension and insecurity. The present distribution of economic power in the world is imbalanced and unjust. More than two-thirds of the world's trade takes place among the developed countries themselves. Moreover, three-fourths of the world's income is generated in the developed countries.[4] The developing countries, therefore, want to change the traditional structure of international economic order. In July, 1964 the Secretary-General of the United Nations declared "a change of political dimension in the awareness of the need for a more organised international co-operation in the economic and financial field." [5] This awareness finds itself manifested in putting forward the concepts of 'economic decolonization', 'New International Economic Order' 'Collective economic security', 'Economic Rights and Duties, 'Collective developing world', 'self-reliance', etc. "The world has no choice but to move towards greater and greater global co-operation in economic, financial and technological spheres, simultaneously with the co-operation in the political field." [6]

U. N. Charter Provisions*.—The framers of the U. N. Charter were quite aware of the significance of the economic and social questions and recognised the importance of economic and social stability. The preamble of the Charter expresses the resolve 'to promote social progress and better standards of life in larger freedom' and 'to employ international machinery for the promotion of the economic and social advancement of all peoples.' After having made this resolve, the Charter enlists the achievement of 'International co-operation in solving international problems of an economic, social, cultural or humanitarian character'[7] as one of the purposes of the U. N. It is also provided that the General Assembly shall initiate studies and make recommendations for the purpose of promoting international co-operation in the economic field.[8] The framers of the U. N. Charter attached so much importance to the International Economic and Social Co-operation that a Chapter (Chapter IX comprising of Articles 55 to 60) is exclusively devoted for this purpose. The most important Articles for the purpose of present

1. Preamble of the United Nations Educational Scientific and Cultural Organisation (UNESCO).
2. Stepren S. Godspeed, "The Nature and Function of International Organisation" (Second Edition, New York, Oxford University Press, 1967), p. 395.
3. K. B. Lall, "Economic Inequality and International Law", I.J.I.L., Vol. 14 (1974), p. 6 at p. 11.
4. P. Chandrasekhar Rao, "Charter of Economic Rights and Duties of States", I.J.I.L., Vol. 15 (1975), p. 351 at 352.
5. United Nations Press Release S.G./I.S.M./110, July 16, 1964, p. 2.
6. S. L. N. Sinha, "Three Decades of International Monetary Co-operation", India Quarterly, Vol. XXXII (1976), p. 121 at p. 139.

* See also for I.A.S. (1979) Q. No. 9(a).

7. Article 13.
8. Article 13 (1) (b).

discussion are Article 55 and 56. Article 55 provides : "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 rights and self-determination of peoples, the United Nations shall promote : (a) higher standard of living, full employment, and conditions of economic and social progress and development ; (b) solution of international economic, social, health and related problems....." Under Article 56, all the members have pledged to take joint and separate action in co-operation with the organisation for the achievement of the purpose set forth in Article 55. It may be noted that recommendations under Articles 55 and 56, are not binding as such but the word "pledge" in Article 56 implies that the members are under obligation to co-operate for attainment of the purposes set forth in Article 55.[9] Article 56 thus constitutes a legal obligation upon members in respect of International Economic Co-operation. The objectives mentioned above for the attainment of the International Economic Co-operation are sought to be achieved through a structure provided by the Charter. This comprises mainly of the General Assembly, the Economic and Social Council, various subordinate Commissions and Committees, the Secretariat and the specialised Agencies. The Charter provides that responsibility for the discharge of functions of the Organisation relating to Inernational Economic and Social Co-operations (mentioned in Chapter IX) shall be vested in the General Assembly and under the authority of the General Assembly in the Economic and Social Council.[10]

Evolution of a New International Economic Order

Background to the proposed New International Economic Order[11]. — The ever-widening gap between the rich and poor nations, prevalent injustice and inequality among the nations in the field of economic matters and the persistent denial of rightful place to the Third World in the world economic order are some of the main reasons impelling the developing countries to make all out efforts to transform the existing world economic order which was devised and developed at a time when many of the developing countries did not even exist as independent States. The concept of new International Economic Order was envisaged by the developing countries when they realised that they had acquired a new bargaining strength which could enable them to force decisions so as to make some changes in their favour in the existing world economic order.

"The present world economic order is supposed to be guided by the operation of free market forces propelled by free competition and enterprise, and based on free movement of goods and services, including technology. In the field of trade, it has been governed by the so-called General Agreement on Tariffs and Trade (GATT) principle of non-discrimination and free trade of fixed parties and dollar standard till recently. In practice, however, these principles have not been applied, in an untrammelled or consistent manner, but have been guided and manipulated in many respects. To take only a few examples, the industrialised countries have consistently tried to insulate their agriculture from competition, by seeking an exception of agriculture from the basic GATT rules in order to erect protectionist walls to shelter their agriculture. Under the name of free enterprise, transnational corporations, based in industrialized countries, control the production and trade of vital raw materials of the developing countries and other products through their cartel activities, tied purchasing, licensing devices, intra-corporate transfer pricing, arbitrary restrictions on exports by their subsidiaries in developing countries, etc. These selective departures have been made from the GATT principle of non-discrimination in order to promote intra-growth of groups of developed countries as in the case of European Economic Community (EEC), European Free Trade Association (EFTA) etc., and for forging neocolonialist links with groups of developing countries, as in the case of various exclusive trade arrangements between industrialized and developing counties. And the principles governing the international monetary system were unilaterally

9. M. Goodrich and Edward Hombro, Charter of the U. N. (New York, N. Y. 1969), p. 381.
10. Article 60 of the U. N. Charter.
11. For background see also Chapter on "GATT" and "UNCTAD", in Part III of the book; See also "The IMF" and "The World Bank" discussed in chapter on "The Specialized Agencies."

abrogated, once it was realized that fixed parties and dollar standard had served their historic purpose of triggering unprecedented growth and prosperity in the western world." [12]

Recently America has made initiatives to widen the scope of the GATT, The U. S. has been pushing for liberalised trade environment under GATT for services like banking and travel. But this idea has been opposed by India, Brazil and some other developing countries. The GATT was designed to deal with only trade in merchandise. On September 20,1986, at Punta Del Este (Uruguay), a global accord was made by the 92-nation GATT ministerial conference. India later on had conceded that she was not against discussing services so long as they were not placed under GATT. Thus India succeeded in keeping the negotiations on services outside the framework of GATT.

The hike in oil prices further caused unprecedented strain upon the economic of the non-oil exporting countries. In the beginning even the developed countries were adversely affected by it but "thanks to their economic and technological capabilities, most of these surpluses were recycled to the developed countries. It took the developed market only one year to restore the over all equilibrium of their balance of payments.[13] On the other hand, the developing countries who were already immersed in a crisis of survival "were confronted with unprecedented balance of payment deficits, due to the increase in the prices of oil, food, fertilizers and other manufactured imports from developed counries. Their balance of payment deficits reached a figure of $ 28 billion in 1974 and rose to $ 35 billion in 1975." [14] Even after a decade there has been no improvement in the situation. According to the Geneva based GATT annual report on international trade, world trade based on the GATT system was being threatened with losing confidence in the system itself. It may be noted that while the value and volume of world trade increased modestly by 1 per cent respectively over 1984, developing countries primary commodities other than crude oil earned 9.5 per cent less in dollar prices for their exports in 1985. The Group of 77 developing countries have therefore rightly criticized very sharply the industrialized countries advice to the developing countries to introduce internal economic reforms.

The emergence of large number of States since 1960 changed the structure of International community and this was bound to have its impact on the economic sphere also. "The accelerated emergence of new nations since 1960 and their enormous increase in political power has led to what has sometimes been called a 'revolution of rising expectations.' The developing nations now clamour for greater participation in world trade rather than the traditional handouts of financial aid and technical assistance....."[15] It is in the context of these developments that the objective of the establishment of a New International Economic Order has acquired a special significance. The most significant achivements so far in this direction are the adoption of the Declaration on the Establishment of a New International Economic Order, Programme of Action and the Charter of Economic Rights and Duties of States.

(A) U. N. Declaration On The Establishment of A New International Economic Order

In order to solve problems posed by economic inequality prevalent in the world, the developing countries have given the call to establish a New International Economic Order. The demand for the establishment of a *New International Economic Order* was officially voiced for the first time at the UNCTAD-III Conference in Santiago (Chile) in 1972, by the developing countries. The developing countries demanded, *inter alia*, easier access to the markets of industrialized countries, for producer cartels of the developing countries, to enforce higher export prices, for limitation of the use of synthetics, for an integrated raw materials programme and for linking the developing countries export prices to their import prices. It was at the instance of the developing countries that the *Sixth Special Session* of

12. M. Dubey, "Problems of Establishing a New International Economic Order", India Quarterly, Vol. XXXII, No. 3 (July—September, 1976), p. 269 at pp. 269-70.
13. Ibid, at p. 271.
14. Ibid.
15. Robin C. A. White, "A New International Economic Order" I.C.L.O. Vol. 24 July 1975, p. 524 at p. 531.

the U. N. General Assembly was convened. The Sixth Special Session was devoted entirely to the consideration of matters relating to International Economic Co-operation. The most significant achievement of the Sixth Special Session was the *U. N. Declaration on the Establishment of the New International Economic Order.* This declaration was adoped without vote at the Plenary Meeting No. 2229 of the Sixth Special Session of the U. N. General Assembly on May 1, 1974.[16] Through this Declaration the Members of the U. N. have proclaimed their "United determination to work urgently for *The Establishment of a New International Economic Order* based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social system which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development in peace and justice for present and future generations."

The U. N. Declaration on the Establishment of a New International Economic Order[17] noted that the developing countries, which constitute 70 per cent of the world population, account for only 30 per cent of the world's income. It has proved impossible to achieve an even and balanced development of the international community under the existing international economic order. The gap between the developing and developed countries continues in a system which was established at a time when most of the developing countries did not even exist as independent States and which perpetuates inequality. Further, the present international economic order is in direct conflict with current developments in international political and economic relations. Since 1976, the world economy has experienced a series of grave crises which have had severe repercussions, especially on the developing countries because of their generally greater vulnerability to external economic impulses. The developing world has become a powerful factor that makes its influence felt in all fields of international activity. These irreversible changes in the relationship of forces in the world necessitate the active, full and equal participation of the developing countries in the formulation and application of all decisions that concern the international community. All these changes have thrust into prominence the reality of interdependence of all the members of the world community. Current events have brought into sharp focus the realization that the interests of the developed countries and the interest of the developing countries can no longer be isolated from each other, that there is closer inter-relationship between the prosperity of the developed countries, and the growth and development of the developing countries, and that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts. International Co-operation for development is the shared goal and common duty of all countries. Thus the political, economic and social well-being of present and future generation depends more than ever on co-operation between all members of International Community on the basis of sovereign equality and the removal of the disequilibrium that exists between them.

The declaration also mentioned the principles on which the new International Economic Order should be founded. The principles mentioned are : (a) Sovereign equality of States, self-determination of all peoples inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other States; (b) Broadest co-operation of all the member-States of the international community, based on equity, whereby the prevailing disparities in the world may be banished and prosperity secured for all; (c) Full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries, bearing in mind the necessity to ensure the accelerated development of all the developing countries, while devoting particular attention to the adoption of special measures in favour of the least-developed, land-locked and island-developing countries as well as those developing countries most seriously affected by economic crisis and natural calamities, without

16. For the text of the Resolution see Foreign Affairs Reports, Vol. XXIII, No. 6 (June 1974), pp. 119-22; U. N. Press Release GA/5022, May 2, 1974.
17. Hereinafter referred as "the Declaration."

losing rights of other developing countries; (d) Every country has the right to adopt the economic and social system that it deems to be the most appropriate for its own development and not to be subjected to discrimination of any kind as a result; (e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation which means suitable for its own situation, including the right to nationalization or transfer of ownership to its nations this right being an expression of full permanent sovereignty of the State. No State may be subjected to economic, political, or any other type of correction to prevent the free and full exercise of this inalienable right; (f) All States, territories and peoples under foreign occupation alien and colonial domination or *apartheid* have the right to restitution and full compensation for the exploitation and depletion of, and damages to the natural and other resources of those States, territories and peoples; (g) Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporation operate on the basis of the full sovereignty of those countries; (h) Right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities; (i) Extending of assistance to developing countries, peoples and territories under colonial and alien domination, foreign occupation, racial discrimination or *apartheid* or which are subject to economic, political or any other type of measures to coerce them in order to obtain from the subordination of the exercise of their sovereign rights and to secure from them advantages of any kind, and to neo-colonialism in all its forms and which have established or are endeavouring to establish effective control over their natural resources and economic activities that have been or are still under foreign control; (j) Just and equitable relationship between the prices of raw materials, primary products, manufactured and semi-manufactured goods exported by developing countries and the prices of raw materials, primary commodities manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and expansion of the world economy; (k) Extension of active assistance to developing countries by the whole international community, free of any political or military conditions; (1) Ensuring that one of the main aims of the reformed international, monetary system shall be the promotion of the development of the developing countries and the adequate flow of real resources to them; (m) Improving the competitiveness of natural materials facing competition from synthetic substitutes; (n) Preferential and non-reciprocal treatment of developing countries whenever feasible, in all fields of international economic co-operation wherever feasible ; (o) Securing favourable conditions for the transfer of financial resources to developing countries; (p) To give to the developing countries access to the achievements of modern science and technology, to promote the transfer of technology and the creation of indigenous technology for the benefit of the developing counries in forms and in accordance with procedures which are suited to their economics; (q) Necessity for all States to put an end to the waste of natural resources including food products; (r) The need for developing countries to concentrate all their resources for the cause of development; (s) Strengthening—through individual and collective action—of mutual economic, trade, financial and technical co-operation among the developing countries mainly on a preferential basis; and (t) Facilitating the role which producers' associations may play within the framework of international co-operation, and in pursuance of their aims, *inter alia,* assisting in promotion of sustained growth of world economy and accelerating development of developing countries.

The Declaration further provided that U. N. as a universal Organisation should be capable of dealing with problems of international economic co-operation in a comprehensive manner and ensuring equally the interest of all countries. It must have an even greater role in the establishment of a new international economic order. Finally, the members of the U. N. expressed the hope that the Declaration shall be one of the most important basis of economic relations between all peoples and nations.

(B) Programme of Action on the establishment of A New International Economic Order

The Sixth Special Session of the General Assembly also adopted a resolution entitled, "Programme of Action on the Establishment of New International Economic Order.[18] The strategies to establish the new economic order were mentioned in detail in the Action Programme. A special programme was provided to mitigate the difficulties of the developing countries most seriously affected by the sharp hike in the prices of oil and other essential commodities. As regards raw materials, the action programme suggested 'recovery, exploitation, development, marketing and distribution of natural resources' which belonged to them and for facilitating the functioning of producers, associations, it advocated 'joint marketing arrangements, 'orderly commodity trading', etc., with a view to ensure increase of the share of developing countries in world trade, it suggested measures, such as, equitous pricing policies, expeditious commodity agreements, greater use of natural resources in preference to synthetic materials and compensatory financing scheme. The Action Programme made recommendation for the improvement of food and nutrition situation in the poor countries, promotion of equitable participation of developing countries in world shipping, etc. Finally, it envisaged the strengthening of the role of the U. N. system in the field of international economic co-operation.[19]

(C) The Charter of Economic Rights and Duties

Background.—The credit for initiating the discussion and elaborating the economic rights and duties of States goes to the UNCTAD. At the third session of the UNCTAD held at Santiago (Chile) in April, 1972, President of Mexico put forward the following proposal : "We must strengthen the precarious legal foundations of the international economy. A just order and a stable world will not be possible until we create obligations and rights which protect the weaker States. Let us take economic co-operation out of the realm of goodwill and put it into the realm of the law.[20] On 18th May, 1972, a resolution[21] was adopted by the UNCTAD whereby it decided to prepare the text of a draft Charter of Economic Rights and Duties and for this purpose of a working group comprising of governmental representatives of 31 member States was formed. The membership of this group was subsequently enlarged to 41 by the General Assembly through a resolution[22] dated 19th December, 1972. The developed and the developing countries were given equal representation in the working group. The group was expected to complete the work in 1973 in two sessions. Due to the complex nature of the work, it could not be completed in 1973 and the Group held four Sessions in between February, 1973 and June, 1974. Mr. Jorge Castaneda acted as the Chairman of the Working Group. Even the Fourth Session failed to adopt to generally agreed text. The developed countries wanted the Working Group to continue its efforts so as to narrow down the areas of disagreement and to produce a generally acceptable text. But this proposal was rejected by the Second Committee of the General Assembly.[23] The developed countries realized that if the discussion were prolonged further, they might widen the areas of disagreement instead of narrowing them. They, therefore, decided to present the text before the Special Session of the General Assembly. Thus the Charter of Economic Rights and Duties was finally adopted by the General Assembly on 12th December, 1974. More than two-thirds of the Charter received general support and only six countries voted against the Charter as a whole. The Charter of Economic Rights and Duties[24] was adopted by a roll-call vote of 120 in favour to 6 against with 10 abstentions. Belgium, Denmark, The Federal Republic of Germany, Luxemburg, the U. K. and the U. S. voted against the Charter. Austria, Canada, France,

18. G. A. Resolution 3202 (S-VI), 16th May, 1974.
19. See Rahmatullah Khan, "The Struggle for World Resources", Foreign Affairs Reports, Vol. XXIV, No. 7 (July, 1975), p. 101 at pp. 112-113; see also Ibid, "International Law—Old and New", I.J.I.L., Vol. 15 (1975), p. 371 at pp. 378-79.
20. A/PV 2315, p. 67.
21. Resolution 35 (III).
22. Resolution 3037 (XXVII) of 19th December, 1972.
23. A/C/L. 1419.
24. Hereinafter referred as "the Economic Charter."

Ireland, Israel, Italy, Japan the Netherlands, Norway and Spain abstained from voting. Australia, Finland, Greece, Iceland, Portugal, New Zealand, Sweden, China and the Socialist countries were among the developed countries who voted in favour of the Economic Charter as a whole.

Since the developed countries' suggestion to prolong the discussion so as to narrow down the areas of disagreement was not accepted by the developing countries and they hastened to adopt the Charter despite opposition of the developed countries in respect of some of the important provisions of the Charter, some developed countries, particularly the U. S. apparently felt "oppressed" by the "tyranny of the majority". But this was countered by the Mexican representative in the following words : 'There was not tyranny of the majority for all were patiently heard. Furthermore, it should be expressly said that majority tyranny if indeed it exists, is a bad thing, but minority is even worse, and is what existed during the early years of the organisation when others were the tyrants governing of the destiny of the United Nations.[25]

However, the developed countries who voted against the Charter argued that although they were small in number, they occupied a significant place in the field of International Economic Relations and as such their views could not be ignored. In other words, they meant that so far as International Economic relations were concerned, they were *essential states* and unless their support was extended, the Charter could not achieve its objective.[26] To some extent atleast it cannot be denied that the Economic Charter can have universal application only after it is supported by a few most developed countries including the U. S. However, it may be observed that public opinion being the ultimate and greatest sanction behind International Law, and for that matter behind any law, in the course of time the said developed countries may also be compelled to accept the majority view and support the Charter. Thus the Economic Charter represents a significant stage in the development of International Economic Law despite the fact that some *'essential states'* or the States which really matter in the field of International Economic relations, have not supported it. It is bound to have the desired impact on the International Economic Co-operation.

Structure of Economic Charter.—The preamble of the Resolution which adopted the Economic Charter stressed the fact that "the Charter shall constitute an effective instrument towards the establishment of a new system of International Economic Relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries." [27] The Economic Charter comprises of 34 Articles and a preamble.[28] The preamble declared that the fundamenal purpose of this Charter is to promote the establishment of the new international economic order, based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems. The preamble also emphasised the need to establish and maintain a just and equitable economic and social order through :— (a) the achievement of more rational and equitable international economic relations and the encouragement of structural changes in the world economy; (b) the creation of conditions which permit the further expansion of trade and intensification of economic co-operation among all nations; (c) the strengthening of economic independence of developing countries; and (d) the establishment and promotion of international economic

25. A/PV. 2315.
26. As pointed out by Prof. Leo Gross : "A treaty, though formulating principles intended for universal application, will not achieve this objective unless it is suppored by the Essential States. Essential States, in this context, refers to States without whose consent and acceptance the Treaty is not likely to achieve its intended purpose. Thus a convention along the lines of the principle adopted by the 1964 UNCTAD conference, even if accepted by the very large number of States, will not be productive unless it is also accepted by the very small number of economically developed countries. Law and politics can never be completely divorced." Sources of "Universal International Law", in Asian States and the Development of Universal International Law, edited by R. P. Anand, (1972), p. 189 at p. 196.
27. See Resolution 3081 (XXIX), dated 12th December, 1974.
28. For text of the Economic Charter; see U. N. Monthly Chronicle, Vol. XII, No. 1 (January 1975), pp. 108-18.

relations taking into account the agreed difference in development of the developing counties and their specific needs.[29]

The Charter is divided into four Chapters, namely, Fundamentals of International Economic Relations, Economic Rights and Duties, Common Responsibility Towards the International Community and Final Provisions.

Fundamental Principles.—Chapter I provides that the economic as well as political and other relations among States shall be governed *inter alia* by the following principles :

(a) Sovereign, territorial integrity and political independence of States; (b) Sovereign equality of all States; (c) Non-aggression; (d) Non-intervention; (e) Mutual and equal benefit; (f) Peaceful Co-existence; (g) Equal rights and self-determination of people; (h) Peaceful settlement of disputes; (i) Remedying of injustices which have brought about by force and which deprive a nation of natural means necessary for its normal development; (j) Fulfilment in good faith of international obligation; (k) Respect for human-rights and fundamental freedoms; (l) No attempt to seek hegemony and spheres of influence; (m) Promotion of International Social Justice; (n) International co-operation for development; (o) Free access to and from sea by land-locked countries within the framework of the above principles.

"By and Large, the general principles are derived directly or indirectly from the Charter of the United Nations (*e.g.*, Articles 1 and 2)";[30] However, there was great controversy regarding principles (f) *i.e.*, peaceful co-existence and (i) *i.e.*, remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development and some developed countries voted against it. Yet another principle which aroused controvery was the principle (o) *i.e.*, relating to free access to and from the sea by the land-locked countries. Some countries including India had reservations to this principle. India and some seven other nations abstained from voting on this point. These countries were of the view that land-locked countries can be utilized by certain big powers for subversion of free nations. They recommended that access to and from sea should be a matter for bilateral negotiations and settlement. As pointed out by an author,[31] the land-locked countries numbering about 30 "have a legitimate concern to secure access to and from the sea, such access cannot obviously be an absolute one. Since such access involves transit over the territory of another sovereign State, the equally legitimate rights and interests of that State shall have to be fully respected. Consequently, the question of access must necessarily be regulated by mutual discussion and agreement between the land-locked and the transit States directly concerned and cannot be brought within the straight-jacket of a simple formulation as has been attempted in sub-paragraph (o). Besides, the question of access was also before the United Nations Conference of the Law of the Sea. It was in view of these considerations that certain developing countries including India abstained from the voting on sub-paragraph (o). Nepal and some other land-locked countries sought to interpret this paragraph as giving the whole hog and implying *the right of free access to and from the sea of the land-locked countries,*[32] an assertion which seems to go beyond even actual provisions of the Economic Charter. Besides, the so-called free access is subject to the other principles established in Chapter I such as, for instance, the principle of respect for the sovereignty of States and fulfilment in good faith of international obligations including those assumed in bilateral agreement between the land-locked and transit countries concerned. India's observations[33] in the General Assembly that, 'In our understanding the present Charter does not elevate access to and from the sea of land-locked countries to the level of a right under International Law, nor could it effect any way

29. Ibid, at p. 109.
30. P. Chandrasekhara Rao, "Charter of Economic Rights and Duties of States", I.J.I.L., Vol. 15 (1975), p. 351 at p. 356.
31. Ibid, at pp. 357-58.
32. A/PV 3216, 27-30; Emphasis supplied.
33. A/PV 2316, 3-5.

the present legal position on the subject' reflect on the correct legal position in the matter deserve a mention here." Some developed countries including the U. S., U. K. and France put forward a proposal that the principles enshrined in Chapter I should be treated as "directory instead of mandatory" but the same was rejected.

Economic Rights and Duties of States

Due to the paucity of the space it will not be possible to discuss critically all the Economic Rights and Duties of the States. However, an endeavour will be made to discuss briefly the more important Rights and Duties of the States incorporated in the Economic Charter. Chapter II which describes the Economic Rights and Duties of States forms "the essence of the Economic Charter." It may be noted here that there was general agreement in respect of a number of Rights and Duties mentioned in Chapter II and they were, therefore, unanimously adopted. Such rights and duties are contained in Articles 7, 8, 9, 10, 11, 12, 13, 14, 17, 18, 21, 22, 25 and 27. There was, however disagreement in respect of more important rights and duties contained in other Articles. Some of the more important rights and duties are being discussed below :

(1) Permanent Sovereignty over Wealth and Natural Resources.— Article 2, para 1 of the Economic Charter provides that every State shall "freely exercise full permanent sovereignty including possession, use and disposal, over all its wealth, natural resources and economic activities." There was no dispute in respect of the principle of full permanent sovereignty of natural resources but the developed countries objected to the words "wealth" and "economic activities." They contended that if a State transferred a portion of its wealth in some foreign country, the above principle could be interpreted to mean that the State would still retain full permanent sovereignty over such wealth. On this ground nine developed countries including U. S., U. K., Canada, France, Japan, the Federal Republic of Germany voted against this principle.[34]

(2) Foreign Investment.—The Economic Charter provided that each State has the right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment.[35] Obviously this principle was against the interest of the developed countries. Ten developed countries therefore, voted against this principle.[36] While the developing countries wanted full control over foreign investment, the developed countries in view of their interests emphasised the "International obligations" of States in respect of foreign investment.[37]

(3) Transnational Corporations.—Multinational Corporations have emerged as dominant factors on the International Economic scene during the last quarter of a century. "The main object of any Multinational Corporation anywhere is to maximise its profits and any impediment that comes in its way of maximising profit, is resented and for this purpose sometimes interference is resorted to. Political interference has been widely reported in other countries....."[38] In the view of an Indian economist, Mr. V. K. Narasimhan, "The very fact that a Multinational Corporation has enormous resources creates suspicion. Some of the revelations about the big Multinational Companies have shown how they tried to influence foreign government. These have created a certain climate of antagonism to the MNCs." [39]

According to Prof. Vernon, "Multinational enterprise is a parent company that controls a large cluster, appears to have access to common pool of human and financial resources and seen responsive to elements of common strategy.[40] This concept of MNC's

34. A/C 2/SR, 1648 : pp. 38-39; see also A/PV, 2315, 56.
35. Article 2 (a).
36. A/C 2/SR 1648, pp. 39-40.
37. See A/PV, 2315, 56 and A/C 2/SR 1649, p. 21.
38. V. Gauri Shanker, "The Performance of Transnational Corporations in India" India Quarterly, Vol. XXXIII, No. 2 (April—June, 1977), p. 180 at p. 187.
39. "Whither Multinations ?" Span Vol. XVIII, No. 6 (June 1977), p. 29.
40. Raymond Vernon, Sovereignty at Bay, (New York, 1971), p. 4.

was accepted by the group of Eminent Persons appointed by the Secretary-General in pursuance of a resolution of the Economic and Social Council to consider the role of MNC" and their impact on development and international relations.[41] Mr. L.K. Jha of India acted as the Chairman of the Group. On the basis of the recommendations of the Group, the U. N. has recently set up two bodies in this connection and has renamed 'multinationals' as 'transnationals.'

Despite the widespread apprehensions and suspicions about the role of the Transnationals and their real objectives allegedly neo colonialism), they "are economic phenomenon of the twentieth century which no one-can wish away except at the cost of remaining on a Robinson Crusoe's Island in an ocean of prosperity." [42]

"Obviously, one would not want multinations to control one's scarce mineral resources. At the same time, their technology in such things as offshore drilling, as well as in some of the derivative of oil is something which one would not wish to deny oneself. One solution which in fact is already in operation would be to set up a contractual relationship with them paying for their services on an agreed basis and allowing them the requisite measure of technical control, but not proprietary control.[43]

It is in this context that the developing States want to exercise full control over transnational corporations. That is why, they were keen to include it as a right in the Economic Charter. Economic Charter, therefore, recognises under Article 2 (b) that each State has the right : "to regulate and supervise the activites of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational Corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard to its sovereign rights, cooperate with other States in the exercise of the right set forth in this sub-paragraph." Since most of the Transnational Corporations originate in the developed countries, this above right of the States conflicts directly with their interests. They, therefore, wanted adequate protection of the interests of Transnational Corporations. They were of the view that the transnational corporations should atleast have the same obligations and rights which any other foreign person enjoys in the host State. Since this was not conceded by the developing countries, U. S., U. K., Federal Republic of Germany and Japan voted against Article 2 (b).[44] But "An essential ingredient in the view International Economic Order, therefore is a set of policies to curb the monopolistic practices of the transnational corporations, especially in trade. Policies for the elimination of cartels and of exclusive dealing arrangements would have to be adopted and greater flexibility introduced in territorial markets and produce allocation arrangements." [45]

(4) Nationalisation and Expropriation of Foreign Property.—On this subject, there are a number of resolutions passed by the General Assembly wherein the developing countries have asserted their rights. The Economic Charter simply reaffirms their position on this subject. The Economic Charter recognises the right of every State "to nationalise, expropriate or transfer ownership of foreign property in which case

41. See also, "Summary of the Hearings before the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations" ST/ESA/15, 1974—a Secretariat study which served as a background paper for the Group; see also A. Jaya Govinda, "Report of the Group of Eminent Persons on Multinational Corporations : An Analysis", I.J.I.L., Vol. 4 (Oct.—Dec., 1975), p. 521.
42. V. Gauri Shanker, "The Performance of Transnational Corporations in India", India Quarterly, Vol. XXXIII (1977), p. 181 at p. 192.
43. L. K. Jha, "Multinations As a Source of Technology—For Developing Countries "India Quarterly, Vol. XXXIII (1970), p. 49 at pp. 54-55; See also Mrs. S. K. Verma, "Taxation of Multinational Corporations" I.J.I.L., Vol. 16 (1976), p. 93; V. Gauri Shanker, "Taxation of Foreign Companies—An Indian Perspective with Reference to Code of conduct for Transnational Corporations", I.J.I.L., Vol. 17 (1977), p. 21 ; R. S. Bhatt, "Problems of Transnational Corporation", I. Q., Vol. XXXIV (1978), p. 1 at pp. 15-16. Mrs. S. K. Verma, "Taxation of Multinational Corporations", I.J.I.L. Vol. 16 (1976) p. 93.
44. See A/C 2/SR 1648, pp. 40-41.
45. Janina Gomes, "UNCTAD-IV—And the New International Economic Order", Foreign Affairs Reports, Vol. XXV, No. 8 (August, 1976), p. 110 at p. 127.

appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulation and all circumstances, that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned, that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means." [46]

This right generated a lot of controversy. It is significant to note that the developed countries did not dispute the right of States to nationalize or expropriate foreign property. Their main contention was that prompt, adequate and effective compensation or just compensation should be paid and in this respect they emphasised that State should fulfil in good faith their international obligations.[47] On the other hand, the developing countries accepted the principle of "appropriate compensation" but reserved to themselves the right to determine it, "taking into account its relevant laws and regulations and all relevant circumstances that the State considers pertinent" and in case of any controversy "to settle under the domestic law of the nationalizing State and by its tribunals." In view of this disagreement between the developing and the developed countries as many as 16 developed countries voted against Article 2 (c)." [48]

(5) Organisation of Primary Commodity Procedures.—Article 5 of the Economic Charter recognises the right of all States to associate in organisations of primary commodity producers in order to develop their national economic resources to achieve stable financing for their development, and in pursuance of their aims assisting in the promotion of sustained growth of the world economy in particular accelerating the development of developing countries. Corresponding all States have the duty to respect that right by refraining from applying economic and political measures that would limit it. The developed countries voted against this Article.[49] The developed countries were of the view that the commodity problems are the concern of the exporters and importers and should therefore, be planned and executed by them.[50] Since the developing countries possess most of the materials of the world and the developed countries import these raw materials and by the application of advanced technology finished goods are exported to developing countries there being no rational proportion between the price of the raw materials and the finished goods, organizations of primary commodity producers are expected to go a long way to protect their interest and to ensure stable financing for their development. It has been rightly observed : "There is clearly concern among the developed nations who import considerable quantities of raw materials that the success of the oil exporters will cause a succession of increases and cartels among producers of raw materials with its consequent problems of recycling the capital used to finance the purchases into the very economic form which it came so that economic collapse is avoided. But it is difficult to see the grounds upon which it can be argued that there is no right to associate. The economic repercussions are great but that alone cannot justify the denial of the right." [51]

(6) Transfer of Technology.—Article 13, para one of the Economic Charter recognises the right of every State to benefit from the advances and developments in science and technology for the acceleration of its economic and social development. It further provides that all States "should" promote international scientific and technological co-operation and the transfer of technology, with proper regard for all legitimate interest *inter alia* the rights and duties of holders, suppliers and recipients of technology." In particular, all States should facilitate the access of developing countries to the achievements of modern science and technology, the transfer of technology and the

46. Article 2 (e).
47. See A/C 2/SR 1938 pp. 5-6; A/C 2/L 1404.
48. A/C, 2/SR 1648, p. 41; See also matter discussed in this connection under chapter on "State Responsibility."
49. A/C 2/L 1406.
50. For British and Canadian Views See A/C. 2/SR, 1650, p. 17 and A/C 2/SR 1649, p. 1 respectively.
51. Robin C.A. White, "A New International Economic Order", I.C.L.Q., Vol. 24 (July, 1975), p. 542 at p. 549.

creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies and their needs.[52] Accordingly, developed countries should co-operate with the developing countries in the establishment, strengthening and development of their scientific and technological *infra* structures and their scientific research and technological activities so as to expand and transform the economies of the developing countries.[53] Finally, all States should co-operate in exploring with a view to evolving, further internationally accepted guidelines or regulations for the transfer of technology taking fully into account the interest of developing countries.[54] The right relating to transfer of technology contained in Article 13 was unanimously adopted. This was probably due to the fact that this right has been expressed in general terms and in permissive language. Instead of the word 'shall', the world 'should' has been used.

As pointed out in the preamble to the Programme of Action adopted in Vienna in 1979 by the U. N. Conference on the Science and Technology for Development, developed countries dominate the field of science and technology to the extent that around 95 per cent of research and development is executed by them, while developing countries which all represent 70 per cent of the global population have only 5 per cent of the world's research and development capacity. It may also be noted here that most of the technology is owned by multi-national corporations. The developing countries represented by the Group of 77 insist on the adoption of an international code relating to transfer of technology universally applicable. The resolution of the General Assembly which proclaimed the International Development strategy for the Third U. N. Development Decade also called upon States to finalise at an early date the adoption of an international code. Though such a code will have certain advantages, it is not "the complete answer to all the scientific needs of the L.D.C....mere import of technology does not ensure development."[55]

(7) Promotion, Expansion and Liberalization of World Trade.—The duty of each State for promotion expansion and liberalization of world trade finds mention in Article 14 which was also unanimously adopted. Article 14 provides that every State has the duty to co-operate in promoting a steady and increasing expansion and liberalization of world trade and an improvement in the welfare and living standard of all peoples, in particular of those developing countries. Accordingly, all States should co-operate *inter alia*, towards the progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade and to these ends, co-ordinated efforts shall be made to solve in an equitable way the trade problems of all countries taking into account the specific trade problems of the developing countries.

(8) Utilization of Resources Freed by Effective Disarmament Measures.—The Economic Charter recognises the duty of all States "to promote the achievement of general and complete disarmament under effective international control and utilize the resources freed by effective disarmament measures for the economic and social development of countries, allocating a substantial portion of such resources as additional means for the development needs of developing countries." [56] This principle may be traced back to the General Assembly Resolution 3176 (XXVIII) wherein it was approved by consensus. The developed countries including the U. S., the U. K., France and Federal Republic of Germany wanted this Article to be omitted but their proposal was rejected.[57] The developed countries neither appreciated the link between disarmament and development nor were they prepared to accept any such obligation.

---

52. Article 13, para 2.
53. Article 13, para 3.
54. Ibid., para 4.
55. S. K. Agrawala, "Transfer of Technology to LDC's : Implications of the Proposed Code", I.J.I.L., Vol. 23 (1983) p. 246 at p. 263.
56. Article 15.
57. A/C 2/SR 1648, pp. 7-8.

(9) Elimination of Colonialism, *Apartheid*, Racial Discrimination, Neo-colonialism and Restitution and Full Compensation for Exploitation of the Natural and Other Resources of the Territory affected.—Article 16 of Part I of the Charter provides that it is the right and duty of all States, individually and collectively, to eliminate colonialism, *apartheid*, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination and the economic and social consequences thereof as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the "restitution and full compensation for the exploitation and depletion of and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them. Further, no State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force." [58] The concept of payment of compensation to the colonial people, victims of racial discrimination and those affected by foreign aggression was strongly opposed by imperialist powers like U. K. and France. "It is only natural and logical that the developing countries are pressing for the former colonial powers to return their plundered riches to their rightful owners the peoples of Asia, Africa and Latin America. Essentially, this is a matter of imperialism making historical repression for its oppression, exploitation and robbery of the peoples of the former colonies and semi-colonies. The economic declaration of the recent Non-aligned Summit explicitly and very justly states that peoples, countries and territories subjected in the past to colonial exploitation and plunder are entitled to reparation and full restitution for this exploitation and depletion of their natural resources." [59]

(10) Extension of Tariff Preferences.—Article 18 provides that the developed countries should extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and decisions as adopted on this subject, in the framework of the competent international organizations. Article 19 further provides that with a view to accelerating the economic growth of developing countries and bridging the economic gap between developed and developing countries, developed countries should grant generalized preferential, non-reciprocal and non-discriminatory treatment to developing countries in those fields of international economic co-operation where it may be feasible. These two Articles were also opposed by developed countries including the U.S., U. K and France.

(11) Most-Favoured-Nation Treatment.—The Economic Charter provides that all States have the duty to co-exist in tolerance and live together in peace, irrespective of difference in political, economic, social and cultural systems, and to facilitate trade between States having different economic and social systems. International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries on the basis of mutual advantage, equitable benefits and the exchange of "most favoured-nation treatment." [60] As many as 14 developed countries cast their votes against this principle.[61] Among the socialist countries, China and Albania also voted against this principle.

(12) Indexation of Prices.—The Economic Charter recognises the duty of all States "to co-operate in achieving adjustments in the prices of exports of developing countries in relation to prices of their imports so as to promote just and equitable terms of trade for them, in a manner which is remunerative for produces and equitable for producers and consumers." [62] This provision is very important for the developing countries because one of the main reasons for the existing economic inequality is the wide gap between the prices of exports and imports of goods. According to the studies made by the U. N., export

58. Article 16, para 2.
59. A Vladmiroy, "On fair and Democratic Principles", New Times, Vol. 42 (October, 1976), p. 18 at p. 19.
60. Article 26.
61. A/C 2/SR, 1648, pp. 57-58.
62. Article 28.

of basic commodities of developing countries accounted for more than 75% of their total export in 1970. There has been no relation between the price of exports and those of imports while the prices of goods exported by developing countries have been constantly rising, the prices of goods imported by them have not risen significantly. For example, cost of cereals increased by 150 per cent and that of meat rose by 350 per cent. Similarly, the price of wheat doubled from July 1972 to July 1973, then again nearly doubled during the second half of 1973. The prices of fertilizers also doubled between June 1972 and September, 1973. The developed countries have made a great hue and cry over price hike in oil by Arab countries. But if one looks at the statistics and arguments of such countries, hike in prices of oil will not appear to be as un-reasonable as is made out.

It is in this context that the developing countries included the principle of indexation of prices in the Charter. But the response of the developed countries was most discouraging and they greeted these proposals "with howls of anguish." While some developed countries proposed the deletion[63] of Article some others considered that such a principle was not desirable or feasible.[64]

Common Responsibilities towards the International Community.—Chapter III deals with the common responsibilities of States towards international community in respect of sea-bed and ocean floor and Environment. Chapter III comprises of only two articles—Articles 29 and 30.

Final Provisions.—Chapter IV entitled "Final Provisions" comprises of four articles—Articles 31 to 34. Article 31 emphasizes the inter-dependence of developed and developing countries for balanced expansion of the world economy. Article 32 deals with the prohibition of coercion in relation among states. Article 33 deals with inter-relationship between the Charter of the U. N. and the Economic Charter. Finally Article 34 provided for the review of Economic Charter in the XXX session of the General Assembly and thereafter on the agenda of every fifth session.

Significance of the Declaration on the establishment of a New International Economic Order, Programme of Action and the Economic Charter.*—Since the resolutions and declarations of the General Assembly are said to be generally of the recommendatory nature, it is pertinent to consider the significance of the Declaration, Programme of Action and Economic Charter which aim to establish a new international economic order. Strictly speaking a General Assembly resolution is only of recommendatory character and does not create binding obligations. But a resolution of the Assembly unanimously adopted or a resolution adopted unanimously interpreting the U. N. Charter may create legal implications. Similarly, if on a subject numerous resolutions are adopted unanimously or by overwhelming majorities, then all these resolutions taken together may create legal implications provided, of course, it is to attain the purposes of the U. N. and is not expressly prohibited under the Charter.[65] A resolution unanimously adopted or passed by a overwhelming majority declaring customary rules of international law or enunciating new rules of international law may have legal implications. It is also generally recognised that the resolutions of the General Assembly help in the evolution of general international law. It is in this context that the documents relating to the establishment of a new international economic order have to be studied.

It has been rightly pointed out, "In a strict legal sense, therefore, the Charter is a declaration of the General Assembly and will have the force which such declarations have. But it is a declaration of special significance. The value of the declaration has to be assessed in the context of the fact that 120 States supported its adoption.....Of course it has to be remembered that amongst the States which have voted against or abstained are most of the most developed States of the world to whom many of the obligations under the Charter have been addressed, and many of the amendments, though

63. A/C 2/L, 1413.
64. A/C, 2/SR 1649 p. 19.
* See also for C.S.E. (1983) Q. No. 6.
65. J.A.C. Gutteridge, The U. N. in a Changing World (1969), p. 8.

defeated, came from the very same countries.[66] Further, "Let it be said that the Charter is not based on complete mutuality and has not enunciated the existing rules of international law on economic relations. It aims at removing the imbalances in world economy, at bridging the gap between the developed and developing countries, and has accordingly laid down norms which could achieve the purpose. Naturally, some involve progressive development on the subject." [67]

As pointed out by another author,[68] "It is the assertion of political power by the developing nations that makes the Declaration, Programme of Action and Charter so important. Quite clearly the documents are not perfect and have met severe criticism from the highly industrialized nations, *but they do present a comprehensive series of norm-creating statements on a new international law of co-operation in the sphere of economic rights and duties.*" Further, "The main criticism that can be levelled against the documents is that in some respects they appear to be based upon the first approach rather than the second. Nevertheless they will provide *primary evidence and guidance for all nations of international legal norms governing international economic relations. It is not an overstatement to say that a new era in the international law of economic co-operation has arrived.*[69] In the words of another eminent author,[70] "The Economic Charter represents the first systematic effort ever made to embody in a single and comprehensive document various economic rights and duties of States which have been explicitly or implicitly referred to in several multilateral treaties and resolutions of the United Nations and other related international organizations, and to build guidelines for future action in this field. It was never intended to be a complete instrument, but only a basic legal Code on economic principles.....Generally speaking, the General Assembly resolutions are only of a recommendatory nature. But *they may by general agreement reflect the developments of general international law.* The Economic Charter is something more than a mere programme of action such as the International Development strategy for the Second Development Decade or the one adopted at the Sixth Special Session of the General Assembly. Nor is it a convention or a treaty in a Technical sense. *It lies somewhere in beween a mere programme and a treaty.* The Economic Charter looks forward in the direction of laying the foundations for the evolution of a just and equitable economic law.[71]

Thus the Charter of Economic Rights and Duties of States and the resolutions of the General Assembly relating to the establishment of a new international economic order "represent the *radicalization of* intrnational relations and *constitute the normative bases of the new international law that has come into being.*[72] It is significant to note here that a number of rights and duties incorporated in the Economic Charter have been adopted unanimously. Many of the principles are such as have been explicitly or implicitly referred in a number of resolutions passed earlier by the General Assembly. Even in respect of the principles which have generated controversy between the developed and the developing countries, the controversy resolves not on the general principles but in respect of their implementation and specific obligation upon the developed countries. It would not be an overstatement to say that atleast in respect of the principles which have been adopted unanimously, the Economic Charter may be said to have created, to say the least, legal implication. Even if it is conceded that these documents have yet not established a new international economic order it cannot but be admitted that the Economic Charter has brought about a significant change in respect of the normative bases of international

66. S. K. Agarwala. "The Emerging International Economic Order, I.C.I.L., Vol. 17 (1977), p. 261 at p. 273.
67. Ibid, at p. 274.
68. Robin C. A. White, "A New International Economic Order", I.C.L.O., Vol. 24 (July 1975) p. 542, at p. 552; emphasis supplied.
69. Ibid; emphasis added.
70. P. Chandrasekhara Rao, "Charter of Economic Rights and Duties of States." I.J.I.L., Vol. 15 (1975), p. 351 at pp. 369-70, emphasis supplied.
71. Speaking on the significance of the Economic Charter, the Australian representative said "The Charter might have a significant effection on the development of international economic law; while it could not itself create law, it might influence the opinio juris and decisions by States on what their practice should be in the light of international law", A/C 2/SR 1650, p. 6.
72. Rahmatullah Khan, International law—Old and New," I.J.I.L., Vol. 15 (1975), p. 371 at p. 379.

economic relations among nations and will hasten the establishment of a new international economic order.

Eleventh Special Session of the General Assembly on new International Economic Order.—The eleventh Special Session of the General Assembly was held from 25th August to 15th September, 1980. The Assembly took note with satisfaction of the consensus reached on the text of the International Development Strategy for the Third United Nations Development Decade which was to come into effect and to be implemented from Ist January, 1981. During deliberations on the strategy, agreement was reached on a target level of 0.7 per cent of the gross national product of developed countries as official development assistance to developing countries. It was agreed that, that target should be achieved by 1985, but not later than the second half of the Decade, and that a target of 1 per cent should be reached as soon as possible thereafter. It was proposed that the first review and appraisal of progress made in implementation the strategy should be undertaken by the Assembly in 1984. However, the Special Session did not adopt the strategy. It was decided that the document would be considered by the thirty-fifth regular Assembly Session. Finally, the General Assembly on 5 December, 1980, proclaimed the Third United Nations Development Decade. It also approved the International Development Strategy emphasizing the most important objectives that should be pursued by Member States in implementing the goals of the Decade, starting 1 January, 1981. As regards action on New Economic Order, the General Assembly adopted a resolution (35/57) on the new International Economic Order and the Charter of Economic Rights and Duties by 134 to 1 votes with 12 abstentions.

Implications of the New International Economic Order.—The New International Economic order called by the U. N. General Assembly in 1947 would have following certain essential characteristics :

(1) It would support the development effort of poor countries in all areas by changing unfair and inadequate rules and regulation that now exist. Such changes would be particularly important in trade and monetary affairs where developing countries say that existing rules and regulations either actively discriminate against them or do so by not making allowance for their weakness.

(2) It would increase the share of developing countries in world industrial and agricultural production, including food, as well as in such areas as trade, transport and communications.

(3) It would change the patterns of trade, technology, flow, transport and communications from a primarily North-South orientation to one of more equal interchanges, one-sided dependence would be replaced by genuine interdependence.

(4) It would require States to behave according to an agreed Code in international economic relations. The norms of such behaviour have been set out in the Charter of Economic Rights and Duties of States, a seminal documents of the North South encounter. The aim of the charter is to ensure that small countries are not bullied out of their natural resources and that in decisions affecting them their views are considered.[73]

Conclusion.—The present structure of international economic relations does not accord with the key interests of most of the developing States. That is why the reconstruction of international economic intercourse on democratic lines and the establishment of a system of equal and mutually advantageous international economic co-operation is today among the problems in the focus of world attention. The existing system of international economic relations, in its character, may be said to be a transitional one.

In view of the wide gap between the views of the developed and the developing countries and even "confrontation" in respect of important matters, it has been pointed out that the respects for establishing a new international economic order do not appear to be

73. U. N. Chronicle, Vol. XIX No. 9 (1982) pp. 37-38.

particularly promising. In any case, it seems unlikely that a new world economic order will be brought about as a matter of conscious, well-planned and systematic global policy.[74] Although there are formidable difficulties in the establishment of a new International Economic Order, it would be wrong to say that nothing has so far been achieved in this connection. The Charter of Economic Rights and Duties of States and the Declaration and Programme of Action on the Establishment of a New International Economic Order are the important documents which have been adopted by the General Assembly as a result of this struggle. These documents constitute the normative bases of the new international law that has come into being."

The present existing system of international economic relations being only a transitional one in character, the documents cited and discussed above may be reckoned as the first important stage in the establishment of a new international economic order. A number of principles incorporated in these documents have been adopted unanimously and to that extent they create legal implications. It is also significant to note that the realization that the West's writ cannot run any more on the Third World has dawned upon the developed countries, and therefore, slowly but steadily the developed countries are trying to accommodate the interests of developing countries. For example, in the Geneva Conference sponsored by the UNCTAD, the developed countries on April, 1977, agreed to establish a "Common Fund" to maintain commodity price stabilization. It may, however, be added that the concept as proposed by the developing countries who wanted a common fund to finance buffer stocks of 10 commodities to keep prices of 10% above are below a target price, was greatly diluted because the industrialized nations made it clear that the "Common Fund" must not interfere with the working of world markets and should not have control over commodity arrangements, which should be entered into between producer and consumer nations independently of the Fund. London Summit of 7 industrialized held in May, 1977, confirmed and further advanced the concept "Common Fund." However, the talks between the developed and the developing countries were completely deadlocked at the Paris Summit held in June, 1977, and no significant advancement could be made.[75]

The Cancun Summit (23-24, October, 1981).—The proposal for such a summit was put forward by Brandt Commission in 1980. This summit assumed significance in the context of the rigid attitude adopted by Mr. Ronald Reagan towards the developing countries since he assumed the office of the United States of America. Mr. Reagan was not in favour of North-South dialogue and wanted his allies to do the same. The Cancun Summit which was attended by 22 States 8 developed and 14 developing including India, brought about a change in the attitude of the U. S. The only significant achievement of this summit was that the doors for North-South dialogues would not be closed and that they would be held in future also on economic matter.

UNCTAD VII.—The United Nations Conference on Trade and Development held its seventh session from 6th July to 31st September, 1987 in Geneva. In the Conference certain procedures were agreed which, it may be hoped, may ease developing countries' burden of debts. A consensus was arrived at that talks should continue on this matter and that there should be division of responsibilities. It is a great achievement of the conference that on 14 July, 1987, Soviet Union announced that in order to bring about stability in the prices of commodities, it has decided to become a member of the 'Commodities Fund'. After joining of Soviet Union, the Fund has now 45 members and 84% of 47 crores of investment has been reached. Thus only 2% more investment is required for entry into force of the Fund. It is rightly hoped that soon this requirement will also be fulfilled. UNCTAD VII gave emphasis mainly on the point that an environment may be created by multilateral corporation so that international trade may be developed and promoted.

Brady Plan.—The problem of the constant increase of debts of developing countries has assumed serious magnitude. According to an estimate of the World Bank,

74. India Quarterly, Vol. XXXII, No. 3 (1976) pp. 287-88.
75. See S. D. Muni, "The Paris Dialogue on International Economic Cooperation : The North's Strategy and the outcome" Foreign Affairs Reports, Vol. XXXV No. 10 (October 1977), p. 205 at pp. 210-11.

by the end of year 1988, total amount of the debts of the third world has reached 1.3 billion. This amount is 50 per cent of the national production of these countries. The U. S. Treasury Secretary, Mr. Nicholas Brady proposed a scheme to reduce the debts of most-debted countries. According to this scheme, the debt of 17 most debted nations would be reduced by 20% and the payment of their debts would also be reduced proportionately with a view to achieve this, there is a scheme for the contribution of 12 billion by the International Monetary Fund and the World Bank. But this scheme is subject to the increase in contribution quotas of members and also to make more funds available to Commercial Banks. While a controversy has started among the developed countries in this respect, this has not been completely welcomed by the developing countries.

Paris Summit Conference of 7 Developed Countries.—Seven developed countries—Britain, Italy, France, West-Germany, Canada, Japan and America held a summit conference in Paris on 16th July, 1989. In this conference they pledged to help the developing countries by opening and widenning the world trade system. It is to be seen how they fulfil their pledge and whether this renders help to developing countries in real terms.

Ninth Replenishment of I.D.A.—Talks for ninth replenishment of International Development Association (I.D.A.), an affiliate of the World Bank, began in February 1989. Both the Group of 24 developing countries and the development committee of the World Bank had in their mid-term meetings in April 1989, underlined the need for an early finalisation of the ninth I.D.A. replenishment to enable recipient countries to gain and maintain their development momentum and make progress in poverty alleviation. The Group of 24 had suggested that I.D.A. donor countries take into account the gains that had been made as a result of I.D.A-assisted operations which should be sustained and maintained. The World Bank's latest report acknowledges that despite impressive progress in such areas as food self-sufficiency, health and institutional capacity to manage disaster relief, the overall picture is not encouraging for over half of the developing countries' poor—nearly 500 million people—who are overwhelmingly concentrated in Asia.

UNCTAD-VIII.—The Eighth Session of UNCTAD took place in February 1992, at Caretegena. More than 40 least developed countries sought the cancellation of all bilateral official debts and urgent measures for reduction of Least Developed Countries (L.D.Cs.) debt stock and debt serving burdens including those due to multilateral financial institutions and commercial debts. Mr. P. Chidambram, Union Minister of Commerce who attended UNCTAD session on behalf of India, said of the five areas under negotiations, one area where UNCTAD might make a move was the convening of an international commodities conference.

The UNCTAD VIII was held at Cartagena de Indias, Colombia from 8th to 25th February, 1992. In its final document, approved by consensus, UNCTAD VIII stressed that, without economic progress, there could be neither peace nor security. The document included : a concise political declaration entitled, "The Spirit of Cartagena" ; a programme document—"A New Partnership For Development : The Cartagena Commitment"; a note on a proposed world commodity conference and a message to the U.N. Conference on Environment and Development (UNCED). The Conference, in its Cartagena Commitment, stated that the international community faced an unprecedented conjunction of challenges and opportunities, responses to which would shape the outcome of efforts to build a "healthy, secure and equitable world economy."

The Conference decided by consensus that UNCTAD Secretary-General should hold consultations on a world conference on commodities. Subject to a positive outcome of such consultations and the deliberations in the Standing Committee on Commodities, the Trade and Development Board—UNCTAD's executive body—should "decide on an invitation to the General Assembly of the U. N. to convene a world conference on commodities under UNCTAD auspices." [76]

---

76. U.N. Chronicle, Vol. XXIX No. 2 (June, 1992) pp. 67-69.

The co-operation and unity among the developing countries are, pre-conditions for any fruitful negotiations to change the existing world economic order and to usher in new international economic order.[77] Reference may be made here to South-South consultations of 44 developing countries which started in New Delhi on 22nd February, 1982. While inaugurating the Conference of 44 developing countries, Mrs. Indira Gandhi, the Prime Minister of India, said that the need of the hour was development of solidarity and collective self-reliance of developing countries to reduce their vulnerability to pressures from and events in affluent countries. She, however, hastened to add that the problems of the world economy demanded co-operation between the North and the South and South co-operation alone could not be an alternative to global negotiations. It may be noted here that it is rather unfortunate that the South-South consultation could not make any significant headway in the field of co-operation among the developing countries so as to reduce their vulnerability to pressures from the developed countries. As pointed out by Mr. Willy Brandt former West German Chanceller on June 1, 1984 during his visit to China, there has been virtually no improvement in the North-South in the past three years *i.e.*, since the Summit at Cancun, in the Autumn of 1981 and in almost every respect the position of the third world had deteriorated. On June 9, 1984, the economic summit of leaders of seven industrialized countries issued a communique agreeing to maintain and wherever possible to increase the flow of the resources, including official development assistance and aid through the international financial and development institutions, to the developing countries, particularly the poorer nations. This summit, which was held at London, was similar to the one held at Williamsburg (Virginia on 31st May, 1983). These conferences can be said to have given only lip-sympathy without offering any concrete proposals. The UNCTAD-VI which concluded on 3rd July, 1983 could not also make any headway. In the end, it may be noted that since the settlement of the complex question involved in the establishment of a new international economic order is inseparable from solution of the contemporary world's key political problems, sooner a just and equitable new international economic order is established the better. A new era in the international law of co-operation has begun and let us hope that new International Economic Order is in the offing.

World Trade Organisation

N.B. : This has been discussed in greater detail in a separate Chapter *i.e.* Chapter 40 in Part IV of the book.

---

77. See Tarlok Singh, "Economic Co-operation And Complementarity Among Less Developed Countries", I.Q. Vol. XXXIV (1978) p. 188; see also. T. K. Jayaraman, "Economic Co-operation Among Afro-Asian Countries", I. Q., Vol. XXXIII (1977), p. 198; J. D. Sethi. "The Third World Power Elite, Its Strategies of Political Integration and Economic Development," I.Q., Vol. XXXIII (1977) p. 216.