CHAPTER 27

DEVELOPMENT AND ENVIRONMENT

Development

Environmental consequences of industrialization and economic development and the pollution of air, water and soil, on which our life depends, is the high or dear cost which man has to pay for economic progress.[1] While in developed countries environmental problems are as a result of industrialization and technological development, in poor countries these problems are due to less development. Since the developed countries are facing environment crisis, they argue that the developing countries will also have to face the same crisis if they make the same development. On the other hand, poor countries feel that the greatest source of pollution is poverty.[2] While speaking before U. N. Conference on Human Environment at Stockhom, late Prime Minister Mrs. Indira Gandhi had said that for the developed countries development might be the cause of destruction of environment, for a country like India it was the primary means for improving the standard of living, to make available food products, water, cleanliness, shelter, to bring about greenery in deserts and to make hills and mountains worth living.

Development and Environment are invariably related to each other. Even the developing countries cannot afford to ignore the environmental consequences of the process of development.[3] Hence an essential and grave problem is to maintain harmony between development and environment. The future of the developing countries greatly depends on better international understanding of the right of development because this right depends on several other human rights.[4] Article 55 of the U. N. Charter describes economic development and respect for human rights as the twin foundations of friendly and peaceful relations among nations. Economic development and human rights are thus intimately connected with each other. Development is linked with human rights through the clear acceptance of social and economic rights as well as established human rights. Thus human rights and economic development are clearly complementary to each other.[5]

There is great confusion over the right to development. This confusion is in respect of its origins, formulations, ambit, existence and nature. Although this controversy is mainly among international jurists, its implications run deep for the future of U. N. system as well as mankind.[6] It may, however be noted that right to development is crystallizing as a rule of international law. Reference may be made in this connection to the *'Declaration on the Right to Development"* adopted by the General Assembly on 4th December, 1986.[7] The Declaration provides that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[8] States have the primary responsibility for the creation of national and international policies with a view to facilitating the full realization of the right to development.[9] States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating

1. See R. P. Anand." Development and Environment : the case of Developing Country", I.J.I.L. Vol. 20 (1980) p. 1.
2. Ibid at p. 9.
3. Ibid, at p. 13.
4. C. G. Weeramantry, "The Right to Development", I.J.I.L., Vol. 25.
5. See M.G. Kaladharan Nayar, "Human Rights and Economic Development : The Legal Foundations", Universal Human Rights, Vol. 2 (1980) p. 55.
6. Upendra Baxi, "The New International Economic Order, Basic Needs and Rights Notes Towards Development of the Right to Development", I.J.I.L., Vol. 23 (1983) p. 225 at p. 226.
7. See resolution 41/128 dated 4th December, 1986 of the General Assembly.
8. Article 1 of the Declaration.
9. Article 3.

the full realization of the right to development.[10] Finally, steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.[11]

There is close relationship between development and conservation of environment. This relationship was acknowledged in 1972 Stockholm Conference on Human Environment. In 1979, the General Assembly, with a view to formulate the right of development had stated in a resolution (G. A. Res. 34/46) that right to development is a human right that nations have the same right of equality of opportunity and as people have within the nation.

In August-September 1980 in the General Assembly in its International Development Strategy for the decade 1981-1990 had said that in the developing countries rapid development will enhance their capacity for improving the environment. Environmental implications of mutual relations of poverty and less development and populations and resources should be kept in mind. It is essential to ensure that the process of economic development be such that it must be environmentally sustainable for a long time. Efforts should be made to prevent deforestation, soil erosion, degration of land and spread of deserts.

As pointed out by Starke, "The international law of development has yet not reached the stage where it can be set down as a substantial body of binding rules, conferring specific rights upon developing states and imposing duties on developed countries. For the most, it is best described as institutional law, that is to say the law of various bodies and agencies through which development is promoted and development aid is channelled.[12] But this cannot be denied that the 'right to development' is constantly developing.

With a review to find the satisfactory solution of the problem, it is necessary to enlist the cooperation of all countries—Communist and Capitalist, rich and poor, satisfied and dissatisfied—otherwise the survival of the whole mankind will be in danger. As pointed out by Commission on International Development (Pearson Commission), which was established by the President of the World Bank Group, in its 1969 report : Who can now say where his country will be after a few decades without asking where the world will be. If we want a safe and prosperous world, we will have to take into account common problems of people. Pearson Commission listed ten objectives in its report which can be regarded to be the standards of development. The ten objectives are as follows :—

"1. The creation of a framework for free and equitable trade involving the abolition by developed countries of import duties and excessive taxes on those primary commodities which they themselves do not produce.
2. The promotion of private foreign investment with offsetting of special risks for investors.
3. Increases in aid, should be directed at helping the developing countries to reach a path of self-sustained growth.
4. The volume of aid should be increased to a target of 1% of the gross national product of the donor countries.
5. Debt relief should be a legitimate form of aid.
6. Procedural obstacles should be identified and removed.
7. The institutional basis of technical assistance should be strengthened.
8. Control of the growth of population.
9. Greater resources should be devoted to education and research.
10. Development aid should be increasingly multilateralised. Such multilateralisation would contribute to a uniform development of the principles governing the grant and receipt of aid." [13]

10. Article 4.
11. Article 10.
12. J. G. Starke, Introduction to International Law, Tenth Edition (Butterworths. Singapore, 1989) p. 397.
13. Ibid. pp. 398-399.

On 24 October, 1970, the General Assembly adopted policy document relating to international Development Strategy and included in it the above-mentioned ten objectives. The said policy document was adopted for the Second Development Decade (1971-1980). It was also stated that by 1972 the developed countries should give 1% of national production as aid to developing countries. It may be noted that this target could not be reached. In August- September 1980, the third Development Decade was announced. In March, 1988, the United Nations Environment Programme (UNEP) adopted Environmental Strategy for 1990-1995. It was decided that in future the United Nations will focus on helping countries to achieve sustainable development, reduce the impact of environmental degradation and pollute and rehabilitate ecosystems already degraded or polluted. It may be noted here that the trend was quite manifest that climatic change—the ominous "greenhouse effect—the Ozone layer," tropical deforestation and toxic wastes will continue to large on U.N.E.F.'s agenda. Further, the concept of sustainable development that does not hurt the environment—runs throughout the whole programme. It was the dominant theme of two ground—breaking documents · 'the Environmental Perspectives to the year 2000 and beyond, which reflected the Government's thinking adopted by the General Assembly in 1987, and our Common Future', the report of the high level, non-governmental world commission on Environment and Development, a major input to the Perspective.

Sustainable development is now the basis for the United Nations environmental philosophy and is already giving a sharper edge to global environmental action.[14]

It may be noted here that the present law relating to right to development is institutional. The institutions such as United Nations Conference on Trade and Development (UNCTAD), United Nations Development Programme (UNDP), United Nations Industrial Development Organisation (UNIDO), Organisation of Economic Co-operation and Development Organisation (OECD), European Economic Community etc., are making significant contribution in this respect.

On 22nd December, 1990 the General Assembly of the United Nations announced the Fourth Development Decade (1991-2000) and suggested for vast national and international means for rapid development of developing countries (especially least developed countries). The General Assembly acknowledged that the Third Development Decade failed to achieve most of the objectives. The General Assembly asked the developed countries to invest the money released from disarmament in official aid. Laying stress on industrial development the General Assembly recommended that the rate of development of industrialisation be increased from 8 to 10%.

The advantages of development can be enjoyed in true sense only when it does not cause adverse impact on environment. Unfortunately in the very first year (*i.e.*, 1991) Fourth Development Decade, Gulf War (1991) aggravated the gravity of the problems of environment. The States responsible for causing adverse impact on environment should be compelled to make reparation and the funds thus received should be invested for improving the environment. Last but not the least, the concept of sustainable development should be emphasized and should form the basis in all programmes of U. N. system and all agencies and institutions connected with development and environment.

Population explosion increased urbanisation and unprecedented expansion of science and technology may be said to be the basic causes responsible for the deterioration of the environment. Over much of the world, environmental problems are still those associated with proverty, such as poor housing, bad public health, malnutrition and inadequate employment. Such problems can only be solved through development which is environmentally wise and based upon through evaluation of the potential uses of the different regions of the earth.[15] International collaboration, on a scale not seen in the history of the world, is essential if mankind is to meet basic human needs while

14. See "Action To save our Environment", U. N. Chronicle, Vol. XXV, No. 2 (June, 1988) p. 43.
15. U. N. Monthly Chronicle, Vol. XIII, No. 3 (March 1976), p. 44; See also Mapzi Sinjela, "Developing Countries Perceptions of Environmental Protection and Economic Development", I.J.I.L., Vol. 24 (1984) p. 489 at pp. 499-502

safeguarding the environment for future generations. The greatest challenge is to design development so that it satisfies basic needs beginning with the eradication of poverty. The world is not environmentally uniform. Nations differ in their environmental resources. No single solution will work every where. The environmental inequalities in the world are paralleled by economic ones which are major obstacles to satisfaction of basic human needs, especially in developing countries, and a barrier to the harmonious development of mankind.[16] The economic development now enjoyed by the developed countries was sometimes achieved without due regard to the preservation of human environment.[17]

Technological progress has brought enormous numbers of chemicals into everyday life. Five million substances have been identified; about 70,000 of these are marketed, about half of them in quantity. They have brought immense benefit to the society—increased food production, improved health care, eradicated deadly diseases, and bestowed longer life expectancy and a better standard of living. But they have also brought new dangers, largely through the wastes generated in their manufacture. Tens of million of tons of toxic and otherwise hazardous substances enter the environment every year as unwanted wastes. Managing and disposing of these hazardous wastes properly faces mankind with significant problem.[18] It may also be noted that food production can only be sustained if the environment is preserved; conservation is a precondition of long term food-security. But threats to the environment in developing countries are very serious and they are mounting. Genetic resources which should be preserved as sources of future diversity and improvement are shrinking because of pollution, deforestation, and the neglect of traditional species of crops and livestock.[19]

A new expert report has warned that current patterns of energy production and use will not lead to a "sustainable world." This expert report was considered by the Committee on the Development and Utilization of New and Renewable Sources of Energy at its sixth session held at Newyork from 3rd to 14th February, 1992. The report said that our current energy production and use accounts for "at least as many global or regional manmade environmental problems as all other human activities combined." According to the experts, the health of the planet demands a renewed search for energy alternatives. The flow of energy to the Earth's land surface is thousands of times greater than mankind's present rate of total energy use." Yet these sources at present contribute only 14 to 20 per cent of the total world energy supply.

The Committee on the Development and utilization of New and Renewable Sources of Energy has been renamed by the General Assembly as the Committee on New and Renewable Sources of Energy and on Energy and Development. In addition to its current responsibilities, the renamed Committee will assume the energy portion of the mandate of the Committee on Natural Resources.[20]

Relevance of General International Law to Environment.—As rightly remarked by an author,[21] "the general principles and prescriptions of International law are not without applicability to problems of transnational pollution or environment degradation. Thus a fundamental principle of international law limits action by one State which would cause injury in the territory of another State.[22]....."there has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interest of other States....."[23] The principle is in turn a reflection of the fundamental doctrine, *Sic utere tuo ut olienum non leades*—'one must use his own rights so as not do injury to another.' This concept underlines the range of State-to-State relations just as it

16. Ibid.
17. Mapzi Sinjela, note 15 at p. 489.
18. U. N. Chronicle, Vol. XX, No. 5 of (1983) p. 33.
19. U. N. Chronicle, Vol. XX, No. 1 of (1983) p. 74.
20. U. N. Chronicle, Vol. XXIX, No. 2 (June 1992) p. 71.
21. Cecil, J. Olmstead, "Prospects for Regulation of Environmental Conservation under International Law" in The Present State of International Law and other Essay's, (1973), p. 245 at p. 246.
22. Corfu Channel Case, (1949) I.C.J. Rep. 4; see statement at p. 22 to the effect that every State is obliged "not to allow knowingly its territory to be used for acts contrary to the rights of other States."
23. Survey of International Law, 34 U. N. Doc. A/CN. 4/1 Rev. 1 (1949).

does in personal relations." This principle has also been recognised by Arbitration Tribunals.[24] It is not suggested that general principles of international law provide the degree of specificity that will be required for a framework of international concern for global environmental conservation. These general principles of international law, however, do indicate the duty of State not to engage in or permit conduct within its territory which would result in environmental injury outside its territory.[25] Further, "It seems apparent from the facts of the environmental state among different countries and from the complex and sensitive economic political consideration involved that international co-operation and agreement will be necessary to initiate prompt measures to improve our global environment. The case-by-case development of international law to cope with a myriad of problems would not provide the urgent action needed even if authoritative tribunals were available to claimants." [26]

Reference may be made here to *Trail Smelter Arbitral Award.*[27] This case related to the damage caused to the State of Washington by fumes of Sulphur Dioxide emitted from Trail Smelter on the Canadian territory. It was held by the Tribunal that Canada was responsible in international law for the conduct of Trail Smelter. It was further held by the Tribunal that, apart from the undertakings in the treaty between the two states, the Government of the Dominion of Canada was under duty to ensure that its conduct should be in conformity with the obligations under international law. The Tribunal held : "Under international law, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another state or the properties or persons therein, when the case is of some serious consequence and the injury is established by clear and convincing evidence." [28]

International Co-operation for and Regulation of Environmental Conservation.—Until the 1972 United Nations Conference on the Human Environment held in Stockholm, the subject of environmental conservation had been dealt with by international Conventions in only a fragmentary manner. For example Article IX of the Treaty of 1967 of the Principles Governing the Activities of State in the Exploration and use of Outer Space including the Moon and Celestial Bodies provided, "State parties to the Treaty shall pursue studies of outer space including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse change in the environment of the earth resulting from the introduction of extraterrestrial matter and where necessary shall adopt appropriate measures for this purpose."Article I of the Convention on the Prevention of Marine Pollution By Dumping of Wastes and other Matter, 1972 obliges the contracting parties individually and collectively to promote the effective control of all sources of pollution of the marine environment and to take all practicable steps to prevent the pollution of the sea by the dumping of waste and other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea. Other Treaties and Conventions which deserve mention in this connection are : The Nuclear Weapons Tests Ban Treaty of 1963 ; the Treaty for the prohibition of Nuclear Weapons in Latin America ; Treaty on the Non-Proliferation of Nuclear Weapons 1968; Treaty on the Prohibition of the Emplacement of Nuclear Weapons on the Seabed and Ocean Floor and Subsoil Thereof, 1971; the two Brussels Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties and on Civil Liability for Oil Pollution Damage, 1969.[29] The Convention on Wetlands of International importance especially as waterfowl Habitat, 1971; The Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972 etc. Reference may also be made to the General Assembly Declaration of

24. See The Lake Lanoux Arbitration between France and Spain, 24 Int. L. Rep. : 101 (1957) and Trail Smelter Arbitration between the U. S. and Canada decided on March 11, 1941, 3 U. N. Rep. Int. Arb, Awards 1905 (1945), A.J.I.L., Vol. 35 (1941) p. 648.
25. Olmstead, note 6, at p. 247.
26. Ibid, at p. 248.
27. *U. S.* v. *Canada,* Vol. 35 A.J.I.L. (1941), p. 684.
28. Ibid at p. 716.
29. Gen. Ass. Resolution 2749 (XXV).

December 17, 1970 of Principles Governing the Seabed and the Ocean Floor and the Subsoil thereof beyond the limits of National Jurisdiction. Principle eleventh of the said Declaration provides for the (a) Prevention of Pollution and contamination and other hazards to the marine environment including the coastal line and of interference with the ecological balance of marine environment, and (b) Protection and Conservation of the natural resources of the area and prevention of danger to the flora and fauna of the marine environment. It was a significant development because 'our oceans and sea-vital links in earth's life giving cycles may indeed soon see the day of their 'death'.....If the occeans and seas die all humanity perishes with them." [30] Further, "Marine pollution is a global problem in several senses. It affects the health of the ocean in all parts of the world; it affects all countries, both developed and developing; and all countries contribute to some aspects of the problem." [31]

Stockholm Conference of 1972 on the Human Environment.—The U.N. Conference on the Human Environment held at Stockholm from June 5 to June 16, 1972[32] may rightly be reckoned as the first major attempt to solve the global problems of Conservation and regulation of human environment by international agreement on a Universal level. It mobilized and concentrated the attention of the international co-operation for environmental conservation.[33] The main contributions of the Stockholm Conference of 1972 on the Human Environment comprise of : (i) The Declaration on the Human Environment; (ii) the Action Plan for the Human Environment; (iii) the Resolution on Institutional and Financial Arrangements; (iv) Resolution on Designation of a World Environment Day; (v) Resolution on Nuclear Weapons Tests; (vi) Resolution on the Convening of a second Conference; and (vii) Decision to refer to Governments recommendation for action at the national level. A brief discussion of each of these is being given below :

(i) The Declaration on the Human Environment.—Contained in section 1 of the Report of the United Nations Conference on the Human Environment the Declaration on the Human Environment is one of the most significant achievements of the U. N. Conference on the Human Environment 1972. Starke has compared it with the Universal Declaration of Human Rights, 1948 and says that "it was essentially a manifesto, expressed in the form of an ethical Code intended to govern and influence future action and programmes, both at the national and international levels."[34] The Declaration is divided in two parts—first part proclaims seven truths about man in relation to his environment and part two enunciates 26 principles. The first part contains general observations such as that man is both creature and moulder of his environment which gives him physical sustenance and affords him the opportunity for intellectual moral, social and spiritual growth; the protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world it is the urgent desire of the peoples of the whole world and the duty of all governments in the developing countries most of the environmental problems are caused by under-development; the natural growth of population continuously presents problems on the preservation of the environment and adequate policies and measures as appropriate, to face these problems ; and a point has been reached in history when we must shape our actions throughout the world with a more prudent case for their environmental consequences.

Part II of the Declaration contains principles. Principle 1 which is of general nature states that man has the fundamental right to freedom, equality and adequate conditions of life, in environment of a quality that permits a life of dignity and well being, and he bears a

30. "Act Now on Pollution Don't Just Talk", The Plain Truth (a monthly Magazine), February, 1970, p. 3 at p. 9.
31. Oscar Schachter and Daniel Server, "Marine Pollution Problems and Remedies." 65 A.J.I.L. 84 (1971); see also "Marine Pollution Potential for Catastrophe", U. N. Monthly Chronicle, Vol. VIII No. 3 (March 1971) p. 28.
32. See U. N. Doc. A/CONF./48/14 and Corr. 1.
33. Olmstead, note 14, at p. 253.
34. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 406.

solemn responsibility to protect and improve the environment for present and future generations. Principle 2 states that the natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the present and future generations through careful planning or management, as appropriate. According to principle 7, States shall take all possible steps to prevent pollution of the seas by substances are liable to create hazards to human health, to harm living resources and marine life to damage amenities or to interfere with other legitimate uses of the sea. Principle 8 recognises that economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life. Principles 21 and 22 are particularly important for they proclaim certain principles of international law respecting environmental preservation. Principle 21 provides : "States have, in accordance with the Charter of the United Nations and the principles of international law the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." According to Principle 22, "States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction." These two principles represent "the most significant consensus that has been reached in the field of international co-operation among States respecting environmental preservation"...[35] Further, "These principles reflecting the fundamental international responsibility of States regarding enviromental preservation and pollution control were accepted by the 27th General Assembly in a Resolution [G. A. Res. 2996 (XXVII)] which declared that no resolution adopted at that session could affect those principles." [36] Last but not the least, Principle 26 states that man and his environment must be spared of the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement in the relevant international organs, on the elimination and complete destruction of such weapons.

(II) The Action Plan for the Human Environment.—The Action Plan for the Human Environment is divided into three parts—(A) Framework for environmental action; (B) Recommendations for action at the international level; and (C) The Action Plan. The broad types of action that make up the plan are—(a) the global environmental assessment programme (Earthwatch) ; (b) Environmental management activities; and (c) International measure to support the national and international actions of assessment and management. The functions of Environmental Assessment (Earthwatch) include evaluation and review—to provide the basis for identification of the knowledge needed and to determine the necessary steps to be taken; research—to create new knowledge of the kinds specifically needed to provide guidance in the making of decisions; monitoring—to gather certain data on specific environmental variables and evaluate such data in order to determine and predict important environmental conditions and trends; and Information exchange—to disseminate knowledge within the scientific and technological communities and to ensure that decision-makers at all levels shall have the benefit of the best knowledge that can be made available in the forms and at the times in which it can be useful. Environmental management covers functions designed to facilitate comprehensive planning that takes into account the side effects of man's activities and thereby to protect and enhance the human environment for present and future generations. Lastly, International measures to support the national and international actions of assessment and management relate to measures required for the activities in the other two categories (*i.e.*, environmental assessment and environmental management) and include Education, training and public information, Organizational arrangements and Financial and other forms of assistance.

35. Olmstead : note 21 at p. 252.
36. Ibid., at p. 253.

(iii) The Resolution on Institutional and Financial Arrangements.—The Resolution on Institutional and Financial Arrangements recommended the establishment of following institutions and financial arrangement :—

(a) Governing Council For Environmental Programmes (UNEP).—The Resolution recommended that "the General Assembly establish the Governing Council for Environmental Programmes composed of 54 members, elected for three-year terms on the basis of equitable geographical distribution." Resolution 2997 (XXVII) adopted by the General Assembly on December 15, 1972 relating to Institutional and Financial Arrangements for International Environmental Co-operation established a 58 members (instead of 54 as recommended by the Conferene) Governing Council for Environmental Programme and directed it to "keep" under review the world environmental situation in order to ensure that emerging environmental problems of wide international significance receive appropriate and adequate consideration by Governments". To assist the Council in the task, the Executive Director prepares each year a report on the state of the environment.

(b) Environment Secretariat.—The Resolution recommended the establishment of a small Secretariat in the United Nations to serve as a focal point for environmental action and co-ordination within the United Nations System in such a way as to ensure a high degree of effective management.

(c) The Environment Fund.—In order to provide for additional financing for environmental programmes, the resolution recommended that a voluntary fund be established in acordance with existing United Nations financial procedures.

(d) An Environmental Co-ordination Board.—In order to provide for the maximum efficient co-ordinations of United Nations environmental programmes, Resolution recommended the establishment of an Environmental Co-ordinating Board, chaired by the Executive Director under the auspices and within the framework of the Administrative Committee on Co-ordination.

(iv) Resolution on Designation of World Environment Day.—The Resolution on World Environment Day recommended that June 5 be observed as World Environment Day. Subsequently this recommendation was adopted by the General Assembly through a resolution.

(v) Resolution on Nuclear Weapon Tests.—The Resolution on Nuclear Tests condemned nuclear tests, particularly those carried out in the atmosphere and called upon States to refrain from conducting such tests as could contaminate the environment. Principle 26 of the Declaration on the Human Environment, which has been referred earlier, also deserves mention in this connection.

(vi) Resolution on the convening of a Second Conference on Environment.—The Resolution recommended that the General Assembly should take initiative and decide to convene a second United Nations Conference on the Human Environment at the appropriate time.

(vii) Decision to refer to Governments recommendations for action at the national level.—The Stockholm Conference also decided to refer to State Governments recommendations for action at the national level.

In addition to the above-mentioned results of the Stockholm Conference, reference may also be made to the recommendation of the Conference that a Conference be convened in the end of 1972 by the United Kingdom for the adoption of the draft articles of a convention on Ocean Dumping.

Work of UNEP and other Developments in the field of Environment.—Some of the above-mentioned decisions and recommendations of the Stockholm Conference, 1972 were implemented by resolutions of General Assembly in its 27th Sessions in 1972. In this connection, resolution 2997 (xxvii), which has been briefly referred earlier, deserves a special mention. Through this resolution a 58-member Governing Council for the Environmental Programme (UNEP) was set up. The Governing

Council held its first Session in Geneva in June 1973. As pointed out by Mr. Maurice Strong, Executive Director of the UNEP, in his address to the UNEP Governing Council which met in Nairobi (Kenya) from 17 April to 2 May, 1975 for its third Session, the concept of UNEP as leader, catalyst stimulator and co-ordinator in effect the hub of the environmental action centres had begun to become a reality.[37] He said that most of the activities which affect the environment are carried out for purposes and by organizations for which environment is not the principal concern. UNEP's task is thus to help assure that environmental factors are given adequate attention in taking decisions concerning such activities and to improve the quality of the decisions by which the environment is affected.[38] The Council reached broad agreement on and over all strategy in environmental policy to put the principles and recommendations endorsed by the Stockholm Conference on the Human Environment and General Assembly into action. It allocated $5 million to the budget of *Habitat* ; the United Nations Conference on Human Settlements; urged the Conference on the Law of the Sea to incorporate in draft treaties effective provisions for the protection of the marine; and provided $500,000 to support the programmes and preparations for the United Nations Conference on Desertification (1977).[39]

The year 1975 proved to be significant from the point of environment for as a result of ratifications by a number of States, seven important global conventions came into force in 1975. They are : (1) The Convention on International Trade in Endangered species of wild Fauna and Flora, 1973; (2) The Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971; (3) The Convention concerning the protection of the Wold Cultural and Natural Heritage, 1972; (4) The International convention relating to Intervention on the High Seas in cases of Oil Pollution Casualities, 1969; (5) The International convention on Civil Liability for Oil Pollution Damage, 1969; (6) The convention for the Prevention of Marine Pollution by Dumping from Ships and Aircrafts, 1973; and (7) The convention for the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 1972.

In his report to the fourth session (from 30 March to 14 April, 1976) of the Governing Council of UNEP, the Executive Director, Mostafa K. Tolba pointed out that international collaboration, on a scale seen in the history of the world is essential if mankind is to meet basic human needs while safeguarding the environment for future generations. The ratification of above-noted important global conventions on matters relating to the environment is an encouraging sign in that respect.[40]

One of the greatest contribution of the Governing Council of U. N. E. P. was the holding of *Habitat Conference in 1976.* Its over-all theme was the formation and maintenance of human settlements. The Conference declared that "Nations must avoid the pollution of the biosphere and the oceans and should join in the effort to end irrational exploitation of all environment resources, wheher non-renewable or renewable in the long term." [41] In 1977, a series of meetings on environmental questions were held in the Caribbean, Tunis and Nairobi under the auspices of the UNEP. A great landmark in the field of environment was the *United Nations Conference on Desertification held in Nairobi, Kenya* from 29th August to 9th September, 1977. The Conference adopted a Plan of Action containing 26 recommendations for action at the national, regional and international levels. The Conference recommended that UNEP, with its Governing Council and the Environment Co-ordination Board, should be responsible for following up and co-ordinating implementation of the Plan and that the U. N. regional commissions would have responsibility for co-ordinating, catalysing and executing intra-regional programmes adopted by Member States.[42]

37. U. N. Monthly Chronicle, Vol. XII, No. 5 (May 1975), p. 34.
38. Ibid, at p. 19.
39. U. N. Monthly Chronicle, Vol. XII, No. 5 (June 1975), p. 27.
40. U. N. Monthly Chronicle, Vol. XIII, No. 3 (March 1976), p. 44.
41. U. N. Monthly Chronicle, Vol. XIII, No. 7 (July 1976), p. 52.
42. U. N. Monthly Chronicle, Vol. XIV, No. 9 (October 1977), p. 36.

Habitat II

Preparations for the U. N. Conference on Human Settlements (Habitat II) were launched at the organisational session of its Preparatory Committee held from 3rd to 5th March, 1993 at Newyork. The major objective of Habitat II is to address issues in the context of sustainable development. The Conference is expected to formulate a global plan of action to improve people's living environment for the first two decades of the next century, building on the legacy of the first Habitat Conference held in Vancouver, Canada, in 1976.[43]

Nairobi Declaration (1982).—The tenth anniversary of the U.N. Conference on the Human Environment, held in Stockholm in 1972 was celebrated in Nairobi from 10th to 18th May, 1982 by the world community of States. A Declaration called Nairobi Declaration was adopted. It requested Governments and peoples to build on the progress so far achieved, but expressed serious concern about the present state of environment world-wide, and recognized the urgent necessity of intensifying the efforts at the global, regional and national levels to protect and improve it. According to the Declaration, the principles of the Stockholm Declaration are as valid today as they were in 1972. They provide a basic code of environmental conduct for the years to come. The world community of States solemnly reaffirmed its commitment of the Stockholm Declaration and Action Plan, as well as further strengthening and expansion of national efforts and international co-operation in the field of environmental protection. It urged all Governments and peoples of the world to discharge their historical responsibility collectively and individually, to ensure that our small planet is passed over to future generations in a condition which guarantees a life in human dignity for all.

At its Helsinke meeting (25th April to 6th May, 1983), the Commission on Human Settlements called for the immediate launching by all Governments of activities related to the International year of shelter for the Homeless (1987). It also called for increased efforts to ensure that adequate land is made available to the poor and disadvantaged in developing countries to enable them to build and improve their own shelter and neighbourhoods.

Environment and Charter of Economic Rights and Duties, 1974

N.B.—For this please see matter discussed under the heading 'Environment' in chapter on ".....New International Economic Order".

Environment and the U.N. Convention on the Law of the Sea, 1982.—Part XII of the U.N. Convention on the Law of the Sea, 1982 deals with the protection and preservation of marine environment. Part XII begins with the general obligation of States to protect and preserve the marine environment.[44] It deals with measures to prevent, reduce and control pollution of the marine environment[45] and recognises the duty not to transfer damage or hazards or transform one type of pollution into another.[46] It also deals with environmental problems such as pollution from land-based sources,[47] pollution from sea-bed activities,[48] pollution from activities in the International Sea-bed Area,[49] dumping[50] pollution from vessel[51] and pollution from or through the atmosphere.[52]

So far U.N. Convention on the Law of the Sea, 1982 has been signed by 159 States and 72 States have ratified or acceded to it.

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43. U. N. Chronicl.e Vol. XXX, No. 2 (June 1993), p. 65.
44. Ibid, Article 192.
45. Ibid, Article 194.
46. Ibid, Article 195.
47. Ibid, Article 207.
48. Ibid, Article 208.
49. Ibid, Article 209.
50. Ibid, Article 210.
51. Ibid, Article 211.
52. Ibid, Article 212.

The System—Wide Medium Term Environmental Programme.—A brief reference may be made here to the System Wide Medium Term Environmental Programme (SWMTEP) which was evolved in 1982 and though developed by the Executive Director of the UNEP now represents the environment programme of the United Nations System. Following the pattern of UNEP its programme for the medium term 1984-89 is divided into fifteen items—Environment and Development; Environmental awareness; Atmosphere, Oceans; Waters; Lithosphere; Natural Disasters; Terrestrial Ecosystems; Living Resources; Health and Welfare; Working Environment, Human Settlements; Energy; Industry and Transportation; and Arms Race and Environment. Each of these 15 programmes divided into two or more sub-programmes brings the total to 38 programmes.

Environmental Perspective to the year 2000 and Beyond.—The General Assembly has established a special commission to propose long-term environmental strategies for achieving sustainable development to the year 2000 and beyond.

1994 World Conference on Natural Disaster Reduction[53]

Nuclear Safety and Environment

Nuclear explosions, accidents etc. adversely affect the environment. It is unfortunate that before accident at Chernobyl Nuclear Plant on 26th April, 1986 sufficient attention was not given to this inadequacy of international law. As a result of the recommendations of the First Review Conference of Non-Proliferation Treaty, 1968, a Convention on the Physical Protection of Nuclear Material was adopted in 1979. Under this Convention, it is the obligation of Parties to the Convention to take action to check theft, sabotage etc. of nuclear material. But the Chernobyl accident proved that there is need to consider this matter seriously.

Accident at Chernobyl Nuclear Plant, 50 Km. away from Kiev, the capital of Ukraine, on 26th April, 1986 caused a wave of shock and fear throughout the world. Due to fire in the Chernobyl Nuclear Plant radio-active dust spread more than 1,600 Km. Several countries including Poland, Sweden, Norway, Denmark and Finland were adversely affected by the said spread of radio-active dust. Much greater area could have been adversely affected if the direction of the winds had not suddenly turned towards the Soviet Union. On 29th April, 1986, Soviet Union announced the happening of the accident at Chernobyl Nuclear Plant and asked several countries such as West Germany and Sweden to render help to extinguish the fire at the Nuclear Plant.

According to Russia, 7 persons were killed and 299 persons were admitted to hospitals for radio activity. But according to the Scientists of Western countries, the number of persons dying in the accident was in thousands. According to an American Defence Official, a study of the informations received from U.S. Spy Satellite, 2000 persons died as a result of the fire in Nuclear Plant at Chernobyl.

The accident at Chernobyl Nuclear Plant was due to human and technical errors. It has been admitted by the Soviet Union that the accident was caused due to "a whole series of gross violations of operating regulations by workers." Whatever be the causes of the accident its adverse effects have been grave and wide spread. India was also affected, though slightly, by the Chernobyl disaster. A radio-active plume originating from Chernobyl in Russia hit India on May 14, 1986 and its impact was recorded at the atomic power stations at Tarapur (near Bombay), Rawatlata (Rajasthan) and Kalpakkam (Madras) until May 26, 1986. According to a source at the Bhabha Atomic Research Centre in Bombay, Tarapur, recorded at the highest level of 7,700 and 7,160 milli becqueral per gramme on May 21 and 22, 1986. The permitted value is 3000 mbq. per gramme. However, it was pointed out that the impact of this radio active plume in India was very small and there was no need to worry about it.

According to Dr. John Gofman, a Professor emeritus of medical physics at the University of California at Berkeley, more than one million people throughout the world could develop cancer due to exposure to the radioactive fall out from the Soviet Union's

53. This has been discussed later on in this chapter after the discussion of "Earth Summit".

Chernobyl Nuclear accident and half that number would die from it. On account of Chernobyl accident, 9,50,000 persons were removed from the affected areas. But 15 lakhs including 4,60,000 children remained in the affected areas. Even after five years of the accident, problems created by the accident have not been satisfactorily solved. This information was given by the Health Minister of Ukraine on 11th April, 1991. On 2nd April, 1992, the Ukrainian authorities have finally decided to shut down the Chernobyl Nuclear Power Plant.

In his report to the 41st session of the U.N. General Assembly, Secretary-General. Mr. Javier Perez de Cuellar has suggested the setting up a "Nuclear Alert Centre' to reduce the risk of an accidental nuclear war and to lessen the 'chilling' possibility of isolated launchings by those who may clandestinely gain access to nuclear devices. It has been rightly pointed out, "The Chernobyl syndrome has rammed the lesson home that no country can remain safe if the nuclear genie manages to escape..... the moral. It is one world or none. The split atom and a sharply divided world cannot co-exist." [54]

It is well established rule of international law that a sovereign State may do anything within its territory provided that its adverse effects do not fall upon another sovereign State.[55] International Law does not permit any sovereign to conduct any activity or to do anything within its territory or elsewhere which may adversely affect other States. In this connection, Nuclear Test case[56] deserves a special mention. In this case, the International Court of Justice directed France not to conduct its planned nuclear tests as the radio-active dust eminating from them caused health hazards to the people of Australia and New Zealand. If, however, the activities conducted by a State within its territory do not adversely affect other States, it will not constitute any violation of international law.[57] For example, when India conducted nuclear test at Pokhran (Rajasthan), no neighbouring country was adversely affected for there was no increase in the level of radio-activity in any of the neighbouring States and as such India was not guilty of any violation of the rules of international law.[58] But the position will be different if what a State does within its territory adversely affects other States. It will constitute international tort and such a State will be liable to make reparation to the aggrieved States. The above discussion makes it clear that accident and fire at Nuclear Plant at Chernobyl adversely affected other States. The former Soviet Union was, therefore, clearly liable to make reparation to States which were adversely affected.

It may be noted here that the accident at Chernobyl Nuclear Plant brought into focus the inadequacies and deficiencies in respect of nuclear safety and environment. Consequently a special session of International Atomic Energy Agency (IAEA) was immediately called and on 26th September, 1986, it adopted two Conventions—(i) Convention on Early Notification of a Nuclear Accident or Radiological Emergency; and (ii) Convention on Assistance in the Event of Nuclear Accident or Radiological Emergency. The first Convention came into force on 27th October, 1986 and the second Convention entered into force on 26th February, 1987. Under the first Convention, it is the obligation of the State parties to the Convention to transmit information of nuclear accident to the States likely to be affected by it. This obligation is for military and non-military activities but will not apply to nuclear weapons. The five nuclear weapon States have indicated that they will transmit the said information. This Convention is a step in the right direction.

Under the above-mentioned Conventions, nuclear weapons have not been included. Endeavours should, therefore, be made to include nuclear weapons also in respect of transmission of nuclear accidents.

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54. See Editorial Entitled "The Chernobyl Syndrome", "The Pioneer, 16 May 1986.
55. See S.K. Kapoor, "The Legality of Nuclear Testing : the Pokhran Explosion", IJIL, Vol. 14 (1974) p. 452:
56. See Nuclear Test Case (*Australia* v. *France*) Judgment of 20 December, 1974, (1974) I.C.J. Rep. 253; Nuclear Test Case (*New Zealand* v. *France*) Judgment of 20 December, 1974, (1974) I.C.J. Rep. 457.
57. See G. Schwarzenberger, "The Legality of Nuclear War (1958) p. 49 : M.S. Mc Dougal, The Hydrogen Bomb Tests and Interntional Law of the Sea, AJIL Vol. 49 (1955) p. 356 ; M.S. Mc Dougal and Nobert, A Schhin in Yale Law Journal, Vol. 14 (1955) p. 629.
58. See S. K. Kapoor, note 55, at p. 485.

Reference may also be made here to the International Convention on Nuclear Safety which was opened for signature on 20th September, 1994 at the thirty eighth session (held from 13 to 23rd Sept, 1994) of the General Conference of International Atomic Energy Agency (IAEA). This is the first legal instrument, which addresses the issue of nuclear power plants safety world-wide. The convention applies to land-based civil nuclear plants, and obliges the parties to establish and maintain proper legislative and regulatory framework to govern safety. Through the convention, states commit themselves to fundamental safety principles for nuclear installations and agree to participate in periodic pre-review meetings on implementation of their obligations.

On 20th September 1994, the convention was signed by 38 countries including Canada, France, India, Pakistan, Republic of Korea, Russian Federation, South Africa, United Kingdom and the United States. The Convention will enter into force on the 19th day the 22nd instrument of ratification is deposited with IAEA.

It is clear from the foregoing that nuclear safety and environment are inter-related to each other. With a view to ensure pollution free environment, special attention should be given to nuclear safety. States making peaceful and other uses of nuclear energy have some obligations towards international community. The progress made so far in this connection is far from satisfactory.

It has been rightly pointed out, "The right of private individuals to be guaranteed a decent and safe environment is one of the newer rubrics of human rights law." [59] Further, "Proposals have been advanced to include the rights of individuals and non-governmental entities to a pure and decent environment within the ambit of present day human rights Conventions, *i.e.*, United Nations Human Rights Covenants and the European Convention on Human Rights..... Fortunately, the foundations are in place. When coupled with existing regional and international Conventions, such as those relating to Ocean pollution, it becomes clear that a massive corpus of law does in fact exist. It is becoming necessary to bring together this body of law in order to deal effectively with the growing destruction of environment. Secondly, additional treaty instruments are required, as an immediate solution." [60]

Legality of the use by a State of Nuclear Weapons in Armed Conflict and its effects on Health and Environment.—On 27th August, 1993, the World Health Organization (WHO) requested the International Court of Justice to give an advisory opinions on the following question :

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

Before the World Court, it was contended by some states, specially America, that the Court should decline to give advisory opinion because the question before the Court is an essentially political one and is beyond the scope of the WHO's proper activities.

On 8th July 1996, the International Court of Justice held that the request for an advisory opinion submitted by WHO does not relate to a question which arises within the scope of activities of that organisation in accordance with Article 96, paragraph 2, of this Charter and as such an essential condition of founding its jurisdiction in the case is absent. The Court, therefore, refused to give the advisory opinion. The Court arrived at this decision by a majority of 11 votes to 3.

However, it may be noted here that earlier the General Assembly *vide* its resolution 49/75-K dated December 15, 1994 had requested the International Court of Justice to give its advisory opinion on the following question.

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59. W. Paul Gormley, "The Right to a Safe and Decent Environment", I.J.I.L., Vol. 28 (1988) p. 1.
60. Ibid, at pp. 31-32.

"Is the threat or use of nuclear weapons in any circumstance permitted under International Law ?"

The General Assembly had made this request in pursuance of Article 96, paragraph 1 of the Charter of the United Nations. Acceding to the request of the General Assembly, the World Court gave its advisory opinion on 8th July, 1996, i.e. the same day on which it refused to give advisory opinion at the request of WHO. The Court unanimously held that neither under customary nor conventional international law, there is specific authorisation for the threat or use of nuclear weapons. Moreover, a threat or use of nuclear weapons which is contrary to Article 2(4) of the U.N. Charter and which fails to meet the requirements of Article 51 is unlawful. The Court further held that a threat or use of nuclear weapons ought to be compatible with the requirements of international law applicable in armed conflict, especially, those of the principles and rules of internal humanitarian law, as well as with specific obligations under treaties and undertakings which expressly deal with nuclear weapons. Though the Court conceded that the use of nuclear weapons seems scarcely reconciliable with respect to the requirements of the principles and rules applicable in armed conflict, nevertheless the Court expressed the view that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in *any circumstance.*

It was rather unfortunate that the World Court did not accept the request of the WHO to give advisory opinion. If the Court had accepted the request the matters relating to health and environment arising out of the use of nuclear weapons would have been clarified. Since the Court gave its advisory opinion on a similar question submitted by the General Assembly, it shows that the Court did not consider the question as political. As regards the opinion of the Court that the question is not within the scope of activities of WHO, serious doubts have been expressed. Since the use of nuclear weapons even in limited scale jeopardises health and affects adversely the environment which in its turn again causes adverse effects on health, it does not seem to be plausiable that the question referred by the WHO is beyond the scope of its activities.

Global Warming, Depletion of Ozone layer etc. : 'Global Warming : Global Warning'

Probably more dangerous than the danger of the use of nuclear weapons is the warming of the earth and depletion of ozone layer. According to the scientists, as a result of the warming up of the earth, water of the seas will rise 6 feet from its present level. If the glaciers of the Arctic and Antarctic melt, water of seas will rise more than 3 feet and as a result of this, major cities of the world and all the ports will submerge in water. In second half of December, 2002, the scientists reported that in past summer (before 2002), the melting of Greenland glaciers and Arctic Ocean Sea ice reached levels not seen in decades. It is feared that if the present trend of shrinking continues at current rates year round average sea ice coverage may drop by 20 per cent by 2050 and the Arctic may be almost ice free during summer months. By the year 2030, temperature of earth will increase by 4.5 Degree centigrade. The gravity of this situation is evident from the fact that during last 10,000 years temperature of the earth has varied not more than 2 Degree centigrade and in the Ice Age temperature of the earth was only five Degree centigrade less than the present temperature.

The main reason for the warming up of earth is the emission of carbondioxide from the burning of coal, oil fossil fuels and industrial gases. The earth is warming up as if it were a green-house. Since the industrial revolutions, the emission of carbondioxide has increased by 25% and in the next 50 years it is likely to increase by 50 per cent more. Nibous oxide, methan chlorifloro carbons (CFCs) and other green-house gases are warming up the earth. The only practical way to solve green-house problems is to reduce the production of energy. But the countries of the world are not prepared for this.

In the upper atmosphere, ozone layer protects earth from ultraviolet rays of the sun. Ultraviolet rays cause cancers, especially skin cancers, cataracts, destruction of aquatic life and vegetation and loss of immunity. The ozone layer shields the earth from deadly ultraviolet rays of the sun. One per cent depletion of the ozone layer may be responsible for reaching of 2 to 3 per cent more of ultraviolet rays on earth. In 1983 British Scientists witnessed for the first time a hole in ozone layer in South Pole. Two years after that *i.e.* in 1985, a Treaty was signed in Vienna on conservations of ozone layer. This was followed by signing of the Montreal Protocol on 16 September, 1987 by 56 countries stipulating a 50 per cent reduction of CFCs by 1998. This was followed by Helisinki meeting which stipulated total elimination of CFCs by the end of this century. It is based on the estimates that one per cent of the ozone layer has already been damaged. The hole in ozone layer is moving towards densely populated areas of America and its area is as big as the size of America. Montreal Protocol has come into force since January 1989 as more than one thirds of its signatories have ratified it. India has, however, yet not ratified it. India has claimed that for ending the CFCs causing deletion of ozone layer, she should be given the compensation of 2 billion dollars. Moreover, India does not see any rationale of ratifying the protocol because its release of CFCs is just 6,000 tons a year which is equal to one and a half day's of world total release. India's per capital consumption is. 03 Kg. as compared to developed countries per capita consumption of one Kg. The developed countries release 95% of CFC's. The developing countries share is only 5% yet the treaty stipulates each developing country will be allowed a maximum 300 gms. per capita per year consumption of CFCs until 1989. Then CFC consumption must be frozen at the level reached by 1989 if it is well below the maximum limit. On the other hand industrialized countries are allowed a per capita CFC consumption of 500 gms. per year until 1989. Thereafter it will be reduced to half that amount by 1993. The countries which do not sign the protocol will not be allowed to import certain CFCs and halons from the signatory countries. They will also not be able to import technology or obtain financial aid to produce such chemicals. So far, 17 countries have ratified the protocol. In the last week of February 1992, India indicated that she might sign the Montreal Protocol in March 1992. On 7th April 1992, the Minister of State for Parliamentary Affairs told that Government has decided to join the Montreal Protocol after the amendments to protocol adopted at London in June, 1990 come into force.

The Montreal Protocol came into force on 1st January, 1989 as more than one-third of signatory states have ratified it. The fourth meeting of the State Parties of Montreal Protocol concluded on 25th November, 1992 at Copenhagen.

It need not be overemphasized that the developed countries have capacity to discover alternative sources of energy. The developing countries are not in a position to give up or reduce consumption of coal, oil, fossil fuels and other CFCs. Therefore, India's claim for compensation is reasonable and justified. An Ozone Fund should be established so that countries such as India be compensated. The idea of financial assistance to developing countries to help them to change over to CFC free substitute was first mooted by the Executive Director of the U.N. Environment Programme (UNEP), Dr. Mostafa Tolba, at the Helisinki meeting. Since the problem is worldwide, its solution should also be found on a world scale keeping in view the interests of developing countries. Since developed nations release 95 per cent of CFCs, they have special and more obligations in this connection. On 11th March, 1989, 24 countries including Hungary, India, Italy, Norway, Japan, Netherlands, Spain, and France signed Hague Declaration. The Declaration adopted the principle, *inter alia*, that countries to which decisions taken to protect the atmosphere shall prove to be an abnormal or special burden, in view, *inter alia*, of the level of their development and actual responsibility for the deterioration of the atmosphere, shall receive fair and equitable assistance to compensate them, for bearing such burden. To this end mechanisms will have to be developed.

In view of the gravity of the situation U.N. Environment Programme (UNEP) chose *"Global Warming: Global Warning"* as a slogan for environment day of this year (*i.e.* 5th June, 1989). The problem is really very serious and soft options will not solve it. It requires strong measures, will and determination of states to implement it. Though the international

community has awakened to the gravity of the problem, measures taken so far and progress achieved is far from satisfactory.

While inaugurating the ministerial meeting of the small states conference on sea level rise being held in the island resort of Kurumlia (Maldives), President Gayoom called on the affluent nations and the international community to help the fight of small island nations against the threat of being submerged by the rise of sea level. The conference was being held in the Maldives because according to predictions, it would be the first to go under water. As a first step, President Gyoom called for agreement by the world community for stabilising and subsequently restricting the green-house gases released into the atmosphere.

The seminar organised by the Malaysian forum of environmental journalists and the Asian Institute for Development Communication called for setting for establishing a research centre to prevent degradation of the earth's environment by finding substitutes for existing chemicals such as CFCs used in various industrial applications.

On 21st September, 1989, the Soviet Deputy Foreign Minister proposed that a U.N. Conference on the Environment in 1992 should be held at the summit level. He was speaking at a press conference at the United Nations Headquarters. As regards the preparations being made for an international conference on environmental problems, he said that in order to give a strong push to the practical deeds in the field of environment, the proposed international conference of 1992 should adopt some kind of a code of environmental behaviour. Though it is a good idea, the problem has assumed such serious magnitude that world community cannot afford to remain inactive and complacent till then. Continuous and determined efforts are required to check the degradation of the earth's environment.

It may be noted here that in September 1991, delegates from 116 countries attended the ten-day warming at Nairobi with a view to enter into an international pact to slow global warming by controlling man-made emissions of carbon dioxide which trap heat, and are believed to be the main cause for gradual warming of the earth's atmosphere while the experts of most of the countries supported the idea of stablising carbon-dioxide emission at 1990 levels by the year 2000, America, which is the world's biggest emitter of carbon dioxide, refused to set a specific target on reducing the emissions, saying scientific data on the issue is uncertain and the costs of implementing an emissions reductions policy are unpredictable. Thus the U.S. was accused of 'delaying' the pact. The U.S. is the world's worst polluter besides consuming the most resources and giving out 21 per cent of the Chloro Fluro Carbons (CFC's) in the atmosphere.

The problem of global warming and consequences thereof is becoming more and more serious day by day. Recently scientists have detected cases of sheep becoming blind and children suffering allergies and sunburns in southern Chile because of ozone depletion. The Scientists have also detected a new ozone hole in the earth's stratospheric layer. Being alarmed by this, the U.S. and British Governments have now decided to hasten the process of phasing out chloroflurocarbuns (CFCs), the main agents of ozone destruction they have revised the target to halt production of CFCs altogether by 1995 instead of earlier target of doing this by 2000.

The developed countries have succeeded in evolving appropriate ozone-friendly substitutes and are now in a position to hasten the phasing out CFCs earlier than the anticipated deadline. The Third-world countries cannot afford the costs of using such advanced technologies. It was on account of this reason India and China refused to sign Montreal Protocol. India therefore insisted on the "polluter must pay"[61] principle and succeeded in the creation of a special 240 million fund to be financed by the developed countries to help country like India to phase out chlorfluro carbons. Later on, it was agreed

61. It may be desirable to note here that total per capita use of the C.F.Cs (used in refrigeration, airconditioning etc.) is 1.22 kilogrammes highest in the U.S. Japan and Europe are not far behind. In the rest of the world, consumption rates are far lower.

that the size of the Montreal Protocol Fund would be increased to U.S. $ 500 million for the three year period 1994-96. The developed countries have agreed on a minimum level of funding of $113 million annually during 1993-1994. Despite all these efforts the situation is still grim and complacency in respect may shell disaster.

It has been reported that condition of the Ozone layer over the Central Antarctic deteriorated at the beginning of October 1993 to a new all time low with 60 per cent of the earth's protective sheath there having been destroyed. The World Meterological Organisation (WMO) said at Geneva that at a height of between 14 and 19 km. the Ozone over the Antarctic, a continent bigger than Europe, almost disappeared.

In 1999, the ozone hole seen on Antarctic is reported to be the largest seen so far. It was greater than one crore square miles and lasted for 100 days. It became visible 15 days prior to the last year and its period also increased from two three weeks. According to a recent study, by the middle of next century short radio waves, which are essential for long distance communication, may be destroyed. According to the study of a scientific panel a world-wide rise in temperature at the Earth's surface is "undoubtedly real". The Panel has pointed out in January, 2000 that the increase in temperatures over the past century between 0.7 and 1.4 degrees Fahrenheit— a 30 per cent increase from earlier projections that reflects record shattering high temperatures in the late 1990s. The Panel warned that further warming could disrupt agriculture and cause sea levels to rise swamping coastal cities. The 11 member panel was organized by the Academy of Sciences National Research Council (NRC). In the first week of December, 1999, the U.N. said that planet's protective ozone layer would start to heal in the next few years but the non-government organisations disagreed with this and slammed the U.N. for not moving faster.

In November, 2000, talks were held at Hague to find ways to implement the Kyoto agreement (1997) under which developed countries would reduce emissions of gases mainly carbon di-oxide to 5.2 per cent below 1990 levels by 2012. However, the scientists have predicted that with cut of just 5.2 per cent temperatures would rise by up to 5c and sea levels would rise more than 60 cm flooding many low-lying areas. But obstacles facing even a 5.2 per cent reduction are huge. The key was to persuade America to cut its emissions. It is pertinent to note that America has just 5 per cent of the world's population but it emits a quarter of all the gases. After America's withdrawal in March, 2001 from 1997 Kyoto Protocol, a global deal to cut pollution, world leaders have been at logger heads over what steps governments need to take to reduce emissions. In June, 2001, President Bush of the U.S. vowed to pursue scientific and diplomatic solutions to global warming, trying to blunt international criticism of his rejection of the Kyoto climate treaty ahead of a visit to Europe. However, many Europeans see the U. S. as a nation totally absorbed with its own interests and ready to go it alone in the world even if its allies don't bend to its will.

1994 World Conference on Natural Disaster Reduction

The World Conference on Natural Disaster Reduction was held at Yakohama (Japan) from 23 to 27 May, 1994, at the mid-point of International Decade for Natural Disaster Reduction (1990-2000). It was attended by 1,000 delegates, including the representatives of 147 countries. It called for development of a global culture of prevention and improved risk assessment, broader monitoring and communication of warnings. The conference adopted the Yakohama strategy for a Safer World : Guidelines for Natural Disaster Prevention, Preparedness and Mitigation. The documents include : an assessment of disaster reduction since the beginning of the Decade a strategy for the year 2000 and beyond; a plan of action of activities at the community and national levels, at the regional and sub-regional levels, and at the international level, and recommendations for follow up action.

As pointed out by the U.N. Under-Secretary-General for Humanitarian Affairs at the opening session of the conference on 23 May, 1974, "Earthquakes and cyclones will happen. There is nothing we can do about that, but we can be prepared for them when they do strike". Further, "Disaster reduction can take place at any point in the process which

we call disaster. It can comprise prevention and preparedness, relief and development as well as measures to reduce the effects of such disasters."

Summarising the outcome of the conference, "Yakohama Message" affirms that the impact of natural disasters in terms of human and economic losses has risen and society has become more vulnerable to such disasters over the past two decades, earthquakes, volcanoes, landslides, tidal waves, droughts and other natural events had killed some 3 million people and inflicted injury, displacement and misery on countless more. The number of people affected had increased by 6 per cent per year, three times the global population growth rate.

It was pointed out that environmental protection as a component of sustainable development consistent with powerly alleviation is imperative in the prevention and mitigation of natural disasters.[62]

1994 Desertification Convention Adopted

The convention on desertification was called for at the 1992 Earth Summit in Rio de Janeiro and mandated by the General Assembly in resolution 47/188 for completion by June, 1994. The Convention was concluded at Paris on 18th June 1994. More than 100 Governments concluded negotiations on the said date. It is a concerted effort to help over 900 million people around the world fight life and death battle against the degradation of their fragile dry lands *i.e.* the process of desertification. The Convention will enter into force 90 days after it has been ratified by 50 countries.

It may be noted that a previous U.N. Plan of Action to combat Desertification, adopted in 1977, fell short of expectations because of inadequate funding and a too narrow, technical focus. It failed to give enough recognition to the Socio-economic causes of the problem and did not involve local populations in the process.

Having learnt from the past experiences and with a view to improve the effectiveness of existing international finance, the convention has established a "Global Mechanism" to identify and coordinate available funding sources. The governments have been urged to pursue the possibility of financing anti-desertification action through the Global Environmental Facility (GEF), in cases where curbing desertification can be linked with the GEF's four mandated funding areas : preventing climate change, ensuring conservation of biological diversity; protecting international waterways; and reducing depletion of Ozone layer. The GEF is the interim financing channel for the legal agreements the convention on Biological Diversity and Framework Convention on Climate change signed at the Earth Summit.[63]

Earth Summit (1992)*

The Earth Summit or United Nations Conference on Environment and Development (UNCED) began at Rio de Janeiro, Capital of Brazil, 3rd June 1992. It was the largest international conference in the history of international relations and international law. It was attended by 178 nations and more than 20,000 participants attended the conference. The plenary session was attended by 130 heads of State and Government. UNCED Chief Maurice Strong described it "parliament of the planet." According to environmental experts, this was probably the last chance to save our dear planet Earth. The success of the conference depended on the reconciliation of the interests of North and South. As remarked by Maurice Strong, Secretary-General of UNCED, "If we fail at Rio, it will be one of the greatest breakdowns ever in international relations especially concerning North and South." Indeed "This is our last chance.".

The Earth Summit is the culmination of a series of UN conferences beginning with the Stockholm conference on Human Environment in 1972. In 1983, the General Assembly of the United Nations set up a commission, headed by Norway's Prime Minister, Gro Harlem Brindtland, to examine the state of world environment and development, beyond

62. See U.N. Chronicle, Vol. XXXI No. 3 (September, 1994) pp. 70-71.

63. Ibid., at p. 74.

* See also for (1995) C.S.E. Q. 5(c).

2000. The report of the commission entitled "Our Common Future," highlighted the risks of human future if we continue the current modes of unsustainable development. Consequently, General Assembly decided to hold a special conference on safeguarding environment against further degradation beyond repair, and sustainable development for the future of the mankind on earth. Even after the decision to hold the Earth Summit was taken it took more than two years to prepare for the Earth Summit held in Rio de Janeiro (Brazil). There was growing awareness and common concern in the world about the constantly increasing degradation of global environment. It need not be overemphasized that much of this degradation is due to patterns of production and consumption in industrialized countries. But from the point of environment the world, nay the entire planet Earth, is one and indivisible. Hence the consequences of degradation of global environment are also shared by nearly 80 per cent of the world population which resides in developing countries. The Rio conference therefore had before it topics such as global warming, ozone depletion, climatic changes, biological diversity and management of forests.

On 22 December 1989, 159 States Members of the U.N. General Assembly passed two resolutions (44/228 and 44/207) expressing their resolve to draft as soon as possible a convention to protect the earth's climate and to convene a world conference in Brazil in 1992 on ways to encourage environmentally sound development. The Preparatory Committee of UNCED held its first substantive session at Nairobi from 6 to 31 August, 1990 and recommended that UNCED scheduled to be held in Brazil in 1992 should be convened at highest political level that of Heads of States or Governments, Maurice Strong, Secretary-General of the UNCED proposed that the world meeting agree on an *Earth Charter* to be known as Agenda 21—a set of principles for the conduct of peoples and nations towards each other and the Earth.[64]

On 21 December 1990, the General Assembly created (vide resolution 45/212) the Inter-governmental Negotiating Committee to conduct "a single inter-governmental negotiating process" on a framework convention on climate change. Assembly also decided that the convention and related instruments should be open for signature at the UNCED in June 1992. The Inter-governmental Negotiating Committee held its first session at the Westfields International Conference Centre at Washington D.C.[65] on 4 Feb. 1991. It held its second session from June, 1991 at Geneva. It was attended by the representative of 127 states.[66] Proposals to achieve environmentally sound, sustainable economic development in all countries known collectively as "Agenda 21" were thoroughly discussed by the Preparatory Committee for the UNCED from 12th August to 4 September 1992. During the session, the Preparatory Committee agreed on a framework for "Agenda 21" which was to be adopted in Rio de Janeiro, as a comprehensive blue print for action into the twenty-first century. Agreement was also reached on a text, the "Earth Charter" or "Rio Declaration on Sustainable Development" that will form the basis for commitment by states to conference goals. While it will not establish any strict obligations, it will be morally binding on signatory states.[67]

Industrialized countries degrade the environment by insatiable consumption of resources and intense production of wastes, while high fertility, and rapid population growth in many developing countries put damaging pressure on the planet. Combined, such human demands are undermining the world's natural resource base-land, water and air upon which all development depends. These issues are, therefore, not only environmental but also economic. With a view to highlight these links, the U.N. conference on Environment and Development, which was originally scheduled to be held from 1 to 12 June, 1992, was held from 3rd June to 12 June 1992 at Rio de Janerio (Brazil). The conference was funded by the UN and voluntary contributions.[68]

64. See U.N.C., Vol. XXVII, No. 4 (December, 1990), p. 63.
65. See U.N.C., Vol. XXVIII, No. 2 (June, 1991), p. 56.
66. U.N.C. Vol. XXVIII, No. 3 (September 1991), p. 66.
67. U.N.C., Vol. XXVIII, No. 4 (December 1991), p. 65.
68. U.N.C., Vol. XXIX, No. 1 (March 1992), p. 81.

Some of the main issues confronting the Earth Summit or UNCED were Finances (*i.e.* who will pay for the cleaning of the world) ; technology transfer ; institutional framework, climate change ; forests; biological diversity; and sustainable development. Six issues on which North and South expressed divergent views were : Greenhouse gas emissions; Forests ; Population; Technology transfer ; Finance; and Degradation. Thus on account of several reasons a great uncertainty was haunting.

Besides the main issue of funding environmental programmes outlined in Agenda 21, other major achievements of the UNCED include *a convention on Bio-diversity, a convention on climate change, a convention on Forestry, and Earth Charter or Bio Declaration.* As regards Bio-diversity convention, America took a very rigid stand from the beginning that it will not sign the convention. The aim of the Bio-diversity convention is to preserve the vast gene pool of flora and fauna and make developed countries pay for exploiting it. America took such a rigid stand that even countries like Britain, Germany, Japan and European Community distanced themselves from American stand with the result that America found itself isolated in this respect. On 7th June 1992, Japan indicated that it will join Britain and the 11 other members of the European Community in breaking with the U.S. to sign the Bio-diversity treaty. India also signed the treaty on bio-diversity. There was however controversy about the ambiguous clause relating to transfer of technology. According to first clause of Article 16 of the Convention, the contracting parties are to facilitate access to technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources. The second clause further adds that the technologies are to be provided 'under fair and most favourable terms, including on concessional and preferential terms were mutually agreed'. The third and fourth clause of Article 16 add that irrespective of Intellectual Property Rights (IPR) and patent protection, developing countries which provide genetic resources should be given access to all technology making use of these resources and even private sector companies will 'facilitate transfer of technology for the benefit of both government institutions and private sector of developing countries. The fifth clause of Article 16, however, recognized that patents and other IPR may have an influence on the implementation of the convention, because it provided that contracting parties shall cooperate to ensure that such rights are supportive of and do not run counter to its objectives. The controversy revolved on a sentence in the second clause which says that "in the case of technology subject to patents and other IPR, such access or transfer shall be provided on terms consistent with adequate and effective protection of IPR". This was probably added to please the US who had refused to sign the convention. But as remarked by Muchkund Dubey, India's former foreign Secretary, "Despite the apparent contradiction in the clauses this is a significant improvement over the Dunkel Draft". Further, "In just two years the bio-diversity convention has achieved what could not be done in six years of GATT negotiations". Experts of developed countries, however, interpret it differently. Thus divergent interpretations are being given in respect of the said vague clause. The convention on Biological Diversity has been signed by as many as 167 countries. Mongolia was the thirtieth country to ratify the convention. The prescribed number of countries (*i.e.* 30) having ratified the convention, three months after Mongolia ratified the convention has come into force as part of international law on 29th December, 1993.

It may be noted here that in the Fifty-third year of the Republic Indian Parliament has enacted the Biological Diversity Act, 2002. As per preamble of the Act, this Act has been enacted to provide for conservation of Biological Diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto.

As regards convention on climate change or Green-house Gas Emission, there was a wide gulf between the views of the North and South. While the North wanted a 20 per cent cut in green-house gas emissions like carbon dioxide and methane by 2005 and a major shift from the use of coal and wood for energy, the South blamed developed countries for excessive emissions over last 50 years and wanted them to reduce it considerably. The South was opposed to any cut in its own emission as it hindered development. As pointed

out by Deng Nan, China's Deputy Minister for Science and Technology "Developed Countries are the biggest polluters. They have to take moral responsibility for it and make financial commitments for cleaning up the mess." But due to pressures from the US and OPEC countries the convention on climate change was watered down. Originally, the convention aimed to reduce carbon dioxide (Co) emissions to their 1990 levels by the year 2000 but the treaty now simply requires signatories to formulate plans "with the aim" of returning emission to 1990 levels. The developed countries have agreed to provide financial help and technology to third world nations to help them deal with global warming. They have, however, not accepted any specific obligations in this respect. When the Treaty on climate change was opened for signature, Mr. Fernando Collor, Brazil's President, was the first to sign it. Subsequently 150 countries signed it. After having been ratified by 50 countries (*i.e.* prescribed number of countries), climate change convention came into force on 21st March, 1994. Now the conference of the State Parties of the convention will meet for the first time within a year. This session is scheduled for March, 1995 in Berlin. One of the most important decisions to be taken at the Berlin session will be relating to financial arrangements for the treaty. The Conference on the Parties (COP) will have to finalise the guidelines on how developed countries should assist developing countries in implementing the convention. Because a number of important decisions will have to be made at the COP's first session, two more inter-governmental meetings will be held to prepare the way. The first such meeting was scheduled to take place from August 22 to September 2, 1994 in Geneva, while the second was scheduled for early 1995 in Newyork.

As noted above, the convention commits developed countries to take measures aimed at returning their emissions of carbon di-oxide and other green-house gases to 1990 levels by the year 2000. The convention has now come into force on 21st March, 1994.

Reference may also be made here to Kyoto Protocol (1997) a global deal to curb pollution by reducing emission of gases mainly carbon di-oxide to 5.2 per cent below 1990, levels by 2012. But it received a great upset when America withdrew from it in March 2001. In June 2001, President Bush of U.S. said, in a statement at the White House that the U.S. realised its responsibilities to curb its greenhouse gas emissions but at the same time behind the 1997 Kyoto Protocol was a "fatally flawed" treaty and that it must balance environmental with economic demands. But many Europeans are of the view that the U.S. as a nation is totally absorbed with its interests and ready to go alone even if its allies don't bend to its will.

The convention on Forests also generated a lot of controversy from the very beginning. While the rich nations wanted to control massive deforestation through a convention, the developing countries regarded it as infringement on their sovereignty. Developing countries including India had serious reservations on forest principles contained in the draft. These countries led by India succeeded in getting the said provisions changed. Thus consensus was reached on provisions relating to sustained development of forests. It was recognized that forests are essential to economic development and the maintenance of all forms of life. In committing themselves to the prompt implementation of the principles agreed, countries decided to keep them under assessment for their adequacy with regard to their further international cooperation on forest issues. Thus the provisions agreed are persuasive and weak.

In addition to the above conventions, one of the major achievements of the Earth Summit *i.e.* UNCED is the adoption of Earth Charter or Rio Declaration. America had reservations about some of the provisions of the Declaration yet it ultimately decided to sign it. According to Indian Prime Minister, Mr. Narasimha Rao, Rio Declaration is 'balanced'. Rio Declaration contains 27 principles or points concerning almost all countries of the global community, and enlisting general rights and obligations on environmental protection. The more important of the principles of Rio Declaration are as follows :—

Principle 1 : Human beings are at the centre of concerns for sustainable development. They are entitled to healthy and productive life in harmony with nature.

2. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.

3. The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

4. In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

5. All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development.

6. The special situation and needs of developing countries, particularly the least development and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.

7. States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth's ecosystems. In view of the different contributions to global environment degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

8. To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

9. States should cooperate to strengthen indigenous capacity--building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

10. Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

11. States shall enact effective environmental legislation, environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

12. States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

13. States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damages. States shall also cooperate in an

expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

14. State should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause several environmental degradation or are found to be harmful to human health.

15. In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

16. National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

17. Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

18. States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

19. States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect.

Yet another accomplishment of the Earth Summit was the agreement to create a new U.N. body to monitor compliance with environmental treaties and review progress towards the goals of the Earth Summit. Further, to salvage some of the prestige lost due to adoption of rigid attitude in respect of Bio-diversity treaty and consequent U.S. isolation in the Summit President George Bush proposed on 31 June 1992 a follow up conference to the Earth Summit. Probably taking cue from this proposal, Mr. Maurice Strong, Secretary-General of UNCED, announced a follow-up Summit in two to four years to make nations accountable for decisions taken at the Earth Summit.

As regards the final outcome of the Earth Summit, divergent views have been expressed. Even before the summit had begun, chances of the complete success were dampened because of rigid attitude of the U.S. over Bio-diversity treaty and other issues. As regards the crucial issue of funding environmental programmes all hopes of developing countries were belied. While developing countries wanted a special fund of $ 250 billion, developed countries insisted that existing Global Environment Facility (GEF) will serve the purpose. Finally in a closed door meeting the G-77 had no option but to drop its demand for a separate Green Fund and agreed to accept a "restructured" GEF as one of the financial mechanisms. The restructured GEF implies greater 'transparency' in the decision-making process and also a more universal membership of the GEF. According to some critics, the Earth Summit has been anything but a success. While the hopes of the people of industrialized countries that it would take first steps towards making the world safe for future generations have been belied the net outcome of the Summit was hardly satisfying in any concrete measure to the developing countries, including India. But to say that the Earth Summit has failed or not achieved anything would not be correct. Despite the opposition of the U.S., many nations signed the Bio-diversity treaty. Climate change convention has been signed by 150 countries. Is it not a matter of great satisfaction that even the rigid, almost intransigent, attitude of the U.S. could not thwart the Summit's outcome ? Is it not a remarkable achievement in the present unipolar world ? Further, the U.S. was almost isolated because of its intransigent attitude and a number of developed countries including Britain, Japan, Germany, and European Community distanced themselves from the U.S. stand and shifted their position on crucial issues and participated in evolving consensus which finally took shape as Earth charter or Rio

Declaration. As pointed out by Indian Prime Minister, Mr. P.V. Narasimha Rao, the net outcome of the Summit was "satisfactory" and "a step in the right direction". According to Maurice Strong, Secretary-General of the UNCED or Earth Summit, the Summit was a success but regretted that developed countries had made no generous financial commitment to the environment protection programmes. He added that though not all the problems discussed found solutions, the conference served as a starting point and that the road from Rio was a fast track to a better future for the world. Thus the road from Rio is pointing in the direction of hope, it is for the nations—both the developed and the developing—to bring it to fruition so as to ensure the world, rather the planet Earth, safe for the present and future generations.

Commission on Sustainable Develcpment.—On 22nd December, 1992, the General Assembly of the U.N. approved the creation of a new high-level Commission on Sustainable Development to oversee the implementation of "Agenda 21". The Commission consists of 53 members. On 12th February, 1993, the Economic and Social Council Commission formally established the 53-member Commission on Sustainable Development to monitor progress in implementing "Agenda 21", the comprehensive action programme adopted by the U.N. Conference on Environment and Development (UNCED) in June, 1992 in Rio de Janeiro. The Commission, a functional body of the Economic and Social Council, will also oversee activities related to the integration of environmental and developmental goals throughout the United Nations system. The Commission began its work in May, 1993 to consider holding high level ministerial meetings to provide 'political impetus' to the commitments and decisions of the Earth Summit.

Johannesburg Declaration on Sustainable Development.—The world Summit on Sustainable Development was held in Johannesburg (Sough Africa) from 2 to 4 September 2002. The representatives of the peoples of the world reaffirmed their commitment to Sustainable Development. They recognized that the global environment continues to suffer, loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile lands, the adverse effects of climatic change are already evident, natural disasters are more frequent and more devastating and developing countries more vulnerable, and air, water and marine pollution continues to rob millions of a decent life.

They expressed their determination to ensure that their rich diversity which is their collective strength will be used for constructive partnership for change and for the achievement of common goal of sustainable development.

They recognized that sustainable development requires a long term perspective and broad based participation in policy formulation, decision making and implementation at all levels. As social partners, they will continue to work for stable partnerships with all major groups, respecting the independent, important roles of each of them.

The world Summit also prepared a plan of implementation of the World Summit on Sustainable Development. It dealt with such matters as poverty eradication, changing unsustainable patterns of consumption and production, protecting and managing the natural base of economic and social development, sustainable development in a globalizing world, health and sustainable development, sustainable development for Africa, means of implementation and institutional frame work for sustainable development.

Even though not much can be expected from such world Summits yet they serve a significant object of highlighting the gravity and urgency of the problems. Due to great differences in attitudes and their way of fulfilling their commitments, the results of the Summit cannot at all be said to be encouraging.[69] The developed countries are not serious about fulfilling their obligations. On the other hand developing countries do not have enough funds to give up their conventional modes of energy and adopt those which may ensure sustainable development.

First Ministerial Conference of the Forestry Forum for Developing

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69.See also Mohammed Hussain K.S., "World Summit on Sustainable Development, Johannesburg. An Appraisal", I JIL Vol. 2 No. 3 (2002), p. 348.

Countries (FFDC).—The three day first Ministerial Conference of the Forestry Forum for Developing Countries concluded at New Delhi on 3rd September, 1993 after adopting the Delhi Declaration on Forests. It was attended by the representatives of 40 countries apart from observers from nine advanced countries and seven international organisations such as World Bank and Asian Development Bank. The Conference is a direct follow up to the U.N. Conference on Environment and Development (UNCED). The Delhi Declaration has called upon the Commission on Sustainable Development to identify at its next session "an appropriate mechanism within the U.N. system".

The Delhi Declaration has asserted that forests are inalienable national resource and has called for a U.N. mechanism on forests. The Delhi Declaration has reiterated the right of the sovereign countries to choose between the various multiple "uses of their forest resources in accordance with their national policies, promises and strategies. According to the Declaration, the right of the Development must be fulfilled so as to equitably meet developmental and environmental needs of the present and future generations." The Declaration also calls upon the international community to seek and adopt options for sustainable alternative forms of employment opportunities to people dependent on forests. Further the Declaration has asked the international community "to work for determining methodologies for the economic valuation of goods and services provided by forests including *inter alia* traditional knowledge and technologies, biological diversities, sequestration of carbon and other ecological processes and the forgone opportunity costs." The Declaration has also called for "increasing financial assistance provided by the developed countries and international organisations including a restructured Global Environmental Facility (GEF) to sustain investment in the Forestry sector in developing countries within a given time frame through transparent mechanisms to assist and meet the incremental costs incurred to implement sustainable development" and for "facilitating open and free international trade in forest products through the removal of unilateral and discriminatory measures that impede market access, while ensuring that the sustainability criteria on forest management is equitably applied to all types of timber."

Conference to review the implementation of the decisions taken at Rio Earth Summit (1992).—A U.N. conference to review the implementation of the decision taken was held in June 1997. Nearly 160 member states participated in the Conference. The Conference renewed its commitments and set goals for future. It was generally agreed that major and crucial part of the recommendations of the Rio Summit remained unimplemented. One of the main causes for this was that the differences between developing and developed nations over several matters still persisted. Yet another reason for the same was the reluctance of the developed nations to bear the cost of providing finances or technology at affordable rates to the developing nations to meet the environment standards fixed for them.

Kyoto Environmental Summit on Global Warming (December 1997)—N.B. : For this please see Appendix II

Conclusion.—As remarked by Maurice F-Strong, Secretary-General of the United Nations Conference on the Human Environment, "The concept of respecting and protecting the human environment has its objective the fulfilment of the legitimate, immediate ambitions of individuals and nations as well as the interests of future generations. The rectification of past errors, wherever possible, has as its object the provision of better opportunities for development and progress".[70] "Environmental and Ecological Constraints have symbolized our thinking towards new goals, or goals which have been neglected under the influence of a culture of mass production and consumption."[71] In this sense, the Stockholm Conference on the Human Environment was

70. "The United Nations and the Environment", Int. Orgn., Vol. 26 (1972), p. 169 at p. 172.
71. B.D. Nag Chaudhary and S. Bhatt, "Energy, Environment and World Order, India Quarterly, Vol. XXXVI, Nos. 3 and 4 (July-Dec. 1980), p. 336 at p. 344.

neither a beginning nor an end but an unprecedented opportunity to break new ground in the management of a world in which all of us live.[72] It cannot be denied that the Stockholm Conference has been successful in breaking the new ground. The Conference "has served to identify those areas in which rules of international environmental law, acceptable to the international community as a whole, can be laid down, and as well as those areas in which the formation of environmental rules must encounter insurmountable obstacles. To that extent it has provided foundations for the development of international environmental law.[73] Stockholm Conference, Habitat Conference and Conference on Desertification and several other conventions relating to environment which have been referred earlier not only provide foundation for the development of international environmental law but make it clear that a real beginning has been made in the management of the world in which all of us live in the right directions. The Stockholm Conference on Human Environment is also remarkable for creating institutions (as discussed above) for the protection and preservation of human environment but it must be noted that "their vitality will obviously depend on the behaviour of governments. Will the members of the U.N. devote the necessary resources to national and international environmental efforts? Will they accept limitations on their traditional freedom of action in the interest of preserving the common biosphere ? Many leaders now use the rhetoric of 'spaceship earth' but are they really prepared to accept the political and economic costs of self-denial that this rhetoric implies."[74] It is clear from above discussion that protection and preservation of environment are necessarily related to development. A major topic that of inter-relationship between environment and development is now-supported by both developed and developing countries. In the end it may be noted that for economic development use of energy is indispensable. But increasing use of energy adversely affects nature's balance. It has, therefore, been rightly suggested that we should take a global view of the energy problem based on ecological considerations.[75]

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72. See note 54.
73. J.G. Starke, Introduction to International Law, Tenth Edition (1989) p. 409.
74. Richard N. Gardner, "The Role of the U.N. in Environmental Problems", Int. Orign Vol. 26 (1972), p. 237 at 254.
75. See note 55.

CHAPTER 28

DIPLOMATIC AGENTS*

Introduction.—The allegation of Oppenheim and other Western Jurists that international law originated in Europe and its credit is to Western civilisation is not correct. The study of the original text books of Ramayana and Mahabharata falsifies the contention of Western Jurists.[1] In his view, during the Ramayana and Mahabharata period some aspects of International law were in their developed stage. Examples of International law relating to diplomatic agents may be cited in this connection.[2] "Consequent on a development over some hundreds of years the Institution of Diplomatic Representatives has come to be the principal machinery by which the intercourse between States is conducted." [3] The permanent appointment of diplomatic envoys began from the seventeenth century. The rights, duties, immunities and privileges etc., of the diplomatic agents in eighteenth and nineteenth centuries were mostly in the form of customary rules of International law. The first great land mark, therefore, was the Congress of Vienna 1815 wherein the customary law regarding diplomatic agents was clarified and codified. After 1815 also, the law relating to diplomatic agents continued to develop and finally a convention was adopted in 1961. This Convention is called Vienna Convention on Diplomatic Relations. However, the Preamble of the Vienna Convention makes it clear that those matters for which there is no express provision in the Vienna Convention will still be governed by the customary rules of International law. It may be noted here that the Indian Parliament passed the Diplomatic Relations (Vienna Convention) Act, 1972, to give effect to the Vienna Convention on Diplomatic Relations, 1961, and to provide for matters connected therewith.[4] Other States have also passed similar Acts. "The law relating to the diplomatic and consular affairs remains the strongest section of international law." [5]

Classification of Diplomatic Agents.**—The diplomatic agents have been classified according to their status and functions. The first classification of diplomatic agent was made in the Congress of Vienna, 1815. The Congress of Vienna, 1815, classified the diplomatic agents under following categories : (1) Ambassadors and Legates ; (2) Ministers Pleni-potentiary and Envoys extraordinary; and (3) Charge-d' affaires. Some changes brought about in the above classification by Congress of Aix-la-Chappele, 1818. In the Congress fourth category of diplomatic agents namely Ministers Resident was added and was kept on the third place in order of priority. But it was again dropped by 1961 Convention on Deplomatic Relations. Thus, at present, the classification of diplomatic envoys is as follows—

(1) *Ambassadors and Legates.*—Ambassadors and Legates are the diplomatic agents of first category. They are the representatives of the completely Sovereign States. They are either appointed as Ambassadors or Permanent Representatives of their respective countries in the United Nations. The representatives appointed by Pope are called Legates.

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* See also for I.A.S. (1958), Q. No. 6.

1. S. S. Dhawan, "The Ramayana—International Law, in the Age of the Ramayana", National Herald Magazine, Sunday, January 28, 1973, p. 1.
2. See also Dr. Nagendra Singh, India and International Law (1969), p. 12.
3. J. G. Starke, Introduction to International Law, Tenth Edition (Butterworths, Singapore, 1989) p. 421.
4. For text of the Act see I.J.I.L., Vol. 12 (1972), pp. 637-46.
5. Rahamatullah Khan, "International Law—Old and New", I.J.I.L., 5 (1975) p. 371 at p. 373.

** See also for P.C.S. (1991) Q. 9(a).

(2) *Ministers Pleni-potentiary and Envoys Extraordinary.*—Minister Pleni-potentiary and Envoys Extraordinary are the diplomatic agents of second category and as compared to the diplomatic agents of the first category, they enjoy less privilege and immunities.

(3) *Charge-d'Affaires.**—Charge-d' Affaires are the diplomatic agents of the last category. The main reason for this is that they are not appointed by the head of the State. They are appointed by the Foreign Ministers of States. In rights and status they are considered below the Minister Resident.

It was made clear in Article 14 (2) of the Vienna Convention on Diplomatic Relation that apart from precedence and etiquette, there is hardly any difference between the diplomatic agents of above-mentioned categories. Obviously, there is no difference so far as their privilege and immunities are concerned.

Functions of Diplomatic Agents**

According to Article 3 of Vienna Convention, the functions of a diplomatic mission consist *inter alia* in : (a) representing the sending State in the receiving State; (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; (c) negotiating with the government of the receiving State; (d) ascertainment by all lawful means conditions and developments in the receiving State; and reporting thereon to the government of the sending State ; (e) promoting friendly relations between the sending State and the receiving State, and developing their economic cultural and scientific relations. In addition to these functions diplomatic agents have also to perform any special functions which are allotted to them from time to time. Diplomatic agents which are appointed only for specific functions, perform only those functions.

The Basis of Immunities and Privileges of Diplomatic Agents.—Before discussing the immunities and privileges of the diplomatic agents it will be necessary and desirable to know as to what is the basis of these immunities and privileges. To put it more precisely, why diplomatic agents are given certain immunities and privileges ? There are two theories prevalent in this connection (i) Theory of Extra-territoriality; and (ii) Functional Theory.

Theory of Extra-territoriality.—According to this theory, the diplomatic agents enjoy immunities and privileges because they are deemed to be outside the jurisdiction of the State in which they are appointed.

Criticism.—The theory of extra-territoriality was very much prevalent up to the past and a number of jurists supported it. But this theory has now been discarded. A number of jurists have severely criticized it. In the view of Prof. Oppenheim the theory of extra-territoriality is not the correct basis of the immunities and privileges which the diplomatic agents enjoy. In his view, it is wrong to contend that they enjoy these privileges and immunities because they are deemed to be outside the territorial jurisdiction of the receiving State.[6] Fenwick has also criticized the theory of extra-territoriality and has expressed the view that this theory cannot be the basis of immunity and privileges enjoyed by the diplomatic agents. It has finally been abandoned in the Vienna Convention which offers no theoretical basis for the privileges and immunities it grants.[7] In *Bergman* v. *De Sieyes*,[8] the District Court of New York held ".....that a Foreign Minister is immune from the jurisdiction, both criminal and civil of the courts in the country to which he is accredited, on the grounds that he is the representative, the *alter ego*, of his sovereign who is, of course, entitled to such immunity, and *that subjection to the jurisdiction of the courts, would interfere with the performance of the duties as such minister.....*"

Reference may also be made here to *Ex party Petroff* (1971) wherein the Supreme Court of Australia criticized and discarded the theory of extra-territoriality and expressed

* See also for C.S.E. (1994) Q. 8 (d).

** See also for P.C.S. (1975), Q. No. 6 ; P.C.S. (1970), Q. No. 7.

6. L. Oppenheim, International Law, Vol. 1, Eighth Edition, p. 793.
7. Charles G. Fenwick, International Law, (Third Indian Reprint, 1971), p. 552.
8. (1946) 71F Supp. 334, Facts of this case have been mentioned in this chapter under the heading "Immunity from Civil Jurisdiction."

the view in unambiguous terms that this cannot be regarded the true basis of the immunities and privileges enjoyed by the diplomatic agents in the present period. In this case two citizens of Australia had thrown some explosive substances on the Soviet Chancery situated in Canberra. The proceedings were started against these two accused, according to the criminal law of Australia. These two persons argued that on the basis of the theory of extra-territoriality, the Chancery of Soviet Union is outside the territorial jurisdicion of Australia and therefore they cannot be prosecuted under the law of Australia. The Court had, therefore, to decide whether or not the Chancery will be deemed to be out of the territorial jurisdiction of Australia. The Supreme Court of Australia reveiwed the earlier law on the point and ruled that it is wrong to say that Chancery is not within the territorial jurisdictions of Australia and that the accused cannot be punished under the local laws. Thus the Supreme Court of Australia condemned and discarded theory of extra-territoriality and upheld the conviction of the said two accused persons.

Functional Theory.—In fact, the true basis of the immunities and privileges enjoyed by the diplomatic agents is not the theory of extra-territoriality but the special functions which these agents perform. That is to say, diplomatic agents are given certain immunities and privileges because of the special functions which they perform. It is thought necessary and expedient to grant these immunities and privileges to them otherwise they would be greatly handicapped in the performance of their functions. Thus Diplomatic Missions are accorded privileges and immunities for functional reasons as is clearly brought out in the Vienna Convention on Diplomatic Relations.[9]

Immunities and privileges of Diplomatic agents*.—As observed by the International Court of Justice on 15 December, 1979 in *Case concerning United States Diplomatic and Consular Staff in Tehran* (Provisional Measures), ".....the institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an instrument essential for effective co-operation in the international community, and for enabling states, irrespective of their differing constitutional and social systems to achieve mutual understanding and to resolve their differences by peaceful means :....."Further, "while no state is under any obligation to maintain diplomatic or consular relations with another, yet cannot fail to recognize the imperative obligations inherent therein, now codified in the Vienna Convention of 1961 and 1963....." "One of the Pillars of modern International Law is the diplomatic immunities of the Ambassadors." [10]

(*1*) *Inviolability of Persons of Envoys.*—It is a well-recognised principle of international law that the person of Envoys is regarded inviolable. It may be noted here that International law relating to inviolability of the persons of envoys was recognized in India from a very early time. "In the Ramayana this very principle—the inviolability of the person of the envoy is affirmed and enforced on several occasions—sometimes even against the wishes of sovereign who in a fit of anger wanted to slay the envoy for having delivered a rude ultimatum on behalf of his sovereign." [11] In this connection the example of Hanuman who went as a messenger to the Court of Ravana may be cited. On the basis of inviolability of persons of envoys, diplomatic agents cannot be arrested for debts, etc. If a diplomatic agent is attacked and insulted, it is deemed to be an attack on and the insult of the State whose representative he is. On this basis, all the cases against him are invalidated. In the present period this immunity has been incorporated in Article 29 of the Vienna Convention on the Diplomatic Relations, 1961. Article 29 provides : "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take apropriate steps to prevent any attack on his person, freedom or dignity." But the diplomatic agents

9. See Statement of Dr. Sayid Mohammad (the then Central Minister of State for Law and Justice) in the Sixth Committee on the item concerning Diplomatic Asylum appearing in I.J.I.L., Vol. 15 (1975), pp. 534-536 at p. 537.

* See also for I.A.S. (1954), Q. No. 5 ; P.C.S. (1975), Q. Nos. 2 (e) and 9 ; P.C.S. (1969), Q. No. 3(c) ; P.C.S. (1971), Q. No. 9 ; P.C.S. (1983), Q. 10(a) ; P.C.S. (1985) Q. 6(a) ; C.S.E. (1987), Q. 5(c) ; P.C.S. (1995) Q. 8(b).

10. See supra note 1.

11. Ibid.

have a duty not to interfere in the internal affairs of that State. Moreover, the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present convention or by other rules of general international law or by any special arrangements in force between the sending and the receiving State.[12] "The right of inviolability extends to the person of diplomatic officials as well as diplomatic agents, their premises, archives, papers, documents and correspondence, and the receiving State must take appropriate steps to prevent any attack on their person, freedom of dignity as violation of any fraction of this right constitutes a serious breach. However, this is not to say that any abuse, such as, committing acts of violence, sabotage, or espionage against the receiving State will go unnoticed and indeed unpunished. Indeed such acts have invariably resulted in the receiving State requesting the recall of such offending officials, and in extreme cases the receiving State has found it necessary to expel and declare them *persona non-gratia."* [13] Further, "To be sure, the right which the principle for inviolability confers on the sending State is believed to be limited by such overwhelming national security considerations, such as, when diplomatic mission engages in fostering a civil war within the territory of the receiving State or uses its premises for espionage activities." [14] For example, a few years back Pakistan declared Iraqi Ambassadors as *persona non-gratia* because arms and ammunitions were recovered in the Iraqi Embassy. Arms and ammunitions were being collected in the Embassy, Pakistan contended, to supply to certain factions in Pakistan to foment civil strife in Pakistan.

In *the case of the United States Diplomatic and Consular Staff in Tehran,* the International Court of Justice reaffirmed the principle of the inviolability of the person of diplomatic envoys and of the premises of diplomatic mission. This case was brought before the world court by United States following the occupation of its embassy in Tehran by Iranian militants on 4 November, 1979, and the capture and holding as hostages of its diplomatic and consular staff. On a request by the United States for the indication of provisional measures, the court held :

"there is no more fundamental prerequisite for the conduct of relations between states than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose, and.....the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution *are essential unqualified, and inherent in their representative character and their diplomatic function."* The world court indicated provisional measures for ensuring the immediate restoration to the United States of the Embassy premises and the release of the hostages.

In its decision on the Merits of the case,[15] at a time when the situation complained of still persisted the court in its judgment of 24 May, 1980, found that Iran had violated was still violating obligations owed by it to the United States under conventions in force between the two countries and rules of general international law, that the violaion of those obligaitons engaged its responsibility, and that the Iranian Government was bound to secure the immediate release of the hostages, to restore the Embassy premises, and to make reparation for the injury caused to the United States Government. The world court reaffirmed the cardinal importance of the principles of international law governing diplomatic and consular relations.

Reference may also be made here to 1984 incident in England wherein shots were fired from the Libyan People's Bureau situated in London at demonstrators outside the Bureau as a result of which a woman police officer was killed. Despite this, the British Government did not authorise the police to enter the premises of the Bureau. Thus the British Government strictly complied with the principle of inviolability of the premises of

12. Article 41 of the Vienna Convention on Diplomatic Relations, 1961.
13. A. Akvnsanya, "The New Nations and Diplomatic Immunity : Nigeria and the Diplomatic Pouch", I.J.I.L., Vol. 14 (1974), p. 400 at p. 401.
14. Ibid., at p. 401.
15. See case concerning Untied States Diplomatic and Consular Staff in Tehran, L.C.J. Reports (1980) p. 3.

diplomatic mission as laid down by the world court. However, as permitted under international law, the British Government insisted on the recall of the Bureau's staff.

Torture of Indian Diplomat in Pakistan.—On 24th May, 1992, an Indian diplomat, Rajesh Mittal, was tortured and interrogated for nearly seven hours. Later on, he was expelled on charges of obtaining secret documents. It may be noted here that a month prior to this incident, a Pakistani diplomat was expelled from India on espionage charges. Mr. Mittal's torture was probably in retaliations of the said Indian action. Probably in retaliation, the next day, *i.e.*, 25th May, 1992, India declared two Pakistani diplomats, Counsellors Zafarul Hassan and Sayed Fayaz Mahmood Endrabi *persona non gratia, i.e.,* undesirable persons and asked Pakistani High Commission to withdraw them within 48 hours.

When prior to Mittal's incident, India declared Pakistani diplomat *persona non gratia,* it was in conformity with Vienna Convention and rules of international law. But the torture of Indian diplomat by Pakistani intelligence officials is a flagrant violation of the principle of inviolability of the person of diplomatic envoy as enshrined in Article 29 of the Vienna Convention on Diplomatic Relations, 1961. The principle of the inviolability of the person of the diplomatic envoy and the obligation of the receiving State to protect the personnel of the mission has been upheld and reaffirmed by the International Court of Justice in the case of the *United States Diplomatic and Consular Staff in Tehran* (1980).

Subsequent Indian action in retaliation to declare two Pakistani diplomats *persona non gratia* was also in conformity with Vienna Convention on Diplomatic Relations, 1961. On the other hand, Pakistani action torturing Indian diplomat was not only barbaric and primitive but was also a flagrant violation of the rules of international law including Vienna Convention on Diplomatic Relations, 1961 and established norms of international relations.

Time and again such incidents in violation of the Vinna Convention on Diplomatic Relations 1961 has occurred in Pakistan despite India's protests and condemnation of such acts, there has been no abatement of the number of such cases. The only course open to India is either to break diplomatic relations or widely publicize Pakistan's violations of the Convention so as to create world public opinion against Pakistan. The former course does not seen to be feasible in the present state of circumstances. India can adopt the latter course and should make use of her diplomatic missions abroad for this purpose.

(2) *Immunity from criminal jurisdiction of the courts.*—The diplomatic agents also enjoy immunities from criminal jurisdiction of courts.[16] However it is generally believed that they will not violate the provisions of the law of the State where they are appointed. Beside this it may also be noted that there are conditions under which the diplomatic agents may lose their immunities. For example, they may lose the immunity if they are guilty of conspiracy against the State. The example of George Gyllenborg 1712 may be cited in this connection. He was an Ambassador of Sweden in England and he was arrested on the charge of conspiracy against George I, the King of England. If a case is filed in a court against a diplomatic agent, then it is not necessary for him to present himself personally in the court. It is sufficient for him to send the message that he is a representative of a sovereign State and is outside the jurisdiction of the court. But if he does not take this ground and presents himself personally and unconditionally in the court then it will be deemed that he has waived his immunity and he will then be deemed to be within the jurisdiction of the court.

On 6 June 1986, the Defence Secretary of the U.S. said that the U.S. and other countries should consider ending criminal immunity for diplomats who plan or take part in terrorist activities. This suggestion merits serious consideration.

Illustration 1.—The divorced daughter of the Hungarian diplomatic agent in India

16. See Article 31 of the Vienna Convention.

comes to India as a tourist. She causes a car accident and thereby a person is killed. A case is filed against her in India. She claims immunity in her defence.*

In this case her defence will fail because she comes to India as a tourist and not as a member of the family of Hungarian diplomatic agent. Moreover, she cannot successfully claim immunity on the ground of being a member of envoy's family because she has not been living with him and does not belong to his retinue. As pointed out by Oppenheim, "Now-a-days the exemption from civil and criminal jurisdiction of such members of an envoy's family *as live under his roof* is always granted"[17] Only "the wife of the envoy, his children, such as of his near relations as *live within his family and under his roof belong to his retinue.*"[18]

It may also be noted that according to Indian practice members of their families enjoy immunity from jurisdiction only in those cases of acts which are related to their official functions of the mission only.[19] "The mere possession of a diplomatic passport or visa, without actual membership of a diplomatic accredited to the territorial or any other state, is insufficient to confer immunity....."[20]

Illustration 2.—An international conference is being held in State *C* for settlement of a dispute which had led to armed conflict. During the conference the diplomatic envoy *AX* of State *D* shoots and kills the foreign Minister *BY* of State *C*. Will *AX* be entitled to any diplomatic immunity from prosecution in State *C* for murder of *BY*?*

The diplomatic envoy *AX* of State *D* will be entitled to diplomatic immunity from prosecution in State *C* for murder of *BY*. According to Article 31, a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. As pointed out by Edward Collins[21], "If a foreign diplomat violates the laws of the receiving state, the only recourse is to register a diplomatic complaint to his government or in an extreme case to demand his withdrawal as *persona non gratia.*"

Illustration 3.—An Indian *K* is a high official in the French embassy in India. He causes physical injuries to a Frencnman who has come to the embassy for personal work. Will *K* be entitled to diplomatic immunity in Indian Courts against criminal prosecution ?**

K will be entitled to diplomatic immunity in Indian Courts. As held by the International Court of Justice in the *case concerning United States Diplomatic and Consular Staff in Tehran,* "..... the personal safety of diplomats and their freedom from prosecution, are essential, unqualified, and inherent in their representative character and their diplomatic function....."

Since the ambassador possesses jurisdiction upon his officials and the premises of the mission, he can take necessary action in the matter and *K* can be tried in French Courts in accordance with French law. The utmost what the Indian Government can do is to insist on the recall of *K*.

(3) *Immunity from civil jurisdiction.*—The diplomatic agents enjoy immunities from the jurisdiction of civil courts.[22] Suits for recovery of debt or breach of contract cannot be filed against diplomatic agents. However, there are certain exceptions to this rule. Article 31 of the Vienna Convention which recognises this immunity also provides three exceptions. That is to say the rules of immunity from civil and administrative jurisdiction will not apply in the following three cases : A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the

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* P.C.S. (1985) Q. 6 (b).

17. Oppenheim, note 6, at p. 812; emphasis added.
18. Ibid.
19. See also Arun Chaturvedi, "Diplomatic Laws and Indian State Practice", I.J.I.L., Vol. 25 (1985) p. 50 at pp. 64-65.
20. See Starke, note 3, p. 283, note 1.

* Asked in C.S.E. (1989), Q. 7(b).

21. International Law in a Changing World, p. 228.

** P.C.S. (1990) Q. 7(c).

22. See Article 31 of the Vienna Convention.

sending State for the purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; and (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

A distinction is made between members of the diplomatic staff, members of the administrative and technical staff and the members of the service staff for the purposes of privileges and immunities. It is also seen whether an act committed by a member of diplomatic mission was performed in the performance of his duties. For example, if an embassy chauffeur has committed a traffic accident, he will have the immunity only if he was acting in the course of his employment.

Illustration.—(1) Differences arose between the Belgian Military Attache in London and his wife concerning the ownership of the yacht *Amazone*. The wife issued a writ *in rem* for possession, claiming that the yacht had been purchased with her money and that the defendant husband was acting as her agent in respect of the yacht. The husband put in conditional appearance and moved the court to set aside the writ on the ground that he enjoyed diplomatic immunity and that the yacht was owned by him and was in his possession and control.* In this case the husband being a diplomatic agent is entitled to claim immunity and the court cannot exercise jurisdiction over him.

Illustration.—(2) *X*, a foreign diplomat in Delhi has taken a private house on lease. On his failure to pay the rent, the landlord filed a suit to recover the rent as well as possession of his house. *X* pleads diplomatic immunity.** The exemption from the civil jurisdiction of the country is complete in so far as is necessary to secure to the fullest freedom in the performance of their official duties.[23] But it must be stressed that the immunity is for official functions only. So is the case with residence. Immunity is in respect of official residence and not for private residence. According to Article 31 of the Vienna Convention on Diplomatic Relations, the immunity is not available in respect of a real action relating to the private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State.

In the instant problem *X*'s plea for diplomatic immunity will fail because it is no where stated that he holds the house on behalf of the sending State for the purposes of the mission. Moreover, the immunity will not be available to *X* because it is a real action relating to private immovable property situated within the territory of the receiving State, *i.e.*, India. Lastly, under Article 34 (b) of the Vienna Convention, a diplomatic agent is not immune in respect of dues and taxes on private immovable property situated in the territory of the receiving State unless he holds it on behalf of the sending State.

In India suits against foreign states and diplomatic agents are governed by Section 86 of the Civil Procedure Code, 1908. According to this section, for filing of such suits consent of the Central Government is a condition precedent. Immunity conferred by section 86 is not limited to any particular class of suits. A person is 'sued' not only when the plaint is filed but also when the suit remains pending against him. The word 'sued' covers the entire proceeding in an action. Though section 86 is not retrospective yet it refers to all stages of a suit and bars the further progress of a pending suit in absence of sanction even if no sanction was necessary at the time of its institution. A pertinent question, however, arises, are the Indian citizens without remedy when the Central Government refuses to give sanction ? In *Century Twenty One (P) Ltd.* v. *Union of India*[24], a private party gave his residential premises to the Ambassador of Afghanistan under a lease. The Government refused to give consent for filing of the suit. The petitioner filed a writ in the High Court of Delhi under Article 226 of the Constitution for the enforcement of his fundamental right to hold and dispose of property. After making a distinction between

* Asked in I.A.S. (1971), Q. No. 6(b).

** C.S.E. (1985) Q. 6 (b).

23. See Fenwick, note 7, at p. 563.

24. A.I.R. 1987 Delhi 124.

liabilities arising out of sovereign acts of foreign states and liabilities arising out of commercial activities, the court directed the Central Government to accord sanction to the petitioner to sue the Afghan Ambassador for the recovery of arrears of rent.

But in *Harbhajan Singh* v. *Union of India*[25], the Supreme Court's orders were persuasive and not peremptory. In this case, the petitioner claimed recovery of his dues from the Ambassador of Algeria in New Delhi for the building maintenance, reconditioning and renovation work at the Embassy of Algeria in New Delhi. His representation for the recovery of dues having failed to produce the desired result, he requested the Ministry of External Affairs to grant sanction for suing the Algerian Embassy. The Ministry rejected his request in November 1983 saying that it regretted that "permission to the State of Algeria cannot be given on political grounds". Against this, the petitioner filed a writ petition in the Supreme Court under Article 32 of the Constitution. In reply the Government changed its stand and said that "no *prima facie* case was made out and the case was not squarely covered under Section 86, paras (1) and (2) of the Code of Civil Procedure". It was also argued on behalf of the Government that under Section 86, paras (1) and (2) of Code of Civil Procedure the Central Government has "discretion to refuse consent as required under that section". The court noticed the apparent contradiction in the Government's stand and held that it was for the judiciary to adjudicate whether there was a *prima facie* case or not. As regards the refusal of sanction on 'political grounds' the Supreme Court observed that "the political relationship between two countries would be better served and the image of a foreign state be better established if citizen's grievances are judicially investigated. This would be in consonance with human rights." [26]

The Supreme Court further observed : "In this case, the petitioner had a right to carry on the work of maintenance and repairs in this country. The right is granted to him under the Constitution and he trades within the local limits of the courts in India and the foreign state which he wants to sue has immovable property in India situate within the limits of this country. There is a dispute about the petitioner's claim. That dispute has not been judicially determined. It has not been held that the claim of the petitioner is frivolous. In that view of the matter, it appears to us that a foreign state in this country if it fulfils the conditions stipulated in sub-section (2) of Section 86 of the Code would be liable to be sued in this country. That would be in conformity with the principles of international law as recognized as part of our domestic law and in accordance with our Constitution and human rights." [27]

Further, "It is well to bear in mind the two principles on the Sovereign immunity rests. So far as the principle expressed in maxim *par in parem non habet jurisdictionem* is concerned with the status of equality. The other principle on which immunity is based is that of non-intervention in the internal affairs of other states..... In the days of international trade and commerce, international interdependence and international opening of embassies, in granting sanction the growth of a national law in this respect has to be borne in mind. The interpretation of the provisions of the Code of Civil Procedure must be in consonance with the basic principles of the Indian Constitution." [28]

Sabyasachi J. of the Supreme Court delivering the judgment set aside order dated 26 November 1983 and directed the Union of India to reconsider the matter and "explore the possibilities with Algerian authority of mutual settlement either by arbitration or by other accepted legal norms." Further, "The Union of India should pass reasoned order in accordance with the development of international law....."[29]

It has been aptly remarked,[30] "To frustrate their (*i.e.* Indian Citizens) grievances in the name of diplomatic immunities hardly contributes to the dignity of foreign missions.

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25. A.I.R. 1987 S.C. 9.
26. Ibid, at p. 14; per Sabyasachi Mukharji, J (as then he was and who later on became the Chief Justice).
27. Ibid, pp. 13-14.
28. Ibid, pp. 14-15.
29. Ibid, at p. 15.
30. K. Narayana Rao, "Foreign Embassies in India; Claims for Recovery of Rents and Repair Charges" I.J.I.L., Vol. 27 No. 4 (Oct.-December 1987), p. 483 at p. 486.

The Government of India is therefore well advised to evolve a code of conduct to resolve just claims of Indian citizens in this regard and the foreign missions be persuaded to adhere to such a course of action. This course will be in harmony with the conventional obligation on the part of the host country to 'facilitate the acquisition on its territory in accordance with its laws, by the sending state of premises for its mission to assist the latter, in obtaining accommodation in some other ways' and, where necessary it shall also 'assist missions in obtaining accommodation for their members'[31] Implicit in this provision is the concomitant reciprocal obligation on the part of foreign mission in India to pay promptly the rents and other charges relative to the accommodation occupied by them and the members of their staff. Any claim of immunity in this area is definitely derogatory to diplomatic decency."

The fact, however, remains that in the absence of consent of the Central Government as required under Section 86 of the Code of Civil Procedure, suit cannot be filed against the ambassador of a foreign state. Even after obtaining the consent, if a suit has been filed, the ambassador can claim immunity from the jurisdiction of the court and the courts will then be precluded from proceeding against him.

In *Bergman* v. *De Sieys,* [32] the respondent was the French Minister for Bolivia. When he was passing through New York, the appellant started civil process against him. The respondent contended that being a diplomatic representative, he was immune from civil process. Dismissing the appeal the court held, "that a Foreign Minister *en route* either to or from his post in another country, is entitled to innocent passage through a third country, and is also entitled, on the same grounds, whether as a matter of right or of discretion, to the same immunity from the jurisdiction of the courts of the third country that he would have if he were resident therein....." This rule has been adopted in Article 40 of the Vienna Convention which adds that the same shall apply in the case of any members of his family enjoying privileges of immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

It should be remembered that the immunity belongs to the diplomatic envoy and ultimately the State. It is only he or his State who is entitled to claim immunity. For example, *P*, the plaintiff was injured in London by the car of *D*, the defendant (a secretary in the Peruvian Legation), who did not plead his diplomatic immunity in the suit but called on his insurance company to indemnify him against the claim. The insurance company repudiated liability contending that *D* himself was, as a diplomat, under no liability to *P*.* Here the contention of insurance company is not maintainable because the immunity belonged to *D* and he did not claim it and asked insurance company to indemnify *P*. This amounts to waiver of his immunity, since the immunity has been waived by *D*, it cannot be claimed by anyone else on his behalf.

(4) *Immunity regarding residence.*—Yet another immunity enjoyed by the diplomatic agents is regarding their residence. Ordinarily, their residences are regarded inviolable. This immunity has been reaffirmed by the International Court of Justice in *case concerning the United States Diplomatic and Consular Staff in Tehran*[33] which has been discussed earlier [I.C.J. Reports (1980) p. 3). If a person is wanted by police and he is not enjoying any immunity of arrest then the proper course is that the diplomatic agents should hand over such person to the police. Ordinarily, the diplomatic agents resort to such a behaviour.

(5) *Immunity from being presented as witness.*—Diplomatic agents enjoy the immunity from being presented as a witness in the court. They cannot be compelled to come to the court and give evidence in a case howsoever grave the case may be. But if any diplomatic agent himself waives this immunity then he may personally present himself and give evidence. In that case he will be deemed to be within the jurisdiction of the court for it will be considered that he had waived his immunity in this connection.

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31. Vienna Convention on Diplomatic Relations, 1961, Art. 21.
32. (1946) 71 F. supp. 334.
* Asked in I.A.S. (1965), Q. No. 6 (a).
33. I.C.J. Reports (1980) p. 3.

Illustration.—A Canadian is charged for conspiring with some Soviet spies to commit offence under Official Secret Act.

(i) Can certain files of the Military Attache of Soviet Embassy be summoned in Canadian Court ?

(ii) Can an employee of the Soviet Embassy be asked to prove the contents of the files.**

Certain files of the Military Attache of Soviet Embassy cannot be summoned in Canadian Court. Article 22 of the Vienna Convention on Diplomatic Relations, 1961 provides, "The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission". Article 27, paragraph 2, further provides, "The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions."

The employee of the Soviet Embassy cannot be asked to prove the contents of files. Article 31, paragraph 2 of the Vienna Convention provides, "A diplomatic agent is not obliged to give evidence as a witness." Article 37, paragraph 2, further provides that the members of the administrative and technical staff of the mission, together with members of their family of a diplomatic agent forming part of his house hold shall, *if they are not nationals of the receiving state,* enjoy the privileges and immunities specified in Articles 29 to 36. Thus if the said employee is not a national of Canada and the acts performed are not outside the course of his duties,[34] he cannot be asked to prove the contents of files.

(6) *Immunity from taxes dues, etc.*—Under International law the diplomatic agents are immune from the payment of taxes, etc. These immunities are incorporated in Articles 34 and 36 of the Vienna Convention on Diplomatic Relations, 1961. Article 34 provides that a diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, *except,* (a) indirect taxes of a kind which are normally incorporated in the price of goods or services; (b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (c) estate, succession or inheritance duties, levied by the receiving State, subject to the provisions of para 4 of Article 39; (d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State; (e) charges levied for specific services rendered; registration, Court or record fees, mortgages dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23. Article 36 (1) further provides that the receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services on : (a) articles for official use of the mission; (b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.

(7) *Immunity from police rules.*—The diplomatic agents are immune from the police rules of the States which they are appointed. However, by courtesy and for the sake of good relations with the receiving State, they generally follow such rules.

(8) *Right to worship.*—The diplomatic agents enjoy right to worship and no interference can be made in this respect. They are free to follow any religion or perform the religious rituals, ceremonies, etc. in their own way.

(9) *Right to exercise control and jurisdiction over their officers and families.*—The diplomatic agents have right to exercise control and jurisdiction over their officers and families.

(10) *Right to travel freely in territory of the receiving State.*—This new right has, for the first time, been introduced in Art. 26 of the Vienna Convention on Diplomatic Relations,

** P.C.S. (1988), Q. 4(b).

34. Article 37, paragraph 2 of Vienna Convention on Diplomatic Relations, 1961.

1961. Article 26 provides that diplomatic agents can travel in the territory of the receiving State subject, of course, to the condition that they cannot go to the prohibited places or the places which are important from the point of view of the security of the receiving State.

(11) *Freedom of communication for official purpose.*—This freedom has been conferred upon by Art. 27 of the Vienna Convention on the Diplomatic Relations, 1961. This article provides that they have freedom to communicate with their home-State in connection with their functions and duties.

(12) *Immunity from local and military obligations.*—Diplomatic agents are also exempt from local and military obligations. This provision has been incorporated in Art. 35 of the Vienna Convention.

(13) *Immunity from Inspection of Personal baggage.*—Article 36 (2) of the Vienna Convention provides that the personal baggage of a diplomatic agent be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. State inspection shall be conducted only in the presence of the diplomatic agent or of his authorized agent.

(14) *Immunity from Social Security Provisions.*—According to Article 33, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.

Duties of Diplomatic Agents etc.

(1) *Duty to respect laws and regulations of the receiving state.*—According to the Vienna Convention on Diplomatic Relations, 1961, without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving state.[35]

(2) *Duty not to interfere in the Internal Affairs of the State.*—They have a duty not to interfere in the internal affairs of that state.[36]

(3) *Official business to be conducted with or through the Ministry of Foreign Affairs of Receiving State or such other Ministry as may be agreed.*—All official business with the receiving state entrusted to the mission by the sending state shall be conducted with or through the Ministry for Foreign Affairs of the receiving state or such ministry as may be agreed.[37]

(4) *Premises of Mission not to be used in any matter incompatible with the function of the Mission.*—Article 41, paragraph 3 provides, the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the Vienna Convention, 1961 or by other rules of general international law or by special agreements in force between the sending and the receiving state.

(5) *Diplomatic agent not to practise for personal profit any professional or commercial activity.*—According to Article 42 of the Vienna Convention, a diplomatic agent shall not in the receiving state practise for personal profit any professional or commercial activity.

Immunities of the Servants of Diplomatic Agents.—Servants of diplomatic agents also enjoy some immunities. But these immunities are not so vast and important as those of the diplomatic agents. The servants of the diplomatic agents include officials of the embassies, their women, children and other personal servants, messengers, *etc.* These immunities are enjoyed only by those servants who are in some way or the other connected with the office of embassy. The messengers of the embassies are also immune from civil and criminal jurisdiction of the courts. The immunities of these servants depend much upon their functions. Moreover, they are based upon the principles

35. Article 41, paragraph 1.
36. Ibid.
37. Article 41, paragraph 2.

of reciprocity. That is to say, if a State provides certain immunities and rights to certain classes of officials of the embassies then the other State, on the basis of reciprocity, also grants those facilities and immunities to the officials of the embassy of the other State.

The exemption in respect of social security provisions referred above also applies to private servants who are in the sole employment of diplomatic agent if they fulfil two conditions (a) that they are not nationals of or permanently resident in the receiving State; and (b) that they are covered by the social security provisions which may be in force in the sending State or a third State. This exemption does not preclude voluntary participation in the social security system of the receiving State, provided that such participation is permitted by that State. According to Article 37, private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by that receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

The privileges and immunities are of the diplomatic representatives and if they waive them, the immunities of their servants also come to an end. In *R.* v. *Kent,*[38] Kent was a code clerk in American embassy in England. He was dismissed from service on the charge of stealing two documents. On the same day, the American Ambassador waived immunities in this respect. Kent was arrested and tried. Kent argued that being a servant of a diplomatic envoy he was immune from the jurisdiction of the court. The court dismissed his contention and sentenced him seven years of imprisonment. The court observed that the privileges and immunities are of the diplomatic envoys and finally of the State concerned which has accredited him. The privileges and immunities end when the diplomatic envoy waives them.

Reference may be made here to Section 5 of the Diplomatic Relations (Vienna Convention) Act, 1972, which was passed by the Parliament of India to give effect to the Vienna Convention on Diplomatic Relations, 1961 and to provide for matters connected therewith. Section 5 provides : "For the purposes of Article 32 of the Convention set out in the schedule, a waiver by the head of the mission of any State or any person for the time being performing his functions shall be deemed to be a waiver by that State".

Can Diplomatic Agent waive or lose his immunity?—As pointed out earlier, the diplomatic agents enjoy a number of immunities and privileges. The question, however, may arise whether a diplomatic agent may waive his immunity or he may lose these immunities under certain circumstances. There are certain circumstances under which a diplomatic agent may lose his immunities. For example, if a case is filed against a diplomatic agent, he is entitled to refuse to go to the court and may simply send the message that he enjoys the immunity from the jurisdiction of the court. But if he does not do so and presents himself unconditionally in the court and allows the case to proceed, he may lose his immunity. Similarly, if a diplomatic agent files a suit in a court it will mean that he has waived his immunity and has accepted to be under the jurisdiction of the court. Thus he automatically loses his immunities. The diplomatic agents enjoy the immunity from being presented as a witness in any court. But if a diplomatic agent waives this immunity and presents himself as a witness then he will lose his immunity. Similarly, the diplomatic agents enjoy the immunity from payment of taxes.

Article 32 of the Vienna Convention requires that waiver must always be express. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from involving immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim. It is, however, provided that the waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the

38. (1941) 1 K.B. 454.

judgment, for which a separate waiver shall be necessary. Thus at the time of the execution of the judgment of court, the diplomatic agent may successfully claim his immunity.

Consuls.*—Consuls are the representatives of their States but they are not deemed to be diplomatic agent.[39] The function of these Consuls is generally to look after the commercial and trade interests of their countries. Since their main function is to look after the commercial interests of their countries, they are certainly treated to be far below in status than the diplomatic agents. But these consuls perform very important functions so far as trade and commerce between States are concerned. In the modern period, the importance of trade and commerce is constantly increasing because of the inter-dependence of the States and because of the specialisation of certain States in certain goods and things. The activities of the Consuls have increased manifold during the last 50 years. It was, therefore, thought desirable to modify the law relating to Consuls. A convention was, therefore, adopted at Vienna on 24th April, 1963. In this convention it has been made clear that the matters in which there is no express provision in the convention, will continue to be determined by the customary rules of International law. Thus at present the bulk of International law relating to Consuls has been incorporated in Vienna Convention, 1963, and the remaining is still in the form of customs.

Classification of Consuls.—(1) *Consul-General.*—Consul-General is of the first category of Consuls and is generally appointed in main commercial cities and generally heads the Consul office.

(2) *Consuls*—Consuls occupy the second place, that is, below Consul-General and are either appointed at small cities or they assist the work of Consul-General.

(3) *Vice-Consuls.*—Vice-Consuls are below the Consuls and in some States they are appointed by Consul-General.

(4) *Consul Agents.*—They are of the last category and are appointed either by Consul-General or in some States even by Consul.

The Consuls are often appointed by the head of the States and the receiving State accepts them by issuing a "Letter of Premission", namely, 'Exequator'.

Functions of Consuls.—Following are the four functions of Consuls : (1) They protect commercial interests of their States. (2) They supervise and look after the shipping, *etc.*of their country, (3) They also look after the interests of their citizens and assist them in cases and for getting passport, etc. (4) They also perform certain other functions for the citizens of their States, such as, to testify signatures, registration of marriage, birth, death, etc.

Rights and Immunities of Consuls.—As pointed out earlier, Consuls are not regarded as diplomatic agents hence they do not enjoy those immunities and privileges which are enjoyed by the diplomatic agents. But ordinarily they are conferred upon special immunities and privileges by bilateral treaty which generally grants them immunity from the jurisdiction of the local courts. It is also generally agreed that they perform the functions on behalf of their States and, therefore, the local courts cannot proceed against them unless and until they seek prior permission from the Government. Hence it is clear that although the Consuls are as a matter of right not entitled to enjoy those immunities and privileges which the diplomatic agents enjoy, yet by bilateral treaties and on the reciprocal basis, they are conferred upon almost the similar privileges and immunities. "The modern tendency of States is to amalgamate their diplomatic and cosular services and it is a matter of frequent occurrence to find representatives of States occupying, interchangeably or concurrently diplomatic and consular posts. Under the impact of this tendency, the present difference between diplomatic and consul privileges may gradually be narrowed." [40]

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* See also for P.C.S. (1988), Q. 4 (a).

39. See J.G. Starke, Introduction to International Law, Tenth Edition (1989) p. 429.

40. Ibid, at p. 432; For detailed study see Satyadeva Bedi, "Inviolability of Consular Premises," I.J.I.L., Vol. 15 (1975), p. 93; Daniel D. Nsereko, "The Concept as a Defendant : His Amenability to the Jurisdiction of the Receiving State", I.J.I.L., Vol. 15 (1975), p. 333.

Reference may be made here to a recent case, namely, *Legrand case (Germany v. United States of America)* decided by the International Court of Justice on 27th June, 2001. The facts of this case are as follows :

On 7th January, 1982, Karl La Grand and Walter La Grand were arrested in the United States by law enforcement officers on suspicion of having been involved the same day in an attempted armed bank robbery in Marana, Arizona, in the course of which the bank manager was murdered and another bank employee seriously injured. They were subsequently tried before the Superior Court of Pima County, Arizona, which on 17th February, 1984, convicted them both of murder in the first degree attempted murder in the first degree, attempted armed robbery and two courts of kidnapping on 14th December, 1984, each was sentenced to death for first degree murder and to concurrent sentences of imprisonment for the other charges.

Walter La Grand and Karl La Grand both were born in Germany in 1962 and 1963 respectively and were German nationals. In 1967, when they were still young children, they with their mother to take up permanent residence in the United States. They returned to Germany only once, for a period of about six months in 1974. Although they lived in the U.S. for most of their lives, and became the adoptive children of a United States national, they remained at all times German nationals, and never acquired the nationality of the United States. However, the U. S. emphasized that both had the demeanour and speech of Americans rather than Germans that neither was known to have spoken German and that they appeared in all respects to be native citizens of the U.S.

Germany claimed that the U.S., by not informing Karl and Walter La Grand without delay following their arrest of heir rights under Article 36, sub-paragraph 1(b) of the Vienna Convention on consular relations, and by depriving Germany of the possibility of rendering of consular assistance, which ultimately resulted in the execution of Karl and Walter La Grand, violated its international legal obligations to Germany in its own right and in its right of diplomatic protection of its nationals under Articles 5 and 36 paragraph of the said convention. Germany further contended that the criminal liability imposed on Karl and Walter La Grand in violation of international legal obligations is void, and claimed that Germany is entitled to reparation.

At all material times, Germany as well as the United States were parties to both the Vienna Convention on consular relations and the optional Protocol to the convention. Article 36, paragraph 1(b) of the Vienna convention provides that

"if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of the rights under this sub-paragraph.

It was not disputed that at the time the La Grands were convicted and sentenced the competent United States authorities had failed to provide the La Grands with the information required by this provision of the Vienna Convention, and had not been informed the relevant German Consular post of the La Grand's arrest. The U.S. conceded that the competent authorities failed to do so, even after becoming aware that the La Grands were German nationals and not United States Nationals and admitted that the U.S. had therefore violated its obligations under this provision of the Vienna Convention. However there was some dispute between the parties as to the time at which the competent authorities in the U.S. became aware of the fact that the La Grands were German nationals.

On 24th February, 1999 certain last-minute Federal Court proceedings brought by Karl La Grand ultimately proved to be unsuccessful. In the course of these proceedings the U. S. Court of Appeals, Ninth circuit, held again that the issue of failure of consular notification to be procedurally defaulted, Karl La Grand was executed later the same day.

On 2nd March, 1999, the day before the scheduled date of execution of Walter La Grand, at 7.30 P.M. (the Hague time), Germany filed in the Registry of the world court the

application instituting the present proceedings against the U.S. accompanied by a request for the following measures :

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

In an order on 3rd March, 1999 the International Court of Justice found that the circumstances required it to indicate, as a matter of greatest urgency and without any other proceedings, provisional measures in accordance with Article 41 of its statute and with Article 75, paragraph of its Rules (I.C.J. Reports 1999, p. 9, para 26) it indicated provisional measures in the following terms :

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

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

Earlier, *i.e.* on 2nd March, 1999, the Arizona Board of Executive Clemency met to consider the case of Walter Le Grand. It recommended against a commutation of his death sentence, but recommended that the Governor of Arizona granted a 60-day reprieve having regard to the application filed by Germany in the International Court of Justice. Nevertheless, the Governor of Arizona decided, "in the interest of justice and both the victims in mind", to allow the execution of Walter La Grand to go forward as scheduled.

On 3rd March, 1999, *i.e.* the date on which the world court indicated provisional measures, the proceedings were also instituted in the United States Supreme Court by Walter La Grand. These proceedings, were decided against him. Later that Walter La Grand was executed.

The U.S. acknowledged that there was a breach of the U.S. obligation to inform the La Grand brothers that they could ask that a German consular post be notified of their arrest and detention.

After hearing the case on merits, the International Court of Justice held :

"that, by not informing Karl and Walter La Grand without delay following their arrest of their rights under Article 36, paragraph 1(b), of the convention, and by thereby depriving the Federal Republic of Germany of the possibility, in a timely fashion, to render the assistance provided for by the convention to the individuals concerned, the United States of America breached its obligations to the Federal Republic of Germany and to the La Grand brothers under Article 36, paragraph 1;"

The world court also found "that, by not permitting the review and reconsideration, in the light of the rights set forth in the convention, of the convictions and sentences of La Grand brothers after the violations referred to above had been established, the United States of America breached its obligation to the Federal Republic of Germany and to the La Grand Brothers under Article 36, paragraph 2, of the convention,"

The court also found that "..... by failing to take all measures at its disposal to ensure that Walter La Grand was not executed pending the final decision of the International Court of Justice in the case, the United States of America breached the obligation incumbent upon it under order indicating provisional measures issued by the court on 3rd March, 1999,".

The Court unanimously took "note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b), of the convention and finds that this commitment must be regarded as meeting the Federal Republic of Germany request for a general assurance of non-repetition.

Finally, the Court found "that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1(b), of the Convention having been respected, the United States of America by means of its own choosing shall allow the review and reconsideration of the conviction sentence by taking account of the violation of the rights set forth in that convention."

Slashing of strength of Indian Consulate-General at Karachi from 62 to 20.—On 29th December, 1992, Pakistan asked the Government of India to reduce to 20 the strength of its 62 member Consulate-General in Karachi. According to Pakistan, this has been done with a view to make the number of staff same in Consulate-General Office of both the countries. Pakistani action may be unfriendly but is not violative of rules of international law. Later on, *i.e,* on 19th October, 1993, Pakistan declared a diplomat and three staff-members of the Indian Consulate-General in Karachi as *persona non gratia* and asked them to leave Pakistan within two weeks, thus bringing down virtually the number of diplomats and staff members to 16.

Closure of Pakistani Consulate Office in Bombay.—On 20th March, 1994, Pakistan announced closure of its Consulate Office in Bombay. According to Pakistani Government spokesman, this action was taken due to "non-cooperative and negative attitude of the Indian authorities." It is significant to note that this decision came close on the heels of Islamabad's move to "defer" the resolution on Kashmir for a year before the United Nations Human Rights Commission (UNHRC) in Geneva at the request of China, Iran and 15 other countries. One of the bone of contentions between two countries has been the question of procurement of Jinnah House on lease for the use of the Consulate-General. Nevertheless, Pakistani action is in line with its general attitude towards India and its sustained efforts to build barriers that can prevent communication with India. In a near future, Pakistan may ask India to close its Karachi Consulate as a balancing measure. Even in such a case it may be an unfriendly act but in no way will be violative of international law.[41]

Termination of Diplomatic Mission.—A diplomatic mission may be terminated through any of the following ways :

(1) *Recall of Envoy.*—If the appointing State recalls the envoy, the diplomatic mission comes to an end. Such a step is taken only when relations between the States deteriorate and there are very remote chances of their improving.

(2) *Notification in regard to the end of Envoys functions.*—As provided under Art. 43 of the Vienna Convention, the appointing State may end the functions of envoy through a notification.[42]

(3) *On the request of the receiving State.*—The termination of diplomatic mission may also take place on the request of receiving State. This step is also taken when on account of some reasons the relations between the States are strained.

(4) *By delivery of passport.*—Delivery of passport is yet another way of the termination of the diplomatic mission. If a diplomatic envoy is handed over the passport it means that he has become an undesirable person in the receiving State and should go back to his country immediately. Such a step is taken only when either war has broken out in between the two States or some very grave situation has arisen.

(5) *Persona non-gratia.*—The receiving State is entitled to declare at any time that a diplomatic agent has become *persona non-gratia,* i.e., undesirable person. This declaration terminates the diplomatic mission immediately. This provision finds mention in Articles 9 and 43 of the Vienna Convention. Thus International law permits a State to declare any diplomatic agent *persona non-gratia* at any time even without giving reasons for the same. Article 9 of the Vienna Convention provides the following :

"1. The receiving state may at any time and without having to explain its decision, notify the sending state that the head of the mission or any member of the diplomatic mission is *persona non-gratia* or that any other member of the staff of the mission is not acceptable. In any such case the sending state shall, as appropriate, either recall the

41. See also Naulilaa Incident, RIAA, 1012, 1019 referred below under the heading 'Persona non-gratia'.
42. Article 43 provides: The function of a diplomatic agent comes to an end, inter alia: (a) on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end; (b) on notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission.

person concerned or terminate his functions with the mission. A person may be declared *non gratia* or not acceptable before arriving in the territory of the receiving state.

2. If the sending state refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving state may refuse to recognize the person concerned as a member of the mission."

Reference may be made here to the *Naulilaa Incident,*[43] wherein the Tribunal held, "the expulsion of a consular agent, of whom a State has cause to complain, might constitute an 'unfriendly' act, giving rise to diplomatic representations, but it cannot, when done in the exercise of the sovereignty of a neutral State, constitute an act contrary to International law justifying, under the title of reprisals, an attack accompanied by all the rigours of war."

(6) *End of the object of mission.*—The diplomatic mission comes to an end when the object of the mission has been achieved.

(7) *Expiration of Letter of Credence*—When a diplomatic agent has been appointed for a fixed period then his mission comes to an end after the expiration of that fixed period.

In addition to the above conditions and circumstances diplomatic mission may also end on account of the following reasons :

(1) By death; (2) Removal from post ; (3) Breaking of diplomatic relations ; (4) Constitutional changes; (5) Revolutionary changes in Government ; (6) End of the work of mission by some Conference ; (7) War ; and (8) Change in the post of diplomatic agent.

Can a State refuse to accept a Diplomatic Agent ?—The receiving State may refuse to accept a diplomatic agent on the following grounds:—

(1) If the appointment of a particular person as diplomatic agent in a particular State is harmful for the receiving State.

(2) If the diplomatic agent has by his declaration or conduct done some enemical thing.

(3) Yet another reason for the refusal of the acceptance of a particular person as a diplomatic agent is his being a citizen of the receiving State. The reason for this is quite obvious. No State will like that its own citizen should be given certain privileges and immunities over and above other citizens.

(4) If he is not acceptable to the receiving state as provided under Article 9 as stated above.

Ordinarily the above reasons may be for the refusal of the acceptance of diplomatic agent by the receiving State. It may, however, be noted that it is not necessary that the receiving State should give reasons for its refusal to accept a particular person as a diplomatic agent. The practice of the States shows that in this connection the States are completely independent and everything depends upon their discretion. International law does not impose any obligation in this connection. Ordinarily the practice of the States is that before appointing a particular person as diplomatic envoy in any State its receiving State is first consulted and only when the receiving State gives its concent to accept that person, then the appointment is made. So, ordinarily, the question of refusal does not arise. Such a question may arise only when certain special circumstances take place or when prior consultation in regard to the appointment of a particular person as a diplomatic envoy has not been made.

Special missions of permanent nature.—In addition to the permanent embassies and Consuls, sometimes States appoint diplomatic agents for special missions. The appointment of such agents is always after the prior consent of the receiving State. In this connection a Convention was adopted by the General Assembly of the United Nations in 1969. This convention is called the *Convention on Special Missions,* 1969. This Convention is mainly based on the Convention on Diplomatic Relations, 1961 and Convention of Consuls, 1963. The diplomatic agents appointed on special missions enjoy almost the same immunities and privileges which the diplomatic agents in general enjoy subject, however to the following changes :

43. 2 R.I.A.A., 1012, 1019.

(1) Two or more States may send a special mission in another State. The functions of these agents is connected with the common interest of those States.
(2) The prior consent of the receiving State is necessary for the appointment of special mission.
(3) Prior consent in regard to the situation of the special mission is also necessary.
(4) The diplomatic agents appointed for special missions also enjoy limited freedom to travel in the receiving State, that is, they have freedom to travel in the receiving State only those areas in which their functions warrant.
(5) If such agents are involved in accidents, such accidents, etc. are not deemed to be outside the civil and criminal jurisdiction of the receiving State. The receiving State permits certain immunities to them in respect of travelling to certain areas, but for this they have to give prior intimation to the Government of the receiving State.

In other matters their immunities and privileges are almost the same as those of the diplomatic agents.[44] The Convention on Special Missions will come into force after 22 States have ratified or acceded to it.

Representatives appointed in International Organisations.—After the establishment of the United Nations the establishment of permanent missions of the member-States to the United Nations has also become a normal feature. It was, therefore, desirable and expedient to have definite rules of international law regarding them. Keeping in view, the need for having definite rules of international law in this connection, the General Assembly of the United Nations requested the International Law Commission in 1959 to study and consider this matter. The International Law Commission considered and studied this matter for several years and after much labour had suggested the incorporation of certain rules of International law in this connection. The suggestions of the International Law Commission were based on the Vienna Convention on the Diplomatic Relations, 1961. These rules are mainly for three types of representatives in international organisations—(1) Permanent representatives in international organisation; (2) Observers of non-members of international organisation ; and (3) Representatives attending conferences called by International Organisations. These representatives enjoy more or less the same privileges and immunities as are enjoyed by diplomatic agents.

The United Nations Conference on the Representation of States in their Relations of International Organisations was held in Vienna from 4 February to 14th March, 1975. It adopted a new International convention to govern the status of functions of Governments missions and delegations to international organizations as well as their representation at conferences convened by such organization.[45] The adoption of the convention on the Representation of States in their Relations with International organization of a Universal Character completes a cycle of treaties that have resulted from the work of the International Law Commission in codifying principles of diplomatic relations. Those efforts have led to the Vienna Convention on Diplomatic Relations and on Consular Relations and to the Convention on Special Missions 1975.[46] Vienna Convention on the Representations of State in Their Relation with International Organisation of a Universal Character will enter into force after 35 States have ratified or acceded to it.

International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, 1973*.—The question of special protection for diplomatic agents and other internationally protected persons assumed urgency because of the many cases of

44. See also Franciszek Przetacznik, "Jurisdictional Immunity of the Members of Special Mission", I.J.I.L., Vol. 11 (1971), p. 593.
45. U.N. Monthly Chronicle, Vol. XII, No. 4 (April 1976), p. 41.
46. Ibid, at p. 42.
* See also for P.C.S. (1980) Q. 6(a).

kidnapping of officials of foreign States and even of their assassination by private persons.[47] Hence through Resolution (XXVI) the General Assembly requested the International Law Commission to study the protection, inviolability of diplomatic agents and other persons entitled to special protection under International Law and prepare a set of draft articles dealing with offences committed against such persons. Thereupon the International Law Commission adopted certain draft articles.[48] The report of the Commission formed the basis of the United Nations Conference in 1973 wherein the Convention on the prevention and punishment of crimes against internationally Protected Persons, including Diplomatic Agents. After having received requisite ratifications, the Convention entered into force on 20th February, 1977. By August 1983, 59 States have expressed their consent to be bound by the Convention. The Convention will go a long way to deter the commission of offences against internationally protected persons.

For the purposes of the convention, an Internationally protected person" means : (a) a Head of State, including any member of a collegial body performing the functions of a Head of State under the Convention of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him ; (b) any representative or official of a State or any official or other agent of an international organization of an inter-governmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.[49]

The more important other provisions of the convention are following :

(1) The International Commission of : (a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person ; (b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty ; (c) a threat to commit any such attack; (d) an attempt to commit any such attack; and (e) an act constituting participation as an accomplice in any such attack shall be made by each State Party a crime under its internal law. Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature. It is further provided that these provisions in no way derogate from the obligations of States Parties under international law to take all appropriate measures to prevent other attack on the person, freedom or dignity of an internationally protected person.[50]

(2) Each State Party shall take such measures as (may be necessary) to establish its jurisdiction over the crimes mentioned above in the following cases : (a) when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State ; (b) when the alleged offender is national of that State; and (c) when the crime is committed against an internationally protected person who enjoys his status by virtue of functions which he exercises on behalf of that State. Further, each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him (pursuant to provisions of this convention) to any of the States mentioned above.[51]

(3) Upon being satisfied that the circumstances so warrant, the State Party in whose territory the alleged offender is present shall take the appropriate

47. See Franciszek Prazetacznik, "Prevention and Punishment of Crimes Against Internationally Protectd Persons". I.J.I.L., Vol. 3 (1973), p. 65.

48. See U.N. Report of the International Law Commission on the Work of its Twenty-fourth Session, 1972 Doc. A/8710, pp. 232-257.

49. Article 1 of the Convention.

50. Article 2.

51. Article 3.

measures under its internal law so as to ensure his presence for the purpose of prosecution or extradition.[52]

(4) The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.[53]

(5) To the extent that the crimes set forth in Article 2 (*i.e.* mentioned above in point No. 1) are not listed as extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them. Further, each of the crimes shall be treated, for the purpose of extradition between State Parties, 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 paragraph 1 of Article 3 (*i.e.* as noted above in point No. 2).[54]

(6) States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the crimes set forth in Article 2, including the supply of all evidence at their disposal necessary for the proceedings. However this provision shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.[55]

(7) The State Party where an alleged offender is prosecuted shall communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other State Parties.[56]

(8) The provisions of this Convention shall not affect the application of the treaties on Asylum, in force at the date of the adoption of this Convention, as between the States which are parties to those Treaties; but a State Party to this Convention may not invoke those Treaties with respect to another State Party to this Convention which is not a party to those Treaties.[57]

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52. Article 6.
53. Article 7.
54. Article 8.
55. Article 10.
56. Article 11.
57. Article 12.

CHAPTER 29

INTERNATIONAL TREATIES

Definition and meaning of the term "International Treaties."—In the modern period International treaties have been the first and foremost source of International law. Whenever, an International Court has to decide an international dispute, its first endeavour is to find out whether there is an International treaty on the point or not. In case there is an international treaty governing the matter under dispute, the decision of the court is based on the provisions of the treaty. International treaties occupy the same significant position in the field of International law as the legislation occupies in the municipal law.

In the view of Prof. Oppenheim, "International treaties are agreements of a contractual character between States or Organisations of States creating legal rights and treaties." [1] According to Prof. Schwarzenberger, "Treaties are agreements between subjects of International law creating a binding obligation in International law." According to Starke, "In nearly all the cases the object of the treaty is to impose binding obligations on the States who are parties to it.[2] The term "treaty" has also been defined in the Vienna Convention on the Law of Treaties, 1969. Article 2(1)(a) of the Convention defines treaty as "an International agreement concluded between States in written form and governed by international law." This definition can be criticised on the ground that it does include international organisation.[2] The definition given by Prof. Schwarzenberger as noted above much better and more exhaustive.[3]

It may be noted here that in 1982 the International Commission has adopted draft articles on a Convention on the Law of Treaties between States and International Organizations. In 1982, the General Assembly requested the Secretary General to submit a report. Later on the General Assembly decided that an International Convention should be concluded on the basis of draft articles adopted by the International Commission.

Basis of the binding force of the International Treaties : Pacta Sunt Servanda.*—There is a great controversy amongst the jurists in regard to the binding force of International treaty. In the view of Italian jurist, Anzilotti, the binding force of International treaty is on account of the fundamental principle known as *Pacta Sunt Servanda*. According to this principle, States are bound to fulfil in good faith the obligations assumed by them under treaties. In this connection Prof. Oppenheim has remarked, "The question why international treaties have binding force always was and is still much disputed. Many writers find the binding force of treaties in the law of the nature, others in religious and moral principles; others again in the self-restraint exercised by

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1. L. Oppenheim, International Law, Vol. I, Eighth Edition p. 877 : see also J.E.S. Fawcett, The Law of Nations (London, 1968), p. 89.
2. J.G. Starke, Introduction to International Law, Tenth Edition (1989) p. 438; See also K.I. Igweike, "The Definition and Scope of the Treaty under International Law", I.J.I.L., Vol. 28 (1988) p. 249 at pp. 250-251.
3. This definition seems to be narrow (as compared to the definition of Schwarzenberger noted above) because it is conspicuous by its absence of any reference to International Organizations. It is now generally agreed that International Organizations are legal persons and can enter into agreements with other International Organizations, States or private individually. Probably due to this Article 5 of the Vienna Convention on the Law of Treaties, 1969 provides that the present Convention applies to any treaty which is the constituent of an International Organization and to any treaty adopted within an International Organization without prejudice to any relevant rules of the organization. Article 3 further provides that the fact that present Convention does not apply to International Agreements concluded between States and other subjects of International Law or between such other subjects of International law or to International agreements not in the written form shall not affect—(a) the legal force of such agreements; (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under International law independently of the Convention; and (c) the application of the Convention to the relations of States between themselves under international agreements to which other subjects of International law are parties.

* See also for I.A.S. (1974), Q. No. 5, (a) ; I.A.S. (1967), Q. No. 6(b).

States in becoming a party to the treaty. Some assert that it is a will of the contracting parties which gives binding force to their treaties. The correct answer is probably that the treaties are legally binding because there exists a customary rule of International law, that treaties are biding. The binding effect of that rule rests in the last resort on the fundamental assumption which is neither consensual nor necessarily legal, of the objective binding force of International law.[4] This assumption is frequently expressed by the form of principle, *pacta sunt servanda*. "The norm *pacta sunt servanda* which constituted since times immemorial the axiom postulate and categorical imperative of the science of International law and thus has very rarely been denied on principle, is undoubtedly a positive norm of international law." [5] Few rules for the ordinary society have such a deep moral and religious influence as the principle of the sanctity of contracts : *pacta sunt servanda."* [6] "The principle of sanctity of contracts is an essential condition of life of any social community. The life of international community is based not only on relations between States but also to an ever-increasing degree of relations between States and foreign corporations or foreign individuals. No economic relations between States and foreign corporations can exist without the principle of *pacta sunt servanda."* [7]

In his dissenting opinion in 1958 *case concerning the application of the Convention of 1902 governing the Guardianship of Infants (Netherland* v. *Sweden*) the Maxican Judge Cardova of the International Court of Justice referred the rule as "a time honoured and basic principle." In its advisory opinion in 1922 *on the Designation of Workers Delegates to the International Labour Conference,* the Permanent Court of International Justice emphasized that the contractual obligation was not merely "moral obligation", but was "an obligation by which, in law, the parties are bound to one another." Later on the International Court of Justice in *its Advisory opinion of 1951 on the Reservation to the Genocide Convention*[8] stated that, "None of the contracting parties is entitled to frustrate or impair by means of unilateral decisions or particular agreements, the object and *raison de etre* of the Convention."

Thus "perhaps the most fundamental principle of International law and surely the basic principle of treaties is *pacta sunt servanda."* [9] The principle of *pacta sunt servanda* has also been incorporated in the Vienna Convention on the law of Treaties, 1969. Preamble of the Vienna Convention notes that the principle of *pacta sunt servanda* rule is universally recognized. Article 26 of the said Convention provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith.[10] But "It (*i.e. pacta sunt servanda*) means nothing more than that the basis for the validity of International agreements and therefore for international law itself is the postulate that international agreements are binding, and it may seem as if little had been gained in this way. The realization that international customary law does not rest on agreements and that the text *pacta sunt servanda* is itself a rule of customary law, led to new formulations of the basic norm.[11] Kelsen himself has now decided on a formulation which takes account of usage as the fact which is origin of the rules of International law. 'States ought to behave as they have customarily behaved." [12] Moreover, as pointed out by a Soviet author[13]

4. Oppenheim, see supra note 1, at pp. 880-81.
5. Josef L. Kunz, "The Meaning and the Range of the Norm Pacta Sunt Servanda", A.J.I.L., Vol. 39 (1945), p. 181.
6. Hans Wehberg, "Pacta Sunt Servanda", A.J.I.L., Vol. 35 (1959), p. 775.
7. Ibid., at p. 786.
8. I.C.J. Rep. (1951), p. 15.
9. Edward Collins, International Law in a Changing World (1969), p. 289.
10. Article 27 further provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46. According to Article 46, a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provisions of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
11. Torsten Gihl, The Legal Charter and Sources of International Law (Stockholm 1957) p. 62.
12. Kelsen, Theory of Law and State, p. 369.
13. V.M. Shurshalov, "Juridical content of the Principle Pacta Sunt Servanda and its Realization in International Relations", Soviet Yearbook of International Law (1958), p. 166, reprinted in Edward Collins (Ed.), International Law in a Changing World, pp. 323-25.

the maxim *pacta sunt servanda* does not have an absolute importance and hence it cannot be applied to every treaty. For example, it will not apply to unequal treaties. Thus. "..... *pacta sunt servanda* embraces only lawfully concluded treaties, and only in relation to them can it play a progressive role." [14] One may not accept the view expressed above by the Soviet author for the concept of unequal treaties is still fluid and has not been finally adopted but it must be admitted that *pacta sunt servanda* is not an absolute principle for it fails to explain the binding force of customary rules of international law.

Vienna Convention on the Law of Treaties, 1969.—In view of the significance of the Law of Treaties, the International Law Commission decided in 1945 to attempt its codification in Draft Convention on the Law of Treaties. The Commission completed its work in 1966. On 23rd May, 1969, the United Nations Conference on the Law of Treaties adopted the Vienna Convention on the Law of Treaties. Forty-four States have so far expressed their consent to be bound by the Convention. As remarked by I.M. Sinclair,[15] "The Convention without question, a major work of codification of progressive development comparable in most to the Geneva Convention on the Law of Sea and augurs well for the movements towards the progressive development of International law and codification." [16] Article 84 of the Convention provided that the Convention shall enter into force on the thirtieth day following the deposit of the thirty-fifth instrument of ratification or accession. This requirement was fulfilled on 27th January, 1980 and consequently the Convention is in force since then.

Classification of Treaties.—McNair has classified the treaties under the following categories : (1) Treaties having the character of conveyances ; (2) Treaty contracts ; (3) Law-making treaties; and (4) other treaties, such as, the treaty of Universal Postal Union. The famous jurist Vattel has also classified treaties into four categories. But Prof. Oppenheim[17] has classified treaties into the two categories : (1) Law-making treaties ; and (2) The Treaties for their purposes.

Parties competent to make a treaty.—Generally, only Sovereign States are competent to make a treaty. In accordance with the principle of sovereignty sovereign States have unlimited powers to make treaties. Those States which are not completely sovereign are not competent to make it. Mostly the representatives of the sovereign States first sign the treaties but the treaties do not bind their Governments or States until they ratify it. In view of the developing and changing character of International law, International organisations may also make treaties. Thus, "Generally only States which fulfil the requirements of Statehood, or International organisations can be parties to treaties." [18]

Requirement of Free Consent in respect of International Treaties.—It is a fundamental principle of law of contracts that there should be free consent of the parties. Consent procured by coercion or fraud makes the contract viodable. In International treaties also, ordinarily free consent is required. But this rule has not been strictly applied in the field of International law. In case of international treaties this rule is very flexible. In past a number of International treaties were made through coercion or fear yet they were considered binding. For example, the conquered State imposed its conditions on the vanquished State and compelled it to sign it. Treaties entered into after

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14. In view of these reasons Shurshalvo has defined the content of the principle in the following words : "The State in accordance with the principle pacta sunt servanda, is obliged scrupulously and in full measure to carry out international treaties lawfully concluded and which do not contradict existing international law. Rejection of treaty obligations can be justified only in the following exceptional cases : (a) when a revolution or a national liberation struggle gives rise to new social structure and a new State authority, which is entitled to denounce the humiliating and unacceptable treaties of the deposed government; (b) when one of counter agents is no longer an international law subject, as a result of merging of several States into a single State or the division of one State into two or three ; (c) when the obligations are associated with the territory over which the corresponding State has lost territorial supremacy."
15. I.M. Sinclair, "Vienna Convention on the Law of Treaties", I.C.L.Q., Vol. 19 (1970), p. 47.
16. For detailed study of the Vienna Convention on the Law of Treaties, see Richard D. Kearney and Robert E. Dalton, "The Treaty on Treaties", A.J.I.L., Vol. 64 (1970), pp. 495-561.
17. Oppenheim, see supra note 1, at pp. 878-879.
18. Starke, see supra note 2, at p. 444.

the First and Second World War are glaring examples of such types of treaties. According to Grotius, such treaties shall be valid. In view of another jurist (Hall) such treaty shall be valid only when its object is valid.

The Vienna Convention on the Law of Treaties, 1969, has ended all ambiguities in this connection and has provided definite rules. Preamble of the convention notes that the principles of free consent and good faith are universally recognized. Article 48 provides that a State may involve an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty. But this provision will not apply if the State in question constituted by its own conduct to the error or "if the circumstances were such as to put that State on notice of a possible error. However an error relating to the wording of the text of a treaty does not apply its validity. As regards fraud, Article 49 provides that if a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State the State may involve the fraud as invalidating its consent to be bound by the treaty. So will be the case regarding corruption of a representative of a State. Article 50 provides that if the expression of a State's consent to be bound by a treaty has been procured through the corruption of representative directly or indirectly by another negotiating State, that State may invoke such corruption as invalidating its consent to be bound by the treaty. As regards coercion of a representative of a State, Article 51 of the Convention provides that the expression of a State's consent to be bound by treaty which has been procured by the coercion of its representatives through acts or threats directed against him shall be without any legal effect. Article 52 further provides : A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations. In the *Fisheries Jurisdiction* case[19] the International Court of Justice had also occasion to consider the validity of treaties concluded under coercion. The opinion of the court in this connection has been aptly summarised by a writer[20] in the following words :

"1. Under the principles of contemporary International law, which found their expression in the Charter of the United Nations and the Vienna Convention on the Law of Treaties, a treaty concluded under the threat or use of force is void.
2. The allegation that a given treaty is concluded under coercion is an accusation of a very serious nature, and it cannot be based on the grounds of a vague general charge, unfortified by evidence in its support.
3. By reason of the seriousness of this accusation, the question whether a given treaty is vitiated by coercion should be decided by an International body, preferably the International Court of Justice.".

Various modes by which a State may express its consent to be bound by a treaty.*—The consent of a state to be bound by a tready may be expressed by following means[21] :

(1) By Signature.—The consent of a state to be bound by a treaty is expressed by the signature of its representative when : (a) the treaty provides that the signature shall have that effect; (b) it is otherwise established that the negotiating states were agreed that signatures should have that effect; or (c) the intention of the state to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.[22]

(2) By an Exchange of Instruments constituting a treaty.—The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when : (a) the instruments provide that their exchange shall have that effect ; or (b) it is

19. I.C.J. Reports (1973), pp. 13 and 49. In this case the court rejected the charge of coercion or duress.
20. Franciszek Przetacznik. "The validity of Treaties concluded under Coercion". I.J.I.L., Vol. 15 (1975), p. 173 at p. 194.
* C.S.F. (1980), Q. 7(b) ; P.C.S. (1983), Q. 4(a).
21. Article 11 of the Vienna Convention on the Law of Treaties, 1969.
22. Article 12.

otherwise established that those States were agreed that the exchange of instruments should have that effect.[23]

(3) **By Ratification, acceptance or approval.**—The consent of a state to be bound is expressed by ratification when : (a) the treaty so provides for such consent to be expressed by means of ratification ; (b) it is otherwise established that the negotiating States were agreed that ratification should be required ; (c) the representative of the State has signed the treaty subject to ratification ; or (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.[24]

(4) **By Accession.**—The consent of a State to be bound by a treaty is expressed by accession when : (a) the treaty provides that such consent may be expressed by that State by means of accession ; (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by means of accession ; or (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.[25]

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon : (a) their exchange between the contracting states ; (b) their deposit with the depositary ; or (c) their notification to the contracting States or to the depositary, if so agreed.[26]

(5) **By any other means if so agreed.**—In addition to the above means, the consent of a State to be bound by a treaty may also be expressed by any other means if so agreed. But such a consent will be effective only if it is made clear to which of the provisions the consent relates.[27]

It may be noted at the end, as provided by Article 18 of the Vienna Convention, 1969, that a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when : (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty ; or (b) it has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Invalidity of Treaties : Can provisions of International law regarding competence to conclude treaties be invoked ?*—Article 46 of the Vienna Convention on the Law of Treaties provides that a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance. It is further provided that a violation is manifest if it would be objectively evident to any State conducting itself in the matters in accordance with normal practice and in good faith. Article 47 further provides that if the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to specific restriction his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

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23. Article 13.
24. Article 14.
25. Article 15.
26. Article 16.
27. Article 17.

* See also for I.A.S. (1978), Q. 3 ; C.S.E. (1982), Q. (a) and (b).

As regards observation of treaties, Article 27 provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46.

Formation of Treaties.*—Following are the main steps in the formation of treaty :

(1) *Accrediting of persons on behalf of contracting parties.*—The first step in the formation of treaty is the accrediting of persons on behalf of the contracting parties. States authorise some representatives to represent them for the negotiation, adoption and signature, etc. of a treaty. Unless these representatives are accredited or authorised, they cannot participate in the Conference.

(2) *Negotiation and adoption.*—The accredited persons of contracting parties enter into negotiations for the adoption of the treaty. After the matters are settled, the treaty is adopted.

(3) *Signatures.*—After negotiation, next important step is the signature of the accredited representatives of the contracting parties. The authorized representatives of the State parties sign the treaty on behalf of their States. It may, however, be noted that the treaty does not become binding until it is ratified by the respective States.

(4) *Ratification.*—Ratification is a very important step in the formation of a treaty. Ordinarily, unless and until a treaty is ratified it does not bind the States concerned. By ratification we mean that the head of State or the State Government by conforming to the provisions of the Constitution confirms or approves the signature made by their authorised representatives on the treaty. The State parties become bound by the treaty after ratification.[28]

(5) *Accession or Adhesion.*—The practice of the States shows that those States which have not signed the treaties may also accept it later on. This is called accession. A treaty becomes a law only after it has been ratified by the prescribed number of State parties. Even after the prescribed number of State parties have signed, the other States may also accept or adhere to that treaty. This is called adhesion.

(6) *Entry into force.*—The entry into force depends upon the provisions of the treaty. Some treaties enter into force immediately after the signature. But the treaty in which ratification is necessary enter into force only after they have been ratified by the prescribed number of State parties. Thus treaty becomes binding law only among the States which have signed and ratified. It is a fundamental principle of International law that only parties to a treaty are bound by that treaty. This is often expressed by the maxim *'pacta terties nec nocent nec prosunt.*[29]

(7) *Registration and Publication.*** . —After a treaty comes into force its registration and publication are also ordinarily considered essential. Article 102 of the United Nations Charter provides that the registration and publication of every International treaty entered into by the members is essential. It is made clear in this Article that if an International treaty or agreement is not registered, it cannot be invoked before any organ of the United Nations. Thus International treaties or agreements should be got registered and published. This provision, however, does not mean that if the treaty is not registered and published it will not come into force or become invalid. In fact Art. 102 means that if treaty is not registered in the United Nations, it cannot be invoked before any organ of the United Nations. 'The object of Article 102 was to prevent the practice of secret agreements between States, and to make it possible for the people of democratic States to repudiate such treaties when publicly disclosed." [30]

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*. See also for P.C.S. (1987), Q. 5 ; See also matter discussed below under the heading "Reservation".

28. The Law Relating to Ratification of a Treaty has been discussed in a little greater detail later on in this Chapter.

29. This maxim has also been explained in detail later on in this Chapter.

** See also C.S.E. (1986) Q 6 (a) (ii).

30. Starke, see supra note 2 at p. 487. He further adds : It has been suggested that Article 102 gives Member States a discretion in deciding whether or not to register treaties, by electing not to register, voluntarily to incur the penalty of unenforceability of the instrument, but the better view, adopted by the Sixth Committee (Legal) of the United Nations General Assembly in 1947, is that it imposes a binding obligation to effect registration," Ibid ; See also R.B. Lillich, "The obligation to Register Treaties and International Agreements with United Nations," A.J.I.L. (1971), p. 771.

(8) *Application and Enforcement.*—The last step of the formation of treaty is its application and enforcement. After a treaty is ratified, published and registered, it is applied and enforced.

Ratification of Treaty.*—As pointed out earlier ratification is important step in the formation of a treaty. Ordinarily, without ratification a treaty cannot become binding. Ratification means that the head of the State or its Government approves (or ratifies) the signatures of its authorised representative.[31] Article 2 of the Vienna Convention on the Law of Treaty, 1969, says : Ratification is the International act. ..... whereby a State establishes on the International plain its consent to be bound by a treaty." It is generally agreed that ratification becomes effective from the day when it is made. It has no retroactive effect. Some jurists are of the view that without ratification a treaty has no value in law.[32] This view might have been correct in past, but in the present period this view has undergone significant changes. In the modern period, it depends upon the intentions of the parties as to whether or not the treaty will have the force of law. According to Article 14 of the Vienna Convention on the Law of Treaties, 1969, a State becomes bound by treaty when it ratifies it positively or it becomes bound by the treaty under the following circumstances :

(1) When there is a provision in the treaty to this effect.

(2) When the parties express the view that the ratification is necessary. In such a condition treaty becomes enforceable as a law only after ratification.

(3) When the treaty signed under the condition that ratification is necessary.

(4) When the intention of ratification is evident from the circumstances and talks during negotiations.

Following are the reasons for ratification of treaty :

(1) Through the process of ratification, the States get an opportunity to consider in detail the treaties which have been signed by their representatives.

(2) On the basis of the principle of sovereignty each State is entitled to keep itself away from the treaty or repudiate it if it so desires.

(3) Sometimes the provisions of treaties require some change in the State law. Hence the time between the signature and ratification is utilized for bringing about changes in the State law.

(4) Lastly, on the basis of democratic principles, the Government of the States get opportunity to respect public opinion in respect of treaties or to get the consent of the Parliament.[33]

It has been pointed out earlier in the Chapter relating to Relationship between State Law and International Law that some treaties require the consent of Parliament before they are enforced in State law. For example, in Britain there is no such rule that all the treaties should be ratified before they are enforced. But some treaties require the consent of the Parliament before they are enforced.

Is there a duty to ratify ?—On the basis of the principle of sovereignty, sovereign States possess unlimited powers in respect of treaties. If a treaty has been signed by the authorised representative of State, it does not create binding obligations on the State concerned nor the State concerned is bound to ratify such a treaty. In other words, we may say international law does not impose any duty upon the States to ratify those treaties which have been signed by their representatives. Nor it is necessary for the States to explain the reason for not ratifying the treaty. In fact, it depends upon the sweet-will of the State concerned whether or not to ratify a treaty.

Consequences of non-ratification of a treaty.—Ordinarily State parties are not bound by treaties until they ratify them. Hence ratification of a treaty is very

* See also for P.C.S. (1974) Q. No. 7; P.C.S. (1964), Q. No. 5; P.C.S. (1994) Q. 7 (b).

31. Starke, see supra note 2 at p. 460.

32. The Soviet Union held the view that without ratification a treaty can create no legal effects. See for example, Kazimierz Grezybowski, Soviet Public International Law (1970), p. 422.

33. Starke, see supra note 2 at p. 455.

important. However, it may be noted that it is not necessary in all cases for a treaty to be binding without ratification. As pointed out earlier, much depends upon the intention of the State parties. If a State party has intended that the ratification was essential then the treaty becomes enforceable in law only after ratification. But if ratification is not essential then under some special circumstances, the provision of treaty may create binding force. In *Mavrommatis Palestine Concession case,*[34] Judge J.B. Moore, made it clear that the principle that a treaty becomes effective only after ratification has become very old. It may, therefore, be concluded that so far as the binding effect of a treaty is concerned, much depends upon the intention of the parties. Ordinarily, practice of States shows that they do not regard themselves bound by a treaty unless and until they ratify it. So far as the application of an international treaty in the municipal field is concerned, it is applied only after it is ratified by the State concerned.

Reservation*.—There is a great controversy in regard to the reservation in the modern period. "There are few aspects of the Law of Treaties which have generated greater controversy in past 20 years than the question of Reservation to multilateral conventions.[35] The term "reservation" has been defined in Article 2(1) of the Vienna Convention on the Law of Treaties, 1969. It runs as follows:—" Reservations means a unilateral statement ..... made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby, it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to the State".

So far as bilateral treaties are concerned, there are no difficulties because if either party refuses to accept the reservation, the treaty comes to an end. But the same is not true in case of multi-lateral treaties. Multi-lateral treaties present conflicting legal problems. At one time it was generally agreed that reservation could be allowed only when the treaty expressly made a provision in this regard. But the modern practice of States shows that a State is entitled to make reservation in a treaty and the relations of those States which do not oppose the said reservation are governed by the treaty. In the advisory opinion given in 1951, on the *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide*[36] the International Court of Justice held :

(a) that a State which has made and maintained a reservation which has been objected by one or more of the parties to the convention but not by others can be regarded as a party to the convention if the Reservation is compatible with the object and purpose of the Convention ;

(b) that if a party to the treaty objects to a Reservation which it considers to be incompatible with the object and purpose of treaty, it can consider that the reserving State is not a party to the treaty ; and

(c) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the treaty it could consider that the Reserving State is a party to the treaty.

The Court was asked by the General Assembly in November 1950, a series of questions as to the position of a State which attached reservations to the signature of the multilateral convention on Genocide if other States, signatories of the same convention objected to these reservations. In its advisory opinion of 28 May, 1951, the Court said that even if a convention contained no article on the subject of reservation, it did not follow that they were prohibited. The character of the convention, its purposes and its provisions must be taken into account. It was the compatibility of the reservation with the purpose of the convention which must furnish the criterion of the attitude of the State making the reservation, and the State which objected thereto. It may be noted here that the court was adjudicating only on the specific case referred to it, namely, the Convention on the Prevention and Punishment of the Crime of Genoicide, 1948.

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34. Pub. P.C.I.J., (1924) Series A No. 2.
* I.A.S. (1976), Q. NO. 2 ; I.A.S. (1974), Q. NO. 5 (b) ; I.A.S. (1970), Q. NO. 10(b) ; I.A.S. (1969), Q. NO. 6 ; I.A.S. (1966), Q. NO. 6 ; I.A.S. (1973), Q. NO. 10, P.C.S. (1987), Q. 5.
35. I.M. Sinclair, "Vienna Conference on the Law of Treaties", I.C.L.Q., Vol. 19, (1970), p. 47 at p. 53 ; See also G.G. Fenwick, "Reservations to Multilateral Treaties", A.J.I.L. (1951), p. 145.
36. I.C.J. Rep. (1951) p. 10.

"Although the opinion of the International Court of Justice was limited to the case of the Genocide Convention it must be considered as having a distinct bearing upon the question of reservation in general." [37] Further, "While the opinion fails to give a working legal rule, it gives expression to the view, which is gaining ground that the principle of the universal consent to reservation is not well suited to the requirements of international intercourse characterised by multi-lateral conventions of a general character, and that it is impracticable and unwarranted to give one State the right to prevent another State from becoming a party to the convention although all or most contracting parties considered the reservation appended to it be compatible with the object of convention." [38] "The fact that the International Community of States has more than doubled in the past 20 years (now it has trebled in the last 20 years) has made increasingly difficult to draft the general multilateral convention which will re-concile all interests and view points. This fact alone argue in favour of some degree of liberality with respect to the making of reservations. The flexibility of Convention Regime does accordingly have some advantages for the future." [39] "The position of the Soviet members of the International Law Commission, which debated the law of treaties, was that reservations were necessary institution because treaties should be the expression of the will of the parties." [40]

The Vienna Convention adopts the view that modern practice along with the compatibility doctrine expressed by International Court of Justice should be generally accepted. The two basic provisions on reservations are Article 19 on formulation and Article 20 on acceptance of and objection to reservations. The former incorporates the rule in the Genocide case ; the latter the flexible approach endorsed by the General Assembly.[41] Article 19, which deals with formulation of reservations provides : A State may, when signing, ratifying, accepting, approving or acceding to the treaty, formulate a reservation unless, (a) the reservation is prohibited by the treaty ; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made ; or (c) in cases not falling under (a) and (b) noted above, the reservation is incompatible with the object and purpose of the treaty. As regards acceptance and objection to reservations, Article 20 provides the following :

1. "A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of negotiating States and the object and purpose of a treaty that the application of the treaty is in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organisation and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides—

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37. Oppenheim, see supra note 1, at p. 915.
38. Ibid, at pp. 915-916; Oppenheim has suggested : "A more rational solution would seem to be to confer the power to decide on the admissibility of a reservation either upon some international, judicial or administrative authority or upon the contracting parties themselves. These could act either through an organ created by them or by arriving at a decision themselves in the sense that a reservation should be regarded as admissible unless rejected by a substantial majority of the contracting parties", ibid.
39. I.M. Sinclair, See Supra note 35, at p. 60 ; The International Law Commission had come to the conclusion that frequently a number of States have found it possible to participate in the treaty subject to one or more reservations. It added, "when today the number of negotiating States may be upwards of one hundred States (now 159) with very diverse cultural, economic and political conditions, it seems necessary to assume that the power to make reservations without the risk of being totally excluded by the objection of one or even of a few States may be a factor in promoting a more general acceptance of multilateral treaties. "[I.L.C. Report U.N. General Assembly, 21st Session, official Records, Supp. 9 at 38, para 12 of the Commentary].
40. Kazimierz Grzybowski, Soviet Public International Law (A.W. Sijthoff, Leyden, 1970), p. 427.
41. Richard D. Kearney and Robert E. Dalton, "The Treaty on Treaties", A.J.I.L., Vol. 64 (1970) p. 495 at p. 511 ; For General Assembly approach see Schachter, "The Question of Treaty Reservations at the 1959 General Assembly", A.J.I.L., Vol. 54 (1960) p. 372.

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to the other State if or when the treaty is in force for those States ;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State ;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

As regards the legal effects of reservations and of objections to reservations, Article 21 provides that a reservation established with regard to another party in accordance with Articles 19, 20 and 23[42] : (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation ; and (b) modifies those provisions to the same extent for that other party in its relations with reserving State. The reservation does not modify the provisions of the treaty for other parties to the treaty *inter se.* Further, when a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation. The Vienna Convention also provides for the withdrawal of reservations as well as of objections to reservations. Article 22 provides that unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of State which has not accepted the reservation is not required for its withdrawal. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

"Although the difficulty of defining 'compatibility among other problems will cause the matter of reservation to multi-lateral treaties to remain a source of doctrinal controversy, it would seem that, on the whole, the Commissions' approach serves the International community need for wide acceptance of norms contained in the increasing number of law-making treaties".[43] "The convention regime constitutes a half-way house between the traditional unanimity rule (which the U.K. upheld in the past) and the absolute sovereignty doctrine supported by the Soviet Union. The traditional unanimity rule is acknowledged for the category of restricted multi-lateral treaties, that is to say, treaties concluded between a limited number of States. But for the rest, the convention regime incorporates by and large the flexible Pan-American doctrine on reservation".[44]

Interpretation of treaties.*—Following are the general principles of interpretation of treaties :—

(1) *Grammatical interpretation.*—In the first instance, the words and phrases are considered according to their plain and natural meaning. This is called grammatical interpretation of treaty.

(2) *Object and content of treaty.*—In case the words and phrases are ambiguous, they are considered keeping in view the general object of the treaty and its context.

(3) *Reasonable and consistent.*—It is a general principle of law of the treaties that treaties should be interpreted so as to give reasonable and consistent meaning of the phrases and words.

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42. Article 23 provides procedure regarding reservations.
43. International Law in a Changing World (1969) p. 289.
44. I.M. Sinclair, see supra note 35, at p. 60.

* See also for I.A.S. (1972), Q. No. 5.

(4) *Principle of effectiveness.*—Yet another general principle of the law of treaties is that the treaties are interpreted in such a way as may prove to be most effective and useful.

(5) *Recourse to extrinsic material.*—There is a controversy in regard to the recourse of extrinsic material. International Law Commission proposed that resort may be had to extrinsic material for interpretation of the treaty. Hence it was of the view that recourse may be had to the preparatory work of the treaty and the circumstances of its conclusion. According to Article 31(1) of the Vienna Convention of the Law of Treaties, 1969, treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the term of treaty in their context and in the light of its object and purpose." Article 31(2) further provides : The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes : (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty ; and (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. According to Article 31 (3), following shall be taken into account, together with context : (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions ; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation and (c) any relevant rules of International law applicable in the relations between the parties. Finally sub-section (4) of section 31 adds that a special meaning shall be given to a term if it is established that the parties so intended.

The famous jurist Bynkershoek has aptly remarked, "The Civil law protects the contracts of individual ; good faith the contracts of princes. If you destroy good faith you destroy the mutual intercourse of princes and destroy even international law itself".[45] It seems reasonable and appropriate that the treaties should be performed in good faith. But as remarked by Mc Dougal, the basic approach of the International Law Commission in placing prime emphasis on the text was, "exercise in primitive and potentially destructive formalism." [46]

Even after the completion of the treaty, the practice of the States may make evident the intention to amend the treaty. If it is clear from the practice of the State or if the provisions of the treaties are applied in a different way then such a behaviour or practice may become basis for the interpretation of the treaties. Consequently, it becomes necessary to take into consideration these facts while interpreting the treaty. Thus, "when a treaty has been commonly applied by the parties in a manner different from that contemplated at the time of its conclusion, such subsequent practice and the new expectations connected with it may properly form the basis of interpretation." [47] However, in assessing the significance of the decisions taken by the Conference in relation to Treaty Interpretation, attention should be fixed on the fact that all the three Articles (that is, Articles 31, 32 and 33 in the text of the Convention) were adopted by an unanimous vote. This represents a clear affirmation by the International Community that, for the purpose of treaty interpretation, prime emphasis must be placed on the text of a treaty as representing the authentic expression of the will of the parties".[48] But as provided in Article 32, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application to Article 31, or to determine the meaning when the interpretation according to Article 31 : (a) leaves the meaning ambiguous or obscure ;

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45. See Alfred Verdoss, "Jus Dispositivum and Jus Cogens in International Law" I.J.I.L., Vol. 60 (1966), p. 63, note 56.
46. See McDougal, "The International Law Commission's Draft Articles upon Interpretation; Textually Redivivus", A.J.I.L., Vol. 61 (1967), p. 992; see also Rosenne, "Interpretation of Treaties in the Restatement and the International Law Commission's Draft Article : A comparison", Col. J., Transnat'l Law, Vol. 5 (1966), p. 205 at p. 221.
47. Oliver, J. Lissizyn, International Law Today and Tomorrow (Dobbs Ferry, N.Y. Oceana, 1955), p. 29.
48. I.M. Sinclair see supra note 35, at p. 65.

or (b) leads to a result which is manifestly absurd or unreasonable. As remarked by eminent writers,[49] "The adoption by the Conference of two articles (*i.e.*, Articles 31 and 32) which the United States viewed as somewhat archaic and unduly rigid does not seriously weaken the value of the convention. It seems unlikely that foreign offices will cease to take into consideration the preparatory work and the circumstances of the conclusion of treaties when faced with problems of treaty interpretation, or that international tribunal will be less disposed to consult Article 32 sources in determining questions of treaty interpretation." [50]

Amendment and Modification of Treaties.*—The general rule regarding the amendment of treaties is that a treaty may be amended by agreement between the parties. This rule is contained in Article 39 of Vienna Convention on the Law of Treaties. As regards amendment of multilateral treaties, Article 40 provides the following :

1. Unless the treaty otherwise provide, the amendment of multilateral treaties shall be governed by the following paragraphs.
2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in :
   (a) the decision as to the action to be taken in regard to such proposal ;
   (b) the negotiation and conclusion of any agreement for the amendment of the treaty.
3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.
4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement.
5. Any state which becomes a party to the treaty after the entry into force of the amending agreement shall failing an expression of a different intention by that state :
   (a) be considered as a party to the treaty as amended, and
   (b) be considered as a party to the unamending treaty in relation to any party to the treaty not bound by the amending agreement.

As regards agreements to modify multilateral treaties between certain of the parties only, Article 41 provides the following :

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if —
   (a) the possibility of such a modification is provided for by the treaty ; or
   (b) the modification in question is not prohibited by the treaty and ;
      (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligation ;
      (ii) does not relate to a provision, derogation from which is incompatible with the effective execution, of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Termination of Treaties.[51]**—Treaties may be terminated by (1) operation of law; or (2) by act of the State parties.

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49. Richard D. Kearney and Robert E. Dalton, "The Treaty on Treaties", A.J.I.L., Vol. 64 (1970), p. 495 at p. 520.
50. Cf. Gross, "Treaty Interpretation; The Proper Role of an International Tribunal", 1969 Proceedings, American Society of International Law, pp. 108, 117.

* See also for C.S.E. (1981) Q. 7(a), see especially Article 41.

51. For detailed study see S.E. Nahlik, "The Grounds of Invalidity and Termination of Treaties", A.J.I.L., (1971), p. 736.

** See also for P.C.S. (1977), Q. No. 9(b); C.S.E. (1984), Q. 7 ; P.C.S. (1990) Q. 10(d).

*By operation of law.*** —Termination of treaties by operation of law may be made in the following cases :

(a) *Extinction of either party to a bilateral treaty.*—Extinction of either party to bilateral treaty may amount to the termination of the treaty.

(b) *Outbreak of war.*—According to the old view, the outbreak of war between the parties resulted in the termination of the treaties. But in the modern period all treaties do not end at the outbreak of war. In regard to the operation of treaties at the outbreak of war, Starke has pointed out the following :—

(i) Treaties, between belligerent States for which general, political and good relations are essential, cease at the outbreak of war.

(ii) Treaties relating to completed situations, such as fixation of boundaries remain unaffected by war.

(iii) Treaties dealing with the rules of war remain in force and remain binding upon the parties. Hague Convention of 1899 and 1907 and four Geneva Conventions of 1949 are the glaring examples of such types of the treaties.

(iv) Some multilateral treaties relating to health, service, protection of industrial property, etc., do not completely end at the outbreak of war. They simply remain suspended and revived at the end of war.

(v) Sometimes there is an express provision in the treaty as to what would happen in case of the outbreak of the war.

We may, therefore, conclude that according to modern practice all treaties do not end at the outbreak of war. Some treaties are completely terminated, others remain unaffected whereas some others are simply suspended during the war.

(c) *A material breach of bilateral treaty.*—A material breach of a bilateral treaty by one party entitles the other party to terminate treaty.

(d) *Impossibility of performance.*—The impossibility of the performance of a treaty also is a valid ground for the termination of treaty. This provision is contained in Article 61 of the Vienna Convention on Law of Treaties, 1969.

(e) *Rebus sic stantibus.*—*Rebus sic stantibus* is also a ground for the termination of treaty. The maxim *rebus sic stantibus* means that when the fundamental circumstances under which the treaty was entered into change then this change entitles the other party to terminate the treaty. A detailed discussion of this will be taken up later on in this Chapter. At this place it is sufficient to note that if the fundamental circumstances under which a treaty is made, change, then this change may become a valid ground for the termination of treaties.

(f) *Expiration of fixed term.*—If the treaty has been concluded for a fixed period, the expiration of the fixed term will automatically terminate the treaty.

(g) *Successive Denunciation.*—Successive denunciation may also lead to the termination of a treaty. The provision relating to this is contained in Article 55 of the Vienna Convention on the Law of Treaties, 1969.

(h) *Jus Cogens*[52] *of Emergence of new Peremtory Norm of General International law.*—According to Article 64 of the Vienna Convention, if a new peremptory norm of general International law emerges any existing treaty which is in conflict with that norm becomes void and terminates. A little detailed discussion of *jus cogens* will be made later on in this chapter.

Consequences of the Invalidity, Termination or Suspension of the Operation of a Treaty**.—Article 69 of the Vienna Convention on the Law of Treaties 1969 provides that a treaty the invalidity of which is established under the convention is void. If acts have nevertheless been performed in reliance of such a treaty : (a) each party may require any other party to establish as far as possible in their mutual relations the

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* See also for P.C.S (1983), Q. 4(b).

52. Jus Cogens has been discussed in detail later on in this Chapter.

** See also for C.S.E. (1984), Q. 7.

position that would have existed if the acts had not been performed ; (b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

As regards consequences of the termination of a treaty Article 70, paragraph 1 provides that unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present convention :

(a) releases the parties from any obligation further to preform the treaty ; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. Paragraph 2 of Article 70 further provided that if a state denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that state and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71 of the convention deals with the consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law. It provides that in the case of a treaty which is void under Article 53[53], the parties shall : (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law, and (b) bring their mutual relations into conformity with the peremptory norm of general international law. In the case of a treaty which becomes void and terminates under Article 64, the termination of the treaty : (a) releases the parties from any obligation further to perform the treaty.

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination ; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general International law.

As regards consequences of suspension of the operation of a treaty, the Vienna Convention provides that unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the convention : (a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension, (b) does not otherwise affect the legal relations between the parties established by the treaty. Further during the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.[54]

Important Maxims relating to Law of Treaties

Following are the three important maxims relating to the Law of Treaties :

(1) *"Pacta terties nec nocent nec prosunt"* ; (2) *Rebus sic stantibus* ; and (3) *Pacta sunt servanda.*

(1) Pacta terties nee nocent.*—It is a fundamental principle of the Law of Contract that only parties to a contract are bound by the contract. Similarly it is a general principle of International Treaty that only parties to an International Treaty are bound by it. This principle is expressed in a Latin maxim called *"pacta terties nec nocent nec prosunt"*. This principle has been incorporated in Article 34 of the Vienna Convention on the Law of Treaties, 1969. This principle is subject to certain exceptions which are contained in Articles 35 to 38. They are :

(1) Treaties which concern the right of the third party. This provision finds mention in Article 36 of the Vienna Convention.[55] Through this provision even third party can be conferred some rights under the treaty.

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53. For Art. 53, see matter discussed under the heading "Jus Cogens" in this Chapter.
54. Article 72.

* See also for I.A.S. (1977), Q. No. 2 ; C.S.E. (1988), Q. 5(d); P.C.S. (1990) Q. 6(b).

55. Article 36 provides the following ; (1) A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not included unless the treaty otherwise provides. (2) A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

(2) Multilateral treaties which declare the established customary international law may bind even non-parties.[56]

(3) Multilateral treaties which create new rules of international law may also bind non-parties. For example, Article 2(6) of the United Nations Charter provides that non-member shall act in accordance with the purposes of the United Nations Charter.

(4) Some multilateral treaties have universal application. In such treaties it may be provided that they will be applicable even on non-parties. The United Nations Charter is such type of international treaty.

(5) When a treaty imposes some obligation on a third party and third State party accepts that obligation, then such a third party becomes bound by that treaty.[57]

As regards revocation or modification of obligations or rights of third States, Article 37 provides that when an obligation has arisen for a third State in conformity with Article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed. It is further provided that when a right has arisen for a third State in conformity with article 36, the right may not be invoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

"In the light of the impact of the above-mentioned Articles 34 to 38 of the Vienna Convention upon the admissibility of third party rights and obligations, the practical course for States not wishing, in any treaty concluded by them, to confer such rights or impose such obligations is to stipulate expressly against this result, while a non-party state, unwilling to be saddled with an external treaty obligation, should ensure that neither by its conduct nor by its declarations has it assented to imposition of the obligation." [58]

As provided under Article 38 of the Vienna Convention and noted above, even non-parties may be bound by a treaty if it creates customary rule of International law. It has, therefore, been remarked : "A treaty does not create rights or obligations for a third State without its consent but the rules set forth in a treaty may become binding upon a non-contracting State as customary rules of International law."* One of the important examples of such a treaty is the 1958 Geneva Convention on the High Seas. Even non-parties to the Convention are bound by the freedoms of the High Seas enunciated in it and other provisions. The preamble of Convention says that the provisions incorporated in the Convention are "generally declaratory of established principles of International law." Similarly sovereignty over air space and sovereignty over continental shelf to the extent of exploitation of resources are as a result of customary rules generated by Chicago Convention on International Civil Aviation, 1944 (Art. 1) and 1958 Geneva Convention on the continental shelf[59] respectively. In practice even non-parties to these Conventions follow these provisions and consider them binding. In *North Sea Continental Shelf Cases*,[60] the International Court of Justice expressed the view that provisions in treaties can generate Customary Law and may be of norm-creating character." [61]

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56. Article 38 of the Vienna Convention provides : Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of International law recognized as such.
57. Article 35 provides : An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in wirting. But when an obligation has arisen for a third State in conformity with Article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed. Similarly, when a right has arisen for a third State in conformity with Article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.
58. Starke, note 2, at p. 446.
* Asked in I.A.S. (1977), Q. No. 2.
59. Article 2 of the Convention.
60. I.C.J. Rep. (1969), p. 3.
61. Ibid, at p. 43 : The jurisprudence of the International Court of Justice has been discussed under the heading "Generation by Treaty of Customary Rules of International Law" in Chapter on Sources of International Law.

(2) Rebus sic stantibus*—*Rebus sic stantibus* is also considered to be a ground for avoidance or termination of treaty. The maxim *rebus sic stantibus* means that if the fundamental or material circumstances under which a treaty is concluded change, then this change becomes a basis for the avoidance or change or termination of a treaty. "It is widely recognized that if fundamental changes in the circumstances upon which a treaty rests take place, these changes may be invoked as a ground for the termination of the treaty. The principle, known generally as the doctrine of *clausula rebus sic stantibus* is based on the assumption that there is an 'implied clause in every treaty that provides that the agreement is binding only so long as the material circumstances on which it rests remain unchanged." [62] Some writers have expressed the opinion that this principle as the basis for the termination of the treaty, creates very difficult problem. However, "There may be situations in which the continued application of a treaty may be both contrary to the shared expectations on the parties and an intolerable burden on them." [63]

Criticism.—Some jurists have criticized the principle of *rebus sic stantibus.* According to Starke, "The *rebus sic stantibus* doctrine is one of the enigmas of International law. Its exact scope and application are uncertain, practice is inconsistent and International law tribunals feel shy of committing themselves to the pronouncements or decision involving it." It may be noted that this observation does not find place in the last three editions of Starke's book. The reason for this is that since Article 62 of the Vienna Convention on the Law of Treaties, 1969, provides for fundamental change of circumstances as one of the grounds for termination of treaties and determines the scope and limit of the application of this ground, *rebus sic stantibus* is no more an enigma of international law. Prof. Oppenheim has also pointed out, "The operation of the doctrine is necessarily limited for the simple reason that it is the function of the law to enforce contracts of treaties even when they become burdensome for the party bound by them.[64] He has further added that this explains why in almost all cases in which the doctrine *rebus sic stantibus* has been invoked before an International Tribunal, the latter while not rejecting it in principle, has refused to admit that it can be applied to the case before it. He cites example of the case *Free Zones of Upper Savoy and District of Gex,*[65] wherein the Permanent Court of International Justice decided in 1932 that "the changes upon which France rely has no reference to the whole body of circumstances which the contracting parties had in mind at the time the free zones were created and hence they could not be taken into consideration."

The Report of the International Law Commission on which the Vienna Convention is based, rejected the theory of an implied clause or term and preferred the doctrine of fundamental change upon grounds of equity and justice as the basis of the doctrine. It is also significant to note that Article 62 does not at all mention the words *rebus sic stantibus.* "Soviet reluctance to use the principle of *rebus sic stantibus* as justification for denouncing treaties lies in the fact that as a legal argument *clausula rebus sic stantibus* is a weak argument, while a charge of violations of treaties by the other side is legalistically, at least impeachable.[66] The famous American jurist Cheney Cheney Hyde, the author of "International Law, as chiefly interpreted and applied by the United States" has rejected the term *rebus sic stantibus* "unhelpful". Lord McNair in his book on the 'Law of Treaties' has regarded the term as essentially one of the intention of the parties 'implied conditions' or 'disappearance' of the *"raison de'etre"* of the treaty.

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* See also for I.A.S. (1974), Q. No. 6 (b); I.A.S. (1971), Q. No. 9; I.A.S. (1963), Q. No. 4; I.A.S. (1961), Q. No. 6(a) ; P.C.S. (1976), Q. No. 10 (d), P.C.S. (1982), Q. 4 and 7 (b) ; P.C.S. (1984), Q. 10 (b) ; C.S.E. (1996) Q. 8(b)

62. Edward Collins, International Law in a Changing World (1969), p. 292.
63. Oliver, J. Lissitzyn, "Treaties and Changed Circumstances (Rebus sic Stantibus)" A.J.I.L., Vol. 61 (1967), p. 895 at p. 898 ; He further adds : "The dangers for the stability of treaties of the International Community residing in the doctrine of rebus sic stantibus can be exaggerated. The idea that it can play a significant role in unleading determined law-breakers and aggressors such as Hitler is fantasic. Great political issues are not decided by International law," Ibid, at p. 915.
64. L. Oppenheim, International Law, Vol. 1, English Edition, p. 940.
65. P.C.I.J. (1932) series A/B No. 46.
66. Kazimierz Grzybowski, Soviet Public International Law (1970), p. 441.

Conclusion.—As pointed out earlier, it is a fundamental principle of the Law of Treaties that once the parties enter into a treaty, they are bound by its provisions. This principle is expressed in the time honoured maxim or rule known as *"pacta sunt servanda"*. But, "The *Pacta sunt servanda* means the inviolability, not of the unchangeability of treaties. The revision of treaties is neither exception nor in contradiction with the norm of *pacta sunt servanda*." [67] According to Prof. Brierly, "In short, the clausula is a rule of construction which secures that a reasonable effect shall be given rather than an unreasonable one which would result from literal adherence to its expressed terms only." [68] In his view, there is a close similarity between the doctrine *rebus sic stantibus* and 'implied term' in English law of the 'Frustration of Contract'. He has rightly written "the doctrine *rebus sic stantibus* is clearly a reasonable doctrine which it is right that International law should recognize." [69] However, it may be submitted that the doctrine *rebus sic stantibus* should be clearly defined and should not be allowed to serve as a means to undermine international agreements by providing an excuse for the breaches of treaty obligations that States find it inconvenient to fulfil. Article 62(1) of the Vienna Convention on the Law of Treaties, adopted in 1969 exhibits awareness of this difficulty by allowing the invocation of the clausula only if—(a) the existence of those circumstances (which have changed) constitute an *essential basis* of the consent of parties to be bound by the treaties; and (b) the effect of the change is radically to transform the extent of obligation still to be performed under the treaty. Article 62(2) excludes treaties that fix boundaries from the operation of the doctrine in order to avoid an obvious source of threat to the Peace.[70]

Thus the two doctrines *pacta sunt servanda* and *rebus sic stantibus* can be reconciled to some extent. It is certainly the most fundamental principle of the law of treaties that every treaty is binding upon the parties, and must be performed by them in good faith. But International Law is a dynamic concept and it endeavours to adopt itself to the needs of the day, in order to be effective. International Law or any law for that matter, must keep pace with the tide of the time to obliterate those norms which have fallen out of date and to baptise new principles as norms of the law. Allowance therefore must be made for the discharge of treaties if fundamental circumstances change or as Article 62(1) of the Vienna Convention of 1969 provides by allowing the invocation of *clausula rebus stantibus* only when changed circumstances constitute an *essential basis and if the effect of change is radically to transform the extent of obligations still to be performed under the treaty.*

(3) Pacta sunt servanda.—The maxim *pacta sunt servanda* has already been discussed in detail under the heading "Basis of the Binding Forces of International Treaties".

Unequal Treaties.*—There is a great controversy in regard to the concept of unequal treaties. This concept has been developed by the communist countries, particularly Soviet Union and China. "The doctrine of unequal treaties was directly linked to the principle of the equality of sovereign States. States could not be forced to accept obligations contrary to basic principles of International Law, particularly the principle of co-existence"[71] It is further pointed out, "In the first place the validity and force of treaties depended upon their being a free expression of the will of the parties ..... In the second

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67. Josef L. Kunz, "The Meaning and the Range of the Norm Pacta Sunt Servanda", A.J.I.L., Vol. 39 (1945), p. 181 at p. 197.
68. J.L. Brierly, The Law of Nations, Sixth Edition ((1963), p. 356.
69. Ibid, at p. 338.
70. It has been aptly observed : "Given the delicacy of the article and the doctrinal dispute as to whetehr or not the principle represented an implied term in treaties..... its adoption nearly unchanged in the form proposed is a tribute to the skill with which the International Law Commission had balanced a rule which afforded 'a safety valve in the Law of Treaties' yet provided protection to the security of treaties by 'adequate safeguard's..... against its arbitrary application". Richard D. Kearney and Robert E. Dalton. See supra note 41 at p. 544 : see also ibid at p. 561.

* See also for I.A.S. (1977), Q. No. 10(a).

71. Kazimierz Grzybowski, Soviet Public International Law (1970), p. 41.

place, no treaties could contradict recognized principles of International Law.[72] Furthermore, "The principle that International Treaties must be observed, does not extend to treaties which are imposed by force and which are unequal in character—such treaties contradict international law and hence cannot enjoy its protection. Their repudiation cannot be considered a violation of the principle that International Treaties must be observed." [73] According to the Soviet view, an example of special category of unequal treaties are those which were entered into between the imperialist powers and colonial and dependent nations. Similarly a treaty which provides that one State has the right to exercise power on the territory of the other, such as, agreements permitting establishment of foreign military bases, collective security agreements between the capitalist States, and economic assistance agreements, will be unequal.[74]

The term unequal treaties has been explained in the following words : "Equal treaties are concluded on the basis of the equality of the parties ; unequal treaties are those which do not fulfil this elementary requirement. Unequal treaties are not legally binding, equal treaties must be strictly observed.[75] "While Western writers and Statesmen oppose this doctrine, ostensibly on the basis of its vagueness and the adverse effects it would have on the sanctity of treaties, it is increasingly regarded as just in the "unequal States,"[76] "In the attempt to provide justification for their efforts to change the *status quo*, the less developed nations increasingly rely on the argument that 'unequal' or 'inequitable' treaties, and the treaties imposed by duress, are invalid *ab initio*. Attacking the treaty by which the Union States obtained the canal Zone, for example, the foreign minister of Panama called it "humiliating, injurious, unjust and inequitable" and said that it does not conform to the principles, precepts and norms of international morality universally accepted today.[77] Communist China is also a staunch supporter of the concept of 'unequal treaties'. In the view of Chinese writer, Hungdah Chiu, unequal treaties are contrary to international law and have no legal validity.[78] Further, 'Whether or not a treaty is equal does not depend upon the form and words of various treaty provisions, but depends upon the States character, economic strength and the substance of correlation of the contracting parties." [79]

As pointed out earlier, Western States and jurists oppose the concept of 'unequal treaties'. During the last two decades, many Asian and African States have emerged and they have supported the concept of unequal treaties. It may, however, be noted that the Vienna Convention on the Law of Treaties 1969, does not contain any provision relating to 'unequal treaties'. But since many States had raised the matter relating to 'unequal treaties' in the Vienna Conference, a Declaration was adopted which said that in past many States entered into treaties under duress and expressed the hope that in future they would not exercise duress or enter into such treaties with other States.[80]

*Jus Cogens.** —One of the most controversial provisions incorporated in the Vienna Convention on the Law of Treaties, 1969 is in respect of *jus cogens*. Article 53 of the Vienna Convention incorporates the principle of *jus cogens*. It provides : A treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general

72. Ibid.
73. Ibid.
74. Ibid. For Soviet theory and practice of unequal treaties see Jan F. Triska and Robert M. Slusser. The Theory, Law and Policy of Soviet Treaties (Stanford : Stanford University Press, (1962); see also S. Rama Rao, "Soviet Approach to The Law of Treaties", I.J.I.L. (1974), p. 432 at p. 437.
75. Adopted from Oliver, J. Lissitzyn, International Law: Today and Tomorrow (New York, 1965), p. 53.
76. Edward Collins, see supra note 62 at p. 290.
77. Lissitzyn, see supra note 75, at p. 56.
78. Hungdah Chiu, "Comparison of the Nationalist and Communist Chinese views on Unequal Treaties" in China's Practice of International Law : Some Case Studies. Edited by Jerome Alan Cohen (1972), p. 239 at pp. 258-59.
79. Hungdah Chiu, The People's Repbulic of China and the Law of Treaties (1972), p. 63.
80. See I.L.M. 84 : 733 (July 1969).

* See also for I.A.S. (1976), Q. No. 10 (ii) ; C.S.E. (1989), Q. 5 (a) ; C.S.E. (1993) Q. 8 (d) ; C.S.E. (1995) Q. 8 (d).

international law.[81] For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. While the principle was being formulated by the International Law Commission, majority of jurists from the developing countries and from European countries favoured the incorporation of the principle of *jus cogens* and attached great importance to it. They expressed the view that a treaty conflicting the existing or new rule of *jus cogens* should be regarded as void.[82] On the other hand, majority of international lawyers from the Western Europe expressed considerable alert. For example Prof. Schwarzenberger, expressed the view that "International law on the level of unorganized international society, does not know of any *jus cogens.*"** But diametrically opposite view was expressed by Prof. Verdross who contended that certain principles embodied in Article 2 of the Charer of the United Nations possess the character of *jus cogens.*[83] It may be noted here that great difficulty will be experienced in the application of the rule of *jus cogens* because the International Law Commission did not define the term *jus cogens.*[84] As remarked by Edward Collins,[85] "Although the Commission stopped short of compiling a list of such norms, ostensibly because to do so might lead to misunderstanding as to the position of norms not included, several of the members suggested that certain types of treaties, including agreements contemplating the unlawful use of force, or trade in slaves, or the commission of acts of piracy or genocide, would clearly, conflict with peremptory norms.[86] But, in the absence of a general agreement on the precise content of *jus cogens,* the rule will surely be productive of considerable diplomatic controversy."

Reference may also be made to Article 64 of the Vienna Convention which is a corollary of Article 53 noted above. Article 64 provides : If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. "The necessity for it as a separate article springs from the fact that different legal consequences attend a treaty that is entered into in violation of an existing rule of *jus cogens* (which is considered as void *ab initio*) and the annulment of an existing treaty by the emergency of a new rule." [87]

As noted earlier, there was controversy in respect of the formulation of the rule of *jus cogens.* A compromise formula was brought forth by a group of African and Asian delegations led by Nigeria and this is now embodied in Article 66 of the Vienna Convention.[88] Article 66 provides : If, under paragraph 3 of Article 65,[89] no solution has

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81. See Richard D. Kearney and Robert E. Dalton, "The Treaty on Treaties", A.J.I.L., Vol. 64 (1970), p. 495 at p. 535; I.M. Sinclair, "Vienna Convention on the Law of Treaties" I.C.L.Q., Vol. 19 (1970), p. 47 at p. 66; V. Nageswar Rao, "Jus Cogens", and the Vienna Convention on the Law of Treaties" I.J.I.L., Vol. 14 (1974), p. 362; Schwelb, "Some Aspects of International Jus Cogens as Formulated by the International Law Commission", A.J.I.L., Vol. 61 (1967), pp. 1960-61.
82. See Schwelb, Ibid : Soviet Union is Staunch Supporter of the rule of jus cogens. For Soviet view see : S. Rama Rao, "Soviet Approach To the Law of Treaties", I.J.I.L., Vol. 14 (1974), 433 at pp. 439-440.
* C.S.E. (1985), Q. 5(b).
83. Verdross, "Jus Dispositivum and Jus Cogens in International Law", A.J.I.L., Vol. 60 (1966), pp. 59-60.
84. In the Commentary to this article, the International Law Commission had observed : 'The formulation of the article is not free from difficulty, since there is no simple criterion by which to identify a general rule of international law as having the character of Jus Cogens", Further, "The emergence of rules having the character of Jus Cogens is comparatively recent, while international law is in process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of jus cogens and to leave the content of this rule to be worked out in State practice and in the jurisprudence of international tribunals." I.L.C. Report U.N. General Assembly, XXI Session, Official Records, Supp. 9 at p. 76.
85. Edward Collins, see Supra note 62, at pp. 289-290.
86. See the International Law Commission's Commentary to Article 50, reprinted in 61 American Journal of International Law p. 409 (1967).
87. Richard D. Kearney and Robert E. Dalto, see supra note 72, at p. 538.
88. See I.M. Sinclair, "Vienna Convention on the Law of Treaties", I.C.L.Q., Vol. 19 (1970), p. 47 at p. 69.
89. Article 65 deals with procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of treaty.

been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed :—

(a) any one of the parties to a dispute concerning the application or the interpretation of Articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration .....

Thus, "A major achievement was the provision for reference of disputes concerning *jus cogens* to the International Court of Justice. This reflects a willingness on the part of many States that had voiced disappointment with the court in 1966 to recognize its signal appropriateness as a forum for resolution of disputes relating to *jus cogens* the one *principle that presents the most basic issue in the development of a world rule of law*".[90] Further : "By Codifying the doctrines of *jus cogens* and *rebus sic stantibus* the convention provides a framework for dealing with change in an orderly fashion. 'By re-asserting the principle of *pacta sunt servanda* it strengthens the customary rule which has always been the keystone of the treaty structure." [91]

In his separate opinion in *Military and Para Military Activities in and against Nicaragua* case *(Nicaragua* v. *U.S.A.)*[92] Judge Nagendra Singh emphasized that the principle of non-use of force belongs to the realm of *jus cogent*, and is the very corner-stone of the human effort to promote peace in a world torn by strife.

Judge Sethe Camara also, in his separate opinion, observed that he firmly believed that the non-use of force as well, as non intervention the later as a corollary of equality of states and self determination are not only cardinal principles of customary international law but could in addition be recognized as peremptory rules of customary international law which impose obligation on all states.

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90. Richard D. Kearney and Robert E. Dalton, see supra note 81. at p. 561 ; emphasis added ; see also Sinclair, see supra note 81.
91. Ibid.
92. (1986) ICJ Rep. 14.

Part IV

INTERNATIONAL ORGANISATIONS

CHAPTER 30

DEFINITION, NATURE, FUNCTIONS AND EVOLUTION OF INTERNATIONAL ORGANISATION

Definition and Essentials of International Organisation.—An International Organisation has been defined "as a forum of co-operation of Sovereign States based on multilateral international agreement, and comprising of a relatively stable range of participants the fundamental feature of which is the existence of permanent organs with definite competences and powers acting for the carrying out of common aims.[1]

In the widest sense, International organisation can be defined as "a process of organising the growing complexity of international relations. International organisations are the institutions which represent the phase of that process. They are the expressions of, and contributors to the process, of international organisation, as well as, the significant factors in contemporary world affairs." Further "International organisation, the institutions may come and go in accordance to the significance of the dynamism of international relations. But international organisation, the process, exists as an established trend. It was the stimulus of the existing process ready at hand, that automatically led, after the collapse of the League of Nations, to the creation of new organisation, the U. N. .....Thus, international organisation is the process by which states establish and develop formal, continuing institutional structures for the conduct of certain aspects of their relationships with each other. It represents a reaction to the extreme decentralisation of the traditional System of international relations and the constantly increasing complexes of the interdependence of states." [2]

Following are the main essentials of international organisation, the institution :

(i) Its origin is based on multilateral international agreement.

(ii) The institution has a personality of its own which is distinct from its individual members.

(iii) It has permanent organs which carry out common aims.

(iv) As compared to the will of all members, its organs exhibit autonomy of will.

Chief Functions of International Organisations.—At present international organisations perform many functions and their functions are constantly increasing. Due to paucity of space it is not possible to mention here all the functions performed by international organisations. It will suffice to note here only those functions which are main in principle and which include other functions. Such functions are the following :—

(i) One of the main functions of international organisation is that keeping intact the sovereignty of States and despite thier different social systems, it establishes and expands peaceful cooperation among them.

(ii) Its second main function is to ensure that the competition going on among the individual States remains peaceful.

Evolution of International Organisation.—It may be noted at the outest that International organisation as a distinct phenomenon of international relations is of recent origin. The development of international organisation is possible only when certain prerequisites exist. In the first place, the whole world must be divided into a number of

1. Wojciech Morawiecki, "Some Problems connected with the organs of International Organisation." Int. Orga., Vol. XIX No. 4 (Autumn 1965), p. 913 at p. 914.
2. S. J. R. Bilgrami, International Organisation (1977), p. 1.

Sovereign States. Secondly, these sovereign States must have a substantial measure of contact with each other. Thirdly, these states must be aware of the problems which arise out of their mutual contacts and co-existence. Lastly, these Sovereign States must recognise the need for creation of international institutions for organising and regulating their relations with other.[3] These requirements were not fulfilled by the end of the eighteenth century. It was in the nineteenth century that these prerequisites were satisfied to a considerable extent and that is why the birth of international organisation took place in this period. We may, however, hasten to add that international organisation as we know today was not created all of a sudden in the nineteenth century. The International organisation has developed as a result of three major streams of developments.

As regards the prerequisites for the development of International Organisation, it may be noted that the State system started developing in Europe in the Seventeenth century and the Treaty of Westphalia (1648) may be said to have formalized the State system for it recognized that the Holy Roman Empire no longer commanded the allegiance of its parts (so much so that even in spiritual matters Pope could not maintain his authority everywhere in Europe). Thus by 1648 the state system was well-established in Europe. It need not be over-emphasised that the state system which was formalized by the Treaty of Westphalia remains more or less unchanged in its basic patterns although it has been affected by a number of developments and factors such as rise of representative government, growth of international law, increase in economic inter-dependence and expansion of State-System to non-western world. As pointed out by Prof. Goodspeed, "The International *status quo* is the system of nation-states wherein there continues to exist a constant struggle for power since international organisation is a mechanism designed to encourage a better functioning of the state system it must, of necessity contend with this ceaseless struggle and the forces which shape it. Despite the ideals and objectives of international organisation with the exception of the most technical matters politics and conflict are always present and will continue to be as long as the national state is the basic unit of representation. What must be examined, then are the forces underlying the state system if there is to be an understanding of the difficulties confronting the development function, and successful operation of an international organisation. These include the legal notions of sovereignty and equality, as well as the elements which make for national power and the explosive force of nationalism." [4]

With the establishment of the State System, its expansion to non-western world and the development of means of transport and communications, the first three prerequisites for the development were satisfied to a sufficient measure. However, it took considerable period of time before the fourth prerequisite could be satisfied and this took place in the nineteenth century. The development of international organisation as we know today may be divided into three main streams of developments which are following :

(1) The Concert of Europe.—The first phase of the development of the international organisation begins with the establishment of the concert of Europe. It grew out of the Holy Alliance and the Congress of Vienna in 1815. It was a loose association or exclusive club for great powers. With a view to maintain balance of power in Europe great powers joined hands and used to hold consultations among themselves from time to time. In the beginning, they concentrated their efforts in preventing dynastic and imperial interests from destroying the European balance of power. It helped to develop the habit of consultation among great powers. It thus laid the foundation for the collective negotiation which has now become a part and parcel of international organisation. The concert of Europe contained the seeds for the League Council and the Security Council for it laid the groundwork for the creation of the executive organ of an International organisation.

(2) The Hague System.—The Hague system represents the second stream of the development of international organisation. The two Hague conferences of 1899 and

3. See Inis L. Clande, J., Swords into Plomshres—The Problems and Progress of International Organisation, 3rd Edn., Random House, New York (1964) pp. 18-20.
4. Stephen S. Goodspeed, The Nature and Function of International Organisation, Second Edition pp. 9-10.

1907 were not convened by European great powers. These are remarkable because for the first time all states participated in these conferences on equal terms to consult problems of international concern. "The era of the concert was the period of great power hegemony. The Hague conferences enabled smaller States to taste independence and equality." [5] While the first Hague conference was attended by 26 states, the second Hague conference was attended by as many as forty-four states thereby manifesting to approach towards universality. These two conferences contained the seeds of the League Assembly and the General Assembly. In fact, "the Hague conference were the prelude to the building of the League of Nations, a sort of interim stage in the developments of international cooperation designed to bring about a great measure of security within the system of nation States." [6]

3. Private International Unions.—The development of Private International Union could take place because its interests were international and such interests needed private international Unions. Probably Anti-slavery World Conference of 1844 was the first of such conferences as a result of which permanent arrangements were established. In between 1840 and 1914 nearly 400 permanent Unions were established. These unions were established in different fields such as International Committee of the Red Cross (1863), Inter-Parliamentary Treaty (1889), International Law Union, (1873), International Dental Union (1878), International Commercial Chamber (1919). The development of these Unions took place so rapidly that in order to co-ordinate their activities and to lay down conditions of members a Union of International Unions was established in 1910. The conditions laid down in it were as follows :

(1) existence of a permanent organ ;

(2) the object being not the profit but the interests of all or some of the States ;

(3) the membership should be open to individuals or groups of individuals. Regular meetings were provided in these Unions or institutions. Besides this several Unions established permanent Secretariats which function successfully. On the basis of their functions, 'private' and 'public' unions were distinguished.

4. Public International Unions.—The third main stream of development arose from the appearance of Public International Unions, particularly after 1850. A significant thing to be noted in connection with this auspicious development was that such agencies dealt with problems which were essentially non-political. "Whereas both the concert and Hague reflected the significance of the quest for security and the importance of high political issues, this third phenomenon was the manifestation of the increasing complexity of the economic, social, technical and cultural interconnections of the peoples of the modern world." [7] The International Telegraph Union (ITU) and Universal Postal Union (UPU) which were established in 1865 and 1874 respectively represent early public international Unions which set this benign trend to be followed by others. Such as International Labour Organisation, Food and Agriculture Organisation, World Health Organisation, International Monetary Fund and many others. These public international Unions later on became the specialized agencies of the U. N. They deal with such diverse matters as science, art, economics and finance, food and agriculture, health, International civil aviation and Communications and Transit. It may be noted that the Bureau of ITU contained the seeds for the secretariat of the League of Nations and the U. N. The development of permanent staff to perform the functions of the organisation and to carry out functions of correspondence, research, publication etc., was significant contribution of these public International Unions.

The above-mentioned development prepared the ground for the establishment of the League of Nations which represented the first attempt to develop a comprehensive global organisation. Often it is remarked that "the League of Nations pioneered in practically all aspects of international organisation." [8] But this remark does not seem to be correct. The

5. Bilgrami, note 2, at p. 5.
6. Goodspeed, note 4, at p. 27.
7. See note 2, at p. 7.
8. See Goodspeed, note 6, at p. 364.

League of Nations can at best be said to be the first international attempt at a general and comprehensive global international organisation. It was greatly indebted to the development in the field of international organisation which had taken place (as noted above) prior to its establishment.

Nature and Legal character of International organisation.—It has been pointed out earlier that International organisation is an international legal person and subject of international person. In *Reparation for Injuries suffered in the Service of the U. N.*[9] the International Court of Justice observed that the U. N. is an international legal person having rights and duties under international law. It can claim compensation for injuries suffered by persons under its service; what is true of the U. N. is also true of other international organisations. However, the world court added that there is nothing in the character of international organisations to justify their being considered as some form of "super-state." [10]

This view was reaffirmed by the International Court of Justice in its Advisory opinion of 20 December, 1980 *in Interpretation of Agreement of 25 March, 1951 Between the WHO and Egypt.* In this case the court said that international organisations are subjects of international law and, as such, are bound by any obligation incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.[11]

Privileges and Immunities of International Organisations.—For the proper performance of its function, the International Organisations or its branches wherever they may be situated, should possess some privileges and immunities. Similarly, its agents and servants who perform the functions of international organisation should possess some privileges and immunities. For the same reason, the money and Funds of International organisations are exempted from local financial rules and controls. These matters are determined by International Conventions for they cannot be left to be decided on the basis of laws and practices of States. So far as the United Nations is concerned, Article 105 provides that the organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes. Representatives of the Members of the United Nations and officials of the organisation shall similarly enjoy such privileges and immunities as are necessary for exercise of their functions in connection with the organisation. The status of the Headquarters of International organisations depends on Special Agreements. The most prominent of such agreements is the Headquarters Agreement between the United Nations and the United States of America. The Advisory Opinion of 26th April, 1988 of the International Court of Justice on *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 23 June, 1947* deserves a special mention. The American Congress passed Anti-Terrorism Act, 1987. Under this Act, the Information Office of the Palestinian Liberation Organisation (PLO) situated in Washington and Observer Mission of PLO situated at Newyork were ordered to be closed by 21st March, 1988. In this connection, it may be noted, as pointed out by the Spokesman of the Secretary-General of the U. N., the Members of the PLO Mission are, by virtue of resolution 3237 (XXIX) invitees to the United Nations. As such, they are covered by Sections 11, 12 and 13 of the Headquarters Agreement of 26 June, 1947. There is, therefore, a treaty obligation on the host country to permit PLO presonnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters. In this respect, it may be noted that Section 11 of the Headquarters Agreement provides that the federal State or local authorities of the United States shall not impose any impediments to transit to or from the Headquarters district of representatives of Members or the families of such representative and other persons invited to the Headquarters district by the United Nations on official business. Section 12 provides that "the provisions of Section 11 shall be applicable irrespective of the relations

9. I.C.J. Reports, (1949) p. 174.
10. Ibid, at p. 179.
11. Para 37 of the Advisory opinion dated 20 December, 1980.

existing between the Governments or the persons referred to in that section and the Government of the United States." Section 13 provides that "Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11."

Further, Section 21, paragraph (a) of the Headquarters Agreement of 1947 provides :

"Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement which is not settled by negotiation or other agreed mode of settlement shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice."

Since the matter regarding the P.L.O. Observer Mission was not settled by negotiations between the U. N. and America, it was decided to refer it to the International Court of Justice for its advisory opinion. In the first week of March, 1988, a special session of the General Assembly was convened. On 3rd March, 1988, the General Assembly passed two resolutions sponsored by India and 43 other States. These resolutions provided for referring the dispute relating to PLO Observer Mission between the U. N. and the U. S. to International Court of Justice for the advisory opinion. For the first resolution 143 States voted in favour and only Israel voted against it. 143 States voted in favour of the second resolution and none voted against it. The World Court gave its advisory opinion on 26th April, 1988. In the words of the Court :

"The Court must conclude that the United States is bound to respect the obligation to recourse to arbitration under Section 21 of the Headquarters Agreement.

Further, ".....It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law. This principle was endorsed by judicial decision as long ago as the arbitral of 14 September, 1872 in the *Alabama* case between Great Britain and the United States, and has frequently been recalled since then, for example in the case concerning the Greco-Bulgarian 'communities' in which the Permanent Court of International Justice laid down that—

"It is generally accepted principle of international law that in the relations between Powers who are contracting parties to treaty, the provisions of municipal law cannot prevail over those of the treaty." (P.C.I.J. Series B., No. 17, p. 32).[12]

On 13th May, 1988, the General Assembly passed a resolution wherein America was asked to start the procedure of arbitration. 136 States voted in favour of this resolution. Only two States (Israel and America) voted against the resolution.

It may be noted here that the decision to close P.L.O. Observer Mission was taken by America under Anti-Terrorism Act, 1987. While the dispute was continuing between the U. N. and U. S. relating to closure of P.L.O. Observer Mission in Newyork, a case had been filed in American District Court challenging the American decision. In June, 1988, the American District Court ruled that under the Anti-Terrorism Act, 1987, it was not necessary to close P.L.O. Observer Mission and that the United States of America should not obstruct the functioning of P.L.O. Observer Mission. According to the then Secretary-General of the U. N., Mr. Avier Perez De Cuellar, this decision of the American Federal Court made it clear that the American judicial system respected the obligations under international law.

Like the Headquarters Agreement of 1947 between the U. N. and the U. S., there are also special agreements relating to Headquarters or Regional Offices of Specialized Agencies of the United Nations. In this connection, advisory opinion dated 20th December, 1980 of the International Court of Justice on the *Interpretation of the Agreement of 25 March, 1951 between the W.H.O. and Egypt* deserves a special mention. The facts of this case are :

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12. Para 57 of the Advisory Opinion of 26th April, 1988.

One of the Regional Offices of World Health Organisation (W.H.O.) is in Alexandria (Egypt). This office was established as a result of the agreement of 25th March, 1951 between W.H.O. and Egypt. Due to political situation in Middle East. W.H.O. was facing many difficulties in carrying on the functions of office. Several member States wrote letters to W.H.O. for transfer of the said regional office to some other Arab Country. Consequently, it was decided to transfer the Regional Office to some other Arab Country. Section 37 of the Agreement between Egypt and W.H.O. provides that the existing agreement can be amended on the application of either party. In such a situation both the parties shall hold consultations and if no agreement is reached within one year, then either of the parties can terminate the agreement after two years' notice. Since there was dispute in respect of application of Section 37, the W.H.O. referred the following two questions for the advisory opinion of the International Court of Justice :

(1) Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March, 1951 between the W.H.O. and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt ?

(2) If so, what would be legal responsibilities of both the W.H.O. and Egypt, with regard to the regional office in Alexandria during the two-year period between notice and termination of the Agreement.

By a majority of twelve votes to one, the International Court of Justice's Opinion in respect of the first question was that in the event specified in the Request the legal principles and rules, and the mutual obligations which they imply, regarding consultation, negotiation and notice, applicable between W.H.O. and Egypt are :

(a) Their mutual obligations under those legal principles and rules place a duty upon both the organisation and upon Egypt to consult together in good faith as to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected.

(b) In the event of its being finally decided that the Regional Office shall be transferred from Egypt, their mutual obligations of co-operation place a duty upon the organization to consult together and to negotiate regarding the various arrangements needed to effect the transfer from the existing to the new site in an orderly manner and with a minimum of prejudice to the work of the Organization and the interests of Egypt.

(c) Their mutual obligations under those legal principles and rules place a duty upon the party which wishes to effect the transfer to give a reasonable period of notice to the other party for the termination of the existing situation regarding the Regional Office at Alexandria taking due account of all the practical arrangements needed to effect an orderly and equitable transfer of the Office to its new site.

Giving the answer with regard to the second question, the World Court by a majority of eleven votes to two, gave the following opinion :

In the event of a decision that the Regional Office shall be transferred from Egypt, the legal responsibilities of the W.H.O. and Egypt during the transitional period between the notification of the proposed transfer of the office and the acccmplishment thereof are to fulfil in good faith the mutual obligations which the Court has set out in answering Question 1.[13]

The agreement of Headquarters or Regional Offices of International Organisations have following general features :

(i) Within the Headquarters district local laws apply. But these are subject to the application of staff administrative regulations relative to the Secretariat.

(ii) The premises and the property of the Organization are immune from search, confiscation, requisition, etc., and any other form of interference by the local authorities.

(iii) Local officials cannot enter the premises of the Organisation except with the consent of the Organisation.

13. Para 51 of the Advisory Opinion of 20th December, 1980; See also para 49.

(iv) It is the obligation of the local government to use diligence to protect the promises of the Organisation against outside disturbance and unauthorised entry.

(v) Except for charges of public utility services, headquarters are exempt from local taxes.

(vi) The Organisation enjoys freedom of communication and is immune from censorship.[14]

Legislative and Regulatory Functions of International Organisations.—There is no world legislature in the international field. However, international organisations and their organs perform different types of legislative and regulatory functions. For example, the General Assembly of the United Nations is not a World Parliament yet in different situations it performs legislative functions. More than a dozen of its resolutions are considered to be binding upon the member States. This has been discussed in detail in the Chapter entitled, "General Assembly of the United Nations." Similarly, the Economic and Social Council, United Nations Commission on International Trade Law (UNCITRAL) and International Law Commission also perform some legislative functions. Some Specialized Agencies of the U. N. such as International Labour Organisation (ILO), W.H.O., International Civil Aviation Organisation (ICAO) adopt regional regulations and procedures in their regional meetings. In the international field, the development of performance of legislative and regulatory functions by international organisation is like the delegated legislation in the Municipal field.

International Administrative Law.—Like the Municipal field but in very limited sense, international organisations also perform some administrative functions. For example, the European Economic Community (EEC) has the power to determine whether aid given by a member is not inconsistent with the common market and whether it is not being used in improper way. EEC possesses this power under Article 93 of Treaty of 25 March 1957 establishing the European Economic Community. Similarly, the Courts of European Community have the power to review the validity of the acts of some organs of the Community. Likewise, the organs of the international organisations have the power or jurisdiction of interpreting the provisions of the Constituent instruments. For example, the Council of the International Civil Aviation Organisation (ICAO) has such power under Articles 84-86 of the International Civil Aviation Convention of 7th December, 1944. Similarly, the Executive Directors and Board of Governors of the International Monetary Fund (IMF) under Article XVIII of the Articles of Agreement of the Fund. Reference may also be made here to development of a practice of delegating an inquiry to a smaller body or committee by an organ of international institution such as complaints regarding infringements of trade union right come for preliminary examinations before the Committee on Freedom of Association on behalf of the Governing Body of the International Labour Organisation (ILO). In certain respects this Committee is a quasi-judicial body.

Capacity or Power of International Organisations to enter into International Treaties.—The Constituent Instruments of some international organisations expressly mention the capacity or power of the Institution to enter into treaties. For example, Article 43 of U. N. Charter confers power on the Security Council to conclude special Agreements for making available the armed forces. Similarly, Article 57 of the Charter provides for entering into agreements for bringing the Specialized Agencies into relationship with the United Nations. Besides this, Article 77 expressly provides for entering into trusteeship agreements. Moreover, impliedly also, international institutions also possess power to conclude treaties (*e.g.*, Headquarter or Regional Office Agreements) to carry out or perform their functions properly. Such power may also be delegated. An example of this is the 1982 Agreement between the Government of Pakistan and U. N. High Commissioner on Refugees. In the Vienna Convention (of 21st March, 1986) on the Laws of Treaties between States and International Institutions, power of international organisations to conclude treaties has been recognized.

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14. J. G. Starke, Introduction to International Law, Tenth Edition, Butterworths Singapore, 1989, p. 622.

Dissolution of International Institutions.—Dissolution of International Institution may take place in any of the following three ways :

(1) If it has been established for a fixed period on the expiry of that period;

(2) If it is for some special purpose or is of temporary nature on the completion of that purpose; and

(3) On the express or implied decision of the members of the Institution. For example, League of Nations was dissolved on 18th April, 1946 by a resolution passed by the Assembly of the League.

Succession of Rights and Duties of International Institutions.—When the question of succession of rights, duties etc., of international institution to another institution arises, the question of succession of constituent functions is also involved. The first thing that deserves mention in this connection is that succession of rights and duties takes place only when the nature and functions of the predecessor and succeeding International organisations are the same. This was held by the International Court of Justice in its *Advisory Opinion* on the International Status of South West Africa (Namibia).[15] Besides this, the succeeding International organisation should have expressly or impliedly the constitutional competence to get the rights and duties in succession. If the succeeding organisation has no such capacity, there shall be no succession. It may also be noted that if the constituent instrument of the succeeding international organisation does expressly mention the functions of the predecessor organisation relating to succession, then the question of succession shall be determined in accordance with the said provisions. The best example of this is the Statute of the International Court of Justice which is the successor of the Statute of Permanent Court of International Justice.[16]

Convention on Safety of U.N. Personnel (1994)

On 9th December, 1994, the General Assembly adopted 29-article convention on the Safety of U.N. and Associated Personnel. The convention was opened for signature, ratification and acceptance. The convention defines duties of states to ensure safety and security of such personnel and to release or return those captured or detained. Under the convention state parties will be under obligation to establish jurisdiction over crimes, including murder, kidnapping or threat of attack against U.N. and Associated Personnel. It calls on host states and the U.N. to quickly conclude agreements on the status of the U.N. operation and personnel. The convention obliges Transit states to facilitate unimpeded transit of such personnel. The convention also deals with issues such as prosecution or extradition of alleged offender.

The convention had become necessary in view of the alarming rise of crimes recently against U.N. personnel especially in U.N. operations in Somalia and Bosnia. The convention is a step in the right direction and the sooner it enters into force the better.

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15. I.C.J. Rep. (1950) p. 128.
16. See Ibid, at p. 630.