CHAPTER 41

COLLECTIVE SECURITY*

The Concept of Collective Security.—"The United Nations provides three pillars for the maintenance of peace : peaceful change, the pacific settlement of disputes, and *Collective Security*".[1] Further, "the idea of Collective Security is that by pooling their strength and collectively organizing international force and security all nations will be relieved of their anxiety over national security. All will co-operate in controlling a disturber of the peace. They will act as one for all and all for one. Their combined power will serve as guarantee of the security of each. In the face of such overwhelming strength, the theory goes, every nation will fulfil its international obligations as it could not resist collective enforcement any way. The use of peaceful methods will be stimulated, greater trust among nations will be created, and aggression will cease as an obviously enterprise." [2] The term, "collective security" has not been used either in the Covenant of the League of Nations or in the Charter of the U.N. It means "general co-operative action for the maintenance and enforcement of international peace.[3] Collective Security is based on the principle that conflict among the members of the community affects the whole community and unilateral violence against a member is crime against all the members. Thus under it, the idea is to maintain peace which is inherent on the basis of every political community.[4]

The League of Nations deserves credit for starting the concept of Collective Security. The Covenant of the League of Nations provided that if any member-State resorted to war in violation of the provisions of the Covenant it would be deemed to be the enemy of the whole League of Nations. This was for the first time that an International Organization introduced such important provisions in regard to collective security. A brief discussion, therefore, of the provisions of the Covenant of the League of Nations will be desirable here.

Covenant of the League of Nations and Collective Security.—The Covenant of the League of Nations under Articles 10 to 17 introduced the concept of Collective Security. Following are the main provisions in this connection :

(i) *Guarantee against aggression.*—The Covenant of the League of Nations provided that the members of the League undertake to respect and preserve as against external aggression, the territorial integrity and existing political independence of all members of League. In case of any such aggression and in any case of threat and danger of such aggression, Council shall advise upon the means by which this obligation shall be fulfilled.[5]

(ii) *Action in case of threat of war or war.*—The Covenant of League of Nations provided that any war or threat of war, whether immediately affecting any member of the League or not, is hereby declared a matter of concern to the whole League and the League shall take action that may be deemed wise and effectual to safeguard the peace of nations.[6]

(iii) *Disputes to be submitted for settlement.*—The members of the League agreed that, if there should arise any dispute between them likely to lead to a rupture, they will submit the matter either to arbitration of judicial settlement or to enquiry by the Council and they agreed in no case to resort to war until 3 months after the award by the arbitrators or

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* See also for P.C.S. (1985), Q. 5—For answer see also Chapter on "War, Its Legal Character and Effects".

1. Werner Levi, Fundamentals of World Organization (1950), p. 86.
2. Ibid, at p. 72.
3. Millard N. Hogan, International Conflict and Collective Security (University of Kentuchy Press, 1955), p. 179.
4. Ibid., at p. 1.
5. Article 10, Covenant of the League of Nations.
6. Article 11, Ibid.

judicial decision or the report by the Council.[7] This provision is very important because it for the first time imposed restrictions upon the freedom of the States to resort to war at their will.

(iv) *Implementation of the award or the judicial decision.*—The members of the League also agreed that they would carry out in full any award or decision that might be rendered and they would not resort to war against a member of the League which complied therewith. In the event of any failure to carry out such an award or decision, the Council could propose what steps should be taken to effect thereto.[8]

(v) *Sanctions.*—The Covenant of the League of Nations contained important sanctions under Article 16, which provided that "should any member of the League resort to war in disregard of its Covenant under Articles 12, 13 and 15, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League, which hereby undertake immediately to subject to the severance of all trade, financial relations, the prohibition of all intercourse between their nations and the nations of Covenant-breaking State, and prevention of all financial, commercial or personal intercourse between the nationals of covenant-breaking State and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State whether a member of the League or not." Article 16 further provided: "Any member of the League which has violated any provision of the Covenant of the League, may be declared to be no longer a member of the League by a vote of the Council concurred in by the representatives of all other members of the League represented thereon".

It is clear from the above provisions that League of Nations made first important endeavour to introduce the system of collective security. It is entirely a different matter that the Collective Security system of the League could not succeed. The proof of its greatest failure was the Second World War, Failure of the Collective Security system was mainly due to the fact that the members failed to abide by their solemn obligations which they undertook under the League of Nations. However, it cannot be denied that there were certain defects and *lacunas* in the Collective Security provided under the League. To mention only one constitutional defect of the Covenant, although it imposed certain restrictions upon the right of the nation to resort to war, it did not completely prohibit the war. That is to say, after exhausting the provisions of Articles 12, 13 and 15, the members could resort to war, after a lapse of 3 months, after the award by the arbitrators or the judicial decisions report by the Council. The United Nations gained immensely from the experience of the League of Nations and that is why the system of Collective Security provided under the United Nations is much more effective than that of its predecessor, the League of Nations.

United Nations Charter and collective security*

Following are the main provisions which have built a system of a Collective Security under the Charter :

(1) In the Preamble of the Charter, it has been resolved "to save succeeding generations from the scourge of war, which in our life time has brought untold sorrow to mankind" and for this end, "to unite our strength to maintain international peace and security."

(2) It is one of the purposes of the United Nations (under Article 1), to maintain international peace and security, and to that end to take *"effective collective measures* for the prevention and removal of threats and the suppression of acts of aggression or other breach of peace and to bring out by peaceful means, and in conformity with the principles of Justice in International law,

7. Article 12, Ibid.
8. Article 13 (4), Ibid.

* See also for I.A.S. (1970), No. 8; P.C.S. (1976), Q. No. 1; C.S.E. (1982), Q. 8 (b).

adjustment or settlement of international disputes or situation which might lead to a breach of peace." [9]

(3) It is one of the principles of the United Nations that, all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations.[10] As rightly remarked by Louis Henkin, in accordance with this principle the Charter ended the freedom of the States to resort to war at their will.

(4) Yet another principle of the United Nations is that all members shall give United Nations every assistance in any action it takes in accordance with the Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.[11]

(5) *Pacific Settlement of Disputes.*—The Charter provides that parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial-settlement, resort to regional agencies or arrangements or other peaceful means of their own choice. It is further provided that the Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means.[12] It is further provided that if the Security Council deems that the continuance of any dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate (Article 37).

(6) *Binding effect of Security Council decisions.*— Members of the United Nations have agreed to accept and carry out the decisions of the Security Council in accordance with the present Charter.[13]

(7) *Enforcement or Preventive Action.*—Chapter 7 of the Charter deals with the enforcement or preventive action and is most important Chapter which builds a system of Collective Security. Following are some of the important provisions under this Chapter :

(i) For any action to be taken under Chapter 7, it is necessary that the Security Council should first determine the existence of any threat of peace, breach of peace or act of aggression. It is only after the Security Council has determined that a breach of peace or an act of aggression has taken place, then it may make recommendations or decide what measures shall be taken to maintain or to restore International Peace and Security.[14]

(ii) The Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decision and it may call upon the members of the United Nations to apply such measures which may include complete or partial interruption of economic relations

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9. As remarked by Werner Levi, "Since the end of the First World War, however, international organisation has retained the idea of using the combined forces of nations for the dual purpose of discouraging the wrongful application of force by any one nation and of controlling any threat or breach of the peace. This system so-called collective security was impliedly embodied in the Covenant, where it was accepted as a reaction against the discredited pre-war balance-of-power system and a return to the idea of Universalism and the concept of powers. The Charter again and more fully incorporated the principle, specifying in Article 1 that for the purpose of maintaining Peace and Security the members should take effective collective measures," Note 1, at p. 71.
10. Article 2 (4) U.N. Charter.
11. Article 2 (5), Ibid.
12. Article 33, Ibid.
13. Article 25, Ibid.
14. Article 39, Ibid.

and rail, sea, air, postal, telegraphic, radio and other means of communication and severance of diplomatic relations.[15]

(iii) In case, the measures taken by the Security Council under Article 41 mentioned above, proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or to restore International Peace and Security. Such actions may include demonstration, blockade and other operations by air, sea or land forces of the members of the United Nations.[16] This is the most important provision so far as the Collective Security is concerned, because it empowers the Security Council to use even armed forces for the maintenance of peace and security. As noted earlier, the members have agreed to accept and carry out the decision of the Security Council. Thus it is through the collective measures under this provision, the system of Collective Security has been made very effective. It is further provided in the Charter that the members are under obligation to make available to the Security Council on its call and in accordance with the special agreements armed forces, assistance and facilities for the performance of maintaining International Peace and Security.[17] It is unfortunate that the provisions under this Article have not been implemented.

(iv) It is further provided that there shall be a Military Staff Committee, to advise and assist the Security Council's military requirements for the maintenance of International Peace and Security, the employment and command of forces placed at its disposal, the regulation of armaments and possible disarmaments.[18] It may be noted here that since special agreements envisaged under Article 43 for the availability of armed forces could not be made this provision has also not been implemented and has become more or less a defunct provision.

(v) It is further provided that the members of the Untied Nations shall join in affording mutual assistance in carrying out the measure decided upon by the Security Council.[19]

(8) *Individual and Collective Self-defence.*—Besides the above-mentioned provisions, the Charter of the United Nations under Article 51 confers inherent right of individual or collective self-defence upon the members of the United Nations.[20] As pointed out by Prof. Julius Stone, the right of individual and collective self-defence is, however, subject to the certain conditions—(i) if an armed attack takes place ; (ii) the right exists until Security Council takes any action ; (iii) it shall be reported to the Security Council ; (iv) it is subject to the review by the Security Council; (v) this right cannot affect the authority and responsibility of the Security Council, for the maintenance or restoration of international peace and security; (vi) this right is limited to the members of the United Nations and is not available to the non-members.[21]

It is clear from the above provisions that the framers of the Charter tried their best to equip the United Nations with a formidable system of Collective Security. So far as constitutional provisions of the United Nations are concerned, it need not be over-emphasised that if they were properly implemented, the United Nations might have a formidable system of Collective Security. But because of conflict and non-cooperation among the major powers many important provisions have become more or less defunct. Therefore, the United Nations has not been able to equip itself with armed forces and other

15. Article 41, Ibid.
16. Article 42, Ibid.
17. Article 43, Ibid.
18. Article 47, Ibid.
19. Article 49, Ibid.
20. For a critical discussion of the right of 'Individual and Collective Self-defence' See Chapter on 'Intervention.'
21. Julius Stone, Legal Control of International Conflicts, p. 243.

necessary powers to ensure the maintenance or restoration of international peace and security. When the framers of the Charter conferred upon the members the right of individual or collective self-defence, they never thought that it might jeopardise, to some extent the system of Collective Security. In pursuance of Article 51, and other articles under the Chapter of 'Regional Arrangements' many regional agreements have been entered into by the States, which instead of assisting the Security Council for its functions of Collective Security, have escaped its control and supervision and to some extent even undermine the functions of the Security Council. Regional Arrangements which were intended to be complementary to the functions of the Security Council have, to some extent, proved detrimental for the maintenance of peace and security.

First Ever Summit of the Security Council.[22]—A brief reference may be made here to the First Ever Summit meeting of the Security Council held on 31st January, 1992. Attended by 13 Heads of States or Government and two Foreign Ministers of the Council's 15 members, the Council reaffirmed its commitment to the Charter's Collective Security system to deal with threats to peace and reverse acts of aggression.

Distinction between Collective Security and Collective Self-Defence.—It may be noted here that there is difference between Collective Security and Collective Self-defence. As pointed out by Hans Kelsen,[23] "Collective Security differs from Collective Self-defence in so far as enforcement action taken by Security Council under Chapter VII is the intended reaction against the breach of peace committed through an act of aggression, whereas the use of force in self-defence is intended by Charter as provisional and temporary until Security Council takes necessary measures and until Collective Security comes into action and not a substitute for it." It has been pointed out earlier that under Article 51 the right of Collective Self-defence exists until Security Council takes any action. Thus it is provisional and temporary. It comes to an end as soon as the Security Council takes any action. Moreover it should not affect the authority and responsibility of the Security Council for the maintenance or restoration of international peace and security. In view ofthe provisions of the Charter discussed above, it is clear that the sanctions behind the Collective Security are much stronger than that of Collective Self-defence. Collective Self-defence is, in fact, an exception to the principle of non-intervention incorporated in Article 2(4) of the U.N. Charter so far as Collective Security is concerned, Article 2(7) specifically provides that this principle (*i.e.*, the principle of non-intervention in the domestic affairs of a State by the U.N.) shall not prejudice the application of enforcement measures under Chapter VII.

Conclusion.—Due to the conflict among the permanent members, the system of Collective Security has failed to achieve the desired objectives. Because of the exercise of veto, Security Council failed to fulfil the 'primary responsibility' of maintaining international peace and security. Due to the failure of the Security Council to fulfil the responsibility entrusted to it under the Charter the General Assembly assumed certain powers in the field of International Peace and Security.[24] But Congo experience has shown that even for the successful functioning of the General Assembly in this field, unanimity among major powers is essential. It has been pointed out, and rightly too, that the arguments in favour of the system are based on faulty or incomplete assumptions.[25] First, an essential assumption is the absolute irresistibility of the accumulated force.[26] A second assumption of the Collective Security system is doubtful, namely, that all nations want International Peace and Security. What they really, want is peace and security for themselves.[27] A third difficulty that has been overlooked is that the construction of a

22. For a little more detailed discussion see Appendix II.
23. Hans Kelsen, "Collective Security and Collective Self-Defence under the Charter," A.J.I.L., Vol. 42 (1948) p. 783 at p. 795.
24. For criticial discussion of the Expanding Role of the General Assembly see Chapter on "The General Assembly."
25. Werner Levi, Note 1, at p. 73.
26. Ibid.
27. Ibid, at p. 74.

Collective Security system is the one of reaching agreement when action is to be taken.[28] Finally, the greatest difficulties can be experienced in determining collectively what form the force is to be given.[29] To conclude in the words of Francis O. Wilcox, "The high expectations of 1945 have collided head on with the hard realities of 1950's and 1960. The concept of Collective Security as it was envisaged in the United Nations Charter may not be entirely dead but its blood pressure is very low and its heart beat is hardly discernible." [30]

Gulf War (1991) and Collective Security.—Whenever there is unanimity among the five permanent members the system of Collective Security not only proves to be effective but is able to achieve the desired objectives. The glaring example of this is Gulf War (1991).[31] However, it may be noted that one of the main reasons for the successful working of the system of Collective Security in Gulf War was the decline in the power and capacity of the Soviet Union and the emergence of the U.S. as the sole super power. Indeed throughout the Gulf War (1991), the U.S. dictated the Security Council so much so that it did not allow the Council to meet and deliberate even once until its objectives were achieved. In view of the breaking up of the Soviet and growing demand for enlargement of the Council, only time will tell how such manipulated unanimity will work in future.

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28. Ibid, at p. 78.
29. Ibid, at p. 79.
30. Francis O. Wilcox, "The Collective Security and Insecurity, Global and Regional," Proc. ASIL. (April 24-26, 1969), p. 54.
31. For a detailed discussion of Gulf War (1991) *see* Appendix II.

CHAPTER 42

REGIONALISM AND REGIONAL ARRANGEMENTS

As pointed out by Francis O. Wilcox, "The question of relative merits of regionalism and globalism in International Organisation generated as much heat as any other issue at San Francisco in 1945 with the exception of the veto. In more recent years the inadequacies of the U.N., the changing nature of the Cold War, the growth and expansion of Regional Organisations, the proliferation of nuclear weapons, and the continued shrinking of the universe have kept the heat of this controversy at a relatively high level." [1] At one extreme are those staunch supporters of regionalism who are of the view that regional arrangements are a natural out-growth of international co-operation. They contend that a Universal Organisation is too ambitious and cannot command the allegiance necessary to fulfil its objectives in a world still divided by National Sovereignty. At the other end of the spectrum are those who are of the view that regional agencies foment great military power rivalries, weaken the effectiveness of the U.N. and undermine the principle of Collective Security.[2] As stated by Prof. Inis L. Claude, Jr., "Regional Organisations, which have escaped the direction and control of the United Nations that was stipulated in the Charter, have been used to some degree not only as alternative agencies for promoting the solution of disputes but also as jurisdictional refuges, providing pretexts for keeping disputes out of the United Nations hands. These political factors are likely to continue to inhibit the full development of the United Nations potentiality for assisting in the settlement of disputes." [3]

Regionalism under the League of Nations.—Even prior to the League of Nations, 'regionalism' in the sense of a grouping of States by a common bond of policy existed. Monroe Doctrine of the British Empire are obvious examples.[4] The Covenant of the League of Nations under Article 21 had made a provision for regionalism by stating that "Nothing in the Covenant shall be deemed to affect the validity of international engagements such as the treaties of arbitration or regional understandings like the Monroe doctrine for securing the maintenance of peace." Thus, "the sum total of such rebirth of regionalist thinly disguised disappointment with the world wide Collective Security of the League of Nations and a determination to provide some protection against the possibility of a similar breakdown of a future global system." [5]

Regionalism under the U.N. Charter.*—At the San Francisco Conference, some formula had to be devised to bring about compatibility between regional and global organisations. A compromise formula was evolved and embodied in Articles 52 to 54 of the Charter. The Charter does not define the term regionalism but provides certain guidelines and safeguards.

Article 52 provides that nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of peace and security as are appropriate for regional action, provided that arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations. Article 53 provides that the Security Council shall, when appropriate, utilise such regional arrangements or agencies for enforcement action under its authority. Article 54 provides that the Security Council shall at all times be kept fully

1. Francis O. Wilcox, "Regionalism and the United Nations", Int. Orgn., (Summer 1965), p. 789.
2. Ibid.
3. Inis L. Claude, Jr., "Implications and Questions for the Future," Int. Orgn., Vol. XIX, No. 3 (Summer 1965), p. 835 at p. 843.
4. D.W. Bowett, the Law of International Institutions (1970), p. 143.
5. Stephen S. Goodspeed, the Nature and Function of International Organisation, Second Edition, p. 571.

* C.S.E. (1980), Q. 11 (b).

informed of the activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

A further enforcement to local or regional action is found in Article 51 which affirms that nothing in the present Charter shall impair the inherent right of individual or Collective Self-defence if an armed attack occurs against a member of the U.N. until the Security Council has taken measures necessary to maintain international peace and Security. It however, provides that the right of self-defence shall be immediately reported to the Security Council and shall not in any way effect the responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Thus the Charter has embodied the above and other safeguards to prevent regional arrangements from challenging the basic Charter principle of Universal Collective Security. The said other safeguards provided under the Charter are the following :

(1) Under Article 102, all regional arrangements must be registered with the Secretariat and published by it.

(2) Under Article 52, it is necessary "that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations."

(3) Article 103 provides that in the event of a conflict between the obligations of the Members of the U.N. under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

(4) Article 53 clearly prohibits the regional agencies from taking any enforcement action "without the authorization of the Security Council".

(5) As provided under Article 52 "the regional arrangement or agency must be appropriate for regional action".

(6) Finally, Article 54 requires, "the Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional agencies for the maintenance of international peace and security".

As remarked by Good speed, "the framers of the Charter realistically faced the problem and made universalism and regionalism as compatible as possible in these provisions." [6] It is evident from the above provisions that the framers of the Charter reserved the basic right of the Security Council to deal with any dispute whether regional, inter-regional or global in character. "The framers of the Charter intended to establish a flexible framework within which existing and future regional agencies and the United Nations might function together harmoniously, the one lending support and encouragement to the other in their mutually complementary task. They intended to underline the primary role of the regional agencies in the settlement of local disputes and they obviously wished to recognise the inherent right of States to defend themselves against armed attack, veto or no veto. They did not intend, however, to kick the day lights out of the world 'Organization' or to detract from its primary responsibility for the maintenance of peace and security.'[7] But after the establishment of the U.N. the balance achieved in the provisions of the Charter began to shift. This is evident from the treaties that have been negotiated setting up the various regional arrangements. Both the NATO and SEATO have neglected to establish any regional relationship or commitments.[8] The NATO refers only Article 51 and no mention is made of Articles 52-54. The SEATO did not refer to any particular article of the Charter. "The significance of these changes is obvious. As the Cold War intensified, the parties to the newer arrangements considered it desirable to avoid the burdensome limitations restrictions found in the regional articles of the Charter." [9] Further, "A second shift in the balance between the regional organisations and the United Nations stems from the fact that the regional agencies have been the less

6. Ibid., at p. 572.
7. Francis O. Wilcox, Note 1, at p. 792.
8. Ibid.
9. Ibid., at p. 794.

active in the peaceful settlement of disputes than the framers of the Charter anticipated..... Moreover, the regional agencies have not eased the burden of the United Nations very much by serving either as a shock absorber or as a court of last resort for the settlement of local disputes." [10]

As pointed out by Francis O. Wilcox, this shift has taken place because of the following three reasons : (a) inability of the U.N. to create a kind of enforcement machinery contemplated in the Charter; (b) regional defence organisations have not been created for the purpose of resolving differences between their own members; (c) the third and perhaps the most important reason stems from the serious limitation on their membership.[11] Further, "As far as enforcement action is concerned, the relationship between the United Nations and the regional organisations have undergone for reaching and, in the eyes of some people, highly disturbing changes. By their words and their deeds the O.A.S. the O.A.U., the Arab League, and to lesser extent, collective defensive Organizations like N.A.T.O., C.E.N.T.O. and S.E.A.T.O. have either disregarded the authority of the U.N. or have taken positive steps to avoid the controls over regional action contemplated by the Charter." [12]

Regional and Global Security.—Regionalism has some obvious advantages. A smaller organisation which is restricted geographically, can easily cope with the common problems more effectively than a world organisation ; on the other hand, a global organisation has its own advantages. For a reasonable balance between the regional and the Universal, the United Nations must be reshaped to meet the realities of a new era. As suggested by Wilcox, "what we should do now is to strengthen the Organisations, first by building a greater sense of responsibility and second, by developing a more Universal basis of support for U.N. peace keeping operations".[13] As aptly remarked by Corbett, "there is ample reason to believe that the Nations will go on strengthening their existing regional associations and devising new ones for political as well for economic and social purposes. The problem of relationship between regional and universal will remain. If the regional associations are not to become simply larger and stronger centres of arbitrary power, their activity must be subjected to some measure of collective control. In planning such control, one lesson from the experience of last twenty years might be that preliminary authorization of enforcement action is unworkable and that we must be satisfied with an *ex post facto* scrutiny of complaints of excess of regional authority and a system that would provide due compensation. If so here as in many other contexts, an ultimate appeal to judicial decision leading, where necessary, to collective sanction, would be highly desirable." [14]

Important Regional Agreements

The length of the book does not permit discussion in detail of all the Regional Agreements. It is, therefore, proposed to discuss briefly below some of the important Regional Agreements of the World.

Following are some of the important Regional Agreements of the world :

(1) *Organisation of American States (O.A.S.).*—The Organisation of American States is a Regional Agreement which was established in 1948. In accordance with Article 1 of the Charter of the said Organization, it is a Regional Agency in accordance with the provisions of the United Nations Charter. So far as the question of collective security is concerned, Article 24 of the Charter of the said Organisation lays down the following: "Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States". In 1965 a Conference of American States was held at Riole Janeiro wherein it was declared that it

10. Ibid., at p. 795.
11. Ibid.
12. Ibid., at p. 799.
13. Ibid., at p. 811.
14. P.E. Corbett, "Regional, Functional and Universal Organisation," in Asian States and the Development of Universal International Law (1972), p. 123 at pp. 128-129.

was essential to force a new dynamism for the inter-American System and imperative to modify the working structure of the Organization of American States, as well as to establish in the Charter new objectives and standards for the promotion of the economic, social and cultural development of the peoples of the Hemisphere, and to speed up the process of economic integration. A Protocol of Amendment to the Charter of the Organization of American States was signed on 27 February, 1967. It came into force on February 27, 1970.[15]

(2) *Arab League.*—The Arab League was established on 22 March, 1944. The chief objective of the Arab League is to maintain and further unity, territorial integrity, political independance of the Arab States. Egypt, Iraq, Syria, South Arabia, Lebanon, Lybia, Algeria, Sudan, United Arab Emirates, Morocco, Tunisia, Bahrain, Qatar, Oman and Maritania etc. are its members. This League aims to bring about coordination among the political programmes of its members so as to preserve their independence and sovereignty. Besides this it also aims to bring about cooperation in economic, commercial, customs, currency, cultural, communication, social and Health matters. As per Article 5 of the Treaty, the members have also undertaken not to use force in settlement of mutual disputes.

In case of an aggression, each member has the right to convene the council. Its collective security is based on Article 51 of the U.N. Charter. Thus Arab League is a regional organisation under Chapter 7 of the United Nations Charter. The permanent secretariat of Arab League is in Cairo. It is headed by a Secretary General.

(3) *Central Treaty Organisation (C.E.N.T.O.).*—Central Treaty Organisation is also properly known as Baghdad Pact, because it was established in 1955 at Baghdad. Iraq, Turkey, Britain, Pakistan, etc. are its members. The Charter of the Central Treaty Organization makes it clear that it has been established in accordance with the provisions of the United Nations Charter regarding individual or collective self-defence contained in Article 51 of the Charter.

(4) *Organization of African Unity (O.A.U.)*[16].—It was established in 1963 at Addis Ababa in the Conference of Independent States of Africa. The chief objective of the Organization is to encourage unity, development, territorial integrity and political independence of African States and to make joint efforts for ending colonialism in Africa.

(5) *North Atlantic Treaty Organization (N.A.T.O.)*[17].—North Atlantic Treaty Organization was established in 1949 at Washington in the Conference of 12 nations. Belgium, Canada, Denmark, France, Italy, Luxumburg, Netherlands, Britain and Pakistan are its members. According to Article 3 of the Charter of the said treaty, if any party of the treaty is attacked or otherwise becomes a subject of aggression, the other parties are bound to help that member. As a matter of fact, the Western States had established it to arrest the expansion of communism. Greece and Western Germany also became its members in 1952 and 1955, respectively. The Organization, however, received a set back in 1966 when France left this Organization. In the beginning, this Organization was chiefly of military importance. But slowly and gradually it is becoming more and more an organization of political rather than military importance.[18]

A significant change has recently come when former Soviet Republics (except Georgia) applies for admission to NATO. On 12 February 1992, NATO's Secretary-General Manfred Worner said, "NATO is ready to accept the former Soviet Republics into its North Atlantic Cooperation Council." Thus in one sense NATO has outlived its utility because its

15. For text of the Protocol of Amendment to the Charter of O.A.S. ("Protocol of Buenos Aires"). See A.J.IL., Vol. 64 (1970), pp. 996-1021.
16. For text of the Charter of OAU, See: Basic Documents in International Law (1972) Edited by Ian Brownlie, pp. 68-76; I.J.I.L., Vol. (1963), pp. 375-382, For detailed study See also K. Mathews, "The Organisation of African Unity," India quarterly Vol. XXXIII, No. 3 (July-September, 1971), p. 308.
17. For more details See Backett, the North Atlantic Treaty, the Brussels Treaty and the Charter of the U.N. (1950).
18. For a detailed study: See Rafin A.A. Kindele, "The Warsaw Pact, The U.N. and the Soviet Union," I.J.I.L. (1971), p. 553.

aim of arresting expansion of communism has almost been achieved with the breaking up of the Soviet Union. In the two-day summit of the NATO Leaders at Brussels, it was decided on 10th January, 1994 that as a first step, the countries of Eastern Europe would be offered military cooperation by NATO. In fact, the Summit leader approved the U.S. sponsored plan called "partnership for peace" to build closer military links with all Soviet block States including Russia. This plan was adopted on the first day of the two-day summit in Brussels. Its aim is to build new security order for Europe. The plan is considered as an essential but not automatic step towards NATO membership. It may be noted here that the move to build closer military links with all former Soviet block States is not likely to be smooth sailing. NATO Leaders, especially, Mr Bill Clinton of the U.S., will have to convince Russia that NATO's absorption of Warsaw is not aimed at containing Russia. Russia's apprehensions about NATO offensive against Serbs may also come in the way. Last but not the least, Russian nationalist leader Vladimir Zhirinovsky has warned that the move of extending NATO membership could lead to World War III.

As noted above plan "partnership for peace" does not spell any precise time table for admission of former Soviet block States including Russia. The admission of these States into NATO may be in phases stretching from three to five years depending upon the developments in Russia, Ukraine and other former Soviet Republics.

Eastward Expansion of the NATO.—

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

(6) *Warsaw Treaty or Pact.*—Warsaw Treaty or Pact was established in 1955 by Bulgaria, East Germany, Hungary, Poland, Rumania and Russia for a period of 30 years. The headquarters of this Organization is in Moscow. It is clear from its preamble that this organization has been established to set-up a system of collective security for East European States. A meeting of the Political Consultative Committee of the Warsaw Treaty was held in Bucharest on November 25-26, 1976. By general agreement of the member States of the Warsaw Treaty, a treaty (comprising of 6 Articles) was adopted.[19] Article I of the Treaty provides that Members of the Treaty shall "not be" the first to use nuclear weapons, one against the other, on the land, at sea, in the air and in outer space. Article IV provides that the treaty shall be open for signature by any State which signed in the city of Helsinki the Final Act of the Conference on Security and co-operation in Europe on August 1, 1975.

Dissolution of Warsaw Pact.—Following the political upheavals in Eastern Europe, Czechoslovakia and Hungary led the way in pressing for an end to Warsaw Pact. At the insistence of Czechoslovakia, Hungary and Poland, the military strictures of the Pact were dissolved last April 11 in Moscow. The seventh member East Germany ceased to exist with German Unification last October 3. Finally at the stroke of 12 midday of July 1, 1991, the leaders of the Warsaw Pact signed the Protocol dissolving the Warsaw Pact, thus ending a 36 year era of East-West confrontation.

(7) *Organisation for Security and Cooperation in Europe (OSCE).*—Leaders of 54 countries including the United States and Russia, on 19th November, 1999 adopted a Charter for European Security the accord establishes the principle that conflicts in one state are the legitimate concern of all. A two day summit of the organisation for Security and Cooperation in Europe (OSCE) was held at Istanbul where the said accord was adopted. The member states reaffirmed their commitment to peace, human rights, democracy and the prevention of conflict. According to a key passage in the Charter, "participating states are accountable to their citizens and responsible to each other for the implementation of their OSCE commitments. We regard these commitments as our common achievements and therefore consider them to be matters of immediate and legitimate concern to all participating states."

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19. For text of the Treaty : See New Times, No. 49 (December, 1976), p. 32; For Communique issued after the Meeting and Declaration of Warsaw Treaty Member States, See Ibid pp. 25-31.

The accord, which was signed by President Bill Clinton on behalf of the United States and Igor Ivanov on behalf of Russia, has been described by U.S. official as the equivalent in security terms of what the 1975 Helsinki final act did for the human rights, which at the height of the cold war, were declared to be a matter of legitimate international interest.

Russia's acceptance of the text of the Charter seems to represent a concession to western pressures following Moscow's previous rejection of what it saw as international interference in its internal affair (such as Russia's war in Chechnya). However, President Boris Yeltsin of Russian had angrily told the western leaders on 18th November 1999 that they had no right to criticise Russia's war against "bandit and killers" in the rebel Caucasian republic. Probably due to this that the declaration strongly reaffirmed that "we fully acknowledge the territorial integrity of the Russian Federation and condemn terrorism in all its forms. The declaration added that "in the light of the humanitarian situation in the region it is important to alleviate the hardships of the civilian population, including by creating appropriate conditions for international organisations to provide humanitarian aid."

As pointed out earlier, the above list is simply illustrative and by no means exhaustive. In view of the paucity of space, only a few regional arrangements have been discussed above briefly.

Conclusion.—Immediately after the establishment of the United Nations it became obvious that the system of collective security established under it was unrealistic and defective. It was based on the assumption that the Great Powers would perform their responsibilities sincerely and would co-operate among themselves. The assumption proved to be unreal. The Great Powers on account of their non-co-operation and the repeated exercise of Veto, completely undermined the system of collective security. The failure of the system of collective security established under the Charter, compelled the nations of the world to enter into regional agreement for their security.[20]

Article 52 of the United Nations Charter provides that the members of the United Nations entering into regional arrangements shall make every effort to achieve pacific settlement of local disputes through such regional arrangement or by such regional agencies before referring them to the Security Council. It was, therefore, intended that local and regional matters will thus be resolved and the system of regional arrangements will assist the Security Council in the performance of its functions of the maintenance of international peace and security. The regional arrangements were, therefore, intended to be complimentary to the system of collective security established under Charter. But they have not only escaped the control and supervision of the Security Council, but have, in many respects, undermined the system of collective security introduced under the Charter. But it would be wrong to say that they made no contribution at all. As remarked by Francis O. Wilcox, "yet despite the plethora of unresolved disputes that plague international community, we have managed to middle through 20 years (now about 47 years) of U.N. history without pluging the world into nuclear war. To that extent the determining power to some of our regional agencies coupled with the moral force and the peace-keeping activities of the United Nations have been successful".[21]

In the first-ever summit of the U.N. Security Council held on 31 January, 1992, Secretary-General of the U.N. was asked to give his recommendations on improving preventive diplomacy, peace-making and peace-keeping. In his response, the Secretary-General submitted a special report entitled. "An Agenda for Peace" which was released on 23rd June, 1992.[22] In his report "Agenda for Peace", Secretary-General Boutros Boutros Ghali recommended that regional arrangements and agencies should also be utilized for

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20. See Lawrence S. Finkelstein, "The United Nations; Then and Now", Int. Orgn., Vol. No. XIX, No. 3 (Summer, 1965), p. 367 at p. 382.

21. Francis O. Wilcox, "Regionalism and the United Nations," Int. Orgn. (Summer 1965), p. 789 at p. 808.

22. See Also U.N. Document (A/47/277-S/24111).

prevention, peace-making, peace-keeping and peace building. As a matter of decentralization, delegation and cooperation with U.N. efforts, regional action would not only lighten the Council's burden but also "contribute to a deeper sense of participation, consensus and democratization in international affairs. Similarly, U.N. peace operations require the cooperation of international organizations and specialized agencies. The Secretary-General has rightly said that the most difficult problem facing peace-keeping and peace-making operations is building greater coordination and synchronization within the U.N. system".[23]

The Security Council concluded a nine-month review of "Agenda for Peace" on 28 May, 1993. The Security Council said that regional organizations and arrangements were asked to consider ways of enhancing their contributions to the maintenance of peace and security. The Council expressed its readiness to support and facilitate peace-keeping efforts undertaken in the framework of regional organizations and arrangements in accordance with Chapter VIII of the Charter.[24] It need not be overemphasized that all these developments have taken place in the context of the activist role of the Security Council which commenced during the Gulf War. It is in the context of these developments that NATO's involvement, especially the threat of air strike, in former Yugoslavia must be seen.

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23. U.N. Chronicle, Vol. XXIX, No. 3 (September, 1992) p. 4.
24. U.N. Chronicle, Vol. XXX, No. 3 (September, 1993) p. 3.

CHAPTER 43

MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY : APPRAISAL AND NEW TRENDS*

Introduction.—The memories of Nazi atrocities, flagrant violation of human rights, loss of lives of millions of innocent people and unprecedented devastation caused during the Second World War were fresh in the minds of the framers of the Charter of United Nations. Though the League of Nations as an institution failed to "preserve as against external aggression, the territorial integrity and existing political independence of all members of the League"[1] and consequently failed to prevent the breaking of the Second World War, yet the statesmen of the world still had faith in International organisation (in its wider sense of process of organising International relations). Even during the Second World War, they had started endeavours to establish another International organisation. Indeed they ultimately succeeded in establishing the United Nations on the basis of the United Nations Charter which was adopted and signed at Sanfrancisco on 25th June, 1945. After having been ratified by five permanent members and majority of other States, the U.N. Charter came into force on 24th October, 1945.

Born as a result of the experiences of a devastating 'war that witnessed Nazi atrocities, flagrant violation of human rights and death of millions of innocent people, it was quite natural for the framers of the Charter to have determined *"to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and* to re-affirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" and for these ends *"to unite our strength to maintain international peace and security"* and "to ensure, by the acceptance of principles and the institution of methods, *that armed force shall not be used save in the common interest"* and to "have resolved to combine our efforts to accomplish these aims." [2] It is with this chief objective that the United Nations was established.

Having expounded the above reasons for the establishment of the United Nations, the very first purpose of the United Nations could not but be *"to maintain international peace and security,* and to that end : to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." Thus, "The purpose of the United Nations Organisation is to maintain world peace."

The flagrant violation of human rights, dropping of atom bomb at Hiroshima and Nagasaki and the unprecedented death and destruction caused during the Second World War created such a scare in the minds of peoples that they shuddered even at the idea of war. The framers of the U.N. Charter were also so much scared of war that they have not used the word "war" in any concrete provision of the Charter.[3] They have replaced it with the term "use force". The framers of the Charter wanted not only to prohibit war but also to

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* See also for P.C.S. (1991) Q. 10.

1. Article 10 of the Covenant of the League of Nations.
2. Preamble of the U.N. Charter.
3. The term "war" occurs only thrice in Charter—first in the preamble to stress that it is a scourge 'which twice in our lifetime has brought untold sorrow to mankind and secondly twice in Article 107 which says "Nothing in the present Charter shall invalidate or preclude actions, in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action". Since all the States to which Art. 107 refer have already become members of the U.N., this provision has become redundant.

ensure that not even 'force' or 'threat' thereof shall be used by member States in their international relations. That is why, in Article 2 (4) of the Charter they provided :

"All Members shall refrain in their international relations from *the threat or use of force* against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations."

The provisions relating to international peace and security are studded throughout the Charter. They find mention in preamble, purposes, principles and many other concrete provisions of the Charter. In order to ensure prompt and effective action by the United Nations, its members have conferred on the Security Council *the primary responsibility for the maintenance of international peace and security* and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.[4] Further, the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present charter.[5] Moreover, the five permanent members of the Security Council namely United States of America, U.K., France, China and Soviet Union were conferred on Veto power[6] under the assumption that they shall continue to cooperate in the same way as they did during the second world war. But this assumption proved to be wrong and unrealistic for the cooperation among the Great Powers, which was the prerequisite for making peace settlements failed to materialise. The high expectations of 1945 collided head on with the hard realities of 1950's and 1960's.[7]

Immediately after coming into force of the U.N. Charter, there developed confrontation between the East and West—mainly between the Soviet Union on the one hand and the United States of America and United Kingdom on the other hand. This confrontation proved to be detrimental for the achievement of chief objective of the U.N. *i.e.* maintenance of peace and security. "It did not take long for Sanfrancisco hopes of great power unity to fade. Bitter disillusionment rapidly replaced cautious optimism of the spring of 1945. Irreconciliable conflict over German settlement, harsh agreement over other peace treaties; the clash over Trieste; guerilla war in Greece; and the continuance of Soviet forces in Iran beyond the agreed deadline rapidly produced an atmosphere of distrust and hostility. In U.N. itself, the Security Council was the scene of bitter clashes and within a year the Soviet Union had cast several vetoes and staged famous walkout over Iranian affair." [8] It obviously resulted in the failure of the Security Council from equipping itself to exercise the full powers conferred on it by the Charter. The frequent use of vetoes crippled the Security Council and it failed to perform the role which was envisaged for it under the Charter. Though the Security Council failed to fulfil the 'primary responsibility' for the maintenance of international peace and security, the responsibility of the organisation as a whole *i.e.* the U.N. did not end. Therefore, with the initiative of the U.S., Uniting for Peace Resolution was passed by the General Assembly on 3rd November, 1950. It equipped the General Assembly with important powers for the maintenance of international peace and security. "It was an attempt to transfer the sanctioning competence from the Security Council to General Assembly in order to evade veto and to revise the task of the United Nations to maintain and restore international peace and security." [9] Thus in fact, "The objective of the Resolution was to improve the machinery of the U.N. for preserving peace." [10]

The transfer of sanctioning competence from the Security Council to the General Assembly naturally devolved a lot of powers on the Secretary-General because being "the chief administrative officer of the organisation"[11] he acts in that capacity in all meetings of

4. Article 24
5. Article 25
6. See Article 27.
7. See Francis O. Wilcox, "Collective Security and Insecurity, Global and Regional", Proc. ASIL, April 24-26, 1969, p. 54.
8. Lawrence S. Finkelstein, "The United Nations : Then and Now", Int. Orgn., Vol. XIX No. 3 (1965) p. 367 at p. 382.
9. Josef L. Kunz, "Sanctions in International Law", AJIL, Vol. 54 (1960) p. 324 at . 336.
10. Juraj Andrassy, "Uniting for Peace", AJIL, Vol. 50 (1956) p. 563.
11. See Article 97.

the General Assembly and Security Council and has to "perform such other functions as are entrusted to him by these organs." [12] Thus the centre of gravity in respect of international peace and security which was originally in the Security Council shifted to the General Assembly and from there it shifted to the Secretary-General. As regards maintenance of international peace and security, the decade of 1950's witnessed a new trend in thought and practice. The main factors responsible for the new trend were the unprecedented increase in membership of the U.N., non-alignment of the new members of Asian and African countries in the cold war and the appointment of Dag Hammarskjold as the Secretary-General in 1953. One of the important features of the new trend was 'preventive action' or 'preventive diplomacy' which increased the role of the Secretary-General. Preventive action involved mainly two lines of action—(1) to stabilise the situation in the field on a day-to-day basis and to prevent the incidents endangering international peace and security; and (2) to be quietly helpful by being a third party which may bridge the gulf between two conflicting parties.

The establishment of the United Emergency Force (UNEF) in Suez Canal Crisis brought about a revolutionary change in the role of the U.N. in keeping the peace. The objective of the establishment of UNEF was to secure and supervise the cessation of hostilities. Later in the Congo Crisis (1960-61), the General Assembly broadened the scope of the U.N. operation in Congo (ONUC), created earlier by the Security Council. The involvement of the U.N. in Congo, however, proved to be very costly and virtually plunged the U.N. in a financial crisis because France and Soviet Union refused to pay their part of expenses of the UNEF and ONUC on the ground that the General Assembly was not competent to undertake such operations and that Uniting for Peace Resolution, 1950 was *ultra vires* of the U.N. Charter. It became evident from the Congo experience that Secretary-General was not an adequate substitute for cooperation and Unity of Five Permanent Members or the assumptions of the Great Powers Unity upon which the whole fabric of international peace and security was envisaged and built under the Charter.

A brief reference may also be made here to the Regional Arrangements or organisation completed under Article 52 of the Charter. Article 53 clearly provides that the Security Council, where appropriate, may utilize such regional arrangements or agencies for enforcement action under its authority. Further, no enforcement actions can be taken under regional arrangements without the authorization of the Security Council. Moreover, as provided by Article 54, the Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security. Thus the regional arrangements were to remain under supervision and control of the Security Council. But due to lack of trust and non-cooperation among the great powers, regional arrangements or agencies escaped the supervision and control of the Security Council. They were rather used to some degree not only as alternative agencies for promoting the solution of disputes but also as jurisdictional refuge providing pretexts for keeping the disputes out of U.N. hands. These political developments thus inhibited the full development of the U.N. "potentiality for assisting in the settlement of disputes." [13]

Due to the limitations of the General Assembly and Secretary-General as referred above and the near paralysis of the Security Council due to frequent use of veto, the system of maintenance of international peace and security stipulated under the U.N. Charter remained fragile for a long time. The present decade of the 1990's has brought about new hopes. The factors responsible for the optimism and new hopes are the breaking up of the Soviet Union, end of cold war and the emergence of the U.S. as the sole super power. It was on account of these factors that U.N. Security Council's role in the Gulf War (1991) was a complete success. Being emboldened by this and the factors mentioned above, the Security Council has started playing a more active, rather an activist role, in the maintenance of peace and security. This is evident from its role in former Yugoslavia, Somalia, Lockerbie case etc. This new role undoubtedly requires the

12. See Article 98.
13. See Iris L. Claude, Jr., "Implications and Questions for the Future", Int. Orgn., Vol. XIX (Summer 1965) p. 835 at p. 843.

development of new techniques, mechanism and capacities. In the first ever summit of the Security Council held on 31st January, 1992, the members of the Council "affirmed their determination to build on the initiative of their meeting in order to secure positive advances in promoting international peace and security..... The members of the Council agree that the world now has the best chance of achieving international peace and security since the foundation of the United Nations.....". As regards peace-making and peace-keeping the Secretary-General was asked "to prepare, for circulation of the members of the United Nations by July 1992, his analysis and recommendation on ways of strengthening and making more efficient within the framework and provision of the Charter the capacity of the United Nations for preventive diplomacy, for peace-making and peace-keeping. In response, Secretary-General Boutros Boutros Ghali, submitted a special report entitled *"An Agenda for Peace"*. This report was released on 23rd June, 1992 as a 53-page booklet and also as a U.N. document.[14]

Before we discuss "An Agenda for Peace" it will be desirable to discuss the role of different principal organs of the U.N. and other agencies for the maintenance of International Peace and Security. In this connection the roles of Security Council, General Assembly, Secretary-General and Regional Arrangements or Agencies deserves a special mention here :—

(I) Role of Security Council.—The provisions of the U.N. Charter relating to maintenance of international peace and security are contained in Articles 24 to 32 of Chapter V. Articles 33 to 38 of Chapter VI entitled "Pacific Settlement of Disputes" and Articles 39 to 51 of Chapter VII entitled "Action with Respect to Threats of the Peace, Breaches of the Peace, and acts of Aggression". These have already been discussed in Chapter on "The Security Council" under the heading "Maintenance of International Peace and Security" including the discussion of 'Pacific Settlement of disputes', 'Sanctions against aggressor or action with respect to threats to peace, breach of peace and acts of aggression, 'Definition of Aggression', 'Consequences of failure of the Security Council', 'Veto and its effect on the Efficiency of the Security Council', 'Contribution of the Security Council for the maintenance of Peace and Security' and 'Evaluation'. Besides this, the concept of Collective Security has been discussed in Chapter on "Collective Security". The readers are, therefore, requested to read Chapters on "The Security Council" and "Collective Security" for the discussion of the Role of the Security Council.

(II) Role of General Assembly.*—Next only to the Security Council, General Assembly is the important principal organ of the U.N. concerning the maintenance of international peace and security. This is because of the obvious reason that the General Assembly is the most democratic and representative principal organ of the United Nations. Every member State of the U.N. is represented in this august body[15] and each member State has one vote.[16] At present, there are as many as 185 members of the U.N. When so many States pass a resolution unanimously or with overwhelming majority, it cannot but have an important impact. It represents international standard and may be a link for the development of customary rules of international law. Though the framers of the Charter envisaged General Assembly to be only a deliberative body with no power to pass binding resolutions. But because of being the most representative organ, the powers of the General Assembly constantly increased and will continue to increase. This development also found support from some provisions of the Charter, the most important of which is Article 10. Article 10 provides that the General Assembly may discuss any question or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the U.N. Charter. The only limitation to such wide powers of the General Assembly is, as provided by Article 12, that while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests. Besides, the

14. See U.N. document (A/47/277-S/24111).
* See also for C.S.E. (1995) Q. 6(b).
15. See Article 9.
16. See Article 18.

wide powers conferred on General Assembly by Article 10, Article 11 specifically provides that General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or both. Further, the General Assembly may discuss any question relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a State which is not a member of the U.N. in accordance with Article 35, paragraph 2. Besides this, the General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security. Finally the powers of the General Assembly set forth in Article 11 shall not limit the general scope of Article 10.

It need not be overemphasized here that Article 10 confers very wide powers on General Assembly. There is no other provision in the whole of the Charter which confers such wide powers on any other organ of the United Nations. Having such wide powers under the Charter, the General Assembly became the most potent principal organ of the U.N. in the course of time due to distrust among the Great powers, cold war and frequent use of vetoes in the Security Council. The powers of the General Assembly reached their zenith with the passing of Uniting for Peace Resolution, 1950.

Uniting for Peace Resolution

N.B.—For the Expanding Role of the General Assembly, Uniting for Peace Resolution, 1950 and validity of Uniting for Peace Resolution, 1950, please see Chapter on "The General Assembly of the United Nations."

Despite the phenomenon increase in the role of the General Assembly Congo experience made it clear that even for the successful functioning of the General Assembly, especially in the field of international peace and security, unanimity and cooperation of five permanent members of the Security Council is essential. In fact, there is no substitute to unanimity and cooperation of great powers. In the 1990's, especially after the breaking up of the Soviet Union and Gulf War (1991), the Security Council reasserted itself and started fulfilling effectively its 'primary responsibility' of maintaining international peace and security. Taking advantage of the situation the United States of America assumed the leadership of the Security Council as the sole super power and the Council started taking even an activist role in the field of international peace and security.

(III) Role of the Secretary-General.—Article 99 of the U.N. Charter provides that the Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. Since it involved expression of his opinion, in past Secretary-General hardly ever used this provision. They feared that they might not become centre, of conflict between great powers. In 1990's however, the situation has changed and new role envisaged and outlined after the First-ever summit of the Council on 31st January, 1992, will require the Secretary-General to take initiatives and to perform a very active role. The provisions of Article 99 will therefore assume significance and may be implemented properly.

N.B.—For a more detailed discussion of the role of the Secretary-General please see 'Functions of the Secretary-General' discussed under the Chapter on "The Secretariat".

(IV) Role of Regional Arrangement.—Articles 52 to 54 of the U.N. Charter deal with Regional Arrangements. These Articles envisage a definite role for the maintenance of international peace and security. For example, Article 53 provides that the Security Council shall, where appropriate, utilize regional arrangements or agencies for enforcement action under its authority. The Charter envisaged that regional arrangements would remain under the control, authority and supervision. But because of distrust and conflict among great powers, they escaped from the control and authority of the Security Council. Due to end of cold war and the emergence of U.S. as the sole super power, the situation has changed in the 1990's. Now the provisions of Article 53 may be enforced in their letter and spirit. The recent involvement of NATO in Bosnia is a glaring example of this.

N.B.—For a more detailed discussion see also Chapter on "Regionalism".

First-ever Summit Level—Meeting of the Security Council: New Challenges and New Trends.—The whole perspectives of the concept of Collective Security in particular and international peace and security in general changed in the 1990's especially after the breaking up of Soviet Union, end of cold war, Gulf War (1991), disillusionment with communism in socialist countries, turmoil in Yogoslavia, Czechoslavakia etc. New challenges and new trends required new initiatives, new techniques and new strategies. Taking advantage of the situation, first-ever summit of the Security Council was held on 31st January, 1992. It was attended by 13 Heads of State or Government and two Foreign Ministers of the Council's 15 members. This summit was described as "historic", "timely", "extraordinary", "unique" and "unprecedented". The Security Council in its joint statement said these were "new favourable circumstances, under which it had begun to fulfil more effectively its primary responsibility for the maintenance of international peace and security." Taking place at "a time of momentous change", the Council members said that the end of cold war had raised hopes for "a safer, more equitable and more humane world." The Security Council asked the U.N. Secretary-General Boutros Boutros Ghali to make recommendations on ways to strengthen and make more efficient the U.N. capacity for preventive diplomacy, peace-making and peace-keeping within the U.N. Charter's framework and provisions.[17] The joint statement added that the Secretary-General's recommendations could cover the U.N. role in identifying "potential crisis and areas of instability" as well as the contribution to be made by regional organizations, in accordance with Chapter VIII of the Chapter, in helping the Council's work. They could also cover the need for adequate resources, both material and financial.[18]

Addressing the Summit meeting of the Council, Secretary-General Boutros Boutros Ghali said, "Now that cold war had come to an end, we must work to avoid the outbreak or resurgence of new conflicts. The explosion of nationalities, which is pushing countries with many ethnic groups towards division, is a new challenge to peace and security." He added, "the U.N. would have to respond to the irredentist claims of ethnic and cultural communities or their call for autonomy." Further, account must be taken of "the abundant supply of arms, the aggravation of economic inequalities between various communities and the flow of refugees." Secretary-General favoured periodic summit-level meetings of the Council to take stock of the state of the world.[19]

Secretary-General's Response—"An Agenda for Peace".—In response to the request of the Security Council, Secretary-General submitted a special report entitled, "An Agenda for Peace"[20] which was released on 23rd June, 1992. In the beginning of the report Secretary-General Boutros Boutros Ghali stated : "The adversarial decades of the cold war made the original promise of the organisation impossible to fulfil. The January 1992 Summit therefore represented an unprecedented recommitment, at the highest political level, to the purposes and principles of the Charter."

Further, "In these past months, a conviction has grown, among nations large and small, that an opportunity has been regained to achieve the great objectives of the Charter—a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, 'social progress and better standards of life in larger freedom'. This opportunity must not be squandered. The organization must never again be crippled as it was in the era that has now passed." [21]

In his special report entitled, "An Agenda for Peace", the Secretary-General submitted his recommendations on improving preventive diplomacy, peace-making, peace-keeping and Post-conflict peace-building.

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17. See U.N. Chronicle, Vol. XXIX, No. 2, (June, 1992), p. 4.
18. Ibid, at pp. 4-5.
19. Ibid, at p. 6.
20. See U.N. document (A/47/277-S/24111).
21. See U.N. Chronicle, Vol. XXIX, No. 3, (September, 1992), p. 2.

Preventive Diplomacy.—A brief reference of 'Preventive Diplomacy' has already been made above under the heading 'Introduction'. Besides this, readers are requested to see Chapter on "The Secretariat" wherein Secretary-General's recommendations on 'Preventive Diplomacy' have been mentioned.

In addition to this, it may be noted that Security Council met on 29th October, 1992 and 30th November, 1992 to consider proposals put forward in Secretary-General's "An Agenda for Peace". In 30 November, 1992 statement[22], the Security Council supported the wider use of fact-finding as tool of preventive diplomacy. The Council also endorsed the Secretary-General's view that in some cases, a fact-finding mission could help defuse dispute or situation, indicating to those concerned that the U.N. and in particular the Council was "actively seized the matter as a present or potential threat to international peace and security." The Council asserted that such an action in the early stages of a potential dispute could be particular effective. The Council welcomed the Secretary-General's readiness to make use of full of his powers under Article 99 of the U.N. Charter to draw the Council's attention to any matter which in his opinion might threaten international peace and security.[23]

The General Assembly also considered "An Agenda for Peace" and adopted without a vote a resolution[24] containing specific recommendations. The General Assembly supported the continued use of experts in fact-finding missions and urged that Member States requests for such missions be considered expeditiously. In the area of resources and logistical aspects of preventive diplomacy, member States were asked to provide political and practical support to the Secretary-General in his efforts in that area as well as any necessary expertise and logistical resources.[25]

Peace-Making.—In his report, "An Agenda for Peace", Secretary-General Boutros Boutros Ghali pointed out, "Between the tasks of seeking to prevent conflict and keeping the peace lies he responsibility to try to bring hostile parties to agreement by peaceful means". To further the pursuit of peace-making he recommended the following :

(i) Creation of new category of U.N. forces—"Peace enforcement units"—to be deployed in cases where the task of maintaining a cease-fire might exceed the mission of peace-keeping. Such units would consist of trained volunteer troops more heavily armed than peace-keeping forces;

(ii) Full participation of the General Assembly in supporting efforts at mediation, negotiation or arbitration of a dispute;

(iii) Greater reliance on the International Court of Justice for the peaceful adjudication of differences; and

(iv) Armed forces should be made available by Member States to Security Council on a permanent basis to provide the U.N. with credibility as a "guarantor of international security." [26]

Peace-Keeping.—According to Secretary-General Boutros Boutros Ghali, the nature of peace-keeping which has evolved in recent years is "the invention of United Nations." In his report he stated, "As the international climate has changed and peace-keeping operations are increasingly fielded to help implement settlements that have been negotiated by peace-makers, a new era of demands and problems has emerged regarding logistics, equipment, personnel and finance." To meet increasingly demands, he recommended the following :

(i) The immediate establishment of a $50 million revolving peace-keeping reserve fund;

(ii) Improved training of peace-keeping personnel especially language training for national police contingents who may serve with the organization; and

(iii) Establishment of a pre-positioned stock of basic peace-keeping equipments

22. See S/24872.
23. See U.N. Chronicle, Vol. XXX, No. 1, (March, 1993) p. 2.
24. See Resolution 47/120.
25. See note 23, p. 3.
26. See note 21, at p. 3.

to fill gaps in under-equipped troops provided by Governments. Alternatively, Governments should commit to keeping certain equipments on stand-by for immediate use by the U.N. when required.[27]

The Security Council concluded on 28 May, 1993 a nine-month review of Secretary-General Boutros Boutros Ghali's wide-ranging strategy "An Agenda for Peace" urging all States to make participation in and support for international peace-keeping a part of their foreign and national security policy. In its review[28], the Council said U.N. peace-keeping operations should be conducted in accordance with operational principles consistent with U.N. Charter provisions, including a clear political goal with a precise mandate, subject to periodic review and change in its character or duration only by the Council itself; consent of the Government and, where appropriate, the parties concerned, save in exceptional case, support for a political process or the peaceful settlement of disputes; impartiality in implementing Council decisions; the Council's readiness to take measures against parties which do not observe its decisions; and the Council's right to authorize "all means necessary" for U.N. forces to carry out their mandate and the inherent right of U.N. forces to take measures for self-defence.

In that context, the Council emphasized the need for the full cooperation of the parties concerned in implementing mandates of peace-keeping operations, and stressed that such operations should neither be a substitute for a political settlement nor should they be expected to "continue in perpetuity."

In the context of the rapid growth in and new approaches to peace-keeping operations, the Council commended the initial measures taken by the Secretary-General to improve U.N. capacity in that field. Bold new steps were required. The Secretary-General was asked to report by September 1993 on specific new proposals to further enhance those capabilities.

In view of the mounting cost and complexity of the operations, the Council also asked the Secretary-General to address measures designed to place them on a more solid and durable financial basis, taking into account the Ford Foundation Report[29] and addressing the necessary financial and managerial reforms, diversification of funding and the need to ensure adequate resources for peace-keeping operations and maximum transparency and accountability in use of resources.

Member States were called upon to pay their assessed contributions for peace-keeping operations in full and on time. The Council also encouraged those States which could do so to make voluntary contributions.

The Council also strongly condemned attacks on U.N. Peace-keeping, U.N. Peace-keepers and declared its determination to undertake more decisive efforts to ensure the security of U.N. personnel in the course of fulfilling their duties.

The Council asked the Member States to provide detailed information on situations of tension and potential crisis so that the Secretary-General could consider measures to strengthen the Secretariat's capacity to collect and analyse information. The Council supported preventive deployment, on a case-by-case basis, in zones of instability and potential crisis. The close link which might exist, in many cases, between humanitarian assistance and peace-keeping operations was underlined.

Existing U.N. Peace-keeping Operations Around the World.—At present, there are following 14 U.N. Peace-keeping operations :[30]

(1) U.N. Truce Supervision Organisation (UNTSO).—UNTSO was established in June 1948 to assist the Mediator and the Truce Commission in supervising the observance of the truce in Palestine. UNTSO supervises the General Armistice Agreement of 1949 and the Observation of the cease-fire in the Suez Canal area and the

27. Ibid.
28. See U.N. Chronicle, Vol. XXX, No. 3, (September, 1993) pp. 2-3.
29. This has been referred under the heading "Financial Crisis Faced by the U.N." in Chapter on "The General Assembly of the United Nations".
30. See U.N. Chronicle, Volume XXX, No. 3 (September, 1993), pp. 40-41.

Golan Heights which followed the Arab-Israeli war of June 1967. It also cooperates with the United Nations Disengagement Observer Force and the United Nations Interim Force in Lebanon. UNTSO has the strength of 224 military observers who are stationed in Beirut and in the Sinai.

(2) U.N. Military Observer Group in India and Pakistan (UNMOGIP).—UNMOGIP was established in January 1949 to supervise the cease-fire between India and Pakistan in the State of Jammu and Kashmir. It has the strength of 38 military observers.

(3) U.N. Peace-keeping Force in Cyprus (UNFICYP).—Established in March 1964, UNFICYP has a strength of 1,480 military personnel and 38 civilian police. It was established to use its best efforts to prevent the recurrence of fighting and to contribute to the maintenance and restoration of law and order and a return to normal conditions. Since the hostilities in 1974, this has included supervising the cease-fire and maintaining a buffer zone between the lines of the Cyprus National Guard and of the Turkish and Turkish Cypriot forces.

(4) U.N. Disengagement Observer Force (UNDOF).—UNDOF was established in June 1974 to supervise the cease-fire between Israel and Syria; disengagement of Israeli and Syrian forces, and the areas of separation and limitation as provided in the Agreement on Disengagement between Israeli and Syrian forces of 31 May, 1974. It has strength of 1,120 troops assisted by military observers of UNTSO's Observer Group Golan.

(5) U.N. Interim Force in Lebanon (UNIFIL).—Established in March 1978, UNIFIL has a strength of 5,280 troops, assisted by 57 military observers of UNTSO's Observer Group Lebanon, and 520 civilian staff. It was established to confirm the withdrawal of Israeli forces from Southern Lebanon, restore international peace and security, and assist Government of Lebanon in ensuring the return of the effective authority of the area.

(6) U.N. Iraq-Kuwait Observer Mission (UNIKOM).—UNIKOM was established in April 1991 with a strength of 320 military personnel and 188 civilian staff to monitor the 40 kilometre long Khor Abdullah Waterway and the Demilitarized Zone (DMZ) between the two countries, using observer posts and land and air patrols, to deter boundary violations and to observe any hostile or potentially hostile actions. In February 1993, the Security Council transformed UNIKOM from an observer contingent into an armed force capable of preventing small scale violations of the DMZ authorizing an increase in personnel to some 3,600.

(7) U.N. Angola Verification Mission (UNAVEM II).—It was established in June, 1991 with a strength of 75 military observers, 28 police observers and 115 civilian staff to verify the arrangements agreed to by the Angolan parties for monitoring the cease-fire and observing and verifying elections. Despite the U.N. declaration that the September 1992 elections were generally free and fair, their results were contested and renewed fighting broke out. Since then UNAVEM II has sought to help the two sides agree on ways to restore peace.

(8) U.N. Observer Mission in El Salvador (ONUSAL).—ONUSAL was established in July 1991 to verify implementation of agreements between El Salvador and the Frente Farabundo Marti para la Liberacion Nacional (FMLN). These concern : maintaining the cease-fire, reform and reduction of armed forces, creation of a new police force, reform of the judicial and electoral systems, human rights, land tenure and other economic and social issues. ONUSAL has a strength of 380 military and police personnel and 250 civilian staff. Some 900 electoral observers are to assist in the scheduled 1994 March elections.

(9) U.N. Mission for the Referendum in Western Sahara (MINURSO).—It was established in September 1991 originally to monitor a cease-fire, verify reduction of Moroccan troops in the territory, monitor confinement of troops to designated locations, ensure the release of Western Sahara political prisoners or detainees, oversee the exchange of prisoners of war, implement the repatriation

programme, identify and register qualified voters, organize and ensure a free referendum and proclaim the results. Due to divergent views, the plan has not been fully implemented. MINURSO has a strength of 225 military observers, 100 military support personnel and 103 civilian staff.

(10) U.N. Protection Force (UNPROFOR).—Established in February, 1992, it has a strength of 24000 military and civilian personnel—14,000 in Crotia, 9200 in Bosnia and Herzegovina and 750 in the former Yogoslav Republic of Macedonia.

Crotia.—It was established in Crotia in March 1992 as an interim arrangement to create conditions of peace and security required for negotiating an overall settlement. It is deployed in three "United Nations Protected Areas" (UNPAs) in Crotia, to ensure a demilitarization process.

Bosnia and Herzegovina.—In June, 1992, UNPROFOR was enlarged to ensure the security and functioning of the Sarajevo airport and delivery of humanitarian assistance. In September, 1992 it was further enlarged to support humanitarian relief. Since November, 1992, UNPROFOR has monitored the ban of military flights. In June 1993 it was authorised to use force in response to bombardments or attacks against "safe areas" or deliberate destruction of humanitarian convoys.

The former Yogoslav Republic of Macedonia.—In December, 1992 UNPROFOR was deployed, on request of the country's President to monitor border areas and report on any potentially destabilizing activity.

On 30th June, 1993 Security Council extended UNPROFOR's for an additional period until 30th September, 1993. The Council also approved Secretary-General's reports and his request for $ 91.2 million to strength the force thus sanctioning a total of 2,650 additional troops and 100 military observers.

(11) U.N. Transitional Authority in Cambodia (UNTAC).—UNTAC was established in April, 1993 with a strength of 28000 military personnel to organize and conduct free and fair elections (23-28 May, 1993) and help oversee civil administration, human rights situation, the maintenance of law and order, repatriation and resettlement of refugees and displaced persons, and the rehabilitation of infra structure. The transitional period will end when a Constituent Assembly is elected and a new Cambodian Constitution approved.

(12) U.N. Operation in Mozambique (ONUMOZ).—ONUMOZ was established in December, 1992 with a strength between 7000 and 8000 military and civilian personnel to facilitate implementation of the 4 October, 1992 Rome Agreement, in particular by chairing the Supervisory and Monitoring Commission and the subsidiary bodies; to monitor and verify the cease-fire, demobilization and complete withdrawal of foreign forces, and to provide security in transport corridors; to monitor and verify the disbanding of private armed groups, to authorize the security arrangements for vital infra structures; to provide security for U.N. activities etc.

(13) U.N. Operation in Somalia II (UNOSOM II).—Established in April, 1993 it has a strength of 28,000 military personnel and 2,800 civilian staff. UNOSOM II was originally established in April, 1992 to monitor a cease-fire, provide security for U.N. personnel and supplies and escort humanitarian supplies to distribution centres. In August 1992, UNOSOM was strengthened so it could better protect convoys and distribution centres throughout Somalia. The Security Council authorized in December 1992 the Unified Task Force (UNITAF) organized and led by the United States to use "all necessary means" to establish to secure environment for humanitarian relief operations in Somalia. In March, 1993, the Security Council citing concerns over "crippling famine and drought" compounded by civil strife, created UNOSOM II to replace UNITAF. UNOSOM II is the largest peace-keeping force in U.N. history and the first authorized to use force under Chapter VII of the U.N. Charter. It also assists in rebuilding Somalia's government and economy.

(14) U.N. Observer Mission Uganda-Rivanda (UNOMUR).—UNOMUR was established in June 1993 with a strength of 81 military observers and 24 civilian staff for monitoring the Uganda/Rivanda border to verify that no military assistance reaches

Rivanda, focusing primarily on "transit or transport, by roads or tracks" of weapons and ammunition across that border as well as "any other material which could be of military use."

(15) U. N. Observer Mission in Georgia (UNOMIG).—This observer mission was established on 24 August, 1993 to verify the enforcement of cease-fire between Georgia and the separatist forces of Abkazia in black sea area. This was the first U. N. Peace-keeping Mission in former Soviet Union Area. Under this Mission 88 military observers were deployed to verify the enforcement of cease-fire.

(16) U. N. observer Mission in Liberia (UNOMIL).—This observer mission was established on 22 September, 1993 to supervise the cease-fire of July 1993, and elections of February-March, 1994 and to coordinate humanitarian help. About 300 military, humanitarian and election observers were deployed in this mission.

A perusal of the above-mentioned peace-keeping operations makes it clear that in recent years there has been a phenomenonal increase in the deployment of persons in U.N. Peace-keeping operations. In U.N. Protection Force (UNPROFOR) and U.N. Operation in Somalia II (UNOSOM II) 24000 and 30,800 military and civil personnel respectively have been deployed. Thus in these two operations as many as 54,800 persons have been deployed. Such huge operations obviously require logistic informations, equipment and above all matching financial resources. That is why, in its meeting on 28 May, 1993 the Security Council said that in the context of rapid growth in and new approaches to peace-keeping operations, initial measures taken by the Secretary-General to improve U.N. capacity in that field were commendable. The Council said that bold new steps were required. It asked the Secretary-General to report by September, 1993 on specific new proposals to further enhance these capabilities.[31] It may be noted that in a study made by Worldwatch "a think Tank of Washington, in collaboration with Ford Foundation has suggested to revolving peace-keeping reserve fund of $ 400 million and charging of interest on late payments made by States. It has also suggested that instead of single annual contribution, payments may be taken in four annual instalments. These suggestions merit serious consideration. As regards for $ 400 million revolving fund for peace-keeping, it should be financed by three annual assessments on Member States.

Post-conflict Peace-building.—According to Secretary-General, Boutros Boutros Ghali, whereas preventive diplomacy is to avoid a crisis, "Post-conflict peace-building is to prevent a recurrence." He, therefore, recommended[32] various post-conflict measure designed to foster confidence between parties to an armed dispute, including—

(i) Disarming them, repatriating refugees, monitoring elections, advancing efforts to protect human rights and reforming or strengthening governmental institutions;

(ii) Undertaking projects that bring States together, including agricultural development, improvement of transportation, sharing of resources and educational exchanges;

(iii) Demining combat zones to enable restoration of agriculture, road building and other peace-building activities; and

(iv) Development of U.N. technical assistance to help transform deficient national structures and strengthen democratic institutions.

On 30th April, 1993, the Security Council issued a statement[33] on post-conflict peace-building emphasizing importance of building strong foundations for peace in all countries and regions of the world. The Council generally agreed with the recommendations of the Secretary-General and said that in the aftermath of an international conflict, peace-building might, among other things, include measures and

31. See U.N. Chronicle, Vol. XXX, No. 3 (September, 1993) pp. 2-3.
32. See U.N. Chronicle, Vol. XXIX, No. 3 (September, 1992) pp. 3-4.
33. See S/25696.

cooperative projects linking two or more countries in mutually beneficial undertakings, "which constitute not only to economic, social and cultural development, but also enhance mutual understanding and confidence that are so fundamental to peace". The Council added that U.N. organisations and agencies in developing and implementing their programmes "need to be constantly sensitive to the goal of strengthening international peace and security as envisaged in Article 1 of the Charter". Recognizing that post-conflict peace-building, in the context of overall efforts to build the foundations of peace, also needed adequate financial resources in order to be effective, the Council stressed that Member States, U.N. bodies and other international organizations should make all efforts to have adequate funding available for specific projects—such as the earliest possible return of refugees and displaced persons to their homes of origin—in post-conflict situations. The Council fully recognized that social peace was as important as strategic or political peace.[34]

U.N. Rapid Force Proposal Rejected

In January 1994, U.N. Secretary-General Boutros Boutros Ghali proposed the setting up of a United Nations Rapid Reaction Force to act quickly in case of need and a Unified Command for the U.N. Peace Keeping Forces. Both these suggestions were promptly rejected by the United States of America because this was seen an attempt by the U.N. Secretary-General to abrogate to himself more powers. India has also rejected Secretary-General's concept of an independent U.N. Peace Enforcement Capacity. This was made clearly by Ambassador T.P. Srinivasan while speaking at the 50th anniversary of the U.N. However, Indian delegate fully endorsed the Secretary-General's suggestions for the establishment of a mechanism to implement Article 50 especially regarding compensation to countries whose trade is adversely affected by the imposition of sanctions.

Conclusion.—For more than four decades, the Security Council remained almost paralysed due to conflict among great powers and frequent use of vetoes. The whole fabric of international peace and security under the U.N. Charter is based on the assumption of cooperation and unity among the five permanent members. Since this assumption failed to materialise and proved to be unrealistic, the Council failed to perform its primary responsibility for the maintenance of international peace and security. The end of cold war in the 1990's and the successful action against Iraq in the Gulf War (1991) have created new opportunity and rekindled hopes for a proper and effective functioning of the Security Council. Due to the emergence of the U.S. as the sole super power the Council has even embarked on an activist role. But there are dangers and risks on the pursuance of such a role. On the one hand, countries like Russia might feel that the specific action in question (such as in Bosnia) has been launched to contain Russia, on the other hand, developing countries may apprehend that the western countries led by the United States of America might not monopolise the U.N. and establish their hagemony over the world as they did in past. For ensuring success of the new initiatives and strategies, it is necessary that the Security Council should be enlarged and made more representative. The majority of member States will have faith and confidence in the Council only after it is democratised and made more representative. The membership of the Security Council should be increased to 25. The number of permanent members should be increased from 5 to 10. Suggestions have been made for inclusion of Germany, Japan, India, Brazil and Egypt as permanent members. These suggestions merit serious consideration. Moreover, the number of non-permanent members should be increased from 10 to 15. Secretary-General Boutros Boutros Ghali's recommendations regarding preventive diplomacy, peace-making, peace-keeping and post-conflict peace building can be successfully implemented only in an atmosphere of trust, cooperation and unity. A democratic and representative Security Council will definitely prove to be a better guarantor of international peace and Security. In the words of Secretary-General Boutros

34. U.N. Chronicle, Vol. XXX, No. 3 (September, 1993) p. 3.

Boutros Ghali, "The United Nations was created with great and courageous vision. Now is the time, for its nations and peoples, and the men and women who serve it to seize the moment for the sake of the future." We can seize the opportunity only when we are able to create trust in nations and peoples, in men and women, *i.e.*, in the "people of the United Nations." Last but not the least, trust required a sense of confidence that the organization would react "swiftly, surely and impartially" and that it would not be debilitated by political opportunism or by administrative or financial inadequacy. According to Secretary-General Boutros Boutros Ghali, there is a near unanimous view among member-States of the U.N. that the Security Council has to be expanded. But according to his personal view "this will not be possible by 1995 as desired by some member-States. He expressed this view at Moscow on 5th April, 1994 while addressing a Press Conference. He added that questionnaires had been sent to the then all 184[35] member-States to ascertain their views on the subject. So far about 80 to 90 countries had sent in their replies. Judging from these replies, there seems to be agreement to overhaul the Security Council. There is, however, no unanimity on who should become new permanent members or how the new non-permanent members should be chosen.

35. At present there are 189 members of the U.N.

CHAPTER 44

DISARMAMENT[1]

Introduction.—Disarmament is a very complicated and gigantic problem in the modern period. The devastating effects of nuclear weapons have further added to the urgency of the problem. Numerous efforts have so far been made to achieve disarmament but unfortunately a very little, rather negligible, success has been achieved. As aptly remarked by Prof. Lincoln P. Bloomfield, "A visitor from another, more advanced, planet would find many paradoxes on earth, but surely the most extraordinary would be the fantastic destructive potential of nuclear weapons which contrasts starkly with the primitive and near impotent institutions of global peacekeeping. He might marvel that a breed capable of producing the wealth for a 185 billion armoury of lethal devices, let alone the technology for killing several hundred in a single exchange of weapons had not produced a workable international order capable of regulating such apocalyptic man-made power..... Also no such International Order exists today and the prospects are not encouraging that it will exist within the foreseeable future." [2] Dr. Hambro has also rightly remarked : "The armament race comes as close to collective insanity as anything in the history of mankind and it is, to my mind, surprising that public opinion is willing to take it." [3]

Disarmament efforts before the League of Nations.—"Disarmament has been discussed for several centuries but plans for its implementation have failed because no State whose participation was essential was willing to pay the price that is required.[4] The idea of disarmament is not new and may be traced through the writings of Sully, William Penn, Rousseau and Kant. The proposal of Russian Isar to Lord Castlereagh of Great Britain in 1816 was, however, the first practical attempt to achieve quantitative disarmament. Similar proposals were made by the French monarch in 1831 and on several occasions but with no success. Abortive attempts were made by Great Britain and France also before 1890. The International Peace Conference at Hague in 1899 is the first great landmark in the field of disarmament because it was invoked for the specific purpose of limiting armaments by national agreement. Thus, during the nineteenth century and down to the time of the First World War numerous efforts were made to achieve the limitation and reduction of national armaments by international agreement. Yet another landmark was the Treaty of Versailles which drastically limited the German armaments. As regards the period after 1918, although there was a great deal of discussion on disarmament at many disarmament Conferences, the only respect in which disarmament was effective was in respect of the navies, that too in a limited scale. It has been rightly observed, by an eminent author :

> "Disarmament efforts have been many, the successes few and limited. There has never been an approach to what Cohen calls 'effective disarmament' ".[5]

League of Nations and disarmament.—The Covenant of the League of Nations dealt at length with the reduction of armaments. "The League of Nations" writes Philip Noel Baker,[6] "is the first attempt in history to furnish the international society of nations with the permanent and organic system of international political institutions. This attempt was an outcome of the world war." The horrors of the war shocked the minds of

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1. See for detailed study; S.K. Kapoor, "Disarmament, Restrospect and Prospect," Lawyer, Vol. 5, No. 4 (April, 1973), p. 65.
2. Lincoln P. Bloomfield, "Arms Control and International Order," Int. Orgn., Vol. XIII, (1969), p. 637.
3. Edward Hambro, "Problems Facing the United Nations," A.J.I.L., Vol. 65, No. 4 (September, 1971), p. 384 at p. 385.
4. Stephen S. Goodspeed, the Nature and Function of International Organisation Second Edition (1967), p. 285.
5. C.P. Schliecher, Introduction to, International Relations (1954), p. 744.
6. Encylopaedia of Social Sciences, Vol. 9, p. 287.

men, so that they looked forward to the creation of an international order based on respect for law. Since the League of Nations was the child of the First World War, it was quite natural for its framers to secure the reduction of armaments. The Covenant, therefore, provided that League Council, with the assistance of a Permanent Advisory Commission, would formulate plans for reducing arms. The Covenant, recognised that the maintenance of peace required the reduction of "national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligation." [7]

The long awaited Disarmament Conference met on February 2, 1932, in Geneva. The representatives of sixtyone States who participated, agreed on necessity of arms limitation of international supervision of the arms business and of publicity of arms budget. But the Conference "could never reconcile the French demand for security with the equally insistent German determinations to regain a status of equality with the other European powers. General disarmament was impossible unless these positions could be reconciled. Any hope for compromise was destroyed by the rise of Hitler and the mounting suspicion of France." [8] However, it must be noted that the Conference proved to be useful for some of the technical problems of the disarmament became clear through study and debate. It also "became evident that security was the important requisite to guarantee any system of limiting armaments. The lesson was learnt that disarmament must follow rather than precede security." [9]

The efforts of the League to promote disarmament failed because of the frantic efforts of re-armaments by Germany. As a matter of fact, the League of Nations was abandoned by those who failed to abide by their solemn obligations. "Certainly a fundamental question concerning the failure of the League" writes Prof. Goodspeed, "then centres around the betrayal of the Covenant by its members. It may be granted that the Covenant had weaknesses, faulty drafting, even structural defects which inhibited its smooth functioning. But its goals were unobtainable primarily because the will to achieve them was absent." [10]

United Nations and Disarmament.—The Charter of the U.N. does not speak of reduction but of "regulation" of armaments. The provisions relating to disarmament in the U.N. Charter are as follows :

(1) After having determined "to save the succeeding generations from the scourge of war" and for that end "to ensure..... that armed force shall not be used, save in common interest." [11] The Charter goes on to empower the General Assembly to consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments and to make recommendation with regard to such principles to the Members of the Security Council or to both.[12]

(2) Secondly, but more importantly, it is further provided that in order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Art. 47 plans to be submitted to the members of the U.N. for the establishment of a system for the regulation of armaments.[13] Thus the Charter aims to provide security along with the regulations of armaments by granting military powers to the U.N. under Art. 43.

(3) Thirdly, the Charter makes the provision for a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security

7. Article 8 of the Covenant of the League of Nations.
8. Stephen S. Goddspeed, the Nature and Function of International Organisation, p. 293.
9. Ibid.
10. Ibid.
11. Preamble of the Charter.
12. Article 11, Paragraph 1, of the U.N. Charter.
13. Article 26.

Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments and possible disarmament.[14]

(4) Fourthly, in order to enable the U.N. to take urgent military measures, the Charter enjoins the Members to held immediately available national air force contingents, for combined international enforcement action.[15]

It may be noted that special agreements contemplated under Art. 43 have not materialised. The Military Staff Committee has ceased to function. As a matter of fact, it was never actively concerned with the regulation of armaments.

Establishment of the U.N. Atomic Energy Commission.—"From the outset the role of the U.N. as a control Organisation has been at issue in disarmament negotiations." [16] The first important endeavour of the General Assembly in the field of disarmament was to adopt on January 24, 1946 a resolution which established the U.N. Atomic Energy Commission.

Baruch Plan.—On June 24, 1946, the United States presented a plan known as the Baruch Plan, to the U.N. Atomic Energy Commission. The said plan envisaged the establishment by treaty and International Atomic Development Authority to own, operate, manage and licence all facilities for the production of atomic energy. In short the United States, "sought to retain the U.N. Charter while at the same time urging the establishment of what in effect was limited world government to enforce atomic disarmament. While the Charter's enforcement provisions were to stand as they were, a new treaty would have effectively altered Article 27 in atomic energy matters." [17] The Soviet Union, on the other hand, stuck firmly by the original Charter and his unanimity principle and wanted a general reduction of all armaments and the prohibition of the manufacture and use of atomic weapons. Consequently, a compromise was effected in the form of "Principles governing the General Regulation and Reduction of Armaments" which was passed unanimously by the General Assembly in 1946. Through this resolution the Security Council was directed to take practical measures to reduce and regulate armaments and to expedite the work of the U.N. Atomic Energy Commission. "Thus while the former continued to insist on a control system including inspection and verification before they were ready to countenance major steps towards disarmament while the latter pressed for prior outlawing of atomic weapons and reduction of all weapons without effective international control by means of inspection." [18]

Establishment of Disarmament Commission.—The United States monopoly of atomic weapons ended in 1949. This naturally made the Baruch Plan irrelevant. The next important step was the establishment of Disarmament Commission by the VI General Assembly in 1952. This, in fact, consolidated the U.N. Atomic Energy Commission and the U.N. Commission for Conventional Armaments. Moreover, the following year Soviet Union and Western allies agreed to negotiate as members of five power sub-Committee of Disarmament Commission. Although the Soviet Union receded from its earlier stand that atomic weapons should be banned first and control established second, it remained firm on the stand that the International Control Organisation must not interfere in the domestic affairs of States.

Establishment of the International Atomic Energy Agency (IAEA)

Under the aegis of the U.N., an international conference for the peaceful uses of atomic energy was held in August 1955 at Geneva. Thereafter, the representatives of 81 States assembled at the U.N. headquarters in September 1956 to consider a draft for the statute of the IAEA. It was adopted unanimously on 23 October, 1956 and came into force from 29th July, 1957. According to the statute, the Agency aims to "seek to accelerate

14. Article 47, Paragraph 1.
15. Article 45.
16. Daniel S. Cheeves. "The U.N. and Disarmament," Int. Organ. Vol. XIX, No. 3 (Summer 1965), p. 463 at p. 468.
17. Ibid., at pp. 468-469.
18. Ibid. at p. 469.

and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world". Its aim is to ensure "as far as it is possible that assistance provided by it or its request or under its supervision is not such a way as to further any military purpose." The IAEA comprises of three main organs— (A) General Conference; (B) A Board of Governors; and (C) Staff headed by a Director-General. The most difficult problems that confronts the activity of the Agency throughout the world are those of inspection and safeguarding of fissionable materials. The IAEA is neither a specialized agency related to the U.N. nor an independent inter-governmental organisation. It has a special status and is an Agency "under the aegis of United Nations."

Disarmament Efforts from 1960 to 1970.—After fifteen years of seemingly futile discussions, disarmament debates reached a turning point in 1960 which witnessed a thaw in the relation between the two super powers. Consequently, the following four important treaties were agreed upon :

(1) **Partial Test Ban Treaty (1963).**—The Partial Test Ban Treaty of 5th August, 1963 which prohibited nuclear tests in the atmosphere, in outer space and under water. It may be noted here that France and China have refused to sign this treaty which has been signed by many countries including India.

(2) **Outer Space Treaty (1967).**—The Treaty on Principles governing the activities of States in the Exploration and use of outer space including the Moon and of other Celestial Bodies of 1967 (or popularly known as Outer Space Treaty) which banned nuclear and other weapons of mass destruction from outer space and provided for the demilitarization of celestial bodies.

(3) **The Treaty for the Prohibition of Nuclear Weapons in Latin America.**

(4) **Non-Proliferation Treaty (1968)*.**—The Treaty for the Non-Proliferation of Nuclear Weapons of 1968 which under Art. 1 prohibited further spread of nuclear weapons.

So far 187 nations have become parties to this treaty India has refused to sign this treaty on the ground that it is discriminatory and unequal. A lot of pressure has been put on India by the western countries especially the U.S., to sign Non-Proliferation Treaty (NPT).

On 3rd November, 1993, India's delegate to the U.N. General Assembly, Mr K.P. Unnikrishnan, said in his speech on International Atomic Energy Commission (IAEA) report that India hoped that the NPT review and extension conference in 1995 would offer an opportunity to evolve a universal and non-discriminatory regime. He added, India would not subscribe to "a treaty of an attitude that divides the world into nuclear haves and have-nots..."

In May 1995, in the Review Conference of Treaty for the Non-Proliferation of Nuclear Weapons held in Newyork, the Treaty has been extended unconditionally for an indefinite period. 187 nations having already become parties to the Treaty now there are only 12 nations who have not signed the Treaty, of these three possess nuclear capability (Israel, Pakistan and India) and the rest to have this capability. Since India is committed to peaceful use of nuclear energy, its position is different from Israel and Pakistan. But in view of the new scenario due to indefinite NPT extension, India will have to formulate adequate response to withstand U.S. pressures.

Yet another review conference of the NPT was held in May 2000. Under the treaty only five countries—the U.S., Russia, Britain, France and Cuba are permitted to have nuclear arms. The other parties to the Treaty have to renounce nuclear weapons. That is

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* See also for C.S.E. (1995) Q. 8(b).

why India calls it a discriminatory treaty and has refused to join it. India, Pakistan, Israel and Cuba have not joined the treaty.

But what caused upset to the review conference was Moscow's decision to store rather destroy 20,000 non-strategic or tactical nuclear weapons and the U.S. plan to refurbish its reserve of 2500-3000 warheads after START II limit of 3,500 deployed warheads for each side is activated. However, the five nuclear powers promised to get rid of estimated 20,000 strategic and tactical nuclear arms they have mostly in U.S. and Russia. Many non-nuclear nations have criticised the big atomic powers for not having a true strategy for disarmament for they have found ways around reduction agreements to maintain their arsenals.

An important development, however, took place on 19th May 2000 when during the review conference the five nuclear powers agreed to an unequivocal undertaking to totally eliminate their nuclear arsenals. The agreement specified no time table and it was pointed out that it would take many years to achieve a nuclear free world. The agreement was included in a document outlining practical steps to implement Art-IV which was considered by 187 signatories to the NPT. But during war against Taliban Government of Afghanistan, America once again revised its priorities.

Disarmament Decade (1970-1980).—The decade of 1970 was declared by the United Nations as the Disarmament Decade. The U.N. Agency that has been mostly involved with the goal of disarmament is the 26 Nations U.N. Conference on the Committee on Disarmament. It celebrated its 10th anniversary in March, 1970.[19] It was very heartening to note that the U.N's Disarmament Decade began auspiciously with the coming into force on 5th March, 1970 of the Treaty on the Non-Proliferation of Nuclear weapons. The deposition of the instruments of ratification by 43 countries in Washinghton, London and Moscow was really an event of historic importance. In the 1984 session, the name of the Committee was changed to Conference on Disarmament. In the regular session the Conference on Disarmament recommended the declaration of the Decade of 1991 to 2000 as the Third Disarmament Decade. A world-wide ban on chemical weapons—the goal of U.N. for many years—was the centre-piece of deliberations during the first part of 1992 session of the Conference on Disarmament held from 21st January to 26th March, 1992. The Conference on Disarmament comprises of 61 nations.

The treaty on the Prohibition of the Emplacement of Nuclear weapons and other weapons of Mass Destruction on the sea bed and Ocean floor and in the sub-soil thereof or Sea-bed Treaty, 1972.—Yet another significant achievement in the field of disarmament is the Treaty on the Prohibition of the Emplacement of Nuclear Weapons of Mass Destruction on the Sea-bed and Ocean Floor and in the sub-soil thereof signed by U.K., U.S.S.R. and U.S. on February 11, 1971. The importance of the treaty as a disarmament measure lies in the fact that it has been predicted that : "The total potential for war in the future will be largely determined by its under sea component." [20] The Sea-bed Treaty came into force on May 18, 1972 as 30 nations ratified it by that time. In the words of the then Prime Minister Kosygin of Russia, this treaty is "an important act in international affairs..... a first step towards complete demilitarisation of the sea". This treaty has been hailed as "a significant effort to prevent the spread of weapons of mass destruction to areas which man is just beginning to explore." [21] It may, however, be noted that the treaty is directed solely against the placement, that is, fixation of weapons on the sea-bed and is silent about mobile launchers as well as submarines which remain and are likely to remain a principal means of nuclear warfare. "The practical value of this treaty is still uncertain chiefly for the reasons that the military use of the sea on its surface and in water column is not forbidden. The military use of the sea necessarily affects the sea-bed too." [22] In fact, every one of the nuclear limitation treaties which the U.S. and Russia have put through so

19. "World Disarmament—A Decade of Progress", The American Reporter, (March 22, 1972), p. 5.
20. William A. Nirenberg, "Militarised Oceans" in Nigel Calder, Unless Peace Comes, at p. 11.
21. The American Reporter, May 31, 1972, p. 8.
22. Vladimir Ibler, "The Interests of Self-locked States and the Prospects and Development of the Law of the Sea,"I.J.I.L., Vol. 11 (July, 1971), p. 389 at p. 409.

far has only been a non-permanent move aimed at preventing the non-nuclear countries from acquiring atomic weapons rather than a step towards limiting their own armaments. In view of these reasons, India has refused to subscribe to the one-sided pact. Nevertheless, the treaty has barred nuclear weapons from 70% of earth's surface and is thus a significant addition to the structure of multilateral arms control agreements.[23]

Disarmament and outer space.—Outer space is another important area where some modest beginnings have been made. As remarked by Prof. Lincoln P. Bloomfield "... ...in the realm of arms control, which could ultimately prove to be the most important aspect of international co-operation in space, some modest steps have been taken through the ban on nuclear weapon tests in outer space and the agreement not to orbit nuclear weapons..... It may, however, offer some special prospects growing out of the relative newness of outer space and the consequent common interests in demilitarising it, as much as Antartica was demilitarised and internationalised by 1959 Antartica Treaty.[24]

Strategic Arms Limitation Talks (SALT).—A brief reference of the Strategic Arms Limitation Talks, popularly known as SALT between U.S. and U.S.S.R. will not be out of place here. The object of these talks was to find a way for both sides to agree on plan that would limit and perhaps some day reduce their vast nuclear arsenals. An agreement limiting the strategic offensive and defensive system of the U.S. and U.S.S.R. would go to the heart of the security concerning the two countries. The United States' President, Richard Nixon's visit to Soviet Union in May, 1972 helped to bring about a thaw in the relations of the two countries. Probably, the most important outcome of the visit was the SALT agreement concluded in May 26, 1972 lifting defensive Anti-Balastic Missiles (ABM) sites in each country. It took the form of a treaty subject to ratification by the United States Senate.[25]

The said agreement, however, permitted both countries to replace existing offensive nuclear missiles, whether placed on land or a board at sea, with more sophisticated weapons as technological advance permits. As stated by Mr Chiao Kua Hua, Chinese Chief delegate to U.N., the Soviet-American Agreement to limit Strategic arms "by no means be regarded as a step towards nuclear disarmament." He added, "on the contrary this marks the beginning of a new state in the Soviet-American arms-race". He further added, "Before the ink on the agreement had dried the one hastened to test new types of nuclear weapons and the other expressed its intention to make a big increase immediately in its military expenditure".

Convention on the Development, Production and Stockpiling of Bacterio-logical and Toxin Weapon and on their Destruction.—This convention was drafted by the conference of the committee on Disarmament and was commenced by the General Assembly on December 16, 1971.[26] On April 10, 1972, the Secretary-General, Kurt Waldheim opened the Convention for signature and made an appeal to the Governments of all States to sign and ratify it at an early date thus contribute to its early entry into force as an important and effective international instrument.[27]

Geneva Disarmament Conference.—25-nations Geneva Disarmament Conference began on 17 April 1974. In a message to the Conference the Secretary-

23. The first Review Conference of the Parties to the 1972 Treaty Prohibiting the emplacement of nuclear and other weapons of mass destruction on the sea-bed opened on 20th June and ended on 1st July, 1977 in Geneva. It adopted a Final Declaration requesting the conference of the committee on disarmament (CCD) to consider promptly further measures for the prevention of an arms race on the sea-bed. The next Review Conference will be held in Geneva in 1982 or not later than 1984, U.N. Monthly Chronicle, Vol. XIV, No. 7 (July, 1973), p. 18.
24. Lincoln P. Bloomfield, "Outer Space and International Co-operation," Int. Organ., Vol., XIX (1965), P. 603 at p. 620.
25. The said SALT Agreement was to expire on October 1 this year. In March 1977, the U.S. and U.S.S.R. failed to search an accord at SALT. On 23rd September, 1977, however, the U.S. and the U.S.S.R. agreed to extend the SALT. [The Statesman dated 25 September, 1977]: For detailed study see also J.P. Jain, "The SALT Agreements, India Quarterly" (1976), p. 6.
26. Resolution 2826 (XXVI).
27. U.N. Monthly Chronicle, Vol. IX, No. 5 (May, 1972), p. 21.

General of the U.N. appealed to the nations attending the Conference to enter into an agreement on Chemical Weapons and Prohibition of the Use of Nuclear Weapons under the Ground. Talks were going on for years in connection with the prohibition of the use of nuclear weapons under the ground but no progress could be achieved.

Special Session of General Assembly on Disarmament in 1978.—On 21st December, 1976, the General Assembly decided to hold a special session on disarmament in May and June, 1978. A preparatory Commission was also established.[28] The General Assembly held its tenth special session devoted to disarmament from 23rd May to 1st July, 1978 at United Nations Headquarters. Before the session ended, the Assembly adopted by consensus on 30th June, 1978 a Final Document consisting of an *Introduction, a Declaration, a Programme of Action,* and recommendations *concerning the international machinery for disarmament negotiations.* Under the programme of action the Assembly set out a series of suggestions for negotiation and other action in specific areas, and in the Declaration, which forms another part of the Final Document, it urged that the resources released through disarmament be used to promote the well-being of all peoples and to improve the economic conditions of developing countries. In a statement at the end of session the Assembly President said the strengthening of international disarmament negotiating machinery was the central focus of the session and the decisions in the Final Document related to that matter represented important and historic achievements.[29] As regards the international machinery for disarmament negotiations, the Final Document contains, *inter alia* the following important points :—

(i) The First committee of the General Assembly should deal in the future only with questions of disarmament and related international security questions.

(ii) The General Assembly established, as successor to the commission originally established by resolution 502 (VI) a *Disarmament Commission composed of all Members of the U.N.*

The General Assembly decided that :—

(a) the Disarmament Commission shall be a deliberative body, a subsidiary organ of the General Assembly, the function of which shall be to consider and make recommendations on various problems in the field of disarmament and to follow up the relevant decisions and recommendations of the special session devoted to disarmament. The Disarmament Commission should *inter alia,* consider the elements of comprehensive programme for disarmament to be submitted as recommendations to the General Assembly and, through it, to the negotiating body, the committee on Disarmament;

(b) the Disarmament Commission shall function under the rules of procedure relating to the committees of the General Assembly with such modifications as the Commission may deem necessary and shall make every effort to ensure that, in so far as possible decisions on substantive issues be adopted by consensus;

(c) the Disarmament Commission shall report annually to the General Assembly. It will submit for the consideration by the thirty-third session of the General Assembly a report on organizational matters. In 1979, the Disarmament Commission would meet for a period not exceeding four weeks, the dates, to be decided at the thirty-third session of the General Assembly;

(d) the Secretary-General shall furnish such experts, staff and services as are necessary for the effective accomplishment of the commission's functions.

(iii) A second special session of the General Assembly devoted to disarmament should be held on a date to be decided by the General Assembly as its thirty-third session.

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28. On September, 1977, the Preparatory Commission recommended that the Special Session should be held between 23rd May and 28th June, 1978 [U.N. Monthly Chronicle, Vol. XIV, No. 9 (October, 1977), p. 28].

29. U.N. Monthly Chronicle, Vol. XV, No. 7 (July, 1978), p. 3.

(iv) At its earliest appropriate time a world disarmament conference should be convened with universal participation and with adequate preparation.

(v) In order to enable the U.N. to continue to fulfil its role in the field of disarmament and to carry out the additional talks assigned to it by this special session, the United Nations centre for Disarmament should be adequately strengthened and its research and information functions accordingly extended.

Evaluation of Disarmament efforts by the U.N.—As regards the U.N. as the Disarmament forum we may quickly dispose of the Security Council because it has played scarcely any role in disarmament discussions although the Charter of the U.N. has fixed the responsibility on it to formulate plans for the establishment of a system for the regulation of armament. The General Assembly became an important forum for disarmament discussions mainly because the major protagonists failed to compromise their differences. Yet another reason for the greater involvement of the General Assembly was that non-nuclear States, especially the non-aligned, sought to bring pressure on both East and West to curb the arms race. The Secretariat must also be given credit for playing a useful conspicuous role by providing services, which have been utilized even by non-U.N. bodies such as the Eighteen Nations Disarmament Committee (ENDC). The Assembly has gained importance as disarmament forum because both major and minor powers utilize it as a forum to mobilize support for their points of view. It may be noted that since 1957 negotiations relating to disarmament have been carried on principally in non-U.N. bodies. It is ironical to note that this shift in the negotiating forum correspond with the almost doubling of U.N. membership that began in 1955. Nevertheless, the General Assembly has always had an active concern with disarmament negotiations. From time to time, it has passed resolutions on various aspects of arm control. The inescapable importance of the General Assembly as a disarmament forum lies in the fact that even when disarmament negotiations take place in the non-U.N. bodies such as ENDC, the reports of success or failure are demanded in the General Assembly.

Thus, one could not discount the role of the U.N. in its influence on the negotiations and this was even true of the U.S.-U.S.S.R. negotiations on SALT. As regards the Non-Proliferation Treaty it may be noted that it was the U.N. contribution which helped materially to bring the treaty into force. However, it cannot but be conceded that the concentrations in the years 1963—69 on such formal arms control progress as there had been since the nuclear age began, all the achievements inside the U.N. were preceded by bilateral negotiations outside the U.N. Despite this, the U.N. particularly the General Assembly, has been very much concerned with disarmament. In every session it devotes considerable time on this topic and passes a number of resolutions on varied aspects of disarmament. "International relations cannot be stable so long as the arms race continues." [30] Hence, "In the present conditions, no other way of strengthening international security and ensuring peace is more reliable than disarmament. It is a problem that bears on the interests of all States, big and small. In view of this, it is the U.N., where the overwhelming majority of the world are represented, that must give a fresh impetus in accelearating the solution of the whole complex of problem connected with disarmament.[31] It may, however, be noted, "That five powers have a special responsibility for maintaining world security and success of nuclear disarmament depends, above all, on them." [32] As aptly remarked by Prof. Lincoln P. Bloomfield, "The United Nations cannot disarm the nuclear weapon nations. It has neither carrots nor sticks with which to bend them to the will of even an overwhelming majority of nations." [33]

30. N. Kapchenko, "U.N.'s Main Task. To keep and Strengthen Peace," Int. Affairs No. 12 (December, 1971), p. 10 at p. 15.
31. Ibid.
32. A. Stoleshnikov, "Disarmament The possibilities of a World Forum", Int. Affairs (December 1971), p. 18 at p. 19; see also P.R. Chari, "The Nuclear Balance Between the Super Powers, India Quarterly, Vol. XXXII, No. 64 (October-December, 1976), p. 381.
33. Lincoln P. Bloomfield, "Arms Control and International Order", Int. Orgn., (1969), p. 637 at p. 638.

Recent Developments in the field of Armament and Disarmament.—As regards recent developments in the field of armament and disarmament following deserve special mention :

Star War

The formal name of 'Star War' is *Strategic Defence Initiative*. This plan is based on the strategy that if America was ever attacked by nuclear weapons, it would destroy the said weapons in the outer space or space and would not allow them to come down on earth. It also takes into account the possibility of a limited nuclear war.

The idea that a limited nuclear war can be fought is most dangerous. As regards the legal position of 'star war' under international law, it deserves consideration under two heads—(i) Laws of outer space, and (ii) Laws of war. To take up the first, Article IV of the Outer Space Treaty, 1967 provides that State Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons on celestial bodies, or station such weapons in outer space in any other manner. So far as laws of war are concerned, the use of nuclear weapons or threat thereof is clearly violative of international law. But the test and manufacture of nuclear weapons by a state so long as it does not affect other sovereign states or is not inconsistent with the provisions of a treaty. 'Star war' is also violative of 1972-Anti-Ballistic Missile Treaty (ABM). It is also violative of Articles 1 (1) and 2 (4) of Charter.

New types of weapon to counter ICBM's

The U.S. has been studying new types of nuclear weapons capable of attacking newly deployed Soviet mobile Inter-Continental Ballistic Missiles (ICBMs).

Six Leader's Appeal for Disarmament.—It may be recalled here that last year the U.S.S.R. suspended nuclear tests (which was later on extended to 6 August, 1986) and urged U.S. to join the moratorium. The six leaders—Prime Minister Rajiv Gandhi of India, Mr. Andreas Papandreon of Greece, Mr. Inguar Carlsson of Sweden, President Miquel De La Madrid of Mexico, Raul Alfonsion of Argentina, and former President Julius Nyerere of Tanzania—meeting in Mexico in August 86 urged the U.S. to join the Soviet freeze and also offered a detailed plan for monitoring a test ban, with their over instruments and observers. The six leaders said in their declaration, "We cannot accept that a few countries should decide the nuclear fate of the world." But unfortunately the appeal was rejected by the U.S. The initiative taken by India and five other countries received wide support at the U.N.

U.S. Developing Anti-matter weapon.—It has been reported that the U.S. has been seriously considering the possibility of developing a new kind of weapon systems using anti-matter. It is pointed out that when anti-matter meets ordinary matter, the result is total annihilation.

U.S. Raising Arsenal for Germs War.—It is also reported that the U.S. is quietly increasing its research into germs by cloning some of the world's rearest and deadliest of diseases to increase its arsenal for germs warfare. Seventeen years ago, President Nixion had outlained germs warfare and dismantled the military's biological arsenal. At present, the Medical Research and Development Command spend about $42 million to fund 47 bio-technology projects this year, this amounts to a tenfold increase since 1981.

Failure of U.S.—U.S.S.R. Summit—The long-awaited Disarmament Summit between American President, Ronald Reagan and Soviet Union leader Mikhail Gorbachov was held on October 11 and 12, 1986 at Reykjavik (Iceland). The summit proved to be a failure as it did not produce any tangible agreement on the vital issue of reduction of nuclear weapons.

The Intermediate Nuclear Forces Treaty or I.N.F. Treaty.—On 9 December, 1987, American President Ronald Reagan and Soviet Leader Mikhail Gorbachov signed the Intermediate Nuclear Forces Treaty or I.N.F. Treaty. It is a great achievement in the field of disarmament. Under this treaty, both the great powers have pledged to destroy nuclear missiles stationed at earth and having intermediate range of

500 to 5000 kilometres. Under the treaty Britain undertook to destroy its missiles situated in Britain, West-Germany, Italy and Belgium. On the other hand, Soviet Union would destroy S.S. 4, S.S. 20, S.S. 12 and S.S. 23 missiles. It is evident from this treaty that if there is will and determination on the part of Soviet and American leader, the world can be saved from the holocast of the nuclear weapons.

Indian Proposals to Ban Nuclear Arms.—On 9 November, 1988, India introduced three proposals, (i) A freeze on nuclear weapons; (ii) A convention on the prohibition of the use of nuclear weapons; and (iii) Assessing Scientific and technological advances and their impact on international security—in the U.N. General Assembly to freeze nuclear weapons production and ban their use. While introducing these proposals, Indian delegate, Mr Atal Behari Vajpayee, warned that unless wisely directed, new strides of science and technology might push mankind closer to a deadlier end. He said, "New technologies will inevitably spawn new weapons system as has been the case throughout history. But these will be more subtle, deadlier and difficult to curb. He therefore suggested, "we must give science and technology to human face."

U.S.—U.S.S.R. Agreement to ban Chemical Weapons.—On July 18, 1989, U.S. and U.S.S.R. reached an agreement on key issues banning chemical weapons including a time table for destroying them and procedures for inspecting factories. While the Geneva Protocol of 1925 prohibited the use of chemical weapons but not their manufacture or stockpiling, the draft treaty, which took eight years in the making, would ban development, production, possession and transfer of chemical weapons.

U.S.—U.S.S.R. Summit on Naval Arms Control.—On 3rd December, 1989, U.S.—U.S.S.R. Summit on Naval Arms control concluded. Presidents Mikhail Gorbachov and George Bush hailed their first summit as the start of a new era in U.S. Soviet relations. Though the summit achieved some success, yet substantial differences remained on arms control and Central America.

U.S. Pledge to Destroy Chemical Weapons

In May 1991, the U.S. President Bush pledged to destroy all U.S. chemical weapons stockpiles in the next ten years with a promise never to use them under any circumstances.

Signing of SAART Treaty

President Mikhail Gorbachov of the then U.S.S.R. and President George Bush of U.S. signed on July 31, 1991 the 'historic' Strategic Arms Reduction Treaty (SAART) to reduce their nuclear arsenals by about 30 per cent. The treaty was signed after negotiations for nine years. It is the first ever treaty to bring about the real reduction in super power long-range (inter-continental) nuclear arsenals which the two super powers specifically built to cause heavy damage to each other. However, the cuts fall short of the 50 per cent aimed at by the super powers when they started talks in 1982 yet the treaty is significant because it reduces the most dangerous and destabilising nuclear forces. Even with the proposed 30 per cent cut, the two sides will have 4,900 ballistic missiles each. The treaty limits the strategic nuclear delivery vehicles (SNDVs) to 1,600 each. The treaty provides for a joint commission on verification and inspection. The treaty is valid for 15 years, unless superseded earlier by a subsequent agreement.

Major Voluntary Cuts announced by the U.S. and the U.S.S.R.

On 6 October, 1991 President Gorbachov announced sweeping cuts in Soviet nuclear arsenal in response to voluntary cuts announced earlier by U.S. President George Bush. Then on 28 September, 1991, President Bush once again announced a sweeping, unilateral reduction in U.S. nuclear strength in response to changes in Moscow.

Problem of Nuclear Proliferation arising as a result of the breaking up of the Soviet Union

Since the nuclear arsenals of the Soviet Union were spread in several republic, the breaking up of the Soviet Union has led to the fears and apprehension about the proliferation of nuclear weapon. The fears of the U.S. are quite genuine that until all the

nuclear arsenals of the former Soviet Union are brought under the unified command of Russian or any other single entity, the problem of proliferation of nuclear arsenals shall continue to persist.

Register of Conventional Arms.—On 9th December, 1991, the General Assembly passed a resolution[34] calling for the creation of a universal and non-discriminatory register of conventional arms as of Ist January, 1992. States are requested to report annually to the Secretary-General and their inventories and export/import of battle tanks, armoured combat vehicles, large calibre artillery systems, combat aircraft, attack helicopters, warships and missiles of missile systems. According to Secretary-General Javier Perez de Cuellar, such a register would "foster a climate that is conducive to voluntary restraint and more responsible behaviour."[35]

Convention on the Prohibition, Production, Stockpiling and use of Chemical Weapons and on Their Destruction, 1993.—The Convention on the Prohibition, Production, Stockpiling and use of Chemical Weapons and on their Destruction 1993, (hereinafter referred as Chemical Weapons ban Convention) was formally approved by the General Assembly on 30th November, 1992. This Convention was opened for signature by U.N. Secretary-General Boutros Boutros Ghali at a special meeting in Paris in January 1993. The 24-article chemical weapons ban convention has three annexes and a text on the preparatory commission for the organization for the Prohibition of Chemical Weapons. Under Article I, each State party undertakes, never under any circumstances to develop, produce, otherwise, acquire, stockpile or retain chemical weapons, or transfer them, directly or indirectly, to anyone, to use or engage in any military preparations to use chemical weapons; and to assist, encourage or induce, in any way, anyone to engage in any activity prohibited under the Convention. Further, each State is obliged to destroy chemical weapons and such production facilities it owns or possesses or that are located in any place under its jurisdiction or control, as well as all chemical weapons it may have abandoned on the territory of another State Party. Each State Party will use riot control agents as a method of warfare.

Article III provides that each party will submit to the organization, not less than 30 days after the convention enters into force, declarations with respect to chemical weapons and their facilities, specifying their precise location and quantity, and providing a general plan for their destruction.

Article XII provides for principal safeguard of the convention to protect State parties against violations of the basic obligations by other State parties. It provides the means to remedy any situation which contravenes the provisions of the convention. It provides that the organization may require a State party deemed not in full compliance with the convention to take remedial action and, in the event it fails to do so, apply a number of penalties, including sanctions. In case of particular gravity, the conference of State parties would bring the issue to the attention of the General Assembly and the Security Council.

It may be noted that the convention is of unlimited duration and will enter into force 180 days after the date of the deposit of the 65th instrument of ratification, but in no case earlier than two years after its opening for signature. Thus the convention offers the long-awaited opportunity to eliminate a whole category of chemical weapons of mass destruction.

Nuclear Arms Reduction Treaty (START-II) Between Russia and America.—On 3rd January, 1993, Boris Yeltsin of Russian Federation and George Bush of United States of America signed START-II at Moscow. This Treaty is also required to be ratified by four Nuclear Weapons former republics of Soviet Union. This treaty envisages reduction of 2/3 nuclear stockpiles within ten years. Boris Yeltsin has described this treaty as the "Treaty of the Century". The ratification of the treaty by the said four republics of former Soviet Union is doubtful because only Russia and Kazakistan have so far ratified START I.

34. Resolution 46/36L.
35. See U.N. Chronicle, Vol. XXIX, No. 1 (March, 1992) p. 74.

American President Bill Clinton's Declaration not to conduct Nuclear Test till October 1994.—On 3rd July, 1993, President Bill Clinton of U.S. declared that the U.S. would not conduct any nuclear test till October 1994 and invited other countries to do the same. He said that if other countries also accepted such a moratorium, it would help to create an environment conducive to conclude a wide nuclear test ban treaty. The American President, however, clarified that the self-imposed moratorium would continue till any other nuclear State does not conduct a nuclear test. He warned that if any State violated this prohibition, America would be entitled to conduct additional test to compensate for the tests not conducted during the period of moratorium. This is undoubtedly a courageous and praiseworthy step of President Bill Clinton. Other States should emulate this example.

U.S. Russia Sign Accord on Ukraine N-Arms.—On 14 January, 1994, President Bill Clinton of the U.S., Boris Yeltsin of Russian Federation and Ukrainian President Leonid Kravchuk signed an agreement to scrap Ukrain's ex-Soviet atomic weapon. The agreement calls for dismantling the world's third largest nuclear arsenal with 176 missiles and more than 1,500 warheads, and transfer of its key components to Russia in the shortest possible time. The most sophisticated weapons 46 SS-24 strategic missiles are to deactivate within the next ten months. The Accord also provides writing off of $30 billions of Ukraine's oil and gas and that U.S. and Russia will not target each other with nuclear missiles. Thus the accord removes the last problem of the cold war.

Comprehensive Test Ban Treaty (CTBT).—In June 1995, a conference was held in Geneva to adopt the Comprehensive Test Ban Treaty (CTBT). This Treaty contains a comprehensive plan to prohibit nuclear tests. This Treaty seeks to remove the shortcomings of the Treaty on Non-Proliferation of Nuclear Weapons. But so far as the question of destroying of existing nuclear stockpiles is concerned, this treaty does not contain any time-bound programme. India was required to clarify her position before 28 June, 1995. According to India, this treaty seeks to perpetuate the monopoly of nuclear states and discriminates against non-nuclear states. Moreover, there is no time bound programme for destroying existing nuclear stockpiles. Since objections raised by India were not removed, India made it clear that she will not sign this treaty. Despite the pressures of Western States, India refused to change her decision towards the treaty. On 20 August, 1995, India formally voted against the adoption of the treaty while voting against the Treaty Indian representative made it clear that the Treaty will not be able to achieve the objectives of universal disarmament. India took this stand notwithstanding. The strong criticism and pressure of America and its allies.

In June 1997 it came to be known that America has developed a super nuclear weapon which can even destroy targets under the ground. This has made a mockery of CTBT. On the one hand, America has been pressurizing countries like India to sign the Treaty, on the other hand, America has been developing devastating weapons, thereby acting against the letter and spirit of the Treaty : The U.S. underground sub-critical tests of Neveda is a glaring example of this.

On 17 June, 1997, India was elected as the first Chairman of the 41-member Executive Council of the Organisation of Chemical Weapon (OPCW), the international body to enforce the implementation of the Chemical Weapons Convention (CWC). This vindicates several aspects of India's foreign policy. This shows that India's stand is not only praised by other states but also vindicates India's stand toward CTBT. India has made it clear that she will not be intimidated into signing the CTBT despite threats of isolation or penalties. While America is keeping all its options open for the use of nuclear weapons such as its use against attackers who hit American forces with chemical or biological weapons, it seeks to tie down even the hands of countries like India even in respect of developing nuclear weapons even when its preservation or survival is at stake. So far American bullying tactics have worked but there must be a limit or end to it.

Considerable changes have come in the situation after India conducted Pokhran II tests and in its reply Pakistan also conducted nuclear tests. America and Western

countries imposed strong sanctions against both India and Pakistan. Once again western countries pressurized India to sign the CTBT, on her part India replied that she was prepared to sign the CTBT provided that some basic changes were made in the treaty and India's conditions were accepted.

On the other hands, strong sanctions were also imposed against Pakistan which adversely affected its financial position. Under pressure Pakistan declared that it was prepared to sign the CTBT. In his visit to America, the then Prime Minister of Pakistan told America that Pakistan was prepared to sign the CTBT without conditions provided that sanctions against it were lifted. Thus Pakistan's stand on CTBT was not clear the only point conceded by Pakistan was that it gave up the condition that it would sign the CTBT after India signed it. On the other hand, India's stand was quite clear and there was no change in her policy towards the CTBT.

Comprehensive Test Ban Treaty Review Conference.—Comprehensive Test Ban Treaty Review Conference was held in Vienna in the first week of October 1999. This Conference was attended by 90 countries the Conference, appealed to the countries whose ratification is necessary for the Treaty to come into force to ratify the treaty at an early date. Without naming such countries, the Conference asked them to expedite the ratification of the Treaty. Among the five major nuclear nations, ratification by America, Russia and China is necessary for CTBT to come into force. Apart from these countries, India, Pakistan and North Korea are the countries who have not signed the CTBT. It may be noted that while on the one hand, America exhorts other countries to sign and ratify CTBT, America itself has not yet ratified the Treaty. The main reason for this is that according to the majority party in the American Senate, the CTBT does not take proper care of America's security interests. Thus there is a vast difference in what America preaches and what it does.

Before the start of the Review Conference, 154 countries had already signed the CTBT and 51 countries had ratified it. There are 44 countries including the five original nuclear powers who have nuclear capability out of these 44 countries 41 countries have signed the CTBT and 26 countries have ratified it.

Without naming India and Pakistan, the speakers of the Conference appealed to the countries who have not signed the CTBT to announce moratorium before entry into force of the Treaty. The main aim of Conference was to find out the means in accordance with international law to achieve consensus to expedite the process of ratifications of the treaty so that the treaty may come into force at an early date. Undoubtedly, the opposition of American Senate and its reluctance to ratify the treaty has caused greaf upset to the efforts of the Conference on the question of expeditious ratification of the treaty for bringing the treaty to even into force at an early date.

Conclusion.—"Effective, adequate disarmament depends primarily upon the development of a climate of trust and mutual understanding among the major powers." [36] Moreover, " ..... progress towards disarmament depends heavily on concurrent progress towards an international legal order. No international disarmament Organisation of itself can make the peace by transforming the nature of international relation." [37]

It has been rightly observed, "As long as mens want ingeneous ways of killing or dominating one another, the natural world, through the medium of science, will provide them. The same ingenuity and knowledge of nature can be applied quite otherwise, for creating a healthy, pleasant and exciting environment for all mankind. But the worst forebodings will surely be fulfilled, and even the most modest visions of a better world will be smashed, if present military tendencies continue our loss will be a double one—both of

36. Goodspeed, note 4, at p. 321.
37. Daniel S. Cheever, "The U.N. and Disarmament", Int. Orgn. (1965), p. 463 at p. 482.

what we have and what we might have made unless peace comes"[38] As remarked by Mr A.A. Mironov of the United Nations Institute for Training and Research, if arms race is allowed to continue further the whole of civilization will be wiped out or, as the saying goes, will go with the wind.[39] In a report prepared for the Secretary General of the U.N., International Panel of Scientists and scholars observed, "the arms race must be stopped not only because of the immediate perils it holds for all nations, but because the longer it continues, the more intractables the problems of economic growth, social justice and the environment will become." [40]

The arms race is spiralling at an alarming rate and absorbing some $ 350 billion a year in armaments, three quarters of which, is borne, by six countries, the U.S., the U.S.S.R., China, France, the U.K. and the Federal Republic of Germany. This disclosure was made in a report of panel of experts which also warned that the continuation of the arms race was irreconcilable with an acceptable rate of development and the establishment of peace, security and a new world economic order. In the view of the experts, effective disarmament presupposed simultaneous progress in two directions : curtailment of the qualitative arms race and reduction of military budgets.[41] America's 'Star War' has further complicated the problem of disarmament. It is estimated that there are 50,000 nuclear weapons in the world, out of which 18,000 are of strategic importance. According to Scientists 500 to 2000 nuclear weapons of strategic importance are enough to cause nuclear winter which may not only cause death of crores of people but may destroy most of the agriculture of the world. It is also feared that if nuclear war takes place, the whole human race may be erased from the face of the earth. Thus day by day the problem of disarmament is becoming more and more complex. Nearly 2,700 years ago Hebrew Prophet Issaih said : "They shall beat their swords and plowshares and throw their spears into pruning brooks." [42] This prophecy remains still unfulfilled. One may argue that a beginning has been made through measures such as the outer space treaty, sea bed treaty, non-proliferation treaty and the recent agreement on START II. But it is clear from the foregoing discussion that most of the nuclear limitation treaties which the U.S. and the U.S.S.R. have put through so far has only been a non-permanent move aimed at preventing the non-nuclear countries from acquiring atomic weapons than a positive step towards limiting their own armaments. So a real beginning, which requires a climate, a trust and mutual understanding, has yet to be made. "The recently concluded INF Agreement between the U.S.S.R. and the United States and the START negotiations now underway have ignited a new spirit of hope that the two super powers may now be embarked on a new and more promising pathway towards disarmament. But this is still only a first step along a pathway that is likely to be long and difficult one." [43] Let us hope that the forces of peace will ultimately triumph and the goal of disarmament will be achieved. The end of cold war has rekindled hopes for success of disarmament efforts. As pointed out by Secretary-General Boutros Boutros Ghali on 27th October, 1992 speaking before a special meeting of the First Committee (Political and Security) in Observance of the Disarmament Week (24th to 30th October, 1992), "The end of bipolarity has not diminished the need for disarmament. If anything, it has increased it." [44] Thus any sense of complacency may prove to be fatal and suicidal.

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38. Nigel Calder, Unless Peace Comes, p. 217.
39. "Whole Civilization will go with the Wind of Arms Race Allowed to Continue." U.N. Monthly Chronicle, Vol. XII, No. 4 (April, 1975), p. 50.
40. "U.N. Experts call to stop Arms Race", National Herald, November 5, 1971.
41. U.N. Monthly Chronicle, Vol. XIV, NNo. 9 (October, 1971), p. 41.
42. Referred in World Disarmament—A decade of progress, The American Reporter, March 22, 1972. p. 5.
43. Maurice Strong, "The United Nations in an Interdependent World", International Affairs (Moscow, January 1989), p. 11 at p. 12.
44. U.N. Chronicle, Vol. XXX, No. 1 (March, 1993) p. 75.

CHAPTER 45

AMENDMENT OF THE U.N. CHARTER*

We will discuss the question or problem of the amendment of the Charter under the five headings—(i) Whether wholesale change or amendment of the Charter is feasible and necessary? (ii) Is desirable change possible without amendment of Charter? (iii) Procedure for amendment. (iv) Amendments made so far and their consequences. (v) Some proposals for the amendment of the Charter.

(i) *Whether wholesale change or amendment of the Charter is feasible and necessary* ?—In view of the failures of the U.N. (particularly in the field of peace and security) some critics have suggested the need of the complete review of the U.N. Charter. The Charter is like a constitution and should be amended from time to time to adapt it to the changing times and circumstances. Principal argument put forward in support of a review is that the majority of Member-States had not taken part in the establishment of the Organisation at the San Francisco Conference and that its structure was insufficient for existing their influence in its activity and the Charter must be adapted to changes which have taken place since 1945. It may, however, be noted here that a complete change, a review of the Charter is neither necessary nor feasible. As remarked by Prof. Goodspeed. "But any attempt at a wholesale revision or a 'showdown conference' to force recalcitrant nations into line might not only raise false hopes but result in accentuating existing bitterness and weakining even further whatever unity exists within organization. Structural changes involving more machinery and more law will not eliminate the serious disturbances which exists in the world today. Defects in charter are not the cause of basic differences separating peoples".[1] Thus, "To hold a special Conference to revise the Charter would be a frustration removing activity of a quite different order. It would deal, article by article with the fundamental law of the United Nations, and it would inevitably bring into the open some very fundamental disagreements on basic principles." [2] Further, "A mighty impediment to charter review, which is virtually unmentioned in the General Assembly debates, is that whereas in the immediate aftermath of the traumatic and exhaustive experience of World War II it was possible for a large number of States to sink their differences to the extent necessary to make the compromises which gave birth to the charter, that sort of situation does not exist today at any rate in the perception of most States." [3]

(ii) *Is desirable change possible without wholesale amendment of the Charter* ?—The charter of the U.N. was conceived as a living thing, adjustable to meet the challenges of the times.[4] Alvarez, Judge of the International Court of Justice has aptly observed : "An institution once established, acquires a life of its own, independent of the elements which gave birth to it, and it must develop, not in accordance with the views of those who created it but in accordance with the requirements of International life".[5] In another advisory opinion the International Court of Justice observed that under International law, the powers of the institution should be regarded not only those which are expressly mentioned under the Charter but also those which, by necessary implication are necessary for the performance of its duties.[6] Thus "the evolution of the law of the U.N. is

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* See also for I.A.S. (1959), Q. No. 5; P.C.S. (1968), Q. No. 7; P.C.S. (1964), Q. No. 6. For answer see also matter discussed under the heading, "India and the United Nations" in this Chapter.

1. Stephen S. Goodspeed, the Nature and Function of International Organization, Second Edition, p. 659.
2. Arthur Lall, "Problems and Prospects of Revision of the U.N. Charter", India Quarterly, Vol. XXXI. No. 2. (April-June, 1975), p. 111 at p. 113.
3. Ibid. at p. 115.
4. See Int. Orgn. Vol. XIX, No. 3 (Summer 1965), p. VI.
5. Advisory Opinion on Admission of a State to Membership in the U.N., I.C.J. Rep. (1948), p. 4 at p. 68.
6. Advisory Opinion on Reparation of Injuries Suffered in the Service of the U.N., I.C.J. Rep. (1949), p. 182.

possible without amendment of the charter....."[7] Desirable changes are possible without major changes in the charter. In past changes have been possible by liberal interpretation of the existing provisions. Most of the problems confronting the world community are not because of defects of the charter but due to the attitude of the Member States of the U.N.

(iii) *Procedure for amendment.*—Articles 108 and 109 deal with the amendment of the charter of the U.N. Article 108 provides that amendments to the present charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council. Thus no amendment can be made unless agreed by all the permanent members of the Council. In other words, a single permanent member of the Security Council can undo the efforts of all other Members to make an amendment of the charter. Article 109 envisages a general conference of the Members of the U.N. for the purpose of reviewing the charter and most of the controversy regarding the amendment centres round this provision. "The main problem that confronts the organization in regard to changes in the charter is inherent in Article 109 itself. For the purposes solely of amendment of the charter this whole article is redundant." [8] Further, "The thrust at the United Nations has been to strive to implement this article. This movement is doomed to failure—short of a new global disaster so awesome that it forces the emergence of a general will among nations to rethink and redesign the type of world system within which they should try to live at peace." [9]

Article 109 provides that a General Conference of the Members of the United Nations for the purpose of reviewing the present charter may be held at a date and place to be fixed by a two-thirds vote of the Members of the General Assembly and by a vote of any nine Members of the Security Council. Each Member of the United Nations shall have one vote in the Conference.[10] Any alteration of the present charter recommended by a two-thirds vote of the Conference shall take effect when ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations including all the permanent members of the Security Council.[11] If such a Conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present charter, the proposal to call such a conference shall be placed in the agenda of that session of the General Assembly and the Conference shall be held if so desired by a majority vote of the members of the General Assembly and by vote of any seven Members of the Security Council.[12]

(iv) *Amendment made so far and their consequences.*—Leaving apart a few minor changes, the Charter is, to a large extent, still the instrument which was adopted in 1945. "The United Nations wheel has not turned full circle; it simply has not moved. But one must hasten to add a comment : it would be reading the superfices to conclude that this necessarily indicates that the United Nations is useless." [13] That the Organization has come thus far (it has now completed more than 41 years of its existence) is to attribute to the vision of those who drew the founding plans, a testimonial to the soundness of the guiding principles upon which it was built.[14]

Amendments to Articles 23, 27 and 61 were adopted by the General Assembly on 17th December, 1963 and came into force on 31st August, 1965. The amendment to

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7. J.A.C. Gutteridge, the U.N. in a Changing World (1969), p. 3.
8. Arthur Lall, note 2,at p.111.
9. Ibid., at p. 113.
10. Article 109, Paragraph 1. This is the provision as amended on 20th December, 1965 and having come into force on 12th June, 1968.
11. Article 109, Paragraph 2.
12. Article 109, Paragraph 3; This paragraph has been retained in its original form in its reference to a vote, of any seven members of the Security Council, for it has been acted upon in 1955 by the General Assembly, at its tenth regular session, and by the Security Council.
13. Arthur Lall, see supra note 2, at p. 111.
14. Int. Orgn., Vol. XIX, No. 3 (Summer 1965), p. 5.

Article 23 enlarged the membership of the Security Council from eleven to fifteen. The amended Article 27 provides that decisions of Security Council on procedural matters shall be made by an affirmative vote of nine members (formerly seven) and on all other matters by an affirmative vote of nine members (formerly seven), including the concurring votes of five members of the Security Council. The amendment to Article 61 enlarged the membership of the Economic and Social Council (ECOSOC) from 18 to 27.

An amendment to Article 109, adopted by the General Assembly on 20th December, 1965, came into force on 12th June, 1968. It provides that a General Conference of Member States for the purpose of reviewing the charter may be held at a date and place to be fixed by a two-thirds vote of members of the General Assembly and by a vote of any nine members (formerly seven) of the Security Council.

Lastly, a further amendment to Article 61 was adopted by the General Assembly on 20th December, 1971 and came into force on 24th September, 1973. It increased the membership of the ECOSOC from 27 to 54. Thus so far, the Charter has been amended only three times.

As a result of these amendments, the ECOSOC has become a more representative principal organ. As regards the Security Council, "The only effect of these changes which might be important, but was not foreseen or discussed, is that under the original Charter the permanent members could block a decision without a veto, if all of them abstained, while under the revised charter a vote of nine non-permanent members can push a decision through even if all the permanent members should indicate their displeasure by an abstention. As the permanent members are reluctant to veto a resolution which is strongly supported by all the three "Southern" blocks (Africa, Asia and Latin America), there may be some resolution in the future which might pass despite an abstention of as many as six members, including four or five permanent members. This was less likely in the past, but the Congo case has shown how far the U.N. can go though some of the permanent members don't like the direction".[15]

(v) *Some proposals for the amendment of the Charter.*—As noted earlier a wholesale revision of the Charter is neither feasible nor necessary. However, specific articles of the Charter may be amended as done in the past. Thus, "The other more practicable approach to revision of the Charter is for U.N. membership to focus on specific issues and develop tentative proposals after full study of each case." [16] Further, "Timing is a very important consideration in changes of this kind. By the middle of sixties, for example, the time was ripe to increase the size of the Security Council and Economic and Social Council (ECOSOC). Now that the Trusteeship Council is winding up its duties perhaps the time is ripe to give some thought to maintaining six principal U.N. organs by *creating a Social Council to deal with human rights and other social questions, and by redesigning ECOSOC as an Economic Council.* It would be difficult for the Permanent Members to maintain opposition to such proposal, even if their first reaction was cool.

Such an amendment would upgrade economic and financial matters, as well as social questions including the growing field of human rights. There is no guarantee that this would lead to great results, but it should; in a measure, increase the chances of beneficial results.[17] Yet another proposal which merits consideration is to delete all references to "enemy States" in the Charter. It has also been proposed "to strengthen the capacity of the United Nations to be an influence in making and keeping peace" and for this "the representative character of the Security Council should be improved..... A Change is required at the core of the Security Council. Without disturbing the rights of the present incumbents, this change should seek to represent all the regions of the world in the consensus-making core of the Council. Only the recognition of the rights of all the regions would lay the basis for a fair and effective world organization." [18]

15. Louis B John, "The Development of the Charter of the United Nations; the Present State" in the Present State of International Law and the other Essays (1973), p. 39 at pp. 49-50.
16. Arthur Lall, note 2, at p. 117.
17. Ibid. at p. 118.
18. Ibid. at p. 119.

On 17th December, 1974, the General Assembly through a resolution,[19] established an *ad hoc* committee for the review of the Charter and on the strengthening of the role of the Organisation. On 15th December, 1975 the General Assembly decided that the said *ad hoc* committee should be reconvened as a Special Committee on the charter of the United Nations and on strengthening of the role of the Organization to examine in detail the observations received from Governments concerning suggestions and proposals regarding the charter and strengthening of the role of the U.N. with regard to maintenance and consolidation of international peace and security, development of co-operation among all nations and promotion of international law in relations between them. The General Assembly also decided to enlarge the 42-member committee by including five additional Member States, Barbados, Belgium, Egypt, Iraq and Romania. The said resolution was recommended by the sixth Committee following the committee's consideration of the report of the *ad hoc* committee on the Charter of the U.N.[20]

During the debate in the Sixth Committee of the General Assembly, a divergence of opinion on the question of the review of the charter was revealed. One group of countries favoured a gradual process of examination of different charter provisions and of their validity in the situation with a view to enhancing the effectiveness of the U.N. in maintaining international peace and security. In the view of a number of delegations, the veto in the Security Council contradicted the principle of sovereign equality of States and was based on relations of domination and oppression, characteristic of a world where some States made all the decisions. A number of countries on the hand, defended the permanence of the principles and purposes of the charter and expressed opposition to attempt to revise it under current conditions.[21]

The Special Committee on the Charter of the United Nations and on the strengthening of the role of the organization, at its sessions held from 14th February to 11th March, 1977 in New York, completed the first reading of the view of the Government concerning aspects of the functioning of the U.N. The Committee adopted its report to the General Assembly. It also decided to annex to the report two papers containing suggestions for revising the Charter and strengthening the Organization's role.[22] The Committee also decided to annex to its report to the Assembly the report of its Working Group. According to the Working Group, some countries were of the view that the composition and structure of the Security Council remained fully valid and well founded since the main task of the United Nations was to maintain international peace and security, other countries wanted to enhance the Membership of the Council to increase its effectiveness.[23]

The second section of the first paper sets out specific charter amendments by Columbia, Ecuador, Mexico the Phillipines, Romania and Yugoslavia. It made the following main suggestions :

(i) The Statehood of an applicant for membership should be decided by the International Court of Justice on the basis of a set of general criteria for Statehood, adopted by the General Assembly. It also suggested the elimination of the requirement of a two-thirds majority vote in the Assembly and unanimity among the permanent members of the Security Council for the admission of new States.

(ii) The functions of the Trusteeship Council be expanded to encompass the task of protecting human rights in general so that the Council would become a "Human Rights and Trusteeship Council".

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19. Gen. Ass. Resolution 3349 (XXIX) of 17th December, 1974.
20. U.N. Monthly Chronicle, Vol. III, No. 1 (January, 1976), p. 71.
21. Ibid.
22. U.N. Monthly Chronicle, Vol. XIV, No. 4 (April, 1977), p. 52; one papaer (A/AC, 182/L, 12/Rev 1) was submitted by 16 countries: Algeria, Argentina, Columbia, Congo, Cyprus, Ecuador, Egypt, El Salvador, Kenya, Mexico, Nigeria, Phillipines, Romania, Sierra Leone, Tunisia and Yogoslavia. The other (A/A. 182-L 16) was submitted by Italy and Spain.
23. Ibid.

(iii) Romania suggested inclusion of "the affirmation of the need of a new world economic order designed to put an end to the present division of the world into 'rich countries' and "poor countries".

(iv) Yogoslavia suggested that a U.N. document on national minorities (regulation and protection of the rights of minorities) should be adopted and "incorporated into the charter as a competent part".

(v) The Phillipines proposed that the Commission on Human Rights be elevated to full Council on a level with the Economic and Social Council and the Trusteeship Council.[24]

The second paper (submitted by Italy and Spain) contained many suggestions made in the first paper. It also made some other proposals which are as follows :

(i) Elaboration of a Universal treaty on the peaceful settlement of disputes.

(ii) Deletion of "obsolete clauses" in the charter referring to enemy "States".

(iii) Strengthening of the role of the Commission on Human Rights.

(iv) Election of non-permanent members of the Security Council with "due regard" paid to their "contribution to the maintenance of international peace and security." [24]

The Special Committee on the Charter of the U.N. and on the strengthening of the role of the organization held its session from 27 February to 24th March, 1978 in New York. It received 22 working papers from Governments suggesting possible reforms in the peaceful settlement of disputes and other areas of concern to the Committee. Although the Committee was unable to complete its work, it made progress in fulfilling its mandate.[25]

Enemy clause certain to be deleted

There seems to be general agreement that enemy clause appearing in Articles 53, 77 and Article 107 has become redundant. Therefore, whenever the U.N. charter is amended, it is certain that for deleting enemy clause these articles will be suitably amended. This clause does not identify any country but Article 53 says, the term enemy state "applies to any state which during the world war II has been an enemy of any signatory of the present charter". Since Japan and Germany are the members of the U.N. this clause has become obsolete. Sooner this clause is deleted the better.

Enlargement of the Security Council.—The end of cold war has witnessed a dramatic increase in Security Council activities and this new reality raised questions about its "representative" character. A number of State representatives pleaded for the enlargement of the Council in the 1993 session of the Special Committee of the U.N. and on the Strengthening of the Role of the Organization.

N.B.—For this, please see also Chapter on "The Security Council."

Proposals on peaceful settlement of Disputes.—Among the proposals listed were those suggesting, preparation of a General Assembly declaration on the peaceful settlement of disputes as a first step towards a treaty on the subject, establishment of a permanent Assembly Commission to fulfil the functions of mediation, good offices and conciliation, preparation of a practical United Nations manual on the subject; non-use by the Security Council of the veto in the matters of the peaceful settlement of disputes; establishment by the Council of a Standing Committee of fact finding and mediation experts; greater use by the Council of Committees and a more active role by the Council, including review of situations of potential crisis, establishment and utilization of regional machinery in settlement of disputes; and greater use of the International Court of Justice to settle disputes and as a source of law.[26]

The working papers submitted on the maintenance of international peace and security proposed additions to Charter Article 2 regarding the principles of the U.N. and enlargement of the membership of the U.N. The working paper submitted on the

24. U.N. Monthly Chronicle, Vol. XIV No. 4 (April, 1977), p. 52.
25. U.N. Monthly Chronicle, Vol XV No. 4 (April, 1978), p. 70.
26. Ibid. at pp. 70-71.

importance of diplomatic negotiations called for establishment of a permanent commission of the Assembly to fulfil the functions of mediation, good offices and conciliation.[27]

The Special Committee on the Charter of the U.N. and on the strengthening of the Role of the organization concluded its 1983 annual session on 6 May, 1983 by expressing disappointment at its failure to make substantial progress. The Committee's inability to reach agreement on substantive items on its agenda was contrasted with the success of its previous session (*i.e.* 1982 session) when it completed work on the Manila Declaration on the Settlement of International Disputes. The General Assembly, at its 1982 session, approved the Manila Declaration without a vote and requested the committee to accord priority regarding the maintenance of international peace and security to continue its work on the peaceful settlement of disputes, and to consider proposals on the rationalization of the existing procedures of the United Nations.[28]

Besides the above suggestions many other suggestions for amending the Charter have been made by authors and jurists. These include the clear definition of the term 'domestic jurisdiction': some restrictions on the exercise of veto by permanent members of the Security Council; strengthening the legislative activities of the General Assembly; amendment of Article 99 or addition of Article 99 (A) to empower the Secretary-General to bring to the attention of the Security Council matters relating to human rights, expanding and strengthening of the role of the International Court of Justice, etc. But it may be noted that none of the proposed amendments can be made unless all the permanent members decide to cast their affirmative votes for it. However, some suggestions such as renaming Trusteeship Council as "Human Rights and Trusteeship Council," deletion of the term "enemy States" from Article concerned and breaking of ECOSOC into Economic Council and Social as two principal organs and abolishing Trusteeship Council etc. can be incorporated into the Charter because even the permanent members can be pursuaded not to oppose them. In any case, in the present circumstances, general review of the Charter is neither desirable nor necessary. It has been rightly remarked : "In conclusion, it does not appear that a good case has been made out for undertaking a general review of the Charter at the present time. The failures of the United Nations cannot be attributed to any shortcomings within the Charter itself. It is primarily the non-observance of the principles enshrined in the Charter that has undermined the effectiveness of the United Nations. The Charter itself has revealed a remarkable degree of flexibility in accommodating new situations that had not been foreseen by its founding fathers. There is, however, ample room to carry on the struggle for a more equitable international politico-economic order within the framework of the present Charter. The special committee could play an important role in this regard." [29]

The peaceful settlement of disputes and strengthening of the U.N. role in international peace and security were among the issues discussed at the 1993 session of the Special Committee on the Charter of the U.N. and on the Strengthening of the Role of the Organization. The session was held at Newyork from 1st to 19th March, 1993.

India and the General Review of the United Nations Charter.—Since the inception of the United Nations Charter, time and again, views have been expressed for and against the general review of the United Nations Charter. It is pointed out that the development of nuclear weapons and the inter-continental missile have raised new problems upsetting the traditional concepts of peace and security upon which the United Nations was built. There are proposals for abolition or limitation of the use of veto. It may be noted here that "None of the permanent members, particularly the United States and the Soviet Union, would ever agree to a situation whereby the United Nations could undertake sanctions without their consent. Any amendment of the Charter which would permit this would be immediately killed in the Security Council, a fact which should be obvious." [30] According to the Soviet view, "The majority rule can not be applied to the

27. Ibid. at p. 71.
28. U.N. Chronicle, Vol. XX, (No. 7 of 1983), p. 101.
29. P.C. Rao and Mrs. R. Lakshmanan, "What is Wrong with the United Nations Charter, I.J.I.L., Vol. 16 (1976), p. 500 at p. 516.
30. Stephen S. Goodspeed, The Nations and Function of International Organisation, Second Edition, p. 655.

relations between different social systems. Such relations are inevitably to be based on mutual respect for the sovereign equality of nations, peaceful negotiation, and reasonable compromise." [31]

There are other proposals regarding the modification of Article 37, amendment of provision relating to domestic jurisdiction (Article 27), expanding mechanisms for the maintenance of the peace and security, etc. Then there are proposals for world government whether limited in scope, calling for the creation of institutions of a super-national character.[32] There are some who favour the revision of the United Nations Charter in such a way as to transform that organisation into a United States of world. On the other hand, there are others who would leave the United Nations more or less as it is but would like many of its members join in establishing separate federal structure with real power.[33]

There have been some amendments (regarding the increase in number of members of the Security Council and the Economic and Social Council) of the United Nations Charter but neither is the climate conducive for any wholesale revision on general review of the Charter nor is it possible. India is against the general review of United Nations Charter. Thus ".....India retained its constitutional conservatism in the sense that it did not formally initiate resolutions seeking extra constitutional changes." [34] India made it clear at the legal committees of the United Nations (which had before it a draft resolution tabled by the Phillipines and about 25 other nations for the establishment of an *'ad hoc'* committee to consider proposals and suggestions regarding review of the Charter) that it was against the general review of the United Nations Charter but was prepared to consider amendments to make the United Nations "more effective and meaningful." [35] While explaining India's view, Mr Rikhi Jaipal, India's permanent representative said that in India's judgment what was needed was not a general review of the Charter but adherence to its provisions by all member States without exception. He added, "The time is not yet ripe and the International climate is not yet right for a revision of the Charter." [36] Referring to the veto issue he further added, "I wonder whether the veto system is any more discriminatory than the system of voting which bears no relationship to the size and population of member States or to other such factors..... The Charter is based on certain principles and certain rights which if applied or exercised with good sense and judgment can strengthen the United Nations but which if applied indiscriminately and without regard to consequences can only lead to a situation in which the United Nations will be as strong as its weakest link." [37] As regards the veto provisions, all the permanent members excepting China, were in favour of continuing the present Charter without change.

Thus wholesale revision of the United Nations Charter is neither possible nor necessary. In the view of Miss Gutteridge, "..... the evolution of the law of the United Nations is possible without amendment of the Charter." [38] Harlan Cleaveland has also written, "The United Nations system as a whole has opportunities to serve mankind which are limited only by the capacity of its members to work together and keep on working together." [39]

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31. Victor P. Karpov, "Soviet Concept of Peaceful Co-existence and its Implication from International Law" in the Soviet Impact on International Law, Edited by Hans W. Baade (New York, 1965), p. 14 at p. 17.
32. For a most ambitious plan in this respect see Grenville, Clark and Louis Sohn, World Peace. Through World Law (Cambridge, Mass : Harvard University Press, 1960).
33. See Norman D. Palmer and Howard C. Perkins, International Relations—The World Community in Transition, third Edition (1970), pp. 761-762.
34. Swadesh Rana, "The Changing of Indian Diplomacy at the U.N.", Int. Orgn. (1970) p. 48 at p. 57.
35. National Herald, 7th December, 1974.
36. Ibid.
37. Ibid.
38. J.A.C. Gutteridge, The United Nations in a Changing World (1960), p. 3.
39. Harlan Cleaveland, "The Evolution of Rising Responsibility", Int. Org., Vol. XIX No. 3 (1965), p. 828

CHAPTER 46

EVALUATION OF THE WORK OF THE UNITED NATIONS*

Initial hopes.—"The San Francisco Conference was concerned as an act of faith in the future and remorse for the past."[1] The devastating effects of the Second World War had compelled the nations of the world to establish an Organisation which might be able to establish peace and security in the world and might 'save the succeeding generations from the scourge of war'. The great powers of the world, the prominent among them being America, Britain, Russia, France and China performed commendable work and co-operated with each other to end the war. This mutual co-operation among the great powers created hopes among the nations of the world that in future also they would co-operate and would be able to maintain peace and security in the world. In fact, this was the fundamental assumption on which the whole structure of peace and security provided under the Charter is based. It was expected that these great powers would continue to co-operate even after the war. Consequently these great powers were made the permanent members of the Security Council and were also given veto power so that they could perform their functions effectively.

The Role of Great Powers.—"It did not take long for San Francisco hopes of great powers, unanimity to fade." [2] Immediately after the establishment of the United Nations the conflicts and bickerings among the great powers started. The conflict over the issue of Germany, conflict over Guerilla war in Greece, difference on the question of Korea, etc., were the glaring examples of such conflicts among the great powers. The conflict among the great powers and the repeated exercise of veto proved to be detrimental for the effective functioning of the Security Council. The Security Council could not take any action in a case where the interest of any of the permanent members was involved, not only this, the Security Council could not also take any action in regard to any member-State of the United Nations if that State could muster or get the support or blessings of any of the permanent members of the Security Council. Consequently, the Security Council became unable to perform its primary responsibility of the maintenance of peace and security which the Charter entrusted upon it.

In the Gulf War (1991), effective action could be taken due to the end of cold war between the U. S. and the U. S. S. R. The Gulf War (1991), however, shows that the balance of power which more or less continued for 45 years has now been disturned. While on the one hand, America has emerged as the most powerful nation, due to internal and economic crisis in the Soviet Union, Soviet Union failed to maintain its power and position as a super power. In fact, throughout the Gulf War (1991) the Security Council functioned under the dictates of the U. S. and the U. S. S. R. remained a mere spectator. After the formal cease-fire of the Gulf War, entry of U. S. forces in Iraqi areas through Turkish boundaries, to establish camps for Kurdish people and to provide them military protection etc., were the acts which not only deserved condemnation but also constituted violation of Iraqi political independence and Sovereignty. The position of Soviet Union declined so much so that it could not do anything except remaining a silent spectator. Subsequently the breaking up of the Soviet Union confirmed that U. S. is now the sole super power.

Maintenance of Peace and Security.—[3]**This has been critically discussed earlier in Chapters on "The General Assembly" and "The Security Council", "The

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* See also for P.C.S. (1970), p. No. 3; I.A.S. (1962), p. No. 11.

1. Lawrence S. Finkelstein, "The United Nations. Then and now." Int. Organ., Vol. XII No. 3 (Summer 1965), p. 367 at 369.
2. Ibid., at p. 382.
3. See also S. K. Kapoor, "The Maintenance of International Peace and Security," Lawyer (November, 1972), p. 170.

** See also for P.C.S. (1988), Q. 2 (a). For answer see Chapters on "General Assembly" and "Security Council."

Secretary-General"and "Regional Arrangements". Besides this, in this edition, a new Chapter entitled, "Maintenance of International Peace and Security-Preventive Diplomacy, Peace-making. Peace-keeping and Post-Conflict Peace Building" has been added for the benefit of readers. Therefore, a detailed discussion is not proposed to be made here, only a brief reference of the contribution of the U. N. will be made here.

Sometimes it is said that the U. N. has made no contribution for the maintenance of Peace and Security. This statement is far from true. It is true that because of the mutual conflicts of great powers, the Security Council has not been able to perform properly its primary responsibility for the maintenance of international peace and security but at the same time it cannot be denied that in a number of conflicts the Security Council has contributed to the maintenance or restoration of international peace and security. Among such conflicts, conflicts of Korea (1950), Palestine, Suez-crisis (1956), Congo (1960-61) and Middle-East (1973) deserve a special mention. It must, however, be added that U. N. has been successful only in stopping the hostilities or armed conflict. It has failed and failed miserably in finding out the political solution of the problem.[4] Yet it deserves the credit for having prevented the escalation of conflicts into world wars.[5] It has been aptly remarked, "The United Nations was created, first and foremost, as an instrument for ensuring world peace and security. It has, indeed, played a significant role in maintaining world peace, principally through the consultative procedures of the Security Council for the Peaceful Settlement of Disputes and, in some specific instances, the deployment of U. N. peace-keeping forces." [6] It may also be noted that in appreciation of the significant role played by U. N. Peace-Keeping Forces for world peace, they have been awarded Nobel Peace Prize for the year 1988.

Regional Arrangements[7].—Due to the failure of the United Nations to perform its chief objective of maintaining peace and security in the world, the nations of the world were compelled to enter into regional arrangements such as North Atlantic Treaty Organisation (NATO), South East Atlantic Treaty Organisation (SEATO), Middle East Defence Organisation (MEDO), Central East North Treaty Organisation (CENTO), "The crippling of the United Nations intended peace and security functions as a result of great powers conflict led to search for alternative security arrangements." [8] "The framers of the Charter intended to establish a flexible framework within which existing and future regional agencies and the United Nations might function together harmoniously, the one extending support and encouragement to the other in their mutual complimentary tasks." [9] However it may be noted that due to the confict among the great powers the regional agencies not only evaded the performance of their function of assisting the Security Council, but also evaded the control and supervision of the Security Council. It would not be wrong to say that some of the regional agencies are little more than the old fashioned military alliances which foment great power rivalries, weaken the offectiveness of the United Nations and undermine the principle of collective security. Thus "Even apart from veto the Security Council was affected from its beginning by some disabilities, some open and some concealed, threatening its paralysis as an executive organ of international community." One of the disabilities was "the liberty of action of members to enter into regional arrangements under Articles 52-54." [10]

Place of General Assembly.—After the establishment of the United Nations, the most important constitutional change that took place was the constant expansion of the powers and functions of the General Assembly. It assumed a much more important

4. See also Quincy Wright, "The Foundations for a Universal International System" in Asian States and the Development of Universal International Law, Edited by R. P. Anand (1972), p. 167.
5. See Nagendra Singh, Recent Trends in the Development of International Law and Organisation Promoting Inter-State Co-operative and World Peace (1969), p. 52.
6. Maurice Strong, "The United Nations In an Inter-dependent World", International Affairs (Moscow, January 1989), p. 11.
7. For a little more detailed study see Chapter on "Regionalism".
8. Finkelstein, note 1, at p. 382.
9. Francis O. Wilcox, "Regionalism and the United Nations", Int. Org., XIX, (1965) p. 789 at p. 792.
10. Julius Stone, Legal Control of International Conflicts, p. 243.

place than the Charter intended it to have. In this connection, the most remarkable event was the passing of the Uniting for Peace Resolution, on November 3, 1950. It was the fundamental assumption of the framers of the Charter that there could be no alternative to the unity and co-operation of the great powers so far as the maintenance of International peace and security was concerned. Their assumption proved to be correct. In the words of a prominent jurist, "the original expectation was correct that there could be no substitute for great powers co-operation, in the peace and security field." Consequently, despite the fact that the Uniting for Peace Resolution has conferred some important powers upon the General Assembly in respect of maintenance of peace and security, it cannot be an adequate substitute for the co-operation of great powers. The Congo experience finally proved that even after the successful functioning of peace and security measures under the General Assembly, co-operation among major powers (permanent members) is necessary. In Congo, the United Nations undoubtedly performed a very commendable work, but by doing so it plunged itself into an unprecedented financial crisis because of the huge expenses incurred in sending the forces first to Egypt (Suez-crisis) then finally to Congo. In the present unipolar world when the U. S. has emerged as the sole super power, the demand for greater democratisation the U. N. is gathering momentum. There is every likelihood that the General Assembly, which is the most representative principal organ of the U. N., will occupy a place of prominence and continue to expand its role and significance. The General Assembly has become nearly universal for it has now the representation of as many as 189 member states of the United Nations.

The Role of the Secretary-General.—In consequences of the mutual conflict and non-cooperation among the great powers the powers and functions of the Secretary-General also expanded. The Uniting for Peace Resolution, 1950, conferred upon him important powers in respect of peace and security. Under this resolution Dag Hammarskjold, the second Secretary-General of the United Nations, performed commendable work in respect of peace and security first in Egypt (Suez-crisis of 1956) and then in Congo (1960-61). But as pointed out earlier, the Congo experience made it clear for once and all that even the Secretary-General could not be a substitute for the co-operation among the major powers. As pointed out by a jurist, "It (Secretary-Generalship) was always an unsatisfactory substitute for arrangements contemplated by the Charter."

However, it should not be concluded from the above discussion that the United Nations has proved to be a complete failure and that it has made no contribution for the maintenance of peace and security. In fact, there are several examples wherein the United Nations has performed commendable functions even in the sphere of maintaining world peace. In this connection, the case of Korea (1950), Palestine, Suez (1956), Congo (1961) and Indo-Pakistan Conflict (1965) and, above all, Gulf War (1991) deserve special mention. It must, however, be conceded that excepting the case of Congo, the United Nations could be successful only in stopping the armed conflict for a temporary period. It failed miserably to achieve a political solution of the problem. In case of Gulf War (1991), however, the U. N. was completely successful in restoring political independence and integrity of Kuwait. This has therefore become the most successful operation ever made by the United Nations.

Besides its contribution for the maintenance of peace and security, the United Nations has made commendable contributions in the following spheres :

(1) *Colonialism.*—The United Nations has performed commendable functions for ending colonialism. Most of the States which were the colonies of some major powers have now become independent and are at present the members of United Nations. There are, however, still 18 non-self-governing territories. On 25th November, 1992 the General Assembly reaffirmed its declaration of the decade beginning in 1990 as the International Decade for the Eradication of Colonialism. Thus "eradication of colonialism is one of the priorities of the organization for the decade beginning in 1990." Complete decolonization by 2000 is being pursued by the U. N.

(2) *Human Rights and Fundamental Freedoms*[11].—The functions performed by the United Nations in the field of human rights and fundamental freedoms have been really

11. For detailed study see Chapter on "Human Rights".

praise-worthy. The most glaring example of such functions is the adoption of the 'Universal Declaration of Human Rights, 1948 and International Bill on Human Rights'.

Economic and Social Field[12].—The General Assembly of United Nations, the Economic and Social Council and the specialised agencies of the United Nations have performed important functions in the economic and social fields. Even if we leave aside the functions of the United Nations in other spheres, it has become an indispensible organisation because of the functions it has performed in this sphere.

Thus "whether as symbol or as instrument it would seem to be clear that it has been much of the former than the latter and the United Nations continues to justify its existence in many fields of activity for the promotion of human welfare and a spirit of community, however short it has come of the role once envisaged for it as a legal authority sufficiently adequate for keeping the peace." [13]

Conclusion.—As rightly written by an author ".....the United Nations continues to justify its existence in many fields of activity for the promotion of human welfare and of a spirit of community, however short, it has come of the role once envisaged for it as a legal authority sufficiently adequate for keeping the peace." [14] It cannot be denied that the major defects and deficiencies of the U. N. conflicts among the great powers and lack of their mutual co-operation have not yet been overcome. As pointed by Finkelstein, "The Organisation has never been able to overcome the limitations which result from the lack of great power consensus." [15] It cannot also be denied that in the sphere of maintaining world peace, there is a crisis before the United Nations which has not so far been satisfactorily resolved. But if we evaluate the functions of the United Nations as a whole, we cannot but conclude that it has proved its worth and it is difficult to imagine a world without it. To quote Finkelstein again "The U.N.....demonstrated its usefulness to point where it would be difficult to see a world which did not have a U. N." [16] Professor L. M. Goodrich has also remarked, "The United Nations has shown a remarkable capacity for a development within the limits of the existing Charter. There is no reason to believe that possibilities of future development have been exhausted." [17] Thus we see that despite the failures, weaknesses and many defects, the United Nations survives and it has become indispensible and it would not be wrong to say that it has become an Organisation of inescapable importance. As pointed out by Secretary-General of the U. N. Javier Perez De Cuellar, "The world is changing so quickly today that change itself has become a subject for study. The nations and peoples of the world are interdependent and the waves of change send out their ripples to every corner of the earth. In this situation, the United Nations remains the only international organization capable of coordinating global perspectives, and the United Nation's Charter remains the most universally accepted document for setting the legal framework for contemporary international affairs. Despite its shortcomings, the United Nations is indispensable." [18] Further, "Even more today than when it was created, the

12. For a detailed and critical study see Chapter on "International Economic Cooperation and the Evaluation of a New International Economic Order."
13. Robert R. Wilson, "The United Nations as Symbol and as Instrument", AJIL, Vol. 64 (1970), p. 139 at p. 143; See also R. S. Pathak, "The Functioning of International Law in the International System", I.J.I.L., Vol. 24 (1984) p. 1 at p. 9.
14. Ibid.
15. Lawrence S. Finkelstein, "The U. N. : Then and Now" Int. Orgn., Vol.XIX, (1965) p. 367 at p. 390.
16. Ibid.
17. In the words of another eminent author, "Newspaper reports from the United Nations too often emphasize the difficulties and the disagreements, but behind them there is a story of solid accomplishments.....While much remains to be done, especially with respect to peace keeping, one may conclude that the U. N. has found it possible to adopt promptly to the new requirements of the technological age. It has been able to maintain a balance between on the one hand, the needs for stability and for preserving the integrity of its Charter, and on the other hand, the requirements of innovative change in the U. N.'s own functioning in modernizing international law through new law-creating processes.' Louis B. John, "The Development of the Charter of the U. N. : the Present State" in the Present State of International Law and other Essays (1973), p. 39 at p. 59.
18. "The Role of United Nations in World Affairs", International Affairs (Moscow, October 1988), p. 88.

United Nations continues to reflect and enshrine the hopes and aspirations of the entire human family as well as the imperatives for its survival and well being." [19]

The work of the U. N. is constantly increasing. If all the paper work produced by the U. N. Organisation in the year 1980 was put together it would stretch 270,000 km and in two years it would reach the moon. But the present financial crisis will greatly upset U. N. efforts in different fields. This is evident from the fact that the present U. N. Secretary-General, Mr. Boutras Boutras Ghali has already done away with twelve U. N. departments and has assigned their work to other existing departments.

In the field of maintenance of international peace and security the vacation of Iraqi aggression in Kuwait leading to the eventual freedom of Kuwait is indeed a great achievement. But the Gulf War (1991) has brought about unprecedented situation. The United Nations seems to be at the crossroads in more senses than one. The end of cold war as a result of several disarmament agreements between the U. S. and the U. S. S. R. was a welcome change. But with the collapse of the Soviet Union, the U. N. became entirely different than it was for several decades. During the Gulf War (1991) and afterwards the U. N. became a new important instrument of American policy. As pointed out by Ingvar Carlsson, Julius Nyerere in their study, "New world order by reshaping U.N.", "The transformation of relations between East and West has ended the cold war, freeing mind and resources that for so long were bound by sterile confrontation. Though the openings presented by this new situation are real, the process is fraught with danger, especially regarding the extreme difficulties facing the Soviet transformation." They have rightly suggested :

"World leaders must act now to build a new system for peace and security or the 1990s may become a decade of dangerous instability. Whenever International law is broken resolute action must be taken by the United Nations. Fears must be allayed that double standards played a role in making possible international response to the Iraqi invasion of Kuwait. And we must make sure that military culture is not given a new lease on life. A system of security must be built on principles of sovereignty and universality, not on the military might of individual powers.

We do need a new world order, but one founded on the vision of belonging to one global neighbourhood. It should be based on a sense of common responsibility, in which the notion of security is expanded to include economic and ecological, as well as military dimensions. Such an order will be far better suited to the interdependent realities of the next century than the old system of competitive and confrontational power blocs."

In the study "Tomorrow's United Nations", the two U. N. experts Brian Unquhart and Erskine Childers, pointed out, "apart from conflict resolution, the future concept of security has to embrace many global problems and challenges including the widening gulf between the rich and poor—"the afluent North and much of a poverty-stricken and increasingly South."

Pointing out the difference between the 1990s and the world of 1945 when the U.N. system was set up, they added :

"We live in a period when Governments, the basic units of the U. N. system, have less and less control over the forces that are shaping the future. Nationalism and sovereignty are increasingly problematic concepts. Their relationship to international responsibility and to the realities and hard facts of contemporary life are inevitably changing."

According to the study main areas of responsibilities for the U. N. system include conflict preventing diplomacy, peace-keeping settlement of disputes, arms reduction, strategies to overcome mass poverty, environment and promotion of human rights.

The study was sponsored jointly by the Ford Foundation (U.S.A.) and the Dag Hammarskjold Foundation (Sweden) and the authors consulted eminent international

19. Maurice Strong note 6, p.21.

persons and experts including Dr. Shridath Ramphal, Dr. I. G. Patel, Mr. Robert McNamara, Mr. Julius Nyerere, Mr. James Callaghan, Mr. Maurice Strong and Lestern Brown.

Thus we see that though the U. N. is now free from tensions which arose from the East-West relationship in its first forty years, it still faces "formidable problems for the world community in the vast complex of socio-economic and environmental issues on which the future conditions of life on the planet may well depend."

On 4th April, 2000, U.N. Secretary General Kofi Annan called for concerted efforts to make globalisation work for all. He unveiled a "forward looking" report outlining the main challenges facing the United Nations in the 21st century and suggesting an action plan to address those. The report entitled "we the peoples; the Role of the United Nations in the 21st century" was prepared ahead of the Millennium Summit of the U.N. in September 2000. Reminding the members that the U.N. was founded on the theme of "we the peoples", the Secretary General presented his Millennium Report at a plenary meeting of the General Assembly. In his report he said :

"We are at the service of the world's people, and we must listen to them. They are telling us that our past achievements are not enough. They are telling us we must do more and do it better". As regard poverty, he said : "It shows that the world has been far too tolerant of gross injustice and human misery, and it argues that we have to change that."

Last year the U.N. celebrated its 50th anniversary. That in itself is a great achievement. But one of the most disturbing thing that cast its shadow on the celebrations was its acute financial crisis. Instead of expanding its activities financial constraints have compelled it to curtail its functions in different fields. Though the U.N. is still struggling to solve formidable problems and finds itself surrounded by strifes and confrontations and is immersed in never ceasing financial crises, yet the U.N. is plodding its way slowly but steadily and looks like a light house and a ray of hope in a sea stirred by ever threatening storms. Indeed the United Nations is "the best hope of all humanity."

As pointed out by the former Chinese Vice-Premier Qian Qichen, "The world's hope lies in an effective, united and powerful U.N." He added that all nations should work to build a safe and stable international environment by abiding by the United Nations Charter and the five principles of co-existence. Further as an organisation with the most recognized authority, the United Nations has scored acknowledged achievements in safeguarding regional and world peace as well as promoting the progress and development of mankind. All is good so far as it goes. But the American wilfulness and disregard of norms and rules is proving a formidable obstruction. A glaring example of this is American invasion of Iraq in March, 2003 without any sort of authorization of the U.N. This undermines the authority of the U.N. and raises strong doubts about the utility and significance of the U.N.

PART V
THE LAWS OF WAR

CHAPTER 47

SETTLEMENT OF INTERNATIONAL DISPUTES*

It has always been the objective of international law to develop means and methods through which the disputes among the nations may be resolved through peaceful means and on the basis of justice. In this connection, the rules of international law are partly in the form of customs and partly in the form of law-making treaties. The two Hague Conferences of 1899 and 1907, the covenant of the League of Nations and the United Nations Charter deserve special mention in this connection. A dispute has been defined as "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons." [1] In an international dispute, the dispute must be between States. In a case of a wrong done to a national of one State, it does not become an international dispute until it is taken up by the Government of the State of the injured national. Secondly, the dispute must lead to some action by the aggrieved State. Thirdly, the dispute must relate to a reasonably well-defined subject-matter.[2] A distinction is made between legal and political disputes. But the distinction is difficult to apply in practice to actual disputes in the world, the factors in situation and the influences on governments are so complicated that most disputes have legal and political elements.[3]

The methods of the settlement of international disputes may be divided into two main categories : (1) pacific means of settlement; and (2) compulsive or forcible means of settlement.

Pacific means of settlement of international disputes**

Following are the pacific means of settlement of international disputes :

(1) Arbitration; (2) Judicial settlement; (3) Negotiations; (4) Good offices; (5) Mediation; (6) Conciliation; (7) Enquiry; and (8) Settlement of international disputes under the auspices of United Nations Organisation.

We will now discuss critically each of these methods one by one.

(1) *Arbitration.****—By arbitration we mean the method through which a dispute is referred to certain persons called arbitrators. Their decision is known as the award. These arbitrators are selected by the parties to the dispute. Although they are selected or appointed on the basis of the consent of the parties to a dispute, their decision or award is binding upon the parties. Article 15 of the Hague Convention of 1899 provides : "International arbitration has for its object the settlement of differences between States by Judges of their own choice and on the basis of a respect for law." This definition emphasises two elements—(i) consent of parties to arbitration; and (ii) settlement on the basis of respect of law.[4]

The history of settlement of international disputes through arbitration may be traced from very ancient times. But in modern times its history dates back from Jay treaty of

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* See also for I.A.S. (1973), Q. No. 5.

1. Mavrommatis Palestine Concessions (Preliminary Objections) case P.C.I.J., Series A. No. 2, p. 11.
2. International Disputes—The Legal Aspect (Report of a Study Group of the David Davies Memorial Institute of International Studies, (1972), pp. 57-58.
3. Ibid, at p. 58

** See also for I.A.S. (1957), Q. No. 9; P.C.S. (1977),

*** See also for I.A.S. (1972), Q. No. 8 (b); I.A.S. (1969), Q. No. 7 (a); I.A.S. (1968), Q. No. 11 (c); I.A.S. (1958), Q. No. 6 (b); P.C.S. (1966), Q. No. 7 (b); P.C.S. (1978), Q. No. 5; P.C.S. (1984), Q. 4—For answer see also forcible means discussed in the Chapter ; P.C.S. (1987), Q. 7 (a) ; C.S.E. (1994) Q. 5(d).

4. Hazel Fox, "Arbitration", Note 2, pp. 101-102.

1794 between England and America. The next important event in the development of settlement of international disputes through arbitration was *Alabama Claims Arbitration,* 1872. In this case, America had claimed compensation from Britain on the ground that it had violated the laws of neutrality. The arbitrators gave their award in favour of America and held that Britain was lible to pay a compensation. As remarked by Judge Hudson, "The success of Alabama Claims Arbitration stimulated a remarkable activity in the field of international law decisions." [5] The next important event was the adoption of Hague Convention of 1899, wherein international law relating to arbitration was codified. Yet another important result of the Hague Conference of 1899 was the establishment of the Permanent Court of Arbitration. This work was completed by the Hague Conference of 1907.

Permanent Court of Arbitration.*—It comprises of three institutions : (i) Panel of Experts; (ii) Administrative Council; and (iii) International Bureau. Each signatory power selects four persons competent in questions of international law and of highest moral reputation. They are inscribed in a list called panel of experts and the aggrieved States select five experts from this panel to constitute temporary arbitration Court. Situated in Hague, the Administrative Council comprises of the diplomatic representatives of the parties to the convention. The International Bureau comprising of a General Secretary and certain other employees is also situated in Hague. States wishing to avail the services of the Court are helped by this office through correspondence etc., and it also serves as a mediator for the States who want to make use of the court. Some of the more important decisions or awards by the court are *North Atlantic Fisheries case (1910), Muscat Dhows case (1905), Savarkar's case (1911), The Island of Palmas case (1928), Canberro's case (1912), Russian Indemnity case (1912),* and Pious Fund case (1920). It may be noted that though the Permanent Court of Arbitration still exists and is situated in Hague yet states do not make frequent use of this Court. Despite attempts in the General Act for the Pacific Settlement of International Disputes (1928) to rationalise and systematize further the recourse to arbitration, the Court has fallen into disuse.

"The Permanent Court of Arbitration was relative success and in the early years of this century influenced a more frequent recourse to arbitration as a method of settling international disputes while it may be said to have moulded the modern law and practice of arbitration.[6]

".....The Permanent Court of Arbitration was relative success, and in the sense is neither a court nor permanent. As pointed out by Fawcett. ".....the 'court' is permanent only in the sense that it has a registry, the International Bureau, which has its seat at the Hague, keeps the archives and acts as an intermediary between States desiring to use the court." [7] Instead of being a court, it comprises of a panel of names from which arbitrators for temporary arbitral tribunals are chosen. As stated by P. E. Corbett, "though it never sits and has no jurisdiction this body of jurists rejoices in the name, 'Permanent Court of Arbitration." [8]

Some Arbitration Courts were established after the first world war. In the modern times also the importance of the settlement of the international disputes through arbitration has not lessened. A glaring recent example is that of Kutch Arbitration of 1968 for the settlement of dispute between India and Pakistan. However, "Arbitration is essentially a consensual procedure. States cannot be compelled to arbitrate unless they agree to do so either generally and in advance or *ad hoc* in regard to a specific dispute. Their consent even governs the nature of tribunal established.[9]

It is one of the recognized principles of international law that the award given by the arbitrators is binding. The International Court of Justice has also reaffirmed this principle

5. International Tribunal, 1944), p. 5.
* See also for P.C.S. (1966), Q. No. 5.
6. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 488.
7. J. E. S. Fawcett, The Law of Nations (1968), p. 116.
8. P. E. Corbett, The Growth of World Law, (1971), p. 35.
9. Starke, note 6, at p. 436.

in *Arbitral Award Made by the King of Spain or December, 1906 (Honduras* v. *Nicaragua).*[10] The facts of this case are as follows :

Honduras and Nicaragua signed a convention on 7 October, 1894 for the demarcation of the limits between the countries. One of the articles of the convention provided that, in certain circumstances, any points of the boundary line which were left unsettled should be submitted to the decision of the Government of Spain. In October 1904, the King of Spain was requested to determine that part of the frontier line on which the Mixed Boundary Commission appointed by the two countries had been unable to reach agreement. The King gave his arbitral award on 23 December, 1906. The validity of the award was contested by Nicaragua. Both the countries agreed in July 1957 to refer the matter to the International Court of Justice for its decision. Honduras claimed that failure by Nicaragua to give effect to the arbitral award constituted a breach of an international obligation and requested the court to declare that Nicaragua was under an obligation to give effect to the award.....After going through the evidence produced, the Court found that Nicaragua had in fact freely accepted the designation of the King of Spain as arbitrator, had fully participated in the arbitral proceedings, and had thereafter accepted the award. The International Court of Justice, therefore, held that the award was binding and that Nicaragua was under an obligation to give effect to it.

A brief reference of the Kutch Award will not be out of place here :

The Kutch Arbitration Award (1968)[11].—The Rann of Kutch is a place on the border of Gujarat and West Pakistan. There was a dispute between India and Pakistan in regard to some land in the Rann of Kutch. Pakistan claimed 3,500 sq. miles of the land. On the issue of the said land, there took place an armed conflict in 1965. After the cease-fire both India and Pakistan agreed to refer this matter to arbitration. One arbitrator, Ales Bebber of Yugoslavia, was nominated by India; the other arbitrator, Nasrollah Entezam of Iran, was nominated by Pakistan, and the third was to be nominated with the mutual agreement of both States. Since India and Pakistan could not agree upon a third arbitrator, on the request of both the countries Judge Gunnar Lagergen the Chairman of the Arbitral Court was nominated by the Secretary-General of the United Nations. The Arbitral Court gave its award on 19th February, 1968. According to the award, 320 sq. miles (*i.e.*, about 10% of the Pakistani claims) of the land belonged to Pakistan and the rest belonged to India.

This award has been severely criticised and termed as 'political' and 'partial'.[12] Since the arbitrator nominated by India gave his decision in favour of India and the arbitrator nominated by Pakistan, gave his decision in favour of Pakistan, the decision of Chairman Gunnar was to be decisive. In his decision, Judge Gunnar wrote ".....It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory which is wholly surrounded by Pakistan territory also be declared as such." [13] This is the passage because of which the award has been termed 'political'. But as pointed out by R. P. Anand, ".....the primary object in settling boundary disputes is and should be to achieve stability and finality.....But the very nature of things, it may be surmised, settlement of any international dispute, through whatever means is bound to have political overtones and political repercussions. But that does not necessarily make it a political settlement." [14] As pointed out earlier, the award of the arbitration court is binding on the parties. Consequently, India accepted and agreed to implement it.

An important case relating to the implementation of the Kutch Award is *Maghanbhai Ishwarbhai & Others* v. *Union of India.*[15] Through the exchange of letters India and

10. Judgment of 18, November, 1960.
11. For detailed and critical study see : R. P. Anand, Studies in International Adjudication, (1969), pp. 218-49; J. Gilliswater, "The Rann of Kutch Arbitration", A.J.I.I., Vol. 65 (1971), p. 346; Mukund G. Untawala, "The Kutch-Sind Dispute. A case Study in International Arbitration", I.C.L.Q., Vol. 23, Part 4 (October, 1974), pp. 818-839.
12. See R. P. Anand, note 11, at pp. 218-19.
13. The Kutch Award, p. 153.
14. R. P. Anand, note 11 at pp. 238-39.
15. A.I.R. 1969 S.C. 783

Pakistan agreed to implement the Kutch Award. In this case, the petitioners contended that the implementation will amount to cession of Indian land and therefore it required approval or ratification by the Indian Parliament. The Supreme Court rejected the contention of the petitioners and held that the settlement of boundary or land cannot be called the cession. The Supreme Court observed : "A settlement of a boundary dispute cannot therefore, be held to be a cession of territory. It contemplates a line of demarcation on the surface of the earth. it only seeks to reproduce, a line.....ordinarily an adjustment of a boundary which international law regards as valid between two nations, should be recognised by the Courts and the implementation thereof can always be with the executive unless a clear case of cession is involved when Parliamentary intercession can be expected and should be had. This has been the custom of Nations whose constitutions are not sufficiently elaborate on this subject."

Arbitration is recognised as one of the means of pacific settlement of disputes. Article 33, paragraph 1 of the U. N. Charter provides that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation *arbitration,* judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The law of international law of arbitration now exists in the form of (i) International Covenants of Human Rights; (ii) International Public Law; (iii) Private International Law; and (iv) Bilateral arbitration agreements enforced under international arbitral conventions such as the Geneva Protocol on Arbitration Clauses 1923, Geneva Convention on the Enforcement of Foreign Arbitral Awards 1927 and the Newyork convention on the Recognition and Enforcement of Foreign Awards 1958.[16]

Indian Council of Arbitration (ICA).—In 1965, the Indian Council of Arbitration Council was established as the apex arbitral organisation at the national level for promoting the amicable and quick settlement of industrial and trade disputes by arbitration. It provides facilities for settlement of international commercial arbitration disputes. Its rules of arbitration have now been revised on the basis of the Arbitration and Conciliation Act, 1996. The Indian Council of Arbitration (ICA) has recommended tc all parties desirous of making reference to arbitration by the ICA, the use of the following arbitration clause in writing in their contracts :

"Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the ICA and the award made in pursuance thereof shall be binding on all the parties."

Advantages and disadvantages of arbitration as a method of settling international disputes.—Since arbitration is essentially a consensual procedure, it has certain advantages over other pacific methods of settlement of disputes. As pointed out by Starke, "There will always be a place for arbitration in the relations between States. Arbitral procedure is more appropriate than judicial settlement for technical disputes and less expensive, while if necessary, arbitrations can be conducted without publicity, even to the extent that parties can agree that award be not published. Moreover, the general principles governing the practice and powers of arbitral tribunals are fairly well recognised. Lastly, arbitral procedure is flexible enough to be combined with the fact-finding processes which are availed of in the case of negotiation, good offices, mediation, conciliation and enquiry." Moreover, "it should not be forgotten that arbitration in its present form offers States the certainty of a binding award. Stripped of its former grandiose pretensions to solve all international disputes, arbitration continues to offer a useful supplement to the International Court of Justice as regards

16. See V. S. Deshpande, "Towards an International Law of Arbitration" I.J.I.L. Vol. 27. No. 4 (Oct.-Dec. 1987), pp. 556-563.

disputes requiring a purely legal solution particularly in connection with minor disputes or issues involving technical matters unsuitable for decision by so large a number of judges as provided by the International Court. As regards other 'mixed' disputes, States should not overlook the advantages of a process which combines judges of their own choice and respect for the law." [17] Despite these advantages arbitration now serves as a residual procedure, where other procedures for settlement are lacking.[18]

"It may be outmoded in that its former usefulness in fact finding can be equally well done by a commission of inquiry and its former reconciliation of national interests by means of a broad, rather than strict, application of the law can now be more effectively achieved through a conciliation commission." [19] To meet this criticism, it has been suggested that a permanent arbitral or equity tribunal should be established and in addition to any jurisdiction given to it by States under treaties, it may be equipped with an advisory jurisdiction. "Questions by means of this jurisdiction can be referred to it by a political body such as the General Assembly or Security Council of the United Nations in pursuance of their powers to recommend the peaceful adjustment of situations under Articles 14 and 37 of the Charter. The opinion or recommendation of the tribunal, made on such a reference, will have no binding force of themselves but would only become enforceable when approved by the political body which orginally referred the matter to the tribunal, and would then only be enforceable with respect to States which had expressly conferred on the United Nations the power to enforce the tribunal's recommendations.....Thus, it is hoped this proposed 'Court of Arbitral Justice' might provide a suitable forum for courts to discuss questions of peaceful change and offer the Security Council and the General Assembly a new method of finding on objective basis for any decision which they might be entitled to take with respect to a dispute under the existing provisions of the Charter." [20]

(2) *Judicial Settlement* *.—So far as the judicial settlement of international disputes is concerned, at present there is only one such Court called the International Court of Justice which is the successor of the Permanent Court of International Justice which was established under the League of Nations. At present International Court of Justice occupies important place so far as the settlement of international disputes through judicial process is concerned. Its, functions, jurisdiction and achievements have been discussed in a sparate Chapter. So please see the Chapter of *International Court of Justice* for a detailed study of the judicial settlement of international disputes.

Distinction between Arbitration and Judicial Settlement.**—As noted earlier, International Court of Justice situated at Hague is available to States for judicial settlement. Resort to arbitration, on the other hand, can be had under the Permanent Court of Arbitration, as well as outside it. There is a great difference between the arbitration and judicial settlement. Following are the main points of distinction between the two :

(1) The International Court of Justice is a Permanent Court governed by its statute. It has its own rules of procedure which are binding on all the parties who submit their disputes to the Court. On the other hand, the Permanent Court of Arbitration is neither a court nor permanent. It comprises of a panel of names from which arbitrators for temporary arbitral tribunals are chosen. Besides the Permanent Court of Arbitration, Arbitration Courts are appointed for a temporary period by the parties to the dispute.

17. Hazel Fox, note 2, at p. 127.
18. Ibid, at p. 103.
19. Hazel Fox, note 2, at p. 126.
20. Ibid at pp, 126-127.

* See also for I.A.S. (1969), Q. No. 7 (b). For answer see Chapter entitled "The International Court of Justice."

** See also for I.A.S. (1966), Q. No. 7; P.C.S. (1967), Q. No. 4; For answer see also matter discussed earlier under the heading "Arbitration" and Chapter entitled "International Court of Justice"; see also for P.C.S. (1982), Q. No. 7, (b).

(2) The International Court of Justice is situated at Hague having a permanent registry and renders judicial service. Arbitration Courts being temporary have no permanent seat.

(3) Proceedings of International Court of Justice are public and its proceedings, judgments, etc., are published. The judgments of Arbitration Courts are more properly known as awards and may or may not be published depending upon the agreement between the parties to dispute.

(4) The International Court is open to all States. But its jurisdiction depends upon the consent of States. Arbitration is also a consensual procedure but it is consensual to the extent that consent is necessary even for the establishment of the court. Arbitration Court is available to States as well as individual and other legal persons.

(5) Disputes submitted to International Court of Justice are decided in accordance with international law and the Court applies sources of international law as enumerated in Article 38 of the Statute of the Court and also in the order as given therein. The Court has also the power to decide a case *ex ecquo et bono* if the parties agree thereto. The Arbitration Court also settles differences between parties on the basis of respect of law. But strict application of law is neither required nor insisted in an arbitral procedure. In practice often arbitrators waive a strict application of law in order to resolve the dispute.[21]

(6) The International Court of Justice is elected in such a way so that it represents "the main forms of civilization and of the principal legal systems of the world." [22] The constitution of the arbitration court depends upon the consent of the parties to the dispute and therefore it can never be as representative as the International Court of Justice.

(7) The International Court of Justice has developed a consistent practice in its proceeding and has contributed to the development of International law. Arbitration Courts have also developed certain practices in its proceedings but their decisions or awards are often not regarded as legal decisions because they are generally the mixture of law and politics. They confuse law with a diplomatic solution at pleasing both parties.

(8) Judicial settlement is given a place of prominence under the U. N. Charter. International Court of Justice is the Principal Judicial Organ of the United Nations.[23] The U. N. Charter recognises arbitration as one of the pacific methods of settlement of disputes,[24] but it has not been given that prominent role which has been given to the International Court of Justice. Article 36 specifically provides that in making recommendations under this Article the Security Council should also take into consideration that legal disputes as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.[25] There is no parallel provision in the Charter in respect of arbitration.

(9) The Statute of the International Court of Justice is an integral part of the Charter.[26] Since the U. N. is an Organisation which has attained nearly universality, the International Court and Judicial settlement has gained immensely from being linked to the Charter. Arbitration simply finds mention in the Charter.

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21. See for example, the Casablanca case, Hague Court Reports, Ist series (1916), p. 110 and the North Atlantic Coast Fisheries case, Ibid, p. 141.
22. Article 9 of the Statute of International Court of Justice.
23. Article 92 of the U. N. Charter.
24. See Article 33 of the Charter.
25. Article 36, paragraph 3.
26. Article 92.

(10) "Arbitration brings together, the concepts of third party settlement and the application of the rules of law. Courts of law take the matter further and formalise these concepts into a complete system." [27]

On the basis of aforementioned points it may be concluded that adjudication of disputes is certainly a better and more useful method of settlement of disputes. It is an advanced means of settling disputes and should be regarded as natural a means in international society as it is within the States.[28] It may, however be noted that "international adjudication has failed to inspire that confidence which a judicial organ does within nation States. This is primarily because of the absence of an international community in the real sense of the term and the consequent absence of a cohesion and a felling of shared interests between States. Only 46 members of the United Nations have accepted the compulsory jurisdiction of the I. C. J., many of them with wide reservation." [29]

(3) *Negotiations.*—Negotiations are also the means for the settlement of international disputes. It is much less a formal method than judicial settlement.[30] Sometimes disputes are settled through negotiations only. But if negotiations fail to resolve dispute, then other methods, such as, good offices, mediation, etc., may be used along with negotiations.

(4) *Good Offices.*—When two States are not able to resolve their disputes, a third State may offer its good offices for the same. These offices may also be offered by international organisation or some individuals. The third State, individual or international organisation creates such an environment as may be conducive for the settlement of the disputes. Some general suggestions may also be put forward but the third party does not take active part in the negotiations. For example, the United Nations Security Council offered its good offices in the disputes between Indonesia and Netherlands in 1947. The recent example of offering good offices is that of France to America and North Vietnam to settle their mutual dispute so as to end the Vietnam War.

(5) *Mediation.**—Mediation is yet another method through which efforts are made to settle international disputes. In the case of mediation the third State or individual not only offers its services but also actively participates in the talks to resolve the dispute.[31]

Distinction between 'Good Offices' and 'Mediation'.—The main distinction between good offices and mediation is that in case of good offices, the third party simply offers its services, and does not actively participate in the talks, whereas, in the case of mediation, third party actively participates in the talks and makes suggestions so as to resolve the dispute between the States. A good example of mediation and good offices is that of Tashkant Agreement in the end of 1965 and beginning of 1966, wherein Russia succeeded in bringing about an agreement between India and Pakistan. As pointed out by Starke, "The initiative of Soviet Government at the end of 1965 and early in 1966 in bringing representatives of India and Pakistan together at Tashkant to settle the conflict between them, and in creating a propitious atmosphere for settlement, seem to have lain somewhere between good offices and mediation." [32]

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27. P. J. Allott, "The International Court of Justice", note 2, p. 128 at pp. 129-30.
28. Ibid, at p. 157.
29. S. Dayal, "Peaceful Settlement of International Disputes", Punjab University Law Review (1974-1975), p. 113 at p. 117; one more member having conferred compulsory jurisdiction on the court, the figure has now risen to 47.
30. "Negotiations are the simplest method of peaceful settlement of disputes in the sense that in negotiations the parties to the dispute alone are involved in the procedure." H. G. Darwin, "Negotiation", note 2, at p. 77.
* See also for P.C.S. (1973), Q. No. 2 (b).
31. Article 4 of the Hague Convention on the Pacific Settlement of Disputes, 1899 has described the role of the mediator as reconciling the opposing claims and appearing the feelings of resentment which have arisen between States at variance.
32. Starke, note 6, at p. 513.

(6) *Conciliation.** – In wider sense, conciliation is a method through which the other States or the impartial persons try to resolve the dispute peacefully through different means. Often the matter is referred to a Commission or Committee which submits its report and recommends certain measures for the settlement of disputes. These proposals are, however, not binding upon the parties. In the words of Judge Hudson, conciliation is "a process of formal proposals of settlement after an investigation of the facts and an effort to reconciliate to accept or reject proposals formulated." [33] The Hague Conventions of 1899 and 1907 made provisions for a Conciliation Commission. In the present time also conciliation is adopted as a method of settlement of an international dispute. A recent example of this is the 1965 Convention of the Settlement of Investment Disputes between States and the Nationals of other States which provides for Conciliation Commission for the settlement of dispute. Conciliation has following four advantages :—

"(1) It offers the parties to the dispute information and a knowledge of the opponent's case which is invaluable.

(2) It affords an opportunity to the lawyers and politicians involved in the dispute at a national level to refer the matter to a small body of independent and qualified persons for their objective appraisal of the issues and for proposals for their settlement.

(3) It takes full account of the sensitivity, susceptibilities and prestige of governments in that it is easier to accept a third party's solution than that offered by the opponent.

(4) It leaves unchanged the liberty and sovereignty of the parties. There is complete secrecy, no obligation to accept the Commission's proposals, no loss of rights or abandonment of position. A State retains its sovereign control to the last stage of the proceedings." [34]

The above points are also relevant for comparing conciliation with mediation. Moreover, "conciliation is to be distinguished from mediation in that it involves an enquiry by an independent body rather than a third State acting as a negotiator; it is to be distinguished from a commission of inquiry in that in addition to elucidating the facts a conciliation commission proceeds to make positive proposals for the settlement of the dispute and finally it is to be distinguished from arbitration and judicial settlement in that it involves no obligation on the parties to accept the decision of the conciliation commission as binding." [35]

(7) *Enquiry.*—Enquiry is also a method which is often resorted to for the settlement of disputes. It may be noted that it is not an independent method and is often used alongwith other methods. The main objective of the enquiry is to make investigation of the relevant matters so as to establish facts which may help the ultimate solution of the problem. For example, often Enquiry Commission is appointed in relation to the settlement of border disputes. The Commission clarifies the facts after making enquiry into the relevant facts.

(8) *Settlement of International disputes under the auspices of the United Nations Organisations*** –A detailed discussion of this has already been made in the Charter of the United Nations. However, briefly speaking, following are some of the provisions for the settlement of international disputes under the United Nations Charter :

(i) It is one of the purposes of the United Nations that the State members should settle their disputes through peaceful means. Under Art. 2 of the Charter, the member States have undertaken to resolve their disputes through peaceful means and not to resort to force or threat of force to resolve international disputes.

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

33. Hudson, International Tribunals, (1944), p. 323.
34. Hazel Fox, "Conciliation", note 2, at p. 100.
35. Hazel Fox, "Conciliation", note 2 p. 95.

** See also for I.A.S. (1969), Q. No. 7 (c); I.A.S. (1966), Q. No. 8.

(ii) The General Assembly of the United Nations may make recommendations for the peaceful settlement of International disputes.[36]

(iii) Articles 33 to 38 of Chapter VI of the Charter made the provisions for the peaceful settlement of international disputes. In accordance with these provisions if there is a likelihood of danger to international peace and security, then the States should resolve their disputes through judicial settlement, negotiations, good offices, mediation, conciliation, enquiry or any other peaceful means of their choice. In this connection, the Security Council may also make recommendations in regard to the settlement of disputes through peaceful means.[37]

The Security Council has been given wide powers in respect of pacific settlement of disputes. It may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.[38] The Security Council may, at any stage of a dispute of the nature referred above or of a situation of the like nature, recommend appropriate procedures or methods of adjustment.[39] The legal disputes should as a general rule be referred to the International Court of Justice.[40] It is very rarely that the Security Council has utilized this power. It is also provided that if the parties fail to settle their dispute by the means indicated in the said Article they *shall* refer it to the Security Council. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36, or to recommend such terms of settlement as it may consider appropriate.[41] Lastly, if all the parties to any dispute so request, it may make recommendations to the parties with a view to a specific settlement of the dispute.[42]

But as remarked by Bowett, "The Security Council was never intended as an organ appropriate for settlement of inter-State disputes generally. Its 'jurisdiction' is limited under Chapter VI of the Charter to disputes 'the continuance of which is likely to endanger the maintenance of international peace and security.' [The exception to this where *both* parties to a dispute request the Council to make recommendations (Article 38)]. Moreover, even in dispute of this character, the procedures afforded by the Council under Chapter, IV are *supplementary* to, and not exclusive of traditional, procedures to which the parties must first of all refer their disputes.....Recourse to the Security Council should therefore be regarded as a recourse to a *secondary* means of settlement, when the primary, traditional means have failed." [43] Further, "The jurisdiction of the Security Council is also limited in that, not only must the dispute be one the continuance of which is likely to endanger the maintenance of international peace and security, it must not be dispute involving matters 'essentially within the domestic jurisdiction of any State'. The limitation of the famous 'domestic jurisdiction' clause of Article 2 (7)—is a limitation common to all U. N. Organs. It represents the most frequent ground for challenge to the jurisdiction of these organs.....Two further limitations on the competence of the Council exist. The one is to be found in Article 107 which has affected the Security Council only in the Berlin case in 1948 when the Soviet Union denied competence on this ground and voted any resolution—this is a limitation of limited effect and one which becomes increasingly anachronistic. The other is to be found in Chapter VIII of Charter and involves the question whether Article 52 gives a form of 'priority' of competence to regional

36. Article 14 of the Charter.
37. Article 33.
38. Article 34
39. Article 36, paragraph 1.
40. Article 36, paragraph 3.
41. Article 37.
42. Article 38.
43. D. W. Bowett, "The United Nations and Peaceful Settlement", in International Disputes—The Legal Aspects (1972), p. 179 at pp. 179-180.

arrangements over local disputes." [44] As regards the competence of the General Assembly he aptly writes : "The Charter does not contain detailed provisions on the powers of the Assembly with regard to pacific settlement of disputes comparable to Chapter VI. However, such powers are implicit in the very general terms of Articles 10-14 and even explicit in Articles 12 (1) and 35 (2). By and large the limitations on competence which apply to Security Council apply equally to the General Assembly." [45] It has rightly been pointed out that, "the United Nations record both in resolving international disputes by agreement and helping them become quiscent is by no means impressive though it has played significant role at least in 'defusing' a tense situation." [46]

Despite the above mentioned provisions in the Charter the General Assembly on 24 October, 1970, adopted the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the U. N.*[47] The Declaration provides that every State has the duty to refrain from organising, investigating, assisting or participating in acts of civil strife or terrorist acts in another State acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force. It emphasises the obligation of States to refrain from the use of threat or use of force and their duty to settle their disputes through negotiations, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their choice. The Declaration added that the principles of the Charter embodied in this Declaration "constitute basic principles of international law" and appealed to all the States "to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles." As remarked by an eminent author, "This is but one important example of the legislative activity of the General Assembly leading to the creation of new international law applicable to all States.....This is not treaty making but a new method of creating customary international law." [48]

Reference may be made here to the Manila Declaration on the Peaceful Settlement of International Disputes which was drafted by the Special Committee on the Charter of the U. N. and on the strengthening of the Role of the organisation in its February, March 1982 session and approved by the General Assembly at its 1982 session. The Manila Declaration, in its preamble, reaffirmed the Declaration on Principles of International Law concerning friendly relations and co-operation among states in accordance with the Charter of the U. N. The Manila Declaration declared that states shall seek in good faith and in a spirit of co-operation an early and equitable settlement of their international disputes by any of the following means : negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice, including good offices. In seeking such a settlement, the parties shall agree on such peaceful means as may be appropriate to the circumstances and the nature of their dispute.[49]

Further, neither the existence of a dispute nor the failure of a procedure of peaceful settlement of disputes shall permit the use of force or threat of force by any of the states parties to the dispute.[50]

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44. Ibid, at pp. 180-181.
45. Ibid. at p. 183.
46. S. Dayal, note 28, at p. 122; see also Northedge and Donelan, International Disputes—The Political Aspect, op. cit., pp. 224-25. For compulsive means of Settlement by the U. N. see Chapter on "the Security Council".
47. G. A. Res. 2625 (XXV) of 24 October, 1970, G. A. Official Records, Twenty-fifth Session, Suppl. No. 28 (1971), pp. 121-124.
48. Louis B. John, "The Development of the Charter of the U. N. : The Present State", in the Present State of International Law and other Essays (1973), p. 39 at p. 52; For contra see Robert Rosen Stock, "The Declaration of Principles of International Law concerning Friendly Relations : A survey", A.J.I.L., Vol. 65 (1971), p. 713 at p. 715.
49. Paragraph 5, Part I of the Declaration.
50. Paragraph 13, ibid.

The declaration further provides that member states should make full use of the U.N., including the procedures and means provided for therein particularly chapter VI. concerning peaceful settlement of disputes.[51] Member states reaffirmed the important role conferred on the General Assembly by the Charter of the U. N. in the field of peaceful settlement of disputes and stress the need for it to discharge effectively its responsibilities.[52] Member states should strengthen the primary role of the Security Council so that it may fully and effectively discharge its responsibilities in accordance with the Charter of the U. N., in the area of the settlement of disputes or any situation the continuation of which is likely to endanger the maintenance of international peace and security.[53] States should be fully aware of the role of the International Court of Justice which is the principal judicial organ of the U. N. Their attention is drawn to the facilities offered by the International Court of Justice for the settlement of legal disputes especially since the revision of the Rules of the Court. States may entrust the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future. Further, states should bear in mind : (a) that legal disputes should as a general rule be referred by the parties to the International Court of Justice, in accordance with the provisions of the statute of the court; (b) That it is desirable that they : (i) consider the possibility of inserting in treaties, whenever appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation of application of such treaties; (ii) study the possibility of choosing in the free exercise of their sovereignty, to recognise as compulsory jurisdiction of the International Court of Justice in accordance with Article 36 of its statute, (iii) Review the possibility of identifying cases in which use may be made of the International Court of Justice. Besides this, the organs of the U. N. and the specialized agencies should study the advisability of making use of the possibility of requesting advisory opinions on the International Court of Justice on legal questions arising within the scope of their activities provided that they are duly authorised to do so. Last but not the least, recourse to judicial settlement of legal dispute particularly referred to the International Court of Justice should not be considered as an unfriendly act between states.[54]

The Special Committee on the Charter of the U. N. and on the Strengthening of the Role of the Organisation at its 1988 session (Newyork, 22 February—11 March) a draft "Declaration on the prevention and removal of disputes and situations which may threaten international peace and security and on the role of the United Nations in this field." [55] Comprising of a preamble, a 25-paragraph operative part and conclusion, it makes following important recommendations—

(i) The Security Council should sometimes hold meetings, including at a level of Ministers, or consultations to review international situation and search for effective ways of improving it.

(ii) The Council should consider appointing the Secretary-General as rapporteur in a specified dispute.

(iii) The Council should consider sending, at an early stage, fact-finding or good offices missions or establishing appropriate forms of United Nations presence including observers and peace-keeping operations, to prevent further deterioration of the dispute in the areas concerned.

(iv) The Secretary-General should consider approaching the states concerned in order to prevent a dispute from becoming a threat to the maintenance of international peace and security. He should also make use of fact-finding missions where appropriate.[56]

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51. Paragraph 1, Part II of the Manila Declaration.
52. Paragraph 3, ibid.
53. Paragraph 4, ibid.
54. Paragraph 5, ibid.
55. See U. N. Chronicle, Vol XXV, No. 2 (June 1988), p. 63.
56. Ibid.

It has been aptly pointed out, "Highly developed though the structure and the role of international organisation have become, each individual State in virtue of its sovereignty remains for the most part legally free to accept or reject in relation to itself any solution proposed for changing an existing situation." [57] The apparent failure of States in many instances to have recourse to appropriate means of settlement cannot reasonably be attributed to the inadequacy of the several procedures available, although it cannot be denied that there are some weaknesses in the existing structure of International Organisation in regard to the provision made for the settlement of disputes.[58] As a matter of fact, "The sense of responsibility and urgency which is present in the international community with regard to the obligation of States to refrain from threat or use of force does not yet exist with regard to their obligation to settle their international disputes by peaceful means." [59]

(iv) International Court of Justice as the principal Judicial organ of the United Nations also performs important functions in regard to the settlement of international disputes through peaceful means.[60]

(v) The Secretary General of the United Nations may also become instrumental in the settlement of certain disputes through mediation or by offering his good offices.[61]

Compulsive or coercive means of settlement*

If the international disputes are not resolved through peaceful means then the States resort to compulsive or coercive means which are as follows :

(1) Retorsion; (2) Reprisal; (3) Embargo; (4) Pacific Blockade; (5) Intervention; and (6) Settlement under the U. N.

(1) *Retorsion.***—When a State behaves in a discourteous manner with another State, International Law confers right upon the State affected to resort to retorsion. The word 'retorsion' means retaliation. But the affected State can take only those means or measures as retorsion which are permitted under international law. For example, in retorsion diplomatic relations may be ended, privileges of diplomatic agents may be withdrawn and economic facilities may be stopped. A recent example of the settlement of international dispute through coercive means is that of Pakistan and Iraq, in connection with the discovery of certain arms in the Iraqi embassy situated in Pakistan. The Government of Pakistan declared the Iraq Ambassador *non-persona gratia* or undesirable person and asked him to leave Pakistan immediately. Pakistan took this action because some arms were recovered in the Iraqi Embassy and it was alleged that these arms were to be supplied to persons in Pakistan to be used against the established Government. The Iraqi Government reacted against this and took resort to retorsion by declaring the Pakistan Ambassador in Iraq an undesirable person asked him to leave the State of Iraq immediately. It may be contended that if Pakistan was justified in taking the action as it did against the Iraqi Ambassador, so far as legal position is concerned, the Iraqi action in declaring the Pakistan Ambassador undesirable person was also in accordance with the rules of international law. The United Nations Charter has to some extent affected the right of retorsion because in accordance with the provisions of Charter no State can take any action in the form of retorsion as may endanger international peace any security.[62]

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57. International Disputes—The Legal Disputes (The David Davies Memorial Institute of International Studies, 1972), p. 4.
58. Ibid, at p. 37
59. Ibid, at p. 50.
60. For a detailed study of this see Chapter on "The International Court of Justice."
61. For this see Chapter on "Secretary-General."

* See also for I.A.S. (1961), Q. No. 8 ; for answer see also Chapter on "The Security Council." ; See also for P.C.S. (1995) Q. 6(a).

** See also for P.C.S. (1982), Q. No. 7 (e); P.C.S. (1984) Q. 5.

62. Starke, note 6, at p. 520.

(2) *Reprisals**.—Yet another compulsive means of settlement of international dispute is reprisal. According to Starke, "Reprisal connotes coercive measures adopted by one State against another for the purpose of settling some disputes brought about by the latter's illegal or unjustified act." [63]

A leading case on reprisal is the *Naulilaa Incident.*[64] In this case, the tribunal laid down the following principles :

(a) Reprisals are illegal unless they are based upon a previous act contrary to international law.

(b) There must be a certain proportion between the offence and the reprisals as a necessary condition for the legitimacy of the latter.

(c) Reprisals are only legitimate when they have been preceded by an unsuccessful demand of redress. In fact, the employment of force is only justified by necessity.

The facts of the *Naulilaa Incident* are as follows —

In October 1914 when Portugal was neutral, a German group entered the Portugese-African territories from the German South West Africa. Thereafter the incident that took place was due to misunderstading at the Portuguese Port, Naulilaa. It was mainly due to the inefficiency of German interpreters. Lt. Sereno thought that he was being threatened and, therefore, he took the action in his self-defence. As a result of this misunderstanding shots were fired resulting in the death of a German Officer and his two subordinate officers. As a reprisal, the Governor of German South-West-Africa sent a military party to the Portuguese territory which had a confrontation with the Portuguese soliders which were sent to the Southern border territory of Angola to suppress the people of a certain tribe. The Portuguese soldiers were defeated in this confrontation. Thereafter, the German military party returned back to German territory, but after the Germans had gone, the natives there revolted, resulting in a great harm to the State of Portugal. As a reprisal Portugal expelled the German Consul from its country. The Arbitral Court had to decide how far Germany was responsible for the above-mentioned incident and how far the action taken by Germany should be justified. The Court had also to decide how far Germany was responsible for the subsequent events, particularly the revolt of the people resulting in a great harm to the State of Portugal. Germany contended that her action was justified as a valid reprisal. The Arbitral Court held that Germany was liable to pay compensation as her action was not justified as a reprisal.

Recent example of the use of this means for the settlement of the International disputes is the Israeli action in bombarding certain areas of Lebanon from where the Arab Guerillas operated attacks from time to time in different parts of the territory of Israel. A question may, however, arise whether in the present time this right of reprisal is in keeping with the provisions of the United Nations Charter. As a matter of fact, the United Nations Charter has greatly affected the right of the States to resort to reprisal. No State is entitled to resort to reprisal which may endanger international peace and security.

Moreover, as pointed by an eminent Indian author,[65] "There seems to be general agreement among jurists that forcible reprisals are no longer valid in international law.For example, Mc Dougal and Feliciano are of the view that the prescriptions and policies embodied in the U. N. Charter forbid the unilateral use of force and violence by way of

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* ee also for I.A.S. (1976), Q. No. 8; I.A.S. (1974), Q. No. 6 (a); P.C.S. (1982), Q. No. 7 (c).

63. Starke, note 6 at pp. 484-85. In the words of Oppenheim : Reprisals are such injurious and otherwise illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory Settlement of a difference created by its own international delinquency", International Law Vol. II, Seventh Edition, p. 136.

64. Special Tribunal : *Germany* v. *Portugal,* (1928) 2 RIAA 1012, 1019. For the fact of this case see Appendix II.

65. M. K. Nawaz, "Limits of Self-Defence : Legitimacy of use of Forces Against Economic Strangulation?" I.J.I.L., Vol. 16 (1976), p. 252 at pp.255-256.

reprisal for 'lesser wrongs or 'tortious' conduct.[66] Similarly, Quincy Wright has commented that the Charter prohibits the use of armed force as a measure of reprisal except in case of defensive necessity or explicit authorisation by the United Nations.[67] If there was any ambiguity in the legal status of forcible reprisals, as a form of coercion short of war, says Ian Brownlie, it was removed by Article 2, para 4 of the U. N. Charter.[68] Stating that forcible reprisals are illegal, Rosalyn Higgins exhorts that the remedying of international wrongs no longer lies within the jurisdiction of individual States, but can only be accomplished by peaceful procedures or by the authority of the United Nations.[69]

The general consensus among jurists is now echoed in the Friendly Relations Declaration, contained in Resolution 2625 (XXV), which says : 'States have a duty to refrain from acts of reprisals involving the use of force.'[70]

Thus the law of the United Nations interdicts forcible reprisals."

It is generally believed that the right of reprisal can be validly and justifiably used only when the other State has committed an International crime or violated any rule of international law. Moreover, the reprisal will be justified only when its objective is to satisfactorily settle the international disputes.

*Difference between Retorsion and Reprisal.**—The main distinction between reprisal and retorsion is that while in retorsion only that action can be taken which is permitted under international law and depends upon the direction and sweet-will of the States. Whereas in reprisal, those actions can also be taken which might otherwise be illegal but are allowed as reprisal in certain special circumstances. As pointed out by Starke, "..... reprisal consists of acts which would generally otherwise be quite illegal, whereas retorsion consists of retaliatory conduct to which no legal objection can be taken." [71]

(3) *Embargo.*—Embargo is yet another compulsive means for settlement of international dispute. It is a type of reprisal. By embargo we mean that if a State violates international law or commits some international crime then the affected State becomes entitled to create obstruction in the transport of its ships which are within the territory of the affected State.

(4) *Pacific Blockade.***—Pacific Blockade is yet another compulsive means of settlement of international dispute. Through pacific blockade the ingress and egress of the ports of the States are blockade so that the ships of other States may not reach those ports and the ship of the blockade State may not go out of the ports. However, there is a distinction between pacific blockade and the blockade which is often resorted to during war. Pacific blockade is a blockade which is used in peace time. It is often resorted to as a reprisal because through blockade of the ports of a State, that State may be compelled to settle its disputes. Some scholars are of the view that this means has become old and international law now does not permit it. Even if it is argued that it has not become an old method yet it cannot but be conceded that the Charter of United Nations has greatly affected this right. That is to say, this means cannot be resorted if it is likely to endanger international peace and security. However, the United Nations may itself use blockade as a means to take collective measures under Art. 42. The advantage of this means for the settlement of international dispute is that it is less violent than war.

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66. Mc-Dougal and Feliciano, Law and Minimum World Public Order (1961), pp. 207-208.
67. Q. Wright, "Legal Aspect of the U-2, Incident", A.J.I.L., Vol. 54 (1960), p. 836.
68. I. Brownlie, International Law and the Use of Force by States (Oxford, 1962), p. 281.
69. Rosalyn Higgins, the Development of International Law through the Political Organs of the United Nations (Oxford, 1963), p. 217.
70. For the meaning and scope of this provision, see Milan Sohoviced, Principles of International Law Concerning Friendly Relations and Co-operation (New York, 1972), p. 104.

* See also for P.C.S. (1982), Q. No. 7(c).

71. Starke, note 6 at p. 520.

** See also for I.A.S. (1957), Q. No. 6 (g).

An example of peaceful blockade is that of the blockade of Cuba by America in 1962. America blockaded the port of Cuba because America contended that Russia was going to supply some nuclear weapons to be stationed at Cuba and which might prove detrimental for the security of America and which was alleged to be the violation of Havana Convention by Cuba. But as pointed out by Starke, the Cuban blockade is different from the old blockades permitted under international law. He has pointed out the following three points in this connection :

(a) In the first place, it was not only the blockade of the Cuba's coast but its objective was to prevent the incoming of nuclear weapons in Cuba.

(b) Secondly, this involved not only the search of Cuban ships but also the ships of other countries which were within that area.

(c) Thirdly, as declared by the President of America, America resorted to this blockade on the recommendation of the Organisation of American States.

(d) "Fourth, the quarantine was conducted in a manner unlike that characteristic of traditional pacific blockades, *e.g.* under a 'clearcet' scheme, shippers could obtain before hand a clearance certificate to send cargoes through the zone subject of the quarantine". Thus, "If not permissible under the Charter, the effect of the quarantine in interfering with the freedom of the high seas raised serious issues as to justification under International Law." [72]

(5) *Intervention.**— A separate Chapter is devoted to the rules of international law relating to intervention. Please see that Chapter for the settlement of international disputes through intervention which is prohibited in principle but is permitted under certain exceptional circumstances.

(6) *Settlement under the Auspices of the U.N.*—The Charter of the U.N. provides for coercive means of settlement of international disputes under Chapter VII entitled "Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression. It provides for two main things, (a) collective Intervention or Enforcement Action, and (b) Individual and collective self-defence while collective or enforcement action has already been discussed in detail in Chapter on "Security Council" ; individual and collective self-defence has been discussed in detail in Chapters on "Intervention", "Collective Security" and "Regionalism".

The International Centre for Settlement of Investment Disputes (ICSID).—The International Centre for Settlement of Investment Disputes or ICSID was established in 1965 under the Convention for the Settlement of Investment Disputes between the States and the National of other States (1965). It was sponsored by the World Bank and the Convention came into force in 1966. Its aim was to provide a machinery and procedure for the investment disputes to encourage private foreign investment. Thus in respect of a dispute at the international level, the person or individual making private investment becomes a party to the investment dispute.

This Centre *i.e.* ICSID provides for the settlement of investment disputes and provides procedure for the same. It consists, *inter alia*, of a plenary Administrative Council and its chairman is the Chairman of the World Bank. It also has a General Secretary. The basis of the jurisdiction of the Centre is consensual which is either written in the contract or which (consent) may be given when the dispute arises, there also exists separate panels of conciliators nominated by the parties. The conciliators act in their personal capacity or on the basis of jurisdiction.

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72. Starke, note 6 at pp. 523-524, Prof. Q. Wright has also expressed the view that American Intervention in Cuba was illegal and cannot be justified under International Law. "The Cuban Quarantine". A.J.I.L. (1963), p. 536; see also G.G. Fenwick, "The Quarantine Against Cuba: Legal or Illegal ?" Ibid. p. 588; Myres S. Mc. Dougal, 'The Soviet Cuban Quarantine and Self-Defence', Ibid., p. 597.

* See also for P.C.S. (1990) Q. 9(b) ; For answer see chapter on "Intervention" and see also Appendix II.

The settlement procedure is initiated by making a request to the Secretary-General. The request or application should make it clear whether the settlement is to be effected through Conciliation or Arbitration. The parties are free to choose conciliation or arbitration as a method of settlement. The number of arbitrators or conciliators should be odd such as 3,5,7 etc. Once the Tribunal or Commission is established, it applies the rules of the Centre *i.e.* ICSID. The recommendations of the Conciliation Commission are not binding. But the award of the Arbitration Tribunal is binding and is enforced like a judicial decision in the states of parties to the contract. The grounds for setting an award are very limited and few such as unjust constitution, beyond or exceeding power, corruption, different from the basic rule of procedure not to give reason or failure to give reason.

Article 64 of the Convention provides for referring to the International Court of Justice matters of interpretation but the validity of an award cannot be challenged in the International Court of Justice.

As mentioned above, one of the special features of the settlement of investments disputes by the Centre (ICSID) in that alongwith states individuals are directly parties to the dispute. It is really praiseworthy to empower individuals to be parties before International tribunals. Thus the view of Kelsen that individuals can get rights under international law only 'mediately' has become old and obsolete.

CHAPTER 48

WAR, ITS LEGAL CHARACTER AND EFFECTS

Definition of 'War'.*—According to Hall, "when differences between State reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of peace, the relation of war is set up, in which the combatants may use regulated violation against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant." [1] Starke has also pointed out that "war in its most generally understood sense was a contest between two or more States primarily through their armed forces, the ultimate purpose of each contestant or each contestant group being to vanquish the other or others and impose its own conditions of peace." [2] According to Prof. Oppenheim, the chief objective of war is to overwhelm the enemy and to impose conditions upon it.[3]

According to the old definition of war, is mainly a contest between the armed forces of the belligerent States. But in the modern period it is often seen that war takes place not only between the armed forces of the belligerent States, but also affects the citizens of the States concerned. The most glaring example of this is the dropping of atom bombs at Nagasaki and Hiroshima, during the Second World War which caused devastation unprecedented in the annals of the World. It may, therefore, be said that the old definition of war does not conform to the modern wars. According to Oppenheim the time honoured distinction between members of the armed forces and civilians has been deeply affected by following five developments which have appeared during and since the First World War : (1) Growth of the numbers of combatants; (2) Growth of numbers of non-combatants engaged in war preparation; (3) The development of aerial warfare; (4) Economic measures; and (5) The advent of totalitarian States.[4] He further adds, "However, while these factors have had the effect of blurring the established distinction in many respects and of necessitating a modification of some of the existing rules, they have left intact the fundamental rule that non-combatants must not be made the object of direct attack by the armed forces and the civilian population." [5]

Non-war-armed conflict.**—As remarked by Lord Mac. Naughten, "The law recognises a State of peace and State of war but it knows nothing of an intermediate State which is neither one thing nor the other—neither peace nor war." As pointed by another author[6] "the legal condition of war has not arisen since 1945, and upon an optimistic view of international relations and the role of the United Nations is unlikely to occur in the near future. But the text books of international law distinguish only conditions of war and peace, not the conditions of limited hostilities which have occurred, and unhappily will continue to occur. The question that arises is how much of the traditional law of war is applicable to this twilight situation which is neither peace nor war and is unrecognised by many jurists". He further adds, "Finally, a definition of limited war will prove to be, helpful in classifying the concept of law to be utilized. It is proposed that the expression 'limited

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

1. This definition was approved in *Driefentin Consolidated Gold Mines* v. *Janson* (1900) 2 Q.B. 339 at p. 343.
2. J.G. Starke, Introduction to International Law, Tenth Edition (1989) p. 527.
3. In his words, "War is a contention between two or more States, through their Armed Forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases". L. Oppenheim, International Law, Vol. II. Seventh Edition, Edited by H. Lauterpacht (1963), p. 202, see also H. Lauterpacht, "The Limits of the Operation of War", BYBIL (1953), p. 206.
4. Ibid., at pp. 207-208.
5. Ibid, at p. 208.

** See also for I.A.S. (1974), Q. No. 6 (d); I.A.S. (1974). Q. No. 8 (a); I.A.S. (1964), P.C.S. (1966), Q. No. 9.

6. D.P.O. Council, "International Law and Contemporary Naval Operations", BYBIL, Vol. XLIV (1970), p. 19 at pp. 2-24.

war' covers the situation of hostilities not amounting to declared war, which, are limited in respect of (a) the area of operations; (b) the weapons employed; and (c) the targets engaged. We have sufficient experience of limited war in this sense for international lawyers to be able to propose new rules for what is new phenomenon." [7] As pointed out by Starke, significant changes have come in the modern wars. In the modern period, many armed conflicts have taken place in which neither the war was declared, nor the rules of war were followed and nor there were the effects of war in accordance with the laws of war. In this connection, he cites the examples of the Korean conflict from 1950 to 1953; Indo-China War; Cango conflict of 1960 to 1963 and Indo-Pak, conflict of 1965. Since the declaration of war is not made, neither are there full effects of war in accordance with laws of war nor the duties and rights of the neutral States are properly defined and determined. In view this consideration, Starke has called such wars as non-war armed conflicts. In his view following are some of the reasons for the development of this category of war :

(1) The States concerned do not want that their conflicts should be regarded as the violation of obligations arising out of international treaties. For example, they do not want that the conflict should be regarded as the violation of the Paris Pact of 1928 through which the States had renounced war as an instrument of national policy.

(2) The belligerent States also do not want that the States not taking part in the wars may declare their neutrality so as to evade the rules of neutrality.

(3) It is also their desire to localize the conflict and not to allow it to take the form of general war.[8]

Further, practice in the non-war conflicts has revealed the tendency of States to apply most of the rules governing a war *stricts sensu* to non-war hostilities. For example, the Geneva Red Cross Conventions were expressly applicable to such non war armed conflicts. But every such armed conflict must vary in its special circumstances and the rules to be applied must also depend upon the circumstances. In case the U.N. Security Council is taking enforcement action "actual decisions or recommendations adopted by the Security Council under Articles 39 et. seq. of the United Nations Charter, for the guidance of States engaged in the hostilities, may fill the place of rules of international law." [9]

Need for Amendment of the laws of war*.—According to Judge Nagendra Singh, in view of change in the methods of war of development of devastating weapons, particularly nuclear weapons, it has become necessary to bring about changes in the laws of war.[10] Besides this, following are the reasons which have necessitated changes in the laws of war : (1) Development of the concept or total war; (2) Expansion of the world community as a result of the independence of new States; (3) Development of human rights; (4) Need for protecting the civilian population from the scourge of war; (5) Need for enforcement of human rights during war; and (6) The laws of war were codified long ago; since then revolutionary changes have taken place. They should, therefore, be revised and recodified. The First and Second World Wars exhibited the inadequacy of the existing laws of war.[11] Josef L. Kunz has, therefore, rightly remarked, "That the Laws of War are actually in a chaotic state and urgently need revision, is a fact which cannot be challenged.[12]"

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7. Ibid, at p. 85.
8. Starke, note 2, at p. 529
9. Ibid, at p. 532
* See also for P.C.S. (1980), Q. 10 (a)
10. See Recent Trends in the Development of International Law and Organisation Promoting Inter-State co-operation and World Peace (1966), pp. 108-27.
11. As pointed out by Pro. D.P.O'. Connel, "Since 1945 the laws of war has tended to be neglected by International lawyers, partly, no doubt, because they have remained optimistic that war had been excluded from their doctrine, but partly because many have lacked the technical knowledge to evaluate the military factors which bear upon the traditional rules of the laws of war and test their validity". Note 6, at p. 19.
12. Josef L. Kunz. "The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision". A.J.I.L. Vol. 45 (1951) p. 37 at p. 53. See also H. Lauterpacht, "The Problem of the Revision of the Law of War", BYBIL, Vol. XXIX (1952) p. 360.

Despite the urgent need for the amendment in the laws of war, there is no likelihood of sincere efforts to amend them for the obvious reason that war, nay even use of force has been prohibited under the charter for the settlement of international disputes. It is feared, and rightly too, that if laws of war are amended they may put the existing position of outlawry of war to the reverse gear.

*Commencement of War.**—From very ancient period, there has been the practice of giving some sort of information or making some declaration or giving some ultimatum in regard to the commencement of war. During sixteenth century there was a custom of sending heralds to give information of the outbreak of war or otherwise declaration was made through some messenger, etc. This practice ended by the end of sixteenth century. In seventeenth century, Grotius expressed the view that declaration is essential. Despite this view, many wars took place in which no formal declaration was made. By the end of nineteenth century, however, it was generally accepted that some sort of ultimatum or warning was necessary before the start of war. In this twentieth century, there is no uniformity in the practice of the States in regard to the commencement of war. In 1904 Japan started war against Russia without any formal declaration or ultimatum. In 1907, the Hague Convention propounded the rule that a formal declaration was necessary for the start of war and an ultimatum should also be given before resorting to war. It was also provided that information regarding the commencement of war should also be given to the neutral States. But as is well known, these rules were flagrantly violated during the two World Wars. Despite this in the present time it is still a valid rule of international law that some declaration or ultimatum is necessary for the commencement of war.

Legal Regulation of War.**—Legal regulation of war was probably the most important development of twentieth century. As pointed out by Oppenheim, "Prior to the General Treaty for the Renunciation of war the institution of war fulfilled in International law two contradictory purposes. In absence of an international organ for enforcing the law, war was a means of self-help for giving effect to claims based or alleged to be based on International Law. Such was the legal and moral authority of this notion of war as an arm of the law that in most cases in which war was in fact resorted to in order to increase the power and positions of a State at the expense of others, it was described by the States in question as undertaken for the defence of a legal right. This conception of war was intimately connected with the distinction which was established in the formative period of International Law and which never became entirely extinct between just and unjust wars..... In the absence of an International Legislature it fulfilled the function of adopting the law to changed conditions. Moreover quite apart from thus supplying a crude substitute for deficiency in international organisation, war was recognised as a legally admissible instrument for attacking and altering existing right of States independently of the objective merits of the attempted change..... International Law did not consider as illegal a war admittedly waged for such purposes. It rejected, to that extent the distinction between just and unjust wars. *War was in law a natural function of the State and a prerogative of its uncontrolled sovereignty.*" [13] Further, "The Hague Conferences of 1899 and 1907 and the movement or the Pacific Settlement of international disputes marked the beginning of the attempts to limit the right of war both as an instrument of law and as a legally recognised means for changing legal rights. At the same time more direct attempts were made to limit the right of war." [14]

In connection with the efforts made to limit the right of war or even to out-law war following deserve special mention :—

(a) Hague Conventions of 1899 and 1907; (b) Covenant of the League of Nations; (c) Treaty of Mutual Assistance, 1923; (d) Geneva Protocol of 1924 ; (e) Locarno Treaty of

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* See also for I.A.S., (1955), Q. No. 7; C.C.S. (1980), Q. 10 (a).

** See also for I.A.S. (1974), Q. No. 7; I.A.S. (1959) No. 8; I.A.S. (1958), Q. No. 5; I.A.S. (1975), No. 5(b) ; I.A.S. (1961), Q. No. 9 ; I.A.S. (1965), Q. No. 7 ; P.C.S. (1982), Q. No. 8 ; P.C.S. (1965), Q. 5—For answer see also Chapter on "Collective Security" ; C.S.E. (1988), Q. 8(a) ; C.S.E. (1990).

13. Oppenheim, note 3, at pp. 177-178 : emphasis supplied.

14. Ibid, at p. 179.

1925; (f) Pact of Paris of the Kellogg Briand Pact (1928) ; and lastly (g) the Charter of the United Nations.

The Hague Convention of 1907 relating tc the limitation of the Employment of Force for the recovery of contract prohibited recourse to force a legal remedy for enforcing contractual obligations. Moreover, the Hague Convention IV of 1907 on the laws and customs of war on Land imposed certain restrictions on the means of injuring the enemy, sieges and bombardments.[15] But these provisions concerned the restriction on the means of injuring the enemy rather than limiting the right of war. In this connection efforts made in the League of Nations, Pact of Paris and the Charter of U.N. are very important and require a little detailed reference. The Covenant of the League of Nations under Articles 12 to 16 imposed certain restrictions upon the States in regard to their right to resort to war. These Articles provided that before resorting to war the States should settle their disputes through arbitration, judicial settlement or by inquiry. Even if their disputes were not satisfactorily resolved through these means, they could not, under the said provisions, go to war before the lapse of three months. It was also provided that if any State went to war violating the provisions of the Covenant then that State would be deemed to be the enemy of the whole League of Nations. Thus the Covenant of the League of Nations for the first time imposed certain restrictions upon the right of the States to resort to war.[16] The next important event in this connection was the *Paris Pact* of 1928 which is also popularly known as *Kellogg-Briand Pact*. In this Pact the States agreed to renounce war as an instrument of national policy in the settlement of international disputes. Article 1 of the Treaty of Renunciation of War, 1928 (*Kellogg Briand Pact*) provides : "The High Contracting Parties solemnly declare in the names of their respective peoples that they *condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.*" Article II further provided that the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be which may arise among them *shall never be sought except by pacific means.* As aptly remarked by Brierly, "The Pact of Paris—the Kellogg Briand Pact is an instrument of outstanding importance signed or adhered to by a great many members of the International Community it declares in the most categorical terms the absolute illegality of war in pursuit of national policies. Moreover having been concluded outside the League, it did not perish with the League, and being fully consistent with the provisions of the Charter, retain its full force today. The Pact was the culmination of a strong movement in the early days of the League to outlaw any recourse to war otherwise than in self defence and it was preceded by a number of draft treaties and resolutions which declared aggressive war to be an international crime." [17] But he adds, "In forbidding war as an "instrument of national policy" the Pact did not forbid recourse to war in self-defence, and in the negotiations concerning the Pact did not forbid recourse to war in self-defence, and in the negotiations concerning the Pact several States made express declarations emphasizing that self-defence is a natural right not touched by the Pact. But the Pact did intend to render wholly illegal all resort to war otherwise than in self-defence or as a sanction for the violation of the Pact." [18] The shortcomings of the Pact are uncertainty as to how far the prohibition of resort to war includes measures of force short of war; the absence of any provisions for authoritative ascertainment of breaches of the Pact, the failure to provide for collective enforcement of its obligations at least to the extent of a mitigation of the rigidity of the established rules of neutrality to the disadvantage of the law breaker and the absence of duty expressly laid down in the Pact to submit disputes between its Signatories to binding settlement. These defects seriously impair the political

15. See Articles 22 to 28 of Annex to the Convention : Regulations Respecting the Laws and Customs of War on Land.
16. As pointed out by Brierly, "The Covenant changed the whole foundations of the law, (1) by creating express obligations to employ pacific means of settling disputes and not to resort to war without first exhausting those means, and (2) by establishing a central organisation of States empowered to pass judgment on the observance of those obligations by individual States and to apply sanctions in the event of the obligations being violated". J.L. Brierly, the Law of Nations, Sixth Edition (1963), p. 408.
17. Ibid., at pp. 408-409.
18. Ibid, at pp. 409-410.

significance and the prospects of observance of the Pact. But in law the terms of the Pact are very comprehensive and the danger of the purpose of the Pact being frustrated lies not in the normal operation of its provisions but in the possibility of their violation by the Signatories." [19] Further, "Henceforth war could not legally, be resorted to either as a legal remedy or as an instrument for changing the law. *Resort to war ceased to be a discretionary prerogative right of States signatories of the Pact; it became a matter of legitimate concern for other Signatories whose legal rights are violated by recourse to war in breach of the Pact; it became an act for which a justification must be sought in one of the exceptions permitted by the Pact of Paris.*" [20] Moreover, being permanent in nature any purpose and representing a fundamental change in the legal structure of international society, the Pact of Paris must be regarded as continuing in being and as one of the corner stones of the International Legal system. This is so although it has not been expressly incorporated in the Charter of the United Nations.[21]

By the establishment of the United Nations Charter in 1945 the legal regulation of war reached its zenith. The United Nations Charter contains the following provisions restricting and even prohibiting war by States :

(1) Preamble of the Charter says "that armed force shall not be used, save in the common interest."

(2) It is an important principle of the United Nations that the States shall settle their disputes peacefully.[22] Article 2, paragraph 4 provides that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the U.N. Thus instead of the word 'war', the Charter mentions the words 'threat or use of force.' The scope of the Charter is thus wide enough because it prohibits not only war but the use of force or threat thereof.

(3) Chapter VI provides certain methods for the peaceful settlement of international disputes. They include negotiations, good offices, conciliation, judicial settlement, inquiry or any other peaceful means of choice.[23]

(4) Under Chapter VII, Security Council is empowered to take collective action against the State which has committed aggression or has otherwise committed a breach of international peace.[24]

The most important achievement of the United Nations is probably that it has prohibited war and there are only a very few exceptions wherein a State can resort to war. Even in these exceptions, a State can resort to war only in accordance with the provisions of United Nations Charter. The Charter prohibits not only resort to war but also to force generally and to threats of war and physical force.[25]

It is clear from the above discussion that in the modern time, there is sufficient legal regulation over war. It cannot, however, be denied that the above-mentioned rules are frequently violated. The violation, however, does not mean that the rules do not exist or there is no legal regulation over war. In fact, States generally accept these restrictions and do their best not to violate them.

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19. Oppenheim, note 3, at 196.
20. Oppenheim, note 3, at pp. 196-197.
21. Ibid, at p. 197.
22. See Article 2, Paragraphs 3 and 4.
23. See Articles 33-38.
24. See Articles 39-50.
25. As remarked by Oppenheim, "..... although the Charter of the United Nations goes beyond Paris Pact inasmuch as its members have renounced not only the right of war—Other than in individual and collective self-defence—but also the resort to force, that fact does not imply any contradiction between the two instruments. The same applies to the fact that unlike the Pact of Paris, the Charter provides a 'positive duty to submit to the Security Council disputes which the parties have failed to settle by means of their choice. The Charter thus adds to the obligations of the Pact in many ways—In particular by prohibiting recourse to force generally as distinguished from the mere prohibition of war. Inasmuch as the Pact does not provide for a legal possibility of unilateral withdrawal from its obligation it ranks highest than the Charter itself", note 3, pp. 195-196.

Effects of the outbreak of War*

For the convenience of our study we will discuss the effects of the outbreak of war under the following headings :

(1) General Effects; (2) Diplomatic and Consular relations; (3) Treaties; (4) Trading and Intercourse in Commerce; (5) Contracts ; (6) Enemy property; and (7) Combatants and non-combatants.

(1) *General Effects.*—Besides affecting the neutral States, war mainly affects the belligerent States. According to Oppenheim, it is wrong to say that due to the outbreak of war all the relations of the belligerent states and that of their citizens come to an end. Although peaceful relations of the belligerent States end, international law prescribes certain limitations and prohibitions and the relations of the belligerent States during war are governed by the laws of War.[26]

(2) *Diplomatic and Consular Relations.*—At the outbreak of the war the diplomatic and consular relations between the belligerent States are broken immediately. Consequently the belligerent States recall their diplomatic agent from each other States. Often at the outbreak of war, the receiving belligerent States hand over the passport to the diplomatic agents of the enemy country which means that they should immediately return to their home State. In this connection Art. 44 of the Vienna Convention on Diplomatic Relations, 1961 provides that it is the duty of the receiving States to provide necessary facilities to such agents so that they may return safely to their home State. In other words, we may say that until the diplomatic agents return to their respective countries and so long as they remain within the receiving State, it is the responsibility of the receiving State to see that their person and property are protected.

(3) *Treaties.***—According to the old view, all treaties are terminated between belligerent States after the outbreak of war. In the present times, many significant changes have come in this respect. The present practice of States shows that all the treaties between the belligerent States do not come to an end. Some treaties are completely terminated, some remain in force, while some others are simply suspended during war times.

There are two main tests in this connection—(a) Subjective test; and (b) Objective test. According to the subjective test, in order to ascertain whether the treaty concerned is to be terminated at the outbreak of war, intention of the parties to the treaties is examined. If it is clear from the intention of the parties that the treaties are only for peace time, then they are terminated at the outbreak of war. In case it is clear from the intention that the treaties will remain in force irrespective of the war, then the treaties remain in force. According to the objective test, the termination or remaining in force of the treaties depends upon the facts whether the provisions of the treaty can be enforced in the context of war or to put it more precisely whether they are inconsistent or not with the outbreak of war.

On the basis of the above tests the practice of the States and the views of the jurists, Starke[27] has summed up as follows :

(i) Those treaties between the belligerent States for which common political action or good relations are essential, terminate at the outbreak of war. An example of such type of treaty is a treaty of alliance.

(ii) Treaties regarding the establishment of completed situations or the fixation of boundaries remain unaffected by war.

(iii) The treaties or conventions regulating the conduct of war remain binding during war upon the parties to such treaties or conventions. The Hague Conventions of 1899 and 1907 are such types of Conventions.

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* See also for P.C.S. (1976), Q. No. 6.

26. Oppenheim, note 3, at p. 301.

** See also for I.A.S. (1974), Q. No. 6(c) ; I.A.S. (1959), Q. No. 9; P.C.S. (1985), Q. 10 (d); C.S.E. (1988), Q. 8(a) ; P.C.S. (1995) Q. 9 (b).

27. Starke, note 2, at pp. 508-509.

(iv) These multilateral law-making treaties which are related to health, medicines, protection of industrial property, etc., are not completely terminated at the outbreak of war. They are simply suspended and are revived after the end of war.

(v) Sometimes there are express provisions in the treaties which make it clear whether the treaties will remain in force at the outbreak of war.

(vi) There are some types of treaties, such as, treaties relating to extradition which are simply suspended at the outbreak of war.

(vii) "A State complying with the resolution by the U. N. Security Council concerning action with respect to threats as to the peace, breaches of the peace or acts of aggression, must either terminate or suspend the operation of a treaty, as to which it is a party, if the treaty would be incompatible with the Security Council's resolution (Institute Resolution, Art. 8)."

Thus much depends upon the provisions of the treaties, intention of the parties, nature of treaty, etc.

(4) *Trading and Intercourse in Commerce.*—All trading and intercourse between the belligerent States are prohibited during the war. It is a well-recognized rule of international law that the treaties relating to trading and intercourse between the belligerent States stand terminated at the outbreak of war.

(5) *Contracts.**—The effect on the contracts at the outbreak of war between the belligerent States is a matter of municipal law rather than that of international law. Consequently, belligerent States are free to make rules and to enforce them in accordance with the contracts. International law leaves them free to make necessary laws regulating the validity or invalidity of contracts at the outbreak of war. The practice of the States, however, shows that the executory contracts become completely void whereas executed contracts remain unaffected at the outbreak of war.

(6) *Enemy property* **—Enemy property may be of two kinds—public enemy property and private enemy property.

Public enemy property.—At the outbreak of war all movable public enemy property situated in the enemy States may be seized. The position in regard to the immovable public enemy property is however, different. Immovable public enemy property may be temporarily taken but cannot be permanently seized. After the outbreak of war, it is determined as to what should be done in regard to this property. Consequently the sale or disposal of the immovable public enemy property is not possible during war. It can only be used by the belligerent State during war.

Private enemy property.—The practice of the States shows that the private enemy property situated in the territory of the belligerent State may be taken over for a temporary period. After the end of the war its fate is decided in accordance with the provisions of the peace treaty concluded, if any, between the belligerent States. The belligerent State is not entitled to seize the private enemy property, but can only take it if it is necessary for local needs. In short, we may say that private property can be temporarily taken only when it is essential for military purposes of the belligerent States. Its plunder or seizure is contrary to International Law. For example, when India occupied certain Pakistani territories in the Indo Pak War of 1971, it did not acquire the right to take private property of the inhabitants of those areas and to dispose them off. India, however, acquired the right to take over or use that property if it was necessary for the administrative purposes or for maintaining law and order in that area. In an American case, *Silesion American Corpn.* v. *Clake,*[28] Marshall, C.J. held that for successful waging of war, private property could be confiscated. But as rightly remarked by Judge C. Jessup : "It is a sound general proposition that the confiscation of private property of aliens is a breach of international

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

** See also for I.A.S. (1959), Q. No. 9; I.A.S. (1956), Q. No. 11.

28. (1947) 332 U.S. 429, 475; For contra see *U.S.* v *Percheman,* (1883), 7 Peters 51, 86-87.

law.[29]" There are, however, certain exceptions in this connection. The rules of international law mentioned above are not applicable in case of enemy ships in the sea. The ships of enemy, whether they are public or private, can be seized during war.

(7) *Combatants and non-combatants.**—Under International law, the soldiers of the belligerent States are divided into two categories—lawful and unlawful. At the outbreak of war, lawful soldiers, can be killed, grievously hurt, arrested or made prisoners of war. Lawful soldiers are ordinarily those soldiers who are in the regular army. Unlawful combatants, however, enjoy certain facilities or concessions. They may also bearrested and made prisoners, but they cannot be killed or grievously hurt during war. As pointed out by Starke, "Traditionally international law maintains a distinction between combatants and non-combatants, inasmuch as non-combatants are not in principle to be wilfully attacked or injured. Certain classes of non-combatants, for example merchants, seamen, may, however, be captured and made prisoners of war." [30]

In its thirtieth Session, the General Assembly, on 15 December, 1975, adopted a resolution,[31] concerning respect for human rights in armed conflict. Through this resolution, the Assembly called upon all parties to armed conflicts to comply with their obligations under humanitarian instruments and to observe international humanitarian rules. The Assembly urged all participants in the *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* to do their utmost to reach agreement on additional rules which might help to alleviate suffering brought about by armed conflicts and to respect and protect non-combatants and civil objects in such conflicts.[32]

It may be noted here that in June 1977 a Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in armed conflicts was held and on 8 June, 1977 two Protocols to the Geneva Convention of 1949 were adopted. The first Protocol is the Protocol Additional to the Geneva Convention 12 August, 1949, and relating to the Protections of victims of International Armed Conflicts. Articles 43 to 45 of this Protocol contain some provisions relating to combatants. Article 43 provides that members of the armed forces of a Party to an armed conflict (other than medical personnel and chaplains) are combatants, that is to say they have the right to participate directly in hostilities. Article 44 provides that any combatant, as defined in Article 43 (as noted above), who falls into the power of an adverse Party shall be a prisoner of war. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. A combatant who falls into the power of an adverse party while failing to meet the requirements set forth above shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoner of war by the third convention and by this Protocol. Article 45 further provides that a person who takes part in hostilities and falls into the power of an adverse party shall be presumed a prisoner of war and therefore shall be protected by the third convention if he claims the status of prisoner of war or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the Detaining Power or to the Protecting Power.

Concept of "Total War."—In accordance with the traditional definition of war, war is a contest between the armed forces of the belligerent States. Its object is to

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29. "Enemy Property", A.J.I.L., Vol. 49 (1955), p. 37; See also judgment of Cardozo, J. in *Shapleigh* v. *Mier*, (1937) 299 U.S. 468 at p. 470; See also A.I.R., 1954 S.C. 447 at pp. 450-57.

* See also for I.A.S. (1960), Q. No. 7; I.A.S. (1955), Q. No. 11 ; I.A.S. (1958), Q. No. 7(a); I.A.S. (1969) Q. No. 8(b) ; For answer see also Chapter on "The Laws of Land Warfare". "The Laws of Marine Warfare" and "The Laws of Aerial Warfare" ; P.C.S. (1982), Q. No. 4(c); P.C.S. (1983), Q. 8 (a).

30. Starke note 2, at p. 548: See also Leaster Nurick, "The Distinction between combatant and non-combatant in the Law of War", A.J.I.L., Vol. 39 (1945), p. 680.

31. Gen. Ass. Resolution 3500 (XXX).

32. U.N. Monthly Chronicle, Vol. XXIII No. 17 (January 1976), p. 72; Reference may also be made to General Assembly Resolution 3103 (XXVII) of 12 December, 1973 where the Assembly declared "Basic Principle of the Legal Status of the combatants struggling against colonial and Alien Domination and Recist Regimes".

overwhelm the enemy and impose conditions upon the enemy. As pointed out earlier, this definition has become inadequate in view of the scientific developments and development of destructive weapons in the modern times. In the modern time, war not only affects the armed forces but also the civilian and the nature of the war is such that observance of the rules of war becomes impossible. Such, a war has, therefore, been called "total war". The term 'total war' was first used by Grotius. In his view, thirty year's war of Europe was a 'total war'. According to Josef L. Kunj, the religious wars of 16th and 17th century were fought with such cruelty and barbarity that they can be called 'total wars'. He further added that 'total wars' do not depend upon the unprecedented development of natural sciences.[33] "It is also clear that the total war will make illusory even such laws of war as are considered 'compatible with total war', such as rules concerning prisoners of war, sick and wounded and so on ....."[34]

*Fides etiam hosit servanda (Non-hostile relations of belligerents).**—As noted above due to outbreak of war, non-hostile relations between the belligerent States, come to an end. But there are certain exceptions to this rule. Due to necessity of circumstances, considerations of humanity and some other factors, some kinds of non-hostile relations of belligerents may continue. As pointed out by Oppenheim, "It is a universally recognised principle of International Law that, where such relations arise, belligerents must carry them out in good faith. *Fides etiam hosit servanda* is a rule which was adhered to in antiquity, when no International Law in the modern sense of the term existed. But it had then a religious and moral sanction only. Since in modern times war is not a condition of anarchy and lawlessness between belligerents, but a contention in many respects regulated by law, it is obvious that where non-hostile relations between belligerents occur, they are protected by law. *Fides etiam hosit servanda therefore, a principle which nowadays enjoys a legal as well as moral sanction."*[35] Non-hostile relations may originate from Multilateral treaties or Convention (such as Geneva Convention of 1949) for the Amelioration of the condition of the wounded and sick, in Armed Forces in the Field,[36] or from special agreements between belligerents. Such agreements may be entered into in respect of flags of truce, passports, cartels, surrender, capitulations and armistices.

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33. Josef L Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision', A.J.I.L., Vol. 45 (1951), p. 37 at p. 40.
34. Ibid, at p. 61.
* See also for I.A.S. (1972), Q. No. 10(e); I.A.S. (1961), Q. No. 12(a).
35. Oppenheim, Note 3, at p. 534.
36. For example Article 16 of the Convention imposes the obligation upon either belligerent to return to the enemy all objects of personal use, letters, etc. found in battlefield or left by those who have died in hospital.

CHAPTER 49

ENEMY CHARACTER*

Immediately after the outbreak of war between the States, a significant change comes in relations which are governed in accordance with the needs of war. States bring about changes in their behaviour against the enemies in accordance with the objectives of war. States determine their behaviour or treatment in accordance with the enemy character of the individuals, goods, corporations, ships, etc. Therefore, in order to regulate their activities and behaviour it is necessary to determine the enemy character of individuals, goods, corporations, etc. Once the enemy character of individuals, goods, corporations, etc. is determined, the belligerent State regulates its behaviour towards the enemy State accordingly. Efforts were made to formulate the rules for determining enemy character in Second Hague Conference of 1977 and Geneva Naval Conference. But no tangible success could be achieved. During the First World War different tests and standards were used to determine the enemy character of individual goods, ships and corporations. From the practice of the States and the rules that have been formulated so far, we can derive the following conclusions :

(1) *Enemy character of individuals.***—Enemy character of individuals can be studied under the two headings—(a) Enemy character of the individuals of the belligerent States; and (b) Enemy character of the individuals of neutral States.

(a) Enemy character of the individuals of the belligerent States.—In regard to the enemy character of individuals there is no uniformity in the practice of different States. They determine the enemy character of individuals of belligerent State in accordance with the different tests and standards. For example, in Britain and America the enemy character of individuals is determined on the basis of their residence and domicile. On the other hand, the enemy character of the individuals in the continental countries (European countries excepting England) is determined on the basis of their nationality. In other matters, there is hardly any difference between the practice of Britain and America on the one hand and continental countries on the other hand. As pointed out by Starke : "Hostile combatants and subject of an enemy State residents in enemy territory are invariably treated as enemy persons and residents in territory subject to effective military occupation by enemy is assimilated for this purpose to be residents in enemy territory." [1]

(b) Enemy character of individuals of neutral States.—The individuals of the neutral States who do not reside in the territory of enemy State are not deemed to be having enemy character. But if they participate in any activities against the belligerent State, then they may be deemed to having enemy character. Similarly, in accordance with the practice prevailing in America and England, if the individuals of the neutral States carry goods etc., to the enemy State or territory or continue intercourse with them, then they will be deemed to be having enemy character or in other words they will be treated as enemies. But the citizens of the enemy States living in the neutral States will not be deemed to be having enemy character.

(2) *Enemy character of Corporations.****—The enemy character of corporations is determined mainly by (a) their permanent residence, (b) their registration. If a corporation is registered in enemy State, then it will be deemed to be having enemy character. The enemy character of the corporation is also determined by its permanent residence. By a permanent residence of the corporation is meant its existence and conduct of business. In regard to the enemy character of corporations, the leading case is *Daimler Co. Ltd.* v.

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* See also for I.A.S. (1971), Q. No. 11 (d); I.A.S. (1967), Q. No. 7 ; I.A.S. (1965), Q. No. 9.

** See also for PCS (1987), Q. 8(a).

1. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 543.

*** See also for P.C.S. (1965), Q. No. 6(b) ; P.C.S. (1977), Q. No. 7(c).

Continental Tyre and Rubber Co. Ltd.,[2] wherein important principles were propounded. In this case the most important principle that was propounded was that if the persons or agents of the corporation who are in *de facto* control of the company reside in the enemy State or territory, then the company shall be deemed to be having enemy character. In this case the House of Lords observed, ".....a company may, however, assume an enemy character.....if its agents or the persons in *de facto* control of its affairs whether authorised or not, or resident in an enemy territory." In this case, the facts were as follows—

Continental Tyre & Rubber Co. Ltd., was a registered company and its registered office was situated in London. All the Directors of the Company were German nationals and resided in Germany. Most of the shareholders also resided in Germany. Daimler Co. Ltd., also a Company registered in England, owed £ 560510 to Continental Tyre & Rubber Co. Ltd., which filed a suit for recovery of the said money. Daimler Co. Ltd., opposed the said claim on the ground that the *Continental Tyre & Rubber Co. Ltd.*, and its officers belonged to the enemy country and therefore it was not liable to pay the said money.

In the First World War, Britain and Germany were enemies. Since the persons who were in *de facto* control of the company were residing in enemy State, the company was also considered to be an enemy company. Similarly, a company which is registered in England but is carrying on trade with an enemy State, will be deemed to be an enemy company.

The decision in *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. Ltd.*, has been criticized by several jurists. They have pointed out that the test of enemy character laid down in this case is very strict. For example, Starke has observed, "A company, incorporated in Britain, which acquires enemy character under the Daimler principle, is nonetheless not deemed to have its location in enemy territory; it is for all other purposes a British company subject to British legislation including regulations as to trading with the enemy." [3] Nevertheless, the principle laid down in *Daimler case,* was approved by the House of Lords in *Sovfracht case,*[4] and *The Glenroy.*[5]

(3) *Enemy character of Ships.**—The enemy character of ships is determined by their flags. This rule was adopted in Declaration of Geneva, 1909. By the flag of the ship is meant flag which the ship is legally authorised to use. For example, if a ship of France uses the American Flag, then it will be unauthorised. If the ship of an enemy State unauthorisedly uses the flag of a neutral State and is seized by the belligerent State then such a ship shall be deemed to be having enemy character. Consequently enemy character of ships, which use the flags of neutral States but are actually under the ownership of the enemy State, will be determined according to the following tests :—

(i) If the ship is in the service of enemy State or carries arms or takes part in the conflict.

(ii) If the ship resists the valid right of the belligerent State to visit and search, then such a ship may be seized and it may be deemed to be having enemy character. If such a ship is seized the onus of proving rests on the owners of the ship that the ship belongs to a neutral State. If it is not proved then the ship and its cargoes are deemed to be those of enemies.

(iii) If the vessel had no right to sail under the flag of neutral State, its real character will have to be determined in order to find out whether it has enemy character.

(iv) The neutral merchantmen acquire enemy character if they are engaged in a trade with enemy in time of war. This practice is prevalent in Britain, America and Japan.

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2. (1916) 2 A.C. 307 : For details of the case see Appendix III.
3. Starke, note 1, at p. 543 ; See also Kuenigal v. Donner Smarak, (1955) 1 Q. B. 515.
4. (1943) A.C. 203.
5. (1945) A.C. 124.

* P.C.S. (1977) Q. No. 7 (a).

(4) *Enemy character of goods**.—It is a well established customary rule that all goods found on board an enemy merchantman are presumed to be enemy goods unless the contrary is proved by the neutral owners.[6] Ordinarily, enemy character of the goods is determined by their ownership. If the owners of the goods are the residents of the enemy State, then the goods may be deemed to be having enemy character. On the other hand, if the owners of the goods live in neutral State, the goods will not be deemed to be having enemy character. Different countries have modified and amended this rule in accordance with their convenience and needs of time and circumstances. But the general rule which is evident from the general practice of the States is that the enemy character of the goods is determined by ownership of the goods.

(5) *Transfer of enemy Ships.*—Clear rules in this connection were formulated in the Declaration of London but it was not ratified by the States. Enemy ships can be transferred to and under the flag of neutral States under the following two situations :

(a) *Before outbreak of war.*—It is necessary that such transfer should not have been made with an objective to evade the capture of the ship.[7]

(b) *After the start of war.*—Transfer of ships after the start of war is generally considered illegal but it may be allowed if the owner of the ship establishes that it was not made with a view to evade the capture of the ship.[8]

(6) *Transfer of goods in sea.*—Nearly the same rules apply in this case as apply in case of transfer of ships. If the sale of the goods takes place before war or without its consideration, State law is applied to determine whether the transfer of ownership had been effected. If the change in ownership is attempted during war or in view of war, the goods are deemed to be of enemy character and such goods are not considered to be the property of neutral State and may be confiscated.

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* See also for P.C.S. (1965), Q. No. 6 (a); P.C.S. (1977), Q. No. (b).

6. L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 281.
7. Article 55 of the Unratified Declaration of London.
8. Article 56 of the Unratified Declaration of London.

CHAPTER 50

LAWS OF LAND WARFARE*

Introduction.—"The 'laws of war' consist of the limits set by International Law within which the force required to over-power the enemy may be used and the principles thereunder governing the treatment of individual in the course of war and armed conflict." [1] The objective of the rules of war is not to govern the war or regulate it as rules of games, such as, cricket, badminton, etc. On the contrary, the objective of the laws of war is to limit the sufferings and pain of the people involved in the war and to limit the area of war. That is why, the laws of war are often called the humanitarian laws of war.[2] In the absence of the laws of war, probably the cruelty and the atrocity during war would have no limits.

This history of the laws of war is very old but the development of the modern laws of war may be traced since the middle ages. The medieval concept of chivalry and Christianity greatly influenced the rules of war. In the modern times, in accordance with the rules of war, killing of civilians, bad treatment of prisoners of war, use of poisonous gases, sinking of ships without affording protection to the crew and its passengers have been prohibited. Before the nineteenth century, many multi-lateral treaties and conventions have been made which provide rules of war. More important of such treaties are : (1) Declaration of Paris, 1856; (2) Geneva Convention of 1864; (3) Declaration of Petersburg; (4) Hague Convention of 1899; (5) Hague Convention of 1907; (6) Geneva Gas and Bacteriological Warfare; Protocol, 1925; (7) The Submarine Rules Protocol, 1937; (8) The Four-Geneva Redcross Convention 1949; (9) Protocol I (*i.e.*, Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the protection of Victims of International Armed Conflicts) and Protocol II (*i.e.*, Protocol Additional to the Geneva Conventions of 12 August, 1949; and relating to the Protection of Victims of Non-International Armed Conflicts) adopted by Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law applicable in armed conflicts on June 8, 1977.

Conference of State parties to the 1925 Geneva Protocol and other Interested States on the Prohibition of Chemical Weapons (1989).—A conference of State Parties to the 1925 Geneva Protocol and other Interested States on the Prohibition of Chemical Weapons was held at Paris from January 7 to 11th January, 1989. 149 States including India participated in the Conference. In the final Declaration of the Conference, adopted by consensus, the representatives of States participating in the conference expressed their determination to prevent any recourse to chemical weapons by completely eliminating them. They solemnly affirmed their commitment not to use Chemical Weapons. They stressed the necessity of concluding at an early date, a convention on the Prohibition of the development, production, stockpiling and use of Chemical Weapons, and on their Destruction.

Convention on the Prohibition, Production, Stockpiling and use of Chemical Weapons and on Their Destruction (1993) :

N.B.—This has been discussed in the Chapter on "Disarmament". Please, therefore, see the Chapter on "Disarmament" for a discussion of this Convention.

Laws of Land Warfare

The Hague Convention, 1907, is a landmark in respect of rules of land warfare. Hague Convention clarified the status of belligerent States and clarified the distinction

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* See also for I.A.S. (1960), Q. No. 8.

1. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 552, see also G. Schwarzenberger, A Manual of International Law, Fifth edition (1967), p. 196.
2. For the proposed changes in the humanitarian laws of war ; see R. R. Baxter, "The Law of War" in the Present State of International Law and other Essays (1973), p. 107 at pp. 121-124.

between combatants and non-combatants. According to it, the persons in the regular army having specific regiment number, etc. are lawful combatants. Besides this the guerrillas, volunteers, corps, etc., may also be included in the category of combatants provided they fulfil the following three conditions :

(1) they serve under a definite and specific authority;
(2) they have specific emblem which may be recognised from distance; and
(3) they conduct war in accordance with the rules and customs of war.

The next landmark in respect of laws of land warfare was the adoption of the Four-Geneva Convention, 1949. Geneva Convention of Prisoners of War formulated important rules relating to land warfare. According to Article 4 of the Geneva Convention on Prisoners of War, 1949, the forces of National Resistance Movement may also be included in the category of lawful combatants provided that they also fulfil the conditions mentioned earlier. In regard to the treatment of the prisoners of war definite rules were formulated for the first time in the Hague Convention of 1907, and later on this was superseded by the Geneva Convention of 1929, on the treatment of prisoners of war which formulated many rules in this connection. In the present time, the rules relating to prisoners of war are contained in Geneva Convention of Prisoners of War, 1949, which has superseded the Convention of 1929 on the same subject. Besides the adoption of Convention on the Prisoners of War, a Convention was also adopted in Geneva in 1949 on wounded and sick members of the armed forces in the field. In this Convention, it was provided that it is the duty of the belligerent States to look after the sick and wounded in the war and provide them adequate medical facilities. Besides, a Convention was also adopted on wounded ship-wrecked members of the armed forces at sea. A brief reference may also be made here to the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts held in June 1977, and which adopted two Protocols to the Geneva Conventions (1949) on 8th June, 1977. Article 43 of Protocol I (*i.e.,* Protocol Additional to the Geneva Conventions of 12 August, 1949 and Relating to the Protection of Victims of International Armed Conflicts) provides that the armed forces of a party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognised by an adverse party. Such armed forces shall be subject to an internal disciplinary system which *inter alia,* shall enforce compliance with the rules of international law applicable in armed conflict Members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Geneva Convention) are combatants, that is to stay, they have the right to participate directly in hostilities. Whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall notify the other parties to the conflict.

Prohibited Means in Land Warfare.*—War is a contest between armed forces of two or more States wherein force can be used within certain limits laid down by the laws and customs of war. International customs, treaties, etc., have prohibited certain means in land warfare. According to Hague Convention, 1907, the use of poisonous weapons, projectiles which cause unnecessary sufferings and pain, etc., have been prohibited. Similarly the use of poisonous gas has been prohibited in land warfare. It has also been laid down that to pollute or otherwise poison water and other food materials to be used by enemy is also the violation of the laws and customs of war. During land war undefended cities and villages cannot be attacked or otherwise destroyed. Those cities and villages which are far away from military areas cannot be attacked. If on account of any special reasons it becomes necessary to attack such areas for the attainment of military ojectives, then it is the duty of the military commanders to give prior warning to the inhabitants of such areas. Killing of wounded and sick persons of the armed forces during war has also been prohibited. International law has always maintained the distinction between combatants and non-combatants. Under international law certain facilities have

* See also for I.A.S. (1958), Q. No. 7 (b).

been provided to non-combatants. They can be made prisoners of war under special circumstances and can be prosecuted but they cannot be killed or otherwise grievously hurt during war. Thus we see that the objective of the rules of war is to minimise the sufferings and pain of the persons involved in war and also to limit the area of war.

Reference may also be made here to a new convention entitled *'Convention on Prohibitions or Restrictions on the use of certain Conventional weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects"* which was signed by the representatives of 34 States on 10th April, 1981. Belgium became the thirty-fifth signatory when it signed the convention later the same day. The convention is designed to prohibit or restrict the use of certain particularly inhumane conventional weapons, such as fragmentation, and incendiary weapons and mines and booby traps. Three Protocols are also annexed to the convention, which are not subject to signature. Protocol I deals with weapons designed to injure by fragments that escape X-Ray detection in the human body. Protocol II deals with mines, booby-traps and other devices. Protocol III deals with incendiary weapons. Expressions of consent to be bound by the three Protocols is optional for each State provided that at the time they deposit their instruments of ratification, accession or approval, they consent to be bound by any two or more of the Protocols. The convention and the Protocols were concluded in 1981 in Geneva, following work in 1979 and 1980 by a United Nations Conference and in 1978 and 1979 by a Preparatory Conference, as well as by efforts over the years by United Nations and other international bodies.

A brief reference may also be made here to Protocol I, *i.e.,* Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed conflicts adopted on June 8, 1977, by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed conflicts. Article 35 of Protocol I which lays down basic rules relating to Methods and Means of Warfare provides that in any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited. Secondly it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. Thirdly, it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long term and severe damage to the natural environment.

Ruses of War or Stratagem.*—Ruses of War or Stratagem are permitted during land warfare. By ruses of war or stratagem we mean that for the attainment of its military objectives, a belligerent State can misguide or mislead the enemy. According to the modern concept of war, war is not only the test of physical strength but also intelligence. That is why, in accordance with the rules of modern warfare ruses of war are permitted under Art. 24 of the Hague Convention. As pointed out by Fenwick, "Ruses of war or Stratagems are recognised by international law as legitimate means of deceiving the enemy. Their use, however, was restricted by the condition that they must not involve a violation of goodfaith." [3] According to Starke, "Ruses of war are permitted but according to general practice, not if tainted by treachery or perfidy or if any breach of some agreement between the belligerents." Thus, ruses of war are permitted under International Law provided that they do not amount to the contravention of any international agreements or contract.

Article 37, paragraph 1 of Protocol Additional to the Geneva Conventions of 12 August, 1946 and relating to the Protection of Victims of International Armed conflicts adopted on June 8, 1977 (hereinafter referred as Protocol I) provides that ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable to armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are the examples of such ruses : the use of camouflage, decoys, mock operations and misinformation.

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* See also for I.A.S. (1967), Q. No. 8.

3. Charles G. Fenwick, International Law (Third Indian Reprint, 1971), p. 673.

Deceit.—As pointed out earlier, ruses of war are permitted under the International Law. But the position is different in regard to deceit which is different from Stratagem or Ruses of War. Deceit is contrary to International Law. For example, according to Hague Convention unauthorised use of the flag or emblem of the armed forces has been prohibited. This type of deceit is contrary to international law. Similarly, the flag of peace or emblem of red-cross cannot be used to deceive the enemy. This is also contrary to International Law.

Espionage.*—The position of espionage under International Law is very peculiar. On the one hand, International Law recognises espionage during land warfare; on the other hand, it also recognizes that the punishment can be awarded to those who are caught or apprehended while spying. According to International Law a belligerent State is entitled to send its spies in order to get information about the enemy. But the general practice of the States and the rules of international law are clear on the point that on their arrest the spies can be punished by the respective States. However, it is provided under the Hague Rules that before awarding punishment to the spies, they should first be tried and should be given sufficient opportunity to disprove the charges against them. It is also provided in the Hague Rules that if a spy escapes and is subsequently arrested, then he will be treated to be a prisoner of war. According to laws of land warfare as recognised in America, no discrimination should be made between men and women in regard to the punishment awarded to spies.

Article 46 of the Protocol I to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts provides that notwithstanding any other provision of the conventions or this Protocol any member of the armed forces of a party to the conflict who falls into the power of an adverse party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy. A member of the armed forces of a party to the conflict who, on behalf of that party and in the territory controlled by an adverse party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces. However a member of the armed forces of a party to the conflict who is a resident of territory occupied by an adverse party and, who, on behalf of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. More over such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage. Further a member of the armed forces, of a party to the conflict who is not a resident of territory occupied by an adverse party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as spy unless he is captured before he has rejoined the armed forces to which he belongs.

Hague Regulation of 1907, has defined a "spy" as one who "clandestinely" or under "false pretences" obtains or endeavours to obtain information in the zone of operation of a belligerent with intention of communicating it to hostile party.[4] Thus "disguise" or "false pretences" is the essential element of espionage. A spy is one who acts in disguise or under false pretences but 'secrecy' is not an essential element.[5] One of the main reasons for the harsh treatment of spies is that since they are not agents of states for their diplomatic relations, they cannot take the plea of following the orders of their government.[6] It may also be noted here that espionage is illegal in peace time if it involves the presence of agents sent clandestinely by a foreign power into the territory of another state.[7] Last but not the least, "For acts of espionage, a 'true' spy, acting in disguise or under false pretences, is himself responsible : he is out in the cold by himself and the

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* See also for I.A.S. (1977), Q. No. 8 (d); I.A.S. (1967), Q. No. 8.

4. See Article 29. Regulations respecting the Laws and Customs of War on Land annexed to Hague Convention IV of 1907.
5. Ingrid Delupis, "Foreign Warships and Immunity For Espionage", A.J.I.L., Vol. 78 (1978) p. 53 at pp. 62, 67.
6. Ibid. at p. 67.
7. Ibid p. 62.

sending state will most likely disavow any knowledge of him. He will be impleaded in local courts and punished under the laws of the state where he carried out his acts." [8]

Provisions of the Geneva Convention relating to the Treatment of Prisoners of War, 1949.*

For the first time the Hague Convention of 1907 laid down certain rules relating to the treatment of prisoners of war. Later on, this Convention was superseded by the Geneva Convention of 1929 on the prisoners of war which laid down the rules relating to the treatment of prisoners of war. In the present time the rules of treatment of the prisoners of war are governed by the Geneva Convention relating to the treatment of Prisoners of War of 1949 which has superseded the Geneva Convention of 1929 on the same subject. The Geneva Convention of 1949 contains exhaustive provisions relating to the treatment of prisoners of war.

The Geneva Convention, 1949, applies to all cases of declared war or of any other armed conflict which may arise between two or more of the parties to the Convention, even if the State of war is not recognized by one of them (Art. 2). The Convention will also apply in the case of armed conflict not of an international character occurring in the territory of one of the contracting parties. In such a situation it is provided that certain minimum provisions contained in Article 3 of the Convention should be applied and properly observed.

Article 4 of the Geneva Convention on Treatment of Prisoners of War, 1949 enumerates the categories of persons who, after they have fallen into the power or hands of the enemy must be treated as prisoners of war. The categories enumerated are as follows :

(1) Members of the armed fores of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces;

(2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements fulfil the following conditions :
   (a) that of being commanded by a person responsible for his subordinates;
   (b) that of having fixed distinctive sign recognisable at a distance;
   (c) that of carrying arms openly;
   (d) that of conducting their operations in accordance with the laws and customs of war;

(3) Members of the armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power;

(4) Persons who accompany the armed forces without actually being members thereof such as civil members of military, aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorisation from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model;

(5) Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the parties to the conflict who do not benefit by more favourable treatment under any other provisions of International Law; and

(6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

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8. Ibid. at p. 70.

* See also for I.A.S. (1977), Q. No. 8(b); P.C.S. (1983), Q. 10(d); P.C.S. (1987), Q. 8 (b).

Reference to the members of 'organised resistance movements' in category (2) noted above is very significant. As pointed out by Oppenheim, "There is in modern conditions no justification for the tendency, which was predominant in the nineteenth century and which found to some extent expression in the compromise reached at the Hague Conference in 1899 on the subject, to brand as illegal the activities of guerilla troops on the additional ground that the continuation of the struggle after the national territory has been totally occupied by the enemy without there remaining any hope of restoring the position is a senseless act of defiance which merits reprobation. For in modern-global warfare the complete occupation of a country may be but an episode in the campaign in which the legitimate government though compelled to withdraw from national territory continues to fulfil its responsibilities in conjunction with its allies.....Moreover, the right of the inhabitants to organise themselves spontaneously and to attack the enemy cannot be reasonably denied when the force of the lawful government re-enter the country in order to expel the invader and when, as the result, the authority of the occupant becomes precarious and is no longer uncontested. There is the further consideration that in modern conditions the distinction which the Hague Regulations established between the territory 'not under occupation' (as to which the inhabitants were permitted to take up arms spontaneously on the approach of the enemy subject to the conditions laid down by the Regulations) and territory under occupation is not as rigid as it was in the past; large areas may be nominally occupied by rapidly advancing motorised and armoured units, leaving full scope for legitimate resistance by scattered and spontaneously organised corps of the population." Thus as compared to the relevant provision of the Hague Regulations, the above provision of the Geneva Convention of 1949 marks a considerable advance for it applies to organised resistance movements operating in outside their own territory provided that they fulfil the four conditions (*i.e.*, a to d) mentioned in category (2) as noted above.

The Geneva Convention on Prisoners of War, 1949, contains the following important provisions relating to the treatment of prisoners of war :

(1) According to Article 13, prisoners of war must at all time be humanly treated.

(2) Any unlawful act or omission by the detaining power causing death or seriously endangering the health of the prisoners of war in its custody is prohibited and will be regarded as a serious breach of the present Convention.[9]

(3) No prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

(4) Prisoners of war must at all times be protected, particularly against act of violation or intimidation against insults and public curiousity.

(5) Measures of reprisal against prisoners of war are prohibited.

(6) Prisoners of war are entitled in all circumstances to respect of their persons and their honour.[10]

(7) Prisoners of war shall retain the full civil capacity which they enjoy at the time of their capture. The detaining power may not restrict the exercise either within or without its territory of the rights which the convention confers except in so far as the captivity requires.[11]

(8) The power, detaining prisoners of war, shall be bound to provide free of charge for the maintenance, for the medical attention required by their state of health.[12]

(9) All prisoners of war shall be treated alike by the detaining power without any adverse distinction based on race, nationality, religious belief or political

9. Ibid.
10. Article 14.
11. Article 13.
12. Article 15.

opinions or any other distinction founded on similar criteria subject, however, to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications.[13]

(10) No physical or mental torture nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind.[14]

(11) All effects and articles of personal use, except arms, horses, military equipment and military documents shall remain in their possession, likewise their metal helmets and gas-masks, like articles issued for personal protection.[15]

(12) Prisoners of war shall be evacuated as soon as possible after their capture to camps situated in an area far enough from connected zone for them to be out of danger.[16]

(13) At no time should prisoners of war be without identity documents. The detaining power shall supply such documents to prisoners of war who possess none. Badges of rank and nationality decorations and articles having above all personal or sentimental value may not be taken from the prisoners of war.

(14) The detaining power may subject prisoners of war (POW) to internment. It may impose upon them the obligation of not leaving beyond certain limits of the camp where they are interned or if the said camp is fenced in, of not going outside its perimetre. Subject to the provisions of the present convention relating to penal and disciplinary sanctions. POW may not be held in close confinement except where necessary to safeguard their health, and then only during the continuation of the circumstances which make their confinement necessary (Article 21).

(15) Officers and prisoners of equivalent status shall be treated with due regard for their rank and age (Article 44). POW other than officers and prisoners of equivalent rank shall be treated with due regard due to their rank and age. (Article 45).

(16) The detaining power shall grant all POW of a monthly allowance of pay, the amount of which shall be fixed by conversion, into the currency of the said power. (Article 60)

(17) POW's shall be allowed to send and receive letters and cards. (Article 71).

It is clear from the above provisions that these rules have been made for ensuring good treatment towards the prisoners of war. It has become a general principle of international law that the prisoners of war should always be humanly treated. It is the duty of the prisoners of war that when they are asked questions relating to their name, date of birth and regiment etc., they should give reply properly. In case they do not give correct and appropriate replies in respect of the said questions they may not get the facilities which they might have been entitled to get.

Protocol I adopted on June 8, 1977 by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts also contains some provisions relating to prisoners of war. Article 44 of Protocol I provides that any combatant, as defined in Article 43,[17] who falls into the power of an adverse party shall be a prisoner of war. Article 45 provides that a person who takes part in hostilities and falls into the power of an adverse party shall be presumed a prisoner of war and therefore shall be protected by the Third Convention if he claims the status of prisoner of war, or if he appears to be entitled to such status or if the party on which he depends

13. Article 16.
14. Article 17.
15. Article 18.
16. Article 19.
17. The definition of combatant as contained in Article 43 has been noted earlier in Chapter on "War', Its Legal Character and Effects".

claims such status on his behalf by notification to the detaining power or to the protecting power. If a person who has fallen into the power of an adverse party is not held as a prisoner of war and is to be tried by that party for an offence arising out of hostilities, he will have to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and does not benefit from more favourable terms in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to the rights of communication under this convention.

Article 75 of the said Protocol I provides that in so far as they are affected by a situation referred to in Article 1[18] of the Protocol, persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the conventions or under this Protocol shall be treated humanly in all circumstances and shall enjoy, as a minimum the protection provided by this Article, without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion of social origin, wealth, birth, or other status, or any other similar criteria. Each party shall respect the person, honour, conviction and religious practices of all such persons.

Lastly, it may be noted that a mercenary shall not have the right to be a combatant or a prisoner of war.

Guerrillas*.—The Red Cross Conventions 1949 have been revised recently to cover modern warfare techniques. Under the new clause recently added guerrillas have been conferred upon the rights and status of prisoners of war. The Red Cross Conventions have been ratified by an overwhelming majority of nations. The conference was held in the last week of April 1977 wherein the said decision was taken by 66 States out of 86 States attending the conference on humanitarian law in Geneva. In effect the revised conventions have legitimatised air piracy or guerrilla action on ground to a great extent. This is due to the widening of the definition of the term "Armed Forces." Article 43 of Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) adopted on June 8, 1977, provides the following—

1. The armed forces of a party to a conflict consist of all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinates even if that party is represented by a government or an authority not recognized by an adverse party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia,* shall enforce compliance with the rules of international law applicable in armed conflict;
2. Members of the armed forces of a party to a conflict (othr than medical personnel and chaplains covered by Article 33 of the Third convention) are combatants, that is to say, they have the right to participate directly in hostilities.

Article 44 further provides that any combatant, as defined in Article 43, who falls into the power of an adverse party shall be a prisoner of war.

It may also be noted here that paragraph 3 of Article I (which deals with general principles and scope of application) of Protocol I provides that this protocol, which supplements the Geneva Conventions of 12 August, 1949 for the protection of war victims

18. Article 1 which deals with general principles and scope of application provides that in cases not covered by this Protocol or by other international agreements civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience. The Protocol also covers situations which include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against recist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the U. N. and the declaration of Principles of International Law concerning Friendly Relations and Co-operations among status in accordance with the Charter of the U. N.

* See also for I.A.S. (1977), Q. No. 8 (c); C.S.E. (1982), Q. 8 (a).

shall apply in the situations referred to in Article 2 common to those conventions. Paragraph 4 of Article I further provides that the situations referred to in the preceding para include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the U. N. and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the U. N.

The above provisions make it clear like crystal that the provisions contained in the Protocol shall apply also to guerilla war and resistance movements. The new clauses were criticized by countries such as Israel who pointed out that the said decision would encourage acts of terrorism. For example, a person committing air-piracy in a plane in a foreign country will get P. O. W. status, on other hand, Palestinian Liberation Organization (PLO) expressed its satisfaction and happiness with the decision.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949).

In regard to the treatment of injured members of the armed forces, some rules were formulated for the first time in Geneva Convention of 1864. These rules were reconsidered in the Hague Conference of 1907 which formulated certain rules relating to this subject. The problem of the dead and the injured members of the armed forces became very complex during the first world war. It, therefore, became necessary to make some definite rules in this connection by convening an international conference. Consequently a conference was convened at Geneva in 1929 wherein many rules were formulated relating to the treatment of the dead and injured members of the armed forces. The Second World War witnessed the flagrant violation of these rules. In order to formulate more definite and liberal rules relating to the dead and injured members of the armed forces, a Conference was called at Geneva in 1949. In Geneva Conference, a Convention was signed which is known as *Geneva Convention relating to the treatment of the Dead and Injured Members of the Armed Forces, 1949.* Most of the signatory States later on ratified this convention. Thus at present the treatment of the dead and injured members of the armed forces is governed under the provisions of the said Geneva Convention of 1949. The Geneva Convention of 1949 contains the following important rules in this connection :

Articles 2 and 3 of the Convention which deal with the scope of the Convention are almost same as in Geneva Convention Relating to the Treatment of POW (1949) which have been referred above. This convention comprises of 64 Articles. Following are some of the main provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (1949) :

(1) For the protected persons who have fallen into the hands of the enemy, the present Convention shall apply until their final repatriation. (Article 5).

(2) The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick personnel and chaplains, and for their relief. (Article 9).

(3) Members of the armed forces and other persons mentioned in the Article 13, who are wounded or sick, shall be respected and protected in all circumstances. They shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria.

(4) According to Article 13 of the Convention, the present Convention shall apply to the wounded and sick belonging to the following categories :

(i) Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(ii) Members of other militias and members of other volunteer corps, including

those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions :

(a) that of being commanded by a person responsible for his, subordinates.
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.

(iii) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.

(iv) Persons who accompany the armed forces without actually being members thereof, such as, civil members of military, aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.

(v) Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions in international law.

(vi) Inhabitants of a non-occupied territory who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units provided they carry arms openly and respect the laws and customs of war.

(5) The wounded and sick of a belligerent who fall into enemy hand shall be POW, and the provisions of international law concerning POW shall apply to them. This is, however, subject to the provisions of Article 12 (Article 14).

(6) At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled. (Article 15).

(7) Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the parties to the conflict (Art. 19)

(8) Hospital ships entitled to the protection of the Geneva Convention for the amelioration of the condition of wounded, sick and ship-wrecked members of armed forces at sea of August 12, 1949, shall not be attacked from the land. (Art. 20)

(9) Members of the personnel designated in Article 25[18a] who have fallen into the hands of the enemy shall be POWs, but shall be employed on their medical duties in so far as the need arises. (Art. 29)

(10) Medical aircraft, *i.e.,* aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at heights, times and on routes specifically agreed between the belligerents concerned. (Art. 36)

(11) The Parties to the Convention undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in Art. 50. (Art. 49)

18a Article 25 provides that members of the armed forces specially trained for employment, should be need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick shall likewise be respected and protected if they are carrying out these duties at the time when they came into contact with the enemy or fall into his hands.

(12) Grave breaches referred to in Art. 49 shall be those involving any of the following acts, if committed against persons or property protected by the Convention : wilful killing, torture, or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

(13) No High Contracting Party shall be allowed to absolve itself or other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in Art. 50 (Art. 51).

(14) Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination of the bodies, with a view to confirming death, establishing identity and enabling a report to be made one half of the double identity disc, or identity disc itself if it is single disc, should remain on the body.

Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on religion of the deceaud. In case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead. (Art. 17)

(15) Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited (Art. 46).

(16) The present Convention replaces the Convention of August 22, 1864, July 6, 1906 and July 27, 1929, in relations between the High Contracting Parties (Art. 59).

It is clear from the above provisions of the Geneva Convention relating to the treatment of dead and injured members of the armed forces that certain facilities have been provided to the dead and injured members of the armed forces. It may however be noted that this Convention has certain weaknesses. As pointed out by Starke it is conspicuous by its silence in regard to financial matters. It also does not make any provision relating to the powers of the occupying belligerent authority in respect of the public finances. It will, therefore, be desirable and expedient to amend the said Convention in order to incorporate the above mentioned and certain other provisions which may be in accordance with the changing times and circumstances of the present warfare.

A brief reference may also be made here to Protocol I adopted on June 8, 1977 by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed conflicts. This protocol supplements the Geneva Conventions of 12 August, 1949. Article 10 of the Protocol provides that all the wounded, sick and shipwrecked, to whichever party they belong shall be respected and protected. In all circumstances they shall be treated humanely and shall receive to the fullest extent practicable and with the possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Red Cross Personnel and Red Cross Insignia*.—With a view to ensure that the wounded and sick members of the Armed Force may be given treatment, the Geneva Convention for the Amelioration of the condition of the wounded and sick in Armies in the Field provides that the belligerents have to respect and protect the mobile medical units and personnel of medical service. But this protection can be claimed by them so long as they are engaged in medical service. This protection ceases if they are involved in carrying on espionage, concealing arms and ammunition or sheltering combatants.[19] Under Article 24, the personnel engaged in the treatment of the sick and wounded must be respected and protected under all circumstances. According to Article

* See also for I.A.S. (1977), Q. No. 8(a).

19. Articles 21 and 22 of the Geneva Convention.

28 of the Geneva Convention of 1949, the medical personnel, chaplains and staff of National Red Cross Societies may be retained by the belligerent into whose hands they have fallen but only in so far as is necessary for the state of health, the spiritual needs and the number of prisoners. The persons thus detained are not to be considered prisoners although they may get the benefits of the provision of the Geneva Convention of 1949 on Prisoners of War. They should be allowed to continue on their duties for their armed forces. For example, they may visit prisoners of war in hospitals outside the camp or labour units. Such personnel should be returned to the belligerent to whom it belongs as soon as it is possible and military requirements permit. The Geneva Convention recognises the emblems of the Red Cross, the red crescent, or the red lion or red sun, on a white ground as a distinctive emblem in such countries as already use these emblems. Oppenheim[20] has summarised the rules concerning the use of this emblem in the following words :

(1) It must be shown, with the permission of the competent military authority (Article 39), on the flags, the armlets (brassards) and on all the equipment belonging to the medical service.

(2) Medical units and establishments hoist the distinctive flag, which may be accompanied by the national flag of the belligerent to which they belong (Article 22).

(3) All the medical personnel proper as well as that of the voluntary societies of belligerents and neutrals (Articles 24, 26 and 27 of the Convention), according to Article 40, wear on the left arm, a water-resistant armlet (brassard) with the distinctive sign, stamped by the competent military authority. Provision is made for the issue, in addition to identity discs, of uniform identity cards both for these categories as well as for the persons employed as auxiliary nurses or strecher-bearers. (Article 25).

(4) The Red Cross on white ground and the words 'Red Cross' or 'Geneva Cross' must not, according to Articles 44 and 53, be used, either in peace or war, except to indicate the protected medical units, establishments, personnel, and material.

It may also be noted that the abuse of the distinctive sign for the purpose of offensive military action is a violation both of the convention and the law of war in general.[21]

It is clear from the foregoing that Red Cross Personnel have been given certain protections under the Geneva Convention of 1949 so as to enable them to render their services for the treatment of sick and the wounded. Red Cross insignia is respected and is given certain immunities so long as it is genuinely and legitimately used. Its abuse is not permissible and constitutes violation of the Convention as well as law of war in general. A brief reference may also be made here to Protocol I adopted by Diplomatic conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted on June 8, 1977.

Red Cross, Red Crescent and other Recognized Emblems.—Article 38 of Protocol I provides that it is prohibited to make improper use of the distinctive emblems, of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the convention or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict, other internationally recognized protective emblems, signs or signals, including the flag of truce and the protective emblem of cultural property. Further, it is prohibited to make use of the distinctive emblem of the U. N., except as authorized by that organization.

As regards emblems of nationality, Article 39 provides that it is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or

20. International Law, Vol. II, Seventh Edition, p. 361.
21. Ibid, at p. 362.

other States not parties to the conflict. Further, it is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse parties while engaging in attacks or in order to shield, favour, protect or impede military operations. It is however provided that nothing in this Article shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

Perfidy.—Perfidy means breach of faith or treachery. Article 37 of Protocol I provides that it is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable to armed conflict and intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy :

(a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
(b) the feigning of an incapacitation by wounds or sickness;
(c) the feigning of civilian non-combatant status; and
(d) the feigning of protected status by the use of signs, emblems or uniform of the United Nations or of neutral or other States not parties to the conflict.

Geneva Convention Relative to the Treatment of Civilian Persons in Time of War (12 August, 1949).[22]—This convention deals with following main subjects :

(a) the treatment of alien enemies in belligerent territory;
(b) the protection of sick and wounded civilians and establishment of safety zones for civilians;
(c) the treatment of internees both in belligerent and in occupied territory; and
(d) the treatment of civilian population in occupied territory.

As regards the last category mentioned above (*i.e.*, the treatment of civilian population in occupied territory), some of the provisions have been noted in next chapter on "Belligerent occupation", hence only those provisions will be referred which have not been referred in the said chapter.

The main provisions of the Geneva Convention Relating to Treatment of Civilian Persons in Times of War are following :

(1) The enemy aliens who want to leave the country before or during the war will be entitled to do so provided that their departure is not contrary to the interest of belligerent States. They should be permitted to take alongwith them money reasonably necessary for their travel and also their personal goods.
(2) Subject to the national security, enemy aliens should be treated in the same way as they are treated during war.
(3) They can be compelled to do only those works and to the same extent which can be taken from the nationals of the belligerent States and their working conditions and conditions to derive profits or gains must also be the same. They cannot be compelled to perform works which are directly relating to military activities.
(4) The internment of alien enemies or their placing in an assigned residence may be ordered only if security of the Detaining Power makes it absolutely necessary.
(5) According to Article 44 of the Convention, the Detaining Power shall not treat enemy aliens, exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not actually enjoy the protection of any government.
(6) Protected persons shall not be transferred to a power which is not a party to the convention. This provision, however, shall in no way constitute an

22. See also provisions of this convention noted in the next Chapter (i.e., Chapter 54 entitled "Belligerent Occupation").

obstacle to the repatriation of protected persons, or to their return to their country or residence after the cessation of hostilities.

Protected persons may be transferred by the detaining power only to a, power which is a party to the convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee power to apply the present Convention.

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear prosecution for his or her political opinions or religious beliefs.

(7) Articles 27 to 33 of the Convention are applicable to persons both in the territory of the belligerent and in occupied territory. These articles lay down principles of general character. For example, it is provided that such persons are entitled to respect of their persons, their honour, their religious convictions and practices, and their family rights. No physical or moral coercion must be exercised against them, in particular for the purpose of obtaining information. The convention specifically prohibits measures of such a character as to cause physical suffering or extermination of the protected persons. Besides these, collective punishment and all measures of intimidation and terrorism are prohibited.

(8) According to the convention, the International Committee of the Red Cross and the National Red Cross Societies must be granted facilities for the fulfilment of their task. This is, however, subject to military considerations and national security.

(9) The convention contains a number of provisions relating to treatment of internees. For example, it provides that as far as possible, the internees shall be accommodated according to their nationality, language and custom. But the internees belonging to the same country shall not be separated merely because they speak different languages, and that as far as possible, families must not be separated.

(10) As regards the enforcement of the convention, the parties to the convention have undertaken to enact legislation necessary to provide effective penalties against persons or ordering to be committed any grave breach of the convention. It is the responsibility of every State Party to the convention to suppress all breaches of the convention which fall short of 'grave breaches.'

(11) As regards the protection of civilians in occupied territory, the main provisions are following :

(a) The convention prohibits individual or mass forcible transfers and deportations of civilians from occupied territory to the occupying power or to any other country, whether occupied or not. It is further provided that the occupying power must not deport or transfer parts of its own civilian population into the territory occupied by him. (Art. 49)

(b) The Occupying Power is prohibited from compelling the inhabitants of the occupied territory to serve in its armed forces. (Art. 51)

(c) The convention forbids the Occupying Power to compel the inhabitants of the occupied territory to work unless they are over eighteen years of age.

(d) The inhabitants of the occupied territory can be asked to do only that work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country.

(e) The inhabitants of the occupied territory must not be forced to do any work which would involve them in taking part in military operations. (Art. 51)

(f) As far as possible, the inhabitants should be kept in their usual place of employment and they must be paid a wage which must be fair and proportional to their physical and intellectual capacities. (Art. 51)

(g) The Occupying Power must not alter the status of public officials and judges nor measures of coercion or discrimination be applied against them in case they abstain from fulfilling their functions for reasons of conscience. (Art. 54)

(h) The Occupying Power is prohibited from destroying the movable or immovable property of private persons, of the state, or of other public authorities, or of social or co-operative organisations except when military operations render such destruction absolutely necessary. (Art. 53)

(i) Unless repealed or suspended by the Occupying Power, the criminal laws of the country remain in force. (Art. 64)

(j) The Convention contains several safeguards against the imposition of death penalty on a civilian inhabitant. It can be imposed only in cases when the person concerned is guilty of espionage, of serious acts of sabotage against the military installations of the occupant, of intentionally causing death. Secondly, in the above cases, death penalty can be imposed if said offences were punishable by death under the law of the occupied territory prior to occupation. Thirdly, the attention of the court must have been drawn to the fact that the accused does not owe any duty of allegiance to the occupant. Fourthly, the accused must not be under 18 years of age at the time of the offence. (Art. 68)

(k) The Occupying Power is prohibited from arresting, prosecuting or convicting any person for acts committed before the occupation or during a temporary interruption thereof with the exception of breaches of laws and customs of war. (Art. 70)

(l) The convention contains a number of provisions for securing a regular trial such as notifying the Protecting Power and ensuring the attendance of its representatives at the trial, sending of information to it of any death sentences or imprisonment for two years or more, certain safeguards relating to evidence and counsel and granting of the right to appeal. No sentence shall be pronounced by the competent courts of the occupying power except after a regular trial. (Art. 71)

(m) The civilians who are accused of offences or convicted by the courts in occupied territory must be handed over to the authorities of the occupied territory at the end of the occupation. (Art. 77)

(n) If the occupying power considers it necessary, for imperative reasons of security, to take measures concerning protected persons it may, at the most, subject them to assigned residence or to internment. (Art. 78)

(o) Last but not the least, it is the duty of the occupying power to ensure the food and the medical supplies of the population to the fullest extent of the means available to it. Further, it shall, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate. (Art. 55)

A brief reference may also be made here to Protocol I to the Geneva Conventions of 1949 adopted on June 8, 1977 by Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. This Protocol supplements the Geneva Conventions of 12 August, 1949. The Protocol contains a number of provisions relating to the treatment of civilian persons in time of war. Article 48 which contains a basic rule relating to civilian population provides that in order to ensure respect for and protection of the civilian population and civilian objects, the Parties shall at all times distinguish between a civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives. The more important of other provisions are following :

(1) The civilian population and individual civilian shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances :—

(a) The civilian population as such, as well as of individual civilians, shall not be the object of attack. Acts of threat or violence primary of which is to spread terror among the civilian population are prohibited.

(b) Civilians shall enjoy the protection afforded by Protocol unless and for such time as they take a direct part in hostilities.

(c) Indiscriminate attacks are prohibited. (Art. 51)

(2) As regards general protection of civilian objects, the Protocol provides that the civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military as defined hereinafter. Attacks shall be limited to military objectives. In so far as objects are concerned military objects are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used. (Art. 52)

(3) Starvation of civilians as a method of warfare is prohibited. (Art. 54)

(4) In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects. (Art. 57)

(5) As regards Civil defence, the Protocol provides that civilian, civil defence organizations and their personnel shall be respected and protected subject to the provisions of this Protocol. They shall be entitled to perform civil defence tasks except in case of imperative military necessity. (Art. 62)

(6) The protection to which the civilian, civil defence organizations, their personnel, buildings, shelters and materials are entitled shall not cease unless they commit or are used to commit, outside their power tasks, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time limit, and after such warning has remained unheeded. (Art. 65)

(7) In addition to the duties specified in Article 55 of the Fourth Geneva Convention concerning food and medical supplies the Occupying Power shall, to the fullest extent of means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship. (Art. 69)

(8) Persons who, before the beginning of hostilities were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the state of the refuge or state of residence shall be protected persons within the meaning of Part I and III of the Fourth Convention, in all circumstances and without any adverse distinction. (Art. 73)

(9) Persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Geneva Conventions or under this Protocol shall be treated humanly in all circumstances and shall enjoy, as a minimum, the protection provided by this Article, (*i.e.*, Article 75) without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status,

or any other similar criteria. Each party shall respect the person, honour, convictions and religious practices of all such persons. The following acts are and shall remain prohibited at any time in any place whatsoever, whether committed by civilian or military agents :

(a) violence to the life, health or physical or mental well being of persons, in particular : (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and mutilation;
(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and in any form of indecent assault;
(c) the taking of hostages;
(d) collective punishments; and
(e) threats to commit any of the foregoing acts.

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court, respecting the generally recognised principles of regular judicial procedures. Women whose liberty has been restricted for reasons related to the armed conflict shall be held, in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units. It is further provided that persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by Article 75 and until their final release, repatriation or re-establishment, even after the end of the armed conflict. (Art. 75)

(10) Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault. (Art. 76)
(11) Children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason. (Art. 77)
(12) Journalists engaged in dangerous professional missions in areas of armed conflicts shall be considered as civilians and shall be protected as such under the conventions and this Protocol. Provided that there is no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in the Third Convention. (Art. 79)
(13) Last but not least, a party to the conflict which violates the provisions of the Conventions of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces. (Art. 91)