CHAPTER 5

HISTORY AND DEVELOPMENT OF INTERNATIONAL LAW INCLUDING SCHOOLS OF INTERNATIONAL LAW

Origin*

International Law as we find today is the product of the experience of the civilized countries of the world and the continuous growth of many centuries. "Rules which may be described as rules of International Law are to be found in the history both of ancient and medieval worlds ; for ever since men began to organise their common life in political communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations." [1] According to Prof. Oppenheim, "It (*i.e.* International law) is in its origin essentially a product of Christian civilization and began gradually to grow from the second half of the Middle Ages." [2] The claim of the European scholars that the credit of giving birth to International Law as we know today, goes to the European countries, is not correct.[3] : "The allegation of Western Jurists, Oppenheim and others that International Law originated in Europe and is the creation of Western civilization is falsified by a study of the original texts of the "Ramayana' (and of the 'Mahabharata')." [4] "It leads us nowhere to hold that modern international law is only three or four centuries old. Such an attitude is not only too legalistic, but is clearly disproved by the present practice which do take account of history." [5] In India too there can be found in the work of Kautilya in the fourth century B.C. elaborate rules for the conduct of diplomacy, as a means of avoiding conflicts, and the reception and treatment of diplomats." [6] A study of the Ramayana reveals that in the Ramayana period relations of the sovereign rulers were based on the definite rules of International law and these rules were recognised by all sovereign rulers. In his view : "These very principles are the foundation of modern International Law." [7]

Although it is true that the International Law had attained a sufficient stage of development in ancient India, yet it must be conceded, that "..... as a definite branch of jurisprudence the system which we know as International Law is modern, dating from the sixteenth and seventeenth centuries, for its special character has been determined by that of the modern European State system, which was itself shaped in the ferment of renaissance and the reformation." [8]

So far as the origin of the International Law is concerned, almost all the civilized States have made their contributions in its development. In this connection the contribution of Jews, Romans, Greeks, Hindus and Muslims deserves a special mention. A brief discussion of their contribution is being given below.

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* See also for I.A.S. (1978), Q. 1.

1. J.L. Brierly : The Law of Nations, Sixth Edition (1963), p. 1.
2. International Law, Vol. I, Eighth Edition, p. 6 ; see also P.E. Corbett, The Growth of World Law (1971), p. 33.
3. See Nagendra Singh, "India and International Law" in Asian States and the Development of Universal International Law (1972), p. 25.
4. S.S. Dhawan, "The Ramayana II International Law in the Age of the Ramayana" National Herald Magazine, Sunday, January 21, 1971, p. 1.
5. J.J.G. Syatauw, Some Newly Established Asian States and the Development of International Law (1961), p. 223 : see also Ibid., pp. 224-25.
6. J.E.S. Fawcett, The Law of Nations (1968), p. 16.
7. See Supra Note 4.
8. J.L. Brierly, The Law of Nations, Sixth Edition (1963), p. 1 ; see also Q Wright, "The Foundations for a Universal International System" in Asian States and the Development of Universal Law (1972), p. 145 at p. 162.

Contribution of Jews, Greeks, Romans, Hindus and Muslims

Jews.—A study of the ancient history reveals that the Jews had relations with other countries. Their relations with other countries were regulated and governed by certain rules. The famous slogan of the Jews "Love the Stranger for ye were strangers in the land of Egypt." It is clear from this slogan that they believed in internationalism. But since they believed in monism in respect of religion, they did not treat those nations on the basis of equality which believed in dualism or plurality of Gods. The Jews strictly followed the treaties entered into by them with other countries and conferred privileges and immunities upon the diplomatic envoys. Thus the Jews made some contribution in the development of International Law in the ancient period.

Greeks.*—It is clear from the study of ancient history that when most of other States of the world were backward and less civilized, the Greek civilization was quite advanced and the Greeks had achieved great advancements in different fields. Socrates, Plato, Aristotle and other Philosophers of Greece enlightended the world through their ideas and philosophies. Greeks lived in small city-States. The mutual relations of these States were regulated and governed by some definite rules and principles. They had formulated definite laws of war and peace. They used to resolve their dispute through arbitration. Prior declaration was made before the commencement of war. There was also provision for the exchange of prisoners of war but there was a custom of ransom for the release of some types of prisoners. The Greeks had formulated many laws relating to war. Oppenheim has rightly remarked that the Greeks had shown to the world how sovereign States could live in mutual co-operation with each other like a single community.[9] It may, however, be noted that the Greeks had more talents for development of art and philosophy than for the development of law. Nevertheless, the Greeks philosophy, ideas and their practices indirectly contributed to the development of International Law.

Romans.**—As compared to the Greeks, Romans were endowed with far greater talents for the development of International Law. Although, modern International Law is ordinarily regarded as dating from the 16th and 17th centuries, it cannot be denied that the Romans contributed much to the development of modern International Law. In its early period, Rome was a small city-State and had relations with other States. These relations were based on the rules of International Law. Subsequently the Roman Empire greatly expanded yet the Romans always considered themselves bound by laws and rules on the basis of laws.

Romans deserved the credit for developing the laws of war. According to them, there were two types of war—just and unjust. Main grounds of waging just wars were (i) Attack on Roman territories; (ii) Disregard or the violation of the privileges of ambassadors ; (iii) Contravention of Treaties ; and (iv) Assistance to enemy States by friendly countries of Rome. According to Romans, the modes of termination of war were (i) Through Treaty of Peace ; and (ii) Through conquest and annexation of the conquered territories. Similarly, the Romans had divided the treaties into three categories (i) Treaty of Friendship ; (ii) Treaty of Alliance ; (iii) Treaty of Hospitality. The Romans strictly adhered to the provisions of the treaty and in their view prior intimation was necessary for termination of Treaties. Thus the Romans made significant contribution in the development of International Law. "The position of Roman Law in Europe in 16th century has important bearing on the beginning of International Law." [10]

Hindus.—As pointed out earlier, some of the rules of International Law were in quite a developed stage in ancient India. A thorough study of the Ramayana, Mahabharata, Manusmriti, Kautilya's Arthashastra will justify the truthfulness of this statement. "The students of International Law will learn from a study of Balmiki Ramayana that the relations between sovereigns in the age of the Ramayana were governed by a Code of conduct based on principles which were recognised and observed by all the

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* See for I.A.S. (1954), Q. No. 2.

9. L. Oppenheim, International Law, Vol. I, Eighth Edition by H. Lauterpacht, p. 75.

** See for I.A.S. (1954), Q. No. 2.

10. J.L. Brierly, The Law of Nations, Sixth Edtion (1963), p. 19.

sovereigns ; they were rarely violated, and any attempt by an individual sovereign to violate them was condemned by the sovereign's own counsellors. These very principles are the foundation of modern International law." [11] Bhagvat Gita, which is regarded a pious religious text-book by Hindus, has not only classified just and unjust wars but has also made a vivid discussion of them. A study of Bhagvat Gita also reveals that the declaration of war before its commencement was essential. The duties of the State in administrative and external matters have been vividly discussed in Kautilya's Arthashastra. According to Kautilya, just as well as unjust means could be used in wars. The study of the Ramayana and Mahabharata reveals that during that period diplomatic agents enjoyed many privileges and immunities. International Law relating to diplomatic agents was in its developed stage, Manu had propounded many principles and rules in his Code, popularly known a Manu's Code. In his view, wars could be either just or unjust. According to him, to fight and die in a just war was a good deed indeed. In the view of Manu, deceit or poisonous weapons were prohibited in war. To kill wounded or sick soldiers in war was contrary to the rules of war. There were also definite rules relating to the treatment of prisoners of war. Thus, International Law was in a developed stage in India. Thus it may be rightly concluded that Hindus contributed much to the development of International Law.[12]

Muslims.—The Muslim rulers of India had relations with other nations. They received the ambassadors of other States and entered into treaties with them. But the Muslim rulers lacked talents for the development of the rules of International Law. However, they had formulated some rules which governed relations with Muslim States. Muslim rulers launched Jehad against those who did not subscribe to Islamic faith. But it would be wrong to contend that the Muslims did not at all make any contribution to the development of International Law. The Muslim rulers recognised the distinction between combatants and non-combatants and had formulated rules for according protection to women and children during war. They observed their treaties in good faith. However, they had a very bad custom of leaving the prisoners of war at the mercy of Imam who was empowered to make them slaves or even to kill them.

Development of International Law during 16th and 17th centuries

As pointed out by Brierly ".....as a definite branch of jurisprudence the system of which we know as International Law is modern, dating only from sixteenth and seventeenth centuries, for its special character has been determined by that of modern European State System, which was itself shaped in the ferment of the Renaissance and the Reformation." He has, therefore, rightly added that, "some understanding of the main features of this modern State system is, therefore, necessary to an understanding of the nature of International Law." [13] The Middle Ages witnessed many obstacles in the growth of strong centralised Governments. The two main such obstacles were Feudalism and the Church. Feudalism was a formidable obstacle to the growth of the national State. The other strong influence which retarded the growth of State in the Middle Ages was the Church. However, rapid changes were taking place. A great landmark in this connection was the Treaty of Westphalia of 1648 which ended the thirty years' war of religion and was the beginning of the acceptance of new political order in Europe. Political developments were leading to the separateness and irresponsibility of every State. Meanwhile, there were certain counter-factors leading to intimate and constant relations of states with one another. According to Brierly,[14] the following were such causes : "(1) the impetus to commerce and the new route to Indies ; (2) the common intellectual background fostered by the renaissance ; (3) the sympathy felt by co-religionists in different States of one another, from which arose a loyalty transcending the boundaries of State ; (4) the common feeling of revulsion against war, caused by the savagery with which the wars of religions were waged." Further, "All these causes co-operated to make it certain that the separate

11. See Supra Note 4.
12. For a detailed study see Nagendra Singh, India and International Law (S. Chand & Co. New Delhi, 1969).
13. J.L. Brierly, The Law of Nations, Sixth Edition, p. 1.
14. Ibid. at p. 6.

State could never be accepted as the final and perfect form of human association, and that in the modern as in the medieval world it would be necessary to recognise the existence of a wider unity. The rise of International Law was the recognition of this truth. It accepted the abandonment of the medieval idea of a world State and took instead as its fundamental postulate the existence of a number of States, secular, national and territorial ; but it denied their absolute separateness and irresponsibility, and proclaimed that they were bound to another by the supremacy of law. Thus it re-asserted the medieval concept of unity, but in a form which took account of the new political structure of Europe." [15]

Grotius, the Father of Modern Law of Nations*

Hugo Grotius was born in Holland in 1583. At the age of fifteen, he took the degree of Doctor of Laws at the University of Leyden. In 1609, his first work, *Mare Liberum* was published. In this book he strongly argued for freedom of the sea-going. This was very significant because at that time maritime powers were appropriating different parts of the sea. Thereafter, Grotius went to Paris and lived there for ten years and in 1625 published his most famous work, *De Jure Belli ac Pacis* (*i.e.* on the Law of War and Peace). This work earned for him permanent fame. An enlarged edition of this work was issued by him in 1631. As pointed out by Oppenheim, "The science of modern Law, of Nations commences from Grotius's work, *De Jure Belli ac Pacis*, because in it a fairly complete system of International Law was for the first time built up as an independent branch of the science of law." [16] *De Jure Belli ac Pacis* has following four main characteristics : (i) In the first place, Grotius advocated that States should also be subject to the same rules which regulate the individuals ; (ii) secondly he formulated the 'law of peace' which subsequently became the basis of his whole system ; (iii) thirdly he contended that States violating the law may be punished by other States, (iv) fourthly in his view natural law (*i.e.*, right reason) was the basis for determining rules for the rightful conduct of States.[17]

Much of the credit of secularising the concept of natural law goes to Grotius. He expounded the secularised concept of the law of nature. According to him natural law was the "dictate of right reason." [18] "While Grotius did not ignore positive law, which he called 'voluntary law', he kept it distinct from the rules which he took from natural law and he felt it to be of minor importance. He did not originate the concept of natural law, for that was very old but his formulation of the rules of State conduct he felt rested upon or sprang from natural law upon such acceptance by other legal writers dominated thinking on international law for two centuries." [19] Grotius's work, *De Jure Belli ac Pacis*, became very famous also because of the time in which it was published and the circumstances that were prevailing at that time. There were a number of independent States in Europe. These States had certain common interests and aims which knitted them into a community of States. "Since a Law of Nations was now a necessity, since many principles of such a law were already more or less recognised and appeared again among the doctrines of Grotius, since the system of Grotius supplied a legal basis to most of those international relations which were at the time considered as lacking such a basis. The book of Grotius obtained such a world-wide influence that he is correctly styled the *"Father of the Law of Nations."* [20] But as rightly pointed out by Brierly, "Few books have won so great a reputation as the *De*

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15. J.L. Brierly, The Law of Nations, Sixth Edition, pp. 6-7.
* See for I.A.S. Exams, (1974), Q. No. 1(d) ; (1972), Q. No 2 ; (1967) Q. No. 2 ; (1959) Q. No. 1 ; (1957) Q. No. 1 ; see also for P.C.S. (1988) Q. 10 (b).
16. International Law, Vol. I, Eighth Edition, p. 89.
17. See Cornelius Van Vallenhoven, "Hugo Grotius", Encyclopaedia of the Social Sciences (New York : The Macmillan Company, 1937), VII, p. 177.
18. He defined natural law in the following words : "The dictate of right reason, indicating that an act, from its agreement or disagreement with the rational and social nature of man, has in its moral turpitude or moral necessity and consquently that such an act is either forbidden or commanded by God the author of nature."
19. Norman D. Palmer and Howard C. Perkins, International Relations (Third Indian Edition, 1970), pp. 279-80.
20. Oppenheim, Supra Note 16, at pp. 84-85 ; emphasis added.

jure belli ac pacis, but to regard its author as the 'founder' of international law is to exaggerate its originality and to do less than justice to the writers who preceded him ; neither Grotius, nor any other single writer, can properly be said to have 'founded' the system. The reputation of the book was not wholly due to its own merits though these are great ; it was partly due to the time and circumstances of its publication. When he wrote it in 1625 Grotius was already so eminent that anything from his pen would have attracted attention." [21]

According to Judge Lauterpacht, there are a number of factors which in a sense, are external to the substance of Grotius's teaching and which had a share in securing its contemporaneous success and its place in the succeeding centuries. He points out the following four reasons : (1) The timeliness of the publication of his book, *De Jure Belli ac Pacis,* (2) *De Jure Belli ac Pacis* was the most comprehensive and systematic treatise on international law ever published up to that date. (3) Thirdly, substantial portion of the treatise was devoted to matters which had little to do with international law for example the treatise to a great dealt with constitutional law, the theory of state, and the basis of legal and political obligation and jurisprudence. But this very circumstance proved 'weighty contributory factor' in the success which the treaties achieved. It must, however, be noted that though International Law properly forms merely a part, it definitely is the important of the treatise. (4) Lastly, the contemporaneous success of the treatise was to some extent due to the great reputation which Grotius had at that time already earned. It may also be noted as pointed out by Lauterpacht, "principal and characteristic features of *De Jure Belli ac Pacis* are identical with the fundamental and persistent problems of international law and that nearly in all of them the teaching of Grotius has become identified with the progression of international law to a true system of law both in its ethical content.

Grotius was also indebted, to some extent, to his fore-runners such as Lagnamo, Prof. of Law in the University of Bologna, Belli (1502-1575), Brunus (14-1-1563), Vitorial (1480-1546), Ayala (1548-1584), Suarez (1548-1617) and Gentilis (1552-1608). Italian jurist, Gentilis deserves a special mention here. His works, *Legationibus and Commentationes de Jure Belli,* were published in 1588 and 1589, respectively. "Gentilis's book, *De Jure Belli,* supplies, as Professor Holland shows, the model and the framework of the first and third book of Grotiu's *De Jure Belli ac Pacis,* 'The first step'—Holland rightly says—"towards making International Law was taken, not by Grotius, but by Gentilis." "Although Grotius owes much to Gentilis, he is nevertheless the greater of the two, and bears by right the title of 'Father of the Law of Nations." [22] As compared to Gentilis's contribution for the development of International Law that of Grotius is far greater. To conclude in the words of Oppenheim,[23] "Grotius, as a child of his time, could not help starting from the Law of Nature, since his intention was to find such rules of Nations as were eternal, unchangeable and independent of the special consent of the single States... the system of the Law of Nature which Grotius built up and from which he started when he commenced to build up the Law of Nations, became the most important and gained the greatest influence as the Father of the Law of Nations.

Whatever may have been the changing fortunes of the doctrine of Law of Nature, the fact remains that for more than two hundred years after Grotius, jurists, philosophers and theologians firmly believed in it. But for the system of the Law of Nature and the doctrines of its prophets, modern Constitutional Law and the modern Law of Nations would not be what they actually are. The Law of Nature supplied the crutches with whose help history has taught mankind to walk out of the institutions of the Middle Ages into those of modern times."*

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21. Briefly. See supra note 13 at p. 28.
22. Oppenheim, Supra Note 16, at p. 91.
23. Ibid, at pp. 92-93.

* See for P.C.S. (1973), Q. No. 1 ; I.A.S. (1958), Q. No. 1.

Development of International Law during 18th century—Contribution of Naturalists and Positivists.*

17th and 18th centuries are conspicuous for giving birth to three different schools of International Law, namely, the Naturalists, the Positivists and the Grotians.

Contribution of Naturalists and Postivists.—The views of the naturalists and positivists and their contribution for the development of International Law have been discussed in detail in Chapter 2 under the heading 'Basis of International Law.' So please see the discussion under the said heading for a critical discussion of the contribution of Naturalists and Positivist.

Grotians.—As pointed out earlier, Grotius was an eminent jurist and contributed much to the development of International Law. He has the credit of secularsing the concept of natural law. He defined natural law as "the dictate of right reason, indicating that an act, from its agreement with the rational and social nature of man has in it moral turpitude of moral necessity, and consequently that such an act is either forbidden or commended by God, the author of nature."

Grotius contributed much for the development of International Law. The followers of Grotius were called Grotians. The more famous among them were Vattel and Christian Wolf. According to Grotians, International Law has originated not only from natural law but customs and treaties are also its sources. Thus, according to Grotians, International Law is the product of natural law as well as customs and treaties. As pointed out by Oppenheim, "The Grotians stand midway between the Naturalists and Positivists. They keep up Grotius's distinction between the natural and voluntary Law of Nations, but in contradistinction to Grotius, they consider the positive or voluntary of equal importance to the natural, and they devote, therefore, interest to both alike." [24]

Distinction Among the Naturalists, Positivists and Grotians**

Naturalists were those writers who were of the view that Law of Nations is only a part of the Law of Nature. They deny that there is any positive Law of Nations. In their view, States obey International Law which is nothing but Law of Nature (applied in different circumstances) which is higher law. The most prominent naturalists who deserve a special mention were Pufendorf, Christian Thomasius, Francis Hutcheson, Thomas Rutherforth and Jean Jacques Burlamaqui. According to Pufendorf, no positive Law of Nations having the force of law exists. The Positivists, on the other hand, contended that it was the positive Law of Nations which had real force of law. According to them, positive Law of Nations was the outcome of custom and International Treaties. During the seventeenth century, the positivists could not exert much influence. Positivism became very popular in the eighteenth century. During the seventeenth century, naturalists and Grotians were in vogue. The Positivists claimed to have based their theory on the actual practice of States and laid emphasis on law positivum, *i.e.* which is law in fact. They emphasized law which is as distinct from law which *ought* to be. In their view, therefore, law enacted by appropriate legislative authority is binding. The prominent Positivists of the eighteenth century were Cornelius, Moser and Martens.

As regards the Grotians, as it has been pointed out earlier that they stood in between the naturalists and the positivists. They maintained the distinction between the natural and voluntary Law of Nations as expounded by Grotius but in contradistinction to Grotius, they gave equal importance to natural and the positive or voluntary Law of Nations. In their view, International Law is the outcome of the Law of Nature as well as custom and International Treaties. Thus they had shared certain things with both the Naturalists and the positivists but differed with them in so far as they gave equal importance to the natural and voluntary Law of Nations. The most prominent among the Grotians were Christian Wolff (1679-1754) and Emerich de Vattel (1714-1767).

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* See for P.C.S. (1965), Q. No. 7(d).

24. See Supra Note 16, at p. 98

** See for I.A.S. (1960), Q. No. 1 ; For further elaboration see also "Theories As to Law of Nature" and "Positivism Discussed in Chapter 2".

It may be noted that in the nineteenth century it was the positivism which triumphed. As pointed out by Oppenheim, "When the nineteenth century opens, the three schools of the Naturalists, the Positivists and the Grotians are still in the field, but positivism gains slowly and gradually the upper hand ..... positivism was victorious at the end of the nineteenth century and the beginning of the twentieth. In denying the validity of sources of International Law other than the will of States it constituted yet another manifestation of the extreme doctrine of State sovereignty which, at that time, was typical of the science of law and of politics. So uncompromising was the positivist attitude that it denied the character of science to any other than the purely positive Law of Nations." [25] It may, however, be noted that ".....rigid positivism can no longer be regarded as being in accordance with existing International Law. Probably ..... the Grotian school comes nearest to expressing correctly the present legal position." [26] Thus there seems to be a revival of the Law of Nature. Article 38 of the Statute of the International Court of Justice by recognising 'General Principles of Law Recognized by Civilized Nations as a source of International Law has sounded a '*death-knell*' of rigid positivism.

Transformation of 'European International Law' into Law of Nations or International Law.* —As noted earlier, modern international law is determined by modern European System. In the beginning, International Law regulated the relations of a few old Christian States of Western Europe and comprised of the customs recognised and treaties entered into by such States. Later on other Christian States joined the Family of Nations and hence during that time it was often called 'European Law of Nations'. In the next stage, certain Christian States outside Europe joined the Family of Nations. America was the most important of such States. Most of such States were previously the colonies of European States. In the next stage of the development of international law, certain non-Christian States joined the Family of Nations. The admission of Turkey into the Family of Nations marked the beginning of this stage. "With the reception of Turkey into the Family of Nations in 1856 International Law ceased to be a law between Christian States only." [27] Turkey was received into the Family of Nations expressly through Article 7 of the Treaty of Paris, 1856. But it was not until 1923 that Turkey was recognised as full-fledged member of the Family of Nations. After Turkey, other non-Christian states including Japan and India joined the family of Nations. The last stage of the development of International Law in this respect was witnessed after the First World War when a number of non-Christian States along with the Christian States joined the League of Nations. Several other non-Christian States such as Egypt, Iraq, Saudi Arabia, Lebanon, and Syria took part in San Francisco Conference. At present no distinction is made between Christian and non-Christian States. Since 1945 (when U.N. Charter was signed and ratified by 51 States) the Family of Nations has more than trebled. The U.N. now comprises of 166 States which may swell to 174 in a near future.

Development of International Law during 19th and 20th centuries :

There were many factors which led to the development of Law in 19th and 20th centuries. The relation of the State and their mutual contacts had greatly increased during the said period and many rules and principles were formulated on the basis of the practice of States and the needs and requirements of the changing times and circumstances. We will discuss them under the following headings :—

(1) *Congress of Vienna, 1815.*—The Congress of Vienna, 1815, was a landmark event for the development of International law. It was the first important European conference where many rules of International law were formulated, *e.g.* rules relating to International rivers, classification of diplomatic agents, etc.

(2) *Declaration of Paris, 1856.*—The Declaration of Paris was a law-making treaty in which many rules relating to the naval warfare were laid down. Attack on undefended

25. Oppenheim, See supra note 16, at pp. 106-7.
26. Ibid. at p. 107.
* See also for I.A.S. (1956), Q. 1 ; For answer see also matter discussed under the heading 6, Emergence of Large Number of New States in Chapter 1 and Chapter on "Subjects of International Law."
27. Oppenheim, note 16, at p. 49.

people during naval war was prohibited. It was also laid that enemy ships could be sunk or otherwise destroyed during war but before doing so, precautions should be taken to save the life of the crew of the ship.

(3) *Geneva Convention, 1864.*—Many rules relating to the wounded and sick members of the armed forces during land warfare were laid down in Geneva Convention of 1864. Killing of wounded soldiers was prohibited and rules were made for providing certain facilities to them.

(4) *Hague Conferences of 1899 and 1907.*—Hague Conferences of 1899 and 1907 are rightly reckoned as great landmarks relating the development of International Law. They resulted in the adoption of several conventions on various subjects of International concern. These conferences emphasized the settlement of International disputes through peaceful means. Many rules of International Law relating to land warfare and naval warfare were formulated. Bombardment over undefended people was declared illegal. Endeavour was also made to determine the limits of armaments and to achieve ultimately disarmament. Duties and rights of neutral States during naval war were also clearly laid down. Yet another great contribution of the Hague Conferences was the establishment of the Permanent Court of Arbitration. It was a landmark event in the history of the development of International Law. It contributed much in the development of International Law. It contributed much in the attainment of the objective of International Law to settle international disputes through peaceful means.

(5) *The League of Nations.*—After the First World War, the nations of the world felt the need of an International organisation which might be able not only to regulate amicably the mutual relations among the nations but could also prevent future wars. The League of Nations was established under the Treaty of Versailles, 1919. The League of Nations, for the first time, imposed certain restrictions upon the nations' right to resort to war at their will. The Covenant of the League of Nations provided, that before resorting to war, they would first settle their disputes through arbitration, judicial settlement, or enquiry by council. It was also provided that even if their disputes were not solved through these means, they would not go to war until the lapse of three months after such failure. It was further laid down that a member of the League going to war in violation or disregard of the provisions of the Covenant would be deemed to be the enemy of the whole League of Nations. Yet another great achievement of the Legaue of Nations was the establishment of the Permanent Court of International Justice which contributed much to the progressive development of International Law. The covenant of League of Nations was in fact a law-making International Treaty. It was the auspcious beginning of a good trend. "Since the establishment of League of Nations the development of International law has been accomplished primarily through the creation of International organisations by law-making treaties and the conclusion of law-making treaties through International organisations." [28]

(6) *Treaty of Locarno of 1925.*—France, Britain, Germany and Italy, etc., concluded the Treaty of Locarno whereby Germany, France and Belgium undertook the obligation of not using force in the settlement of their boundary disputes. The parties to the treaty also expressed their resolve to settle their disputes through peaceful means. Germany, however, refused in 1936 to follow the provisions of this Treaty.

(7) *Kellog-Briand or Paris Pact of 1928.*—This pact was a landmark in so far as the parties to it renounced war as an instrument of their national policy for the settlement of international disputes. It was a very significant International event for regulation over war.

(8) *Geneva Convention, 1929.*—This convention was signed by 47 States of the world. Many rules relating to the treatment of prisoners of war were laid down in this convention. Reprisal against prisoners of war, cruelty towards them and collective penalties against them were prohibited. Rules were also formulated for providing medical and other facilities to the prisoners of war.

(9) *Second World War.*—Almost all the above-mentioned rules of International Law were flagrantly violated during the Second World War which turned into a 'total war'. It,

28. Edward Collins, International Law in Changing World (1969), p. 426.

however, sowed the seeds of a future world organisation because the devastating effects and hair-splitting experiences of the war once more compelled the nations of the world to make their attempts afresh to establish an International organisation which may ensure lasting peace to the world and establish rule of law in the International field. Consequently, the Second World War indirectly led to the eventual establishment of the United Nations.

(10) The United Nations.—The United Nations Charter came into force on October 24, 1945 and thus the United Nations was established. In the beginning the number of its members was only 51 which has now swelled to 185. The United Nations is an International treaty which regulates the mutual relations of its members. The development of International Law received a great impetus under the United Nations. Article 13, Paragraph 1 (a) of the Charter provides that the General Assembly shall initiate studies and make recommendations for the purpose of promoting international co-operation in the political field and "encouraging the progressive development of International Law and its codification". For this purpose, the General Assembly established the International Law Commission which conducts study and research in different aspects of International Law and submits its reports to the General Assembly. At an early stage attempts were made to set a dividing line between the 'progressive development' and 'codification.' But as remarked by Manfred Lachs, President of the International Court of Justice in his commemorative speech delivered at special meeting of the U.N. General Assembly on 12th October, 1973... "it has become clear that the two processes—progressive development and codification—far from being mutually exclusive, in fact merge. It was found, as was bound to happen, that in some domains the distinction established between the two activities could hardly be maintained." [29] Further "the International Law Commission has performed its task with great distinction. Declarations have been enunciated, important principles have been formulated, new conventions have been drafted, and the ways and means for making evidence of customary law more readily available received the attention of the Commission also." [30] It has also prepared draft articles of several conventions and treaties which have been eventually adopted. It has thus creditably performed the task of assisting the General Assembly in "encouraging the progressive development of International Law and its codification." The more important of such treaties and conventions are Geneva Conventions on the Law of Sea 1958, Vienna Convention on Diplomatic Relations, 1961, Vienna Convention on the Law of Treaties, 1969, U.N. Convention on the Law of the Sea, 1982, etc.

Thus after the establishment of the United Nations the development of International Law has been effected mainly through multilateral law-making treaties. The chief objective of International Law is to establish the rule of law in International field and to ensure the maintenance of international peace and security. It is possible only when it adopts itself to the changing times and circumstances. In the words of Edward Collins : "It is equally clear that if International Law is to serve this purpose effectively, it must be continuously developed by revision in content, expansion of scope and improvement of the securing compliance, so that it is kept in accord with the changing needs of the international community." To conclude in the words of Manfred Lachs. "..... it is true that only gradually international law has acquired new dimensions. It has followed man's foot-steps throughout his journey in time and space. It has followed him in his explorations when he crossed oceans and landed on new shores. Such ventures brought Europeans into contact with alien civilizations, giving rise to confrontations, *inter alia*, concerning the nature of the law of nations as seen through different eyes. Owing to the great strides in relations between States, in science and technology, international law has extended its rules until it embraces today all nations in their contracts and into whatever domains and dimensions their activities extend." [31]

Review of International Law during the Second Millennium

N.B.—For this please *see* Chapter 1 entitled "Introduction"

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* See also for C.S.E. (1996) Q. 5(b)

29. "The Twenty-fifth Anniversary of the International Law Commission", I.J.I.L. Vol. (1974), p. 1 at p. 2
30. Ibid, at p. 3.
31. "The Twenty-fifth Anniversary of the Internaitonal Law Commission", I.J.I.L. Vol. 14 (1974), p. 1 at p. 4

Challenges before International Law during the Third Millennium—

N.B.—For this also please *see* Chapter 1 entitled "Introduction".

Schools of International Law

The main Schools of International Law which deserve mention are following :

(1) Natural Law School, (2) Grotian School, (3) Positivist School, (4) The so-cal ed Anglo-American and Continental School of Thought in International Law.

(1) Natural Law School.—The view points of naturalists has already been discussed earlier under the heading *"Distinction Among Naturalist, Positivists and Grotians'*

[N.B.—For a further discussion please see also matter discussed above under the heading *"Theories as to Law of Nature" and "Influence of Natural Law"* in chapter 2 entitled, *"Definition, Nature and Basis of International Law"].*

(2) Grotian School.—This has been briefly discussed earlier under the heading *"Grotians"* but it needs further elaboration here. The main features of Grotian tradition, as summarised and explained by Lauterpacht in one of his articles are following :

(i) The subjection of totality of International relation to the rule of law.—The central theme and the main characteristic of Grotians' treaties that Grotius conceives of the totality of the relations between states as governed by law.

(ii) The acceptance of the Law of Nature as an indepedent source of international law.—According to Grotius, law which was binding upon states is not solely the product of their express will. He advocated and emphasized the Law of Nature as an independent source of international law. By securing the concept of law of nature, Grotius enhanced authority and dignity by making it an integral part of international law. "By doing this, he laid, more truly than any writer before him, the foundation of international law."

(iii) The affirmation of the social nature of man as the basis of law of nature.—According to Grotius, the social nature of man was the basis of the law of nature. He defined natural law as the dictate of right reason, indicating that an act, from its agreement or disagreement with *the relation and social nature* of man has in its moral turpitude or moral necessity, and consequently that such an act is either forbidden or commanded by God, the author of nature.

(iv) The recognition of the essential identity of States and Individual.—At the end of the nineteenth century, Weslake, observed : "The society of States ..... is the most comprehensive form of Society among men, but it is among men that it exists. States are its immediate men ultimate members. The duties and rights are only the duties and rights of men who compose them." But it was Grotius who was the first to have recognised the essential identity of states and individuals and advocated that rules and principles applicable upon individual should also be applied upon states.

(v) The rejection of the reason of state.—Yet another characteristic feature of Grotius teaching was his denial of the 'reason of State' as a basic and decisive factor of international relations.

(vi) The distinction between just and unjust Wars.—Grotius denied the states of the absolute right of war for he emphasized the distinction between just and unjust wars. According to him, a just war is one which is fought for a just cause. It need not be overemphasized here that Grotius deserves full credit for emphasizing this distinction between just and unjust war which was later on further developed under the Covenant of the League of Nations, the Pact of Paris of 1928 and finally, the charter of the United Nations.

(vii) The doctrine of qualified Neutrality.—The distinction between just and unjust war led Grotius to enunciate the doctrine of qualified neutrality. According to Grotius, "It is the duty of those who keep out of war to do nothing whereby he who supports a wicked cause may be rendered more powerful, or where by the movements of him who wages an unjust war may be hampered." These duties, however, did not include the positive obligation to assist actively the state fighting a just war. Thus, as remarked by Lauterpacht, "with the drastic limitation of the right of war as adopted in the Covenant of

the League of Nations and in the General Treaty for the Renunciation of War, the law restored the historic foundations of qualified neutrality as taught by Grotius."

(viii) The binding force of promises.—Grotius emphasized the binding force of promises and held the view that obligation to abide by pacts of the essence of social contract. In modern terminology, it is referred as *pacta sunt servanda* but it is pointed out that the ultimate source of legal obligation cannot logically, be explained in terms of law, Grotius held the view that law of nature was the binding force of the Law of Nations.

(ix) The fundamental rights and freedoms of the individual.—Though it appears alien to the spirit of this teaching, Grotius must be given some share on the development of the concept of fundamental rights and freedoms of the individual. He advocated the right of the individual to refuse to carry arms in an unjust war and championed his claims such as right of expatriation, the rights of economic freedom, right to have plebiscite for transfer of part of national territory.

(x) The idea of peace.—Though he did not deny the right of the state to wage war, he advocated the idea of peace and proposed various methods for the settlement of disputes such as negotiation and arbitration.

(xi) The tradition of idealism and progress.—Grotian tradition is a tradition of idealism and progress. "He initiated or gave support to progressive ideas in various fields in the sphere of international relations. He was one of the first to assist the suppression of crime by urging extradition of criminals as a matter of legal duty. He did more than any of the other founders of international law in developing theory and elucidating the practice of diplomatic immunities. He supplied the basis of modern law of state responsibility founded on fault as distinguished from absolute liability and thus helped to displace the undiscriminating and a chronic practice of reprisals as a normal means of redressing grievances. He urged, and laid down as a rule of law, the principle of freedom of navigation on international rivers and canals. His share in the evolution of the principle of the freedom of the seas needs no elaboration. In all these matters his teaching became part of international practice, wholly or in part. In others, although it has remained a mere postulate or reason, it is not without significance."

To quote Judge Lauterpacht again, "Some of these elements of the Grotian tradition have now become part of the positive law ; others are still an aspiration. But they explain why Grotius's work has remained an abiding force and not merely an episode, however important, in the literature of international law, they explain why writers and statesmen have turned to Grotius not only as a source of the evidence of the law as it is, but also as a well-spring of faith in the law as it ought to be : Grotius did not create international law. Law is not made by writers : What Grotius did was to endow international law with unprecedented dignity and authority by making it part not only of a general system of jurisprudence but also a Universal moral code ..... *De Jure Belli ac Pacis* is pre-eminently a treatise which must be judged not by reference to its method but by its influence on the doctrine and on the practice of the Law of Nations : It satisfied the craving in jurist and layman alike, for a moral content in the law. In stressing and, on the whole, maintaining the distinction between law and morality, it vindicated the place of the Law of Nations in legal science : Last but not the least—it became identified with the idea of progress in international law."

The followers of Grotius were called Grotians. The contribution of the Grotians and their distinction with the Naturalistis and Positivists has been discussed briefly earlier in this chapter under the headings *"Grotians and Distinction Among the Naturalists, Positivists and Grotians."*

(3) Positivist School of law.—The positivists believe in law *postivum i.e.* law which is fact or that law enacted by appropriate legislative authority is law which exists in fact and is binding. They emphasize law which is in fact as distinct from law which ought to be, the chief characteristic of Law of Nature. Applied to international law, positivists defend the existence of a positive Law of Nations as the outcome of custom or

international treaties. A brief reference may be made here to Richard Zourche (1590-1660), Professor of Civil Law at Oxford and a Judge of the Admiralty Court. His book which appeared in 1650 and called the first manual of the positive Law of Nations, earned for him the title of *'Second founder of the Law of Nations'*. As pointed out by Oppenheim, "The stand point of Zouche is totally different from that of Grotius in so far as, according to him the customary Law of Nations is the most important part of that law, although as a child of that time, he does not at all deny the existence of a natural Law of Nations ..... The distinction between the natural Law of Nations, chiefly treated by Grotius, and the customary or voluntary Law of Nations, chiefly treated by Zouche gave rise in the seventeenth and eighteenth centuries to three different schools of writers on the Law of Nations—namely, the 'Naturalists' the 'Positivists' and the 'Grotians'." Further, "The 'Positivists' are the antipodes of the Naturalists. They include all those writers who, in contradistinction to Hobbes and Pufendorf, not only defend the existence of a positive Law of Nations as the outcome of custom or international treaties, but consider it more important than the natural Law of Nations, the very existence of which some of the Positivists deny, thus going beyond Zouche. The Positivist writers had not much influence in the seventeenth century in which the Naturalists and Grotians carried the day, but their time came in the eighteenth century."

[*N.B.*—For further discussion see also matter discussed above under the heading *Distinctions Among the Naturalists, Positivists and Grotians."* See also matter discussed under the heading 'Positivism' in chapter 2].

(4) The so-called Anglo-American and Continental Schools of thought in International Law.—Some writers have expressed the view that there exist in international law two different schools of thought, the Anglo-American and the continental. Lord Hailsham, the then Lord Chancellor, Prof. Pearce Higgins, Sir John Fischer Wiliams, and Prof. Brierly subscribed to this view which became prevalent in some countries, particularly, England and America. The writers who subscribed to this view in fact based their view on the difference between the Anglo-American and continental practice in respect of certain specific matters relating to the Law of Peace, Law of Peace and doctrines of Municipal Law of possible relevance in International Law.

As regards the Law of Peace, clear examples of topics in respect of which difference existed were those relating to jurisdiction over foreign ships in national waters and jurisdiction over aliens. In respect of the jurisdiction over foreign ships Judge Lauterpacht has rightly observed that the divergence in this respect has been shown to be "a matter of form rather than of substance." Further, "The lawyer surveying this part, of international law will be impressed both by large measure of uniformity with which its rules are understood, and applied throughout the world and by the fact that such differences as exist, far from being reducible to a clash of Anglo-American and continental ideas, over their origin and preservation to altogether different reasons." While in some European Countries like France and Italy, the jurisdictional immunities of diplomatic envoys or public ships are granted on the basis of the question whether the activities in question are of public or private character. But this practice is not followed in Germany. On the other hand, courts in Britain and America do not consider the character of the State activity in question as relevant. As regards jurisdiction over aliens in respect of crimes committed abroad, English and American law do not assume jurisdiction but jurisdiction is assumed by the law of Italy, Turkey, China and Mexico. However, Germany, Spain, France, the Netherlands etc. follow Anglo-American practice in this respect. Therefore it is not proper to say that Anglo-American practice is different from the continental countries.

As regards the Law of War, it is pointed out that differences exist in respect of matters such as blockade and enemy character. According to the practice prevalent in Britain and America, a blockade, breaking vessel was liable to seizure when the master had actual or constructive knowledge of the blockade. On the other hand, in continental countries an actual attempt to break the line of blockade was considered necessary for the infliction of punishment. But in the course of World War most of these differences disappeared as the result of reprisals frequently resorted to, the doctrine of continuous

voyage and the extension of the list of contraband goods. Yet another example of the difference pointed out is in respect of enemy character. In U.K., U.S. Japan, Netherlands and Spain, both nationality and domicile were considered relevant for determining enemy character. On the other hand, enemy character was determined on the basis of nationality of the owner in France, Germany, Austria, Hungary, Italy and Russia. But as pointed out by Lauterpacht, "in view of the character of the measures adopted by Great Britain by way of its reprisals and otherwise, the question of enemy character lost much of its importance in relation to liability to capture, it remained important in regard to municipal legislation concerning trading with enemy. It was in this respect that both France and Great Britain, the representative countries of the 'two schools' abandoned their respective position held before the war and cumulative the two tests."

To conclude in the words of Judge Lauterpacht, "...there is no substance in the view that there exist two schools of international law, the Anglo-American and continental either in regard to specific question of International law, or in respect of differences in those questions of municipal law which are of possible relevance in international law, or in the matter of general approach and method. The work of international tribunals shows that international judicial settlement, far from being impeded by the alleged existence of 'two schools of thought' is not actually confronted with the problem. An analysis, ... of the work of the Permanent Court of Justice in general and as the dissenting opinion and observation appended to the Judgments and Advisory Opinions, and observations would show that the question has not arisen there at all."

CHAPTER 6

CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW*

Meaning and definition :

By the term codification we ordinarily mean the process reducing the whole body of law into Code in the form of enacted law. It generally connotes a systematic arrangement of the rules of law which are already in existence. According to Sir H. Lauterpacht, ".....The task of codifying International Law, if it is to mean anything, must be primarily one of bringing about an agreed body of rules already covered by customary or conventional agreement of State." [1] But this is the narrow meaning of the term 'Codification.' In its wider sense, it may also mean modification of the existing rules of law ; so as to keep them pace with time and adapt them in accordance with the needs of time. "There is a school of thought which holds that codification in the proper sense of the word can only mean writing down of already existing rules ; though it usually has to be conceded that in practice even a strict codification in this sense may involve the making of few minor changes in the law..... To adopt too strict a definition of the process involved is therefore to defeat the very ends for which the machinery is to be employed." [2] "Codification means any systematic statement of the whole or part of the law in written form, and that it does not necessarily imply a process which leaves the main substance of law unchanged, even though this may be true of some cases. In other words, codification properly conceived is itself a method of the progressive development of law." [3] "...The two processes—progressive development and codification, far from being mutually exclusive, in fact merge." [4]

Reference may also be made here to Article 15 of the Statute of the International Law Commission which provides that "the expression "progressive development of International Law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law yet has not been sufficiently the very ends for which the machinery is to be employed." [2] Therefore, "Codification of International Law" is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine. It may be noted that "Mere codification without the element of progressive development would defeat the very purpose of law-making by introducing a static concept of law. Thus it is now well recognized by all codifying institutions to consider equally the developmental aspect while engaged in the codification of the law. In fact progressive development is the very life and blood of codification..... In short, therefore, the first essential ingredient of codification is furnished by the aspect relating to 'progressive development' which must always remain the very pith of this theme. This must necessarily be so if the legislative function has at all to be performed for the international community so essential for the maintenance of world public order." [5]

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* See for P.C.S. (1968), Q. No. 4 ; P.C.S. (1971), Q. No. 2 and P.C.S. (1964), Q. No. 3(a).

1. Codificaiton and Development of International Law, A.J.I.L. Vol. 49 (1955), p. 16 at p. 22.
2. R.Y. Zennings, "The Progressive Development of International Law and its Codification, BYBIL, Vol. XXIV (1947), p. 301 at p. 302.
3. Ibid.
4. Manfred Lachs, "The Twenty-Fifth Anniversary of the International Law Commission", I.J.I.L. Vol. 14 (1974), p. 1 at p. 2 ; see also R.S. Pathak, Law Commission in the Codification and Progressive Development of International Law", I.J.I.L. Vol. XVII (1977), p. 1 at p. 2.
5. Judge Nagendera Singh, "Codification and Progressive Development of International Law : The Role of the International Court of Justice." I.J.I.L., Vol. 18 (1978), p. at pp. 2-3.

History of codification.—The history of codification dates back to the end of the 18th century when the idea of codification of international law was conceived by Bentham. Before him an unsuccessful attempt was made by the French Convention to draw up a declaration of the Rights of Nations in 1792.

Declaration of Paris, 1856.—The Declaration of Paris occupies a place of significance in the development of International Law. This Declaration was signed by Britain, France, Austria, Russia, Turkey, Prussia and Sardinia after the end of the Cremean War in 1856. This declaration laid down the principles relating to (a) abolition of privateering ; (b) non-capture of neutral goods except contraband of war, under enemy flags ; (c) Blockade to be binding must be effective ; and (d) except contraband of war, enemy goods cannot be captured under neutral flag.

Codification by individual writers.—Some individual writers also contributed to the codification of International Law. The first important attempt in this connection was made in 1861 by an Austrian jurist, Alfons Von Domin-Petrushnveez who for the first time showed the possibility of the codification of International Law. In 1863, Prof. Trancis Liber of Columbia University Law School, New York, attempted to codify the laws of war. Besides this, Swiss Jurist Bluntshii in 1868, David Dudley Field in 1872, Levi in 1887, Italian Jurist Paspuale Fiore in 1890, E. Duplexis in 1906 and Jerome Internescia in 1911 published their Codes of International Law. Moreover Oppenheim, Hall, Phillimmore and Hyde also deserve the credit of bringing out the rules of International Law in a systematised form of a Code.

The Two Hague Conferences.—The First Hague Conference, which was convened by Emperor Nicholas II of Russia in 1899 resulted in the adoption of following two conventions in the form of a Code : (a) Convention on the Pacific Settlement of International Disputes ; and (b) Convention on the Laws and Customs of War on land. These conventions proved to be great milestones in the field of codification of International Law. Being encouraged with the results of the First Hague Conference, the Second Hague Conference was convened in 1907. This conference produced as many as thirteen conventions relating to warfare and neutrality in war on land and sea, the status of enemy merchantmen at the outbreak of war, bombardment by naval forces, conversion of merchantships into men-of-war. This conference was attended by 44 States.

Declaration of London.—A naval conference was held in 1909 at London to draw up an agreed list of contraband goods. The agreement reached was incorporated in a Declaration known as Declaration of London, 1909. But it never came into force as it was not ratified. It lost all its importance on account of the development of First World War, 1914, into a total war.

Codification under the League of Nations. —The work of codification of International Law received a great impetus under the League of Nations. "It was left to the League of Nations, to approach in a systematic manner the problem of codification properly called." [6] The League Council appointed a Committee of sixteen Jurists in 1924 to report to Council subjects which were ripe for codification. The Committee recommended that the following subjects were ripe for codification : (1) Nationality ; (2) Territorial waters ; (3) State responsibility for damage done in their territory to the persons or property of foreigners ; (4) Diplomatic immunities and privileges ; (5) Procedure of International Conference and Procedure for the conclusion and drafting of treaties ; (6) Exploitation of the products of the sea ; and (7) Piracy. On the recommendation of the said Committee, the Assembly decided that a conference should be held at Hague for the purpose of codifying the topics of (a) nationality ; (b) territorial waters ; and (c) responsibility of States for the damage done to foreigner in their territories. The Committee of experts did not cease its work ; it continued its work and reported in 1928 to the Council that the following two topics were also ripe for codification : (1) Law relating to functions and competence of Consuls ; and (2) the competence of courts regarding foreign States.

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6. L. Oppenheim, International Law, Vol. I, Eighth Edition, p. 60.

The Hague Codification Conference of 1930.—Hague Conference of 1930 may be said to be the first conference on the codification of International Law. Three committees were set up for each of the topics, *i.e.* nationality, territorial waters and responsibility of States for the damage done to foreigners in their territories. No general agreement could be reached in regard to territorial waters and responsibility of States for the damage done in their territories to the property and person of foreigners. But the Committee on nationality adopted several conventions on questions relating to the conflict of Nationality Laws and Statelessness.

Codification under the United Nations.*—Article 13(1) (a) of the U.N. Charter lays down that the General Assembly shall initiate studies and make recommendations for the purpose of "promoting international co-operation in the political field" and "encouraging the progressive development of International Law and its codification." "The most important task of codification is the systematisation and the progressive development of this amorphous and relatively unorganised body of law. It is surely evident that the implementing of Article 13 of the Charter is a task of urgency and importance of which yield place to none of the other problems that face the international law today." [7] The U.N. General Assembly took the task of "encouraging the progressive development of international law and its codification" in all seriousness. On December 11, 1946, the General Assembly appointed a committee for the progressive development of International Law and its codification. In 1947, the General Assembly decided to set up an International Law Commission, an International Law Commission was elected and it met on April 11, 1949. As provided under Article 1 of the Statute of the International Law Commission, the Commission shall have for its object the promotion of the progressive development of international law and its codification. The distinction between the two terms has been explained earlier. The Commission also considers proposals and draft multilateral conventions submitted by the Members of the U.N., the principal organs of the U.N. other than the specialized agencies, or official bodies established by inter-governmental agreement to encourage the progressive development of International Law and its codification and transmitted to it for that purpose by the Secretary-General.[8] It is provided that the Commission shall survey the whole field of International Law with a view to selecting topics for codification having in mind existing drafts whether governmental or not. When the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly. The Commission shall give top priority to requests to the General Assembly to deal with any question.[9] Further, Article 24 provides that the Commission shall consider ways and means for making the evidence of customary international law more readily available, such as, the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

Work of the International Law Commission.**—"The establishment of ILC represented a turning point in the 'codification movement', understood as the movement for the systematic presentation of international law in the form of written rules representing a restatement of existing rules of international customary law or the formulation of new ones." [10] On November 21, 1947, the General Assembly directed the International Law Commission : (a) to formulate the principles of International Law recognised in Charter as well as in the judgment of the Nuremberg Tribunal ; (b) to prepare a draft code of offences against the peace and security of mankind ; (c) to prepare a draft declaration on the rights and duties of States ; and (d) to suggest the desirability and possibility of establishing an international judicial body for the trial of genocide and certain

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* See for I.A.S. (1966), Q. No. 11 ; P.C.S. (1978), Q. No. 1.

7. Zennings, see Supra Note 2, at p. 329.
8. Article 17(1) of the Statute of the International Law Commission (I.L.C.).
9. Article 18 of the Statute of the I.L.C. 1 ; C.S.E. (1987) Q. 5 (a).

** See for P.C.S. (1973), Q. No. 1.

10. Carl—August Fleischhauer, "The United Nations and the Progressive Development and Codification of International Law". I.J.I.L., Vol. 25 (1985) p. 1.

other crimes. The Commission began its work in 1949 and since then it has done commendable work in respect of the codification of International Law. It decided to give priority to the following three topics : (i) Law of Treaties ; (ii) Arbitral Procedure ; and (iii) Law Relating to the High Seas.

By the year 1971, the Commission submitted final drafts or reports relating to : (1) Regime of the High Seas ; (2) Regime of Territorial waters ; (3) Nationality (including statelessness) ; (4) Law of Treaties ; (5) Diplomatic Intercourse and Immunities ; (6) Consular Intercourse and Immunities ; and (7) Arbitral Procedure. In addition to this, the Commission has also worked on the following topics : (1) Draft Declaration on Rights and Duties of States ; (2) Formulation of the Nuremberg Principles ; (3) Draft code of offences against the Peace and Security of Mankind ; (4) Question of Definition of Aggression,[11] (5) Question of International Criminal Jurisdiction ; (6) Question of Reservation of Multilateral Treaties ; (7) Extended Participation in General Multilateral Treaties concluded under the auspices of the League of Nations ; (8) Nationality including Statelessness ; (9) Special Missions ; (10) Representatives of States of International organisations ; (11) Prevention and Punishment of crimes against Diplomatic Agents and other Internationally Protected Persons ; (12) The Most-Favoured-Nation clause ; (13) State Responsibility ; (14) Succession of States in Respect of Treaties ; (15) Succession of States in Matters other than Treaties ; and (16) The Law of Non-Navigational Uses of International Water-courses.

It may be noted here that although the Commission has dealt with a large number of topics as noted above, since 1949 its major contribution has so far been in the fields of the (i) law of treaties, (ii) law of diplomatic and consular relations, and (iii) the law of Sea. In addition to this, in pursuance to Article 24 of the Statute as noted above, the Commission made useful recommendations on making the evidence of customary international law more readily available, pursuant to which the United Nations Juridical Year Book has been published since 1963 as well as U.N. Legislative Series, and Report of International Arbitration Awards. These publications along with the Year Book of the International Law Commission itself serve as rich source-material.[12] The more important of the subjects presently under the consideration of the Commission are—(i) The Most-favoured Nation Clause ; (ii) State Responsibility ; (iii) Succession of States in Matters other than Treaties ; and (iv) Law of Non-Navigational uses of International water-courses.[13]

It may also be noted that the term of earlier Commission expired on 31 December, 1976 and on 17 November, 1976, the General Assembly elected by secret ballot the entire membership of 25 legal experts of the new Commission for five years beginning from 1st January, 1977. Dr. S.P. Jagota of India was also elected as one of the members of the Commission.[14] On 18 November, 1981, the General Assembly adopted a resolution (36/39) enlarging the membership of the Commission from 25 to 35, according to the following pattern : (a) eight nationals from African states ; seven nationals from Asian states ; three nationals from East European states ; six nationals from Latin American states ; and eight nationals from Western Europe or other states. In fact, "..... the International Law Commission has performed its task with great distinction. Declarations have been enunciated, important principles have been formulated, new conventions have been drafted and the ways and means for making evidence of customary law more readily available received attention of the Commission also..... The work of the Commission has been of great importance to the world Court (*i.e.*, International Court of Justice), for in administering law and justice the Court has frequently relied upon it." [15]

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11. The definition of aggression was finally adopted in 1974 ; For a discussion of the definition of Aggression see Chapter on "The Security Council".
12. S.P. Jagota, "The Role of the International Law Commission in the Development of International Law", I.J.I.L., Vol. 16 (1976), p. 459 at p. 461.
13. Ibid at p. 463 ; U.N. Monthly Chronicle, Vol. XIII No. 8 (Aug.-Sept., 1976), pp. 49-50 ; Richard D. Kearney, "The Twenty-fifth Session of the International Commission", A.J.I.L., Vol. 68 (1974), pp. 454-74.
14. U.N. Monthly Chronicle, Vol. XIII, No. 11 (December 1976), p. 57.
15. Manfred Lachs, "The Twenty-fifth Anniversary of the International Law Commission", I.J.I.L., Vol. 1 (1974), p. 1 at pp. 3-4.

"The record of ILC activities over 36 years of its existence includes no less than 13 multinational conventions adopted on the basis of drafts worked out in the ILC by specially convened United Nations conferences or, in two cases, by the sixth committee. The ILC conventions comprise such landmark instruments as the 4 Geneva Conventions on the Law of the Sea 1958, the Convention on Diplomatic Relations of 1961, on Consular Relations 1963 and on the Law of Treaties 1969." [16]

Recent Conventions and Treaties.—Geneva Conventions on the Law of Sea, 1958 Vienna Convention on Diplomatic Relations (1961), 1965 Convention on Settlement of Investment Disputes between the States and Nationals of other States, Vienna Convention on the Law of Treaties, 1969 are some of the landmarks in the field of codification and progressive development of International Law. Besides these, Vienna Convention on Consular Relations, 1963, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1973, International Covenants on Human Rights, 1966, Convention on Registration of Objects Launched into Outer Space, 1974, International Convention on the Elimination of All Forms of Racial Discrimination, 1966, International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, the Vienna Convention on the Representation of States in their Relations with International organisations of universal character (1975) ; Vienna Convention on the Succession of States in Respect of Treaties (1978) ; U.N. Convention on the Law of the Sea (1982) ; Vienna Convention on State Property, Archives and Debts, 1983 ; Convention on the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and Their Destruction, 1971, U.N. Convention on the Rights of the Child, 1989, U.N. Convention on Bio-Diversity, 1992, U.N. Convention on Forestry, 1992, U.N. Convention on Climate Change, 1992 etc. also deserve a special mention. Moreover, for the progressive development and codification of International Trade Law, a United Nations Commission has been established.[17] These Conventions and Treaties had provided the International system with a legislative machinery which, though not equivalent to Municipal Legislative system, yet to some extent, may be said to be the counterpart of the legislative machinery of State legal system. As aptly remarked by Javier Perez De Cuellar, Secretary-General of the United Nations, ".....the magnitude of the achievements of the U.N. in codifying, and progressively developing international law has no precedent in history. On land and sea, as well as in outer space, the United Nations, in the past 40 years (now more than 50 years), has helped to construct a legal network to regulate a wide range of international activities and to set forth international laws, rights and duties."[18]

Merits and Demerits of Codification

Merits of Codification :

(1) One of the defects of International Law is obscurity and uncertainty. Codification not only makes rules clear and certain but also reconciles conflicting and divergent views.

(2) Codification will be helpful in filling numerous gaps existing in International Law and also by providing for rules where there is none.

(3) Yet another merit of codification is that it will bring uniformity in the International legal system.

(4) Codification will also go a long way to end or at least greatly minimise the disagreement and confusion that prevails on many important matters.

(5) Codification will enhance the efficacy of International Law by increasing its binding force.

(6) The International Court of Justice and other Tribunals will find it easier to apply and enforce codified International Law.

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16. Note 10, p. 2.
17. As written by J.A.C. Gutteridge : "The Commission.....will have an important part to play in the progressive development of International Law and its codification in the field of International trade, as well as its unification'. The United Nations in a Changing World (Manchester University, 1969), p. 85.
18. "The Role of the United Nations in World Affairs", International Affairs (Moscow, October 1988), p. 88 at p. 89.

(7) It will be easier and convenient to amend the codified International Law so as to keep it at pace with the tide of time.

Demerits of Codification ;

(1) Codification is detrimental for the natural growth and future development of International Law. This defect can be remedied by a regular and scientfic revision of codes in order to incorporate changes in international conditions.

(2) Yet another disadvantage of codification is that it makes the system of law too rigid and unadaptable to new situations.

(3) Codification also makes the law too formal and conservative. This defect can be removed by progressive interpretation of International Law.

(4) New controversies arise due to codification.

(5) It gives rise to controversies in interpretation because of the hair-splitting tendency of Judges to interpret the law.

(6) International Law still being in its infancy, only a partial codification is possible.

(7) Last but not the least disadvantage of codification is that customary rules still form the bulk of International Law and many of them are not yet fully settled.

It may be noted that "Codification has ceased to be a technical task which can be entrusted to lawyers, it has become a political matter, a task of law creation, and in the absence of any International organ of legislative powers, the contents of the Code can be settled only if the representatives of the Governments can be made to agree upon them".[19]

Conclusion.—A critical perusal of the advantages and disadvantages of codification, will lead as to irresistible conclusion that the advantages outweigh the disadvantages. Codification will make the law certain, simple, intelligible and, above all easily accessible to all. Many of disadvantages of codification may be removed by carefully planning and regular and scientific revision of the Code to incorporate changes in international conditions. "The objective of codification announced in the Charter of the United Nations can be attained without great difficulty in respect to certain less important relations of States, where the conflict of interests is not acute. In respect of other relations much will depend upon the mutual confidence that may result from the successful operation of collective security." [20] "Products of codification, even if initially approved or accepted only by a limited number of Governments, constitute a positive and tangible achievement and a starting point for a gradual extension of their operation." [21] In the clarification, development and codification of public International Law, and United Nation's performance already exceeds the entire record of the nineteenth century *plus* that of the League of Nations." [22] It has been aptly remarked,[23] "The role of 'codification' and 'progressive development' assumes profound significance also because of the complex nature of growing international relations, which call for particular formulation and enactment. The articulate and specific instruments of law-making bilaterial or multilateral treaties, constitute the effective vehicle for regulating international or transnational interests concerning communications, health, conservation of resources, labour and social matters, marine resources and space law.[24] 'Codification, and 'Progressive' development therefore, play an important and vital role in the promotion of world peace, International development and progress. To conclude in the words of Judge Nagendera Singh "In the international field there is no law-making chamber or a legislature as such in the sense as it exists in the municipal shpere of the State and hence the function of codification in the inter-State context has not only the objective of scientfic determination

19. J.L. Brierly, The Law of Nations, Sixth Edition (1963), p. 80.
20. "Fenwick, International Law, (Third Indian Reprint, 1971), p. 105.
21. H. Lauterpacht. "Codification and Development of International Law", A.J.I.L. Vol. 49 (1955), p. 16 at p. 39.
22. P.E. Corbett, The Growth of World Law (Princeton New Jersey, 1971), p. 180.
23. R.S. Pathak, "The Role and means of Codification and Progressive Development of International Law", I.J.I.L. Vol. 17 (1977), p. 137 at p. 145.
24. See Wolfgang Friedmann : The Changing Structure of International Law, 1964, pp. 122-123.

of the law but also its formulation to meet the new needs of its Universal acceptance as required by the ever-changing demands of the world society of Sovereign States. Thus unlike codification in other fields it has to be admitted that as far as Codification of International Law is concerned it has to be substantially legislative in character. The process of codification must essentially embrace the need to change the law and to induce government to accept the revision of old laws and the formulation of new ones." [25]

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25. Judge Nagendra Singh, supra, note 5 at p. 2.

CHAPTER 7

RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW*

Certain theories have been propounded to explain the relationship between International Law and Municipal Law. Following are some of the prominent theories in this connection : (1) Monism ; (2) Dualism ; (3) Specific Adoption theory ; (4) Transformation theory ; and (5) Delegation theory. These theories have been put forward to explain the relationship between International Law and State Law. Of all these theories the most popular are 'Monism' and 'Dualism' and they are diametrically opposed to each other.

(1) Monism.**—The exponents of this theory emphasise the scientific analysis of the internal structure of law. According to them law is a unified branch of knowledge, no matter whether it applies on persons or other entities. "According to monist belief, international obligation and municipal rules are facets of same phenomenon, the two deriving ultimately from one basic norm and belonging to the unitary order comprised by the conception of law." [1] "In their (*i.e.*, monists) view the science of law is a unified field of knowledge, and the decisive point is, therefore, whether or not international law is true law. Once it is accepted as hypothesis that international law is a system of rules of truly legal character, it is impossible, according to Kelsen (1881-1973) and other monistic writers to deny that the two systems constitute part of that unity corresponding to the unity of legal science. Thus any construction other than monism, and in particular dualism, is bound to amount to a denial of the true legal character of international law." [2] It has already been pointed out in the Third Chapter that international law is a law in the true sense of the term and keeping this view in mind, monism seems to be reasonable and correct theory. Wright, Kelsen and Duguit, etc. are some of the prominent exponents of monism.

According to the exponents of Monism International Law and Municipal law are intimately connected with each other. International Law and Municipal Law are the two branches of unified knowledge of law which are applicable to human community in some or the other way. In the view of the monistic writers, in the ultimate analysis of law we find that man is at the root to all laws. All laws are made for men and men only in the ultimate analysis.

Criticism.—Monism is a very sound theory. It is very difficult to disprove the view of Kelsen that man lies at the root of all laws. But in actual practice states do not follow this theory. They contend that Municipal Law and International Law are two separate systems of law. Further, each state is sovereign and as such is not bound by international law. States follow international law simply because they give their consent to be bound and on account of other reasons.

(2) Dualism.***—In the view of the dualistic writers, international law and State law are two separate laws. "The Monist view of law is part of philosophy according to which totality is a single structure. But within the framework of the unitary universe is diversity of phenomenon ..... Differences are significant and the dualist considers that Municipal law differs markedly from international precepts." [3] Monism remained in vogue for a long time. Monism exercised a great influence upon international law, because it had close

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* See for I.A.S. (1957), Q. No. 2 ; I.A.S. (1968), Q. No. 2 ; I.A.S. (1963), Q. No. 5 ; P.C.S. (1976), Q. No. 10(e) ; P.C.S. (1974), Q. No. 5 ; P.C.S. (1972), Q. No. 3 ; P.C.S. (1985) Q. 2. ; P.C.S. (1995) Q 7(b) ; C.S.E. (1995) Q. 6(a).

** See also for P.C.S. (1977), Q. No. 1 ; P.C.S. (1987), Q. 2 ; C.S.E. (1986), Q. 5(a).

1. D.J. Latham Brown, Public International Law, London, Sweet & Maxwell, (1970), p. 265.
2. J.G. Starke, Introduction to Internaitonal Law Tenth Edition (Butterworths, Singapore, 1989) pp. 73-74.

*** See for I.A.S. (1973), Q. No. 11 (c).

3. D.J. Latham Brown, Supra Note 1, at p. 266.

association with natural law. In the 19th century, however, the existence of State-will and complete sovereignty of the State were emphasized. The conception of State-will was taken from Hegel, a German scholar and was further developed. Dualism is based on the complete sovereignty of States. The chief exponents of this theory are Triepel and Anzilloti. Triepel has pointed out the following differences between International Law and State law :

(a) *Regarding subject.*—Individual is the subject of State law, whereas State is the subject of international law.

(b) *Regarding origin.*—Origin of State law is the will of the State whereas origin of the international law is the common will of States.

Criticism.—It is not correct to contend that International Law is binding only on States. In the modern period, International Law is applicable on States, individuals and certain other non-State entities. Besides this, the conception of State-will as the source of State law is incorrect. In fact State-will is nothing but the will of the people who compose it. Similarly, it is not correct to say that the origin or source of international law is common will of the States. There are certain fundamental principles of international law which are binding upon the State, even against their will. "Furthermore, it may be objected to Triepel's theory that it does not explain the existence of a general International law. Even international customary law becomes particular law for Triepel, its rules apply only to the State which by conclusive acts have declared adherence to the 'tacit' agreements' upon which they rest—a view that is at variance with reality." [4] Anzilloti has tried to explain the difference between international law and State law in a different way. According to him, there is a difference between the fundamental principles of international law and State law. The fundamental principle of the State law is that laws enacted by appropriate legislative authorities are to be obeyed. The fundamental principle of international law is *pacta sunt servanda,* namely, agreement between States are to be respected. On this basis, Anzilloti contends that the legal systems of international law and States laws are different. It cannot be denied that *pacta sunt servanda* is an important fundamental principle of international law. But to assert that it is the only basis of international law seems to be far from truth. In fact, it is an important illustration of all the important fundamental principles of international law. It fails to explain the binding force of customary rules of International Law in regard to which the States have not given their consent.

Whether Monism or Dualism is the correct theory.—On the basis of above discussion, monism appears to be the correct theory but no theory can be complete in itself and it is not possible to include all the elements in it. The practice of States indicates that sometimes there is the primacy of international law, sometimes there is the primacy of the Municipal law and sometimes there is mixture of different legal system. For example in the *Greco-Bulgarian Communities* case,[5] The permanent Court of International Justice held, "it is a generally accepted principle of international law that in relations between powers who are contracting parties to a treaty, the provisions of the municipal law cannot prevail over the treaty." On the other hand, when the Municipal Courts find that the conflict between the International law and Municipal law is of such nature that cannot be avoided, they give primacy to the Municipal law. In this connection, *Mortensen* v. *Peters*[6] and *Sri Krishna Sharma* v. *The State of West Bengal*[7] deserve a special mention. From the technical point of view, Municipal law cannot give direction for any act which is prohibited under International law but in practice individuals are compelled to follow such laws.[8] Gould correctly observes : "As matters stand, each situation must be analysed by itself, including the tribunal before which litigation, if any, is

4. Torsten Gihl, "The Legal Character and Sources of International Law" (Stockholm, 1957), p. 59.
5. P.C.I.J. (1930), Series Bo. No. 17.
6. 8, Sessions Cases (5th Series), 93 (1906).
7. A.I.R. 1954 Cal. 598.
8. Edwin Corchard, "Relation between International Law and Municipal Law", Virginia Law Review. Vol. 27 (1940), p. 137.

brought in order to settle the question of which two conflicting rules of law of different orders prevail in the concrete dispute." [9]

(3) Specific adoption Theory.—According to the positivists, international law cannot be directly enforced in the field of State law. In order to enforce it in the field of Municipal Law, it is necessary to make its specific adoption. In short International Law can be applied in the field of Municipal law only when Municipal law either permits it or adopts it specifically. This view is generally followed by States in respect of International Treaties. It is argued that unless there is specific adoption of the International Treaties (such as Tokyo Convention Act, 1975 and Vienna Convention of Diplomatic Relations Act, 1972 enacted by Indian Parliament) or there is some sort of transformation, International Treaties as such cannot be enforced in the municipal field. While considering the International Covenants on Human Rights, the Supreme Court of India observed, in *Jolly George* v. *The Bank of Cochin*,[10] "The positive commitment of the States Parties ignites legislative action at home but does not automatically make the covenant enforceable part of the *corpus juris* of India".[11] As regards specific adoption of international treaties by Indian Parliament, the Anti-Apartheid (United Nations Convention) Act, 1981, the Anti-Hijacking Act, 1982, the Suppression of Unlawful Act against the safety of Civil Aviation Act, 1982 and the International Monetary Fund and Bank (Amendment) Act, 1982 deserve a special mention.

Criticism.—This view is not correct in respect of the whole of international law because there are many principles of international law (especially customary rules) which are applied in the field of municipal law without specific adoption.

(3) Transformation Theory.—The exponents of this theory contend that for the application of international law in the field of municipal law, the rules of international law have to undergo transformation. Without transformation they cannot be applied in the field of municipal law.

Criticism.—This theory is based an consensual theory which has already been criticized. It may also be noted that it is not necessary for all treaties to undergo the process of transformation for their application in the field of municipal law. There are several law-making treaties which become applicable to the States even without undergoing the process of transformation. This theory has been severely criticized by the critics. It is, therefore, incorrect to consider that the transformation from one to other is materially essential.[12]

(5) Delegation Theory.—As pointed out earlier, transformation theory has been severely criticized by a number of jurists. The critics of transformation theory have put forward a new theory called Delegation theory. These critics point out that the constitutional rule of international law permit each State to determine as to how international treaties will become applicable in the field of State law. Thus, in fact, there is no transformation nor is there specific adoption in every case. The rules of international law are applied in the field of State law in accordance with the procedure and system prevailing in each State in accordance with its Constitution.

Criticism.—This theory can be regarded simply as a reaction against the theory of "dualism" and other theories based on positivism, one may ask where are and what are the constitutional rules of international law? When and how these rules have delegated power to state constitutions? This theory is far from true. In fact, each-state is equal and sovereign and does not recognize any authority over and above it.

Thus there is a great controversy in regard to application of international law in the field of municipal law. In order to arrive at the right conclusion, it is necessary to go through the practice of States in this respect. But before we do so, it will be desirable first to consider the question of primacy. In other words, if there is a conflict between international law and State law, which will prevail ?

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9. Gould, An Introduciton of Internaitonal Law, Seventh Edition, at pp. 161-62.
10. A.I.R. 1980 S.C. 470.
11. Ibid at p. 474, per Krishna Iyer, J. for facts of the case see Appendix II.
12. Starke, Supra Note 2, at p. 76.

*Question of primacy.**—After discussing the different theories in regard to the relationship of State law and international law, it is necessary to conclude as to which will prevail in case of conflict ? According to the exponents of dualistic theory, there will be primacy of the State law. The basis of their view is that State is independent and sovereign. On the other hand, there is no uniformity of views among the writers of monistic theory. Some are of the view that there will be the primacy of international law. But some other jurists, such as Kelsen maintains that, in accordance with the facts and circumstances, there may be primacy of State law as well as international law. "Kelsen asserted a scientific indifference, though not a moral or political indifference, as between international and State monism, but contemporary jurisprudence for the most part deplores this indifference and posits the limitations of State Sovereignty by international law." [13]

Thus the view that State law will prevail in case of conflict between State law and international law is not correct. If we accept this theory, it will mean that there will be the primacy of more than 193 state legal systems. Acceptance of such theory will create anarchy and disorder in the international field. Besides this, this view is subject to the following criticism :

(a) If it is accepted that international law derives validity from the State Constitution, it will mean that with the disappearance of the State Constitution, the validity of the rules of international law will also disappear. This is a very absurd suggestion and cannot be accepted. Almost all the jurists are agreed on the point that the disappearance of State Constitution will not affect the validity of the rules of international law. Thus, the theory that international law is not necessarily binding on States sustained by so many theorists and jurists, though founded on essential error, can only aggravate this weakness in the system and postpone the maturity of that international legal order for which most of them profess to be working. It may also be noted that International Law exerts a definite check upon municipal law and holds the State responsible to the State whose nationals are injured by excesses in conflict with international law. There are innumerable precedents which have held States liable for their failure to perform international obligations." [14]

(b) When a new State is admitted to the family of nations, it becomes bound to obey the rules of international law even against its will. In fact, the duty of each State is to adopt its law and Constitution in accordance with the rules and principles of international law.

(c) Most of the States have accepted the supremacy of international law in their Constitutions.[15]

Thus, "since no doctrinal position seems to encompass all facts, it is likely that this controversy will continue indefinitely. Practice suggests that, in fact, a mixture of international law supremacy, municipal law supremacy and co-ordination of legal system exists." [16] In view of the prevailing controversy, each situation must be analysed by itself to decide as to whether there will be primacy of International Law or that of the municipal

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* See for I.A.S. (1971), Q. No. 4 ; see also the British and Indian Practice discussed later on in this Chapter, C.C.S. (1981) Q. 6 ; see also theories discussed above.

13. P. E. Corbett : The Growth of Law., (1971), p. 47.
14. See Edwin Borchard, "The Relation between International Law, and Municipal Law". Virginia Law Review, Vol. 27 (1940), p. 137.
15. See Felice Morgenstern, "Judicial Practice and Supremacy of International Law". BYBIL. Vol . XXVII (1950), p. 42 at p. 92. As pointed out by C.W. Jenks : "Where the doctrine of incorporation applies and International Law is accepted as part of law of the land, the clarification of international law by an international court or tribunal may be self-executory not only, in the sense that it determines the point of law at issue between the parties to the particular case but equally in the sense that the law as clarified becomes a part of law applicable as the law of the land in virtue of incorporation". The Prospects of Internaitonal Adjudication (1964), p. 690 ; see also Christoph H. Schreuer, "The Authority of International Judicial Practice in Domestic Courts", I.C.L.Q., Vol. 23, Part 4 (1947), p. 681 at pp. 645-86.
16. Edward Collins, International Law in a Changing World, p. 45.

law.[17] In practice, national courts endeavour to interpret Statutes in such a way as not to conflict the provisions of international law.[18]

STATE PRACTICES REGARDING THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND STATE LAW*

(1) British Practice.**—For the application of international law in Britain, distinction is maintained in regard to the customary rules of international law and the rules laid down by treaties. It will, therefore, be desirable to discuss them separately.

(A) *British practice in regard to customary rules of international law.*—In Britain, customary rules of International Law are treated as a part of British laws. British courts treat customary rules of international law as a part of their own law subject however to the following conditions. (a) Rules of international law should not be inconsistent with the British Statutes ; and (b) If the highest Court once determines the scope of a customary rule of international law, then all the courts in Britian are bound by it.[19]

Influence of the above practice.—Following is the influence of the British practice in regard to the customary rules of international law :—

(a) *Rules of Construction.*—The British Courts interpret the Parliamentary Statutes in such a way that they should not go against international law. In this connection the presumption is that Parliament never intends to violate international law. This rule is applicable only when the provisions of the Statutes are ambiguous. In case the provisions of the Statutes are clear and unabmiguous, they prevail over the rules of international law.

(b) *Rule of Evidence.*—In Britain, the rules of international law need not be proved through evidence.

Following are the exceptions of the British practice in regard to customary rules of international law :

(i) Acts of State do not come within the purview of the British courts, irrespective of the violation of international law.

(ii) *Prerogative powers of Crown.*—In some matters the British courts are bound to obey the prerogative powers of Crown. For example, if the Crown grants recognition to any State, the British courts are bound to accept it. They cannot question the matters coming within prerogative powers of the Crown.[20]

(B) *British Practice as to Treaties.*—In Britain the practice regarding the rule laid down by treaties is different from the practice in regard to the customary rule of international law. In regard to treaties, the British practice is based on the constitutional principles governing the relationship between Executive or Crown and Parliament. In regard to treaties, the matters, relating to negotiations, signatures, etc. are within the prerogative powers of the Crown. In Britain it is necessary that some type of treaties should receive the consent of Parliament. Either the Parliament accords its consent or adopts it in State law through the help of a statute. Such type of treaties are : (a) Treaties which affect the right of British citizens ; (b) Treaties which amend or modify common law or Statute law of Britain ; (c) Treaties which confer additional powers on Crown ; and (d) Treaties which impose additional financial burden on the Government. In addition to these, treaties which expressly provide that for their application the consent of the Parliament is required, consent of the Parliament is essential for their application. The consent of the Parliament is also necessary for the treaties which cede the British territory. Other types of treaties do not require the Parliamentary consent. Now the question arises if there is a

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17. See Supra Note 9.
18. See Mac:Leod v. U.S. 229 U.S. 434 (1913). See also *Mortensen* v. *Peters,* 18 Sessions Cases (5th Series) 93 (1906) ; *Shri Krishna Sharma* v. *The State of West Bengal,* A.I.R. 1954 Cal. 598.

* See also for P.C.S. (1987) Q. 2. (1963), Q. No. 5 ; I.A.S. (1954), Q. No. 1 ; P.C.S. (1968), Q. No. 6 ; P.C.S. (1985) Q. 2.

** See for I.A.S. (1974), Q. No. 1 (c) ; I.A.S. (1968), Q. No. 2 ; I.A.S. (1963), Q. No. 5 ; I.A.S. (1954), Q. No. 1 ; P.C.S. (1968), Q. No. 6 ; P.C.S. (1985) Q 2; C.S.E. (1935) Q. 6(a).

19. Starke, see supra note 2 at p. 78.
20. See Starke, ibid, p. 80.

conflict between a law enacted by Parliament and treaty, which will prevail. In this connection the House of Lords declared in *Ostime* v. *Australian Mutual Provident Society,*[21] that if a treaty has been enforced through law enacted by Parliament, then this will prevail over an earlier inconsistent British Law.

In *Solomon* v. *Commissioners of Customs and Excise,*[22] Diplock, L.J. observed that where by a treaty, the British Government undertakes to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can be achieved by legislation, the treaty, since in the English law is not self operating, remains irrelevant to any issue in the English writ until Her Majesty's Government has taken steps of legislation to fulfil its treaty obligations. Once the Government has legislated, the court must in the first instance construe the legislation. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out U.K.'s treaty obligations. But if the terms of the legislation are not clear and are reasonably capable of more than one meaning, the treaty becomes relevant for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including there in specific obligations; and if one of the meanings which can reasonably be ascribed to the legislation in consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption.

Reference may also be made to a more recent case namely. *International Tin Council case* (*J. H. Rayner Ltd.* v. *(Mining Law) Department of Trade and Industry*[23] This case relates to the claims of creditors against International Tin Council (ITC) after it failed to meet its depts. I.T.C. was an international organisation established by tin producing and tin importing States for regulating international marketing and production of tins. ITC was established by a treaty, the Sixth International Tin Agreement (ITA6) and it operated in United Kingdom because of a Headquarters Agreement between the ITC and the U.K. But these treaties were not incorporated in the national law of the U.K. although by an order of 1972, passed under the International Organisations Act, 1968, it was provided that the ITC would have the legal capacities of a body corporate. One of the creditors prayed that the U.K. Court, in view of the obligations of the State Parties to ITA 6, to enable claimants to recover directly against those States. Another creditor sought the appointment of a receiver of ITC so as to claim against the State Parties to ITA 6. Both these claims were rejected by the House of Lords unanimously.

Delivering the judgement Lord Oliver observed that treaties are not self executing. A treaty is not a part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned they cannot derive rights by treaties nor can they be deprived of the rights or subjected to obligations, and it is outside the purview of the courts not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant. However, it does not follow that the courts must never look at or construe a treaty. Where, for example, a treaty is directly incorporated into English law by Act of the Legislature its terms become subject to the interpretative jurisdiction of the court in the same way as any other Act of the legislature.[24]

21. (1960) A.C. 459 at p. 476 ; (1959) 3 All E.R. 245 at p. 248.
22. (1967) 2 Q.B. 116.
23. (1990) 2 AC 418.
24. *Fothergill* v. *Monarch Airlines Ltd.*, (1981), AC 251 relied upon.

Moreover, it is well established that where a statute is enacted in order to give effect to U.K.'s obligations under a treaty, the terms of the treaty may have to be considered as to the meaning or scope of the statute. Besides this, where parties have entered into a domestic contract in which they have chosen to incorporate the terms of the treaty, the court may be called upon to interpret the treaty for the purposes of ascertaining the rights and obligations of the parties under their contract.[25]

In the instant case, the creation and regulation by a number of sovereign states of an international organisation for their common political and economic purposes was an act *jure imperii* and an adjudication of the rights and obligations between themselves and that organisation or, *inter se*, can be undertaken only on the plane of international law. Since ITA6 is an unincorporated treaty, there is simply no way in which the case can be put for a claim by ITC against its members for an indemnity or contribution which does not, in the ultimate analysis, involve a reliance upon, and the interpretation of its provision, so that the claim is equally incapable of adjudication under the limb of the principle of non justiciability.

(2) American Practice.*—In America also, the practice regarding customary rules of international law and the rules laid down by treaty is different.

(A) *American practice regarding customary rules of international law.*—The American practice regarding customary rules of international law is more or less same as the British practice. In America also customary rules of international law are treated as a part of American law. In the leading case *Paquete Habana*,[26] Justice Gray remarked, "International law is a part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of rights depending on it are duly presented for their determination." For this purpose, "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations ; and, as evidence of these, to the works of jurists and commentators, who by years of labour, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for the trustworthy evidence of what the law really is." [27] Besides this the American courts also interpret the Statute of the Congress in such a way that may not go against international law.

(B) *American practice regarding rules laid down by Treaties.*—American practice regarding rules laid down by treaties is different from British practice. In case of international treaties, the American practice is not based on the constitutional rules governing the relationship of the executive and Congress. In America, everything depends upon the provisions of the Constitution. Article VI of the American Constitution provides that Constitution of the United States, all laws made in pursuance thereof and the international treaties entered into under the authority of the United States shall be the supreme law of the land. Thus international treaties have been placed in the same category as State law in America. It may, however, be noted that in America the practice is that if there is a conflict in between international treaty and a State law, whichever is later in date shall prevail. If there is a conflict between American Constitution and an International Treaty, the former (*i.e.* the Constitution) will prevail. Besides this, in America treaties have been divided into two categories—self-executing treaties and non-self-executing treaties. Self-executing treaties are those treaties which become applicable in America without any Act or consent of the Congres. . On the other hand non-self-

25. *Philipson* v. *Imperial Airways Ltd.*, (1939) A.C. 332 relied on
* See for I.A.S. (1974), Q. No. 1(c) ; P.C.S. (1968), Q. No. 6 ; P.C.S. (1980) Q. No. 2.
26. (1900) 175 U.S. 677 at p. 700 ; see also *U.S.* v. *Melekh*, (1960) 190 F. Supp. 67.
27. *Hilton* v. *Guyot*, 159 U.S. 113, 163, 164, 214, 215.

executing treaties are those which can become applicable in America only after the consent of the Congress or through its adoption by a specific Statute.

(3) Israeli Practice.—In *Eichman* v. *Attorney-General of the Govt. of Israel*,[28] the Supreme Court of Israel said that according to the law of Israel, which is identical on this point with English law, the relationship between municipal and international law is governed by the following rules :—

"(1) The principle in question becomes incorporated into the municipal law and a part of that law only after it has achieved general international recognition.

(2) This, however, only applies where there is no conflict between the provisions of municipal law and a rule of international law. But where a conflict does exist, it is the duty of the court to give preference to and apply the laws of the local legislature. True, the presumption must be that the legislature strives to adjust the laws to the principles of international law which have received general recognition. But where a contrary intention clearly emerges from the Statutes itself, that presumption loses its force, and the court is enjoined to disregard it.

(3)..... a local statutory provision, which is open to equivocal construction and whose content does not demand another construction, must be construed in accordance with the rules of public international law.[29]

(4) Greek Practice.—Article 28(1) of the new Constitution[30] of Greece provides that the generally accepted rules of international law, as well as international conventions from the time they are sanctioned by law and enter into force according to each one's own terms, shall be an integral part of internal Greek Law, and they shall prevail over any contrary provision of law. It, however, adds that the applications of the rules of international law and international conventions to aliens is always subject to the condition of reciprocity. As regards treaties, Article 36 of the Constitution provides that in respect of treaties on commerce, as well those on taxation, economic cooperation, and participation in international organizations or Unions, and any others that contain concession as to which under other provisions of the Constitution no provision can be made without a law, or that impose a burden upon the Greeks individually, shall have no force without sanctioning by a law voted by Parliament.[31]

(5) The French Practice.*—According to Articles 53 and 55 of the Constitution of the Fifth French Republic, international law is treated as a part of the law of France. The rules of customary international law are part of the law of France. Thus in this respect, the French practice is similar to those of the U.S. and U.K. As regards treaties, the French practice differs from the American practice. In France, international treaties and agreement concluded by France with other States, which are duly published, are administered and applied by the French Courts even though they are in conflict with the provisions of the Municipal Law of France and irrespective of the fact that they have been entered into earlier or later than the Municipal law in question. But like the American practice, the international agreement should not conflict with the French Constitution. In case there is a conflict between the two, the latter shall prevail.

(6) Soviet Practice.**—Article 29 of the draft Soviet Constitution provides : "The relations of the U.S.S.R. with other States shall be based on the observance of the principle of mutual renunciation of the use or threat of force, and of the principles of sovereign equality, inviolability of frontiers, territorial integrity of States, peaceful settlement of disputes, non-interference in international affairs, respect for human rights

28. (1962) 136 I.L.R. 277.
29. See L.C. Green, International Law Through Cases, Third Edition (1970), pp. 239-40.
30. Which came into force on June 11, 1975.
31. For detailed study see A.A. Fatouros, International Law in the New Greek Constitution" A.J.I.L., Vol. 70(1876), p. 492.

* See for I.A.S. (1963), Q. No. 5.
** See also for I.A.S. (1963), Q. No. 5.

and basic freedoms, equality and the right of peoples to decide their own destiny, co-operation between States, scrupulous fulfilment of commitments arising from universally recognized principles and norms of international law, and the international treaties signed by the U.S.S.R.[32] According to Soviet author,[33] a notable feature of the Soviet Constitution is that it formulates the principles underlying the Soviet Union's relations with other nations of particular importance is the principle of non-interference in internal affairs[34] and respect for human rights and basic freedoms. The Constitution puts on record the basic principle of modern international law that the co-operation of States in different spheres including that of human rights should not be misused for interference in each other's internal affairs. This principle is generally recognised and is contained in the U.N. Charter and many international agreements.

According to the principles of the Civil Legislation and Civil Procedure of the Soviet Union, in the case of conflict between international law and Soviet Federal Statute, the former shall prevail. But if there is a conflict between an international treaty and the provisions of the Soviet Constitution, the latter shall prevail over the former. The Soviet writers severely criticize the principle of the primacy of international law. So far as the question of the conflict between the Soviet Internal Statutes and the provisions of the international law is concerned, Soviet writers contend that in view of special nature of the State of Soviet Union, conflict of this type is not possible. As one Soviet author[35] puts it : "In the practice of the Soviet Union and of the countries of people's democracy, conflicts between rules of international law and those of the Internal Statutes are not possible. Socialist States, while strictly observing international law, can neither impose nor accept obligations which would be contrary to the principles of international law of the contracting parties. On the other hand, while strictly observing international agreements, they are unable to enact provisions of municipal law, which would be contrary to international agreements." It may, however, be noted that later on Soviet writers have accepted that the conflict is possible and in such a situation, as compared to international law, the provisions of the later internal statutes shall prevail.[36] In the view of some Soviet writers, in Soviet Union, international law is, in fact, the extension of the Soviet policy. According to the Soviet jurist, Vyshinsky, it is wrong to say that historically international law is a body of binding rules of conduct. In his view, international law is the external law of the State.

In Soviet Union, generally international treaties and international statutes are given almost the equal statuts. But the position is different in regard to customary rules of international law. In England and America, the general principle is that customary rules of international law are generally the part of the municipal law. But the Soviet Union gives more importance to the agreements and treaties. The customary rules of international law are regarded valid only after they have been approved by the Soviet Government. "The Soviet Government claimed the right to choose international obligations which were to constitute in force and to reject those which for various reasons were not to be honoured. The same also applied to international custom, international agreements, bilateral and multilateral, and international practice as evidence of customary law required confirmation by the Soviet Government even by the United States of America.[37] But the position has changed significantly after the breaking up of the Soviet Union and end of Communism over there. Consequently, the Soviet practice is likely to be revised in view of the rapid changes that are taking place in Russia and other former Soviet Republics.

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32. See New Times No. 24 (June, 1977) at p. 37 ; for full draft Constitution of the U.S.S.R. See Ibid, at pp. 34-48.
33. Vladimir Kartashkin, "The Draft Constitution of the U.S.S.R. and International Law", New Times, No 29 (July, 1977), p. 4 at p. 6.
34. For further elaboration of this princple see also Valentin Yaroslavtsev, "Non-Interference—A Basic Principle, New Times, No. 20 (May, 1977), p. 18.
35. See Kazimierz Grzybywski, Soviet Public International Law (A.W. Sijthoff, Leyden, 1970), p. 31.
36. Ibid. at p. 32.
37. Grzybywski, see supra note 35 at p. 28.

Yet another significant thing to be noted is the supremacy of Communist Party of the Soviet Union (CPSU) even in respect of external affair and hence its importance in the field of international law.[38] The supremacy of the CPSU in the U.S.S.R. in terms of internal law seems to have been recognised even by the United States of America.[39]

(7) The Chinese Practice.[40]—In the words of a Chinese writer[41]..... regardless of what the Bourgeoisic says—supremacy of international law over municipal law, supremacy of municipal law over international law, monist theory or dualist theory—all these theories concretely reflect the will of the Bourgeoisic and their historical changes are "solely determined by class interest." The Chinsese authors have never accepted the supremacy of international law over municipal law and have vehemently criticized this view.[42] But as pointed out by Jerome Alan Cohen and Hungdah Chiu, "The relation of international law to municipal law is not only of basic theoretical importance in the conduct of international activity. Yet Chinese writers rarely discuss this problem, and those who do, like Ying T'ao, almost exclusively confine themselves to criticisms of relevant Western theory and practice. These criticisms follow the arguments set forth in the Soviet legal literature." But Soviet authors have in addition, attempted to construct their own specific explanations of relationship between international law and municipal law.[43] Thus China has yet not articulated a definite theory to explain the relationship between International Law and Municipal Law.

(8) Austrian Practice and Practice in Netherlands and Switzerland.—Article 9 of the Austrian Constitution provides that the generally recognised rules of international law are part of Austrian law. This has been interpreted to mean the general recognition need not necessarily be universal and that the changes in these rules are automatically reflected in internal law. However, these rules may be overridden by ordinary laws. The same attitude prevails in countries like France. As regards the abrogation of treaties, like Switzerland and the U.S., Austria adheres to the view that laws enacted in violation of prior treaty, obligations are internally valid although they constitute an international tort. However, in case the ordinary rules referred to in Article 145 of the Austrian Constitution were enacted, the constitutional court can declare any law violating existing rules of international law invalid, whether embodied in treaties or not. It may also be noted that unlike in the U.S. the constitutional court of Austria refuses to review the constitutionality of international agreements. Thus, as pointed out by Ignaz Hohenveldern[44]..... the Austrain Constitution may be described as following a middle course between extrinsic monistic theory of the absolute supremacy of international law, over internal law and the principles according to which, in internal law, the will of the people, as expressed at any given moment by the majority of the *Nationalrat* should be supreme."

(9) Indian practice.*—Before the adoption of Indian Constitution the Indian practice in respect of relation of international law to internal law was similar to the British practice. After the adoption of the Constitution of India everything depended upon the provisions of Constitution. In order to know the position of International Law in the post-Constitution period, it is necessary to examine the relevant provisions of the Constitution of India. The most relevant provision is contained in Article 51 which runs as follows :

38. See Dieter Schroder "Supremacy of the Communist Party of the Soviet Union Recognized in International Law." A.J.I.L. Vol. 70 (1976), p. 322 at pp. 326-27.
39. Ibid, at p. 328.
40. See also Chinese definition and approach to International Law discussed earlier in Chapter 2.
41. Ying Tao, "Recognise the true Face of Bourgeoisic International Law from a Few Basic Concepts" KCWTYC No. 1 ; 47-49 (1960) in Jerome Alan Cohen and Hungdah Chiu, People's China and International Law, (Princeton, New Jersey, 1974), a. p. 101 at p. 104.
42. Ibid, at pp. 103-104.
43. Ibid, at p. 104.
44. Ignaz Seidl-Hohenvelden, "Relation of International Law to Internal Law in Austria", A.J.I.L., Vol. 49 (1955), p. 45 at p. 476.

* See for I.A.S. (1960), Q. No. 2 ; P.C.S. (1968), Q. No. 6 ; I.A.S. (1963), Q. 5 ; I.A.S. (1968), Q. No. 2 ; P.C.S. (1988) Q. 5.

"The State shall endeavour to—(a) promote international peace and security ; (b) maintain just and honourable relations between nations ; (c) *foster respect for international law and treaty obligations in the dealings of organised peoples with one another ; and* (d) *encourage settlement of international disputes by arbitration.*"

For the purposes of the present discussion, the most important provision is contained in Articles 51(c) noted above. It is, however, significant to note that this article specifically mentions "international law" and "treaty obligations." "It seems somewhat paradoxical that separate mention should be made of 'treaty obligations' as they undoubtedly constitute integral part of international law. No explanation is to be found in the Constituent Assembly debates either as to intent of Article 51 or the meaning and scope of the treaty 'international law' and treaty obligations. Prof. C.H. Alexandrowicz says that the expression "international law" in this paragraph connotes customary international law and that 'treaty obligations' stand for treaties. This interpretation would seem to be the most logical in the context of the article as well as of attitude of the Indian Courts to questions of international law." [45]

But Article 51 does not give any clear guidance regarding the position of international law in India as well as the relationship of municipal law and international law because this article is contained in Part IV of the Constitution of India. Part IV of the Constitution deals with the *Directive Principles of State Policy*. Article 37 of this Part clearly provides that the provisions contained in this Part shall not be enforceable by any court. "This Article (Article 51) falls in the Chapter on *'Directive Principles of State Policy'* which are non-justiciable. Secondly, it is doubtful if the expression State includes the courts also within its ambit and if the Directive Principles have been addressed to them too." However, it would be wrong to contend that Article 51 is of no relevance and provides no guidance at all. Article 37 which provides that provisions contained in Part IV of the Constitution are non-justiciable, adds in unmistakable terms that the principles therein laid down are "nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." The majority of constitutional experts in the country now subscribe to the view that simply because the principles contained in Part III are non-justiciable, it cannot be successfully contended that they are of no significance or even of less significance than the fundamental rights contained in Part IV which are justiciable. Amendments of the Constitution particularly XXIV and XXV Amendments, confirm this view. As noted above, the term "International Law' in Article 51 refers to international customary law. It is thus significant to note that both international customary law and treaty law have been treated on the same footing in Article 51. It may also be noted here that an analysis of judicial decision shows that in India dualism is followed. Nevertheless, a pertinent question arises as to whether the Constitution of India has altered the position prevailing in pre-Constitution period. In this connection, Article 372 (1) clearly provides : "Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to other provisions of this Constitution, all the *laws in force* in the territory of India immediately before the commencement of this Constitution, shall continue in force thereinbefore until altered or repealed or amended by a competent Legislature or other competent authority." [46]

Before the adoption of the Constitution of India, the British practice that customary rules of international law are part of the law of the land, applied in India also. This practice continued even after the adoption of the Constitution by virtue of the provisions of Article 372 until it was altered or repealed or amended by a competent Legislature or other competent authority.[47] It has, therefore, been aptly remarked : "It does not mean that the

45. M.K. Nawaz, "International Law on the Contemporary Practice of India : Some Perspective", Proc. ASIL. April 25-27 (1963), p. 275 at p. 278 ; see also C.H. Alexanderowicz, "International Law in India", ICLQ (1952), p. 292.
46. S.K. Agarwala, "India's Contribution to the Development of International Law—Role of Indian Courts" appearing in Asian States and Development of Universal International Law, Ed. by R.P. Anand (1972), p. 73.
47. See *T.K. Varred* v. *State of Travancore-Cochin*, A.I.R. 1956 S.C. 142 at p. 145.

doors of Indian Courts are entirely closed to the wide absorption of international customary law into municipal law. Under the British rule in India, the English Common law doctrines widely applicable in many fields. The Constitution of India did not alter that position for it provided for the continued operation of the 'law in force' immediately preceding the commencement of the Constitution. Therefore, on the analogy of the English Common law, the municipal courts of India have applied the provisions of the treaties entered into by India if they have been incorporated into municipal law through legislation, and the well recognised principles of international customary law have been applied because they are supposed to form part of the law of the land. It is thus the dualist view of international law which has been commenced by the British and Indian courts, *viz.*, that international law can become a part of municipal law only by specific incorporation." [48] Thus, Article 51 of the Constitution of India, in so far as it requires the various organs of State, to foster respect for international law and treaties would seem to strengthen rather weaken the legacy of the common law principle that international law is a part of the law of the land. This is so, notwithstanding, the imprecise formulation of Article 51. And constitutional declarations in India are not mere embellishments on paper. They reflect "law in action." [49]

Thus, so far as customary rules of international law are concerned, the position prevailing immediately preceding the commencement of the Constitution continues even after the coming into force of the Constitution. In India also customary rules of international law are part of the municipal law provided that they are not inconsistent with any legislative enactment or the provisions of the Constitution of India. As regards the treaty rules also, India follows more or less the British dualist view. That is to say, ordinarily, international law can become part of municipal law of India if it has been specifically incorporated. In *State of Madras* v. *G.G. Menon,*[50] the Supreme Court held : "The Indian Extradition Act, 1903, has been adopted but the Fugitive Offenders Act of the British Parliament has been left severely alone. The provisions of the Act could only be made applicable to India by incorporating them with the appropriate changes into an Act of Indian Parliament and enacting on Indian Fugitive Offenders Act. In the absence of any legislation on these lines it seems difficult to hold that sections of the Fugitive Offenders Act, have force in India by the reason of the provisions of Article 372 of the Constitution.[51] In this case, Mr. and Mrs. Menon were Advocates in Singapore (then a British colony). Mrs. Menon had also served as a member of the Legislative Council of Singapore. They came to India in July, 1952. The Colonial Secretary of Singapore requested the Government of India for their extradition for there were certain charges against them according to the law of Singapore. Rejecting the request for their extradition, the Supreme Court held : "The whole basis for the applicability of Part II of the Fugitive Offenders Act has gone ; India is no longer a British possession, no order-in-council can be made to group it with other British possessions. Those of the countries which still form part of British possessions and which along with British India were put into a group may legitimately decline to reciprocate with India in the matter of surrender of fugitive offenders on the ground that notwithstanding Article 372 of our Constitution, India was no longer a British possession and, therefore, the Fugitive Offenders Act, 1881, did not apply to India and they were not bound in the absence of a new treaty to surrender their nationals who may have committed extraditable offences in the territories of India." [52] The Supreme Court, therefore, concluded, "In these circumstances, it is not possible to work out the sections of the Fugitive Offenders Act and apply them to the situation that has arisen after the coming into force of the Constitution of India." [53]

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48. S.K. Agarwala, "India's Constitution to the Development of International Law—the Role of Indian Courts" in Asian States and the Development of International Law (1977), p. 73.
49. M.K. Nawaz, "International Law in the Contemporary Practice in India : Some Perspectives" Proc. ASIL, April 25-27 (1963), p. 275.
50. A.I.R. 1954 S.C. 517.
51. Ibid. at p. 519.
52. A.I.R. 1954 S.C. 517 at p. 519.
53. Ibid, at p. 520.

Reference may be made here to Article 253 of the Constitution which provides : "Notwithstanding in the foregoing provisions of this chapter *i.e.*, Chapter XI of Part XI, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at an international conference, association or other body." It would, however, be wrong to contend that the implementation of every treaty would require legislative aid. This was held by the Delhi High Court in *Shiv Kumar Sharma and others* v. *The Union of India and others*.[54] This case dealt with the implementation of the "Kutch Award" and the question was whether it involved cession of Indian territory. It also dealt with the question whether a constitutional amendment or legislation was necessary for implementation of the "Kutch Award." The court held that there was no cession of any territory belonging to India and no constitutional amendment was necessary for the implementation of the Kutch Award.[55] As regards the question if legislation was necessary for the implementation of treaty, Mr. S.K. Kapur, J., of the Delhi High Court made it clear that every treaty does not require legislative aid. His Lordship observed, "..... In India treaties do not have the force of law and consequently obligations arising therefrom will not be enforceable in Municipal Courts unless backed by legislation. Settlement of dispute as to boundary arises no such obligation requiring implementation in Municipal Courts. Cases may arise where a domestic law is in express terms extended to a named city and that city as a result of treaty settling a dispute like the present, has to be handed over to another country. In that case legislation may be necessary." [56] The same view was taken by the Supreme Court in *Maghanbhai Ishwarbhai Patel and others* v. *Union of India.*" [57] The Supreme Court said that a settlement of a boundary dispute cannot be held to be a cession of territory. The Supreme Court observed : "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 custom of nations, whose Constitutions are not sufficiently elaborate on this subject.[58] In this case Supreme Court seems to have followed the American practice regarding the distinction between 'self-executing' and 'non-self-executing' treaties.[59] While elaborating the law, the Supreme Court observed : "A treaty really concerns the political rather than the judicial wing of the State. When a treaty or award after arbitration comes into existence it has to be implemented and this can only be if all the three branches of Government to wit the Legislature ; the Executive and the Judiciary, or any one of them, possesses the power to implement it. If there is any deficiency in the constitutional system it has to be removed and the State must equip itself with the necessary power. In some *jurisdictions the compromise read with the Award acquires full effect automatically in the Municipal Law, the other body of Municipal Law*

54. A.I.R. 1969 Delhi 64.
55. Ibid, at p. 72.
56. Ibid, at p. 74.
57. A.I.R. 1969 S.C. 783 ; also appearing in I.J.I.L., Vol. 9 (1969), at pp. 234-278.
58. IJIL Vol. 9(1969) at p. 255 ; In re-Berubari Union and Exchange of Enclaves, A.I.R. 1960 S.C. 845, the Supreme Court had to decide whether any legislation was necessary for the agreement relating to Berubari Union. Since it involved the cession of Indian territory, the highest tribunal answered in affirmative. The Supreme Court observed : ".....the question as how treaties can be made by a sovereign State In regard to a cession of national territory and how treaties when made can be implemented would be governed by the provisions in the Constitution of the country. Stated broadly, the treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. Whether the treaty made can be implemented by ordinary legislation or by the constitutional amendments will naturally depend on the provisions of the Constitution itself." Ibid, at p. 857.
59. Besides the provisions of the American Constitution according to which all treaties entered into under the authorities of the U.S. are the Supreme Law of the Land (along with the provisions of the American Constitution and all laws made in pursuance thereof), in America treaties, are divided into two categories—'self-executing' and 'non-self' executing' treaties. Self-executing treaties are those which do not require any specific adoption and directly become applicable in the field of municipal law. Non-self-executing treaties are those treaties which can be applied in the field of municipal law only after their specific adoption by the Congress.

notwithstanding. Such treaties and awards are self-executing. Legislation may nevertheless be passed in aid of implementation but is usually not necessary." [60]

In *A.D.M. Jabalpur* v. *Shukla*[61] one of the questions, *inter alia*, for consideration of the Supreme Court was whether Universal Declaration of Human Rights and the two International covenants on Human Rights, 1966 were part of Indian municipal law. By majority the Supreme Court held that they were not part of Indian municipal law. In his dissenting opinion, however, H.R. Khanna, J. held that if there was a conflict between the provisions of an International treaty and the municipal law, it is the latter that will prevail. But if two constructions of the municipal law were possible the court should give that construction as might bring about harmony between municipal law and International law or treaty. In his view, the constitutional provision should be construed in such a way as to avoid conflict with the Universal Declaration of Human Rights. The view expressed by H.R. Khanna, J. seems to be rational and better.

Thus, in case of conflict between a provision of an International Treaty such as Article 11 of International Covenant on Civil and Political Rights to which India is a party and a provision of a State statute (such as section 51, (Proviso) and Order 21, Rule 37, Civil Procedure Code) it is the latter which shall prevail if the International Treaty in question has neither been specifically adopted in the municipal field nor has gone under transformation. This was held by the Supreme Court of India in *Jolly George Varghese* v. *Bank of Chochin*.[62] Krishna Iyer, J., who delivered the judgment of the Court quoted with approval the observation of A.H. Robertson in his book, "Human Rights in National and International Law" at p. 13. Iyer, J., added that Robertson rightly points out that international conventional law must go through the process of *transformation* into the municipal law before the international treaty can become an internal law.[63] His Lordship further observed : "The remedy for breaches of International law in general is not to be found in the law courts of the State because International Law *per se* or *proprio vigore* has not the force of law or authority of civil law till under its inspirational act actual legislation is undertaken. I agree that the Declaration of Human Rights merely sets a common standard of achievement for all people and all nations but cannot create a binding set of rules. Member States may seek through appropriate agencies, to initiate action when these basic rights are violated but individual citizens cannot complain about their breach in municipal courts even if the country concerned has adopted the covenants and ratified the operational Protocol. The individual cannot come to the Court but may complain to the Human Rights Committee, which in turn will set in motion other procedures. In short, the basic human rights enshrined in the International covenants ..... may at best inform judicial institutions and inspire legislative action with member States, but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of judicial authority." [64] His Lordship added, "The positive commitment of States parties ignites legislative action at home but does not automatically make the covenant an enforceable part of the *corpus juris* of India." [65] Justice Krishna Iyer, however, construed section 51 of the Civil Procedure Code in such a way as to avoid conflict with Article 11 of the International Covenant on Civil and Political Rights, 1966. He observed :

"Article 11 of the International Covenant on Civil and Political Rights only interdicts imprisonment if that is sought solely on the ground of inability to fulfil the obligation. Section 51 of Civil Procedure Code also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he incurs the liability to imprisonment under Section 51 of the Code, but this does not violate the mandate of Article 11 of the Covenant on Civil and Political Rights. However, if he once had the means but now has not or if he

60. I.J.I.L. Vol. 9(1969), p. 244 ; emphasis added.
61. A.I.R. 1976 S.C. 1207.
62. A.I.R. 1980 S.C. 470 : (1980) 2 SCC 360 ; For facts of the case See Appendix II.
63. See ibid, at p. 473.
64. A.I.R. 1980 S.C. 474.
65. Ibid.

has the money now on which there are other pressing claims, it is violative of the spirit of Article 11 of the Covenant to arrest and confine him to jail so as to coerce him into payment."

Thus Justice Iyer seems to reaffirming the above view of H.R. Khanna, J. in *A.D.M. Jabalpur* v. *Shukla.* This shows that in case there is no conflict between municipal law and International law or where two constructions of municipal law are possible, Indian Courts can give effect to International law by giving harmonious construction.

In *Civil Rights Vigilance Committee, S.L.S.R.C. Coliege of Law, Bangalore* v. *Union of India and others,*[66] the Kerala High Court followed and quoted the above observation of the Supreme Court in *Jolly George's* case. The facts in this case were as follows :

Geof Boycott and Geof Cook, the two cricket players of U.K. were included in the M.C.C. team scheduled to visit India between November 1981 and February 1982 to play six matches at different places in India. These two players had links with South Africa which practised policy of *apartheid.* The Government of India was a party to the Gleneagles Accord of June 12, 1977, entered into by the member countries of the Commonwealth wherein they reaffirmed their full support for the international campaign against *apartheid.* Boycott and Cook, as seen from the booklet issued in May 1981, by the U.N. under the title "Centre against the *Apartheid* 'were among the sportsmen blacklisted by the U.N. for having participated in sports events in South Affrica. However, the Government of India allowed the English Cricket team including those two players to come to the country and to play matches as scheduled.

The Civil Rights Committee presented a writ petition impugning the said action of the Government of India but the learned single Judge dismissed it holding, *inter alia,* that such impugned action being an act of state the Court had no jurisdiction to examine its validity and to grant the relief sought in the writ petition. Hence the present appeal was made. The Division Bench of the Karnataka High Court dismissed the appeal. Venkatchalaiah J. who delivered the judgment for himself and D.M. Chandrashekhar, C.J. observed "..... that the provision in Article 51 is not enforceable by any Court and if the Parliament does not enact any law for implementing the obligations under a treaty entered into by the Government of India with foreign countries, courts cannot compel Parliament to make such law. In the absence of such law, court cannot also, in our view enforce obedience of the Government of India to its treaty obligations with foreign countries...the Government of India's obligations under the Cleneagles Accord and obligations attached to its membership of United Nations, cannot be enforced, at the instance of citizens of this country or associations of such citizens, by Courts in India, unless such obligations are made part of the law of this country by means of appropriate legislation."

In *Gramophone Company of India Ltd.* v. *Birendera Bahadur Pandey,*[67] Chinnappa Reddy, J. of the Supreme Court observed that if in respect of any principle of international law the Parliament says 'no', the national court cannot say 'yes'. National court shall approve international law only when it does not conflict with national law. In case however the conflict is inevitable, the national law shall prevail.[68]

Present Legal Position.—But the position will be different when there is no conflict between International Conventions and the domestic law. As pointed out by the Supreme Court in *Vishaka* v. *State of Rajasthan,*[69] in the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality and right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards of sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with

66. A.I.R. 1983 Kant. 85.
67. A.I.R. 1984 S.C. 667.
68. Ibid. at p. 671.
69. AIR 1997 SC 3011.

its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of constitutional guarantee. This is implicit from Article 51(c) and the enabling power of Parliament to enact laws for implementing International Conventions, and norms by virtue of Article 253 read with Entry 14 of the Union List in the Seventh Schedule of the Constitution.

In this case, the Apex Court was dealing with the problem of harassment of working women. Delivering the judgement of the Three Judge Bench, J. S. Verma, C.J.I., observed that the meaning and content of the fundamental rights guaranteed in the Constitution are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment abuse. Independence of judiciary forms a part of our constitutional scheme. The International Conventions (especially Convention on the Elimination of All Forms of Discrimination Against Women) and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to International Conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.

In *Vineet Narain* v. *Union of India*[70] speaking for the Three Judge Bench, J. S. Verma, C.J.I., observed that there are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of the Supreme Court as provided in Article 144 of the Constitution. In a catena of decisions of the Supreme Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps is to cover the gap or the executive discharges its role.[71] Further, J. S. Verma, C.J.I., referred to *Vishakha* v. *State of Rajasthan*,[72] wherein it was pointed out that it is the duty of the executive to fill the vacuum by executive orders because its field is counterminous with that of the legislature and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions, to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.[73]

In *Apparel Export Promotion Council* v. *A. K. Chopra*[74] once again referred with approval the decision in *Vishaka* v. *State of Rajasthan*[75] for its "innovative judicial law making process". In the present case, a superior officer of the Corporation was found guilty of molesting and of having tried to physical assault a subordinate female employee. As a punishment, he was dismissed from service. But the High Court held that the occurrence as alleged had not taken place. Though the High Court did not find any fault with the finding as the unbecoming act of delinquent officer or with the conduct of inquiry yet the High Court interfered with punishment of dismissal on the ground that since the delinquent had not "actually molested" and had "not managed" to make physical contact with her, the punishment of removal was not justified. The Supreme Court held that what punishment was required to be imposed in the facts and circumstances of the case was a matter which fell exclusively within the jurisdiction of the competent authority and did not want any interference by the High Court. The entire approach of the High Court had been faulty. The impugned order of the High Court cannot be sustained on this ground alone. Reversing the order of the High Court, the Supreme Court further observed that there is another aspect of the case which is fundamental and goes to the root of the case and concerns the approach of the High Court while dealing with cases of sexual harassment at the place of work of female employee.[76]

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70. AIR 1998 SC 889.
71. Ibid. at pp. 914-915.
72. 1997 SC 3011 : 1997 AIR SCW 3043.
73. AIR 1998 SC 889 at p. 916.
74. AIR 1999 SC 625, 633.
75. AIR 1997 SC 3011.
76. AIR 1999 SC 625 at p. 632.

Dr. Ananad, C-J.I., further observed :

"In cases involving violation of human rights the courts must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between international norms and the domestic law occupying the field. In the instant case, the High Court appears to have totally ignored the intent and content of the international conventions and norms while dealing with the case."[77]

Earlier in the judgement Dr. Anand, C.J-I., observed :

"There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty—the two most precious Fundamental Rights guaranteed by the Constitution of India. As early as in 1993 at the ILO seminar held at Manila, it was recognised that sexual harassment of woman at work place was a form 'of gender, discrimination against woman'. The contents of fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facts of gender equality, including prevention of sexual harassment and abuse and courts are under a constitutional obligation to protect and preserve those fundamental rights. The sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admit of no debate. The message of the International instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and the Bejing Declaration which directs all State Parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at place of work which may vitiate working environment. *These international instruments cast an obligation on the Indian State to gender sensitise its laws and the courts are under an obligation to see the message of the international instruments is not allowed to be drowned.* The Supreme Court has in numerous cases emphasized that while discussing constitutional requirements, *Court and Counsel must never forget the core principle embodied in international conventions and instruments and as far as possible give effect* to be principles in those international instruments. The *Court are under an obligation to give due regard to International conventions and norms for construing domestic laws more so often when there is no inconsistency between them and there is a void in domestic law*"[78]

Last but not the least in a recent case, namely *Chairman, Railway Board & others* v. *Mrs. Chandrima Das and others*[79], the Supreme Court aptly observed that the International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory states and the meaning given to the words in such declarations (for example Universal and Declaration and Declaration on the Elimination of Violence Against Women) and covenants have to such as would help in effective implementation of those rights. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence.[80]

On the basis of the above discussion the legal position may be summarised as follows :

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77. AIR 1999 SC 625 at p. 634.
78. Ibid; see also with advantage *Prem Shankar* v. *Delhi Administration*, AIR 1980 SC 1535; *Macknnnon Mackenzie & Co.* v. *Andrey D. Costa*, (1987) 4 SCC 469; (1987) 2 JT (SC) 34, AIR 1987 SC 1281; *Sheela Barse* v. *Secretary Children's* Aid Society (1987) 3 SCC 50, 54; AIR 1987 SC 656, 658-659; *Vishaka* v. *State of Rajasthan*, (1997) 7 JT (SC) 384; 1997 AIR SCW 3043 : AIR 1997 SC 3011; *People's Union for Civil Liberties* v. *Union of India* (1997) 2 JT (SC) 311 : 1997 AIR SCW 1234 and *D. K. Basu* v. *State of West Bengal*, (1997) 1 SCC 416, 438 : 1997 AIR SCW 233, 248-249.
79. AIR 2000 SC 988.
80. *Ibid* at pp. 996-997.

It is the obligation of the courts not to ignore and to apply the provisions of International Conventions and Instruments on Human Rights in general and International Covenants in particular to interpret the constitutional provision relating to human rights. If there is a conflict between a provision of an international treaty and a provision of domestic law, the provisions of the domestic law shall prevail. But if two constructions of the provision of domestic law are possible, the court should give harmonious construction so as to be in accord with international treaty. If no domestic law is occupying the field or there is void in domestic law, and the constitutional provisions (fundamental rights) are of sufficient or wide amplitude to encompass the provision of international treaty, the provisions of international treaty can be read into the constitutional provisions. It may be noted here that what is true of human rights is also true of international law in general. It is on the basis of the above legal position that the relationship between the International Conventions or treaties and Indian law including the Constitution of India, which is the supreme law of the land, has to be appreciated and understood.

From the above discussion the following conclusions may be derived .[81]

(1) Customary rules of international law are treated to be part of domestic law in a large number of states and in case they do not conflict with existing municipal law, there is no need of their specific adoption.

(2) Only in a few states, customary rules of international law, without specific adoption are applied by municipal courts even in case of conflict with municipal statute or judge-made law.

(3) As regards practice relating to the application of treaties within the municipal sphere practice of state is not uniform.

(4) In large number of states, municipal courts give priority to the application of municipal law, irrespective of the applicability of rules of international law and the question of any breach of international law is left to be settled at the diplomatic level.

Concept of opposability.—The concept of opposability has been explained by Starke[82] with the help of the following illustration :—

"In a dispute before an international tribunal between two states, *A* and *B*, where State *A* relies upon some ground in support of its claim, State *B* may seek to invoke as against *i.e.* 'oppose' to State *A* some rule, institution or regime under State *'B'* domestic law in order to defeat the ground of claim set up by the State *A*. As a general principle, if the domestic rule, institution or regime is in accordance with international law, this may be legitimately 'opposed' to State *A* in order to negate its ground of claim but if not in accordance with international domestic rule, institution, or regime may not be so 'opposed'.

But for the applicability to this rule in respect of a treaty rule, it is necessary that the state against which rule is being invoked must be a party to treaty. In *North Sea Continental Shelf case*[83], it was held that Article 6 of the 'Geneva Convention on the Continental Shelf, 1958 containing the rule of equidistance for the delimitations of continental shelf common to adjacent states, was not opposable to German Federal Republic which had not ratified the convention. But in a subsequent case if a state which had ratified the convention including Article 6 without reservation, Article 6 would be opposable to such a state.

It may be noted here that even if a rule of domestic law is held to be non-opposable, the rule concerned will not cease to be valid rule in the domestic domain. The position will, however, be different if the domestic rule itself is held to be unconstitutional.

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81. See J.G. Starke, Introduction to International Law (Butterworths, Singapore, 1989) pp. 86-87.
82. Ibid. at p. 90.
83. I.C.J. Reports 1969 p. 3 at p. 41.

CHAPTER 8

SUBJECTS OF INTERNATIONAL LAW AND THE PLACE OF INDIVIDUAL IN INTERNATIONAL LAW

Subjects of International Law*

"A subject of rules is a being upon which the rules confer rights and capacity and imposes duties and responsibility ; whereas an object enjoys and is burdened by no such competence. The law commands its subjects but it merely regulates the use and disposition of objects"[1] Ordinarily international law deals with the rights and duties of the States. Ordinarily its rules are for States. Generally it is the States who enter into treaties with each other and are thus bound by its provisions. This does not, however, mean that other entities or individuals are outside the scope of international law. International law applies upon individuals and certain non-State entities in addition to States.

Various theories regarding subjects of International Law

Following are the three main theories prevalent in regard to the subjects of international law :

(1) States alone are subjects of international law.

(2) Individuals alone are the subjects of international law.

(3) States are the main subjects of international law, but to a lesser extent individuals and certain non-State entities, have certain rights and duties under international law.

*1. Only States are subjects of International Law.***—Some jurists have expressed the view that only States are the subjects of international law. In their view, international law regulates the conduct of States and only States alone are the subjects of international law. As pointed out by Percy E. Corbett : "The triumph of positivism in the late eighteenth century made the individual an object, not a subject of international law. This law more and more emphasised the separateness of States, making their sovereignty, indeed its basic principles." [2]

Criticism.—This view has been subjected to severe criticism by jurists. This theory fails to explain the case of slaves and pirates. Under international law, slaves have been conferred upon some rights by the Community of States. Similarly pirates are treated as the enemies of mankind and they may be punished for piracy by the States. But the jurists who subscribe to the view that only States are subjects of international law to reconcile these exceptions by contending that they are not the subjects, but objects of international law. They have argued that the treaties which confer certain rights over slaves and pirates impose certain obligations upon the States. If there is no such obligation of the States, the slaves cannot have any rights under international law. Hence the exponents of this theory regard pirates, slaves, etc., as the objects of international law. Prof. Oppenheim also subscribes to this view. In his view : "Since the Law of Nations is primarily a law between States, States are to that extent, the only subjects of the Law of Nations." [3] This view finds mention in the eighth edition of Oppenheim's book. In the ninth edition, the editors of his book have changed this view. According to the view expressed

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* See for I.A.S. (1971), Q. No. 3 ; P.C.S. (1984) Q. 10(a) ; P.C.S. (1985) Q. 1.

1. D. J. Latham Brown, Public International Law (London, 1970), p. 234.

** See for PC.S. (1972), Q. No. 2, C.S.E. (1992) Q. No. 5(b).

2. Percy E. Corbett, The Growth of World Law (Princeton, New Jersey, 1971), p. 178.

3. L. Oppenheim, International Law, Vol. I, Eighth Edition, p. 636.

in the ninth edition, "States are primarily, but not exclusively, the subject of international law. To the extent that bodies other than States directly possess some rights, power and duties in international law they can be regarded as subjects of international law, possessing international personality." [4] Further, "International law is no longer if ever was concerned solely with states. Many of its rules are directly concerned with regulating the position and activities of individuals, and many more indirectly affect them." [5] Thus, it is wrong to say that individuals are not the subjects of international law. In the view of Prof. Schwarzenberger, it is contradiction in terms to say that individuals are not the subjects but objects of international law because how can it be expected that individuals who are the basis of society may only be objects of international law. Thus, as a matter of fact, individuals are also the subjects of International law. In *Reparation for injuries suffered in the service of the U.N.*,[6] the International Court of Justice held "that the United Nations has the capacity to bring an international claim against the State for obtaining reparation when an agent of the U.N. suffers injury in the performance of his duties in circumstances involving the responsibility of State". The "Court, by implication, rejected the proposition that only States are subjects of international law".[7] Thus the traditional view that States only are the subjects of international law is not a rule of modern international law.[8]

It is now generally recognised that besides States, public international organisations, individuals and certain other non-State entities are also the subjects of international law.

2. *Only individuals are the subjects of international law**—Just contrary to the above theory, there are certain jurists who have expressed the view that in the ultimate analysis of international law it will be evident that only individuals are the subjects of international law. The chief exponent of this theory is Prof. Kelsen. Even before Kelsen, Westlake had remarked, "The duties and rights of the States are only the duties and rights of men who compose them." [9] Kelsen has analysed the concept of State and expressed the view that it is a technical legal concept and includes the rules of law applicable on the persons living in a definite territory. Hence, under international law the duties of the States are ultimately the duties of the individuals. Truly speaking there is no difference between international law and State law. In his view, both laws apply on the individuals and they are for the individuals. He, however, admits that the difference is only this that the State law applies on individuals 'intermediately' whereas international law applies upon the individuals 'mediately'.

Criticism.—Kelsen's views appear to be logically sound. But so far as the practice of the States is concerned it is seen that the primary concern of the international law is with the rights and duties of the States. From time to time certain treaties have been entered into which have conferred certain rights upon individuals. Although the statute of the International Court of Justice adheres to the traditional view that only States can be parties to international proceedings, a number of other international instruments have recognised the procedural capacity of the individual. This was the case not only in the provisions of the Treaty of Versailles relating to the jurisdiction of the Mixed Arbitral Tribunals, but also in other treaties such as the Polish-German Convention of 1922 relating to Upper Silesia in which—as was subsequently held by the *Upper Silesians Mixed Tribunal*—the independent procedural status of individuals as claimants before an international agency was recognized even against the State of which they were national. In the sphere of substantive law, the Permanent Court of International Justice

4. Oppenheim's International Law, Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, Ninth Edition, Longman Group UK Limted and Mrs. Tomoko Hudson, 1992, p. 16.
5. Ibid, at p. 846.
6. I.C.J. Rep. (1949), p. 174.
7. A.O. Obilade, "The individual as a Subject of International Law", I.J.I.L. Vol. 14 (1974), p. 90 at pp. 91-92.
8. Ibid, at p. 98.

* See for I.A.S (1969), Q. No. 2 ; I.A.S. (1966), Q. No. 2 ; for elaboration see also the third view and conclusion given below ; P.C.S. (1988) Q. 1. See also matter discussed under the heading "Place of Individuals in International Law" ; C.S.E. (1987) Q. 5.

9. Collected Papers (1914), Vol. I, p. 78.

recognized, in the advisory opinion relating to the *Postal Service in Danzig* that there is nothing in international law to prevent individuals from acquiring directly rights under a treaty provided that this is the intention of the contracting parties. A considerable number of decisions of municipal courts rendered subsequently to the advisory opinion of the Permanent Court expressly affirmed that possibility.[10] Reference may be made to the 1965 *Convention on the Settlement of Investment Disputes between States and Nationals of other States.* Through this convention it is provided that disputes between the States and nationals of other States who invest money will be resolved in accordance with the provisions of the said Convention. It is clear from this example that the view of Kelsen that international law applies upon the individuals only 'mediately' does not seem to be correct. There are many examples wherein international law applies upon individuals not only 'mediately' but also directly. It is wrong to say that pirates, slaves, etc. are only objects of international law. To say that they are only the objects of international law is nothing but to distort the facts.

But as Philip C. Jessup has aptly remarked : "But while I agree...that States are not the only subjects of international law, I do not go to the other extreme and say..... that individuals are the only subjects." [11] Although, individual possesses a number of rights under international law, his procedural capacity to enforce the observance of these rights is grossly deficient. In most of the cases claim on his behalf can be brought only by the State whose national he is and as pointed out by the Permanent Court of International Justice. "It is an elementary principle of international law that a State is entitled to protect its subjects when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects respect for the rules of international law"[12] one may, however, still argue that the substantive right belongs to the individual because the amount of the claim is based on the injury suffered by the individual and normally the award is given to him. It may, therefore, be concluded that the extreme view that the individuals alone are the subjects of international law cannot be accepted. Individuals are now recognized as subject of international law and they can now (although in a very few rather negligible cases) even claim rights against States (including his own),[13] but their procedural capacity to enforce their rights is grossly deficient. In practice, International law for its major part still deals with the rights and duties of States. Therefore, it would be absurd to contend that States are not the subjects of international law. The correct position therefore is that besides States, individuals, public international organisations and some non-State entities are also the subjects of International law.

(3) *States, individual and certain non-State Entities are Subjects.**—The third view not only combines the first and second views but goes a step ahead to include international organisations and certain other non-State entities as subjects of international law. This view undoubtedly appears to be far better than the first two views. Following arguments may be put forward in support of this view :

(i) In the present time, several treaties have conferred upon individuals certain rights and duties. International Covenants on Human Rights and 1965 Convention on the

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10. See Survey of International Law in Relation to the Work of Codification of the International Law Commission, Memorandum submitted by the Secretary-General of the U.N. Document A/CN, 4/1, Rev. I, Feb. 10, 1949, pp. 19-20.
11. Transnational Law (New Haven, Yale University Press, 1956), p. 3. In a later article, Judge Jessup wrote : ".....Our international legal realm no longer concentrates on relationship between States themselves. The break-through began, perhaps when it was recognised that 'international law', like national law, must be directly applicable to the individual, it must not continue to be insulated through the tradition that it dealt only with the rights and duties of States". "The Present State of Transnational Law", in the Present State of International Law (1973), p. 339 at p. 343.
12. The Mavrommatis Palestine Concessions Case (1924). Manely O. Hudson, World Court Reports (1934), Vol. i, p. 297.
13. See for Example European Convention on Human Rights, 1950 and International Covenants on Human Rights, 1966 and the Optional Protocol and also U.N. Commission on Human Rights.

* See also P.C.S. (1978), Q. No. 2.

Settlement of Investment Disputes between States and Nationals of other States deserve a special mention in this connection.

(ii) In *Danzing Railways Official Case,*[14]* the Permanent Court of Justice ruled that if in any treaty the intention of the parties is to confer certain rights upon some individuals, then international law will recognize such rights and will enforce them. In this case, Poland had acquired, under an international agreement, *Danzing Railway Co.* Under the said agreement Poland had agreed to provide certain facilities to the officials of the said railways company. Subsequently, Poland refused to provide those facilities to the officials of the Company. Poland argued that since the said agreement was in the form of an international treaty, it created rights and duties only in respect of the parties to the treaty and hence the individuals as such cannot possess any rights under the said treaty. The Permanent Court of International Justice rejected the contention of Poland and ruled that if the intention of the parties is to confer certain rights upon individuals then international law will not only recognize such rights of the individual but may also enforce them.

(iii) 1949 Geneva Convention on the Prisoners of War has conferred certain rights upon the Prisoners of War. These rights have been mentioned in Chapter on "Laws of Land Warfare."

(iv) The Nuremberg and Tokyo Tribunals propounded the principle that international law may impose obligations directly upon the individuals. As observed by the Nuremberg Tribunal, "Crimes against International law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced."**

(v) The Genocide Convention of 1948 has imposed certain duties directly upon the individuals. According to the convention, persons guilty of crime of genocide may be punished, no matter whether they are the head of the State, high officials or ordinary individuals.

(vi) In addition to the above example, a new trend or movement has started in the international field under which some rights are conferred upon individuals even against the States. A glaring example of this is the European Convention on Human Rights in 1950. Under the provisions of the said convention, European Commission and the European Courts were established. The European Commission is entitled to investigate the violation of human rights. It may, however, be noted that the case may go to the European Court on Human Rights only with the consent of the State concerned. The International Covenants on Human Rights, 1966, and the Optional Protocol represent the culmination of the benign trend (so far as human rights are concerned) that individual can claim rights directly (*i.e.* without the medium of the State) under international law.[15] It may also be noted that an individual who is the victim of the violation of human rights and whose State is the member of the U.N. may send a petition regarding violation of human rights by his own State to the U.N. Commission on Human Rights.

(vii) It is now generally agreed that international organisations are also the subjects of international law. In this connection the advisory opinion of the International Court of Justice in the case of *'Reparation for Injuries Suffered in the Services of United Nations'* may be cited. In this case the International Court of Justice decided that the United Nations is an International Person under international law. In the words of the Court "..... what it does mean is that it (U.N.) is a subject of international law and capable of possessing rights and duties and it has capacity to maintain its rights by bringing international claims."[16]

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14. P.C.I.J. (1928), Series B. No. 15.
* See for I.A.S. (1974), Q. No. 3(b) ; I.A.S. (1963), Q. No. 12 (d).
** Asked in I.A.S. (1973), Q. No. 2 ; For answer see also the two views regarding the subjects of International law discussed earlier in this Chapter.
15. For a detailed study of these covenants and the Optional Protocol ; see Chapter on "Human Rights" (Chapter 25).
16. I.C.J. Rep. (1949) p. 174.

(viii) In regard to the international criminal law, the law-making treaties have imposed certain obligations upon the individuals and the States have consented to it. In this connection, Narcotic Drugs Convention, 1961, Hague Convention for the Suppression of Unlawful Seizure of Aircrafts, 1970, etc. deserve special mention.

(ix) There are certain international treaties in regard to the minorities. These treaties have conferred upon minorities certain rights. The example of Articles 297 and 304 of the treaty of Versailles, 1919, may be cited in this connection. In some cases the protectorate States may also be treated as subjects of international law. Article 8 of the Constitution of the World Health Organization permits such States to become associate member. International Law also permits the recognition of insurgents. Bangladesh became a member of WHO long before it was admitted as a member of the U.N.

Percy E. Corbett has rightly written : "To me it has long meant that we are witnessing a transition in international legal development from a prolonged stage in which the predominant, not to say exclusive, concern was the regulation of the conduct of States as distinct entities, to one in which equal attention is given to promoting the growth of a body of world law transcending States, and applicable on a footing of equality to individuals, corporations, international organisations, and State"[17] Thus States are not the only subjects of international law. No doubt they are still the main subjects and the bulk of international law concerns with their conduct and relations but in view of the developing and changing character of international law, international organisations, some non-State entities, individuals are also the subjects of international law.

Place of Individuals in International Law*

As pointed out earlier, individuals are also treated to be the subjects of international law although they enjoy lesser rights than States under international law. Thus, "It is no longer possible, as a matter of positive law, to regard states as the only subjects of international law, and there is an increasing disposition to treat individuals, within a limited sphere, as subjects of international law." [18] In the beginning they were accepted as subjects of international law as an exception of the general rule, and number of jurists treated them as objects rather than the subjects of international law. This view has now been discarded. In the recent times, several treaties have been concluded wherein rights have been conferred and duties have been imposed upon the individuals. Some of the provisions of the international law under which rights have been conferred upon individuals and obligations that have been imposed upon them are as follows :—

(1) *Pirates.*—Under International law pirates are treated as enemies of mankind. Hence every State is entitled to apprehend them and punish them. Thus under international law it is the obligation of the parties not to commit piracy.

(2) *Harmful acts of individuals.*—For the amicable and cordial relation of the States it is necessary that the individuals should not be involved in such acts as may prove detrimental for the good relations among States. Therefore, under international law there are several such provisions which provide that the persons who commit such crimes may be punished. For example, if a person causes harm to the ambassador of another State, then under international law he deserves to be given stringent punishment. A leading case on the point is the *Ex parte Petroff,* 1971, decided by the Supreme Court of Australia, wherein two persons, who were found guilty of throwing explosive substances on the Soviet Chancery, were convicted.

(3) *Foreigners.*—To some extent internaitonal law also regulates the conduct of the foreigners. According to international law, it is the duty of each State to give to them those rights which it confers upon its own citizens.

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17. Percy E. Corbett, The Growth of World Law (1971), p. 184 : see also W. Friedmann, Law in a Changing Society (First Indian Reprint, 1970), p. 331.

* See for P.C.S (1972), Q. No. 2 : For answer see also the theories regarding subjects of International law discussed earlier, P.C.S. (1985) Q. 10(a) ; C.S.E. (1987) Q. 5(b).

18. Oppenheim's International Law, note 4, at pp. 848-849.

(4) *War criminals.*—War criminals can be punished under international law. This conception is based on the principle that rules relating to war crime are not only for the States, but individuals are also bound by them. Nuremberg and Tokyo Tribunals have established the principle in unequivocable and unambiguous terms that since crimes under international law are committed by individuals, only by punishing them the provisions of international law can be enforced.

(5) *Espionage.*—Espionage is a crime under international law. Hence, when the spies are apprehended, they may be punished.

(6) Under some treaties individuals have been conferred upon some rights whereby they can claim compensation or damages against the States. For example, the Treaty of Varsailles, 1919, provided under Art. 297 that any individual could file suit against Germany for compensation or damages.

(7) The United Nations Charter has also given a place of importance to the rights of individuals. The preamble of United Nations Charter begins with the words, "Peoples of the United Nations". This is not incidental but deliberate and meaningful. There are a number of provisions of the U.N. Charter such as Article 1(3), Article 13(1)(b), Article 55(c), Article 62(3), Article 68 and Article 76 (c) which deal with individuals. Besides this, the United Nations adopted the Universal Declaration of Human Rights in 1948. This Declaration mentions in detail the fundamental rights and freedoms of the individuals. Moreover, in 1948, the General Assembly of the United Nations adopted the Genocide Convention. This convention imposes an obligation upon the individuals in respect of the crimes of genocide. It is, therefore, clear that the United Nations Organisation has given much significance to the rights of individuals.

(8) Besides the above-mentioned examples, some very important steps are being taken in respect of the rights of individuals under international law. International law now confers upon the individuals certain rights not only 'mediately' but 'immediately'. An example of this is Convention on the Settlement of Investment Disputes between States and the Nationals of other States. As is clear from its very name, the persons who invest their money in foreign countries have been conferred upon certain rights against the State concerned.

(9) The International Covenant on Civil and Political Rights, 1966 and the Optional Protocol confer rights directly upon the individuals. These along with the U.N. Commission of Human Rights have enabled the individuals to send petitions even against their own States.

Conclusion : "States are becoming increasingly realistic in acknowledging the position of the individual in the legal order. It seems that the basis of law is being shaken. International law today cannot without qualification be described as the law between States ..... The individual has become a subject of international law not having the same quality as a State but capable of asserting his rights himself before some international tribunals although lacking procedural capacity to bring actions in most cases. Article 34 of the International Court of Justice should be amended in order that individuals may have access to the court." [19] Further, "The legal order will continue to be imperfect as long as it faces new challenges such as apartheid and modern technological advance, and the individual as subject of international law will continue to play an important role in the development of the law." [20] Thus slowly and gradually individuals are occupying place of importance under international law. They are no more mere objects of international law. They are in fact the subjects of international law. It cannot, however, be denied that even today States are the main subjects of international law and the bulk of international law deals with their rights and duties. To conclude in the words of Wright.

19. A.O. Obilade, "The Individual as Subject of International Law", I.J.I.L., Vol. 14(1974) p. 90 at 98.
20. Ibid, at p. 99.

"Justice requires that the power of the States be curbed so far practicable in consideraiton of these other interests. In a distant future, these interests, especially the intersts of the individuals for whose welfare other institutions exist in both democratic and socialist theory, may achieve a better balance in Universal Law with the national interest of Sovereign States." [21]

21. Q. Wright, "Towards a Universal Law or Mankind", Columbia Law Review, Vol. 63 (1963), pp. 445-46.

CHAPTER 9

NATURE OF STATE AND DIFFERENT KINDS OF STATES AND NON-STATE ENTITIES

State is the main subject of international law. It is very difficult to define the term 'State', but certain jurists have made their endeavours to this respect. According to Salmond, State is a community of people which has been established for some objectives such as internal order and external security.[1] In the view of Lawrence, State is a society which is politically organised and its members are bound with each other by being under some central authority and most of the people automatically follow the rules of this central authority.[2] As pointed out by Oppenheim, the existence of State is possible only when people of State have settled under highest government authority and habitually follow its orders.[3] According to Prof. H.L.A. Hart, "The expression 'a State' is ..... a way of referring to two facts : First, that a population inhabiting in a territory live under that form of ordered government provided by a legal system which its characteristic structure of Legislature, Courts, and primary rules ; and secondly, that the government enjoys a vaguely defined degree or independence." [4] Starke has rightly pointed out that an ideal definition of the term 'State' is not possible. But in the modern period it is finally settled as to what are the essential elements of State.[5]

Essential Elements of a State.—According to Article 1 of Montevideo Convention, 1933, "The State as a person of international law should possess the following qualifications : (*a*) A permanent population ; (*b*) A definite territory ; (*c*) A Government ; and (*d*) Capacity to enter into relations with other States". Oppenheim[6] has pointed out the following essential elements of a State : (1) Population ; (2) A definite territory ; (3) Government ; and (4) Sovereignty. The famous jurist Holland has added one more essential element, namely, to some extent, 'civilization' because of which the State becomes the member of international community.

Functions of States.—Modern period has witnessed revolutionary changes in regard to functions of a State. Previously there was the conception of a police State, according to which, the essential functions of a State were to maintain internal peace and order and to defend it from external aggression. It cannot be denied that even today these are the essential functions of a State but in the present period the conception of State has undergone significant changes. Instead of the conception of police State, the present conception is that of a welfare State. That is to say, for the benefit of the people, State has to perform many social, economic, educational and cultural functions. But these functions do not come under the category of essential functions. They are in fact subsidiary functions. Nevertheless, these are also the functions of a State in the modern time and the importance of these functions is constantiy increasing.

Concept of Sovereignty*

In the view of jurists, only sovereign States are entitled to be the members of the Family of Nations. According to Austin, "If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society, (including determinate superior) is a society political and independent". In relation between States,

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1. Op. cit. Salmond on Jurisprudence, pp. 129-30
2. T.J. Lawrence. The Principles of International Law, Seventh Edition, p. 48.
3. L. Oppenheim, International Law, Vol. I, Eighth Edition, p. 118.
4. H.L.A. Hart, The Concept of Law (Oxford, 1961), p. 216.
5. J.G. Starke. Introduction to International Law, Tenth Edition, (Butterworths, Singapore 1989), p. 95.
6. Oppenheim, *Supra* Note 3, at pp. 118-19.

* See also for C.S.E. (1991) Q. 6(a) ; C.S.E. (1993) Q. 5(c).

'Sovereignty has been defined by Max Huber in *Island of Palmas Arbitration*. In his words : "Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other State, the functions of a State." [7] In the modern period the credit of propounding the concept of sovereignty goes to John Bodin who in 1576 in his book, *"De-Republic"* has put forward the conception of sovereignty. According to him, the essential element of sovereignty is the law-making power of the sovereign. Since the sovereign makes the law, he does not intend to bind himself by that law. But he hastened to add that the sovereign is however bound by the Divine Law. Slowly and gradually this concept of sovereignty became distorted and it became synonymous with absolution. In sixteenth century, Hobbes expressed that by sovereignty is meant the absolute and complete power of the sovereign. It came to be defined as the Supreme power over a definite territory unrestricted by any earthly power. Every sovereign State can exercise the functions of State, to the exclusion of all other States. In other words, it exercises complete sovereignty within its territories. Since territories of a State are circumscribed by its boundaries, it has been rightly said, "Boundaries are one of the most significant manifestation of State territorial sovereignty". According to Austin, sovereignty is indivisible and illimitable.

In International law of a good example of the application of the principle sovereignty is the 'Theory of auto-limitation'. According to the theory, States follow international law because they have by their consent reduced their powers. This principle is based on the principle of State sovereignty. The chief exponents of this principle were Anzilotti and Triepel. It has been pointed out in an earlier chapter that the theory of auto-limitation suffers from several defects and does not appear to be correct. It has been severely criticized by many jurists. In the modern period, there have been revolutionary changes in respect of the theory of sovereignty of States. In the present time it is not proper to say that State sovereignty is indivisible and illimitable. Ordinarily over one and the same territory there can be only one sovereign. In practice, however, there can be several exceptions such as[8]—

(1) the first and probably the only real exception is the condominium which exists between two or more States exercising sovereignty jointly over a territory, *e.g.*, condominium of Austria and Prussia over Schleswig Holstein Lanenburg from 1864 till 1866, condominium of Great Britain and Egypt over Sudan from 1898 to 1955 and condominium of Great Britain and France over the New Hebrides (now the independent State of Vanuatu) can be cited as example.

(2) One State exercising sovereignty which is, in law vested elsewhere, *i.e.*, where a territory is administered by a foreign power with the consent of the owner State. For example, Great Britain exercised sovereignty over Turkish Island from 1878 to 1914.

(3) The third exception is that of giving territory on lease or pledge by the owner State to a foreign power. For example, in 1998 China leased the district of Kiaochow to Germany, Wei-Hai-Wei and the land opposite the Island of Hongkong to Great Britain, Kuang Chouwan to France and Port Arthur to Russia.

(4) Where the use, occupation and control of the territory are granted in perpetuity by the grantor State to the other State. For example, in 1903 the Republic of Panama transferred to the United States of America a ten-mile territory for construction, administration and defence of the Panama Canal.

(5) The next exception is that of a federal State because sovereignty is divided between a federal State and its member States.

(6) The last exception is that of a mandated or trust territory. The State, which is given a mandate or a trust territory, exercises sovereignty over it although the territory is not its own.

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7. See A.J.I.L. (1928), Vol. 22 at p. 875.
8. See Oppenheim's International Law, Vol. I, edited by Sir Robert Jennings and Sir Arthur Watts, Ninth Edition, Longman Group UK Limited and Mrs. Tomoko Hudson, 1992, pp. 565-572.

In the present time, States have accepted many restrictions under international treaties and in international institution whereby they have impliedly surrendered a part of their sovereignty. For example, the members of the United Nations and International Labour Organization, have accepted many obligations because of which their sovereignty has ceased to be illimitable and indivisible. Thus, "Sovereignty" has a much restricted meaning today than in eighteenth and nineteenth centuries, when, with the emergence of powerful highly nationalised States, few limits on State's autonomy were acknowledged. At the present time there is hardly a State which in the interests of the International community, has not accepted restrictions on its liberty of action. Thus most states are members of the United Nations and the International Labour Organisation (ILO), in relation to which they have undertaken obligations limiting their unfettered discretion in matters of international policy. Therefore, it is probably more accurate today to say that the sovereignty of a State means the *residuum* of power which it possesses within the confines laid down by international law." [9] Judge Lauterpacht has also rightly remarked : "International Law, whether codified or not, implies essentially a restriction of the sovereignties of States whose relations it governs." [10] Though this is true, even new States do not accept this sound proposition in theory as well as practice. There is much force in the following words of Prof. Edward Hambro : "In the world of the twentieth century no frontal attack on national sovereignty will avail. The charter is based on the Sovereign equality of the Members. But—and this is very important indeed—no rule prevents the States from disposing of part of their freedom of action for the common good." [11] 'Sovereignty has been defined[12] as "the supreme authority" in an independent political Society. It is essential, indivisible and illimitable. However, as remarked by Sabyasachi Mukharji, C.J. in *Union of India* v. *Sukumar Sen Gupta*.[13] "it is now considered and accepted as both divisible and limitable and we must recognise that it should be so. Sovereignty is limited externally by the possibility of general resistance. Internal Sovereignty is paramount power over all action within, and is limited by the nature of power itself."

His Lordship quoted with approval the above-mentioned passage from Starke's book and observed : "Any State in the modern times has to acknowledge and accept customary restraints on its sovereignty inasmuch as no State can exist independently and without reference to other States. Under the general international law the concept of inter-dependence of states has come to be accepted." [14]

Further, "..... the complexities of modern developed societies need peaceful co-existence, if the world is to survive. Amicable and peaceful settlement of boundary disputes are in the interest of international community. The older and absolute ideas of sovereignty and independence has thus necessarily to be modified in the dawn of the 21st century." [15]

It may be noted that the world today (*i.e.* in 1994) bears little resemblance to the world of 1945 when the U.N. system was set up. A recent study, "Tomorrow's United Nations" has pointed out : "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."

Since the Gulf War (1991) attempts have been made to bring about changes in the

9. Starke, *Supra* Note 5, at 100 ; see also Oppenheim, *Supra* Note 3, at p. 123.
10. H. Lauterpacht, "Codification and Development of International Law", A.J.I.L., Vol. 49 (1955), p. 16 at p. 38.
11. Edward Hambro, "International use of the sea bed" in the Law of the sea, edited by Lewis M. Alexander (1973), p. 216 at 219.
12. See P.G. Osborne, A Concise Law Dictionary, 5th Edition, p. 297.
13. AIR 1990 SC 1692 at p. 1701.
14. *Ibid*, at p. 1706.
15. Ibid. at pp. 1707-1708.

traditional concept of national sovereignty. Being encouraged by the United Nations intervention on behalf of the Kurdish people of Iraq, several western countries have expressed the view, in the last session of the General Assembly, that internal disorder and violations of human rights by Governments should warrant collective international action through the United Nations. France went a step ahead and suggested that the charter of the United Nations be amended to accommodate the envisaged activist role of the world body. But this view found enthusiasm for the U.N. as an agent of collective security in the quicksilver of shifting international relations is being viewed with alarm by developing countries including India and China. Both India and China did their best to dissuade the Security Council from passing a resolution allowing the Security Council interference in the civil war in Yugoslavia under the reasoning that it was a threat to international peace and security.

In his address to the U.N. General Assembly, Mr. Roland Dumes, Foreign Minister of France, cited the example of the U.N. intervention on behalf of the Kurdish people and said that every people that requested the right to self-determination and Sovereignty were entitled to it so long as they did it through forums like the U.N. He added that the European Community had showed that lasting peace could be established only through "the sharing of national sovereignties". The developing countries, however, view with alarm and fear this new found enthusiasm of the western countries for the activist role of the U.N. because in their view, and rightly too, the new ideas contains too many elements from the concept of "empire" and its mission of civilizing the Colonized world. Thus the traditional concept of national sovereignty is under a serious strain. It is in the interest of the developing countries to watch and respond continuously the new ideas relating to sovereignty especially the enthusiasm for activist role of the U.N. in respect of human rights.

Principle of the Equality of States*

As the members of the international community, in principle, all States are equal. This equality is due to their international personality. Despite the dissimilarity in respect of their territories, population, power, civilization, prosperity etc. all States as international persons are equal. According to Oppenheim,[16] following are the consequences of this legal equality :

(a) When any question is to be decided by consent, each State is entitled to have one vote. (But there are exceptions to this rule, such as the veto of the permanent members of the Security Council).

(b) Legally, the importance of the votes of the weak as well as strong nation is same. There are some exceptions of this rule also.

(c) No State can exercise jurisdiction over another State. The Courts have enforced this rule in many cases such as *Duff Development Co. Ltd.* v. *Govt. of Kelantan.*[17] *The Parliament Belge,*[18] *Mighell* v. *Sultan of Johore,*[19] *De Haber* v. *The Queen of Portugal.*[20] *The Exchange* v. *McFaddon,*[21] *Vavasseur* v. *Krupp,*[22] *and, The Constitution.*[23]

(d) Generally, the Courts of a State cannot challenge the validity of the official acts of another State so far as these acts are related to the jurisdiction of that State. *A.M. Luther Co.* v. *Sagor & Co.,*[24] *Russian Commercial and Industrial Bank* v. *Comptosird*

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* See for I.A.S. (1975), Q. No. 8(a) ; I.A.S. (1958), Q. No. 4 ; P.C.S: (1966), Q. No. 7 ; For Sovereign equality under the U.N. See also matter discussed under the heading "Principles of the United Nations" under the Chpater "Principles, Purposes, Membership, etc. of the U.N." ; See also for P.C.S. (1978), Q. No. 4.

16. See Oppenheim, *Supra*, note 3, at pp.263-67.
17. (1924) AC 79.
18. (1880) 5 PD 197.
19. (1894) 1 QB 149.
20. (1851) 17 QB 171.
21. (1812) 7 Cranch 116.
22. (1878) LR 9 Ch. D. 351.
23. (1879) 4 PD 39.
24. (1921) 3 KB 532.

Escompte,[25] *Banque Internationale* v. *Goukassow,*[26] and *Underhill* v. *Hernandez,*[27] deserve mention in this connection.

Although in principle all States are equal, in reality they are not equal. They are unequals in respect of their respective power, territory, property, etc.[28] The U.N. Charter is based on the principle of 'sovereign equality' of States but as pointed out by P.A. Sorokin, in reality great powers are unequal to small States (and legally also because they possess the power of veto under the charter).[29] Thus the equality of States is a general principle but there are several important exceptions of this principle.

A significant departure from the principle of equality was made under the Covenant of the League of Nations. It manifested itself in the composition of the Council and to some extent, in the principles relating to the membership of the Governing Body of the International Labour Organisation. The principle of 'the sovereign equality of its members' constitutes a significant landmark in the gradual modification of the traditional doctrine of equality of States, while the principle of equality of States has been strictly adhered to in the composition of the General Assembly, it has been greatly diluted in the composition of the Security Council. The principle of sovereign equality of States has also been modified significantly in the Constitution of the World Bank, International Monetary Bank and some other specialized agencies. The principle of sovereign equality of State under the U.N. Charter has been discussed in a little greater detail under the heading 'Principles of the U.N.' under the chapter entitled Purposes, Principles, Membership, etc. of the U.N."

Rights and Duties of States*

The doctrine of basic or fundamental rights and duties was enunciated by the *naturalist* writers. In their view, the doctrine of fundamental rights and duties owns its existence to the Law of Nature. There are certain rights which are inherent in the very nature of States and may, therefore, be regarded as the fundamental rights of States. As pointed out by Oppenheim, "Until the last two decades of the nineteenth century there was general agreement that membership of the international community bestowed so-called fundamental rights of State. Such rights were chiefly enumerated as the rights of existence of self-preservation, of equality, of independence to territorial supremacy, of holding and requiring territory, of intercourse, and of good name and reputation. It was maintained that these fundamental rights are a matter of course and self-evident since the community of nations consists of sovereign States. But no unanimity existed with regard to the number, the appellation and the contents of these alleged fundamental rights." [30] Further, "they are rights and duties which do not arise from treaties between States, but which the States customarily enjoy and are subject to simply as international persons, and which they grant and receive reciprocally as members of the community of nations." [31] It may be noted here that the theory of fundamental rights has been subjected to severe criticism.[32] According to the positivist writers, there are no fundamental or inherent rights

25. (1923) 2 KB 630.
26. (1923) 2 KB 682.
27. (1897) US 250, 11 Sup. at 83.
28. As pointed out by Oppenheim "Legal equality must not be confused with political equality. The enormous differences between States as regards their strength are the result of a natural inequality which, apart from rank and titles, finds its expression in the Province of policy. Politically, States are in no manner equals..... But, however, important the position and the influence of the Great Powers may be, they were not before the establishment of the League of Nations derived from a legal basis of rule. Great powers did not enjoy any superiority of right, but only a priority of action. Nor has a State the character of a Great Power by law. It is nothing else than actual size strength, and economic influence which makes a State a Great Power..... apart from the covenant of the League of Nations, hegemony of the Great Powers was prior to the charter of the United Nations, a political and not a legal one". *Supra* note 3 at pp. 275-277.
29. See P.A. Sorokin, "The Reconstruction of Humanity"; pp. 12-17; see also Kelsen, Yale Law Journal, Vol. 53 (1944), pp. 207-220.
* See for IAS (1974), Q. No. 3(c).
30. Oppenheim, Supra note 3, at pp. 259-60.
31. *Ibid* at p. 261.
32. For criticism see "Theory of Fundamental Rights" discussed under Chapter 2.

and duties of States. The rights so referred are not inherent but have arisen out of historical development and their growth can be traced. In the view of the positivists, rights and duties of States have arisen only out of customs and treaties. In their view, consent is the basis of international law. They also contend that the distinction between fundamental and non-fundamental rights and duties of States is unjustified. Rights and duties of the States are in fact the rights and duties which have been recognised by the community of States. Although there is much force in the above criticism, it cannot be accepted as a whole. Whether we call them basic or fundamental, there seems to be a general consensus in respect of certain rights and duties. Some of the more important of such rights include (*i*) sovereignty and independence of States ; (*ii*) equality of States ; (*iii*) territorial jurisdiction ; and (*iv*) right to self-defence and self-preservation. So is the case with certain duties which include (*i*) duty not to resort to war ; (*ii*) to fulfil treaty obligations in good faith, and (*iii*) the duty of non-intervention. At present sovereignty is deemed neither to be indivisible nor unlimited. In the interest of international community and on the basis of reciprocal rights and duties, no State can now claim absolute sovereignty. Independence of States denotes certain rights, powers and privileges under international law. Some of the rights, associated with the independence of a State are (*i*) power exclusively to control its own domestic affairs; (*ii*) power to admit or expel aliens ; (*iii*) privileges and immunities of diplomatic envoys in other States, and (*iv*) exclusive jurisdiction over crimes committed within its territory. Certain duties are also associated with the independence of States. The duty not to perform act of sovereignty on the territory of another State, duty not to allow in its territory preparations which are prejudicial to the security of another State, duty not to intervene in the affairs of another State etc. are such duties.[33]

Several efforts have been made to formulate and codify rights and duties of States. Some of the more important efforts which deserve a special mention are : 'Declaration of rights and duties of Nations' proclaimed by the American Institute of International Law in 1916; Montevideo Convention of 1933, relating to the Rights and Duties of States, and the Bogota Charter of the Organisation of American States of 1948 which includes a Chapter on fundamental rights and duties of States. Besides this in 1947 the International Law Commission prepared a draft declaration of Rights and Duties of States on the basis of a proposal made by Panama. The General Assembly transmitted it to the Member States of the U.N. for their consideration.[34] It is significant to note that the Draft included 14 basic articles incorporating certain traditional rights such as independence, territorial jurisdiction, equality and individual and collective self-defence and duties such as non-intervention, not to foment civil strike in another State's territory; not to do anything in its territory which endanger international peace and security, not to resort to war or use force or make a threat thereof against the territorial integrity or political independence of another State or in any manner inconsistent with international law (including the Charter of the U.N.), to settle international disputes peacefully and ensure respect for and observance of human rights and fundamental freedoms, without distinction as to race, sex, language or religion in its territory and jurisdiction. The Draft Declaration has yet not been adopted and therefore doubts have been expressed in respect of its general application and validity. As pointed out by Rosalyn Higgins,[35] "on occasions United Nations organs may pass resolutions deliberately declaratory of existing law one may cite for example General Assembly Resolution 375 (IV), the declaration on the Rights and Duties of States though in the event this particular Declaration was not in fact adopted. It covers certain traditional rights and duties in 14 basic articles ranging from jurisdiction to intervention to sovereign equality. Although the General Assembly is not a legislative body, the adoption of such a type of resolution by an overwhelming majority or by unanimous vote would surely provide probative evidence of the belief of States concerning certain rules of law."

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33. For this and the right to self-defence and self-prevention, see Chapter entitled "Intervention".
34. See General Assembly Resolution 375 (IV).
35. See Rosalyn Higgins, "The Development of International Law by the Political Organs of the United Nations", Proc., ASIL Vol. 59 (1955), p. 116.

Different kinds of 'States' and 'non-State entities'

Following are different kinds of 'States' and 'non-State entities' :

(1) *Confederation.*—Confederation is formed by independent States. Under international law confederation has no international personality. The aim and objective of confederation is to establish a sort of co-ordination among the States, leaving States independent in their internal and external matters. But under international law, these States are not international persons.

(2) *Federal State.*—Generally a Federal State is formed by the merger of two or more than two sovereign States. Under international law, a Federal State is an international person. The Federal State exercises control and has rights not only over the member-States but also over the citizens of the States. In a Federal State, generally there is a division of powers between the central authority and the States through a Contribution. States are generally autonomous in their internal matters but the federation or the central authority exercises control over them. The United States of America, Switzerland, India are good examples of the Federal States. The main difference between a Confederation and a Federal State is that while the Federal State in an international person under international law, a Confederation is not an international person.

(3) *Condominium.*—When two or more States exercise rights over a territory, it is called Condominium. "A Condominium exists when over a particular territory joint dominion is exercised by two or more external powers." [36] New Hebrides is a good example of a Condominium. Both England and France exercised control and had rights over the territory of New Hebrides between 1914 and 1980. Thus there is a joint sovereignty of France and Britain over New Hebrides. Other examples of condominium are those of Austria and Prussia over Schleswig-Holstein and Lanenburg from 1864 till 1866, of Great Britain and Egypt over Sudan from 1898 to 1955, and of Great Britain and France over Islands of Canada and Endenbury after 1939. In respect of rivers, gulfs or bays also sometimes the idea of condominium is used.[37]

(4) *Vassal State.**—A State which is under the suzerainty of another State is called a Vassal State. Its independence is so restricted that it has no importance under international law. As remarked by Starke, "Vassal State is one which is completely under the suzerainty of another State. Internationally its independence is so restricted as scarcely to exist at all.[38] In its foreign affairs, the Vassal State possesses no power and all its foreign policies are governed by the State of which it is a Vassal State.

(5) *Protectorate State.***—According to Starke, "Although not completely independent, a Protectorate State may enjoy a sufficient measure of sovereignty to claim jurisdictional immunity in the territory of another State, If may also still remain a State under international law." [39] In the case of *Ionian ship,*[40] the court held that a State may remain international person even though it is dependent upon some other State. The facts of this case are as follows:—

The Treaty of Paris, 1815 declared the Ionian group of Islands as an independent State under Britain. The treaty provided that the Ionian State could independently perform its internal functions with the consent of Britain. This treaty had empowered Britain to declare war or peace on behalf of Ionian State. In 1854 the German War broke out between Britain and Russia. During the war, the British warships apprehended some ships which were flying flags of Ionian State. These ships were seized on the ground that they were carrying on trade with the enemy. It was contended that the inhabitants of the Ionian group

36. Starke, see *supra* note 5, p. 116.
37. See Oppenheim's International Law, note 8, pp. 565-566.
* See for P.C.S. (1971), Q. No. 4(a) ; I.A.S. (1954), Q. No. 4.
38. Starke, *Supra* note 5, at p. 115.
** See for I.A.S. (1964), Q. No. 4.
39. Starke, note 5, p. 115.
40. (1855) 2 Spinks 212 ; Hudson Cases 421.

of Islands are British subjects and consequently they cannot carry on trade with the enemies of Britain during the war period. The Court had to decide mainly two questions. In the first place, it was to be decided whether Ionian group of Islands is an independent State. Secondly, whether the inhabitants of the Ionian group of Islands were British subjects and consequently, whether they will be treated as enemies of Russia.

In reply to the first question the Court ruled the Ionian group of Islands is an independent State and it was, therefore, free to trade with Russia. The Court further observed that it would be wrong to contend that the ships of Ionian State would be treated to be the ships of Britain. In reply to the second question, the Court ruled that since Ionian group of Islands is an independent State, its inhabitants are not the subjects of Britain and hence they will not be deemed to be the enemies of Russia.

Thus, a protectorate State can remain a State under international law and may possess some rights and immunities. This view was expressed by Lord Finlay in *Duff Development Co.* v. *Kelantan Government.*[41] The same view was expressed in *The Charkieh.*[42] In *Rights of U.S. Nationals in Morocco,*[43] the International Court of Justice has subscribed to this view. Often Protectorate Sates entrust matters of foreign policy and the matters regarding defence to other States. For example, Sikkim was a protectorate State of India before it was made an associate State of India. Subsequently, it was compeletely merged in India and became a State in the Indian Union. Thus it lost all vestige of international personality and became a constituent unit and a part and parcel of India. Starke has rightly pointed out, "Protectorates, in the strict sense, have for all practical purposes now disappeared from the international scene." [44]

Difference between Protectorate and Vassal State*

Following are the main points of difference between a Protectorate State and a Vassal State :

(a) Often through a treaty, a Protectorate State entrusts its matters of security, defence and external affairs to another State. A Vassal State is autonomous in its internal matters, but is completely dependent upon other State in external matters.

(b) A Protectorate State may become a member of the international community. A Vassal State is not regarded a member of the international community.

(c) A Protectorate State is not completely sovereign and in fact its sovereignty is taken by the country of which it becomes a Protectorate State. A Vassal State is a semi-sovereign State.

(d) If the protecting State declares a war against any country, then the Protectorate State is not necessarily involved in that war. Thus, the treaty entered into by the protecting State is not binding upon the Protectorate State. In the case of a Vassal State, it is bound by the treaty entered into by the protecting State.

(e) Lastly, Protectorate State may remain a State, but a Vassal State is completely under the suzerainty of another State and has no separate and independent existence under international law.

(6) *Trust Territories.*—Trust territories have been discussed in detail entitled "The Trusteeship Council" therefore, see that Chapter.

International position of Tibet, Holy See or Vatican City and Commonwealth of Nations

Tibet

Tibet is a mountaneous region in between India and China. Till 1720, it was an independent State, but later on it was incorporated by China in its State. After the end of the reign of Manchu dynasty in China, Tibet became free from the suzerainty of China. In 1906, Tibet was brought under the joint protection of China and Britain. After some years.

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41. (1924) A.C. 797 at p. 814.
42. (1873) L.R. 4A & E. 59.
43. I.C.J. Rep. (1952), p. 176.
44. Starke, note 5, p. 116.

* See also for C.S.E. (1988), Q. 5(c).

the control of China over Tibet ceased and it again became an independent State. However, in its external affairs, China continued to exercise control over it. In Simla Conference of 1914 Tibet was declared autonomous in its internal matters and was regarded to be under the protection of China. The next land-mark event was the treaty of 1951 whereby Tibet was regarded as a Protectorate State of China. China accepted Dalai Lama as the spiritual head of Tibet. Thus Tibet was autonomous in its internal matters but was under control of China in its external matters. It may, however, be noted that China flagrantly violated the treaty of 1951 and started interfering in the internal matters of Tibet. In 1959, the situation deteriorated so much that the conflict took the form of a war between China and Tibet. China sent its forces in Tibet and ruthlessly suppressed the movement of people. Dalai Lama, the spiritual head of Tibet was compelled to leave Tibet. He fled away from Tibet and took asylum in India. Thus Tibet is a Protectorate State. But because of the autocratic and imperialistic policy of China it has been converted into a vassal state and the rights of citizens of Tibet are flagrantly violated and Tibetians are at the mercy of the Government of China. But time and again India has declared that Tibet is a protectorate State of China and its affairs are internal matters of China.

Holy See or Vatican City

Holy See or Vatican City is a place where the religious head of Catholic Christians (Pope) resides. Holy See is smallest sovereign State. In the middle of 19th century, the rulers of Italy seized the territory of Pope and occupied his capital, Rome. Consequently Pope went away and settled in his residential place called Vatican City. Since Pope was religious head, the Government of Italy passed a law in 1871 whereby some guarantee was given to Pope. The said Act conferred some privileges and immunities upon Pope more or less equal to those privileges and immunities which are enjoyed by head of the States. Next important change took place in 1929 when a treaty was concluded between Pope and the Government of Italy whereby Vatican City comprising of 100 acres of land was accepted as a State and Pope was conferred upon the rights to enter into diplomatic relations with other States. Thus by the treaty of 1929, Vatican State assumed the status of an international person under the international law. The present position of Vatican City is that it is an international person and possesses all the rights and duties of a sovereign State. It is a natural State. It is not a member of the United Nations. In short, Vatican City is an international person and is fully independent and sovereign State under international law.

Commonwealth of Nations*

Except Britain, Commonwealth of Nations is an association of those States which were at some time the colonies of the British Empire.[45] Before 1948, it was called the British Commonwealth of Nations. Slowly and gradually the British colonies became independent one by one and with their liberation, their attitude also underwent significant changes. After the attainment of independence, these liberated States were not prepared to accept the suzerainty or overlordship of any other State. In the conference of 1948, a resolution was passed that the members of the British Commonwealth of Nations will be autonomous in their internal matters. As pointed out earlier, significant changes had appeared in international field by the year 1948. Consequently, the word 'British' was dropped and was named only "Commonwealth of Nations'. The present position is that all the members of the Commonwealth of Nations are sovereign States. They are fully independent and may exchange diplomatic envoys. In foreign affairs, their powers are unlimited. They can enter into treaty and may make declaration of war or peace on the basis of their sovereign powers.

Legal Status of Commonwealth of Nations.—Commonwealth of Nations is neither a State nor a federation. It is only a loose association of equal and sovereign States who are

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* See for I.A.S. (1956), Q. No. 2 ; P.C.S. (1969), Q. No. 10.

45. Besides Britain The Commonwealth of Nations now comprises of 46 States including Australia ; Bangladesh ; Canada ; Fiji ; Ghana ; Guyana ; Hong Kong ; India ; Jamaica ; Kenya ; Lesotho ; Malawi ; Malaysia ; Malta ; Mauritius ; Newzealand ; Nigeria ; Papua and New Guinea ; Sierra Leone ; Singapore ; Sri Lanka ; Tanzania ; Trinidad ; Uganda and Zambia.

members of the United Nations and agree, to follow certain principles.[46] Under International law, the Commonwealth of Nations is not a separate independent entity. It is only a loose association of independent States. So far as India is concerned, she has made it clear that India is a sovereign democratic republic. India has joined Commonwealth of Nations, on the basis of equality and the membership of Commonwealth of Nations depends upon the sweet will and discretion of India.

Neutral State and Neutralised State and Distinction between them.[47]

N.B.—For a critical discussion of this, please see Chapter on "Neutrality".

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46. See Starke, note 5, at pp. 116-117.
47. See also Chapter on "Neutrality....."

CHAPTER 10

STATE RESPONSIBILITY

Since, formerly, States alone were recognized as subjects of international law, the general topic of international responsibility for wrong used to be discussed under the heading "State Responsibility". Though international responsibility now also involves consideration of position of international organisations and individuals for the sake of convenience, the topic of international responsibility is still studied under the heading "State responsibility".[1]

Meaning of the term 'State Responsibility'

Often it is said that the sovereign has no obligation under law. This statement is true only in respect of the subjects of the sovereign because a State may change its law at its will and may thus bring about changes in its obligations. The position is, however, different in respect of the obligations towards other nations. In that respect, obligations of the State are that of an international person. A State has certain obligations under international law. "The State responsibility concerning international duties is, therefore, a legal responsibility, for a State cannot abolish or create international law in the same way that it can abolish or create municipal law."[2] Thus, "The rules of international law as to State responsibility concern the circumstances in which and the principles whereby the injured State becomes entitled to redress for the damage suffered.[3]"

In the *Chorzow Factory (indemnity) case*,[4] the Permanent Court of International Justice said ".....it is a principle of International law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[5] In the *Corfu Channel* case,[6] the International Court of Justice held Albania responsible for the explosions which occurred and observed : "These grave omissions involve the international responsibility of Albania..... and there is a duty upon Albania to pay compensation to the United Kingdom." As pointed out by Starke,[7] "The law of State responsibility is still in evolution and may possibly advance to the stage where individuals are also fixed with the responsibility for breaches of international law which are 'international crimes.'[8]

State responsibilities during the wars have been generally accepted in Article 3 of Hague Convention, 1907. According to it, if a belligerent State violates rules of war, it shall be responsible for the payment of compensation. It shall also be responsible for the acts committed by persons of its armed forces. "State responsibility, like the question of the

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1. See Openheim's International Law, Vol. I, Ninth Edition, Longman Group UK Limited and Mrs Tomoko Hudson, 1992, p. 500.
2. L. Oppenheim, International Law, Vol. 1, Eighth Edition, p.337. See also W. Friedmann, 'Law in a Changing Society' (First Indian Reprint, 1970), p. 336; F.V. Gracia Amador, "State Responsibility in the Light of the New Trends of International Law", 49 A.J.I.L. (1955), p. 339.
3. J.G. Starke, Introduction of International Law Tenth Edition, (Butterworths, Singapore, 1989) p. 293.
4. (1928) P.C.I.J. Series A. No. 17, p. 29.
5. The World Court further observed, "The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish this situation which would in all probability have existed if that act had not been committed—Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear, the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it— such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." *Ibid* at p. 47.
6. I.C.J. Reports (1949), p. 23.
7. Starke, see *supra* note 2, at p.294.
8. See S.P. Jagota, "The Role of the International Law Commission in the Development of International Law", A.J.I.L. Vol. 16 (1976), p.459 at p. 464.

definition of aggression, is a pedigreed subject. It was considered by the Hague Conference of 1930. It has been considered by the Commission in the early fifties but the present work has been done since 1969 by Professor Ago as the Special Repporteur..... " the object of the current work of the U.N. International Law Commission on State responsibility, is to codify the rules governing State responsibility as a general and independent topic.[9] Under the general plan for the draft on State responsibility adopted by the Commission, the origin of international responsibility forms the subject of Part I of the Draft, which is concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility. Part II deals with the content, forms and degrees of international responsibility, that is to say, the determination of the consequences an internationally wrongful act of State may have under international law (reparative and punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms which reparation and penalties may take). Once these two essential tasks are completed, the Commission may, if it seems fit, decide to add to the draft Part III concerning the settlement of disputes and the "implementation." [10]

By the 42nd Session in 1990, the Commission had provisionally adopted first reading of 35 articles relating to first phase of its work. First five articles of second phase were also adopted.

Original and Vicarious responsibility

Original responsibilities of the State are for the works of its government and vicarious responsibilities are for its citizens and the works done by its agents. When the private individuals of a State cause harm to other States through their acts, the question of vicarious responsibility arises. In such a situation it becomes the duty of the State to punish the individuals concerned and compel them to pay compensation. "'Original' responsibility is borne by a State for acts which are directly imputable to it, such as acts of its government, or those of its officials or private individuals performed at the government's command or with its authorisation. 'Vicarious' responsibility, on the other hand, arises out of certain internationally injurious' acts of private individuals (whether nationals, or aliens in the State's territory), and of officials acting without authorisation. It is apparent that the essential difference between original and vicarious responsibility in this sense is that whereas the former involves a State being in direct breach of legal obligations binding on it and is accordingly a particularly serious matter, with the latter the State's responsibility is at one to remove the injurious conduct complained of : in such cases the State's responsibility calls for it to take certain preventive measures and requires it to secure that as far as possible the wrongdoer makes suitable reparation, and if necessary to punish him. But these preventive and remedial obligations of the State in cases of 'vicarious' responsibility are themselves obligations for the breach of which (as by refusing to take the remedial action, which is required) the State bears direct responsibility." [11] It is to be admitted that the legal consequences of the two categories of acts may not be the same, but there is no fundamental difference between the two categories, and in any case, the use of 'vicarious responsibility' here is surely erroneous." [12]

State responsibilities in different fields

(1) *International Delinquency.**—As pointed out by Prof. Oppenheim, "An international delinquency is any injury to another State committed by the Head or Government of a State in violation of an international legal duty. Equivalent to acts of the Head and Government are acts of officials or other individuals commanded or authorised

9. For details see : Richard D. Kearney, "The Twenty-fifth Session of the International Law Commission", A.J.I.L., Vol. 68 (1974), p.454 at pp. 455-462.
10. U.N. Monthly Chronicle, Vol. XIII, No. 8 (August-September, 1976), p. 49.
11. Oppenheim's International Law, note 1, at pp. 50-1-502.
12. Ian Brownlie, Principles of Public International Law, Second Edition (1973), p. 442.

* See for I.A.S. (1968), Q. No. 7 and I.A.S. (1962), Q. No. 3 and P.C.S. (1966), Q. No. 4 (a).

by the Head of Government. The comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving not more than pecuniary compensation to violations of International Law amounting to a criminal act in the generally, accepted meaning of the term... International delinquencies—a term applying both to wrongs consisting of breaches of treaties and to wrongs independent of treaty may be committed in regard to different objects. Thus a State may be injured in regard to its independence through unjustified intervention; in regard to its treaty rights through an act violating a treaty ; or in regard to its right of protection over citizens abroad through any act that violates the person or the property of one of its citizens abroad." Starke has explained the term, 'international delinquency' in the following words : 'In practice most cases of State responsibility, at least before international tribunals, arise out of wrongs alleged to have been committed by the State concerned. By wrong in this connection is meant the breach of some duty which rests on a State at international law and which is not the breach of a purely contractual obligation. To such wrongs, more frequently the term 'international delinquency' is applied..... Most of the cases that come under this head concern injuries suffered by citizens abroad..... Generally speaking, a person who goes to live in the territory of foreign State must submit to its law ; but that is not to say that certain duties under international law in respect to the treatment of that person do not bind the State. Examples are, the duty of the State to provide proper judicial remedies for damage suffered, and the duty to protect alien citizens from gratuitous personal injury by its officials or subjects." [13]

Thus according to Starke, International delinquency is a wrongful act committed by a State which is not a breach of a purely contractual obligation. International delinquency is a wrongful act which is the breach of international obligation and is independent of any contractual obligation. On the other hand, crimes are violations of customary or treaty rules of International law. For international delinquency, generally the remedy is pecuniary compensation. The remedy for international crime may be the punishment or reparation as the case may be. It is in respect of a crime against international law, the observation of the Nuremberg judgment that individuals who commit crimes against International law may be punished is relevant. As compared to it, international delinquency is a wrongful act committed by an official or organ of the State concerned which may be imputed or attributed to the State.

Notions of Imputability.—As pointed out by Starke, "In the subject of international delinquencies, it is important to apply the notion of *imputability.* This notion assists in clarifying the subject and in providing a proper framework for its theory. To take a practical example, if an agency of State *X* has caused injury to a citizen of State *Y* in breach of international law, technically we say that State *X* will be responsible to State *Y* for the injury done. What this means is that the organ of official of State *X* has committed a wrongful act, and the conduct in breach of international law is *imputed* from the organ or official to the State. The *imputation* is thus the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official and the attribution of breach and liability to the State ..... Imputability therefore depends on the satisfaction of two conditions : (a) conduct of a State organ or official in breach of an obligation defined in a rule of international law ; (b) that according to international law, the breach will be attributed to the State. It is only if the breach is imputable that the State becomes internationally responsible for the delinquency. Responsibility begins where imputability ends." [14] But as rightly remarked by Brownlie,[15] "In general, broad formulae on State responsibility are unhelpful and, when they suggest municipal analogies, a source of confusion. Thus it is often said that responsibility only arises when the act or omission complained of is *imputable* to a State. Imputability would seem to be a superfluous notion, since the major issue in a given situation is whether there has been breach of duty, the content of 'imputability' will vary according to the particular duty, the nature of the breach,

13. Starke, See *Supra* note 3, at p. 304.
14. *Ibid* at pp. 304-305.
15. Brownlie, See *Supra* Note 12, at p. 421.

and so on. Imputability implies a fiction where there is none and conjures up the idea of vicarious liability where it cannot apply."

Reference may be made here to *Youmans* case[16]. In this case, the Mayor of the town (in Mexico) ordered a lieutenant of State forces to suppress riots and attack against certain American citizens. Instead of dispersing the rioters, the troops did just the reverse. They started firing on the house in which the Americans had taken refuge. In the process, one American was killed. The other two Americans were forced to leave the house and were killed by the troops and rioters. In opening the fire against the Americans the troops had disobeyed the orders of the Mayor and had acted beyond the scope of their authority. The Mexican Government was held liable for the wrongful acts of the troops.

It is sometimes said that 'A State is not responsible to another State for unlawful acts committed by its agents unless such acts are committed wilfully and maliciously or with culpable negligence'.* "It is difficult to accept so wide a conclusion and so invariable a requirement. A general floating condition of malice or culpable negligence rather contradicts the scientific and practical considerations underlying the law as to State responsibility ..... It is only in specific cases when particular circumstances demand it that wilfulness or malice may be necessary to render a State responsible for example, if the State knowingly connives in the wrongful acts of insurgents or rioters, it would become liable although not generally otherwise ..... Further the actual decisions of international arbitral tribunals fail to justify a general condition of malice or culpable negligence." [17] In the words of another author, "The fact that an *ultra vires* act of an official is accompanied by malice on his part, *i.e.*, an intention to cause harm, without regard to whether or not the law permits the act does not affect the responsibility of his State. Indeed, the principle of objective responsibility dictates the irrelevance of intention to harm *dolus*, as a condition of liability; and yet general propositions of this sort should not led to the conclusion that *dolus* cannot play a significant role in the law. Proof of *dolus* on the part of leading organs of the State will solve the problem of 'imputability' in the given case, and in any case, the existence of a deliberate intent to injure may have an effect on remoteness of damage as well as helping to establish the breach of duty. Malice may justify the award of "penal damages." [18]

The basis of responsibility "has been said to be essentially delictual and based on fault, requiring either international or negligent conduct on the part of the State before a breach of it or an international obligation can be established ; or to be strict or objective, conduct and result alone establishing the breach of an obligation." [19] There is no single basis of international responsibility which may be applicable in all circumstances. In fact, the basis of responsibility depends on the particular obligation in question. For example, responsibility of State for acts of private individuals is based on fault for normally it is required to be shown that the State failed to show diligence in preventing either the injury or punishing the offender. But in certain areas (*i.e.*) dangerous activities responsibility may arise without fault. In certain dangerous activities, absolute or strict responsibility has been fixed in treaties such as Vienna Convention on Civil Liability for Nuclear Damage, 1963, Convention on International Liability for Damage caused by Space Objects, 1971 and the International Convention on Civil Liability for Oil Pollution Damage, 1969.[20]

(2) *State responsibility for injury to aliens* —Under international law it is generally agreed that aliens living in a State should also be conferred upon the same rights which are given to the citizens. It is the responsibility of the State to protect rights of the aliens in the same way as they protect the rights of their citizens. State responsibilities towards aliens may be of following types:—

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16. Annual Digest of Public International Law Cases, 1925-26, p. 223.
* Asked in IAS (1965). Q. No. 5 and seems to have been adopted from Starke, supra note 2, at p. 339.
17. Starke, *Supra* note, 3 at p. 312.
18. Brownlie, see *supra* note 12 at pp. 427-28.
19. Openheim's International Law, note 1, at pp. 508-509.
20. See *ibid*, at pp. 509-511.

*(a) State responsibility for acts of private individuals**.—Under international law, each State is under a duty to exercise due diligence to prevent its own subjects as well as foreign subjects who live within its territory from committing injurious acts against other States. While the State responsibility for official acts of administrative officials and members of armed forces is extensive, responsibility for private persons is limited because in practice it is impossible for a State to prevent a private person from committing injurious act against a foreign State. The duty of the State is simply to exercise due diligence and where injurious acts have nevertheless been committed, to procure satisfaction and reparation for the wronged act, as far as possible, by punishing the offenders and compelling them to pay compensation, if necessary.[21] If the citizens of a State cause some damage or harm to an alien in that State, that alien gets the right to file the suit for compensation according to law of that State. Thus in such a situation the State tribunals protect the rights of aliens. It may be noted here that the decisions of the State courts are binding upon the aliens in the same way as they are binding upon the citizens of the State. But if the decision of a State Tribunal is arbitrary and against justice, the alien person has a remedy to approach his home State to settle the matter through political means and ensure that the matter is decided in accordance with the principles of international law. Since in such matters the political matters are involved, it would not be correct to say that there is any State responsibility in this connection.

(b) State responsibility for acts of mob-violence.—State responsibility for acts of mob-violence is same as for acts of private individuals. Generally, State may be held responsible for mob-violence only when it has not made due diligence to prevent it. "Outbreaks of mob-violence resulting in injury to the aliens raise regularly the question of prevention as well as of redress. While occasional outbreaks of mob-violence may be accepted in any State, and their mere occurrence is not of itself a ground of responsibility, the State is expected to use 'due diligence' to prevent them".[22] But this test is very uncertain and ambiguous. 'Due diligence' to prevent mob-violence depends upon the time, facts and circumstances. "What constitutes 'due diligence' is a question of time and circumstances'[23] This test is so ambiguous that often jurists express the view that there is no State responsibility in respect of mob-violence. But this view is not correct. Some countries such as England and America do not support this view. If the alien person is some officer of foreign country then the State responsibility is further increased.[24]

As regards the vagueness of the test and definition of the term 'due diligence', "Obviously no very dogmatic definition would be appropriate, since what is involved is a standard which will vary according to the circumstances. And yet, if 'due diligence' be taken to denote a fairly high standard of conduct the exception would overwhelm the rule. The reporteur for the International Law Commission on State responsibility, Gracia Amador, concludes that the basic principle is that there is a presumption against responsibility and proposes the following provision : "The State is responsible for injuries caused to an alien in consequence of riots, civil strife or other internal disturbances if the constituted authority was manifestly negligent in taking the measures which, in such circumstances, are normally taken to prevent or punish the acts in question". There is some authority for the view that the granting of an amnesty to rebels constitutes a failure of duty and an acceptance of responsibility for their acts on the basis of a form of estoppel ; but in many cases this inference will be unjustified".[25]

Reference may also be made here to the *case concerning United States Diplomatic and Consular Staff in Tehran*[26] which involved the acts of rioters and other militants who attached and occupied U.S. diplomatic and consular premises in Iran. The rioters and militants also seized the occupants and held them as hostages. Since the rioters and

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* See also for P.C.S. (1972), Q. No. 6.

21. See Oppenheim's International Law, note 1, at p. 549.
22. Charles, G. Fenwick International Law (Third Indian Reprint, 1971), p. 338.
23. Ibid.
24. Ibid, at p. 339.
25. Brownlie, *Supra* note 12 at pp. 440-41.
26. I.C.J. Rep. (1980) p. 3.

militants were persons without official status in the initial stages their acts could not be imputed to the State, the International Court of Justice held Iran not responsible for the initial stages of their acts. But subsequently the situation changed when the militants became agents of the State and hence Iran was held responsible for their acts. The World Court also held Iran responsible for breach of its international responsibility to take steps to protect American diplomatic premises and to restore *status quo.*

Illustration.—'A Portuguese subject residing in India is mobbed and his property plundered by the mob on India refusing to pay damages to Portugal, Portugal blockades the Indian Coast and orders the capture of Indian vessel.* In this case India would be responsible for injury to the person and property of the Portuguese subject if she did not take 'due diligence' to prevent the mob violence or if she 'was manifestly negligent in taking the measures which, in such circumstances are normally taken to prevent or punish the acts in question'. But the Portuguese action amounts to reprisal and one of the conditions for a valid reprisal is that there must be a certain proportion between the offence and the action taken in reprisal. Obviously in the present case, there is no proportion between the injury caused to the Portuguese subject and the reprisal resorted to by Portugal. Moreover, no State is entitled to resort to reprisal which may endanger international peace and security.

State Responsibility in respect of injuries suffered by Persons Serving the U.N.

There is also State responsibility in respect of the persons serving under the auspices of the international organisations. This conclusion can be validly drawn on the basis of the decision of the International Court of Justice in the case of Count Bernadottee or the case of *Reparation for Injuries suffered in the Service of the U.N.*[27] The facts of this case were as follows : Count Bernadottee along with a French observer was appointed by the United Nations Security Council to mediate in the conflict between Arabs and Jews in Palestine. On September 17, 1948, when he was in that area of Jerusalam which was under the occupation of Israel he along with a French observer was murdered. In this connection, the General Assembly of the United Nations requested, in 1948, the International Court of Justice to give an advisory opinion as to whether in such matters the United Nations can claim compensation and damages for organisation and the persons appointed under its service. If, questions were answered in the affirmative, it was further asked in what manner the action taken by the United Nations could be reconciled with such rights as might be possessed by the State of which the victim was a national. In its advisory opinion of 11th April, 1949, the Court held that the organisation was intended to exercise functions and rights which could only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon the international plane. It followed that the organisation (in this case the U.N.) had the capacity to bring a claim and to give it the character of an international action for reparation for the damage that had been caused to it. The World Court further declared that the organisations can claim reparation not only in respect of damage caused to itself, but also in respect of damage suffered by the victim persons entitled through him. Although, according to the traditional rule, diplomatic protection had to be exercised by the national State, the organisation should be regarded in international law as possessing the powers which even if they are not expressly stated in the Charter are conferred upon the organisation as being essential to the discharge of its function. The Court held that the organisation has the capacity to claim appropriate reparation, including also reparation for damage suffered by the victim or by persons entitled through him. The risk of possible competition between the organisation and the victim's national State could be eliminated either by means of a general convention or by a particular agreement in any individual case. In purusance of the above decision, the Secretary-General of the U.N. claimed compensation from Government of Israel for the death of Count Bernadotte and a French observer. The Government of Israel paid the money in the form of compensation but

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* Asked in P.C.S (1964), Q. No. 8(a).

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

refused to accept any obligation under law in this connection. In other words, we may say that although Israel paid the compensation, but it did not accept that it was its legal responsibility to pay compensation, arising out of mob-violence. Thus the legal position is that a State is responsible for injuries caused in its territory to person serving the U.N. or any other international organisation.

(c) State responsibility for acts of insurgents.—So far as the State responsibility for the acts of insurgents is concerned, the general rule is that it is the responsibility of the States to try to prevent the violent acts of the revolutionaries. But there is a controversy that if States are not able to prevent violent activities, whether they will be responsible or not. According to Fenwick, State responsibility for the acts of insurgents is different from State responsibility for the acts of mob-violence. When there is a revolution or to put it more precisely insurrection, there is a presumption that the State shall make due diligence to prevent it because it is in the interest of the State to suppress it. In the words of Fenwick, "The very existence of organised revolution raises a presumption of 'due diligence' on the part of the State in suppressing it, since the government had an immediate interest in such an open attack upon its authority.[28] As pointed in the Ninth Edition of Oppenheim's International Law[29] where the aim of insurrection or rebellion is to overthrow of government, position in principle is the same as for rioters and acts of mob-violence. "The State is not responsible for acts of the insurrectionists, but is only obliged to exercise due diligence to prevent, or immediately crush the insurrection, and to punish those responsible for injury to foreigners." [30]

Calvo Doctrine*

The doctrine was propounded by Calvo of Argentina and hence it is called Calvo doctrine. According to this doctrine, during civil war the State is not responsible for the losses suffered by the alien persons because if this responsibility is accepted then big nations will get an excuse to intervene in the independence of weaker States. In the words of Fenwick, "The general principle that the State is not responsible for losses incurred by aliens in time of civil war became associated in Latin America with the name of the Argentine publicist Calvo, who argued in his treatise on international law tnat a State could not accept responsibility for losses suffered by foreigners as the result of civil war or insurrection, on the ground that to admit responsibility in such case would be the menace to independence of weaker State by subjecting them to the intervention of strong States, and would establish an unjustifiable inequality between nationals and foreigners." [31] But many States such as America and England do not accept completely the above doctrine. Since the revolts or insurrections are frequent in the States, the presumption that State made due diligence becomes weak.

Reference may also be made here to the insertion of *Calvo clause* in contracts providing for the determination of any dispute arising out of the contract by national courts and preventing the home government of the alien concerned from making diplomatic intervention. "In order to prevent appeals by aliens to their home governments for diplomatic intervention on behalf of their contract right, a number of Latin American States during the latter part of the nineteenth century adopted a policy of writing into their contract with aliens a clause known as the 'Calvo clause' the general tenor of which was that the alien agreed that any dispute that might arise out of the contract were to be decided by the national courts in accordance with national law and were not to give rise to any international reclamation." [32] "Further, the decisions of international arbitration tribunals and of mixed claims commissions upon the subject have been conflicting, some upholding the Calvo clause as a bar to the interposition of the alien's government, others

28. Charles G. Fenwick, International Law, p. 340.
29. See note 1, at p 552.
30. Ibid.

* See also I.A.S. (1973), Q. No. 11 (d) ; I.A.S. (1970), Q. No. 10 (e) ; I.A.S. (1968), Q. No. 7 ; I.A.S. (1963), Q. 12 (c) ; P.C.S.. (1974), Q. No. 10(c) ; P.C.S. (1968), Q. No. 10(d) ; P.C.S. (1966), Q. No. 10(b). ; C.S.E. (1995) Q. 8(c).

31. Charles G. Fenwick, International Law, at p. 341.
32. Ibid., at pp. 350-351.

rejecting it on the ground that the act of the alien's cannot restrict the right of his government under international law." [33] In *Orinoco Steamship Co.* case between *United States and Venezuela*[34] the Steamship Co. had suffered losses as its vessels were requisitioned during revolution. It also alleged that it was unlawfully discriminated against it in the navigation of the river. The Calvo clause was upheld. But on its reference to the Permanent Court of Arbitration at the instance of the United States it was held that the rejection of claims by the Umpire was not justified.[35] *North American Dredging Company* case between the U.S. and Mexico[36] involved the breach of contract by Mexico. The contract related to the dredging at the port of Salina Cruz. The contract provided that contractor and persons working shall be considered Mexicans in all matters and "are consequently deprived of any rights as alien and under no condition shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract." The Mixed Claims Commission held that under international law such a clause may be included by an alien in a contract but he is not entitled to "deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage." Thus although the Calvo clause was held to be binding on the claimant to be governed by Mexican laws, it could not take from him "his and undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law." [37]

"(1) *Thus* in so far as such clause attempts to waive in general the Sovereign right of a State to protect its citizens, it is to that extent void.

(2) ..... it would be obviously improper for the individual to treat the State against which he seeks redress as an inferior and untrustworthy country and to apply for his government's intervention without making any claim in the local courts.

(3) Where such a stipulation purports to bind the claimant's government not to intervene in respect of a clear violation of international law, it is void.

To sum up, it may be said that Calvo clause is ineffective to bar the rights of States to protect the internationals abroad, or to release States from their duty to protect foreigners on their territory.[38]

(3) *State responsibility for acts of government organs.*—The State concerned has responsibility for the act performed by its representatives or high officials towards the alien persons. But State responsibility is accepted only to the extent where the officials concerned have acted out of their powers and jurisdiction. "The traditional doctrine of international law, which restricts State responsibility to persons officially connected with government, as distinct from private persons, is predicted on the assumption that the latter are free from government direction to control in their actions affecting foreign States".[39] Similarly, State is responsible for the acts of its judicial organs.

(4) *State responsibility for contracts with foreigners.*—In this connection, the general rule is that if there is a breach of the contract entered into by a State with aliens, then it does not give rise to any international responsibility. The alien person, however, has the remedy to avail the local means available to him in the State law of the State concerned. If the matter is not resolved to the satisfaction of the alien person then he may try to settle it through the medium of his home State by resorting to political and diplomatic means. In the words of Fenwick, "In general, the alien, believing himself to be the victim of breach of contract by foreign government, must first exhaust such local remedies as are

33. Ibid, at p. 351.
34. (1903), Ralston. International Arbitral Law and Procedure, p. 72.
35. See 1910, Scot. Hague Court Reports, p. 226ff.
36. *U.S.* v. *Mexico*, General Claims Commissions, 1926.
37. See also the International Fisheries Company case between the United States and Mexico, (1926), Opinions of the Commissioners, 1931, p. 207 ff.
38. Starke, see *Supra* note 3, at pp. 302-303.
39. W. Friedmann, Law in a Changing Society (First Indian Reprint, 1970), p. 337.

available to him. These failing him, he may seek to press the claim through the foreign office of his Government." [40]

(5) *State responsibility for Breach of Treaty or Contractual Obligations.*—State responsibility for breach of treaty obligation depends upon the provisions of the treaty. In *Chorzow Factory (Indemnity)* case,[41] the Permanent Court of International Justice held : "It is a principle of international law that the reparation of wrong may consist in an indemnity corresponding to the damage which the national of the injured State have suffered as a result of the act which is contrary to international law ..... Rights or interest of an individual the violation of which right causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never, therefore, identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State." In several cases, international arbitral awards have awarded damages under two separate heads— (i) Damage suffered by individual and (ii) Damage sustained by the claimant State. *I'm Alone*[42] is an illustrative case on the award of such type. In this case I am Alone, a British ship of Canadian registry, was sunk by a United States Coast Guard Vessel in 1929 as it was engaged in the smuggling of alcoholic liquor in the United States. It was sunk on the high seas more than 200 miles from the coast of the U.S. after a hot pursuit which began outside U.S. territorial water but within the inspection Zone provided for in the 'Liquor Treaty' between U.K. and the U.S. The Canadian Government complained of the sinking of *I'm Alone.* The Canadian claim was referred to the Commissioners appointed under the convention concerned. In their final report the Commissioners observed : "We find as a fact, from September, 1928, down to the date when she was sunk, the *I'm Alone,* although a British ship of Canadian registry, was *de facto* owned, controlled, and at critical times, managed and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the purposes mentioned (*i.e.* smuggling of liquor)..... in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo.

The act of sinking the ship, however, by officers of the United States Coast Guard, was ..... an unlawful act ; and the commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor ; and, further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government ; and they recommend accordingly".[43]

As pointed out earlier, if a State contracts with the citizens of another State, then generally there is no State responsibility in consequence of the breach of such contract but if any contract entered into with another State that it will enforce the contract entered into with the citizen of that State, then there will be State responsibility in consequence of the breach of the contract with the citizens. In this connection *Anglo-Iranian Oil Co.* case[44] deserves a special mention here. Anglo-Iranian Company was company registered in Britain on April 19, 1933, a contract was entered into between this company and Iran wherein Iran gave some concessions to the company in respect of extracting oil in Iran. In 1951, Iran nationalised this company by passing a law to that effect. Britain contended that the said contract was sponsored by her and Iran had promised not to end or otherwise make any change in the concessions granted. The International Court of Justice held that for an implied treaty in respect of a contract between a State and the citizens of another State, it is necessary that there should be sufficient evidence for the same. The Court

40. Fenwick, *supra* note 28 at p. 350.
41. United Nations Reports of International Arbitral Awards, Vol. III, p. 1609, L.C. Green, International Law Through cases, p. 469.
42. P.C.I.J. (1928), Series A. No. 17 (1) W.C.R. 646.
43. See also Reparation for injuries suffered in the Service of the United Nations I.C.J. Rep. (1949), p.174.
44. I.C.J. Rep. (1952), p. 93.

rejected the contention of Britain on the ground that there was no privity of contract between Persia and Britain.[45]

The Court also rejected the view that the agreement of 1933 was both a concessionary contract between Iran and the company and an international treaty between Iran and the U.K. since the U.K. was not a party to the contract. The position was not altered by the fact that the concessionary contract was negotiated through the good offices of the council of the League of Nations.

(6) *State Responsibility in respect of Expropriation of Foreign Property.** —There is a great controversy in regard to the expropriation of foreign property situated in a State. However, in the modern period, significant changes have taken place in this connection. Till the 19th century, if any State expropriated the foreign property it was considered to be the violation of international law making the said State liable for the same. But in the modern period, in view of the complete control of States over their economic system and in consequence of the nationalisation of different industries, it has become difficult to recognise such expropriation as the violation of international law. It may be noted here that the term 'expropriation' includes nationalisation and confiscation of property. On the basis of practice, principles and decided cases, it may be that expropriation of foreign property may be valid only where there has been no irregularity or discrimination with the foreigners. This was held in *Anglo Iranian Oil Co. Ltd.* v. *Jaffarte.*[46]

There has been the constant development of the law relating to the expropriation of foreign property. In 1952, the General Assembly approved the concept of economic self-determination through a resolution.[47] The said resolution referred *Anglo-Iranian Oil Co. Ltd.* v. *S.U.P.O.R.*[48] and *Anglo-Iranian Oil Co. Ltd.* v. *Idemtsu Kosan Kobushiki Kaisha.*[49] In 1958, a Commission on Permanent Sovereignty over Natural Resources was established. On the basis of the report of this commission, the Economic and Social Commission passed a resolution[50] in 1962 which declared that in case of expropriation, nationalisation, or requisitioning the owner shall be given "appropriate compensation in accordance with the rules in force in States taking such measures in accordance with international law".[51] In 1965, the Third Committee of the General Assembly adopted a draft article for human rights covenant which provided : "The peoples may for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic co-operation based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." Thereafter, such type of provisions were included in Human Rights Covenants, 1966. These covenants have now come into force. In this connection, 1965 Convention of the Settlement of Investment Disputes between States and Nationals of other States also deserves a special mention. In this convention, an endeavour has been made to establish international procedure and machinery for the settlement of investment disputes between States and nationals of other States. On 17th December, 1973, the General Assembly passed a resolution [Resolution 3171 (xxviii)] on permanent Sovereignty over National Resources wherein it affirmed "that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and mode of payment, and that any disputes which

45. *Ibid.*, at p. 112.

* See also for I.A.S. (1970). Q. No. 6; I.A.S. (1975) Q 4; CSE (1986), Q 6 (a) (ii).

46. (1953) 1 W.L.R. 246; see also J.E.C. Fawcett, "Some Foreign Effect of Nationalisation of Property" BYBIL Vol. XXVII (1950), p. 355 at p. 375.

47. General Assembly Resolution, 626 (vii) of 21st December, 1952.

48. 22nd. International Law Reports (1955), p. 23 at p.40.

49. 20th International Law Reports (1953), p. 305 at p. 315. In this case the Court held that nationalisation was merely a species of expropriation.

50. See Resolution 1803 (xvii) of 14th December, 1962.

51. See *Ibid.* para 4.

might arise should be settled in accordance with the national legislation of each State carrying out such measures.[52]

On December 13, 1974, the U.N. General Assembly adopted by an overwhelming majority a Charter of economic rights and duties of States.[53] It has been hailed by some developing countries as an 'economic *Magna Carta.*' The resolution was passed by a majority of 120 to 6 with ten abstentions. The resolution proclaims that each State has the right to "freely exercise full permanent sovereignty over its wealth and natural resources, to regulate and exercise authority over foreign investments within its national jurisdiction, and to nationalise, expropriate or transfer the ownership, of foreign property." It further provides that "appropriate compensation" should be paid in cases of nationalisation by the State adopting such measures, taking into account its relevant laws and regulations and all the circumstances which the State considers pertinent. In case of any dispute or controversy relating to compensation, it should be settled under the domestic laws of the nationalising State and its tribunals unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and in accordance with free choice of means.[54] United States, Britain, Denmark, West Germany and Luxemburg voted against the resolution while other affluent members, Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain abstained. Despite this, it would not be wrong to say that "the new Charter marks the beginning of a new phase in international relations, even if interested powers may be expected to defy and sabotage it."

In view of the above discussion, it may be rightly said that 'A State's natural asset is a national asset'.* Since it is now generally recognised that each State has permanent sovereign rights over its natural resources, all natural resources are therefore its national assets and it has sovereign right to nationalise, expropriate or transfer ownership of foreign property. In such a case, the only requirement is that appropriate compensation should be paid. But appropriate compensation is to be paid taking into account its (*i.e.* State's concerned) relevant laws and regulations and all circumstances that the State considers pertinent. In case of any dispute in this connection, the same shall be settled under the law of the nationalizing State and by its tribunals or by any other peaceful means agreed between the parties. Even the developed States concede the Sovereign right of each State to nationalise, expropriate or transfer ownership of foreign property but they contend that appropriate compensation (*i.e.* just equivalent of market value) should be paid for such expropriation and it should be subject to international adjudication. Such compensation should not only be adequate but must be paid promptly.

Despite this controversy, there is general agreement about the Sovereign right of each State to nationalise or expropriate foreign property and hence it has been remarked that 'A State's 'natural asset is a national asset'. This is clear from the example of nationalisation of Suez Canal in 1956 by Egypt. By this Egypt asserted its Sovereign rights over its natural resources. This was resented by France, Britain and Israel who made joint, armed intervention in the internal affairs of Egypt. But the problem was subsequently resolved by the efforts of Soviet Union, Security Council and the General Assembly. The agreement that followed recognised the Sovereign right of Egypt to nationalise Suez Canal and to realise taxes for the use of the canal. Thus the nationalisation of Suez Canal is a very strong precedent to show that a natural asset being a national asset, each State has Sovereign rights to nationalise or expropriate foreign property. So is the case with oil in West Asia. The events of past few years have clearly

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52. On Permanent Sovereignty over Natural Resources see also Ian Brownlie, Principles of Public International Law, pp. 431-44 ; U.S. Secretariat Study, The Status of Permanent Sovereignty over Natural Wealth and Resources, 1962 ; Gess, ICLQ. Vol. 13 (1964), pp. 398-449. Hyde, AJIL, Vol. 50 (1956), pp. 851-67.

53. For the text of the Charter of Economic Rights and Duties of States ; see Resolution 3281 (XXXIX) reprinted in U.N. Monthly Chronicle, Vol. XII (January, 1975), p. 118..

54. Article 2(2) (c) of the Chapter of Economic Rights and Duties of States ; see also Chapter I entitled International Economic Co-operation and the Evolution a New International Economic Order."

* Asked in I.A.S. (1975), Q. No. 4.

demonstrated the Sovereign rights of West Asian countries in respect of their most valuable natural resource—oil. They have gone even a step ahead and have used oil as a weapon to get their demands fulfilled and to influence international politics.

In recent years more and more emphasis is being given to the recognition of the principle of nationalisation or expropriation of foreign property by the developing countries and the opposition of the developed countries is growing weaker day by day. The main attack is against the implementation of the principle and not the principle itself. Besides nationalisation the developing countries have also been emphasizing the right of each State "to regulate and exercise authority, over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities" and that "no State shall be compelled to grant preferential treatment to foreign investment." [55] They further contend that each State has the right to "regulate and supervise the activities of transnational corporation within its national jurisdiction and take measures to ensure that such activities comply within its laws, and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State." [56]

To conclude in the words of a writer, "Finally, from a political view point, it appears to follow as a matter of course that the past struggle between the proponents of the Hull rule and adherents of the Calvo Doctrine (or its modern variants) will lead to synthesis in which the emphasis upon domestic law will be considerably stronger than under the old Hull Rule. Put succinctly, one may, therefore well expect that international law will continue to protect alien property, but that the extent of protection will more than previously be in accordance with modern developments in domestic property orders." [57]

(7) *Liability for the Acts of Multinational Corporations : Bhopal Gas Leak Disaster.*— There is lack of definite international law in respect of liability of transnational or multinational corporations. The charter of Economic Rights and Duties adopted by the General Assembly on 12 December 1974, recognises the right of each state "to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies." But developed countries such as U.S., U.K., Federal Republic of Germany and Japan voted against this. In *M.C. Mehta v.* Union of India[58], which is more popularly known as *Oleum Gas Leak case,* the Supreme Court of India held : "the enterprise must be under an obligation to provide that the hazardous or inherently dangerous activity, in which it is engaged must be conducted with the highest standard of safety and *if any harm results on account of such activity the enterprise must be absolutely liable to compensate for such harm and it should be no answer to say that it had taken all reasonable care and that the harm occurred without any negligence on its part ..... the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands* v. *Fletcher.*[59]

After having consolidated all claims relating to Bhopal Gas Leak Disaster and having acquired exclusive right to represent and make the claim by passing Bhopal Gas Leak Disaster (Processing of claims) Act, 1985, the Union of India instituted a suit against Union Carbide Corporation (U.C.C.) on 8 April 1985 in South District Court of Judge John F. Keenan. Judge John F. Keenan held on 12 May 1986 that the proper forum for filing the suit is India. Thereupon, on 5 Sept. 1986 the Union of India filed the suit at Bhopal against the U.C.C. requesting the court to award Rs. 3900 crores as compensation. On 17 December, 1987 Bhopal District Court passed an interim order directing the U.C.C. to

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55. Article 2(a) of the Charter of the Economic Rights and Duties.
56. Article 2 (2) (b), ibid.
57. Rudolf Dolzer, "New Foundations of the Law of Expropriation of alien Property", A.J.I.L., Vol. 75 (1981) p. 553 at p. 589.
58. AIR 1987 SC 1086
59. Ibid, at p. 1099.

deposit Rs 350 Crores. U.C.C. appealed against the said order and the High Court reduced the quantum of interim compensation to Rs. 250 crores. The U.C.C. once against filed an appeal in the Supreme Court against the order of the High Court. Thus the Bhopal Gas Leak Case reached the Supreme Court on the basis of compromise between the Union of India and the U.C.C. The Supreme Court passed an order on 14 February 1989 directing the U.C.C. to pay a sum of US 470 million dollars in full settlement of all claims, rights and liabilities arising out of the Bhopal Gas Leak Disaster and quashing "all Criminal proceedings related to the disaster".

Thus in the *Bhopal Gas Leak Disaster* case the Supreme Court got a golden opportunity to further develop the principle of 'strict and absolute' liability enunciated in *M.C. Mehta* v. *Union of India* but the court abdicated its responsibility and even before the challenge to the validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 was decided, the Court passed settlement under awarding a very meagre sum and ending all criminal and civil liability in respect of the Bhopal Gas Leak Disaster. The settlement order has been severely criticized.[60] As remarked by Mr. P.N. Bhagwati, retired Chief Justice of the Supreme Court of India, "The Bhopal Gas has come to a disturbing end in an abrupt and unprecedented manner. The multinational has won and the people of India have lost. What has happened is unfortunate and distressing. The Supreme Court has lost the opportunity of advancing human rights jurisprudence from the Third world point of view and failed to meet the expectations of the people of India the constituency of the Court." [61]

On 22nd December, 1989, the Supreme Court upheld the validity of Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. The Court decided it in *Charan Lal Sahu* v. *Union of India*,[62] In regard to the review of decision of 14 February 1989, the Supreme Court gave its decision on 3rd October, 1991 in case of *Union Carbide Corporation* v. *Union of India*.[63] The question for consideration, *inter alia*, before the Supreme Court was as to whether the compromise decision of 14 February, 1989 was within the jurisdiction of the Court because the Court was considering an interim order and not an appeal. The Supreme Court held that it was within the competence of the Court under Article 136 of the Constitution.[64] It was also argued before the Court that in *M.C. Mehta* v. *Union of India*,[65] the principle was propounded that greater the enterprise, greater quantum of compensation be awarded by the Court. The Supreme Court held that in compromise decision, this principle cannot be necessarily applied.[66] The Supreme Court rejected other arguments also and upheld the validity of the order of 14 February, 1989.

It may, however, be noted that the courts of states where multinational corporation operate possess jurisdiction over such corporations and their properties situated in the host state. If the acts of such corporation cause loss to the person or property of citizens of the state, the action can be taken against the corporation according to the law of that state.

Legal controls on the Transboundary Movements of Hazardous Wastes.—The most important Convention in this respect is *1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.* By March 2001, this convention has been ratified by as many as 145 States Parties. But unfortunately, the United States of America, the largest generator of hazardous wastes, has not yet ratified the convention. The definition of hazardous wastes given the convention does not include ratification wastes and wastes emanating from the normal operations of the ship because they are already covered under several other international regulations. The object of the convention is to minimize the generation of hazardous wastes to promote disposal of hazardous wastes as close as possible to their source of generation, to encourage to take precautions to control pollution and to reduce

60. See Dr S.K. Kapoor "Bhopal Gas Leak Disaster (Industrial Hiroshima) and the Waterloo of Indian Judiciary" Law Review of Sri J.N.D.C., Lucknow, Vol. II (1989) p. 13.
61. India Today, March 15, 1989, p. 45.
62. AIR 1990 SC 1480.
63. AIR 1992 SC 248.
64. Ibid, at pp. 272-273.
65. AIR 1987 SC 1086.
66. AIR 1992 SC 248, 309.

transboundary movements of hazardous and other wastes covered by the Basel convention. With a view to continuously review and evaluate the effective implementation of the provisions of the Convention, Article 15 of the convention provides for the establishment of conference of Parties as the governing body of the convention. Article 16 provides for the setting up of a Secretariat at Geneva.

Having taken into account the relevant provisions of Principle 13 of the 1992 Rio Declaration on Environment and Development, according to which States shall develop international and national legal instruments regarding liability and compensation for the victims of pollution and other environmental damage and to fulfil the commitment accepted under Article 12 of the convention and emphasizing the need to set out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes, States Parties to the Basel Convention adopted *Protocol of liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal.*

According to Article 1 of the Protocol, the objective of the Protocol is to provide for a comprehensive regime for liability and for adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal including illegal traffic in those wastes.

As regards the scope of application of Article 3 provides that the Protocol shall apply to damage due to an incident occurring during a transboundary movement of hazardous wastes and other wastes and their disposal, including illegal traffic from the point where the wastes are loaded on the means of transport in an area under the national jurisdiction of a State of export. Any contracting party may by way of notification to the Depository exclude the application of the Protocol, in respect of all transboundary movements for which it is the State of export, for such incidents which occur in an area under its national jurisdiction, as regards damage in its area of national jurisdiction. The Secretariat shall inform all contracting parties of notifications received in accordance with this Article.

As regards preventive measures, Article 6 of the Protocol provides that subject to the requirement of domestic law any person in operational control of hazardous wastes and other wastes at the time of an incident shall take all reasonable measures to mitigate damage arising therefrom. Article 4 provides for 'strict liability'. It provides that the person who notifies in accordance with Article 6 of the convention shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes. If the State of the export is the notifier or if no notification has taken place the exporter shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes. Article 5, which provides for 'fault-based liability', adds that any person shall be liable for damage caused or contributed to by his lack of compliance with the provisions implementing the convention or by his wrongful intentional, reckless or negligent acts or omissions. This Article shall not affect the domestic law of the contracting parties governing liability of servants and agents.

Article 13, which fixes the time of liability, states that claims for compensation under the Protocol shall not be admissible unless they are brought within ten years from the date of the incident. Article 16 however, provides that the Protocol shall not affect the rights and obligations of the contracting parties under the rules of general international law with respect to state responsibility.

The Protocol was opened for signature by States and by regional integration Organisations parties to the Basel Convention in Berne at the Federal Department of Foreign Affairs of Switzerland from 6th to 17th March, 2000 and at United Nations Headquarters in Newyork from 1th April to 10th December, 2000. According to Article 29, the Protocol would enter into force on the nineteenth day after the date of deposit of the twentieth instrument of ratification, acceptance, for mal-confirmation, approval or accession.

State Responsibility for Environment

N.B.—For this please see chapter "Development and Environment".

Defences to State Liability

Articles 29 to 35 of the 1980 Draft Articles on State responsibility submitted by International Law Commission deal with the defences to State Responsibility. They are following :

(1) Consent.—If a State gives its consent to such an act of some other State as is not in conformity with the obligation of the other State to it, then the State giving such consent will not be entitled to claim that the said act is wrongful. But this rule will not apply where a peremptory rule of international law has been violated.[67]

(2) Counter measure in respect of an internationally wrongful act.—The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.[68]

(3) Force majeure and fortuitous event.—The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistable force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

The above rule will not apply the State in question has contributed to the occurrence of the situation of material impossibility.[69]

(4) Distress.—The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

But this rule will not apply if the State in question has contributed to the occurrence of the situation of extreme distress or of the conduct in question was likely to create a comparable or greater peril.[70]

(5) State of necessity.—A State of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of State unless :

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril ; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

In any case, a State of necessity may not be invoked by a State as a ground for precluding wrongfulness :

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law.

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the State of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the State of necessity.[71]

(6) Self-defence.—The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self defence taken in conformity with the charter of the United Nations.[72]

(7) Reservation as to compensation for damage.—Preclusion of the wrongfulness of an act of a State by virtue of the provisions of Articles 29, 31 32 or 33 does not prejudge any question that may arise in regard to compensation for damage caused by that act.[73]

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67. Article 29.
68. Article 30.
69. Article 31.
70. Article 32.
71. Article 33.
72. Article 34.
73. Article 35.