CHAPTER 51

BELLIGERENT OCCUPATION

Belligerent Occupation*

When war takes place in between two or more than two States, it often happens that belligerent States occupy some territory of the enemy States. But this type of occupation may be deemed to be complete only when the occupying powers establish their administration over the occupying territory. Belligerent occupation, in fact, is the intermediate stage in between invasion and the transfer of complete sovereignty. Occupation is established after the attack but occupation of the belligerent State over a particular territory does not mean that the occupying power has established its complete sovereignty over that area. Occupation is established by firm possession over the territory. In accordance with the rules formulated in Hague Convention of 1907, belligerent occupation is established only when in fact the territory concerned comes under the occupation and authority of the belligerent State. According to Oppenheim, "occupation is invasion plus taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation become apparent from the fact that an occupant sets up some kind of administration; whereas the mere invader does not."

In consequence of the establishment of occupation over a territory by the belligerent State, the nationality of the local citizens does not change nor their loyalty towards the old Government comes to an end. As a matter of fact, the position of the occupying power is that of an intermediate military occupation. In consequence of this occupation, the belligerent State acquires right to establish administration over the inhabitants or citizens of that territory. It can make rules and regulations, for maintaining peace and order in that territory and for the security of its forces there. Even after the end of the occupation of the belligerent State over such a territory, the legal and valid action performed by such a power as deemed to be valid even after the occupation has ended. But the same is not true in regard to illegal actions performed by it. As pointed out by Starke, "The rational basis of international law as to belligerent occupation is that until subjugation is complete and the issues are finally determined, the occupant power's authority is of provisional character only." [1] He further adds, "The Status of Germany after the second world war following on the unconditional surrender appears to have involved a stage intermediate between belligerent occupation and the complete transfer of sovereignty. The four Allied Powers, Great Britain, France, Russia and the United States exercised supreme authority over Germany, and in the opinions of some writers, this could not be regarded as a belligerent occupation because of the destruction of the former Government and the complete cessation of hostilities with the conquest of the country. Nor, since the Occupying Powers were acting in their own interests, were they trustees in any substantive sense for the German people. At the same time, it should be pointed out that the Allied Control system was expressly of a provisional character, not involving annexation, was predominantly military in form, and based on the continuance of the German State as such, and on the contrivance also of a technical State of war. However, the question is now somewhat of academic interest except as a precedent for the future, owing to the establishment of separate West and East German Governments." [2]

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* See also for P.C.S. (1976), Q. No. 10(a); I.A.S. (1973), Q. No. 7(d); I.A.S. (1970), Q. No. 9; I.A.S. (1962), Q. No. 7; I.A.S. (1960), Q. No. 9; I.A.S. (1955), Q. No. 5; I.A.S. (1956), Q. No. 9; P.C.S. (1984), Q. No. 10(f).

1. J.G. Starke, Introduction to International Law, Tenth Edition, (1989) p. 565. In his view, "Belligerent occupation must be distinguished from two other stages in the conquest of enemy territory:—(a) invasion, a stage of military operations which may be extended until complete control is established; and (b) the complete transfer of sovereignty, either through subjugation followed by annexation, or by means of a treaty of cession," Ibid, at pp. 564-565.
2. Ibid, at pp. 565-566. It may be noted here that recently there has been the unification of two Germanys.

The provisions of the Hague Convention relating to belligerent occupation depended on two main concepts—(a) the belligerent power occupying the territory is not equivalent to sovereign rules and (b) private property cannot be seized.[3] In the twentieth century, these concepts have been greatly affected due to several reasons. According to Julius Stone, following are the said reasons : (1) Expansion of the functions of the State Government; (2) Change in the rules of proper government administration; (3) Increase in the use of human and material resources in war by the belligerent States; and (4) Change in economic rules of war (for example, even if private property can be seized under certain circumstances, the acquiring power pays compensation for the same).[4]

Rights and Duties of occupying power*

The provisions relating to rights and duties of the occupying power find mention in following conventions :

(i) Hague Convention of 1907.
(ii) Geneva Convention of 1949 on Protection of Civilian Persons in Times of War.
(iii) Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).

(I) Hague Convention of 1907

The rights and duties of occupying belligerent power depend upon the needs of maintaining peace and order on that territory, local needs of the inhabitants and the military needs of the occupying power. In short, following are the duties and rights of the occupying power :

(1) As provided under Article 43 of the Hague Regulations, the authority of the legitimate Power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

(2) The Occupying Power must respect family honour and rights, individual lives, private property and liberty;

(3) The occupant is entitled to collect ordinary taxes, dues and tolls imposed for the benefit of the State by the legitimate Government. As far as possible he must do so in accordance with the rules in existence and the assessments in force and must defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.

(4) In regard to the property, the effects are the same as those of the effects of war which have been mentioned in detail in an earlier chapter. In short, private property may be taken over for a temporary period and can be used but it cannot be seized. Public movable property may be seized. Immovable property may be temporarily taken but cannot be permanently seized.

(5) Except for the needs of the forces of the occupying power, the valid professions of the local inhabitants should not be disturbed. They should be free to follow their religious customs and should have freedom to worship in their own ways. The occupying power is not entitled to transfer the inhabitants of the occupying territory to certain other places.

(6) The occupying power is entitled to get food material for the needs of their military forces. But this should be done keeping in view the needs and convenience of the inhabitants of the territory. The people of the territory occupied cannot be compelled to be engaged in military works against their own country. Contributions and donations cannot be extracted from the local

3. Julius Stone, Legal Control of International Conflicts (1954) pp. 727-28.
4. Ibid, at pp. 728-729.

* See also for I.A.S. (1958), Q. No. 9; I.A.S. (1954), Q. No. 8; I.A.S. 91964), Q. No. 10; P.C.S. (1964), Q. No. 8(b); P.C.S. (1965), Q. No. 10(b); P.C.S. (1983), Q. No. 8(a).

people. This could be done only in exceptional circumstances when ordinary taxes are insufficient to meet the essential needs of the occupying power.*

(7) An occupant is prohibited from declaring extinguished, suspended or unenforceable in a court of law the rights and the rights of action of the inhabitants.

(8) An occupant may depose all Government officials who have not withdrawn with the retreating enemy. But he must not compel them by force to carry on their functions, if they refuse to do so except where military necessity arises.

(II) Geneva Convention of 1949 on Protection of Civilian Persons in Time of War :

Following are some of the main provisions of this Convention :

(1) Protected Persons *i.e.* civilian people who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the occupying power, nor by any annexation by the latter of the whole or part of the occupied territory.[5]

(2) Protected persons who are not the nationals of the power whose territory is occupied may avail themselves of the right to leave the territory subject to the provisions of Article 35, and decisions thereon shall be taken according to the procedure which the occupying power shall establish in accordance with the said article. (Art. 48)

It may be noted here that Article 35 provides that all protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the state. The applications of such persons to leave shall be decided in accordance with the regularly established procedures and the decision shall be taken as early as possible those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use. If any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate Court or administrative board designated by the Detaining Power for that purpose.

(3) Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the occupied power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the occupying power may undertake total or partial evacuation of a given area of the security of the population or imperative military reasons do demand.[6]

(4) The occupying power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.[7]

(5) The occupying power may not alter the status of public officials or judges in the occupied territories, or in any way, apply sanctions to or take measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.[8]

(6) To the fullest extent of the means available to it the occupying power has the

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* See also for P.C.S. (1988), Q. 9(b).

5. Article 47.
6. Article 49.
7. Article 51.
8. Article 54.

duty of ensuring the food and medical supplies of the population; it should, in particular bring the necessary food stuff, medical stores and other articles of the resources of the occupied territory are inadequate.[9]

(10) Similarly, to the fullest extent of the means available to it, the occupying power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.[10]

(11) The occupying power may requisition civilian hospitals only temporarily and only in case of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.

The materials and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.[11]

(12) The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the occupying power in cases where they constitute a threat to the security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity of ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.[12]

(13) The penal provisions enacted by the occupying power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provision shall not be retroactive.[13]

(14) Protected persons shall not be arrested, prosecuted or convicted by the occupying power for acts committed for or opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.[14]

(15) No sentence shall be pronounced by the competent courts of the occupying power except after a regular trial.[15]

(16) A convicted person shall have the right of appeal provided for by the laws applied by the Court. He shall be fully informed of his right to appeal or petition and of the limit within which he may do so.[16]

(17) Protected persons accused of offences shall be detained in the occupied territory and if convicted they shall, serve their sentence therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in the prisons in the occupied territory.[17]

(18) Protected persons who have been accused of offences or convicted by the

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9. Article 55.
10. Article 56.
11. Article 57.
12. Article 64.
13. Article 65.
14. Article 70.
15. Article 71.
16. Article 73.
17. Article 76.

Courts in occupied territory shall be handed over at the close of occupation with the relevant records to the authorities of the liberated territory.[18]

(19) Lastly, if the occupying power considers it necessary for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.[19]

Criticism.—The rules formulated in the Hague Convention and the Geneva Convention have been subjected to severe criticism. The most important criticism that has been levelled and, rightly too, is that these conventions are conspicuous for their silence in respect of several matters. For example, no clear rules have been formulated in regard to the economic and financial matters. It is also not clear as to what rights the occupying power possesses in regard to the bank, coinage, etc. of the territory occupied. In this connection, only one thing can be said with certainty that the occupying power should do its best not to take undue advantage from the inhabitants of the territory occupied in regard to economic and financial matters.

However, it may be noted that if the inhabitants of the territory occupied perform certain activities which are against the security and public order of the occupying power, then the occupying power is entitled to award due punishment to them. For example, if the local inhabitants resort to spying against the occupying power or interfere with any military activity of the occupying power then the occupying power can give them due punishment. However, it has been made clear in Articles 67 and 68 of Geneva Convention that the occupying power cannot claim the loyalty of the local inhabitants of the territory occupied. As pointed out earlier, in certain cases the occupying power or authority can establish control over the inhabitants of the territory occupied and can prohibit certain types of activities. It is, however, necessary that for the prohibition of these activities prior intimation should be given to the inhabitants of the territory occupied.[20]

(III) Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of victims of International Armed Conflicts (Protocol I)

In addition to the provisions of Hague Regulations and Geneva Convention of 1949 on Protection of Civilian Persons in Times of War, Protocol I adopted on June 8, 1977 by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed conflicts contains some provisions. The more important of the such provisions are following :

(i) The occupying power has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied. The Occupying Powers shall not therefore requisition civilian medical units, their equipment, their material or the services of their personnel, so long as these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment subject to the general rule in the preceding sentence the Occupying Power may requisition, the said resources, subject to the following conditions :

(a) that the resources are necessary for the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the Occupying Power or of prisoners of war;

(b) that the requisition continues only while such necessity exist; and

(c) that the immediate arrangements are made to ensure that the medical needs of the civil population as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied.

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18. Article 77.
19. Article 78.
20. For detailed study of this aspect see R.R. Baxter, "The Duty of obedience to the Belligerent occupant", B.Y.B.I.L., Vol. XXXVII (1950) p. 235.

(ii) The civilian population shall respect the wounded, sick and shipwrecked even if they belong to the adverse party, and shall commit no act of violence against them. The civilian population and aid societies, such as National Red Cross (Red Cresent, Red Lion and Sun) Societies shall be permitted even on their own initiative, to collect and care for the wounded, sick and shipwrecked even in invaded or occupied territories. No one shall be harmed, prosecuted, convicted or punished for the humanitarian acts.

(iii) The Occupying Power is also under obligation to protect the natural environment of the occupied territory.

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

Last but not the least reference may also be made here to the provision relating to responsibility in case of violation of the provisions of Geneva Convention and Protocol I. Article 91 of the Protocol provides that a party to the conflict which violates the provisions of the Convention or of their Protocol shall if the case demands be liable to pay compensation. It should be responsible for all acts committed by persons forming part of its armed forces.

CHAPTER 52

LAWS OF MARITIME WARFARE

Laws of Maritime Warfare*

Before the nineteenth century, laws of maritime warfare were mostly in the form of customs. In the nineteenth and the present century, a number of international treaties were entered into. As a result of these treaties, the laws of maritime warfare are mainly in the form of provisions of international treaties. Some of the more important of such treaties are Declaration of Paris, 1856, Hague Convention 1907, Geneva Submarine Protocol, 1936 and Geneva Convention of 1949 on Wounded, Ship-Wrecked Members of the Armed Forces at Sea.

Following are the main laws of maritime warfare :—

(1) *Attack on public and private enemy ships.*—During naval war, the belligerent States are entitled to attack the enemy ships and destroy their property. This general rule admits the following exceptions :

(a) *Hospital ships.*—According to Hague Convention, 1907, hospital ships cannot be attacked.

(b) *Vessels employed in religious, scientific and philanthropic works.*—According to Hague Convention of 1907, vessels employed for religious, scientific and philanthropic missions, can neither be seized nor attacked. To attack or seize such ships has been declared illegal according to the said Convention.

(c) *Cartel ships.*—Cartel ships or ships carrying prisoners of war cannot be attacked. Attack on such ships has been prohibited by the rules of maritime warfare.

(d) *Fishing Smacks and Market Boats.*—In accordance with the provisions of the Hague Convention fishing smacks and market boats engaged in their local profession and which are unarmed cannot be seized or otherwise destroyed during naval war.

(e) *Immunities of merchants.*—Hague Convention of 1907 provides the following immunities to merchants :

(i) After the beginning of the war, the merchants detained in the ports are given certain facilities.

(ii) Those merchants and persons who have reached the ports because of their lack of knowledge of war have also been provided certain facilities.

(iii) *Mail boats and mail bags.*—Maritime rules of International law provided certain immunities in regard to mail bags and mail boats. On the basis of the experience of the first world war, States have entered into treaties in this connection and have agreed to provide certain protections and immunities to mail boats and mail bags.

(2) *Merchant ships of enemy.*—Merchant ships of enemy can be destroyed during maritime warfare.

(3) *The crew of the ship.*—As pointed out earlier, enemy ships can be destroyed during naval warfare. However, it is provided that while sinking or destroying the ship, proper and necessary steps should be taken to protect the lives of the crew of the ship passengers and necessary papers, etc., on the board of the ship. Such crew and passengers of the ship cannot be attacked unless and until they resist the valid right of the belligerent State to visit and search the ship.

(4) Merchant ships are entitled to defend themselves against the attack of the enemy.

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* See also for P.C.S. (1969), Q. No. 5 (a).

(5) During maritime warfare, merchant ships cannot be converted into men of war (war-ships). According to British practice, the conversion of merchant ships into men of war can be made by belligerent State in its own port. It cannot be made in a neutral port.

(6) *Bombardment of the coastal cities.*—According to Hague Convention coastal cities can be bombarded or otherwise attacked during maritime warfare, but bombardment over undefended cities has been prohibited. This could be done only when the local inhabitants resist the supply of food materials and other essential supplies to the enemy.

(7) Ordinarily, only the places of military importance can be bombarded. Other places can be bombarded only when they are necessary for the achievement of military objectives.

(8) *Contact Mines.*—It is laid down in the Hague Convention that the laying of anchorless contact mines is contrary to International law. As regards the laying of floating mines under the sea it is provided that they should not be laid indiscriminately. It is the duty of the belligerent State laying such mine to give intimation of the area where such mines have been laid to neutral and other States. As rightly pointed out by Starke, "unfortunately the law as to mines is uncertain because of the weakness of the text of the Hague Convention VIII (Submarine Contact Mines) and because of the development of new types of mines and new kinds of minelaying techniques and mine-launching methods (*e.g.*, from submarines)." [1]

Interference with Submarine Telegraph Cables

As pointed out by Oppenheim, Article 15 of the Convention of 1884 relating to Submarine Telegraph Cables gives some rights to the belligerent States to take action in this connection; it is not certain as to what extent they are entitled to interfere with the Submarine Telegraph Cables.[2] According to Article 54 of the Second Hague Conference, Submarine Cables in the enemy territory which has been occupied and those cables which link or connect the neutral territory should not be destroyed and in case it is essential, then compensation should be paid when peace is established. But there are no definite rules in regard to other types of seizure or destruction. During the Second World War, the existing rules were indiscriminately violated. There is, therefore, an urgent need of an International Convention on this subject.

Geneva Convention of 1949 for the Amelioration of the condition of wounded, sick and ship-wrecked members of the armed forces as sea.

In Geneva Conference of 1949, a convention was also adopted on wounded, sick and ship-wrecked members of the armed forces at sea. A number of rules were formulated in this regard. These rules resemble the rules of land warfare. Article 4 of the Convention makes it clear that in case of hostilities between land and naval forces of parties to the conflict, the provisions of the present Convention shall apply to the forces on board ship. Forces put ashore shall immediately become subject to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

Article 5 of the Convention provides that neutral powers shall apply by analogy the provisions of the present Convention to the wounded, sick and ship wrecked and to the members of the medical personnel and to chaplains of the armed forces of the parties to the conflict received or interned in their territory, as well as to dead persons found.

Like the rules of land warfare, it is provided that the wounded shipwrecked members of the armed forces at sea should be looked after and humanitarian treatment should be made with them. If they are made prisoners of war they should be treated in the same way as the prisoners of land warfare are treated. It is clearly provided that hospital ships and the ships carrying prisoners of war cannot be attacked. During naval war, the ships of enemy can be sunk but before doing so it is the duty of the belligerent State to ensure the

1. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 562.
2. L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 514.

security and safety of the crew of the ship. If the ship of enemy has been sunk and the crew and the passengers of the ship try to save their lives through boats then ordering of firing at them is a flagrant violation of international law. A leading case on the point is the *Peleus Trial* in which it was clearly laid down that firing at the crew of the ship saving their lives through life boats is contrary to International Law. Other rules of maritime warfare are more or less the same as those of the rules of land warfare.

If wounded, sick or shipwrecked persons are taken on board a neutral ship or neutral military aircraft it shall be ensured where so required by international law, that they can take no further part in operations of war (Article 15). Wounded, sick or shipwrecked persons who are landed in neutral parts with the consent of the local authorities, shall, failing arrangements to the contrary between the neutral and the belligerent powers, be so guarded by the neutral powers, where so required by international law, that the said persons cannot again take part in operations of war (Art. 17).

After each engagement, parties to the conflict shall without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled (Art. 18).

Military hospital ships, that is to say, ships built or equipped by the powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, may, in no circumstances be attacked or captured, but shall at all times be respected and protected, on condition that their names and descriptions have been notified to the parties to the conflict ten days before those ships are employed (Art. 22).

It is also provided that merchant vessels which have been transformed into hospital ships cannot be put to any other use throughout the duration of hostilities (Art. 33). The protection to which hospital ships and sick-bays are entitled shall not cease unless they are used to commit, outside their humanitarian duty, act harmful to the enemy. Protection may, however, cease only after due warning has been given, naming in all appropriate cases a reasonable time limit, and after such warning has remained unheeded (Art. 34).

Reprisals against the wounded, sick and shipwrecked persons, the personnel the vessels of the equipment protected by the convention are prohibited (Art. 47).

Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) adopted on June, 8, 1977 by the Diplomatic Conference on Re-affirmation and Development of International Humanitarian Law Applicable in Armed Conflicts also contains some provisions relating to wounded and ship-wrecked members of the armed forces at sea. Protocol I which supplements the said Geneva Convention of 1949 provides that all the wounded, sick and ship-wrecked to whichever party they belong shall be respected and protected. In all circumstances they shall be treated humanly and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their conditions. There should be no distinction among them founded on any grounds other than medical ones. Protocol I also provides for certain protections in respect of hospital ships and coastal rescue crafts.

*Laws of Submarine Warfare.**—Following are the main rules relating to the laws of submarine warfare :—

(1) It was laid down in the *Treaty of Washington of* 1922 that the use of submarine to destory merchant or commercial ships was against international law and hence it was prohibited.

(2) Next important treaty which laid down rules relating to submarines is the *London Naval Treaty* of 1930 signed by the U.S., U.K., France, Italy and Japan. Article 22 (Part IV) of the Treaty provided that rules of International

* See also for I.A.S. (1958), Q. No. 10(a).

Law relating to surface vessels would also apply to submarines, particularly in respect of the attack on merchant ships. Thus a submarine should not sink a merchant vessel without ensuring the safety of the passengers crew and papers of the ships. As made clear in Article 23 of the Treaty the treaty shall remain in force for an indefinite period.

(3) Yet another landmark is the *London Submarine Protocol* of 1936 which was signed by the U.S., U.K., France, Italy and Japan in London. It incorporated the provisions of Part IV of the Naval Treaty of 1930 mentioned above. Germany and U.S.S.R. acceded to the Protocol in 1936 and 1937 respectively. But as pointed out by Prof. D. P. O. Connel, "In the case of submarine warfare the rules in London Protocol of 1936 are viable only in the ideal circumstances which are unlikely ever to occur in practice. Self-defence is then the only criterion of submarine warfare, and it becomes a matter of technological evaluation to ascertain the factors of proportionality and necessity which legitimate submarine warfare in times of limited hostilities." [3]

(4) Last but not the least instrument is the Nyon Agreement of September 1937 which deals with the suppression of attacks by submarines against merchant vessels. A remarkable thing about this agreement is that it provided that the provisions of the Treaty of 1930 and London Protocol of 1936 were "declaratory of International Law."

As with other rules of war, the above rules were also flagrantly violated during the second world war.

The Status of Foreign war ships

As regards the status of foreign war ships, present international law is as follows—

(i) Foreign war ships, their commander and crew are immune from the jurisdiction of coastal state.

(ii) So long as the foreign war ships are engaged in the official acts of state, their immunity is not lost.

(iii) The home state of the war ships is responsible for the acts of the war ships.

(iv) The foreign war ships will lose their immunity if their commander or crew intrude in a foreign state in disguise or false pretences since they are then guilty of aggravated trespass.[4]

As pointed earlier in chapter on "Laws of land warfare", "disguise" or "false pretences", is the essential element of espionage. Thereupon only in the last case (*i.e.,* No. IV referred above) a warship can be termed as a 'spy'. Since secrecy is not an essential element of espionage, the same rules will apply to submarines.[5]

Illustration.—A ship belonging to the Navy of state X was found by the authorities of state Y to have been engaged in acts of espionage within the territorial waters of Y and so was seized by Y's patrol ships. X contests the validity of the seizure under international law.*

It is well recognized principle of international law that the sovereignty of a state extends to its territorial waters. Therefore seizure of the ship of Navy of State X by Y's patrol ships is valid. The sovereignty of a coastal state over its territorial waters is subject only to the innocent passage being given to foreign ships. But it must be emphasized that the passage must be innocent. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state, such passage must take place in conformity with rules of international law. Article 19 (2) of the U. N. Convention on the Law

3. D. P. O.' Conneil "International Law and Contemporary Naval Operations", B. Y. B. I. L., Vol. XILV (1970) at p. 82.
4. See Ingrid Delupis, "Foreign Warships and Immunity for Espionage", A.J.I.L., Vol. (1984) p. 53 at p. 71.
5. Ibid pp. 71-72.

* C.S.F. (1985), Q. No. 7(c). See also P.C.S. (1991) Q. 8 (b).

of the Sea, 1982 provides that passage of a foriegn ship shall be considered to be prejudicial of the peace, good order or the security of the state, if in the territorial sea it engages in the activities such as, *inter alia,* any act aimed at collecting information to the prejudice of the defence or security of the coastal state or any other activity not having a direct bearing on passage. Espionage is certainly such an activity and therefore in the instant case passage cannot be said to be innocent. State 'Y' is therefore justified in seizing the Navy ship of State X.

The position will however be different, if the Navy ship of State Y is seized in the contiguous zone of state Y for the coastal state does not exercise sovereignty in the contiguous zone. It may only exercise control necessary to "prevent infringement of its customs, fiscal immigration or sanitary regulation within its territorial sea" and "punish infringement of the above regulations committed within its territorial sea." [6] Therefore seizure of the Navy ship of state X would not be lawful.

The seizure of the Navy ship of state X by State Y will also be valid if it has been seized on the high sea, after a chase from the territorial waters for its acts of espionage in the territorial waters. Such a seizure is justified under the doctrine of 'hot pursuit'. According to Article 111 of the 1982 Convention on the Law of the sea, the hot pursuit of a foreign ship may be undertaken when the competent authorities of a coastal state have good reason to believe that the ship has violated the laws and regulations of that state. Such pursuit must be commenced when the foreign ship or one of its boats is within the territorial waters, the archipelagic waters, the territorial sea or the contiguous Zone of the pursuing state, and may only be continued outside the territorial sea or the contiguous Zone if the pursuit has not been interrupted. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or of a third state. The right of hot pursuit may be exercised only by war ships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

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6. Article 33 (1) of the 1982 Convention on the Law of the Sea.

CHAPTER 53

LAWS OF AERIAL WARFARE

*Laws of Aerial Warfare**.—In the modern times, the importance of aerial warfare has greatly increased. Aircrafts were used in large scale for the first time during the First World War. Since the First World War, the aircrafts have been used in all the major wars that have taken place so far. The increased use of aircrafts in war necessitated the formulation of definite rules of international law to regulate their use during war. Bombing by aircrafts cause excessive loss of public and private property. In order to regulate the use of aerial warfare, many conferences have been called for from time to time and many rules have been formulated. It has been rightly remarked by Baxter, "The law pertaining to the use of aircraft in war notably that concerning aerial bombardment in the most primitive of these three bodies of law (i.e., Land, Naval and Air). There is no general multilateral agreement relating specifically to aerial warfare, and it is possible to do no more than lay down certain general principles analogy to outdated rules governing bombardment by land and naval forces." For the sake of our convenience, we will study them under the following headings :

(1) *Brussels Conference of 1874.*—Brussels Conference laid down the following rules :

(a) Bombardment of undefended cities, villages and towns was prohibited.
(b) Bombing of buildings and works relating to art, science, religion and culture and philanthropic works was prohibited.
(c) It was also laid down that the buildings of public utility should not be destroyed during aerial warfare.
(d) Bombing of hospitals etc., was completely prohibited.

(2) *Hague Convention, 1899.*—The Hague Convention, 1899, approved the rules formulated in Brussels Conference, 1874 and also laid down the following additional rules :

(a) Bombing of civilian people and their property without just and appropriate cause was prohibited.
(b) Bombardment for the realisation of money or things was declared illegal.
(c) It was laid down that bombardment should be made only for the achievement of military objectives.
(d) Bombardment of those cities and villages which are away from the war area was also prohibited.
(e) Yet another significant principle that was pronounced was that during aerial warfare the damage or loss caused should not be more than that caused by naval war. The obvious reason fo this rule was that hitherto navy occupied an important place in war and it was thought necessary that the damage or loss caused by aerial warfare should not exceed that of naval warfare.

(3) First World War (1914-18).—The above-mentioned rules were flagrantly violated during the First World War. It appeared for the time being as if there were no rules of war and the First World War turned into a total war in disregard of all rules and regulations of war. It was, therefore, felt that definite rules of aerial warfare should be formulated and for this a conference was called in Washington in 1922.

(4) Washington Conference, 1922.—The use of the aircraft during the First World War had made it clear that the rules of aerial warfare formulated so far were not in conformity with the changing facts and circumstances. In order to amend these rules and

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* See also for I.A.S. (1960), Q. No. 8 ; I.A.S. (1958), Q. No. 10 (b) ; P.C.S. (1970), Q. No. 4 ; P.C.S. (1965), Q. No. 11.

to frame certain rules, a conference was called in Washington in 1922 which is popularly known as *Washington Conference.* This conference was attended by America, Great Britain, Italy, Japan and some other nations. This Conference laid down the following rules :

(a) Arming of private aircraft with weapons for self-defence was prohibited.
(b) Bombardment for the realisation of money and things was declared illegal.
(c) It was also laid down that bombardment to frighten civilian population was illegal.
(d) It was also laid down that only factories of military importance could be destroyed through aerial bombardment.
(e) Those villages and towns, and buildings which are unconnected with or are away from the war area should not be destroyed.
(f) Ordinarily civilian areas cannot be bombarded. Such areas can be bombarded only when they are very essential for the achievement of military objectives. But this can be done only after giving prior warning in this connection.
(g) Buildings connected with religion, culture or the philanthropic works cannot be destroyed.
(h) Hospitals and other places where the patients are treated cannot be destroyed by aerial bombardment.
(i) Yet another important rule that was laid-down was that during aerial warfare the rules of land warfare should also be enforced. That is to say laws of neutrality and land warfare were also made applicable during aerial warfare.
(j) Last but not the least, it was laid down that if a belligerent State violated the above-mentioned rules, it will be liable to pay compensation for the same.

(5) The Hague Rules of Air Warfare (1923)*.—The states which participated at the Washington Conference of 1922 agreed to appoint a Commission of Jurists to prepare a Code of Air Warfare Rules. The Commission prepared the Code of Air Warfare Rules and presented the proposed rules in 1923. It may be noted that the proposed rules have not been ratified. However, "they are of importance as authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war and they will doubtless prove a convenient starting point for any future steps in this direction. On occasions governments have announced that they would act in accordance with the provisions of the Hague Air Warfare Rules." [1] Further, the main object of the Hague Air Warfare Rules was to propose a legal regulation of the special problems raised by air warfare." [2]

Among the rules proposed by the Commission following deserve special mentions :—

(*i*) *The use of incendiary or explosive bullets.*—Article 18 of the Air Warfare Rules of 1923 provided that the use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited.

(*ii*) *Aerial bombardment.*—Regarding aerial bombardment following main rules were proposed :

(a) Aerial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants, is prohibited.
(b) Aerial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money is prohibited.
(c) Aerial bombardment is legitimate only when directed at a military objective, that is to say an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

(*iii*) *Treatment of and operations against enemy non-military aircraft.*—According to Article 33, belligerent non-military aircraft can be fired upon unless they

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* See also for I.A.S. (1963), Q. No. 11 ; I.A.S. (1976), Q. No. 10 (ii).

1. L. Oppenheim International Law, Vol. II, Seventh Edition, Edited by H. Lauterpacht, p. 519.
2. Ibid.

make the nearest available landing on the approach of enemy military aircraft. Article 34 further provides that such aircraft can be fired upon if they fly within the jurisdiction of the enemy, in the immediate vicinity thereof and outside the jurisdiction of their own State or in the immediate vicinity of the military operations of the enemy by land or sea.

Besides the above-mentioned rules, rules were also proposed in respect of treatment of crews of enemy military aircraft; the duties of the belligerents towards neutral states and of neutral states towards belligerents; the external marks and belligerent qualification of aircraft, etc. The rules proposed were not intended to be exhaustive. This is clear from Article 62 which provides that aircraft personnel engaged in hostilities come under the laws of war and neutrality applicable to land troops.

(6) *Geneva Protocol,* 1925.—In Geneva Protocol, 1925 the gas and poisonous substance were prohibited during the aerial warfare.[3]

(7) *Disarmament Conference.*—Disarmament Conference was convened under the auspices of the League of Nations in 1932. Its main objective was to achieve disarmament and thereby to reduce the devastating effects of war. In this Conference, some rules relating to war were also laid down, the most important of them that aerial bombardment over the civilian people of cities and villages were completely prohibited.

(8) *Second World War,* 1939-45.—In the Second World War, all the above rules formulated in different Conferences were violated. During the war the German bombers ruthlessly destroyed cities and villages and caused uncalculable and unprecedented loss and damages to the people at large. In reaction to this America, Britain, Russia, etc., also resorted to same tactics. The most unfortunate incident of the Second World War, however, was the dropping of atom-bomb over the two cities of Japan—Hiroshima and Nagasaki—which resulted in the death and excessive suffering of the millions of people. America gave two reasons for its action of dropping atom-bombs on Nagasaki and Hiroshima. In the first place she contended that it was done to end the war immediately. Secondly, America contended that the dropping of atom-bombs was resorted to as a reprisal. But as rightly pointed out by Starke, neither of these grounds is satisfactory and justified. The unprecedented devastation and destruction caused in the Second World War further made it clear that it was necessary to amend the rules relating to aerial warfare.

(9) *International Convention for Protection of Cultural Property* 1954.—In this convention emphasis was laid that during aerial warfare cultural property and the building connected with it could not be destroyed.

(10) *Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),* 1977.—This Protocol was adopted by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts on June 8, 1977. Article 42 of Protocol I provides that no person parachuting from an aircraft in distress shall be made the object of attack during his descent. Upon reaching the ground in territory controlled by an adversary party, a person who has parachuted from an aircraft in distress shall be given an opportunity before being made the object of attack, unless it is apparent that he is engaging in hostile act. Airborne troops are however, not protected by this Article.

Modern science and technology have helped the notions to perfect devastating and very potential weapons of destruction. Atomic-bombs and nuclear weapons have brought about revolutionary changes in the whole aspect of war. The devastating effects of these weapons have made it clear that a future war will be much more devastating and one cannot even foresee as to what will happen if the nuclear war takes place. The scientists have warned that the whole human race may be erased from the face of the earth. The use of atomic and nuclear weapons have made it clear that the civilian areas cannot also escape from the effects of war. These revolutionary changes have also made it clear that

3. For detailed study see R. R. Baxter and Thomas Buergenthal, "Legal Aspects of the Geneva Protocol of 1925", A.J.I.L., Vol. 64 (1970) p. 853. See also Chapter on "Laws of Land Warfare."

the above-mentioned rules of warfare are not in keeping with the facts and circumstances of the present time. It is, therefore, necessary to bring about revolutionary changes in this connection. Some efforts are being made in this connection which will be mentioned later on in this chapter. But it is sufficient to note here that despite these efforts, the progress achieved so far is far from satisfactory.

Legality of Atomic or Nuclear Warfare—Legality of the use of Atomic Bombs dropped on Hiroshima and Nagasaki during the Second World War.*

On the basis of the rules which have been formulated so far in the conferences and conventions mentioned above, there can be no two views that the dropping of atom-bombs by America on Nagasaki and Hiroshima was a flagrant violation of the rules of aerial warfare. The reason given by America can convince no right thinking man. America contended that this action was taken to end the war immediately, and it was also used as a reprisal, but both of these reasons are not justified. In fact, the use of atom-bombs during the Second World War was a violation of international law relating to aerial warfare and cannot be justified on any reason. Reference may be made here of a Japanese case, *Shimoda and others* v. *State,* decided by Tokyo District Court in 1963. In this case for the first time, the legality of the atomic warfare was considered. In this case, five citizens of Hiroshima and Nagasaki filed a case against the State to claim compensation for the damage caused to them by atom-bombs. The Tokyo District Court did not grant relief to them on procedural grounds but it gave its verdict on the validity of dropping of atom-bombs. The Court observed, "The dropping of atomic-bombs was a hostile act taken by the United States of America, which was then in a state of war with Japan and was illegal act of hostility contrary to the positive International Law of that day (treaty and customary-law)."

In the modern time some treaties have been concluded in order to check the spread of nuclear wars and to prohibit it in certain areas. The more important of them are (1) Nuclear Test Ban Treaty, 1963; (2) Treaty on Non-proliferation of Nuclear Weapons, 1968; (3) Treaty on Prohibition of Emplacement of Nuclear Weapons, in Sea-bed and Ocean floor, 1971 or properly called Sea-bed Treaty (1971).

Although significant efforts have been made through these treaties to regulate the use of nuclear weapons, it cannot but be conceded that they are far from satisfactory. So long as five great powers possess nuclear weapons and they do not destroy them, the world will always be afraid from these devastating weapons. Present world may be said to be siting on a crater which may erupt at any time and cause unprecedented damage, destruction and devastation. There is not even the least doubt in the contention that if the nuclear war takes place, the rules of aerial warfare formulated so far will be flagrantly violated. It is unfortunate that the desired progress has not been achieved so far in this connection.

In 1993, the World Health Organisation (WHO) requested the International Court of Justice to give its advisory opinion on the following question :

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

The World Court declined to give its advisory opinion on the ground that the above question is not within the scope of proper activities of WHO.

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

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* See also for I.A.S. (1962), Q. No. 9 ; I.A.S. (1957), Q. No. 11 ; P.C.S. (1964). Q. No. 10(a) ; P.C.S. (1987), Q. 8 (c) ; C.S.E. (1992) Q. 8 (a).

"Is the threat or use of nuclear weapons in any circumstance permitted under International law ?" Giving it advisory opinion, the World Court held that there is no specific authorization for the threat or use of nuclear weapons under customary or conventional law. Moreover, a threat or use of force by means of nuclear weapons is unlawful if it is contrary to Article 2(4) of the U.N. Charter and not vindicated by the requirements of Article 51 of U.N. Charter. Further, a threat or use of nuclear weapons ought to be compatible with the requirements of the international law applicable in armed conflict, especially international humanitarian law including specific obligations under treaties expressly dealing with nuclear weapons. Lastly, there is an obligation of the members of the United Nations to pursue in good faith and conclude negotiations leading to nuclear disarmament under effective International Control.

But as regards the threat or use of nuclear weapons 'in any circumstance' the World Court did not give any definite opinion and observed that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance. This hesitancy on the part of the majority opinion of the World Court is deplorable since there is no authorization for the threat or use of nuclear weapons under customary or conventional law and a threat or use of nuclear weapons is unlawful. If it is in violation of Article 2(4) and not vindicated by Article 51 of the Charter, and has to be compatible with the requirements of International humanitarian law, the World Court should have unhestatingly held that the threat or use of nuclear weapons 'in any circumstance' is not permitted under international law, one of the reasons of World Court's hesitancy to reach the conclusion was the fundamental right of every State to survival, and thus its right to resort to self defence, in accordance with Article 51 of the Charter, when its survival is at stake. But it may be submitted when *i.e.* by the use of nuclear weapons) the survival of the entire human race is at stake, the right of individual State cannot prevail over it. Thus the threat or use of nuclear weapons must be declared to be unlawful in any circumstance. This view finds support from separate opinions of several judges of the World Court.

Legality of the Conducting of Nuclear Tests.*

Despite the agreement among certain nuclear powers not to conduct nuclear tests, some countries, such as, France and China have been conducting nuclear tests, and have been constantly refusing to accept any international control over such matters. Nuclear tests emanate radio-active substances which are very harmful for the health and well-being not only of the present generation but of the generations to come. The question may however, arise whether the nuclear tests conducted by China and France are legal and valid according to international law. Australia and New Zealand lodged complaints in May 1973 in the International Court of Justice about France's plan to conduct nuclear tests. Thus the World Court got an opportunity to give its verdict on the validity of the nuclear tests. The World Court decided on June 22, 1973 by 8 votes to 6 votes to accede to the New Zealand request to restrain France from continuing her nuclear tests in the South Pacific pending a full scale hearing on the dispute. In a ruling on Australian complaint about the planned tests the Court asked France to avoid nuclear tests causing the deposit of radio-active fall out on Australian territory. The court observed, "The governments of Australia and France each ot them should ensure that no action of any kind is taken which may aggravate or extend the disputes submitted to the Court or projects the right of either party in respect of the carrying out of whatever decisions the court may render in this case, and in particular the French Government should avoid nuclear tests causing the deposit of radio-active fallout on Australian territory." Thus the International Court of Justice accepted the Australian request and granted injunction restraining France to conduct the planned nuclear tests.

* See also for C.S.E. (1989), Q. 5 (d).

It was, however, very disheartening to note that the French Government declared that it would not abide by the decision of the Court. It may be noted that since the complaint had been lodged by Australia and later joined by New Zealand, the French Government had been repeatedly declaring that it would ignore the verdict of the Court. The reason of French rejection explained by Foreign Minister was that the court cannot rule on matters arising from France's national defence. The contention conflicted with Australian and New Zealand claim that the tests would be harmful by injuring health. The dispute therefore, raised an important point of international law whether one country in its defence interests can harm another. The World Court answered in negative and gave its verdict in favour of New Zealand and Australia. The transigence of the French Government in refusing to abide by the decision of the International Court of Justice was unfortunate. Nevertheless, so far as the legal position is concerned, it appears quite obvious that the use of atomic-bombs in aerial warfare as well as conducting nuclear tests are flagrant violations of the rules of international law if they affect adversely other sovereign States.

It may be noted that later on the President of France informed the Court that in future France would not conduct atmospheric nuclear tests and confine underground test only. In view of this, the World Court did not decide the case on merits and the case was dropped.[4]

Legality of nuclear tests conducted by India : Pokharan Explosion.[5]*

India successfully carried out her maiden underground nuclear explosion at Pokharan in the Thar desert of Rajasthan on May 18, 1974. It was claimed that the nuclear test was designed to harness the energy of the atom for peaceful purposes. While it was hailed by some countries as a significant achievement, some countries, such as, Canada, Japan and Pakistan reacted adversely to it. Indian Prime Minister and other Indian Government spokesmen repeatedly assured the world that the explosion was not designed to manufacture nuclear weapons but to harness the energy of the atom for peaceful purposes.

Every country is free to do anything it likes within its territory, provided that its acts do not affect other sovereign States. Hitherto it was believed that the nuclear explosions are necessarily followed by the spread of radio-active dust in a wide area adversely affecting the health and well-being of the peple of that area. The most puzzling thing about India's nuclear test was the absence of any radio-active fall-out following the explosion. Indian scientists were both elated and pazzled about this significant achievement. Dr. H. N. Sethana Chairman of the Atomic Energy Commission said that an aerial survey, minutes after the explosion at the heights as low as 30 metres above the explosion area showed no increase in the level of radio-activity. The fact that there was no increase in the level of radio-activity, was not seriously and successfully contested by any country of the world. Thus India's nuclear explosion was not contrary to international law because its effects were contained within the territory of India and no other sovereign State was affected by it.[6]

Let us now examine whether India's nuclear test constitutes a violation of India's treaty obligations assumed by her under any international treaty. In this connection, it will be relevant to refer to Nuclear Test Ban Treaty, 1963 and Treaty on Non-Proliferation of Nuclear Weapons, 1968. As regards the Nuclear Test Ban Treaty, 1963, India is a party to

4. See Nuclear Test case (*Australia* v. *France*) Judgment Dec. 20, 1974, [(1974) I.C.J. Rep. 253)]. Nuclear Test case (*New Zealand* v. *France*) Judgment of Dec. 20, 1974, (1974) I.C.J. Rep. 457.

5. See also S. K. Kapoor, "The Legality of Nuclear Testing : the Pokhran Explosion" I.J.I.L., Vol. 14 (1974) p. 425; Pierre M. Gallois, "India's Nuclear Explosion and India's Security". Foreign Affairs Reports Vol XXIV (1975), p. 91.

** See also for C.S.E. (1989), Q. 5 (d).

6. See George Schwarzenbeger, The Legality of Nuclear War (London Stevens and Sons Ltd., (1958) p. 49; Myres S. McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea" A.J.I.L., Vol. 49 (1955), p. 356; Myres S. McDougal and Nobert A. Schiel. The Yale Law Journal. Vol. 64 (1955), p. 618; For contra, see Emanuel Margolis, "The Hydrogen Bomb Experiment and International Law." The Yale Law Journal, Vol. 64 (1955) p. 629; Ellery C. Stowell, "The Laws of War and the Atom Bomb", A.J.I.L. Vol. 39 (1945), p. 781.

it (India signed this treaty on March 3, 1967). But India's nuclear explosion does not constitute a violation of this treaty. In the first place, this treaty prohibits nuclear test explosion only in the atmosphere, outer space or under water including territorial waters. It does not prohibit underground nuclear explosion. Secondly a nuclear explosion in any other environment to constitute a violation of the treaty must be such as "causes radio-active debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted ....." [Art. 1 (b)]. Thus India's nuclear explosion is in no way contrary to the provisions of the Nuclear Test Ban Treaty, 1963.

The question of the violation of the Treaty on Non-Proliferation of Nuclear Weapons, 1968, does not at all arise because India is not a party to this. India did not sign this treaty on the ground that instead of aiming at disarmament of nuclear weapons, this Treaty will perpetuate the monopoly of the nuclear nations.[7] Besides being highly discriminatory, this treaty places totally unjustified restrictions on the peaceful uses of atomic energy.

Therefore, it is clear that India's nuclear explosion does not constitute a violation of her treaty obligation assumed under an International Treaty. Thus, India's nuclear explosion of May 18, 1974, is not contrary to International Law. India was within her rights to conduct the nuclear test and any attempt to criticize and malign her is motivated by political considerations. In view of the above discussion, it may be concluded that the legality of the India's nuclear test cannot be successfully challenged.

Conclusion—Although the use of atomic weapons is contrary to International law, it does not necessarily follow that their manufacture and possession will also be contrary to the norms and principles of international law. In fact in the absence of any treaty obligations, the existing norms and principles of International law do not prohibit the manufacture and possession of nuclear weapons by a Sovereign State within its territory provided that such manufacture and possession do not affect other Sovereign States. India was, therefore, within her rights to explode her maiden nuclear device on May 18, 1974.

Star War and International Law.

N. B.—For this please see Chapter on "Disarmament".

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7. See also T. T. Poulose, "The Third World Response to Anti-Nuclear Proliferation Strategy, India Quarterly, Vol. XXXIV, No. 2 (1978), p. 145 at p. 156.

CHAPTER 54

WAR CRIMES*

NEUREMBERG, TOKYO, PELEUS, EICHMANN AND OTHER WAR CRIME TRIALS

Sanctions of the Laws of War

International law is often criticized on the ground that it lacks sanctions. It is true that as compared to State law, there are very few sanctions behind the International law. It would, however, be wrong to contend that there are no sanctions at all behind international law. A glaring example of this is the sanctions of the laws of war. It is true that the laws of war are frequently violated but would be wrong to say that international law does not possess any means to enforce these laws upon the States. In fact there are the following three sanctions of the laws of war :

(*1*) *Reprisal.*—It is one of the oldest rules of international law that reprisal is a means to compel the enemy States to observe the rules of war. In the modern times reprisal is often instrumental in making the belligerent State observe the rules of war.

(*2*) *Punishment of War Criminals.*—Yet another sanction of the laws of war is the punishment awarded to war criminals. The persons who are guilty of war crimes can be arrested and prosecuted. After the Second World War, a number of war criminals have been held and the persons found guilty of war crimes have been punished. Among such war crime trials, *Neuremberg Trial, Tokyo Trial and Eichman, Trial* deserve special mention.

(*3*) *Compensation.*—Yet another sanction of the laws of war is that a belligerent State which violates the laws and customs of war may be compelled to pay compensation for such violation. Article 3 of Hague Convention of 1907 provides that a State violating the law of war can be compelled to pay compensation for such violation.

Definition of 'War Crimes'[1]**

Probably the widest definition of the international crimes, as given by Prof. Schwarzenberger, is that they are acts which "strike at the very roots of international society." Genocide, war crimes, piracy, etc., are thus clearly and without the shade of doubt international crimes. Professor Kelsen and other older writers defined war crimes as the violation of the laws and customs of war. According to Prof. Higgins war crimes include the violation of the recognized rules of warfare by members of the armed forces, illegitimate hostilities in arms committed by individuals who are not members of the armed forces, espionage, and war treason and marauding. According to some other writers, war crimes also include illegitimate hostilities in arms committed by individuals who are not members of the armed forces espionage, war treason and marauding. This definition is now considered obsolete and inadequate. As pointed out by Prof. Quincy Wright, "Acts committed in violation of laws of war constitute war crimes in a narrow sense." Further, "the term war crimes has been used in military circles as synonymous with violation of the laws of war but in current official and juristic discussion it has acquired a wider connotation." [2]Acts of sabotage, espionage or seduction committed by enemy soldiers, or civilians, etc., are war crimes in its narrow sense. To quote Prof. Quincy Wright again,

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* See also for I.A.S (1966), Q. No. 9 ; P.C.S. (1985), Q. 10 (c).

1. See also S. K. Kapoor, "War Crimes : Problem of the Pakistani Prisoners of War" Lawyer, Vol. 5, No. 6 (June 1973), p. 109.

** See also for P.C.S. (1978), Q. 7(a) ; C.S.E. (1980), Q. 10(b).

2. Quincy Wright, "War Criminals", A.J.I.L. Vol. 39 (1945), p. 257 at p. 274.

"Very different are the acts of cruelty, perfidy or vandalism forbidden by the rules of war. Among these war crimes are use of forbidden-weapons, maltreatment of sick, wounded and professions ; abuse of red-cross flags of truce; breach of parole or armistices : execution of hostages; massacre of non-civilians or of enemy soldiers who have surrendered spillage; destruction of maritime ships without putting the passenger and crew in a place of safety; bombardment of undefended places, or protection to buildings of non-military objectives. War crimes in this class should be punished at any time the guilty individuals are captured, even after the war. As pointed out by Prof. Schwarzenberger, pirates, war criminals are reckoned as *hostis humani generis* the enemy of mankind and each State may capture, try and punish them.[3]

Professor Oppenheim has given a wide definition of war crimes in the following words : "War crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders." [4] Now it is generally recognised that there is personal responsibility for commission of war crimes. This is evident from *Ex-parte Quirin, Yamista, Neuremberg, Tokyo* and *Eichmann Trials."* [5]

The principles of International law enunciated in the *Neuremberg Trial* have brought about a revolutionary change in the laws of war in general and war crimes in particular. The principles of international law enunciated in the Neuremberg judgment have been summarised in the Report of the International Law Commission in its second session in 1950. The Neuremberg Trial classified the crimes punishable under international law into the three categories : (1) Crimes against peace ; (2) War crimes; and (3) Crimes against humanity.

(1) Crimes Against Peace.—Article 6 of the Charter of Neuremberg enumerated following crimes as crimes against Peace : Planning, preparation, initiation, or waging of a war aggression, or a war violation of International treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(2) War Crimes.—An exhaustive definition of war crimes has been given in Principle IV of the said report. According to it, war crimes are the violations of the laws and customs of war which include but are not limited to murder, ill-treatment or depradation to forced labour or for any other purpose of civilian population or in the occupied territory murder or ill-treatment of the prisoners of war or persons on the seas, killing of hostages, plunder of public property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

Reference may also be made here to Resolution 3074 (XXVIII) passed by the General Assembly of the U. N. declaring Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity. The General Assembly passed the said resolution on December 3, 1973. The General Assembly declared that the United Nations, in pursuance of the principles and purposes set forth in the Charter concerning the promotion of co-operation between peoples and maintenance of International peace and security, proclaimed the following principles :

1. War crimes and crimes against humanity, whenever or wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty to punishment.
2. Every State has the right to try its own nationals for war crimes or crimes against humanity.
3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.

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3. G. Schwarzenberger, The Frontiers of International Law, p. 187.
4. L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 566.
5. See "The Proposed Trial of Pakistani War Criminals", I.J.I.L. (October 1971), p. 645 at p. 647.

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty in punishing them.
5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.
6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial the person indicated in paragraph 5 above and shall exchange such information.
7. In accordance with Article 1 of the Declaration on Territorial Asylum of 14 December, 1967, States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.
8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detention, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.
9. In co-operating with a view to detection, arrest, and extradition of persons against whom there is evidence that they have committed war crimes and crimes against humanity and if found guilty, their punishment, States shall act in conformity with the provisions of the Charter of the United Nations and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

(3) Crimes Against Humanity.—The Nuremberg Charter described crimes against Humanity as the crimes such as murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, investigators, and accomplices, participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

The U. N. War Crimes Commission

The states would now enjoy broader access to the archives of the United Nations War Commission. Thus for the first time access would be given to individual researchers on the initiative of U. N. Secretary-General, Javier Perez de Cuellar, the original 17 members of the U. N. War Crimes Commission on the issue in September and October 1987, and agreed that some of the secrecy surrounding the archives for 40 years should be dispelled. As a result, Governments can now conduct general research, and the files may be opened to "*bona fide* research by individuals into history and work of the United Nations War Crimes Commission and into war crimes." [6]

IMPORTANT WAR CRIME TRIALS

The Scuttled U-Boats case, [(1940) 1 Law Reports of Trials of Criminals 55].

This case relates to war crimes and the punishment of war criminals. The North-Western Command of the German Armed Forces surrendered on May 4, 1945 before the allied nations. The surrender included all the sea vessels in that area. The surrender took place in consequence of an armistice agreement. After the signing of the instrument of surrender but before it came into effect the German Officers ordered their subordinate officers to scuttle the U-Boats. Subsequently this order was countermanded. But the accused who was an instructor of the U-Boats ordered the scuttling of U-Boats and

6. U. N. Chronicle, Vol. XXV, No. 1 (March 1988), p. 91.

consequently the U-Boats were scuttled. The accused was arrested and was prosecuted for violating the laws of war. In his defence, the accused put forward the following two arguments, (1) He did not know the terms of the instrument of surrender because they were not intimated to him, and (2) that he did not know or receive the information of countermanding of the original order regarding scuttling of U-Boats. The accused was held guilty and was sentenced for five years' imprisonment.

While delivering the judgment, the Court observed that by 5th May, it had become clear that the U-Boats had become the property of the allied nations and could not, therefore, be destroyed. In defence also it was admitted that after the armistice agreement and surrender if any German Officer knowingly, scuttled the U-Boats, then it would be the violation of the rules of war. The Court observed that even if it is admitted that the first order (*i.e.*, regarding scuttling of U-Boats) was binding, then in between 5th and 6th May, the incidents that took place could have led any reasonable man to understand that under these circumstances the scuttling of U-Boats would be violation of the laws of war. In the opinion of the Court, the accused knew that the U-Boats could not be scuttled yet he committed this crime. Thus the Court propounded the following principles :

(1) If the armed forces of a State surrender after an armistice agreement, then this agreement shall be binding on both the States (*i.e.*, the surrendering State and the State to whom surrender is made). If after the surrender, the soldiers do not observe and follow this agreement, they will be guilty of the violation of the laws of war.

(2) If person scuttles the Boats or otherwise causes harm to them after the armistice agreement and surrender, he will be guilty of war crimes because after the surrender war-boats become the property of the conquering State.

Neuremberg Trial[7]*

Jurisdiction of Neuremberg Tribunal.—The Neuremberg Tribunal was established after the Second World War to try the war criminals of Germany. In order to confer jurisdiction upon the tribunal, the victorious nations entered into an agreement in 1945 and conferred jurisdiction upon the tribunal through a Charter. The Neuremberg Tribunal was authorised to try and punish the persons who were guilty of war crimes during the Second World War. Besides this, the Charter also conferred jurisdiction upon the Court in respect of crimes against peace and crimes against humanity. The trial of main accused started on November 20, 1945. The tribunal delivered its judgment on September 30, 1946, whereby it acquitted three accused, sentenced to death 10 accused; awarded punishment of transportation for life to 3 accused and awarded imprisonment for a long period to 4 accused.

Facts.—As pointed out earlier, the Neuremberg Tribunal was established to try and punish the war criminals of Germany. The main charges against these accused were that they had committed war crimes, crimes against peace and crime against humanity during the Second World War. Under the leadership of Hitler these accused had committed inhuman atrocities upon the Jews. These accused were also charged for having violated the Treaty of Varsailes, 1919 and the Pact of Paris, 1928. Great emphasis was laid on the Pact of Paris 1928, because through it the parties had renounced war as an instrument of national policy for the settlement of international disputes.

Judgment and Principles laid down.—While delivering the judgment, the Neuremberg Tribunal laid down the following principles :

(1) The 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.

(2) In the words of the Report of the International Law Commission, 1950, the Court also laid down the following :

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7. The International Military Tribunal, Neuremberg, (1946) Cmd 1964, AJ.I.L., Vol. 41 (1947), p. 172.

* See also for I.A.S. (1974) Q. No. 10 (c); I.A.S. (1960), Q. No. 10; I.A.S. (1966), Q. No. 9; I.A.S. (1956), Q. No. 10; P.C.S. (1976), Q. No. 7; P.C.S. (1965), Q. No. 2; P.C.S. (1987), Q. 8 (d).

"The fact that a person who committed an act which constitutes a crime under International law acted as the head of the State or responsible government official does not relieve him from responsibility under international law."

(3) As expressed in principle IV of the Report of the International Law Commission the Court also laid down the fact that a person acted pursuant to orders of his Government or his superior does not relieve him from responsibility under International law, provided a moral choice was in fact possible to him.

(4) The accused had raised the objection that unless there was a pre-existing law, an act cannot be declared as crime nor can it be punished. The Neuremberg Tribunal rejected this argument.

(5) In the view of the Court the conduct of aggressive war was highest international crime. According to this Court, Germany was responsible for starting aggressive wars against other countries which was against the Pact of Paris, 1928. Hence persons responsible for organising and conducting this war were declared guilty. The Tribunal held : "Planning and preparation are essential to the making of war. In the opinion of the Tribunal, aggressive war is a crime under international law."

(6) The Court also held the accused guilty for making bad treatment towards the prisoners of war. The accused argued that since Russia had not signed the Geneva Convention relating to the treatment of the prisoners of war, they could not be punished for the bad treatment towards the Russian prisoners of war, but the Court rejected even this argument and held them guilty.

(7) ".....from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against Humanity; and in so far as the inhumane acts charged in the indictment and committed after the beginning of war did not constitute war crimes, they were all committed in execution of, or in connection with the aggressive war, and therefore constituted crimes against Humanity.

Justification and criticism of Neuremberg Tribunal.—Judgment of Neuremberg Tribunal occupies a significant place in the laws of war in general and war crimes in particular. It was, therefore, quite natural that the jurists of the world should have taken keen interest in it. The verdict of the Neuremberg Tribunal has been justified by a number of jurists. They have contended that war crimes, genocide and crimes against humanity are all international crimes and the offenders of such crimes should be given deterrent punishment and in this respect the Neuremberg Tribunal performed commendable work. Such jurists have laid great emphasis upon the Pact of Paris, 1928.

On the other hand, there are a number of jurists who have severely criticized the judgment of Nuremberg Tribunal. The main points of their criticisms are given below :

(1) According to them, it was not proper to lay so much emphasis upon the Pact of Paris. In their view, the intention of the Pact of Paris was not to make war an international crime. They have also pointed out that the charge of starting war and organising or conducting aggressive war was not justifiably levelled.

(2) As pointed out by Chief Justice Marshall of America, the Neuremberg Charter declared those crimes punishable which were not punishable at the time when the crimes were committed. This was contrary to the principles of criminal law.

(3) According to Prof. Schick, some of the principles incorporated in the Neuremberg Charter were contrary to the law of nations. In his view, the plea of superior orders was rejected without any sound or concrete ground.

(4) The circumstances in which the tribunal was established, impartial justice was not possible.

(5) Grave doubts have been expressed in regard to the principles propounded by the Neuremberg Judgment.

(6) Neuremberg Military Tribunal cannot be called an international tribunal in real sense of the term because most of its judges belonged to the victorious nations.

Legal significance of Neuremberg Trial.—Despite the above criticism, it cannot but be admitted that the principles propounded in the Neuremberg Trial have greatly influenced International law, particularly the laws of war relating to war crimes. The Neuremberg Tribunal made it clear that the laws of war are not only for States but they are also applicable upon individuals, it is only by punishing them the provisions of the international law can be enforced. Besides this, the office or status of the accused is not relevant in respect of the punishment to be awarded to him for violating the laws of war and for committing war crimes. The fact that a person who is accused is the head of a State or high military official will be no excuse in the view of the Tribunal.

Robert K. Woetzel has rightly written, "In conclusion it should be stated that in no area more than in that of war crimes is the responsibility of the individual under International law as undisputable and recognised. The I. M. T. (*i.e.*, International Military Tribunal) was also justified under international law in judging crimes against humanity, as has been shown. Most of these acts constituted heinous crimes judged by any standard of justice. It was clearly in accordance with international law that the defendants at Neuremberg were held responsible for them." [8] The principles enunciated in the Neuremberg Tribunal also encouraged the tendency of codification of international law. The principles enunciated in the Neuremberg judgment have been summarised by the International Law Commission in its Report of the second session of 1950. But it must be admitted that the Neuremberg Military Tribunal was not an international court in real sense. Its main defect was that most of the judges belonged to the victorious States. Consequently its impartiality has been doubted. Nevertheless, Neuremberg Trial occupies an important place in the history or development of war in general and war crimes in particular. Often it is said that States do not hold war crimes trial of the members of their armed forces. In this connection Prof. L. C. Green has replied that ordinarily it is unnecessary because generally war crimes are also contrary to the national military laws.[9] For example, in *U. S.* v. *Griffin,*[10] the plea of superior order was rejected in a case arising from the murder of a member of Vietcong.

Tokyo Trial*

As Neuremberg Tribunal was established to try war criminals of Germany, the Tokyo Tribunal was established to try the war criminals of Japan. The Tokyo Tribunal was established by the victorious States by making an agreement and subsequently by issuing a Charter conferring jurisdiction upon the Court. The Tokyo Trial started hearing on June 4, 1946, and was presided by Sir William. A special feature of this trial was that its judges were not only from the victorious States, but some of the judges belonged to other States also. For example, the eminent Indian Jurist, Dr. Radha Vinodpal was one of the judges of the Tokyo Tribunal. Besides this, there were some judges from Philippine and other countries of the Commonwealth of the Nations. During the trial the accused objected that they could not get justice from this trial because most of the judges belonged to the nations which defeated Japan, but this objection was rejected by the Court. The Tokyo Tribunal awarded death sentences to those persons who were guilty of conducting and organising war and awarded imprisonment for different terms to other persons accused of war crimes.

Dissenting judgment.—Dr. Radha Vinodpal who was one of the judges of the Tokyo Tribunal, delivered his dissenting judgment. According to him war is beyond the scope of International law although its conduct is within the scope of the rules of international law. Besides, he expressed the view that neither the Pact of Paris comes under the category of law nor has it brought about any change in the status of war. According to him, International law has not developed so much so as to make war a crime. Similarly he expressed the view that conspiracy was not an independent crime under international law.

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8. Robert K. Woetzel, The Neuremberg Trials Under International Law (1960), p. 189.
9. L. C. Green, International Law Through Cases, Third Edition, (1970) p. 726.
10. (1968) C.M. 41, 6805.

* See also for I.A.S. (1974), Q. No. 10 (c); I.A.S. (1966), Q. No. 9; I.A.S. (1956), Q. No. 10; P.C.S. (1976), Q. No. 7.

Consequently, he ruled that the accused should be declared not guilty as there was no evidence on the record to prove their guilt.

Peleus Trial

Peleus was a Greek ship which was sunk by the German U-Boat. After sinking the ship the commanders of the U-Boat ordered firing upon the members of the crew of the ship who were trying to save their lives through life-boats. Thus out of 35 people, 22 members of the crew lost their lives in consequence of firing. After some weeks when on account of attacks the U-Boats were compelled to come to the coast, officers on board of the boats were arrested and were prosecuted for war crimes.

The Court ruled that it is the fundamental usage of war that firing on unarmed enemies is prohibited. The Court referred to an old case, namely, *Liandovery Castle* (1921),[11] wherein it was laid down, "In war of land the killing of unarmed enemies is not allowed.....Similarly in war at sea the killing of ship-wrecked people who have taken refuge in life boats is forbidden."

During the trial the accused contended that they were not guilty because they fired on the orders of the superior officers, but the Court rejected the plea of superior orders and held that they were bound to obey only lawful orders of their officers. There is no duty to observe orders which are not lawful. Consequently the accused were held guilty and were duly punished.

Eichmann Case (1962)[12]*

Under Hitler, Eichmann had committed many Nazi atrocities upon the Jews. The charge against him was that he was responsible for the murders of lacs of Jews ar d for inhuman treatment towards them. The spies of Israel were after him for a long time, but he was running from one country to another and escaping arrest and trial. Ultimately the Israeli Spies caught him in Argentina. But on account of the fear that the Government of Argentina might not extradite him for prosecuting him for having committed war crimes, the Israeli spies abducted him from Argentina to Israel in an irregular way. In Israel, Eichmann was prosecuted for crimes and was sentenced to death. An appeal was filed by him in the Supreme Court of Israel. It was contended on behalf of Eichmann that the courts of Israel did not possess the jurisdiction to try him because when the crimes were committed by him, Israel as a State did not exist. That is to say, war crimes were committed during the Second Wold War and Israel came into existence afterwards. But the Supreme Court of Israel rejected this argument and propounded the principle of universal jurisdiction in respect of war crimes and genocide.[13]

Following arguments were put forward on behalf of Eichmann (i) That he was abducted in an irregular way; (ii) That he had to obey superior orders; and (iii) That acts done by him were acts of State. The Court rejected all the arguments and laid down the following principles :—

(1) .....the principle *nullum crimen sine lege nulla poena sine lege,* in so far as it negates penal legislation with retrospective effect has not yet become rule of customary International Law.....it is a universal character of crime, in question, which vests in every State the power to try those who participated in the preparation of such crimes and to punish them therefor.....'

(2) As regards the contention that Eichmann was abducted from Argentina through an irregular way, the Court recorded the following conclusions :

(a) The court will not investigate the circumstances in which the 'fugitive offender' was detained and brought to the area of jurisdiction.

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11. Annual Digest of Public International Law (1923-1924), case No. 235.
12. *Adolf Eichmann* v. *Attorney-General of the Government of Israel, Supreme Court of Israel;* (1962) 136 I.L.R. 277.

* I.A.S. (1973), Q. No. 11 (a); I.A.S. (1962), Q. No. 12 (b); I.A.S. (1963) Q. No. 7. For more details see also the case of Eichmann discussed under the heading "Principle of Universal Juisdiction" in Chapter on "Piracy" and "State Jurisdiction".

13. See also J.F.S. Fawcett, "The Eichmann Case", B. Y. B. I. L., Vol. XXXVII (1962), pp. 181-215.

(b) This also applies if the offender's contention be that the abduction was carried out by the agents of the State prosecuting him, since in such a case the right violated is not that of the offender, but the sovereign rights of the State aggrieved. The issue must, therefore, find its solution on the international level and is not justiciable before the Court into whose area of jurisdiction the offender has been brought.

(c) From the point of view of International Law, the aggrieved State may condone violations of its sovereignty and waive its claim, including the claim for the return of the offender to its territory, and such waiver may be explicit or by acquiescence.

(d) Only in one case eventually has a fugitive offender a right of immunity when he has been extradited by the country of asylum to the country requesting his extradition for a specific offence, which is not the offence for which he is tried.

(e) The right of asylum and immunity belong to the country of asylum and not to the offender.

The Supreme Court of Israel rejected the plea of superior orders ard observed that in this case the principle propounded by the Inernational Military Tribunal, Nuremberg will apply.

(4) The court also rejected the argument regarding the act of State.

Mai Lai Trial

Mai Lai is a village in Vietnam, whole population of which was killed by American military personnel. It was clearly a war crime and consequently there was a great reaction in the international community and America was charged with for having encouraged perpetration of war crimes in Vietnam. American nationals also expressed their resentment against such atrocities and war crimes. Due to the reaction of the international community as a whole and the pressure of the American nationals at home, the Government of America was compelled to hold a trial of the Officer responsible—Lt. Caley. The Court held the accused guilty and awarded punishment to him. Mai Lai trial is a landmark event in respect of the punishment awarded to criminals for the violation of the war crimes. Hitherto war trials were such wherein the victorious States had conducted the war crime trials against the war criminals of the vanquished nations, but Mai Lai trial marked the beginning of a new trend which shows that there may be circumstances wherein because of the reaction or public opinion of the international community and the pressure of its own national State may be compelled to hold war criminal trials against its own officers. It is undoubtedly an auspicious beginning and augurs well for the observance of laws of war in future.

Chernigov Trial.—For two weeks in Chernigov war crimes trial was held against Grigory Shurub of Ukrain. On 27th December, 1986, he was sentenced to death. He was charged of siding with Germany in 1943 and of having participated in slaughter of 100 Ukrainians in Yatsevasky Camp. Out of these 100, he himself killed 10 Ukrainians. At that time, nearby Yatsevo village was destroyed and Bobrovitsa was partially destroyed. 625 villagers were either killed or burned alive because they had helped the prisoners to escape. Grigory Shurub was also charged of having participated in the destruction of other three villages of the Ukrainian district of Koryukovka. About 7,500 inhabitants of these villages were killed.

U. N. War Crimes Commission to investigate war crimes committed in former Yugoslavia.—On 6th October, 1992, the Security Council passed a resolution[14] unanimously authorising Secretary-General Boutros Boutros Ghali to establish U. N. War Crimes Commission to investigate war crimes committed in former Yugoslavia. Though the scope of this Commission is very limited, it is very significant landmark in the history of the United Nations. It is not a permanent Commission yet is significant because it will definitely establish an important precedent.

14. See Resolution 780 (1992).

The Security Council, on 6th October, 1992, asked States, relevant U. N. bodies and other organizations to provide within 30 days any substantial information concerning violations of humanitarian law. It may be noted here that two months before, on 13th August, 1992, in resolution 771, the Council had asked States and international organizations for such information on the former Yugoslavia.

On 6th October, 1992, the Council took the decision for the establishment of War Crimes Commission as it had been alarmed by reports of mass killings and ethnic cleansing" in former Yugoslavia.[15] The Commission reported that it had several thousand pages of documentation, as well as video information on allegations of grave breaches of the 1949 Geneva Conventions and violations of international humanitarian law and was preparing a database on all reported crimes.

Establishment of an International Tribunal for Prosecution of Violators of International Humanitarian Law in former Yugoslavia.— Investigation of war crimes by U. N. War Crimes Commission would have been futile if the persons guilty of war crimes and violation of humanitarian law were not prosecuted and punished. Consequently as the natural next step, the Security Council, on 22 February, 1993, decided[16] that an international tribunal "shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." It will be reckoned as a great landmark in the history of the U. N. because it is for the first time that U. N. has established an International Criminal Court with jurisdiction to prosecute crimes committed during armed conflict. The above-mentioned resolution was unanimously passed by the Security Council. The Council asked the U. N. Secretary-General Boutros Boutros Ghali to make specific proposals within 60 days for the organization and operation of such tribunal.[17]

On 3rd May, 1993, the Secretary-General reported[18] that the tribunal would operate as a subsidiary organ of the Security Council performing its functions, independently of political considerations and would "not be subject to authority and control" of the Council with regard to the performance of its judicial functions. Its life span would be "linked to the restoration and maintenance of international peace and security" in the former Yugoslavia.

The tribunal would consist of two Trial Chambers, an Appeals Chamber, the Prosecutor and a Registry, servicing both Chambers and the Prosecutor. With regard to competence the Tribunal will apply those rules of international humanitarian law which are "beyond any doubt part of customary law", such as international conventions relating to the protection of war victims, respective laws and customs of war on land and prevention of the crime of genocide. The tribunal will also deal with "crimes against humanity—first recognized in the Charter and judgment of the Nuremberg Tribunal—which include "inhuman acts of a very serious nature" committed as part of a "widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." In the case of the former Yugoslavia, such inhuman acts took the form of so-called "ethnic cleansing" and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.[19]

On 25th May, 1993, the Security Council decided to establish an International Tribunal for the purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[20] The Council unanimously endorsed a 34-article draft statute of the tribunal annexed to the Secretary-General's report (S/25704). Under its statute, the Tribunal is to deal with "crimes against humanity", such as murder, extermination, enslavement, imprisonment, torture, rape, persecution on political, racial and religious grounds and

15. See U. N. Chronicle, Vol. XXX, No. 1 (March, 1993) p. 7.
16. See Resolution 808 (1993).
17. See U. N. Chronicle, Vol. XXX, No. 2 (June, 1993) p. 5.
18. Vide document (S/25704).
19. See U. N. Chronicle, Vol. XXX, No. 3 (September, 1993) p. 13.
20. See resolution 827 (1993).

other inhuman acts. Also acting upon an order of a Government or a superior would not relieve the perpetrator of criminal responsibility and should not be a defence. Obedience to superior orders could, however, be considered a mitigating factor should the Tribunal determine that justice so requires.

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

It may also be noted here that on 28th May, 1993, two items on the tribunal's financing and on election of its judges were added to the agenda of the General Assembly's forty-seventh session.[21]

On 17th November, 1993, the 11-member International Tribunal for crimes in the former Yugoslavia was inaugurated at the Peace Palace in the Hague, Netherlands. The two week session of the Tribunal was held from 17th to 30th November, 1993. Judge Antonio Cassere of Italy was elected President of the Tribunal. During its two-week session, the Tribunal also considered proposed rules of procedure and evidence. Earlier Roman Escvar Salern of Venezuela was appointed Tribunal Prosecutor by Security Council.[22]

The first extraditions of suspected war criminals from former Yugoslavia were made on 12th February, 1995. A Bosnian Serb General and a Colonel spent their first day in Dutch jail on 13th February, 1995, after NATO, acting on the request of U.N. War Crimes Tribunal for former Yugoslavia, flew them out of Sargeevo on 12th February, 1995.

Milosevic War Crimes Trial

Slobodan Milosevic, former Yugoslavian President, was required to appear before the International Criminal Tribunal on 3rd July 2001 to hear charges of crimes against humanity committed during his tenure as they so-called "Butcher of the Balkans". After charges were read, he would have 30 days to enter a plea. Aged 59, Milosevic is accused by the International Criminal Tribunal for former Yugoslavia (ICTY) of responsibility for murders, deportations, persecutions and violations of the 1949 Geneva Conventions for his rule in the 1988-89 Serb crackdown on ethnic Albanians in Kosovo.

It took hardly 12 minutes for Slobodan Milosevic to deny the charges : "Thus contemptuously he alleged : "This trial's aim is to produce false justification for war crimes committed by NATO in Yugoslavia," Terming the Tribunal as illegal he even refused to appoint his counsel. The actual trial started on Tuesday, 12th February, 2002. On that day U.N. war crimes prosecutor Carla Del Pente alleged that Milosevic was "responsible for the worst crimes known to mankind" by orchestrating crimes against humanity and genocide in the 1990 wars of Bosnia, Crotia and Kosovo.

Establishment and statute of International Tribunal for Rwanda

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

Articles 2 and 3 of the statute define the terms Genocide and Crime Against Humanity respectively. Article 1, which deals with the competence of the Tribunal, provides that the Tribunal shall have the power to prosecute persons, responsible for

21. See note 19, p. 13.
22. See Resolution 877 (1993) of 21st October, 1993.

serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1st January and 31st December, 1994, in accordance with the provisions of the present statute. According to Article 4 of the International Tribunal for Rwanda shall have power to prosecute persons committing or ordering to be committed serious crimes of Article 3 common to the Geneva Conventions of 12th August, 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8th June, 1977.

Article 10 of the statute provides that the International Tribunal for Rwanda shall consist of the following organs :

(a) The chambers, comprising two Trial chambers and an Appeals chamber,
(b) The Prosecutor, and
(c) A Registry.

As regards the composition of the chambers Article 11 provides that the chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State who shall serve as follows :

(a) Three judges shall serve in each of the trial chambers.
(b) Five judges shall serve, in the Appeals chamber.

The Trial chambers shall pronounce judgments and impose sentences and penalties on persons convicted of serious violations of international humanitarian law. (Art. 22). The penalty imposed by the Trial chamber shall be limited to imprisonment (Art. 23). An appeal against the convictions may be made to the Appeals chamber on the following grounds : (a) An error on a question of law invalidating the decision and (b) an error of fact which has occasioned a miscarriage of justice.

The Appeals chamber may affirm, reverse or revise the decisions taken by the Trial chamber (Article 24).

After the establishment of an International Tribunal for Prosecution of violators of International Humanitarian Law in former Yugoslavia it is the second tribunal of its kind and will not only contribute to the process of national reconciliation and to the restoration and maintenance of peace but will also ensure that such violations are halted and effectively redressed.

The Tribunal delivered its first judgement in September, 1998. It found Jean—Paul Akayesu, the former Mayor of Taba, guilty of genocide and crimes against humanity. The Tribunal also found Jean Kambananada, former Prime Minister of Rwanda, guilty of genocide and crimes against humanity and sentenced him to life imprisonment.

In the last week of August, 2003, U.N. Secretary-General appointed Hassan Jallow, fifty-two year former Gambian Supreme Court Judge and Solicitor -General as the new prosecutor of the Rwandan Genocide Tribunal on a four-year term in place of Carla Del Ponte, who had become involved in a controvery with that country's government. However Del Ponte had been retained as Chief Prosecutor of the Yugoslav Tribunal trying cases of war crimes against humanity committed as the country was breaking up. Her term which was to expire on September 14, 2003 was extended for another four years.

Del Ponte got into controversy when she decided to investigate Tutris, who now ruled the country, in connection with the killings of some 30,000 Hutus. In her view it was necessary to investigate both sides to ensure credibility of the tribunal. The U.S. and U.K. also backed her removal fearing that her investigation into ruling Tutsi top brass could destabilize the country and the region. On the other hand, human rights groups had been supporting Del Ponte as they feared that her replacement would mean the Tutsi culprits go scot free.

The Security Council resolution also set a time table under which both courts were to complete investigations by the end of next year and most of the work by 2008. They were to be wound up by the year 2010. It may be remembered that the Rwanda Tribunal is trying cases of genocide and crimes against humanity arising out of 1994 massacre of more than a million Tutsis and moderate Hutu extremists.

CHAPTER 55

GENOCIDE

Meaning and definition of 'Genocide'

The genocide committed during the Second World War shocked the whole mankind so much so that the General Assembly in its first meeting affirmed the principles enunciated in the Neuremberg Judgment. Besides this, in its resolution 96 (I), dated 11 December, 1946 the General Assembly declared that "genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world." [1] The main cause of such keen interest taken by the General Assembly in its first session was the Nazi atrocities committed by the Germans during the Second World War. The General Assembly did not rest contended and went ahead to adopt unanimously on 9 December, 1948 convention on the Prevention and Punishment of the crime of Genocide (hereinafter referred as 'Genocide Convention'). Article II of the Genocide Convention defines 'genocide' in the following words : "In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such :

(a) killing members of the group;
(b) causing serious bodily harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group."

'Genocide' a crime under International Law

The term 'genocide' was coined by Lemkin a private individual whose efforts played a large part in promoting the United Nations work on genocide. The convention probably reflects customary international law.[2] In *Barcelona Traction, Light and Power Co. Case (Belgium* v. *Spain)*[3]; speaking about the obligations of a State when it admits into its territory foreign investments or foreign nationals, the International Court of Justice observed[4] : "Such obligations derive, for example, in contemporary international law, from the out-lawing of acts of aggression *and of genocide* as also from the principles and rules concerning the basic rights of human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protections have entered into the body of general international law;[5] others are conferred by international instruments of a universal or quasi-universal character."

Article I of the Genocide Convention, 1948, therefore, provides that the contracting parties *confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish. Under Article III of the Convention following acts are punishable : (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; and (e) Complicity in genocide.

Article IV of convention provides that persons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals.

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1. See also Raphael Lemkin, "Genocide as a crime under International Law", A.J.I.L., Vol. 41 (1947) p. 145 at p. 150.
2. D. J. Harri's, Cases and Materials on International Law (London, Sweet and Maxwell, 1973), p. 549.
3. I.C.J. Reports, 1970, p. 3.
4. Ibid., para 34.
5. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports, 1951, p. 23.

Other Main Provisions of the Genocide Convention :

(i) The contracting parties of the convention have undertaken to enact in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.[6]

(ii) Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.[7] It is unfortunate that the provision relating to "international penal tribunal" to try persons for genocide, and for that matter any other international crime, has yet not been implemented although 36 years have passed since the adoption of the Genocide Convention.

(iii) Genocide and other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition.[8]

(iv) Disputes between the contracting parties relating to the interpretation, application of fulfilment of the present convention, including those relating to the responsibility of a State for genocide or any other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.[9]

Example of Genocide in Bangladesh

The military regime of Pakistan under General Tikka Khan committed uncalculable and unprecedented genocide in Bangladesh. As pointed out by M. K. Nawaz, "The Bengali people have a language and culture different from the people of West Pakistan, can accordingly be considered as ethnical group within the meaning of Article II of Genocide Convention." [10] Justice V. R. Krishna Iyer, former Member of the Indian Law Commission and retired judge of the Supreme Court, has also pointed out, "the Bengali population of East Pakistan probably falls under the national and ethnical group—not merely territorial or linguistic." [11] Anthony Mascaren has also written....."The Nazi style programmes were intended, in the context of the ambitions of the West Pakistan Regime, as military answer to what was essentially a political problem of its own making.....the obliteration of Bengali language and culture is the continuing purpose of the regime." [12]

Thus the genocide committed by Pakistani military personnel in Bangladesh was clearly and without a shade of doubt an international crime. As aptly remarked by Justice V. R. Krishna Iyer : "The scenes of blood and bestiality ensuing from the military crack down under General Tikka Khan's deadly direction was such the like of which no eye had seen and no tongue could adequately tell. Bangladesh is fortunately free today but its 'sweetest songs' of freedom are those that tell of 'saddest thought' of the millions dead. The appealing human annihilation perpetrated by military personnel of Pakistan in Bangladesh, its dimensions and dastardliness *prima facie* constitutes an international crime." [13]

Provisional Measures by World Court against Federal Republic of Yugoslavia for Prevention of Genocide.—On 8th April, 1993, the International Court of Justice issued an order calling upon the Federal Republic of Yugoslavia (Serbia

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6. Article V of the Genocide Convention.
7. Article VI.
8. Article VII.
9. Article IX.
10. M. K. Nawaz, "Bangladesh and International Law", I.J.I.L., Vol. 11 (1971), p. 251 at p. 261.
11. "Law's Tryst with the Dead in Bangladesh vis-a-vis punishment of Humanicidists, National Herald, February 4, 1972.
12. Anthony, Mascaren, The Rape of Bangladesh (1971), p. 120.
13. V. R. Krishna Iyer, J., note 11.

and Montenegro) to "immediately.....take all measures within its power to prevent commission of the crime of genocide.

This order was made unanimously by the court in *Case Concerning Application of the Convention on Prevention and Punishment of Crime of Genocide* [*Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)*][14].

The World Court unanimously also directed that the Government of Federal Republic Yogoslavia (Serbia and Montenegro) and the Government of Republic of Bosnia and Herzegovina "should not take action and should ensure that no action is taken which may aggravates or extend the existing dispute over the prevention and punishment of the crime of genocide or render it more difficult of solution". Moreover, by 13 votes to 1, the Court directed that the Government of Former Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as organizations and persons which may be subject to its control, direction, influence, do not commit any acts of genocide, or of complicity in genocide whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group.

On further requests for the indication of provisional measures, the International Court of Justice, on 13 September, 1993 reaffirmed the provisional measures indicated on 8th April, 1993 and directed that the same be "immediately and effectively implemented"[15]

Establishment of International Tribunal for Rwanda for violations of International Humanitarian Law and Genocide committed in the territory of Rwanda and neighbouring States between 1st January, 1994 and 31 December, 1994.

N.B.—For this please see the Chapter on "War Crimes.

Conclusion.—The adoption of the convention on the Prevention and Punishment of the Crime of Genocide, 1948 was a great achievement at the time when the memories of atrocities committed during the Second Wrold War still loomed large in the minds of the people. It is however doubtful whether the convention covers cultural genocide. Moreover, the concept of 'complicity in genocide' is very vague. Last but not the least, failure of the contracting parties to establish, an international penal tribunal to try persons for genocide remains a formidable obstacle in the proper implementation of the convention. Nevertheless the convention has rendered a signal service by making the crime of genocide punishable in time of peace or in time of war. By September 1983, 93 States have expressed their consent to be bound by the convention.

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14. I.C.J. Reports, (1993), p. 3.
15. Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide [*Bosnia and Herzegovina* v. *Yuguslavia (Serbia and Montenegrow)*, (13 September 1993), ICJ Reports (1993) p. 325.

CHAPTER 56

TERMINATION OF WAR AND POSTILIMINIUM

Modes of Termination of War.*—Generally following are the modes of termination of War :

(1) *Simple cessation of hostilities without any definite understanding being reached.*—Sometimes during the war, the belligerent States cease hostilities without any definite understanding being reached between them. The examples of such types of cessation of war are between France and Spain (1720), war between Russia and Prussia (1801), war between Spain and Chile (1878), etc. Termination of war through this mode is not in accordance with the present circumstances because in this mode of termination of war, no agreement or understanding is reached and it is not determined as to what will be the fate of the prisoners of war, how shall the boundaries be fixed or determined and what shall be the fate of the property under the occupation of the belligerent State or other type of property. Consequently this mode of termination of war presents many difficulties.

(2) *Conquest followed by annexation.*—Sometimes it so happens that a belligerent State conquers another State and annexes it into its territory. According to International law, the annexed territory or State cease to have any independent importance under international law. This mode of termination of war may present difficulties when the belligerent State concerned has annexed the territory in violation of the rules of International law. There is no clear rule of international law in this connection. However, it is definite that the war comes to end after one belligerent State conquers the other belligerent State and annexes the territory of that State into its own territory.

(3) *By a Peace Treaty.*—War may also be terminated by the conclusion of a peace treaty. The advantage of the mode of termination of war is that some understanding is reached in regard to the treatment of prisoners of war, property and other relevant matters connected with war. As pointed out by Starke, "On all points concerning property on which the treaty is silent the principle *uti possidetis* (as you possess, you shall continue to possess) applies, namely, that each State is entitled to retain such property as was actually in its possession or control at the date of cessation of hostilities." [1] The principle of *uti possidetis* has been explained by Oppenheim in the following words : "Unless the parties stipulate otherwise, the effect of a treaty of peace is that conditions remain as at the conclusion of peace. Thus, all movable State property, such as munitions, provisions, arms, money, horses, means of transport, and the like seized by an invading belligerent, remains his property, as likewise do the fruits of immovable property seized by him. Thus further, if nothing is stipulated regarding conquered territory, it remains in the hands of the possessor, who may annex it. But it is now-a-days usual, although not at all legally necessary, for a conqueror desirous of retaining conquered territory to secure its cession in the treaty of peace." [2] The principle of Postiliminium also comes into force when war come to an end through this mode. According to this principle in the absence of any express provision the persons and things come to their original position after release from the occupation of the enemy. This principle has been discussed in detail later in this Chapter. This principle does not apply to property.[3]

(4) *By Armistice Agreement.*—Sometimes wars are terminated by the conclusion of Armistice Agreement. Under this mode of termination of war, the hostilities cease for

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* See also for I.A.S. (1973), Q. No. 7(e) ; I.A.S. (1956), Q. No. 7; P.C.S. (1967), Q. No. 10 ; P.C.S. (1981), Q. No. 2 ; P.C.S. (1988), Q. 8.

1. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 572.
2. L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 611.
3. In the words of Starke, "There also applies the postiliminium principle, in the absence of express provision, to the rights of the parties other than to property : that is to say, that any prior condition and prior status are to be restored, hence legal disabilities of former alien enemies are removed, diplomatic relations reconstituted, etc." note 1, p. 573

temporary period but since the state of war continues between States, war may erupt at any time.

(5) *By Unilateral Declaration of one or more of the victorious powers.*—Sometimes war may come to an end by the unilateral declaration of one or more of the victorious powers. For example Indo-Pak War of 1971, came to an end in consequence of the unilateral declaration of India to end the war. The war came to an end because Pakistan also respected this declaration and ceased hostilities. It is not essential that the date of the termination of war should also be the date of conclusion of peace treaty, or the date when the hostilities actually ceased. It is a matter to be determined by State law. There is no rule of international law which may bind States to treat the conclusion of war on the date of the conclusion of peace treaty.

Doctrine of Postiliminium*

The doctrine of *postiliminium* was incorporated into International Law from Roman law. According to it, persons and things released from the occupation of the enemy come to their original position or they are restored to their original position after the end of war. According to Roman Law this principle is applied on persons and things. According to International law, this principle is applied in the context of war. If any State remains under the occupation of another State for a temporary period and then subsequently becomes independent then after its independence the persons and things come to their original position in accordance with the principles of *postiliminium.* This principle cannot, however, be applied in matters of neutral States.

Private movable property can be seized for a temporary period and be used by the occupying power and, therefore, the principle of *postiliminium* does not apply on such properties. However, public movable property can be seized by the belligerent States only when and in so far as it is essential for the objectives of war. If after withdrawal of the enemy the property remains, then it comes or is restored to its original position. The principle of *postiliminium* also applies on immovable property. Similarly after the end of the occupation of the belligerent State, the administration of the valid government of territory concerned is restored on the principle of *postiliminium.* It may, however, be noted that the valid and lawful acts performed by the occupying enemy State remain valid even when the occupation ceases. In fact, the principle of *postiliminium* applies only when the occupying power has exceeded its powers or has acted beyond its rights. Thus the legal and valid acts performed by the occupying power are beyond the scope of the principle of *postiliminium.*

Limitations of the doctrine of Postiliminium.—Following are the limitations of the doctrine of *Postiliminium* :—

(1) It does not apply upon the valid and lawful acts performed by the occupying power. They remain valid even when such occupation ends.
(2) This principle also does not apply in cases of the realisation of taxes etc. made by the occupying power.
(3) The principle of *postiliminium* does not apply in respect of the neutral States.
(4) It does not apply when one State incorporates another State into its State by conquest because conquest followed by annexation, changes the status of things and persons.
(5) Yet another limitation of the doctrine of *postiliminium* is that it does not apply when an enemy State has finally incorporated the territory concerned as a part of its territory.

Case of Elector of Hesse Cassel.

This case is related to the principle of *postiliminium.* Hesse Cassel was a neutral State which was conquerred and annexed by France in 1806. Consequently Elector of Hesse Cassel fled away from its territory. In 1893, in accordance with a treaty, Elector regained his lost territory. After the death of the former Elector, his son claimed to realise

* See also for I.A.S. (1962) Q. No. 12 (a); I.A.S. (1959), Q. No. 6 (g); I.A.S. (1957), Q. No. 6 (f); I.A.S. (1965), Q. No. 12 (a); P.C.S. (1967), Q. No. 10; P.C.S. (1988) Q. 8.

past debts on the basis of the principle of *positliminium*. But he could not succeed. In this case, it was held that after the conquest, the conquering State is fully entitled to realise taxes etc. Napoleon was, therefore, within his right to realise debts, etc. Since it was a valid act performed by the occupying power and it was within the right of Napoleon, the principle of *postiliminium* could not be applied in this case.

CHAPTER 57

NON-INTERNATIONAL ARMED CONFLICTS

The laws of war discussed in earlier chapters generally deal with armed conflicts of an international character. A pertinent question therefore arises as to what will be the position of a non-international armed conflict and what rules will apply in case of a non-international armed conflicts. It is also necessary to know whether civil wars can be called wars in the technical meaning of the term. As pointed out by Oppenheim, "In the proper sense of the term a civil war exists when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State or when a large portion of the population of a State rises in arms against the legitimate Government. As war is an armed contention between *States* such a civil war need not be war from the beginning, nor become war at all, in the technical sense of the term. But it may become war through the recognition of the contending parties or of the insurgents, as a belligerent power. Through such recognition a body of individuals receives an international position in so far it is for some purpose treated as though it were a subject of International Law." Further, "As observance of the generally recognized rules of warfare is one of the conditions of recognition of belligerency, recognition by other States provides evidence of the ability and the willingness of the insurgents to observe these rules. In view of this, such recognition by other States entails upon the legitimate Government even it refuses recognition a compelling moral obligation, closely approximating to a legal duty to treat insurgents in accordance with the rules of warfare of a humanitarian character." Thus it may be said that recognition of one of the contending parties or of the insurgents, internationalises the civil war and the rules of international law become applicable. But if none of the contending parties is recognised as a belligerent Power, the civil war remains a non-international armed conflict.

As regards non-international armed conflicts the four Geneva Conventions of 1949 marked a great advance by providing uniformly that in such conflicts which occur in the territory of one of the parties to the convention, each party to the conflict shall be bound to apply, as a minimum certain humanitarian provisions of a fundamental character. For example, the Geneva Convention of 1949 on Treatment of Prisoners of War provides that in case of non-international armed conflicts, occurring in the territory of the contracting parties, each party to the conflict shall be bound to apply a minimum standard conduct. The conventions provide that persons who take no part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*, as the result of sickness, wounds, detention or any other cause must in all circumstances be treated humanly without any adverse distinction based on considerations of race, colour, religion or faith, sex, birth or wealth, or any other similar reasons. The convention prohibits the following acts in respect of these persons : (a) violence to life and person: in particular, murder of all kinds, mutilation, cruel treatment and torture, (b) taking of hostages; (c) outrages upon personal dignity; in particular, humiliating and degrading treatment ; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

These provisions relating to non-international armed conflicts continue to apply in cases of civil wars until one of the contending parties is recognised as a belligerent power.

It may be noted here that the provisions noted above are contained in Article 3 which forms part of Chapter I dealing with the General provisions and which is common to each of the four Geneva Conventions of 1949. The convention however, provides that these provisions shall not affect the legal status of the parties to the conflict. That is to say, the observance of these provisions shall not amount to recognition of the belligerency of the insurgents on the part of the legitimate government.

As regards guerilla warfare, Oppenheim has aptly expressed the view that "So long as these persons, though operating in occupied territory, fulfil the conditions which the Hague Regulations prescribe generally as qualifying irregular forces for the privileges and treatment enjoyed by the armed forces of the belligerents they are entitled to the same treatment and privileges. Undoubtedly the fact that such forces operate in small units and are in the position to disclose their uniform, or the distinctive sign by which they can be recognised at a distance creates special difficulties for the occupying power. However, provided that they comply with the terms of the Hague Regulation and observe the rules of war they must not be treated as war criminals.

The right to be treated in accordance with these Regulations applies, in particular, to cases in which the resistance movement against the enemy, while backing military cohesion, is authorised by and acts in accordance with the orders of the lawful government."

As noted earlier the four Geneva Conventions of 1949 mark a great advance by containing some provisions relating to non-international armed conflicts. However, it cannot but be admitted that they are far from satisfactory. In view of the marked increase in the number of non-international armed conflicts in last three decades in particular the need for providing more provisions and elaboration of the existing ones was fact for a considerable period of the time. Consequently the Diplomatic conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted on June 8, 1977 Protocol Additional to the Geneva Conventions of 12 August, 1949 and Relating to the protection of victims of Non-international Armed conflicts (Protocol II). The preamble of this Protocol emphasizes the need to ensure a better protection for the victims of the armed conflicts not of international character. Article 1 of the Protocol which deals with the material field of application provides that this Protocol which develops and supplements Article 3 common to the Geneva Conventions of 12 August, 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of this Protocol Additional to the Geneva Conventions of 12 August, 1949 and relating to the Protection of victims of International Armed Conflicts (*i.e.*, Protocol I) and which take place in the territory of a High contracting party between its armed forces and dissident armed forces or other armed groups which, under responsible command, exercise such control over a party of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. This provision now makes it clear like crystal that the provisions contained in the Protocol shall apply also to guerilla war and resistance movements provided that conditions mentioned above are fulfilled. Article 1 however adds that this Protocol shall not apply to situations of internal disturbances and tensions such as, riots, isolated and sporadic acts of violence and other acts of a similar nature as not being armed conflicts. As regards personal field of application Article 2 of Protocol II provides that this Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion national or social origin, wealth birth or other status or any other similar criteria (hereinafter referred to as "adverse distinction") to all persons affected by an armed conflicts as defined in Article 1 (which has been noted above).

Humane Treatment

Part II of Protocol comprising of Articles 4 to 6 lays great emphasis on humane treatment of persons affected by non-international armed conflicts. Article 4 contains certain Fundamental Guarantees. It provides that all persons who do not take a direct part in hostilities whether or not their liberty has been restricted, are entitled to respect for their person, honour and conventions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors. It is further provided that without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever : (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment, such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal

dignity in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; and (h) threats to commit any of the foregoing acts.

It is also provided that children shall be provided with the care and aid they require.

As regards persons whose liberty has been restricted, Article 5 provides the following :

1. In addition to the provisions of Article 5 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained : (a) the wounded and the sick shall be treated in accordance with Article 7 (Article 7 deals with protection and care of the wounded, sick and ship-wrecked and lays emphasis on humane treatment with them in all circumstances); (b) the persons referred to in this paragraph shall in the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict; (c) they shall be allowed to receive individual or collective relief; (d) they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons such as chaplains, performing religious function; and (e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.
2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1, shall also, within the limits of their capabilities, respect the following provisions relating to such persons : (a) except where men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women; (b) they shall be allowed to send and receive letters and cards, the number of which may be limited by the competent authority if it deems necessary; (c) places of internment and detention shall not be located close to the combat zone ; (d) they shall have the benefit of medical examinations; and (e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission.
3. Persons who are not covered by Para 1 but whose liberty has been restricted in any way whatsoever for reasons related to armed conflicts shall be treated humanely in accordance with Article 4 and with paras 1 (a), (b), (c) and (d), and 2 (b) of this Article.
4. If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.

As regards prosecution and punishment of criminal offences related to armed conflict, Article 6 provides that no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. Further, a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised. The death penalty shall not be pronounced on persons who are under the age of 18 years at the time of the offence and shall not be carried out on pregnant women or mothers of young children. At the end of the hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

Civilian Population

Part IV of Protocol II deals with the civilian population. As regards protection of civilian population, Article 13 provides that the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give

effect to this protection, the following rules shall be observed : (i) The civilian population, as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited, and (ii) Civilians shall enjoy the protection afforded by this Part, unless and for such times as they take a direct part in hostilities.

Protocol II also provides protection of object indispensible to the survival of the civilian population.[1] It also contains provisions relating to protection of works and installations containing dangerous forces.[2] Protection of cultural objects and places of worship[3] and prohibition of forced movements of civilians.[4] It is also provided that relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and ship-wrecked. If the civilian population is suffering undue hardship owing to lack of the supplies essential for its survival, such as food stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the high Contracting Party concerned.

Conclusion.—In view of the foregoing discussion, the contention that the laws of war of International Law deal only with international armed conflicts and that they have nothing to do with non-international armed conflicts is no more tenable. The provisions noted above apply to the non-international armed conflicts. It need not be over-emphasized that they apply also to guerillas and persons taking part in organised resistance movement provided that they satisfy the requirements provided in the Geneva Conventions and Protocol II. The Geneva Conventions of 1949 as well as Protocol II which supplements, them, lay great emphasis upon human treatment of persons taking part in non-international armed conflicts and civilian and individuals affected by such conflicts. That is why, they are often called humanitarian laws of war.

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1. See Article 14.
2. Article 15.
3. Article 16.
4. Article 17.

Part VI

THE LAW OF NEUTRALITY

CHAPTER 58

NEUTRALITY

Meaning and definition of the term "Neutrality"*.—As pointed out by Oppenheim, neutrality is "the attitude of impartiality adopted by third States towards the belligerents and recognized by belligerent, such attitude creating rights and duties between the impartial States and belligerents." [1] According to Lawrence, neutrality is the "condition of those States which in times of war take no part in the contest but continue pacific intercourse with the belligerents." [2] In his definition, Lawrence has laid emphasis on the point that neutrality is a condition wherein a State does not take part in war and continues intercourse with the belligerent States. This definition is neither complete nor adequate because it does not mention anything about the attitude of impartiality adopted by the neutral States. Moreover, it is also not made clear in this definition that recognition of neutrality by the belligerent States gives rise to certain duties and rights. As compared to this definition, the definition given by Oppenheim as quoted earlier is more appropriate. Judge Philip C. Jessup has defined the term "neutrality" in the following words : "Neutrality is a legal status arising from the abstention of a State from all participation in a war between other States, the maintenance by it of an attitude of impartiality in its dealings with the belligerent States and the recognition of the latter of this abstention." According to Starke, "In its popular sense neutrality denotes the attitude of a State which is not at war with belligerents and does not participate in the hostilities. In its technical sense, however, it is more than an attitude, and denotes a legal status of a special nature, involving a complex of rights, duties and privileges at international law, which must be respected by belligerents and neutrals alike." [3]

On the basis of the above definitions we may conclude that there are following essential elements in neutrality :—

(1) *Attitude of Impartiality.*—Neutral State is a State which does not take part in war and remains impartial. This impartiality is one of the essential elements of neutrality.

(2) *Recognition of Impartiality by Belligerent States.*—Not only the neutral State should remain impartial, it is also necessary that this impartiality should be recognised by the belligerent States.

(3) *Creation of rights and duties.*—The recognition of attitude of impartiality of the neutral State gives rise to certain rights and duties. It gives certain rights to neutral States and also imposes certain duties upon them. Similarly, the neutral State also acquires certain rights because of the attitude of impartiality and neutrality adopted during the war between the two belligerent States. These rights and duties are recognized under international law and should be observed by the belligerent States as well as the Neutral States.

Development of the Law of Neutrality**

The term 'Neutrality, has been derived from the Latin word 'Neuter' which means impartiality. In wider sense, by neutrality we mean an attitude of impartiality adopted by the States who do not take part in the war. Ordinarily, by neutral States we mean those States which try to keep themselves aloof from the war of their neighbours. The law of

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* See also for C.S.E. (1987), Q. 7 (a).

1. L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 653.
2. T. J. Lawrence, The Principles of International Law, Seventh Edition, p. 582.
3. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 577.

** See also for I.A.S (1954), Q. No. 10; P.C.S. (1976), Q. No. 6 (a).

neutrality was known in India in ancient period. In the Mauryan period nearly four centuries B.C., the law of neutrality was known in India. As pointed out by Prof. K. R. R. Shastry, three different conditions of international law were recognized in India. They were (1) War; (2) Peace; and (3) Neutrality.[4] Although, it is true that the law of neutrality was known in ancient India yet it must be conceded that there was no clear provision of the status of belligerency. So far as the modern International law is concerned, the law of neutrality started in the middle ages. As pointed out by Prof. Schwarzenberger, "neutrality as descriptive of the political and legal status of the country not at war with either of the two belligerents made its appearance in European diplomatic correspondence in the middle ages."

In fact, the word "neutrality" began to be used since seventeenth century. But its systematic development could not be achieved until eighteenth century. In eighteenth century, the two famous jurists Bynker-Shoek and Vattel contributed much to the development of the law of neutrality. In the eighteenth century it was agreed that the States which do not take part in war are entitled to remain impartial and this impartiality may confer upon them certain rights. The development of the law of neutrality received a great impetus in the nineteenth century. Much of the credit for this goes to the United States of America because in the Nepoleonic wars of Europe America remained a neutral country. During the wars of Nepoleon Lord Stowwell who presided the British Prize Court contributed much to the systematic development of the law of neutrality and clarified the rights and obligations of the neutral States arising out of neutrality. The systematic development of the law of neutrality also owes much to the civil war of America. A leading case of this period relating to neutrality is *Alabama Claims Arbitration,* 1872. In the civil war of America, Britain was neutral. But Britain provided the facilities to the Southern States for the fitting and construction etc., of Albama and other destroyer in its territory. America claimed that it was a clear violation of the neutrality adopted by Britain. America contended that it was the duty of Britain to prevent such types of acts in its territory. America, therefore, claimed compensation for the violation of law of neutrality by Britain. Britain and America agreed to entrust this matter to the Court of Arbitration. The Court of Arbitration gave its award in favour of America and ruled that Britain should pay 1,55,00,000 dollars in gold to America as compensation.

The permanent neutralisation of Belgium and Switzerland in nineteenth century was also a landmark event so far as the development of the law of neutrality was concerned. This encouraged the development of the law of neutrality. Some rules relating to the law of neutrality were also framed in the Declaration of Paris, 1856 and Hague Convention of 1907. But the first world war turned into a "total war" and laws of neutrality were openly and flagrantly violated during the war. So was also the case with the second world war. America remained neutral in the first world war up to the year 1917, but later on it was compelled to take part in war. It was claimed by America that it had to participate in war because its neutrality was violated.

The establishment of the League of Nations and then of the United Nations greatly affected the law of neutrality in the twenteith century. Some jurists have gone to the extent of saying that the law of neutrality has become impossible in the presence of the provisions of the Charter. We will take up the detailed discussion of the position of the neutrality under the Covenant of the League of Nations and under the United Nations Charter, later on in this Chapter. It is sufficient to note at this stage that the Covenant and the United Nations Charter have greatly affected the old law of neutrality.

Rational basis of neutrality*.—Neutrality is often justified because of the following reasons : (1) It helps to localise the area of war. (2) It discourages the war. (3) In consequence of neutrality, some States are able to keep themselves away from war. (4) It regularises international relations.

Ordinarily above-mentioned reasons are said to be rational basis of the law of neutrality. But the second world war has clearly established that the first and second

4. See "The Concept of Neutrality in International Law", S.C.J. (1959), p. 113.

* See also for I.A.S. (1973), Q. No. 8.

reasons are not the true basis of neutrality. During the second world war, Norway, Denmark, Ireland and Belgium were neutral countries. But the belligerent States in general and Germany in particular did not respect their neutrality and conquered them. So far as the above-mentioned third basis is concerned the experience of the first world war has shown that it is not a concrete basis because America wanted to keep itself away from the first world war but had to enter the first world war in 1917. As regards the last basis, it may be noted that the establishment of the League of Nations greatly affected the old law of neutrality. At present, the provisions of the United Nations Charter have also greatly affected the law of neutrality. It is because of these reasons that it is contended that the observance of the law of neutrality is not possible in the presence of the provisions of the Charter. We will take up this discussion later on in this Chapter. Presently, it will suffice to note that although the Covenant of the League of Nations and United Nations Charter have greatly affected the old law of neutrality, they have not completely abolished it and the observance of the rules of neutrality is still possible under certain circumstances.

Position of the Law of Neutrality under the Covenant of the League of Nations*

Many jurists have expressed the view that the Covenant of the League of Nations has put an end to the old law of neutrality. Before saying anything for or against this view it will be desirable to discuss the relevant provisions of the covenant of the League of Nations. There could be two types of war under the League of Nations—(1) War not in disregard of the provisions of the Covenant; and (2) War in disregard of the provisions of the Covenant of League of Nations. As regards the first type of war, Covenant provided that the members of the League of Nations were under the obligation to settle their international disputes first through arbitration, judicial decision or inquiry by Council. Even after the States failed to settle their disputes by these means, they could not go to war until a period of three months lapsed after the award of the arbitration or judicial decision or inquiry by Council. That is to say the Covenant had not completely prohibited war. It has simply imposed certain restrictions upon the member States in respect of their right to resort to war. As pointed out earlier, if the problem could not be resolved through the above-mentioned means, the member States could resort to war only after a lapse of three months. If the member-States resorted to war after exhausting the means provided under the Covenant for the settlement of their disputes other member-States of the League of Nations could remain neutral and the Covenant did not impose any obligation upon them. Thus in this type of war States were free to maintain their neutrality. The position was entirely different in regard to the second type of war. The second type of war greatly affected the law of neutrality under the Covenant. This is to say, if a State went to war in total disregard of the provisions of the Covenant of the League of Nations, then such a State could be deemed to be the enemy of the whole of the League of Nations. Article 16 of the Covenant of the League of Nations provided that if any State resorted to war in violation of the Articles 12, 13 and 15, then it was considered to be war against the whole League. In such type of war other members of the League of Nations were under obligation to assist the League of Nations. In short, we may say that in this type of war, other States of the League of Nations could not remain neutral. According to Fenwick, Covenant of the League of Nations put an end to the old law of neutrality.[5] Professor Kelsen has also expressed the view that the provisions of the Covenant of the League of Nations are inconsistent with the old law of neutrality. But as pointed out by Prof. Oppenheim although the Covenant of the League of Nations greatly affected the old law of neutrality it did not completely abolish it.[6] The view of Prof. Oppenheim sems to be better one because under certain circumstances the States could remain neutral under the Covenant. For example, if a State resorted to war not in disregard of the provisions of the Covenant, then in that situation the State members were under no obligation to assist the League of Nations and could remain neutral.

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* See also for P.C.S. (1976), Q. No. 6 (b); P.C.S. (1978), Q. No. 8. For answer See also Chapter on "War, Its Legal Character and Effects"; P.C.S. (1984), Q. 9.

5. Charles G. Fenwick, International Law (Third Indian Reprint, 1971), p. 719.
6. Oppenheim, note 1, at pp. 634-635.

Neutrality under the Pact of Paris (1928) or Kellogg Briand Pact * : As remarked by Oppenheim, "The General Treaty for the renunciation of war (*i.e.*, Paris Pact), although it did not effect an express alteration in the law of neutrality, brought about a fundamental change in the status of war in International Law—a development which it was thought, must in the long run influence the institution of neutrality." [7] Fenwick has also expressed the same view. He writes : ".....the Pact made no provisions for measures of enforcement in case of the violation of its pledges; it set up no machinery to determine whether a particular act should constitute a violation; and its broad 'outlawry of war' was limited and qualified by a covering letter of Secretary Kellogg in which the right of self-defence was reserved in such general terms as to permit escape from the obligations of the Pact even more easily than the terms of Article 15 permitted escape from the obligations of covenant. *Nevertheless its provisions were regarded by a large number of Jurists as definitely restricting the status of neutrality which might otherwise be claimed by States not members of the League of Nations."* [8]

Modern concept of Neutrality or Position of Neutrality under the United Nations Charter**

Some jurists are of the view that the United Nations Charter has put an end to the old law of neutrality. Professor Kelsen has also remarked that the rule of impartiality upon neutral States is superseded by the Charter. Professor Quincy Wright, Fenwick, Professor Smith, Jackson and Mis. V. M. Chricton also subscribe to this view. In the view of these jurists, when a State resorts to war there can be only two conditions. He can either be an aggressor or a defender. If he is an aggressor then preventive or enforcement action can be taken against him under the Charter. If he is a defender then he should be assisted by the United Nations. Thus the Member States of the United Nations cannot remain neutral. Before we criticize the views of these jurists, it will be desirable and necessary to refer the relevant provisions in the United Nations Charter which have affected the old law of Neutrality. Such provisions are as follows :

(*1*) *Article* 2 (5).—Art. 2 (5) provides that all members shall give the United Nations every assistance in any action it takes in accordance with the present Charter and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.

(*2*) *Article* 25.—Art. 25 provides that members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. That is to say, if the Security Council decides to take any action, the member-States have no option but carry out this decision. Under such circumstances they cannot remain neutral.

(*3*) *Articles* 41, 42 and 43.—Arts. 41, 42 and 43 are relating to the right of enforcement action conferred upon the Security Council in respect of maintenance of peace and security. Under these Articles the Security Council has been empowered to ask other States to assist it. These provisions are in fact detrimental for the observance of the rules of the old law of neutrality.

(*4*) *Article* 49.—Art. 49 provides that the members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council. It has also affected the old law of neutrality.

(*5*) *Article* 51.—Article 51 of the Charter confers upon the member-States of the United Nations the right of individual or collective self-defence if an armed attack occurs against a member of the United Nations.

It is clear from the above provisions that the United Nations Charter has greatly

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* See also for P.C.S. (1976), Q. No. 6 (c); P.C.S. (1978), Q. No. 8.

7. Oppenheim, note 1, at p. 635.

8. Fenwick, note 5, at p. 720.

** See also for P.C.S. (1976), Q. No. 6 (d); I.A.S. (1962), Q. No. 8; I.A.S. (1957); Q. No. 12; I.A.S. (1955), Q. No. 10; I.A.S. (1970), Q. No. 10 (a); I.A.S. (1969), Q. No. 9; I.A.S. (1972), Q. No. 8 (a); P.C.S. (1978) Q. No. 8; P.C.S. (1979), Q. No. 11 (c), P.C.S. (1981), Q. No. 10 (d); P.C.S. (1983), Q. No. 5(a); P.C.S. (1984), Q. No. 9; C.S.E. (1984), Q. No. 8; P.C.S. (1987) Q. No. 9 (b).

affected the old law of neutrality. It is on the basis of these provisions that many jurists have expressed the view that the Charter of the United Nations has put an end to the old law of neutrality. But as against this view some jurists have expressed the view that although the provisions of the Charter have greatly affected the old law of neutrality, they have not completely abolished it. That is to say, neutrality can still be practised under certain circumstances. P. B. Potter has aptly remarked, "It is hardly too much to assert that neutrality in the formal juridical sense of that concept and that term, as known prior to 1945, was abolished for all signatory States within the limits of the Charter for issues and conflicts not covered by that instrument neutrality could still exist or be practised." [9] Fenwick has also expressed the view that if in respect of certain matters relating to peace and security, the Security Council is not able to take any decision, then in such a situation other member States of the United Nations can remain, neutral." [10] Professor Oppenheim has also expressed the view that Charter has greatly affected the old law of neutrality, but has not completely abolished the law of neutrality. He adds, in principle no member-State of United Nations can remain neutral in case the Security Council has declared a member-State aggressor or has decided that the breach of peace has taken place. However, there are still certain situations wherein the member-States of the United Nations can remain neutral." [11] For example, if the Security Council decides that a State has committed a breach of peace or has made an aggression but because of the exercise of veto by permanent member, it is not able to take any decision then other member-States of the United Nations do not have any legal obligation and may remain neutral. Starke has also expressed the same view. He has pointed out, "Neutrality, is not, however, completely abolished. Even where preventive or enforcement action is being taken by the United Nations Security Council, certain member-States may not be called upon to apply the measures decided upon by the Council or may receive special exemption (Articles 48 and 50). In this event their status is one of *'qualified' neutrality* inasmuch as they are bound not to assist the belligerent States against which the enforcement measures are directed and must also assist the member-States directly taking the measures (Article 49)." [12] Further, "It seems also that where the 'veto' is exercised by a permanent member of the Security Council so that no preventive or enforcement action is decided upon with reference to a war, in such cases member-States may remain absolutely neutral towards the belligerents.[13]

Thus we see, as pointed out by Starke, the old law of neutrality has not been completely abolished and can be practised by the member-States of the United Nations in certain special circumstances, although in principle the member-States of the United Nations cannot claim to remain neutral. The present status of the neutrality has been very aptly summed up by J. P. Lalive in the following words : "In realm of thinking in International law and particularly as regards neutrality ours is a period of transition in the sense that the grouping by the advocates of international organisation and collective security for a new concept and principle to replace the traditional concept of neutrality is by no means successful and that this despite all reasonings, to impair the status of neutrality which had no doubt become rail in the face of belligerent necessity during the two world wars, neutrality survives by force of logic and by reason of the facts of international politics."

RIGHTS AND DUTIES OF NEUTRAL STATES AND RIGHTS AND DUTIES OF BELLIGERENT STATES*

Duties of Neutral States.—Ordinarily following are the duties of the neutral States :

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9. "Neutrality", 1955, A.J.I.L. (1956), p. 101 at p. 102.
10. See Charles G. Fenwick, "Legal Aspects of Neutralism", A.J.I.L., Vol. 51 (1957).
11. Oppenheim, note 1, at pp. 647-50.
12. Starke, note 3, at pp. 581-582.
13. Ibid. at p. 582.

* See also for I.A.S. (1974), Q. No. 8; I.A.S. (1957), Q. No. 12; I.A.S. 1955, Q. No. 10; I.A.S. (1967), Q. No 10 (a) : P.C.S. (1982), Q. No. 10 (d); P.C.S. (1985), Q. 9; C.S.E. (1987), Q. 7 (a).

(1) *Abstention.*—It is the duty of the neutral State to abstain from rendering direct or indirect help to the belligerent States. For example, the neutral State cannot assist either belligerent through war forces or cannot guarantee the loans to be given to them.

(2) *Prevention.*—It is also the duty of the neutral States to prevent certain things within their territory. For example, it is their duty to ensure that persons are not recruited for the war forces of belligerent States within their territory. They should also prevent the preparation of war in favour of either of the belligerent States.

(3) *Acquiescence.*—It is also the duty of the neutral States to give their acquiescence in respect of certain matters. For example, they should give their acquiescence when a ship using the flag of their States is seized for carrying contraband. If they oppose such seizure it will be deemed to be the violation of the law of neutrality on their part.

In addition to the above-mentioned duties the neutral States have certain other duties although the following duties are in consequence or connected with the above mentioned three duties. Such duties are as follows :

(1) *Restoration.*—It is the duty of the neutral States not to allow any act connected with the war within their territory and in case if any such act takes place it is their duty to restore it. This is to say, if either of the belligerent seizes enemy ship within the territory of the neutral State then it becomes the duty of the neutral State to get such ship restored to the other belligerent State.

(2) *Reparation.*—If a neutral State contravenes the above-mentioned duties, it may be held liable to pay compensation for the same. A leading case on the point is *Albama Claims Arbitration,* 1872. In this case Britain had to pay America 1,55,00,000 dollars in gold in the form of compensation for the violation of the laws of neutrality. This case was related to the civil war of America in which Britain was neutral but had allowed certain facilities of fittings etc., to Alabama and other destroyers within its territory. Since it was violation of laws of neutrality, Britain was made to pay compensation for the same. Rights and duties of the neutral States have been mentioned in Hague Convention of 1907.

The case of Altmark.—The *Altmark,* a German auxiliary vessel carried over 300 British officers and sailors taken prisoners from several British merchant vessels sunk by a German armoured warship, the *Admiral Graf Spee.* In February, 1940, the *Altmark* entered Norwegian territorial waters on her way to Germany. The Norwegian authorities ascertained that she was an auxiliary vessel and so granted her permission to navigate through the vast stretch of the Norwegian territorial waters. Soon after the Commander of the British Naval forces asked for a search of the *Altmark* in order to release the British prisoners, but the Norwegian officers refused the request. Thereupon the *Cosseck,* a British destroyer was ordered to enter the Norwegian territorial waters where *the Altmark,* had taken refuge. Without taking or sinking the *Altmark,* the British soldiers were released and brought to England. Norway strongly protested on the ground that the British action constituted a violation of her neutrality. The British Government alleged that Norway was partial, and showed special consideration to the *Altmark,* permitting a far too deep entrance into her territorial waters to hide prisoners, thus compelling the British officer to resort to self-help on humanitarian grounds.** Great Britain also justified her action on the ground that the British prisoners on board exempted the case from the rule of free passage through territorial waters.

Reference may be made here to Article 5 of Hague Convention No. XIII which provides that belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries. Further, Article 12 *limits to twenty-four hours period* within which belligerent men-of-war may remain within the territorial waters. But as pointed out by Oppenheim "Probably acquiescence in such passage as causes the men-of-war to remain within territorial waters for more than twenty-four hours is not inconsistent with neutrality so long as it does not result in transforming the territorial waters into a base of war-like operations for offensive or for defensive purposes.

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* Asked in I.A.S. (1967), Q. No. 10(a) and also in P.C.S. (1969), Q. No. 7; see also for P.C.S. (1965), Q. No. 10(a).

The passage must be innocent in the primary meaning that it is a normal incident of international navigation and does not amount to an abuse of the right or of the permission of passage by being a device for gaining immunity by circuitous resort to the shelter of neutral waters in manner involving a conspicuous prolongation of the voyage." [14] As regards the case of *Altmark* he rightly observes, "While according to customary International Law and to Hague Convention No. XIII, the neutral State is entitled to permit the passage of belligerent men-of-war through its territorial waters, the nature and the duration of such passage are governed by the overriding principle that neutral territorial waters must not be further permitted to become a basis for warlike activities of either belligerent. The prolonged use of neutral territorial waters by belligerent men-of-war or their auxiliaries for passage not dictated by normal requirements of navigation and intend *inter alia,* as a means of escaping capture by superior enemy forces must, therefore, be deemed to constitute an illicit use of neutral territory which the neutral State is by International Law bound to prevent by the means at his disposal or which in exceptional cases, the other belligerent is entitled to resist or remedy by way of self-help." [15]

In view of the foregoing, if a belligerent ship which is being pursued stops at a neutral port for more than thirty hours,* it will be violative of the law of neutrality.

Duties of the Belligerent States.—Following are the duties of the belligerent States :

(1) *Abstention.*—It is the duty of the belligerents to abstain from committing any act of war within the territory of the neutral States. For example, if the bomber planes of a belligerent fly over the territory of Switzerland and drop bombs on another belligerent, the belligerent State will be guilty of the violation of its duty under the law of neutrality.**

(2) *Prevention.*--It is their duty to prevent bad treatment towards the ambassadors, citizens, etc., of the neutral States.

(3) *Acquiescence.*—Like the neutral States, belligerent States are under duty to give their acquiescence in respect of certain matters. For example, if the neutral State gives asylum or refuge to some members of its forces or allows temporary asylum or refuge to the enemy within its port, or allows the enemy State to get its ships repaired in its port then it is the duty of the other belligerent State not to oppose it and to give its acquiescence in this respect.

Rights of neutral States and the duties of Belligerents towards the neutral States.***—According to Lawrence, following are the rights of neutral States :

(1) The first right of neutral States is that no war-like act should be committed in their territory.

(2) Secondly, their cable lines in seas, etc., should not be damaged as far as possible.

(3) The belligerent States should not use their territory for making preparation for war.

(4) They are also entitled to get certain rules formulated for the protection of their territory and to make the belligerent States observe them.

(5) Neutral States also possess the right that if their neutrality is violated then they may get compensation for the same. It may however, be noted that there is a lack of definite principles in this respect. But at least this is definite that they should get adequate compensation for the violation of the law of neutrality and the compensation should be proportionate to the loss or damage suffered by them.

Commencement of Neutrality.—Immediately after the start of war, neutral States should declare their neutrality. For example, during the Second World War neutral

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14. Oppenheim, Supra note 1, at p. 694, note 1.
15. Ibid, at pp. 694-695.

* P.C.S. (1988), Q. 9 (a).
** P.C.S. (1988), Q. 9 (d).
*** P.C.S. (1982), Q. No. 10(d) ; P.C.S. (1985), Q. 9.

States declared their neutrality immediately after the start of war. It is only after the start of war, States can determine as to whether they will remain neutral or not. Hence, knowledge of the start of war is necessary for the declaration of neutrality. No neutral State can be held responsible for its own acts as well as the acts of its citizens done before the start of war. That is why, Article 2 of Hague Convention III provides that the belligerent States should intimate the neutral States about the start of war. The rights and duties of neutral States begin only after such intimation.

End of Neutrality.—Neutrality comes to an end in one of the following ways :—(a) at the end of war ; (b) when the neutral State starts war with one of the belligerent States; or (c) when any belligerent State starts war with the neutral States. The rights and duties of neutrality continue till a State remains neutral, they end as soon as the neutral State ends its neutrality. However, neutrality does not end simply by a violation of the neutrality.

Kinds of Neutrality and Distinction between them*.—Neutrality may be of following kinds :

(1) *Perpetual or Permanent Neutrality.*—When a State is neutralised through a special international treaty, then such a neutrality is called perpetual or permanent neutrality.

(2) *General and Partial Neutrality.*—When only a part of the State is neutralised, it is called partial neutrality. On the other hand, the whole State adopts the attitude and policy of neutrality, it is called general neutrality.

(3) *Voluntary Neutrality and Neutrality based on some Treaty.*—A voluntary neutrality is a neutrality which is declared by a State voluntarily without being bound by a treaty. On the other hand, a State may become neutral being bound by any general or special treaty.

(4) *Armed Neutrality.*—When a State uses armed force for the defence of its neutrality, it is called armed neutrality.

(5) *Benevolent Neutrality.*—When a State, while remaining neutral, favours a belligerent State or otherwise helps it, it is called benevolent neutrality.

(6) *Perfect and Qualified Neutrality.*—When a State remains completely impartial and does not, directly or indirectly, assist either of the belligerents, then it is called perfect neutrality. But if a State remains neutral generally but as a result of some provisions of treaties entered into before start of war, directly or indirectly, assist any belligerent State, then it is called qualified neutrality.

DEFINITION OF 'NEUTRALITY', 'NEUTRALISATION' AND 'NEUTRALISM' AND DISTINCTION AMONG THEM**

Meaning of the term 'Neutrality' and its distinction with 'Neutralisation' and 'Neutralism'.—The meaning of 'Neutrality' has already been clarified earlier. It is an attitude of impartiality as well as legal status of those States which do not take part in war. When the belligerent States accept or recognize this attitude of impartiality then it gives rise to certain rights and duties. Neutrality is a temporary status and is essentially related to war between two or more States. The neutral State may end the status of neutrality at its will. For example, America remained neutral State during the first world war up to 1917. In 1917 it ended its neutrality and took active part in war.

As compared to this neutralisation is a permanent status of neutrality of a State which is guaranteed by an agreement or treaty. A State may declare its permanent neutrality and if such neutrality is guaranteed by other States through the medium of international agreement or treaty then it is called neutralisation. For example, Switzerland is a neutralised State.

In 1985, referendum was held to decide as to whether Switzerland should join the U. N. The result of referendum was not in favour of joining the U. N. Thus Switzerland continues to be an ideal neutralized state.

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* See also for P.C.S. (1970), Q. No. 10.

** See also for I.A.S. (1965), Q. No. 11; P.C.S. (1974), Q. No. 2 (b); P.C.S. (1973), Q. No. 10 (c); P.C.S. (1985), Q. 9.

As compared to neutrality and neutralisation, neutralism is only a political attitude or status of a State. Under the policy of neutralism any State may keep itself away from the cold war going on between different military blocks of groups.

Meaning and definition of the term 'Neutralisation' and its distinction with 'Neutrality' and 'Neutralism'.—As pointed out earlier, neutralisation is the permanent status of neutrality of a State. Often it is guaranteed by the international agreement or treaty. Such a State cannot participate in war without violating its neutrality. Switzerland is an ideal example of neutralised State. Prof. Schwarzenberger has made the distinction between neutrality and neutralisation in the following words : "Whereas under international customary law a neutral power remain free to exchange its status of neutrality for that of war, a neutralised State which is a party to a treaty prescribing its permanent neutrality may not do so. It cannot resort to war without a breach of its treaty obligation or release from these by the other parties to the treaty. Switzerland represents this type of State."

Thus we see that Switzerland is an ideal neutralised State to the extent that in order to adhere to its neutrality it has not even joined the membership of the United Nations. Austria is also a neutralised State and its neutrality has also been guaranteed under an international treaty. But Austria has become the member of the United Nations. As pointed out by Starke, a neutralised State may become a member of the United Nations because despite the provisions contained in Art. 2 (5), the Security Council under Art. 48 may exempt such a neutral State from the performance of its obligation. Probably on this ground Austria became the member of the United Nations in 1955. In the words of Starke, following is the distinction between Neutralisation and Neutrality : "Neutralisation differs fundamentally from neutrality, which is a voluntary policy assumed temporarily in regard to a state of war affecting other powers and terminable at any time by the State declaring its neutrality. Neutralisation on the other hand, is a permanent status conferred by an agreement with the interested powers, without whose consent it cannot be relinquished." [16]

As compared to neutrality and neutralisation, neutralism denotes the policy of keeping aloof from the conflicts of the military blocks. In the words of Starke, "It is thus also essentially different from 'neutralism' a newly coined word denoting the policy of a State not to involve itself in any conflicts or defensive alliances." [17]

Meaning and definition of the term 'Neutralism' and its distinction with 'Neutrality, and 'Neutralisation'*.—As pointed out by Prof. Schwarzenbenger, "neutralism is still newcomer to the vocabulary of international relations." According to Schwarzenberger, neutralism is a political and ideal concept, the meaning of which may change in different contexts, and circumstances. In his book entitled 'Neutralism', Dr. Peter Lyon has aptly pointed out, "Since the end of the second world war, the political neologism 'neutralism' has been used so often and by so many people in such different circumstances and with such different intentions that its meaning seems to change, Chameleon like, depending on the contest in which it appears." Like neutralism, non-alignment is also a political concept. It means not aligning with either of the two blocks—Capitalistic Block led by the U. S. and the Socialistic Blockled by the U.S.S.R. Non-aligned Movement has now gathered great momentum. It commands great respect in international relations and is a force to reckon with. Its membership is now about 120. But the term non-alignment is not at all a legal term and has nothing to do with the traditional law of neutrality. Non-Aligned Movement (NAM) believes in the policy of non-alignment *i.e.*, not aligning itself with either of the two military blocks but at the same time considers itself free to take independent decisions of specific issues. While neutrality is necessarily connected with war, non-alignment is related to cold war and peace.

There is a great difference between 'neutrality' and 'neutralism'. Neutrality is an attitude of impartiality as well as legal status. As compared to it neutralism is only used to denote the political attitude of a State. As pointed out by Dr. Peter Lyon, "By neutrality is

16. Starke note 3, at p. 122.
17. Ibid.

* See also for P.C.S. (1982), Q. No. 7(e) ; P.C.S. (1987), Q. 9(a); C.S.E. (1987), Q. 7(a).

meant non-involvement in war while by neutralism is meant non-involvement in cold war." Professor Schwarzenberger has also remarked, "in contrast to neutrality which presupposes state of war between at least two other States, neutralism is understood as a policy of non-alliance or non-involvement is available as a patern of policy in times of both peace and war." P. B. Potter has observed "obviously there are no legal bonds upon such an attitude as long as neither party to the 'cold war' commits any illegal action *vis-a-vis* other parties." [18]

In the end, it may be concluded that while on the one hand neutralisation and neutrality are legal status under the international law, on the other hand, neutralism is only a political attitude. It has no significance in law and does not give rise to any rights and duties under international law. It is a policy through which the neutral States may keep itself alloof from the cold war going on between different blocks. For example, India follows the policy of neutralism and keeps herself away from the military pacts of America and Russia.

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18. "Neutrality, 1955", A.J.I.L., Vol. 50 (1956) p. 101 at p. 102.

CHAPTER 59

RIGHT OF ANGARY*

As regards the original right of Angary, Oppenheim has written, "under the term *jus angariae,* belligerents who had not sufficient vessels often claimed and practised in former times the right to lay an embargo on, and seize, neutral merchantmen in their harbours, and to compel them *and their crews* to transport troops, munitions, and provisions to certain places on payment of freight in advance. This practice arose in the Middle Ages, and was much resorted to by Louis XIV. "Thus the original right of angary not only empowered a belligerent to requisition neutral ships for military purposes, but also to compel the neutral crews to render services by which they acquired enemy character." Further, "In contradistinction to this original right of angary, the modern right of angary is a right of belligerents to destroy, or use, in case of necessity for the purpose of offence and defence, neutral property on their territory, or on enemy territory, or on the open sea. This modern right of angary does not as did the origial right, empower a belligerent to compel neutral individuals to render services, but extends to neutral property.....The object of the right of angary is therefore, either such property of subjects of neutral States as retains its neutral character from its temporary position on belligerent territory and which therefore is not vested with enemy character, or such neutral property on the open sea as has not acquired enemy character. All sorts of neutral property, whether it consists of vessels or other means of transport, or arms, ammunition, provisions, or other personal property, may be the object of the right of angary, provided it is serviceable to military ends and wants. The conditions under which private enemy property may be utilized or destroyed ; but in every case the neutral owner must be fully indemnified."

It may also be noted, as pointed out by Oppenheim, "whatever the extent of the right of angary may be, it does not derive from the law of neutrality. The correlative duty of a belligerent to indemnify the neutral owner of property appropriated or destroyed in the exercise of the right of angary does indeed derive from the law of neutrality. But the right of angary itself is rather a right deriving from the law of war. As a rule the law of war only gives the right to a belligerent, under certain circumstances and conditions, to seize, make use of, or destroy the private property of the inhabitants of occupied enemy territory; but under other circumstances and conditions, and very exceptionally, it likewise gives a belligerent the right to seize, use or destroy neutral property temporarily on occupied enemy territory, on his own territory, or on the open sea."

As pointed out by Starke, privilege of Angary means "requisitioning any neutral ships or goods physically within their jurisdiction, but not brought voluntarily subject to the property being useful in war and being urgently required by them and subject to the payment of full compensation." [1]

On the basis of the above definition, it appears that the right or privilege of Angary has following essential elements :—

(1) it is the privilege of the belligerent State to requisition any ship or goods within its territory and it may use it;
(2) it is necessary that such ships or goods should not be brought voluntarily in that area;
(3) such ships or goods should be useful for purposes of war;
(4) such ships or goods should be urgently required; and
(5) it is necessary for the belligerent States to give full compensation in return of taking or using of such goods or ships.

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* See also for I.A.S. (1974), Q. No. 10(a) ; I.A.S. (1970), Q. No. 10 (f) ; I.A.S. (1965), Q. No. 12(b) ; I.A.S. (1959), Q. No. 6(f) ; I.A.S. (1957), Q. No. 6(e) ; P.C.S. (1976), Q. No. 10(b); P.C.S. (1968), Q. No. 10(c) ; P.C.S. (1965), Q. No. 8 ; I.A.S. (1961), Q. No. 12 (b).

1. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 584.

The practice of the first and second world wars shows that belligerent States possess the right to declare war area in the open sea and may notify the ways or routes through which neutral States may send their ships, etc. According to Bullock, following are the essential elements of privilege of Angary :—

(1) Belligerent States are entitled to requisition the ships or goods of the neutral State within their territory.
(2) This can be done only when it is urgently required for transportation and other purposes.
(3) Such goods can be taken only when they are within the territory of the belligerent States.
(4) Such requisition should be necessary due to some urgency.
(5) Full compensation should be given for taking or using of such ships or goods.
(6) After the seizure of ships its crew or servants cannot be compelled to render their services to the belligerent State.

According to Rollin and Bullock, the right or privilege of Angary cannot be exercised for requisition or taking over property within the territory of a neutral State, or in the open sea. A leading case connected with the privilege of Angary is the *Zamora*,[2] wherein Privy Council ruled that in accordance with the rules of international law the ships or goods which are pending for decision of the Prize Court can be taken but there are limitations for the exercise of this right. The Court pointed out the following limitations:—

(i) This should be necessary for the conduct of war and security of the belligerent State concerned.
(ii) There should be a real question for adjudication by the court otherwise seizure or requisition would be unlawful.
(iii) The implementation of such an order should be through the court which will decide whether or not the right has been validly exercised keeping in view all the circumstances.[3]

In short, it will suffice to say that the belligerent States can requisition the neutral ships or goods which are within their territory but the exercise of this right is subject to certain limitations.[4]

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2. (1916) 2 A.C. 77.
3. Ibid., at p. 16; For facts of the case see Chapter on "Blockade."
4. Oppenheim, International Law, Vol. II, Seventh Edition, p. 167.

CHAPTER 60

CONTRABAND AND DOCTRINE OF CONTINUOUS VOYAGE

Contraband*

Meaning and Definition of the term Contraband.—As pointed out by Starke, "contraband is the designation for such goods as belligerents consider objectionable because they may assist the enemy in the conduct of war." [1] Oppenheim has defined contraband in the following words : Contraband of war is the designation of such things as are forbidden by either belligerent to be carried to the enemy on the ground that enable him to carry on the war with greater vigour." [2]

Some rules were formulated in regard to contraband in the Declaration of Paris, 1956. These rules have now become part of international law. According to international law belligerent States are entitled to seize contraband goods during war. They may seize contraband goods during war, no matter whether they are ships of the enemy States or the ships of neutral States. International law has conferred this right upon the belligerent States because during war it is in the interest of self-defence. They are entitled to seize and take into their custody not only the contraband goods but also the ships carrying such contraband goods. They are entitled, according to international law to seize the contraband goods so that it may not assist the enemy in the conduct of war.

Kinds of contraband**

Contraband may be of two Kinds.—*Absolute contraband*; and (2) *Conditional contraband.* Absolute contraband are those goods which are of military character and render help directly in the conduct of war. For example, arms and ammunitions, clothes of armed forces, explosive substances, etc., are absolute contraband. On the other hand, conditional contraband are those goods which may be used in peace as well as war. For example, food materials, fuel, etc., are conditional contraband.

In addition to the above mentioned two kinds of contraband, there is also a third category called free articles. These goods are such as cannot be seized as contraband. For example, Chinaware, glass, soap, medicines, etc., are free articles and cannot be seized as contraband even during war. However it may be noted that there is no general agreement among the States in regard to the different categories of contrabands. A serious endeavour was made in this connection in the Declaration of London, 1909, but it could not succeed. In the Declaration of London lists were prepared for the three types of contrabands but this declaration could never come into force. No recognition was accorded to these lists during the first and second world wars nor the States accorded their general consent in regard to the lists prepared in the Declaration of London, 1909. Consequently it depends upon the States whether to put a particular, contraband goods into the category of absolute contraband or conditional contraband or to treat it free articles. The general principle of international law in this connection is that those goods which directly or indirectly assist the enemy in the conduct of war may be seized as contraband.

Consequences of carriage or contraband of war.—As indicated earlier, during war the belligerents are entitled to seize the contraband. In addition to this, under certain circumstances they are also entitled to seize the ship in which such contraband goods are carried. It may, however, be noted, simply by seizure of the goods or taking the goods into custody such belligerent State does not acquire ownership over such goods. It

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* See also I.A.S. (1974), Q. No. 10(d) ; F.C.S. (1969), Q. No. 3(b) ; P.C.S. (1966), Q. No. 10(c) ; P.C.S. (1964), Q. No. 1 (b) ; P.C.S. (1983), Q. 5(b) ; P.C.S. (1984), Q. 8.

1. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 589.
2. L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 799.

** See also for P.C.S. (1984), Q. 8; C.S.E. (1981), Q. 7 (a).

is clear from the practice followed in Britain, America and certain other countries that such goods or ships are produced before the Prize Courts. Only when the Prize Courts declare the seized goods or ship as a lawful prize, the belligerent State concerned acquires ownership over such goods or ships. In this connection, it may also be noted that, as pointed out by Starke, seizure by a belligerent State is admissible only in the open sea or in the belligerent's own territorial waters : seizure in neutral territorial waters would be the violation of neutrality.

Economic warfare and the doctrine of contraband : Impact of the Second World War*.—The experience of second world war have made a significant impact on the traditional doctrine of contraband. During the Second World War, far-reaching theories of economic warfare were adopted by the U. K. and the U. S. As pointed out by Starke, "Under the new concept of economic warfare, economic pressure was not to be limited primarily to the traditional expedients of contraband interception and blockade, but was to be conducted by multifarious other methods and operations, in order, effectively to weaken the enemy's economic and financial sinews, and therefore his ability to continue the struggle.....An almost unlimited range of techniques and expedients, not restricted to contraband and to blockade controls, was adopted in the waging of this economic warfare;....."[3] Further, "The new concept of economic warfare, as thus put into practice, with its wide permissible limits, has by reflex action necessarily had the result, too, of removing a number of the qualifications upon the doctrines of contraband and blockade, which originated in the period when economic pressure in time of war was conceived in the narrowest terms. It is perhaps not today seriously disputed that the modifications to these two doctrines, made in the course of two world wars, will endure.

Accordingly, contraband and blockade as separate doctrines, of the laws of war and neutrality, must now be treated as special topics within the larger field of economic warfare. It should not, however, be overlooked that in a special case, an operation of blockade may involve primarily naval or military aspects rather than those of an economic character." [4]

Doctrine of Continuous Voyage.**

As pointed out earlier, during war the belligerent States can seize the contraband goods. Connected with the doctrine of Contraband is the doctrine of Continuous Voyage. According to Starke, the doctrine of Continuous Voyage consists "in treating an adventure which involves the carriage of goods in the first instance to a neutral port and then to some ulterior and hostile destination as being for certain purposes one transportation only to an enemy destination, with all the consequences that would attach were the neutral port not interposed." [5]

According to the principle of contraband, objectively things which may assist the enemy in the conduct of war may be seized by the belligerent States. In order to escape the enforcement of this principle or rule, sometimes it so happens that the States instead of sending the contraband directly to the enemy State, send to a neutral State from where it is subsequently transferred to the enemy State. This is done with the objective that the goods may not be seized as contraband by the belligerent States. In order to prevent the violation of the rule of contraband the doctrine of Continuous Voyage was propounded. According to this doctrine, if the ultimate destination of the goods is the enemy State or territory then such contraband goods may be seized, no matter whether they are first sent to a neutral State and are subsequently to be transferred to an enemy State. In the eyes of law it is considered that it was a Continuous Voyage, that is to say, it is deemed in the eyes of law as if the neutral State never interposed. Consequences of the seizure of

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* See also for C.S.E. (1985), Q. 8—For answer see also Chapter on "Blockade," especially 'Strategic and Commercial Blockade' and 'Long Distance Blockade'.

3. Starke, note 1, at p. 588.
4. Ibid, at p. 589.

** See also for I.A.S. (1975), Q. No. 10(a) ; I.A.S. (1962), Q. No. 10 ; I.A.S. (1958), Q. No. 11 ; P.C.S. (1964), Q. No. 9(a) ; P.C.S. (1984), Q. 8 ; P.C.S. (1985), Q. 10(e).

5. Starke, note 1 at p. 591.

contraband goods in accordance with the doctrine of Continuous Voyage will be same as that of the seizure of contraband goods. This has already been discussed earlier. The doctrine of Continuous Voyage was expounded in very clear terms by Lord Stowell in the famous case of *"The Maria".*[6] Besides this, during the civil war of America, Supreme Court of America also contributed much to the development of Continuous Vayage.

It may be noted here that many British and foreign writers condemned the application of the doctrine of continuous voyage. But Great Britain departed from the said view in the case of *Bundesrath* (1900) and defended her action on the ground of the doctrine of Continuous Voyage. In this case, in 1900, three German Vessels—the *Bundesrath, Herzog, and General,* were sailing from German neutral ports to the Portuguese neutral ports. They were seized by British cruisers under the suspicion that they were carrying contraband. Germany contended that since the vessels were sailing from neutral ports to neutral ports, there was no carriage of contraband. Germany demanded the release of the said vessels. But Great Britain did not accept this contention of Germany and defended her action on the ground that the ultimate destination of the goods was an enemy country, hence they were contraband and could be seized. The change in the British view was in consequence of the changed conditions of international transport.

According to the unratified Declaration of London, 1909, in accordance with the doctrine of Continuous Voyage, only absolute contraband goods can be seized and conditional contraband goods cannot be seized. The practice of the States, however, runs to the contrary. The practice of the States reveals that in accordance with the doctrine of Continuous Voyage not only absolute contraband but conditional contraband can also be seized and taken. A leading case on the point is *The Kim.*[7] In this case the court made it clear that the doctrine of Continuous Voyage is applicable on the contraband goods carried on lands as well as sea and that it has become a part and parcel of international law. A brief discussion of this case will be desirable here.

The Kim[8]**.**—Kim and three Norwegian ships and one Swedish ship were carrying some goods from New York to Copenhagen (Denmark). The ship named Kim was going to Copenhagen and was loaded with rubber and hides. This ship was stopped and seized by the British ships in November, 1914 in the High Seas on the ground that the ultimate destination of the ship and its cargoes was not Copenhagen (Denmark) but Germany. Germany and Britain were enemies of each other during the first world war. Consequently, Germany was an enemy State. The ultimate destination of the Kim and the cargoes loaded on it was Germany. Since the ultimate destination was Germany, the British ships seized rubber and hides loaded on the Kim. Ruber was absolute contraband whereas hides were conditional contraband. Subsequently this matter relating to the seizure of the ship as well as the contraband goods was submitted to the Prize Court for its decision. The Prize Court held, the Cargoes "were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that country by sale or otherwise, that Compenhagen was not the real *bona fide* place of delivery ; but that the cargoes were on their way at the time of capture to German territory as their actual and real destination."

Thus the Prize Court declared that the goods were seized as lawful prize and consequently the Government of Britain acquired ownership over the seized contraband goods. It is also clear from the decision of the Prize Court that not only absolute contraband goods but conditional contraband goods can also be seized in accordance with the doctrine of Continuous Voyage.

It may also be noted here that in Britain the doctrine of Continuous Voyage has been applied in a very wider sense. The following two principles laid down by British courts will make this statement self-evident :—

(1) Goods being carried to a neutral State may be seized if their ultimate destination is an enemy State or territory. The British courts have applied this

6. (1805) 5 Ch. Rob. 365.
7. (1915) p. 215.
8. (1915) p. 215.

principle in respect of the raw-materials which are sent to a neutral State and after their manufacture or conversion of the raw material into finished goods they are subsequently sent to enemy State.

(2) The British courts have also applied this doctrine in the situation wherein the owner of the ship might be quite innocent in regard to the ultimate destination of the contraband goods. That is to say, even if the intention of the owner of the ship might not be to send the goods concerned to an enemy State yet if they are actually being sent to an enemy State or being sent for the purpose of being transferred to an enemy State, they may be seized in accordance with doctrine of Continuous Voyage.[9]

It is clear from the above-mentioned principles that the British courts have broadened the scope of the doctrine of Continuous Voyage. The main objective behind this doctrine is that during war the belligerent States may prevent the carriage of contraband goods to enemy State in the interest of their self-defence and self-preservation. Prof. Julius Stone has rightly remarked that the development of the doctrine of continuous voyage has taken place with a view to adopt the legal concepts to the political and economic changes.[10]

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9. Starke, note 1, at p. 592.
10. Julius Stone, Legal Control of International Conflict (1955), pp. 484-85.