# The state practice of India and the development of international law : selected areas

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## Dedicated to

Mr Chinnasamy Jayaraj, Principal State Counsel, Republic of Seychelles and
former Secretary-General, Indian Society of International Law, New Delhi,

Mr Amal Ganguli, Senior Advocate, Supreme Court of India

&

to all those who promote scholarly and juristic works on the State Practice of India on International Law.

# ABBREVIATIONS

| | |
|---|---|
| ACWs | Abandoned Chemical Weapons |
| AFOPS | Asian Forum for Polar Science |
| AOSIS | Alliance of Small Island States |
| ATCM | Antarctic Treaty Consultative Meeting |
| BASIC | Brazil, South Africa, India and China |
| CBDR | Common But Differentiated Responsibilities |
| CBW | Convention on Biological Weapons |
| CCAMLR | Commission for the Conservation of Antarctic Marine Living Resources |
| CCIT | Comprehensive Convention on International Terrorism |
| CDM | Clean Development Mechanism |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CLCS | Commission on Limits of Continental Shelf |
| COMNAP | Council of Managers of National Antarctic |
| CTBT | Comprehensive Test Ban Treaty |
| CWC | Chemical Weapons Convention |
| CWDFs | Chemical Weapons Destruction Facilities |
| CWPFs | Chemical Weapons Production Facilities |
| CWs | Chemical Weapons |
| CWSFs | Chemical Weapons Storage Facilities |
| DROMLAN | Droning Maud Land Air Operators Network |
| EEZ | Exclusive Economic Zone |
| EU | European Union |
| G20 | Group of 20 Countries |
| GCTS | Global Counter Terrorism Strategy |
| GFF | Global Environment Facility |
| GHG | Green House Gas |
| IAEA | International Atomic Energy Agency |
| ICAO | International Civil Aviation Organisation |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| ICTY | International Criminal Tribunal for former Yugoslavia |
| ICWA | Indian Council on World Affairs |
| IEA | International Energy Agency |
| IMF | International Monetary Fund |
| IMO | International Maritime Organisation |

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|---|---|
| ISA | International Seabed Authority |
| ISIL | Indian Society of International Law |
| ITLOS | International Tribunal for the Law of the Sea |
| JGOFS | Data Buoy Programme and Joint Global Ocean Flux Studies |
| LDCs | Least Developed Countries |
| MARSIS | Marine Satellite Information Services |
| NAM | Non Aligned Movement |
| NCAOR | National Center for Antarctic and Ocean Research |
| NCEP | National Committee on Environmental Planning |
| NCEPC | National Committee on Environmental Planning and Coordination |
| NGOs | Non-Governmental Organisations |
| NHRC | National Human Rights Commission |
| NIEO | New International Economic Order |
| NOIS | National Ocean Information System |
| NPT | Treaty on the Non-Proliferation of Nuclear Weapons |
| OCWs | Old Chemical Weapons |
| ODA | Overseas Development Assistance |
| OECD | Organisation for Economic Cooperation and Development |
| OPCW | Organisation for the Prohibition of Chemical Weapons |
| PIL | Public Interest Litigation |
| PKO | Peace Keeping Operations |
| RTI | Right to Information |
| SAARC | South Asian Association for Regional Cooperation |
| SCALOP | Standing Committee of Antarctic and Logistic Operations |
| SELMAM | Sea Level Monitoring and Modelling |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNCED | United Nations Conference on Environment and Development |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNCTAD | United Nations Conference on Trade and Development |
| UNDP | United Nations Development Program |
| UNESCO | United Nations Education, Social and Cultural Organisation |
| UNFCC | United Nations Framework Convention on Climate Change |
| UNHCR | United Nations High Commissioner for Refugees |
| UNHRC | United Nations Human Rights Council |
| WMD | Weapons of Mass Destruction |
| WTO | World Trade Organisation |

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# CHAPTER I
# INTRODUCTION

## 1.0. Introduction

The state practice of India in contemporary world affairs and international law is one of the best means to evaluate and understand India's current and future policy and practical position on various issues which directly or indirectly impact its stature as a growing global and regional power. Countries like the United States of America (USA), the United Kingdom (UK), Germany, Australia, Japan and the Netherlands provide, on a regular basis, updates on views and practices of their governments in public international law, through official documents as well as by writings of leading scholars of international law. This research study attempts to provide an in-depth analysis of actions of the Indian state by its executive, legislative and judicial organs in select areas of international law. These are law of the sea, refugee law, human rights, international environmental law and climate change, disarmament (a case study of weapons of mass destruction), international institutional law (UN reforms and G-20) and peaceful settlement of international disputes (a case study of the International Court of Justice - ICJ). The study begins by examining the growth and development of international law in pre-independence India from 1500 to 1945. By examining the pre-independence state practice, the thesis seeks to enrich the existing knowledge base of the Indian state practice in international law. It shows how India has been contributing to the making of international law in line with its emerging status as a global and regional power. The study aims to enable readers to anticipate how a country like India will respond to major developments in international law. Besides it brings out reactions of other states to the Indian state practice. The study enables us to understand how the judiciary and civil society institutions have accepted or rejected the Indian practice and how have their voices constrained or prompted the country. The study further helps us to evaluate the instruments of secondary sources and hard evidence of state practice to establish the existence of international obligations. This chapter provides a theoretical analysis of state practice as an integral element of customary international law, examines India's search for making of an international law, India's views on fundamental definitions of international law and provisions of the Constitution of India which governs Indian state practice at international level.

## 1.1. State practice an essential element of customary international law

State practice is an important source to understand the determination of relevant rules of international law. Article 38 (1) of the ICJ Statute is generally recognized as a definitive statement of the sources of international law. Pursuant to this Article, the Court is required to apply, among other legal sources, international conventions "expressly recognized by the contesting states" and "international custom, as evidence of a general practice accepted as law". By analyzing the activity, programs and minute details of the state, its organs and officials, one can establish a coherent picture of the state practice. It is extremely difficult to find out a distinction between what states actually do and what they say and if different, what represents the law. State practice shall also include omissions as several rules of international law prohibit states from certain conduct and acts, and, "when proving such a rule, it is necessary to look not only at what states do, but also at what they do not do."[1] Mere

[1] Does state practice consist only of what states do and not of what they say? In this regard, the dissenting opinion of Judge Read in the *Fisheries* case is quite instructive. Judge Read argued that claims made to areas of the sea by a state could not create a customary rule unless such claims were enforced against foreign ships.

statements at international platforms, diplomatic correspondence, voting patterns at international conferences on a mandate mainly from the executive, do not give the entire picture. One needs to analyze national legislations[2] and executive activities and programs as well as judicial pronouncements to obtain a comprehensive or correct treatment of the subject.[3]

State practice, in order to contribute to the customary rule, must be followed consistently, commonly and concordantly.[4] As far as international law in a particular subject is concerned, if the practice is followed by all states and uniformly, such a customary rule is normally established. However, at domestic level, one can observe non-uniformity or inconsistency of state practice across various areas. The state practice in the field of economic development can hardly be considered consistent in terms of norms and procedures in the area of, for example, disarmament, human rights or humanitarian law. Within the context of a particular subject, it is useful to examine the generality of practice and see whether the emerging pattern across various subjects is uniform or inconsistent in terms of substance and procedure or not. There are instances where one can see that a rule may apply if a state has accepted the rule as applicable to it individually, or because the two states belong to a group

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ICJ Rep. 1951, 116, 191. However, in later Fisheries Jurisdiction cases, ten of the fourteen judges inferred the existence of customary rules from such claims, without considering whether they had been enforced. Fisheries Jurisdiction (Merit) (UK. v. Iceland), ICJ Reports, 1974, 3 at 47, 56-8, 81-8, 119-20, 135, 161. These two parallel cases dealt with the validity of the establishment by Iceland of a 50-mile exclusive fishery zone and its effect on the fishing rights of the UK and Germany which these two states had traditionally enjoyed within this zone. Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edition, (Routledge: 1997), p. 43.

[2] "National legislation as an internal evidence of State practice, and insistence on other States acting in that way as external evidence of State practice, are surer as evidence of State practice...since customary law is based on the practice of States in their international relations, rules of law laid down by national legislatures or in national case law for the internal aspect of a State's international relations may have persuasive and indicative value, at times great." Shabtai Rosenne, *The Perplexities of Modern International Law*, (Nijhoff; Leiden: 2002), p. 58.

[3] Jansen, S and Wannet, L., "Literature on Dutch State Practice in the Field of Public International Law", 39 *Netherlands Yearbook of International Law*, 459-881 (2008); van Leeuwen, S. S. A, "Literature on Dutch State Practice in the Field of Public International Law", 38 *Netherlands YbIL* (511-538) 2007; Meyers, Benjamin D., "African Voting in the United Nations General Assembly", 4 *The Journal of Modern African Studies* 2, 213-27 (1966); Carter, David B., *Vote Buying in the UN General Assembly*, The Pennsylvania State University, 14 March 2011 http://www.personal.psu.edu/dbc10/unvote13.pdf; Kim, Soo Yeon and Russett, Bruce, "The New Politics of voting alignments in the United Nations General Assembly", 50 *International Organisation* 4, 629-52 (1996); Sir Michael Wood, "The United Nations Security Council and International Law", *Hersch Lauterpacht Memorial Lectures*, 9 November 2006; Gaebler, Ralph and Smolka-Day, Maria, *Sources of State Practice in International Law*, Ardsley, NY: Transnational Publishers (2002).

[4] The International Court of Justice, pronouncing its judgment in the *North Sea Continental Shelf* case, clarified two important elements in this regard. First, the Court said, "to constitute the *opinio juris*…two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates.* The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty" (*North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 44, paras. 77—78). Second, the Court confirmed that "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely convention rule, an indispensable requirement would be that within the period in question, short thought it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved". Ibid. p. 43, para. 74.

of states between which the rule applies.[5] There are equally good numbers of areas where a state can deny the opposability of a rule in question by consistently demonstrating its objections.[6]

Except few countries, such as the UK,[7] USA,[8] Australia,[9] Japan[10] and the Netherlands,[11] no systematic efforts are made,[12] at least in developing countries, to analyze all sources of state practice, i.e. legislations, court decisions, correspondence, declarations, regulations, etc. which can seek to establish the state's practice and obligations under international law. Where can one find evidence of state practice? Publications of a state itself are perhaps the most important and rich area to learn its pronouncements in characterizing international law. Governments press releases, declarations, statements and other papers of foreign ministries, although not exclusively, do provide important sources of state practice. Increasingly, websites of foreign ministry and diplomatic missions also are useful sources of locating evidence of state practice. However, these should always be subjected to an objective analysis.

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5 *Case Concerning Right of Passage over Indian Territory (Portugal v India) (Merits)* [1960] I.C.J Reports 6 at 39; Colombian-Peruvian Asylum case, Judgment of November 20th 1950: I.C.J. Reports 1950, p. 266, at 276.

6 *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 at 229, 232.

7 The *British Year Book of International Law* has become an essential work of reference for academics and practicing lawyers. Through a mixture of articles and extended book reviews, it continues to provide an up-to-date analysis on important developments in modern international law. It has established a reputation as showcase for the best in international legal scholarship and its articles continue to be cited for many years after publication. In addition through its thorough coverage of decisions in UK courts and official government statements, the *British Year Book* offers unique insight into the development of state practice of the United Kingdom on international law.

8 *Restatement of the Law (Third), the Foreign Relations of the United States, American Law Institute, 1988-2011.*

9 Donald R. Rothwell, Stuart Kaye, Afshin Akhtarkhavari and Ruth Davis, *International Law: Cases and Materials with Australian Perspectives*, Cambridge: Cambridge University Press (2010). As per the marketing text of the book, "With a strong focus on Australian practice and interpretation of international law, this comprehensive cases and materials textbook will provide students with a contemporary understanding of an area of law that has seen major changes in recent years. Written by a team of pre-eminent experts, International Law: Cases and Materials with Australian Perspectives is unique in reflecting the Australian context, perspectives and values on international law. Each chapter covers a substantive area of the law with specialist topics on human rights, law of the sea, and international environmental law. Students will be able to readily identify the key principles, rules and distinctive learning points and will benefit from the clear exposition of state practice in the field, how it has contributed to the development of the law, and how Australian governments have viewed and interpreted international law". http://www.cambridge.org/aus/catalogue/catalogue.asp?isbn=9780521609111 accessed on 22 June 2011. Australian Yearbook of International Law (Australia) contains good commentary on the state practice of Australia on international law.

10 Gianluca, Rubagotti, *Public International Law in the Japanese Legal System: The Case of the GATT*, in Farah, Paolo and Gattinara Giacomo (ed.), *The absence of direct effect of WTO in the EC and in other countries*, (Torino: Giappicchelli, 353-367, 2010); Yozo Yokota, "Theory and Practice of the Application of International Law in Japan", In *International Law: New Actors, New Concepts, Continuing Dilemmas: Liber amicorum Božidar Bakotić* edited by Budislav Vukas and Trpimir Šošić, 75-94. (Leiden: Brill, 2010).

11 See the successive editions of the *Netherlands Yearbook of International Law*, rubric State practice.

12 Asian Yearbook of International Law carries a dedicated section in the Yearbook describing major developments in practices of Asian countries which have influence on international law. However, this section can be enriched with some analytical concluding remarks at the end of each country's description. Similarly, the Nordic Journal of International Law also carries descriptive analysis of state practice of international law of the Nordic nations.

**1.2. India's search for making of international law**

Indian policy-makers, like in most common law jurisdictions, consider that they are entitled to make laws for themselves including international law. Especially in the areas which concern India's rise at the global level and meet its post-independence needs, concerns and interests such as the socio-economic development, India has ensured or is ensuring that no other states force laws on it. Instead, it has shown that it will abide by the laws of its own making. In other words, Indian doctrine has been a strong resistance to foreign pressure. India has withstood, advanced and determined movements and pressures on some key areas of importance, which remain the subject of analysis of this research study. Literature is abound on how ancient Indian civilization[13] recognizes the importance of international law in facilitating international relations[14] and as R. P. Anand explains the Western civilizations learn about great Indian traditions of international law and later on reproduced these as their own.[15] The civilization of India shows that it has inherently advocated, agreed and implemented that it is bound by international law, the law of nations, while fully respecting the existence of other civilizations[16] and in the post-independence era, the existence of other nations. Without the existence of a global body or global judicial mechanism, India, through the centuries of state practice, has established fine traditions of international law without coming into conflict with other states. The historical practice of India clearly shows that it has never attempted to establish legal obligations incumbent upon any other state. This remains much true for its post-independence era too.[17]

However, since 1970s and especially after 1990s, one can discern a tension between India's earlier and current practices. Since late 1990s, India has taken an assertive stand to establish legal obligations of other nations, for example, for global common good. India's practices also suggest that it has fully respected other nations own competence to determine and interpret international law for them. This is in line with the avowed principle of international law, namely, non-interference into internal affairs of a state, which India together with China pronounced as one of the fundamental principles of *Panchsheel*.[18]

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[13] Ancient here means the Indian practices which belongs to the distant past of few hundred years ago and are no longer in existence. By placing together in a systematic referenced manner a thorough knowledge of the ancient times, the book will be able to rightfully defend its analysis and conclusions of the contemporary state practice.

[14] H. M. Jain, "International law and international politics: A study in mutual interactions", 58 *India Quarterly* 1, 75-104 (2002).

[15] R. P. Anand, "The Formation of International Organisations and India: A Historical Study" in 23 *Leiden JIL* 1, 5-21 (2010).

[16] Eric Yong-Joong Lee, "Early Development of Modern International Law in East Asia - with Special Reference to China, Japan and Korea", 4 *Journal of the History of International Law* 1, 42-76 (2002).

[17] Whether this observation is applicable and just with regards to the Indo-Bhutanese bilateral relations requires a full analysis and an objective comprehensive analysis can only justify the assertion. India withdrew subsidy for kerosene and cooking gas generating significant hardship for ordinary Bhutanese people and when the new government was elected in July 2013, it set amicable settlement of issues, including this one, as an urgent priority. India cut off the subsidy when the agreement with Bhutan ended on 30 June 2013. It has been widely believed that the DPT party which won the first parliamentary election of Bhutan under the leadership of the Prime Minister Thinley made significant overtures to woo China which resulted in embracing the Indian wrath culminating in various measures taken by India. The withdrawal of subsidy is one of such measures. See Rajesh Kharat, "Indo-Bhutanese Relations: Strategic Perspectives", in K. Warikoo (ed.) *Himalayan Frontiers of India: Historical, Geo-Political and Strategic Perspectives*, 137-166 (Routledge, 2009); Rajesh Kharat, *Foreign Policy of Bhutan*, (New Delhi: Manak, 2005); Paul Smith, "Bhutan-China Border Disputes and their Geopolitical Implications", In Bruce A. Elleman, Stephen Kotkin and Clive Schofield (ed.), *Beijing's Power and China's Borders: Twenty Neighbours in Asia*, 23-35 (Sharp, 2013).

[18] Mutual Non-Interference in each other's Internal Affairs is one of the five principles of Panchsheel or Five Principles of Mutual Coexistence which were agreed upon between India and China in 1954. India proposed

It is quite interesting to observe that, since its independence, international relations have changed and transformed dramatically, especially since the end of the Cold War, but one is struck to observe that India has remained quite consistent in implementing fundamental international law principles without much change in substance.[19] Furthermore, there is a tacit acceptance among judiciary and executive wings of India, in the area of socio-economic development, that international law and global institutions are superior to national ones, which can help her achieve the proper and appropriate means for its search for global position.[20] One can readily agree that most US academicians and scholars do not look to international institutions or international community to validate their government's actions or their own.[21] This assumption remains equally valid for India.

In the socio-economic development sphere, and specifically in the areas of environment and human rights, international law is seen as an imperative code by the Indian judiciary. The Indian state practice also reveals one of the fundamental pillars of international law: that international law is a body of norms made by states for states, and its content and application are usually open to honest dispute. This remains valid even today, especially in view of the absence of an international body to implement and enforce international law in letter and spirit.

Despite this alleged weakness of international law, Indian state practice, unlike some Western countries, shows that India has not ignored international law in its routine interactions with the world. Indian state practice, in this regard, can be summarized, quite aptly, in what US Chief Justice John Marshall had to say in 1812, "[t]he world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented [to certain legal norms]".[22]

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these five principles during the negotiations on the boundary issue between the two nations. Eventually, these principles found place in preface to the "Agreement between the People's Republic of China and the Republic of India on Trade and co-operation Between the People's Republic of China and India". Chen Meidi, "Panchsheel and International Law", 1 *AALCO Quarterly Bulletin* 2-3, 28-49 (2005); K. R. Narayanan, "The 50th Anniversary of Panchsheel", 3 *Chinese JIL* 2, 369-72 (2004); C. V. Rangnathan, *Panchsheel and the Future: Perspectives on Indo-China Relations*, (New Delhi: Institute of Chinese Studies and Centre for the Study of Developing Societies, 2004); Ministry of External Affairs, *Panchsheel*, Publication of the Ministry of External Affairs, India, June 2004.

[19] P. S. Rao, "The Indian Position on Some General Principles of International Law", In Bimal N. Patel (ed.), *India and International Law*, vol. 1, 33-65 (Leiden: Nijhoff, 2005); V. G. Hegde, "Indian Courts and International Law", 23 *Leiden JIL* 1, 53-77 (2010).

[20] The publications which describe and analyse interlink between the urge of India to become a global power and using the international law as an appropriate tool and the UN as an appropriate platform have started emerging in the last decade. See, Hans Köchler, "The United Nations and Global Power Politics", in R. K. Dixit, *International Law: Issues and Challenges*, vol. 1, 22-42 (Gurgaon: Hope Indian Publications, 2009); Jean-Luc Racine, "Post-Post-Colonial India: From Regional Power to Global Player", 73 *Politiqué étrangere*, 65-78 (2008); Babbage Ross, *India's Strategic Future: Regional State or Global Power?,* (Basingstoke: MacMillan, 1992).

[21] Paul R Dubinsky, "International Law in the Internal Legal System of the United States" , 58 *American Journal of Comparative Law*, 455-78 (2010); Kate Randall, "The United States Violated International Law in Executing Mexican Nationals", In Noah Berlatsky (ed.), *Capital Punishment*, 185-190 (Detroit: Greenhaven Press, 2010); Contemporary Practice of the United States relating to international law published in the American JIL is one of the most important sources of learning the views of US academicians, judges and policy-makers on international law.

[22] *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

### 1.3. India's attitude to a fundamental definition of international law

There are hardly any discourses that analyze India's contention or subscription to any particular definition of international law. India has largely subscribed to the principles and norms enunciated by the League of Nations (India at that time not fully independent, although enjoying the status as one of the members) and the UN and hundreds of international organizations of which India is a member. The main reason for this subscription or compliance is that Indian state practice reveals its affinity for a genuine system of international law, comparable to domestic legal system in its reach and authority as well as substance and procedure. It has shown that despite certain circumstances which require India to be at odds with international institutions, its acceptance of authority of universal institutions such as the UN, remains mostly intact.[23] On the contrary, when it has found that its interests remain substantially at odds with international institutions such as the International Criminal Court,[24] it has displayed vehement opposition[25] and has gone to some extent allying with the USA, the alliance which has potential of weakening the delivery of mandate by the ICC.

India's positions at bilateral and multilateral platforms reiterate its emphasis on independent sovereign status and her entitlement to interpret international law for herself. Interestingly, this position remains true for some areas only. In areas like environment, climate change,[26] human rights and refugees, the judiciary has considered that decisions and declarations of global bodies are sometimes binding at domestic level. Accordingly, the Indian judiciary has demanded legislature and executive to comply with such international views.

### 1.4. Constitution of India, international law and state practice

As far as the Indian Constitution and international law is concerned, there is a uniform position among academicians and scholars that international law is not part of the Indian Constitution and India's obligations are limited to those under customary international law and applicable binding treaties. As per the importance of international law in the governance of the country and its relations with other nations are concerned, Article 51

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[23] P. S. Rao, see above, *Some General Principles of International Law*.

[24] K. C. Joshi, "The International Criminal Court: A Hope against Hope?" 45 *Journal of the Indian Law Institute*, 2 239-252 (2003); Joshua E. Kastenberg, "The Right to Assistance of Counsel in Military and War Tribunals: An International and Domestic Law Analysis," 14 *Indiana International & Comparative Law Review*, 1, 175-225 (2003); James C. Kraska, "The International Criminal Court, National Security, and Compliance with International Law," 9 *ILSA Journal of International & Comparative Law* 2, 407-411 (2003); V. S. Mani, "International Terrorism and the Quest for Legal Controls", 40 *International Studies*, 1, 41-67 (2003).

[25] India signed the *Non-Surrender* Agreement with the US on 26 December 2002 which attempts to derail the ICC. By signing this agreement, India and the US pledged not to surrender any current or former government official or national of the other country to the ICC without the express consent of the either country. This also includes those persons who are on the payroll of either state. This agreement which US signed with other states too, is an expression of clear non-cooperation with the ICC. Ninan Koshy, "India Joins US's "Hague Invasion'", Washington D. C., *Foreign Policy in Focus*, 6 January 2003; Usha Ramnathan, "To Kill a Court: A Quiescent India toes the U.S. Line in the Battle over the International Criminal Court", 20 *The Hindu* 2, 18 Jan-31 Jan 2003._____, "India and the ICC", 3 *Journal of International Criminal Justice* 3, 627-34 (2005).

[26] Wenying Chen, Jiankun He, and Fei Teng, "Possible Development of a Technology Clean Development Mechanism in a Post-2012 Regime", In Joseph E. Aldy and Robert N. Stavins (eds.) *Post-Kyoto International Climate policy: Implementing Architectures for Agreement: Research from the Harvard Project on International Climate Agreements*, 469-90 (Cambridge: Cambridge University Press, 2010); Joyeeta Gupta, "Climate Change and Shifting Paradigms," In Duncan French (ed.) *Global Justice and Sustainable Development*, 167-186 (Leiden: Nijhoff, 2010).

of the Directive Principles[27] lays down that the State shall endeavor to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and (d) encourage settlement of international disputes by arbitration. Article 51 of the Constitution had its source and inspiration in the Havana Declaration of 30 November 1939.[28] In fact, all principles and norms used in the Havana Declaration have found their way through in Article 51 of the Constitution.[29] The first draft (draft Article 40) provided: "[T]he State shall promote international peace and security by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among governments and by the maintenance of justice and the scrupulous respect for treaty obligations in the dealings of organized people with one another".

Furthermore, Articles 245[30] and 246[31] empower the Indian Parliament to make laws for the whole or any part of India within its area of competence as defined and delimited under the distribution of legislative

[27] Directive principles are the ideals of the new order as envisaged by the framers of the constitution of India. According to Article 37 of the Constitution, it shall be the duty of the State to apply these principles in making laws. The understanding of directive principles is becoming increasingly important in the wake of third and fourth generation of human rights, environmental rights, gender rights, etc. The Indian Judiciary has clarified or given firm legal characteristics to various principles over a period of time and have recognized the convergence of directive principles and fundamental rights. As Justice Manohar says, "…an increasing number of directive principles are being perceived as entailed in fundamental rights such as the right to equality or the right to life, and are becoming justiciable.", Sujata V. Manohar, *T. K. Toppe's Constitutional Law of India*, 3rd edition (Lucknow: Eastern Book Company, Lucknow, 2010), p. 413. Article 51 of the Constitution of India, which speaks of promotion of international peace and security by India, is one of the directive principles of the State Policy of India. Respect for international law is displayed by a State by observing the principles of that law in municipal laws. If they are not observed, the courts may apply these principles on the theory of implied adoption provided such principles are not inconsistent with the Constitution and the law enacted by national legislatures. Sujata V. Manohar, *T. K. Toppe's Constitutional Law of India*, p. 433.

[28] The Havana Declaration was adopted by the Governments, Employers and workpeople of the American Continent at Havana on 30 November 1939. The Declaration emphasized that the "lasting peace can be established only if it is based on social justice", and the International Labour Organisation, "has determined to continue the quest for social justice in peace and war", and the International Labour Organisation, "has an essential part to play in building up a stable international peace based upon co-operation in pursuit of social justice for all peoples everywhere". Furthermore, the Declaration proclaimed "unshaken faith in the promotion of international co-operation and in the imperative need for achieving international peace and security by the elimination of war as an instrument of national policy, by the prescription of open, just and honorable relations between nations, by the firm establishment of the understanding of international law as the actual rule of conduct among Governments and by the maintenance of justice and the scrupulous respect for treaty obligations in the dealings of organized peoples with one another". International Labour Office, Official Bulletin, 1 April 1944, Vol. XXV, p. 16-17.

[29] http://www.legalindia.in/the-status-of-international-law-under-the-constitution-of-india.

[30] Article 245 reads "Extent of laws made by Parliament and by the Legislatures of States: (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State, (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation."

[31] Article 246 reads, "Subject matter of laws made by Parliament and by the Legislatures of States (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the Union List), (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the Concurrent List), (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List.

powers between the Union and the States *vide* the 7th Schedule.[32] Laws made by the Parliament cannot be questioned on grounds of extra-territorial operation (Article 245). As far as international relations, foreign affairs, international organizations and international law matters are concerned, the Parliament is assigned the empowerment. Under the 7th Schedule, List I (Union List), the following entries are included:

a. Foreign affairs; all matters which bring the Union into relation with any foreign country (entry 10);
b. Diplomatic, consular and trade representation (entry 11);
c. United Nations Organization (entry 12);
d. Participation in international conferences, associations and other bodies and implementing of decisions made thereat (entry 13);
e. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries (entry 14);
f. War and Peace (entry 15);
g. Foreign jurisdiction (entry 16);
h. Citizenship, naturalization and aliens (entry 17);
i. Extradition (entry 18);
j. Admission into, and emigration and expulsion from India; passports and visas (entry 19);
k. Pilgrimages to places outside India (entry 20); and
l. Piracies and crimes committed on the high seas or in the air (entry 21).

Although no specific distinction is drawn in terms of political powers, rights and obligations between the federation and the individual states, like in case of the USA,[33] the commentary of the Constitution and the practice invariably confirm that the Indian Union asserts one voice at the international level. Indian states have shown respect in terms of compliance of international law norms adhered by the Indian Union. There are no reported incidences, like in case of the USA, whereby the Union and the States have opined or practiced differently on the same issue of international law.[34]

The Indian Parliament, under Article 253 of the Constitution, is solely empowered to implement international obligations. It must be noted that even if a treaty is signed and ratified by India, it does not become enforceable or automatically part of Indian laws. To give it effect at national level, amendments or new

[32] The Constitution distributes legislative powers between Parliament and State Legislatures as per the list of entries in the 7th Schedule.

[33] *McCulloch v. Maryland* (1819) is historical in addressing the issue of the state powers as per the US Constitution Supremacy Clause. In this case, Chief Justice John Marshall asserted that "the laws adopted by the federal government, when exercising its constitutional powers, are generally paramount over any conflicting laws adopted by state governments. This case helped in understanding the primary legal issues in this area concerned the scope of Congress' constitutional powers, and whether the states possess certain powers to the exclusion of the federal government, even if the Constitution does not explicitly limit them to the States." 17 U.S 316 (1819). The Supremacy Clause of the US Constitution reads, "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

[34] For issues concerning the implementation of international judgments at domestic level, specifically, giving effect to the ICJ orders and judgments in the USA, in the *Breard* Case brought by Paraguay against the USA (Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I. C. J. Reports 1998, p. 248), the *LaGrand* case brought by Germany against the USA (LaGrand (Germany v. United States of America), Judgment, I. C. J. Reports 2001, p. 466) and the *Avena* case brought by Mexico against the USA Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I. C. J. Reports 2004, p. 12), see, Curtis A. Bradley, "Enforcing the *Avena* decision in U. S. Courts, 120 *Harvard Journal of Law and Public Policy 30,* 119-125; US Supreme Court Decision – *Medellin v. Texas*, 25 March 2008; Linda E. Carter, "Lessons from *Avena:* The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations", 15 *Duke Journal of Comparative and International Law* 259 (2005).

municipal laws, if required, must be made. However, if there is no conflict with national law, the courts in India generally try to interpret the statutes as to be in harmony with international law rules.[35] As far as customary international law is concerned, it has been observed that in the area of disarmament of nuclear weapons, India has made it consistently clear that a rule cannot be imposed on a state that has objected.[36] In fact, the vehement opposition of three states, India, Israel and Pakistan, has led to a situation whereby non-proliferation of nuclear weapons norms prescribed and implemented by a majority of states, have created a particular customary law for adhering states.

India has neither signed nor ratified the Vienna Convention on Law of Treaties, which is often considered largely but not exclusively as a restatement of customary rules. Article 18 of the Treaty provides that a state cannot take action to defeat the Treaty's object and purpose once it has signed but not yet ratified a treaty.[37] In other words, the Indian position suggests that it does not support the view that a state cannot take action to defeat the Treaty's object and purpose in the scheme of Indian Constitution as well as with respect to general principles of international law.[38] India's position towards international courts and tribunals suggests that these institutions must depend on the voluntary compliance of India or seek its assistance of appropriate political organs. India has also shown reluctance in implementing international obligations undertaken by the Security Council.[39] Nevertheless, India does not distantiate itself from the binding nature of Council decisions as per Article 25 of the Charter.

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[35] *In re Berubari Union,* AIR 1960 SC 845; *Gramophone Co. vs. Birendra,* AIR 1984 SC 667.

[36] Emmanuel Voyiakis, "Voting in the General Assembly as Evidence of Customary International Law?", in Stephen Allen and Alexandra Xanthaki (ed.), *Reflections on the United Nations Declaration on the Rights of Indigenous Peoples,* 209-23 (Oxford: Hart, 2011); Jill M. Sheldon, "Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the Use of Nuclear Weapons in All Circumstances?", 20 *Fordham JIL* 1, 181-262 (1996); Charles Quince, *The Persistent Objector and Customary International Law,* (Denver: Outskirts Press, 2010); Andrew Guzman, Andrew and Timothy Meyer, "Customary International Law in the 21st Century", In Russell A. Miller and Rebecca M. Bratspies (ed.), *Progress in International Law*, 197-217 (Leiden: Nijhoff, 2008). James Green, "India as a Persistent Objector to a Customary Comprehensive Nuclear Test-Ban: The Implications of Possible Preemptory Statute and the Indo-US 123 Agreement, Paper presented at the *123 Agreement Third Workshop*, Delhi, 2 April 2001. Despite the significant importance of the Vienna Convention on Law of Treaties and despite India's non-signature/accession to this Treaty, there are hardly attempts made to understand India's objection to the Treaty.

[37] Mark E Villiger, "The Vienna Convention on the Law of Treaties: 40 Years After", 344 *Recueil des cours,* (2009); V. Crnic-Gotic, "Object and Purpose of Treaties in the Vienna Convention on Law of Treaties", 7 *Asian YbIL* 141-74 (1997); E. W. Vierdag, "The Law Governing Treaty Relations between Parties to the Vienna Convention on the Law of Treaties and States Not Parties to the Convention", 76 *American JIL*, 779-801 (1982); P. K. Menon, "The Law of Treaties with Special Reference to the Vienna Convention on the Law of Treaties", 56 *Revue de droit international, de sciences diplomatiques et politiques*, 133-55 (1978).

[38] Read Article 51 and Article 253 of the Constitution of India together - Article 253 enables the Government of India to implement all commitments under international law. Treaties do not become self-operative. Indian state practice shows that a treaty can be enforced if such enforcement is possible under the existing law and if such enforcement is not contrary to or inconsistent with any domestic law. Such a treaty can also be used to fill a gap in domestic law. The Supreme Court of India explained the position of treaties under the Indian Constitution in *Indo-Pakistan Agreement* ( AIR 1960 SC 845) and in *Maganbhai Ishwarbhai Patel v. Union of India* ((1970) 3 SCC 400; AIR 1969 SC 783).

[39] It shall be noted, however, that the successive Indian Governments have given force to the Security Council resolutions obliging UN Member States to comply with the resolutions in cases concerning war in Iraq (following the invasion of Kuwait by Iraq) and conflicts in the former Yugoslavia. India did not support the UN resolution concerning the establishment of the International Criminal Tribunal for former Yugoslavia (ICTY), but is bound to it under Article 25 of the UN Charter.

**1.5. Research questions**

This study examines contribution of India's state practice to the development of international law. The central inquiry is what does the state practice of India suggest and what contribution it has made to the consolidation of the rule of international law in international and domestic affairs. A comprehensive assessment of state practice of India in various fields has been missing. Hence, as an emerging global and regional power, it is relevant to examine its practice and see how the Indian state practice will govern and will be governed by international law in the future. The study also aims to examine principles and rules of international law which influence India's domestic legal order in the selected fields.

The changes in international relations, the emergence of and realignment of global power structures, and its impact on international law need critical analysis by international lawyers and academicians of states like India to inject the debating process with the principle of equity.[40] This study tests the hypothesis that the Indian state practice in international law resembles the state practice of a dominant state on international law,[41] especially since it has started acquiring political,[42] military and economic[43] influence in world affairs, from 1998 onwards.[44] This study also seeks to identify and show what were the weaknesses and strengths of the Indian state in decisively influencing the shaping of international law. By analyzing the past practice, one can also project the future interventions of the Indian state with greater certainty in terms of scope and content of intervention.[45] The scope of this inquiry is limited to the post-independence phase only. An abundance of literature is available which give insight into India's contribution and practice on international law during these first two phases.[46]

This study builds upon the contribution of Indian and non-Indian scholars to the evolution and development of international law and India. While the existing literature focuses more on theories and

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[40] Although the global power may mean, in general terms, a country which has clear dominance among all countries in a specific region, a global power in the context of this book means a country which is a regional hegemon which aims to project power and influence in the setting of global norms.

[41] Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order", 16 *European JIL* 3, 369-408 (2005); Michael Byers, *United States Hegemony and the Foundations of International Law*, (Cambridge: Cambridge University Press, 2003); Johanne M. Picard, "International Law of Fisheries and Small Developing States: A Call for the Recognition of Regional Hegemony", 31 *Texas ILJ* 2, 317-42 (1996); John E. Noyes, "American Hegemony, US Political Leaders and General International Law,"19 *Connecticut JIL* 2, 293-313 (2004).

[42] Yevgeny Bendersky, "India as a Rising Power", *Asia Times* 21 August 2004; C. Raja Mohan, "Rising India's Great Power Burden", 7 *The Sigur Centre for Asian Studies: Asia Report*, January 2010; Colette Mathur, Frank-Jurgen Richter and Tarun Das (eds.), *India Rising: Emergence of a New World Order*, (Marshall Cavendish Press, 2005).

[43] The Economic Times, *Why It Makes Sense to Have an Indian Heading the IMF*, 21 May 2011.

[44] Year 1991 saw the first wave of economic liberalization policies and programs in India which has been gradually but steadily building India's economic clout in the world affairs. Following the nuclear devices explosion in May 1998, India had acquired significant clout in political and security-military relations in the world. These two years are considered to be most significant in the recent history of India.

[45] See above Nico Krisch, *International Law in Times of Hegemony.* B. S. Chimni, "The Past, Present and Future of International Law: A Critical Third World Approach", 8 *Melbourne JIL* 2, 499-515 (2007); Mahnous H. Arsanjani, (ed.), *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman*, (Leiden: Nijhoff, 2010); Cali Basak (ed.), *International Law for International Relations*, (Oxford: Oxford University Press, 2010).

[46] Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India* (Calcutta: Firma KL Mukhopadhyay, 1958); Nagendra Singh, *India and International Law: Ancient and Medieval*, vol. I and II, (New Delhi: S Chand and Co. Pvt. Ltd, 1973); S. Prakash Sinha, *New Nations and the Law of Nations*, (Leiden: AW Sijthoff, 1967); R. P. Anand, *New States and International Law*,(New Delhi: Vikas Publication, 1979); R. Khan, "International Law – Old and New," 15 *Indian JIL* (1975); R. P. Anand, *Origin and Development of the Law of the Sea*, (Leiden: Nijhoff, 1983).

interpretation of global relations prevailing in the immediate post-independence phase and India's reaction thereto,[47] this research takes an innovative approach in seeking to examine the state practice in the pre-and post-independence but more importantly in the last few decades. The study can help to see whether countries like India, with reasonable economic, political, military clout, cultural and social size are able to counter power and seek successfully concessions from the Western economies. The state practice is also a reflection of combined and collective influence of the vast majority of population that constitute the developing countries, hence, an analysis of Indian state practice allows us to understand the subtle, indirect but gradual impacts of its vast population.

**1.6. Mapping the influence of scholarly debates and institutional machineries on state practice of India**

The post-independence theories and literature work on India's position on international law are apparently lopsided in its objectivity, as these works are heavily based in explaining and analyzing the Indian position from a perspective of post-colonialism and theories of exploitation.[48] Thus, an analysis offering a fresh perspective is essential. This is needed because the structures, alliances, the resources of the pre- and post-independence phase and recent decades have undergone a sea change both at national and international level. This study attempts to show whether the new set-up and an important developing country's approach to international law offers a rejuvenated hope to scholars to see whether the aspirations of developing world vouched in scholarly works will find new meaning and more response from the Western nations. It is to be certainly hoped that this will be so because, although the world power structure remains still imbalanced, the voices of developing countries in international law debates are encouraged and carefully read.

Two important scholarly projects of very recent origin are worth attention, namely the 2010 issue of the *Leiden Journal of International Law* and the Oxford project of the University of Basel and the University of Munich, resulting in *The Oxford Handbook on History of International Law* and published by Oxford University Press.[49] The 2010 issue of the Leiden Journal of International Law[50] brings out an excellent discourse on India

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[47] Upon acquiring independence from European colonial powers, one of the immediate goals for new nations was to challenge and gradually bring equilibrium in power-structure which was based upon the Euro-centric international law. Shaw comments that "the nineteenth century development of the law of nations founded upon Eurocentrism and imbued with the values of Christian, urbanized and expanding Europe did not, understandably enough, reflect the needs and interests of the newly independent states of the mid- and late twentieth century. It was felt that such rules had encouraged and then reflected their subjugation, and that changes were required." Malcom N. Shaw, *International Law*, 6th edition (Cambridge: 2008); See also R. P. Anand, "Attitude of the Afro-Asian States Towards Certain Problems of International Law", 15 *ICLQ* 1996, p. 35; T. O. Elias, *New Horizons in International Law*, Leiden 1980; Hague Academy of International Law, Colloquia, *The Future of International Law in a Multicultural World*.

[48] R. P. Anand, *Role of the "New" Asian African countries in the present International Legal Order*, (Durham, 1962); _____, *New States and International Law*, (New Delhi: Vikas Publications, 1979); _____, "Development and Environment: The Case of Developing Countries," 20 *Indian JIL* 2 (1980); B. S. Chimni, "Towards a Third World Approach to Non-intervention: Through the Labyrinth of Western Doctrine," 20 *Indian JIL* (1980); _____"Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" 2 *Chinese JIL* (2003); _____ "International Law Scholarship in Post-Colonial India: Coping with Dualism,"23 *Leiden JIL* 1, 23-51 (2010).

[49] *The Oxford Handbook of History of International Law* consists of 41 chapters in six parts. The current researcher has contributed a chapter on India and how the *regional international legal principles and institutions which are today not universal and have disappeared or remained a part of the regional law.* Part one and part two examine traditional subjects of international law, namely actors and keys themes such as peace and war. Part three of the Book explains the history of international law in the different regions of the world. The focus lies on international legal principles and institutions which have not become universal. A

and International Law in the Periphery Series – the main aim of the attempt was to see how the Indian scholars have imagined, shaped, and reshaped international law, the manner in which India's domestic system has received international law and the ways in which India has been projected by the international legal system. The special issue brings out scholarly and thought-provoking analyses by leading international law scholars of India; R. P. Anand[51] writes on *The formation of International Organization and India – A Historical Study;* B. S. Chimni[52] focuses on International *Law Scholarship in Post-colonial India*: *Coping with Dualism;* Hegde[53] writes on *Indian Courts and International Law,* whereas Prabhakar Singh[54] analyses *Indian International Law: From a Colonized Apologist to Subaltern Protagonist.* While Chimni and Singh provide doctrinal and theoretical underpinning to India's position on international law, Anand and Hegde analyse the state practice of India in the formation of laws of international organisations (namely the League of Nations and the United Nations) and the Indian judiciary's position and practice of international law at the domestic level.

Hegde suggests that India essentially remained at the periphery of the international legal system which reinforces the dominant view among developing countries scholars that international law is Euro-centric.[55] However, his analysis moves away clearly from this assertion as the Indian judiciary, well founded in common law system, have well treated the cultural, political, social issues drawn from the ancient civilization and objectively opined on various issues of international law. Chimni argues that Indian law scholarship has, since the middle of the last century, been at the forefront of articulating a Third World approach to international law and made seminal contributions to different branches of international law. His argument finds convincing proof in state practice of India in the areas of environment, human rights, trade, disarmament and the law of the sea.[56]

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distinct section is devoted to 'encounters' of regions and the influence of the non-European international principles and ideas on the body of international law as it emerged from the encounter. Part four 'interaction and imposition' is devoted to forms of interaction such as diplomacy or to experiences of imposition such as colonization. Part five addresses specific methodological questions of the history of international law. The final part reflects the importance of the biographical approach in the field and gives some portraits of eminent scholars of different times.

[50] 23 *Leiden Journal of International Law* 1, Leiden (2010).

[51] R. P. Anand, "The Formation of International Organizations and India: a Historical Study," 23 *Leiden JIL* 1, 5-21 (2010).

[52] B. S. Chimni, "International Law Scholarship in Post-Colonial India: Coping with Dualism," 23 *Leiden JIL* 1, 23-51 (2010).

[53] V. G. Hegde, "Indian Courts and International Law," 23 *Leiden JIL* 1, 52-78 (2010).

[54] Prabhakar Singh, "Indian International Law: From a Colonized Apologist to Subaltern Protagonist," 23 *Leiden JIL* 1, 79-103 (2010).

[55] W. G. Grewe, "From European to Universal International Law: On the Question of Revising the Euro-Centric View of the History of International Law", Institute for Scientific Cooperation, 28 *Law and State: A Biannual Collection of Recent German Contributions to these Fields*, 7-31 (1983); James Thuo Gathii, "International Law and Eurocentricity", 9 *European JIL*, 184-211 (1998); Anne Orford (ed.), *International Law and Its Others*, (Cambridge: Cambridge University Press, 2006); Bardo Fassbinder and Anne Peters-Simone (eds.), *The Oxford Handbook on History of International Law* (Oxford: Oxford University Press, 2012); TWAIL: A Twist in the Tale of International Law? http://legalsutra.org/668/twail-a-twist-in-the-tale-of-international-law/ accessed on 3 July 2011.

[56] B. S. Chimni, "Third World Approaches to International Law: A Manifesto", 8 *International Community Law Review* 1, 3-26 (2006); _____, "International Financial Institutions and International Law: A Third World Perspective", Daniel Bradlow and David Hunter (eds.), *International Financial Institutions and International* Law, 31-62 (Alphen aan de Rijn: Kluwer Law International, 2010); Okafor Chinendu Obiora, "Viewing International Legal Fragmentation from a Third World Plane: A TWAIL Perspective?", Proceedings of the 34th Annual Conference of the Canadian Council of International Law, *Fragmentation: Diversification and Expansion of International Law*, 26-28 October 2005; _____, "The Third World, International Law and the Post "9-11" Era: An Introduction", 43 *Osgoode Hall Law Journal* 1-2, 1-5 (2005); Balakrishnan Rajagopal, "International Law and the Third World Resistance: A Theoretical Inquiry",

One can observe that India has adopted a tough state-centric stance at global forums on international law in the last two decades. This bold assertion is due to the political and military clout it has gained through successful explosion of nuclear device tests in 1998 and economic growth it achieved due to liberal economic policies.[57] The scholarly debates on state-practice on international law in developing countries have started evolving. Refugee law, environment and climate change, law of the sea, international criminal law including counter-terrorism, and also space law are some of the most prominent areas of international law where one can see close links between the destiny of a vast majority of the developing world population and the Western economies.

In view of the above, a study of the state practice of India can enable to see how the domestic laws in vital areas like economy and finance is being subjugated to Western-nations centric international law. The question arises, whether under the disguise of international law a re-colonization is taking place?[58] An analysis of India's state practice can enable us to see whether such hypothesis is well-founded or proves to be a matter of mere perception. It also enables us to see the difference in position adopted by India during the pre-independence and post-independence era. How the Indian position has been directly or indirectly serving or helping the end-users of international law, namely the civil society institutions? The civil society institutions are not only the end-users but are also effective platforms in the hands of state machinery that encourage them to take a particular position at global level which directly benefit the state interests in the long-run. State practice does have direct impact on the day-to-day affairs of these institutions and individuals. Therefore, it is important to understand how the civil society actors in India resist to changes in international law and how they influence state practice through adoption of position of cooperation and resistance as per the evolving circumstances.[59] Thus, an analysis of state practice of India enables us to understand the operation of international law at a microscopic level.

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Anthony Anghie (ed.), *The Third World and International Order: Law, Politics and Globalisation*, 145-172 (Leiden: Nijhoff, 2003); P. K. Menon, *The Third World Countries: A Macroscopic View of their Attitude towards International Law and their* Modus Operandi *of its Teaching*, 1991 Barcelona Conference on the Law of the World, Washington D.C.: World Jurist Association (1991); Upendra Baxi, "What may the "Third World" expect from International Law?", In Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds.), *International Law and the Third World: Reshaping Justice*, 9-21 (London: Routledge-Cavendish, 2008).

[57] C. P. Bhambhri, "Domestic Politics and Foreign Policy", 64 *India Quarterly* 2, 27-50 (2008); Nathalie Tocci and Ian R. Manners, "Comparing Normativity in Foreign Policy: China, India, the EU, the US and Russia", In *Who is a Normative Foreign Policy actor?: The European Union and Global Partners*, 300-329 (Brussels: Centre for European Policy Studies, 2008); Radha Kumar, "India as a Foreign Policy Actor: Normative Redux," In Tocci and Manners 211-264 (eds.); James Chiriyankandath, "Realigning India: Indian Foreign Policy after the Cold War", 93 *The Round Table* 374, 199-211 (2004); Sreeram S Chaulia, "BJP, India's Foreign Policy and the "realist alternative" to the Nehruvian Tradition", 39 *International Politics* 2, 215-234 (2002); N. M Khilnani, "The Follies, Fumblings, Frustrations of India's recent Foreign Policy" 321 *The Round Table* 57-59 (1992); V. D. Kulshrestha, "India's Foreign Policy and peaceful settlement of Disputes: Some Reflections", 18 *Pacific Settlement of Disputes (diplomatic, politic, judicial, etc.)* 377-391 (1991); Robert W Bradnock, *India's Foreign Policy since 1971* (Royal Institute of International Affairs: 1990).

[58] Chimni in his discourse on *Teaching, Research and Promotion of International Law in India: Past, Present and Future*, sounds this warning, analyzing the work of Richard Gott, "The reconquest of Africa", *New Statesman*, 15 January 2001, pp. 51-52; Commentary: Bringing Imperialism Back In (1999), Review of African Political Economy, No. 80, pp. 165-169. B. S. Chimni, *Teaching, Research and Promotion of International Law in India: Past, Present and Future*, In 5 *Singapore Journal of International and Comparative Law* 368-87 (2001).

[59] Kenneth Anderson, "The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organisations and the Idea of International Civil Society", In Andrea Bianchi (ed.), *Non-State Actors and International Law*, 221-250, (Farham: Ashgate, 2009); Marcos A. Orellana, "WTO and Civil Society", Daniel Bethlehem (ed.), *The Oxford Handbook of International Trade Law*, 671-694 (2009); Julian

Another major critique of existing literature is the use of positivist Western textbooks to learn and understand international law in the developing world. Unless and until a concerted attempt is made to bring out Developing World scholarship, our understanding of international law will remain biased. This work is a modest attempt to contribute in eliminating the scholarly bias. One important area is international institutions which have been created in large numbers and which reflect growing socio-political-economic order, among other reasons to respond to the aspirations of developing countries and their population. This research study attempts to examine how the developing countries have contributed to the establishment of these institutions and how these institutions have, in turn, shaped the new rules of international law. By selecting divergent areas which contribute significantly to a state's projection of powers and image in the international field, this study attempts to identify the actors and to analyse the means and ways they use to shape operations of international law in India. This analysis can enable us to see whether the influence of aristocracy and bureaucracy is declining or increasing in various spheres of international law. The study also enables us to identify new institutions or structures emerging that are playing a decisive role in shaping and operation of international law at domestic level.

The available literature shows that a systematic mapping of state practice of India in each area of international law is missing. For example, although India together with several developing countries took a leading role in the adoption of the New International Economic Order (NIEO) declaration, very few scholarly articles were published analyzing the outcome of the NIEO and the subsequent state practice of India.[60] One finds sparse literature on the area of international monetary and fiscal law.[61] Against this background, it is worth reasoning that India's policy and practical approach to international economic issues, especially, trade issues, has become a subject of systematic analysis since the establishment of the WTO.[62] Similarly, areas like human

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P Robinson, "A View from within Civil Society of Pitfalls in the Way of Progress towards a World Free of Chemical Weapons", In *The Chemical Weapons Convention: between Disarmament and International Humanitarian Law*, 55-72 (Sanremo: Villa Nobel, 2008); Nicholas Hachez, "The Relations between the United Nations and Civil Society: Past, Present and Future", 5 *International Organisations and Law Review* 1, 49-84 (2008).

60 K. B. Lall, "The Third World and New Economic Order: Role of EEC and India", 33 *Studia Diplomatica* 411-497 (1980); M. Dubey, "Problems of Establishing a New International Economic Order", 32 *India Quarterly* 269-289 (1976); Kamal Hossain (ed.), "Legal Aspects of the New International Economic Order: Studies in the New International Economic Order", (F. Pinter: Michigan, 1980); Subrata Roy Chowdhury, Erik Denters, Paul J.I.M. de Waart (eds), *The Right to Development in International Law* (Leiden: Nijhoff, 1992).

61 Shannu Narayan, "Bilateral Tax Treaties: a Review of Indian Laws", In Bimal N. Patel (ed.), *India and International Law*, vol. 2, 309-337 (Leiden: Nijhoff, 2008); A. K. Koul and Mihir Chatterjee, "International Financial Institutions and Indian Banking: a Legal Profile," In Bimal N. Patel (ed.) *India and International Law* vol. 2, 207-30 (Leiden: Nijhoff, 2008).

62 M. C. Patel and S. M. Pillai, "WTO and India", In Talwar Sabana (ed.), *Intellectual Property Rights in WTO and Developing Countries*, 249-53 (New Delhi: Serial Publications, 2010); Kasturi Das, "Coping with SPS Challenges in India: WTO and Beyond", 11 *Journal of International Economic Law* 4, 971-1019 (2008); Rostam J. Neuwirth, "India: the Largest Democracy in the World: a Critical EU/WTO Comparative Appraisal", Harald Eberhard (ed.) *Perspectives and Limits of Democracy: Proceedings of the 3rd Vienna Workshop on International Constitutional Law* 109-137 (2007); Thomas Zimmerman, *WTO, Dispute Settlement: General Appreciation and Role of India*, University of Munich (2007); Sachin Chaturvedi, *Trade Facilitation Priorities in India and Commitments at the WTO: An Overview of Current Trends*, Research and Information System for Developing Countries (2006); Chaisse, Julien; Chakraborty Debashis, "Dispute Resolution in the WTO: An Experience of India", Dipankar Dasgupta; Debashish Chakraborty, Pritam Banerjee (et. al) *Beyond the Transition Process of WTO: An Indian Perspective on Emerging Issues*, 507-540 (New Delhi: Academic Foundation, 2006); James Harrison, "Incentives for Development: the EC's Generalised System of Preferences, India's WTO Challenge and Reform" 42 *Common Market Law Review* 6,

rights, humanitarian law especially refugee issues[63] and environment have found significant attention since the 1970s.

The problem of international law teaching and teachers in India is another major area of concern. Barring the Centre for International Legal Studies at the Jawaharlal Nehru University and the Indian Society of International Law, both in Delhi, there is no other sound academic or research platform to pursue international legal studies in India. The Indian Journal of International Law, a publication of the Indian Society of International Law, provides platform to international law academicians and researchers. Currently, there are no new contemporary international law textbooks written by Indian scholars. In this regard, it is pertinent to note what Chimni urges, "… what are sorely needed are textbooks written for the beginner and advanced students taking into account State Practice of India and that of the third world countries in general."[64] An analysis of the Leiden Journal of International Law 2010 issue reveals one important observation, namely, Indian scholars want to stake a claim that Europe has learnt quite a lot from the Indian civilization. Anand, for instance writes, "[w]hatever may be said about some other rules of international law, freedom of the seas, which had formed the pith and substance of the modern law of the sea, is one principle Europe learnt and got from Asian state practice through Grotius."[65]

The latest scholarship and state practice clearly suggest each that military and economic powers are two essential pillars for any state to influence its position in international law and international relations.[66] Apparently, this was not necessary as far as India's influence of UN in 1950 and early 1960s was concerned.[67] India, according to one keen observer, "acquired a status and influence much larger than what it could have by virtue of its economic and military strength. It was a case of power and influence without military force and economic might".[68]

It is often perceived that when Indian state practice has made decisive influence on creating new international law norms, such era is seen as a "golden period". For example, the adoption of the UN Declaration

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1663-1689 (2005); Ravindra Pratap, *India at the WTO Dispute Settlement System*,(New Delhi: Manak, 2004); Aditya Mattoo, *India and the WTO*, (World Bank, 2003); T. D. Paneerselvam, "WTO: Is it imposed or implemented?", In N. Balu and D. Ambrose, *India and WTO* 101-108 (1996); Devinder Sharma, *Seeds of Despair: GATT to WTO* 2nd edition, (New Delhi: Konark, 1995).

[63] T. Anantachari, "Refugees in India: Legal Framework, Legal Enforcement and Security", 1 *ISIL Yearbook of International Humanitarian Law* 118-143 (2001); Markandey Katju, "India's Perception of Refugee Law", 1 *ISIL Yearbook of International Humanitarian Law* 251-253 (2001); B. C. Nirmal, "International Humanitarian Law in Ancient India", V. S. Mani (ed.) *Handbook of International Humanitarian Law in South Asia*, 25-38 (Oxford, 2007); V. S. Mani, "International Humanitarian Law: India's Experience since 1962," 1 *ISIL Yearbook of International Humanitarian Law* 115-119 (2001).

[64] Chimni, B. S., "Teaching, Research and Promotion of International Law in India: Past, Present and Future", In 5 *Singapore Journal of International and Comparative Law* 367-387 (2001) at 367.

[65] R. P. Anand, *Origin and Development of the Law of the Sea* (1983), quoted in Chimni above at p. 34.

[66] *International Law: A Tool to Delegitimate the Military or a New Form of Legitimation*, http://www.wri-irg.org/node/2164 accessed on 3 July 2011; Herbert Tillema, and John R van Wingen, "Law and Power in Military Intervention: Major States after World War II", 26 *International Studies Quarterly* 2, 220-50 (1982).

[67] *India and the United Nations*, Report of a Study Group, Indian Council of World Affairs for the Carnegie Endowment for International Peace, (New York: Manhattan, 1957); Ross N Berkes and Mohinder Bedi (ed.), *The Diplomacy of India: Indian Foreign Policy in the United Nations*, (Oxford: Oxford University Press, 1958); Sreeram Chaulia, "India and the United Nations", David Scott, *Handbook of India's International Relations*, 277-88 (London: Routledge, 2011); S. A. Kochanek, "India's Changing Role in the United Nations", 53 *Pacific Affairs* 46-68 (1980).

[68] K. P. Saksena, "The United Nations in India's Foreign Policy Strategy," In M. S. Rajan (eds.) *The Nonaligned and the United Nations* (1987), 188 at 190, quoted in Chimni in *Teaching, Research and Promotion of International Law in India* above at 35.

on the Granting of Independence to Colonial Countries and Peoples (1960)**,** the UN Declaration on Permanent Sovereignty over Natural Resources (1962), the creation of the United Nations Conference on Trade and Development (1964), the adoption of the Non-Intervention Declaration in 1965, the Declaration on Social Progress and Development in 1969, the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in 1970, marked India's prominent presence and contributions. This enables us to understand that when the Indian state practice has been successful in adopting an international law norm, it is seen as true development of international law. Chimni identifies various reasons and an era of ups and downs in the history of the ICJ. He concludes that after the withdrawal of compulsory jurisdiction clause by the USA in Nicaragua case, the ICJ as an institution came to receive less and less attention from the Indian scholars. In this regard, it is important to observe that also India, after the *Right of Passage* case, substantially modified its compulsory jurisdiction acceptance of the Court.[69] This amendment has made the Court jurisdiction almost impossible in any future cases against India.[70]

The Indian policy and practical approach on Law of the Sea area has been subjected to various analyses.[71] The adoption of the United Nations Convention on the Law of the Sea, in the words of Chimni, was a "giant step towards a just order of the oceans…it renewed the faith of the Indian international law community in international law and institutions".[72]

Foreign policy is one of the most important sources of understanding the state practice on international law. As Chimni explains, India "now saw itself as an emerging power and its foreign policy began to undergo changes. Its growing profile has renewed the belief that India could use international law and institutions to its advantage, *albeit* only if it departed from its earlier foreign policy thinking and strategy".[73] In this regard, the Indian state practice has undergone a major departure from the idealist (during Gandhi and Nehru era)[74] to more realist and pragmatic approaches since late 1970s that can secure equality among nations, especially among powerful ones. Every developing country wants to become a developed country and many of them even have a blueprint for it.[75] However, whether international law can provide a platform to achieve some tangible results or

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[69] The States parties to the Statute of the Court may "at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court" (Art 36, para. 2 of the Statute). Each State which has recognized the compulsory jurisdiction of the Court has in principle the right to bring any one or more other State which has accepted the same obligation before the Court by filing an application instituting proceedings with the Court, and, conversely, it has undertaken to appear before the Court should proceedings be instituted against it by one or more such other States. The Declarations Recognizing as Compulsory the Jurisdiction of the Court take the form of a unilateral act of the State concerned and are deposited with the Secretary-General of the United Nations.

[70] See Chapter x below.

[71] Patricia Birnie, "Impact on the development of international law on cooperation: the United Nations law of the sea, straddling stocks and biodiversity conventions" In Myron H. Nordquist, John Norton Moore & Said Mahmoudi (ed.) *The Stockholm declaration and law of the marine environment*, 85-98 (2003).

[72] Despite the Indian effectiveness in negotiations, India took 13 years for ratification of the Convention.

[73] See Chimni above.

[74] Jawaharlal Nehru, *India and the World*, Allen and Unwin (1936); Milan Sahovic, "Nehru's Ideas and the Future of International Law", 29 *Indian JIL* 1-2, 94-98 (1989); Gowher Rizvi, "Gandhi and Nehru: An Enduring Legacy", 323 *The Round Table*, 363-68 (1992); Leo van der Mey, "Nehru's Droom Voorbij: 1962 als keerpunt in India's verhouding tot China", Leiden (1990); R. P. Anand, "Jawaharlal Nehru and International Law and Relations," In R. P. Anand (ed.) *Studies in International Law and History: an Asian Perspective*, (Leiden: Nijhoff, 2004).

[75] Dr Mahathir bin Mohamad, *The Way Forward Vision 2020*, Malaysian Business Council; Spicer, Michael and Godsell, Bobby, *South Africa as a Developed Country: Some Ideas from Business Leadership*, November

not remains to be seen. India is no exception and India's state practice clearly shows that it will use means and machineries available at its disposal to influence the making and shaping of new and existing international law norms to its desired results. In this regard, this study attempts to analyze pre- and post-colonial Indian state practice that can be used to develop a theoretical framework that embraces interdisciplinary scholarship as a way of understanding deep global structures and the location of international law and institutions within it.[76] By doing this, the study seeks to satisfy an 'important need to grasp the transformation of the nature and character of the Indian state over the past six decades …to an appreciation of its changing foreign policy and the metamorphosis of its approach to international law and institutions'.[77]

### 1.7. Selection of issue areas: scope of research

The thesis attempts to analyse India's state practice in selected important areas.[78] While a detailed justification for selection of a particular area and the questions which constitute the analytical framework is given in the beginning of each chapter, a brief overview at this stage is essential. The thesis seeks first to analyse the Indian state practice during the colonization period containing the pre-independence phase, i.e. 1500-1945. This will help to identify the differences and similarities in the Indian state practice between the pre-independence phase and the post-independence phase. In the post-independence phase, the thesis builds its analysis on human rights, international humanitarian law, and also on refugee law, environmental law, climate change, disarmament – a case study of chemical weapons of mass destruction, law of the sea, international institutional law with focus on UN reforms and G-20 and India and international dispute settlement mechanism with focus on the International Court of Justice. Explaining and understanding India's position and approach on human rights and refugee law and practice is important because the ancient civilizational and colonization history exerts an almost eternal influence on India's past, present and future position on human rights and refugee law issues. The analysis can help us to see how Indian practice differs from the Western state practice and how it acts or reacts to the fundamental and contemporary changes that are taking place in the Western world. While the discourses on human rights and refugees have strong past linkages, the selection of environmental law and practice is due to the fact that this area has gained scholarly attention in the recent decades only (since 1970s, especially). Hence, it is important to see how India has practiced and contributed to the development of this new area of international law. The chapter on climate change is selected for the same reasons. Although India's practice and writings on the law of the sea date back to centuries, this area gained India's attention within the first decade of its independence and India started participating actively in multilateral forums on the law of the sea. As law of the sea has enormous critical impact on India's political, strategic, economic, security, and environmental future, an analysis of India's state practice in this area is imperative. Furthermore, in order to explain and understand

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2010 http://www.businessleadership.org.za/cmsfiles/file/Vision accessed on 2 July 2011; Mahmoud Vaezi, "Iran's Constructive Foreign Policy under the 20-Year Vision Plan", *Iran Review* (2010); *Indonesia: Agenda 21* Vision for the Indonesian Environment, ESCAP Virtual Conference: Integrating Environmental Considerations into Economic Policy Making Processes (1997); Olebunne, Cletus E., *Putting a Human Face in the Nigeria Vision 2020 Concept*, http://www.nel-m.org/putting%20a%20human%20face%20in%20nigeria accessed on 3 July 2011.

[76] Chimni in *Teaching, Research and Promotion of International Law in India* above at p. 49.

[77] *Ibid.*

[78] An examination of India's state practice on all important areas of international law covering an entire post-independence period would not be feasible. Although such project would provide enormously useful source of material, it can be achieved only through a team of authors instead of an individual researcher.

India's views and positions on global issues and how the country influences developments on important issues, it is of utmost importance that the thesis examines India's position with regard to the United Nations. Instead of analyzing the whole history of India's relations with the UN and how the United Nations has contributed to India's overall development, this study limits its analysis to the crucial phase of the UN reforms. India, as a staunch supporter, has considered the UN as a single-most important institution to promote ideals of multilateralism. India has used the opportunity to put forward various proposals which would enable it to gain an important position within the overall UN system and garner support for the developing countries during the reform process. Therefore, a chapter to seek India's position and strategy on various reform issues and outcomes and its overall impact on the future of international law thereof merits special attention. Due to crucial importance of the subject of international dispute settlement, a chapter on state practice of India on international dispute settlement mechanism and procedures vis-à-vis the International Court of Justice has been attempted.

### 1.8. Organization of the dissertation

The thesis seeks to provide informative analysis to various answers which constitute the state practice. Each chapter follows a standard pattern, starting with an introduction showing what interests and why India has interests in a particular given area of law. Thereafter, the chapter attempts to answer various questions with the aim to assess the state practice. The most important questions are when and how India began its participation in the negotiations of a particular regime? What were the long-term and mid-term national interests, concerns and needs of India for adopting a particular position? Which were the major forums and instruments in which India participated?–What was the level of participation, the nature of participation? Were there any instruments or forums in which India chose not to participate and what were the reasons for the lack of participation? What were the major positions or proposals of India? Which Indian position or approach was accepted or gained attention of international community and what was India's reaction thereafter during the implementation phase? And, which position of India was rejected or not accommodated and how did India react to such an outcome?

Individual actors, institutions and forums shape international law by playing an important role in the making and implementation of international law. Therefore, this study attempts to identify the key offices that are normally involved in the negotiation process. For example, can we attribute any particular results in the area of environment and disarmament to the personalities of late Prime Minister Mrs. Gandhi or Mr. Rajiv Gandhi?[79] Whether and to what extent international law has decisively influenced domestic law-making process of India?[80]

Finally, the thesis seeks to assess the overall contribution of India in the codification and progressive development of international law. What have been the major challenges in the field, and how did India contribute to overcome those challenges? What should be the role of India in future and how should it translate the vision

[79] L. C. Green, "The Role of Legal Advisers in Armed Forces", 7 *Israel YbIL* 154-65 (1977); *The Impact of International Law on Foreign Policy Making: The Role of Legal Advisers*, 2 *European JIL* 1, 131-64 (1991); Rodoljub Etinski, "The Role of the Legal Advisers in Considering the Legality of Decisions of International Organisations," *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organisations and Practitioners in the Field of International Law*, (New York: UN, 1999); Shinoda Tomohito, *Leading Japan: The Role of the Prime Minister*, (Westport: Praeger, 2000); Michael P. Scharf, and Colin McLaughlin, 99 *Proceedings of the Annual Meeting, American JIL*, 161-69 (2005).

[80] Frances Meadows, "The International Law-Making Process: An Innovative UK Practice and Its Use in Transposing International Norms into Domestic Law", 6 *International Law Forum du droit international* 1, 24-26 (2004); Benedetto Conforti, *International Law and the Role of Domestic Legal System*, (Leiden: Nijhoff, 1993); Alan E. Boyle and Christine Chinkin, *The Making of International Law*, (Oxford: Oxford University Press, 2007).

into action? As India, like any other developing economy, aspires to gear towards achieving the Developed Nation status by 2020 and realizing that international law can be instrumental in realizing this potential, how will the future state practice of India help her in contributing to the realization of Developed India 2020 Vision? What are the expected challenges? What should be India's response domestically and internationally? As the role of civil society institutions has become increasingly important in shaping, clarifying and implementing international law, especially in the areas of environment, climate change, refugees, human rights, and disarmament, it will be important to see which civil society institutions need to play enhanced roles in formulating and helping the Indian position in the progressive development of international law. The civil society-government link in policy formulation in developed countries is quite strong, whereas the same is weak in the context of India and developing countries at large.[81] Recognizing the importance of these actors in the formulation, negotiation and conclusion of international legal regimes, what concrete actions can one visualize in the future?[82] This research study addresses these questions and issues in a systematic manner.

[81] Gordon A Christenson, "World Civil Society and the International Rule of Law", 19 *Human Rights Quarterly* 1 724-37 (1997); Ernst-Ulrich Petersmann, "How to Constitutionalise International Law and Foreign Policy for the Benefit of Civil Society, 20 *Michigan JIL* 1, 1-30 (1998); Helen Durham, "Women and Civil Society: NGOs and International Criminal Law", Kelly D. Askin and Dorean M. Koenig (ed.), *Women and International Human Rights Law*, 819-43 (2001); Samon C Tay, After the Battle in Seattle: Civil Society and Governments: Environment, Labour and Trade", Cheryl Saunders and Gillian Triggs (ed.), *Trade and Cooperation with the European Union in the New Millennium*, 79-106 (the Hague: Kluwer Law International, 2002); Linda L. Malone, *Defending the Environment: Civil Society Strategies to Enforce International Environmental Law*, Ardsley, (NY: Transnational Publishers, 2004); Aidan Hehir, *Humanitarian Intervention After Kosovo: Iraq, Darfur and Record of the Global Civil Society?* (Basingstoke: Palgrave MacMillan, 2008); Barbara K. Woodward, *Global Civil Society in International Lawmaking and Global Governance: Theory and Practice*, (Leiden: Nijhoff, 2010).

[82] Ashutosh Varshney, "Ethnic Conflict and Civil Society: India and Beyond," 53 *World Politics* 3, 362-98 (2001); Ajay Gudavarthy, "Human Rights Movements in India: State, Civil Society and Beyond", Ujjawal Kumar Singh (ed.), *Human Rights and Peace: Ideas, Laws, Institutions and Movements*, 252-75 (New Delhi: Sage, 2009).

# CHAPTER II
# HISTORY OF INTERNATIONAL LAW IN PRE-1945 INDIA

## 2.1. Introduction

This chapter examines the history of international law between 1500 and 1945 and identifies those principles and practices that have disappeared after the independence of India or have become part of the regional system in one or other way. In other words, this historical analysis confines to the colonization period of India,[83] when the country was under the colonization of the European powers. One gets surprised with the reality of today's prevailing laws in India, as the English laws enjoy a persuasive authority as being an embodiment of written reason and impress its own character on a formally independent jurisprudence. This is largely similar to what Roman law prevailed in the medieval Europe. The English laws have also left lasting impressions on international law as practiced by India after independence. Between 1500 and 1945, international law in India grew up by degrees, completely marked by the absence of any attempt at codifying it, nourished however, by the writings and thoughts and practiced upon them by the Princely states.[84]

[83] The expression, India, shall mean British India, together with any territories of any native prince or chief under the suzerainty of Her Majesty – the queen of Great Britain. Under the Interpretation Act of 1889, India ceased to be a cultural or a mere geographic expression and acquired a clearly defined political meaning. The exact number of princely states differ from records to records. For example, while Sir Charles Tupper recorded 629 feudatory states in 1886, *The Imperial Gazetteer* listed 693 in 1907, and Edward Haynes speaks of "the 718 Princely States in India (*c.* 1912)," by 1920 the British authorities in Delhi could only count 587; ten years later the Butler Commission had pared the number down to 562. Within a year of independence, however, the new national government of India recorded a final figure of 584 states, including those that had acceded to Pakistan.http://princelystatesofindia.com/ accessed on 4 March 2011.

[84] Definition and meaning of princely state/native state has been subject to differences of opinion. For example, Sir William described native state as "a political community, occupying a territory in India of defined boundaries, and subject to a common and responsible ruler who has actually enjoyed and exercised, as belonging to him in his own right duly recognized by the supreme authority of the British Government, any of the functions and attributes of internal sovereignty. The indivisibility of sovereignty does not belong to the Indian system of sovereign states, … but the sovereignty of Native states is shared between the British Government and the Chiefs in varying degrees". Sir William Lee-Warner, *Native States of India*, (London: MacMillan and Co., 1910). According to Sir Charles L. Tupper, the native states were "autonomous states, enjoying various degrees of sovereignty,levying their own taxes, administering their own laws, and possessing territory which is, for purposes of internal administration, foreign territory, and has not been annexed to the dominions of the British Crown … [they], or their rulers, can be, and are, punished when the occasion requires, by fine, by the deprivation of salutes and other honors, by sequestration for a time, by the diminution of judicial authority, and, in extreme cases, by the deposition, or even execution, of the ruler and the annexation and incorporation of the states in the territories directly administered by British officers". Sir Charles L. Tupper, *Our Indian Protectorate*, (London: Longmans, Green, and Co., 1893), Government of India Act of 1935 defines "Indian State means any territory, not being part of British India, which His Majesty recognizes as being such a State, whether described as a State, an estate, a Jagir or otherwise." The demarcaction of princely and native staties is indeed a very difficult topic, however, it can be summed up that British India composed of and ruled directly by the representatives of the king-emperor and indirectly by the cabinet and parliament in London and another India composed of a group of states protected by the British government, with their own hereditary princes and chiefs who were sovereign rulers, except to the extent that their sovereignty had been abridged by treaty or agreement with the British Crown. The sovereignty of these states were divided into two – external sovereignty vested in the British government and internal sovereignty was distributed between the Paramount Power and the rulers.

**2.2. Salient features or developments bearing the most important influence on the international law that evolved and practiced in India**

First, there was a systematic collapse of international law traditions, which were observed as a matter of intercourse between princely states with the advent, and invasion of British (and to a limited extent French, Dutch and Portuguese) rule at all levels. In fact, one can observe that between 1600 and 1858, there were hardly any significant achievements noticed except preparation of some codes and digests. Since Hindu and Islamic laws have deeply penetrated into the political-socio-legal system of India, those codes and digests which were found to be not in consonance with the original Hindu or Islamic laws, have over the period, disappeared or were replaced during the colonization period.

Secondly, much like the ancient times, princely states[85] were convinced that interactions among them were necessary since they could not progress in isolation and much so cannot effectively counter the British influence. Various religious festivals and ceremonies, such as, *Aswamedha*, the *Rajasuya*, the *Vajapeya*, the *Punarabhisheka* and the *Aindra Mahabhiseka* sacrifices, which were practiced in ancient times now, were practiced in different versions. These ceremonies significantly enabled the interactions among the princely states and provided avenues for greater interactions between the executive authorities as well as normal people. These mechanisms enabled the princes and officials of princely states to discuss common problems and were also used to reach settlement on differences between them. With the independence of India, these practices have largely disappeared, but it remains interesting to see what have become the means of communication between these princely states in the post-independence Indian history and whether these traditions have any contributing effect on the relations between the Union of India[86] and these princely states.

Third, as far as self-determination, plebiscite and status of Indian princely states were concerned, these states prior to acceding to India (upon India receiving independence) did not seek the popular mandate of the people, as the princes often refused to recognize their people. As Chacko says the implied principle in all these refusals apparently was that the sovereigns of the Indian state alone had the need to exercise the legal rights of accession or secession from a political union.[87] The modern international law does not recognize such accession by the individual units of any nation to accede or secede from a nation state.

Fourth, the grounds on which paramountancy of the British Empire rested being natural factors of geography, politics, economics and history, social, religious and culture congruity, the method of automatic

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[85] In 1928-29, 235 of 562 Indian principalities came under the category of states proper while 327 were grouped together under the heading of "estates, Jaghirs and others", thus, it is impossible to identify the norms and rules of international law proclaimed and adopted by these states at individual level. M. Ramasamy (1940), "The Indian States in the Indian Federation – A juristic view," 3 *The University of Toronto Law Journal* 2, 301-322 (1940) at p. 302.

[86] Before the Islamic conquest, India never became a really centralized political entity but indulged in widespread decentralization. Inter-State relations in the pre-Islamic period resulted in clear-cut rules of warfare of a high humanitarian standard, in rules of neutrality, of treaty law, of customary law embodied in religious charters, in exchange of embassies of a temporary or semi- permanent character, etc. Early in this period, which finally culminated in the creation of the Mauryan and Gupta Empire, relations with ancient Greece and Rome were not infrequent. Alexander the Great left traces of his genius on Indian soil and exported cultural and material values from it to the West. The appearance of similar fundamental institutions of international law in various parts of the world shows that they are inherent in international society, irrespective of culture and tradition. The growth of these institutions in India came to a sudden end with the Islamic conquest, which converted the greater part of the Sub-continent into a highly centralized and autocratic State.

[87] C. J. Chacko, *India's Contribution to the Field of International Law Concepts*, (The Hague: *Recueil des C*ours, 1958(I) at p. 196.

succession that has taken place may be called natural secession in international law. As the instrument of accession binds entities with a certain measure of sovereign powers, these should be construed as instruments of international law. In so far as those instruments can function only on the sub-continent of India they have only a regional value, and hence may be called *regional international law.*

Fifth, a systematic reading of the ancient Indian literature like the *Srutis,*[88] the *Dharmashastras*[89] and the *Arthsastras*[90] show clear evidence of means and methods of international law as practiced by the princely states. These relations were regulated by certain customs and practices.

The history of foreign relations between princely states reveal the classical principles of international law which prevails in the modern world, namely, the rights of existence of self-preservation, of equality, of independence to territorial supremacy, of holding and requiring territory, of intercourse, and of good name and reputation.[91] Some of the rights, associated with the independence of a state were; power exclusively to control its own domestic affairs, power to admit or expel aliens, privileges and immunities of diplomatic envoys in other states and exclusive jurisdiction over crimes committed within its territory.[92] The duties were duty not to resort to war, to fulfill treaty obligations in good faith, the duty of non-intervention, not to perform act of sovereignty on the territory of another state, duty not to allow in its territory preparations which are prejudicial to the security of another state, duty not to intervene in the affairs of another state and not to foment civil strike in another states' territory. These rights and obligations exercised and fulfilled by the princely states originate from the religious scriptures of India and thus one could see that despite the European influence and the need for princely states to collectively defend their independence (or obtain one), these legal principles and norms were practiced and nourished by them.[93]

According to Oppenheim, international law is in its origin essentially a product of Christian civilization and began gradually to frown from the second half of the Middle Ages.[94] It has been widely observed that the claim of the European scholars that the credit of giving birth to international law as we know today, goes to the European countries is not correct.[95] The belief of the Western jurists, Oppenheim and others, that international law originated in Europe and is the creation of the Western Civilization is challenged by a study of the original

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88 *Srutis* cannon of Hindu sacred texts. It has no author and is considered as divine recording of the cosmic sounds of truth. It contains four famous Vedas – *Rig-Vedas* (Knowledge of Hymns of Prais), *Atharv-Vedas* (Knowledge of Magic Formulas), *Sama-Vedas* (Knowledge of Melodies), *Yajur-Vedas* (Knowledge of Sacrifical formulas).

89 *Dharmashastras* are the ancient law books of Hindus which formed the basis for the social and religious code of conduct in the past in areas where the Hindu rulers supported by their priestly supported implemented the Hindu dharma faithfully. These were the works of Manu, Apastamba, Vashistha, Gautama and Budhayana.

90 *Arthsasthra* is an ancient Indian treatise on statecraft, economic policy and military strategy which were prepared by Kautilya (Chanakya), a great Indian scholar belonging to Maurya Empire (350-283 BC).350-283 BC).

91 Ernst Waltraud, *India's Princely States: People, Princes and Colonialism*, (Abingdon: Routledge, 2007).

92 Nagendra Singh, "International Law in India: (II) Medieval India," 2 *Indian JIL* 65-82 (1962); V. S. Mani, "An Indian Perspective on the Evolution of International Law on the Threshold of the Third Millennium", 9 *Asian YbIL* 31-77 (2004).

93 J. Briggs (Transactions of the Royal Asiatic Society) underlines the importance of the correspondence as a historical document and praises the high qualities of the Marathas, particularly the religious tolerance of the Hindus – secular character and nature of inter-state relations.

94 L. Oppenheim, *International Law*, Vol. 1, 8th edition, p. 6, See also P. E. Corbett, *The Growth of World Law*, 1971, p.33.

95 Nagendra Singh, "India and International Law", in R. P. Anand (ed.) *Asian States and the Development of International Law* above at p. 25.

texts of the Ramayana (and of the Mahabharata).[96] It leads us nowhere to hold that modern international law is only three or four centuries old. Such an attitude is not only too legalistic, but is clearly disproved by the present practice which does take account of history.[97] In India too, one can find in the work of Kautilya in the 4th century B.C., elaborate rules for the conduct of diplomacy, as a means of avoiding conflicts, and the reception and treatment of diplomats.[98] A study of the Ramayana reveals that in the Ramayana period, relations of the sovereign rulers were based on the definite rules of international law and these rules were recognized by all sovereign rulers. It can be hardly disputed that these very principles are the foundation of modern international law.[99]

What one observes is that international law which "must be continuously developed by revision in content, expansion of scope and improvement of the means of securing compliance so that it is kept in accord with the changing needs of the international community"[100] was undergoing serious challenges as the European colonizers imposed their legal system on the princely states. If there been a fair and equitable trade, commerce, cultural and political relations between the princely states and the colonizers, the international law, which was practiced in these states, would have been richer and would have provided profound guidance to the current world community at large.

The current international law which is being practiced by India as an independent nation can be considered to be a product of changes that took place in the society as well as principles and practices, which are slowly disappearing from the state institutions and life and acquiring new meanings and shapes and influencing the new international law. In fact, independent India has greatly benefited by the practices of princely states, which themselves were, full-fledged states. By studying the practices of these princely states,[101] one is better equipped to understand the emergence of international law principles. It is remarkable that long before Hugo Grotius, the father of modern international law, Ashoka the Great[102] tried to give by his actions a concrete shape to those ideals and principles, whose defence and vindication has become the first concern of international law in current international affairs.[103]

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[96] S. S. Dhawan, *The Ramayana II International law in the Age of Ramayana*, National Herald Magazine, Sunday 21 January 1971, at p. 1.

[97] J. J. G. Syatauw, *Some Newly Established AsianStates and the Development of International Law*, (Leiden: Nijhoff, 1961) at p. 223.

[98] J. E. S. Fawcett, *The Law of Nations,* (London: Allen Lane the Penguin Press, 1968) at p. 16.

[99] S. Dhawan, *Ramayana II International law in the Age of Ramayana* above at p. 1.

[100] Edward Collins (ed.), *International Law in a Changing World*, (New York: Random House, 1970) at p. 424.

[101] Gradually starting from the late 18th century, the British rule brought India into the framework of a new empire and foreign relations of India were controlled and governed from London. The British Empire started depriving the princely states of their external sovereignty by various means and methods, therefore, one sees that, unlike pre-colonization period, their mutual relations did not call for a solution of legal problems on the basis of international law proper. However, the claim of external sovereignty was related to outside India, to be precise with European powers because non-European powers with whom these states had relations conducted their trade, commerce, cultural exchanges on the basis of principles and practices (customs) which were found to be mutually agreeable to the Indian and non-European states. Thus, an argument that the princely states could not be considered as state in sense of the current terminology because of alleged lack of external sovereignty must be refuted.

[102] Ashoka has been regarded as the Great Indian Emperor who ruled the Indian Subcontinent between 269 B.C. to 232 B.C. The spread of Buddhism in Asia and practice of secularism and non-violence in the Indian subcontinent is attributed during his reign.

[103] 1960 Seminar at the Delhi University which concerned itself with the possible contribution of Indian traditions to the development of international law, seminar failed to consider the point in time at which Indian traditions of interstate conduct were still capable of exercising a direct influence on our system of the

**2.3. Geographical scope of inquiry**

As mentioned above, India consisted of an amalgamation of princely states, the individual and collective inter-se relations is the fundamental and perhaps the only valid basis to understand the principles and practices of international law of pre-independent India. Just like the current reality wherein we find state as big as the Russian Federation and as small as Vatican, practicing international law in their relations, one finds that Indian states also ranged in size from few hundred acres to as large as France. Therefore, by juxtaposing their relations one can truly understand how the international law developed and was practiced by these states.[104]

**2.4. Basis of international law**

The princely states strictly observed that each state has a will that is completely independent and free from external influences. But through the process of auto-limitation, a state can restrict its powers and thereby limit its will. In short, the practice shows that they considered themselves not bound to follow international law because they were independent and sovereign but they can make themselves bound by rules of international law by restricting its powers. This auto-limitation theory is based upon a presumption that there exists a state will - in fact the will of the state is nothing but the will of the people who compose it. The princely states practices show that it was primarily the will of the ruler, which was, will of the state.

The period under examination also clearly shows that a consent was (and still is) a basis of inter-se relations between these states, i.e. international law. Thus, the modern international law which recognizes the importance and utility of consensus as a basis of obligation in international law, was the essential pre-condition of inter-se relations during this period. In fact, the theory of consent as the basis of obligation widely prevailed in princely states inter-state relations and was developed to promote their interests. Natural law, among other legal systems, had the greatest influence in their relations and practice of these states show that they considered the natural law to be of universal application.[105]

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law of nations. It must be recalled that these traditions came to an end with the collapse of the independent state system in India and further India at the end of 18th century and the beginning of the 19th century. The possibility of such influence simply vanished at a later date when the Indian subcontinent was either under the British administration or under the paramountcy of the Crown, and when the various states of Further India came either under British or Dutch rule or remained semi-independent only and ceased to act on their ancient traditions of inter-state conduct. The only point in time at which a direct influence of such traditions on our law of nations was possible was the period of the 16th, 17th and 18th centuries; at that time many of the sovereigns of India and Further India still enjoyed genuine independence and maintained treaty and diplomatic relations with the European agencies in the East Indies to which they tended to apply some of their own notions and usages of inter-state conduct. C. H. Alexandrowicz-Alexander, "Grotius and India" 3 *Indian Yearbook of International Affairs* (1954) at p. 303.

[104] According to Surjit Mansingh's *Historical Dictionary of India* "[a]t the time of India's independence from Britain in 1947, something between 562 and 600 (depending on definition) Princely States were scattered over two-fifths of the subcontinent. Their rulers were of similarly diverse lineage, traced back to mythological times as in the case of Mewar, to medieval Afghan incursions as in the case of Bhopal to the Maratha confederacy in the case of many West and Central Indian states, to the Sikh chieftains in Punjab, or to assertive vassals of the Mughal Emperor as in the case of Hyderabad.

[105] We largely believe that consent of states is must; the reason being states observe rules of international law because they have given their consent for it. However, this practice did not prevail among the princely states because they voluntarily agreed to observe the rules. In this regard, it can be said that all states are bound by international law, no matter whether they have given their consent or not. This was not true in pre-1945 era. H. A. Smith, *Great Britain and the Law of Nations*, vol.II (part I), (London: P. S. King, 1935), pp. 12-13.

Princely states observed norms of inter-state relations because they considered themselves as independent states and were recognized as such by other princely states.[106] The inter-state relations were largely governed by a body of rules of law – international law – to govern their conduct as members of that community. Furthermore, while the fact remains that princely states used to conduct and meet in general gatherings, the outcomes of these meetings are not perfectly documented and preserved exclusively.

**2.5. Disappearance of British common law from international law practice in independent India**

It has been observed that English common law was applied in many fields by the British Empire during their colonization of India. Upon independence, the Constitution of India did not alter that position but provided for the continued operation of law in force immediately preceding the commencement of the Constitution. Therefore, the analogy of the English common law, the municipal courts of India would apply the principles of international law through legislation, and the well-recognized principles of international customary law will be applied because they are supposed to form part of the law of the land. However, this continuity was short-lived because with the passage of time, several new laws came into being immediately after the independence and they clarified or codified some of the international customary law principles into national law. The judiciary of India also played an important role in holding or rejecting the applicability of English Common Law jurisprudence, *inter alia,* including then prevailing and practiced international law, into Indian laws.[107]

**2.6. Sources of international law**

The application of the doctrine of equity, justice and good conscience in India was marked with two characteristic features. Firstly, the application of personal laws to Hindus and Muslims was limited only to few matters, namely, inheritance, succession, marriage and other religious usages and institutions, while all other cases were to be decided according to the customs followed by the community to which the suitors belonged. Secondly, the practice followed by the British Crown's courts and the East India Company's Court greatly differed in this regard. The Crown's court applied personal law only to Hindus and Mohammedans and all other persons were adjudged by the English law which was *lex loci* in presidency towns.[108] On the other hand, the Company's courts in *Mofussils* decided the cases of persons other than Hindus and Mohammedans according to customs and usages followed by the community to which they belonged. The cumulative effect of such a dual application of the doctrine of equity, justice and good conscience was that it greatly helped the development of

[106] This is again a proof of what Brierly has to say, "the ultimate explanation of the binding force of all law is that man, whether he is single, individual or whether he is associated with other men in a State, is constrained in so far as he is reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live". Brierly, *The Law of Nations*, 6th edition, (1968), at p. 56. Not only this validation comes from the analysis observed by western authors but there is hardly any dispute exist among Indian authors with regards to the validity of the claim of the princely states as what one can consider an "independent nation state".

[107] S. K. Agrawala, "Law of Nations as Interpreted and Applied by Indian Courts and Legislatures", 2 *Indian JIL* 4 431-78 (1962) at p. 433.

[108] Trade and Port Cities established by Britishers in India and was the main focus of the British Empire Rule and contained the Western style business districts and amenities. These towns were typically having fort in the centre and followed the pattern of colonial cities. Kolkatta (former Calcutta), Mumbai (former Bombay), Chennai (former Madras) were among the major towns.

different branches of law in India through judicial activism.[109] This doctrine, which is obviously more applicable in private international law than public international law is unique to the Indian sub-continent and still remains valid.

Although treaty law developed in India, the *Farman* (a royal decree) enjoyed a status of treaty in India. For example, the Moghul Emperor in 1615, on the pleadings of Sir Thomas Roe, issued a *Farman* granting certain facilities to Englishmen. By issuing the *Farman*, the Emperor allowed the Englishmen to live according to their own religion and laws and to settle disputes among themselves by their president. A treaty is normally, negotiated and executed by two or more parties in modern international relations, but the Indian history shows that Indian princes practiced a unilateral approach to treaties, in the sense, that the Emperor would set the terms and conditions, without the traders having rights to negotiate the terms. Of course, as the trade progressed, this unilateral practice slowly disappeared and took shape of bilateral negotiations, reflecting the current practice of treaty laws.

The *Shrutis*, the *Smritis*,[110] the *Dharmashastras*, the *Arthashastras*, the *Puranas*[111] and the rest, establish that the states of ancient Indian states had inter-state or international relations and were carried on according to well-established customs, usages and principles of life based on the *Advaita* system of philosophy.[112] These sources of international law continued to guide the relations of princely states.[113]

**State treaties as regional international law**

The domain of operation of the treaties, considered here, was the sub-continent of India, and concerned directly only by the British government, the British Indian government and the Indian states. The conclusion of these treaties was a procedure recognized by and observed under the generally accepted rules of international law governing international instruments. But the moment they came into effect, their scope became regional in character. Oppenheim pointed out that the "diversities between states may render necessary developments and adjustments on the basis of a regional community of interests, provided of course that the creation of such regional or particular international law principles is not derogatory to or subversive of the more universally acknowledged and widely observed principles of universal or general international law".[114] As a result one wonders if paramountcy, although yet undefined in law and perhaps undefinable as well, may not be brought as a

[109] Judicial activism has led to instances of encroachment upon the jurisdiction of legislature in post-independence India. For example, the Supreme Court of India came under considerable criticism for encroaching into the domain of legislature in the wake of its judgment in the *Vishaka v. State of Rajasthan*. The Court invoked the text of the Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW) and framed guidelines to establish redressal mechanisms to tackle problems of sexual harassment at work places.

[110] *Smirits* are specific body of Hindu religious scripture and is considered to be a codified component of Hindu customary law. While *Shrutis* are primary in the source of authority, the *Smritis* – written are the secondary in source of authority.

[111] *Puranas* are the important Hindu religious texts, consisting of narratives of the history of the universe from creation to destruction, genealogies of kings, heroes, sages, and demigods, and descriptions of Hindu cosmology, philosophy and geography.

[112] According to Bandopadhya these customs, usages and principles of life were compendiously called the *Desh Dharma*. Bandopadhyay, *International Law and Customs in Ancient India*, (Calcutta: Calcutta University Press, 1920) at p. 16.

[113] *The authority of Sruti is primary, while that of the Smriti is secondary. Sruti literally means what is heard, and Smriti means what is remembered. This shows the distinction between hard-law and soft-laws in the ancient India.*

[114] See Oppenheim *above.*

principle into the realm of regional international law. One might venture a definition of paramountcy as an implicit right enshrined in a treaty designed to preserve and secure the territorial integrity and welfare of a suzerain power in relation to his contiguous vassals. Otherwise, in view of the experience of the Indian states prior to 1947, one must unavoidably conclude that paramountacy was an unwarranted display of *Real Politik* against a group of helpless entities. These treaties, sanads, etc. can be referred as "inter-state" law.[115] This term may be applied to any series of rules whereby full or quasi-political entities enter into contractual obligations towards one another, being forced hereto by the pressure of unavoidable regional interests. This has ceased to exist since independence and does not prevail anymore.

One reason for non-acceptance of treaty law of the Western powers is founded on the conception that its interpretation as the recognition of quality of lawgivers is assumed by the Western powers. It might even mean endorsement of some treaties, which are in contradiction with the newly independent states' conception of international law and which run counter to their fundamental interests.[116]

It can be seen that India, like many developing countries, resisted accepting the validity of customary international rule of law, so well recognized by the European powers, which permitted the latter the right of acquisition of non-Christian territory by discovery and occupation. It insisted that that part of international law that gave expression to the pattern of domination be no longer recognized. The theory of *terra nullius*, according to which the territories not in possession of a Christian prince were subject to acquisition by Papal grant or by discovery and occupation, was not palatable to India. [117]

*Terra nullius*, a Latin expression, means, land belonging to none – a territory which has never been subject to the sovereignty of any State or over which any prior sovereign has expressly or implicitly relinquished sovereignty. As the Permanent Court of International Justice clarified in the *Legal Status of Eastern Greenland case*, "the expression '*terra nullius*' was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory. 'Occupation' being legally an original means of peacefully acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be ter*ra nullius* – a territory belonging to no-one – at the time of the act alleged to constitute the 'occupation'.[118] The ICJ in the *Minquiers and Ecrehos* case did not however simply disregard the ancient titles, and decide on a basis of more recent display of sovereignty. It did not assimilate the islands to *terra nullius*, but examined evidence of possession as confirmatory of title.[119] In ancient India, the source of native title was the traditional connection to or occupation of the land, that the nature and content of native title was determined by the character of the connection or occupation under traditional laws or customs and that could not be extinguished by governmental powers which happened during the colonial period.

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115 K. M. Panikkar, *Asia and Western Dominance*, (London, 1970) at p. 24.

116 N. R. G. Martens, *The Act of Berlin of 1885*, 2nd Series (2000) at p. 19.

117 B. Prakash Sinha, "Perspective of the Newly Independent States and Binding Quality of International Law," In January *ICLQ* 121-35 (1965) at p. 125; W. S. Armour Esq., "*Customs of Warfare in Ancient India*", Papers read before the Grotius Society in the Year 1922, 71-88 (Cambridge University Press, 1922).

118 *Legal Status of Eastern Greenland*, P. C. I. J. Series A/B, No. 53, pp. 44. 63.

119 *The Minquiers and Ecrehos* case, Judgment, I. C. J. Reports, 1953, pp. 56-57.

**2.6.1. Sources of international law in pre-1945**

Lack of literature disables learning about how the princely states treated customary rules of international law into the domestic setting and what were their approaches in case the customary rules of international law conflicted with existing domestic law. We do not find any treaties like the Treaty of Danzig which provides for the direct rights to individuals under a treaty in pre-1945 era. Treaties were one of the most important sources of inter-state relations. We find enormous references to various treaties concluded between princely states and other states and British India or other nations.[120] However, the determination and interpretation of treaty provisions rested with the kings and not with judiciary, *per se*. We find ample examples of such customs in the pre-1945 era. With independence, all the treaties, which the princely states concluded, either were abrogated or eclipsed as they became part of independent India and independent India acquired all rights and obligations flowing from these treaties. Unlike pre-1945, the judiciary established under the Constitution of India came to determine and interpret the rights and obligations of India vis-à-vis other nations. Thus, the combined role of judiciary, executive and legislature in pre-1945 got bifurcated since the adoption of the Indian constitution.

Treaties were negotiated and the states confirmed to be bound by the obligations flowing from those treaties. In independent India, the treaties were negotiated by the executive and ratified by the Union Cabinet, except few cases, which found ratification of the Parliament, and judiciary acquired independent role in interpreting the obligations of the Indian state. Thus, the earlier customs which were widely followed among the princely states disappeared with the independence of India. In other words, an institution of treaty negotiation, execution and interpretation of pre-1945 and post-1945 was markedly different.[121] Unlike post-1945 era, wherein we see law-making treaties and treaty contracts, we find that pre-1945 era had only treaty contracts which were entered into by two or more princely states of India and other foreign states such as Britain, Portugal, Holland, and France.

Did all ingredients of elements of custom such as long duration, uniformity and consistency, generality of practice, *opinio juris et necesitatis* exist in pre-1945 India? One can find that the motives of fairness, convenience or morality were more prevalent in inter-state relations pre-1945 which differs from an essential element of *opinio juris et necessitatis* which underlines customary law. These elements have disappeared as India has, like any other nations, underlined the importance of *opinio juris et necessitatis*. Customary rules of international law in pre-1945 developed as a result of diplomatic relations between princely states and British India and treaties between princely states, while the current customary international law also developed as a result of practice of international entities and state laws, decisions of state courts and state military or administrative practices. There was no inter-state organization like what we have in the current world in form of the UN.

It is observed that courts in pre-1945 made decisions based upon considerations of fair dealing and good faith, which may be independent of or even contrary to the law. Inter-state comity was another source of development of inter-state law in pre-1945. In pre-1945, a number of matters of the governments of respective states were resolved on the advice of their legal advisors. These advices are also, therefore, sometimes treated as

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120 See above Nagendra Singh, *India and International Law in Ancient India* and V. S. Mani, *Evolution of International Law*.

121 Monroe Leigh, and Merritt Blakslee, *National Treaty Law and Practice: France, Germany, India, Switzerland, Thailand and United Kingdom*, (Washington D.C.: American Society of International Law, 1995).

source of international law currently. However, in pre-1945, it was one of the most dominant sources of inter-state law. [122]

**Equity and justice and fairness in pre-1945**

The Courts emphasized that decisions must be just and equitable. In pre-1945, the principle of equity as applied to a particular case, situation or circumstances would usually turn out to mean in effect the view of a decision maker or a consensus of decisions makers as to what is reasonable and just in the particular case, situation or circumstances. The rulers' principal objectives were to build a more equitable and just society. It is also seen that the rulers resorted to formulations which couched in the language of equity which helped to produce agreements and in this sense equity was an important tool of inter-state legislations.

### 2.6.2. Sources of international law in ancient India and their influence on Independent India

*Dharma* in ancient India was not solely the deliberate creation of lawgivers and legislatures but largely social custom and practices observed under fear of divine sanctions. The sources of ancient Indian laws were Revelations (*Sruti*, the Vedas), the tradition (*Smritis* or Dharmshastra) and the practice of those who knew the Vedas or customs (Acahar), as mentioned earlier. Custom was an important source. Customs were considered as a mixture of inter-caste practices. One of the critiques is in the case of the ancient states of India there is but little that is available in the nature of acts or statutes, or opinions and decisions of judicial forums.

Indian history is proof of respect for the stranger, for we were strangers in the land of another country. Princely states' population believed in internationalism. The princely states continued the practices of following strictly the treaties entered into by them with other states and conferred privileges and immunities upon diplomatic envoys. Although princely states lived in far small city-states than we know now today, their mutual relations were regulated and governed by some definite inter-state rules and principles. Princely states followed definite laws of war and peace. Arbitration was the most preferred means of resolving disputes that finds mention in the Indian Constitution. While in Europe, there were Greeks, in Asia; it was India, which showed to the world how sovereign states could live in mutual cooperation with each other like a single community.[123]

The writers and jurists of princely states developed Law of Nature in accordance with the values and conventions of their age. According to them, if there was a conflict between positive law and natural law, the latter would prevail. Despite some criticisms, it must be admitted that natural law emphasized the importance of purpose behind law. It stressed that law was not the body of meaningless rules or principles to be enforced by the courts. In fact, law existed to achieve definite objectives.[124] It is therefore concluded that India, having deep rooted Natural Law traditions, embraced and developed human rights law, system of punishment of war crimes,

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[122] It remains to be examined whether judicial mechanisms or equivalent of arbitral tribunals contributed as source of international law in pre-1945.

[123] *Jus natural* means, the sum of those principles which ought to control human conduct, because founded in the very nature of man as rational and social being. See Fawcett, *supra note 11* at p. 26. The law of nature is the expression of what is just against what is merely expedient at a particular time and place; it is what is reasonable against what is arbitrary; what is natural against what is convenient and what is for the social good against the personal will. Thus natural law was based on the rational and reasonable needs of man's nature.

[124] Natural law could be adapted to the changing times and circumstances although its fundamental principles remain unchangeable.

due to the influence of Natural Law. Thus, the idealist character of Natural Law has greatly influenced the pre-independence international law among the princely states.

The Indian civilization and state practice demonstrates heavy emphasis on the rule of morality. In fact, the Indian legal literature has combined and explained rule of law and rule of morality as one.[125] Thus, the Western philosophy which is captured in Oppenheim's definition shows that a rule of morality is a rule which applies to conscience only and cannot be enforced by external powers, whereas, the Indian traditions and practice read and practice both together. Regardless of periodization, the Indian policy-makers and rulers have given considerable weight on moral arguments. While the Western nations will appeal to precedents, to treaties and to opinion of specialists, Indian writers would appeal to the general feeling of moral rightousness, as these are based on the long civilization history of India. It is, however, slowly disappearing in the post-independence foreign policy which is at times devoid of moral righteousness. The Indian policy-makers and rulers, earlier and today too, to an extent, give sufficient expression to moral principles in the legal form. India, in its international law and foreign policy and practice, has accepted and practiced the relationship between morality and international law.

It was indeed an important landmark in the history of Islam when religion came to be separated from the conduct of the state at least in respect of external relations and this fundamental principle obtained full recognition in 1535 AD when a treaty was signed by Sulayman of the Ottoman Empire with King Francis I of France. Thus, the modern character of international law separated from religious attachments dates back to this period.[126]

In Islam, it is believed that the law bound individuals rather than territorial groups. Thus, Muslims wherever they went were under the jurisdiction of the Islamic state, as jurisdiction in Islam was based upon the personal rather than the territorial principle. This approach was bound to conflict with the development of inter-state law in so far as every state has a territory and exercises jurisdiction over its nationals and the concept of the latter, has primarily been territorial. However, as the Islamic law also bound the ruler of an Islamic political unit, who was more often than not a monarch, and movement beyond the territories of a state without the monarch in command was rare, this lacuna need not be exaggerated, particularly in an age when jurisdiction could be personal also. This legal principle, which has been in existence since the Islamic civilization comes into conflict with present principles of international law. India is the second largest Muslim country in the world and Indian Muslims do follow this principle. Thus, as far as India and Indian Muslims are concerned, one can discern two approaches to international jurisdiction.

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[125] Oppenheim suggests that "a rule is a rule of morality if by common consent of the community, it applies to conscience and to conscience only; whereas, on the other hand, a rule of law if by common consent of the community it will eventually be enforced by external power. L. Oppenheim, *International Law*, vol. 1, 8th edition at p. 8.

126 The very first article of this treaty stipulated that a "valid and sure peace would be established between the two states and reciprocal rights conceded to the subjects of each nation in the territory of the other. This acceptance of the principle of peaceful relations between Islam and Christendom has been often described as a revolutionary departure from the classical principle of permanent war or jihad. This treaty has, therefore, been regarded as the stepping stone for general recognition of nations of different faiths and this attitude of Islam gradually applied to mediaeval India also.

### 2.7. Concepts of international law

#### 2.7.1. Sovereignty

The king, not only in the ancient times but also during the pre-1945 period, was regarded as the personification of the sovereignty of the people, and that he acted on the powers delegated to him by his subjects. Under current modern international law, the king or the sovereign ruler is one element of the whole sovereignty, especially looking at the examples of monarchy in the Netherlands and the Scandinavian countries. The practice of surrendering external sovereignty, e.g. foreign and defence, was practiced by kings of several Indian states, to British, against protection from British for internal disruption and aggression. It can be also seen that the Indian States were considered to be outside the legal jurisdiction of the Paramount Power in respect of the enforcement of international conventions.[127] Nevertheless sovereignty in this unique form continued to exist in pre-1945 India. It shall be noted that the practices and attitude of princely states and even ancient states towards international law to employ the modern terminology, constituted a community-oriented consensus towards the fulfillment of international obligations instead of sovereignty-oriented consent. As India was constituted of hundreds of princely states, the community approach of these princely states toward the British authorities continued to exist. [128]

Sovereignty in princely states had different meaning in the 18th and 19th centuries of India than now. The 18th and 19th century India had active acceptance of double allegiance (a symbol which does not necessarily fit with the modern allegiance of only one state to which a person citizen despite the acceptance of dual nationality in many cases)**.** In native states of India, there existed double allegiance of the subjects of native states. The native rulers themselves were the subjects of the Indian government. The natives of protected states owe not only allegiance to them, but also certain duties, ill defined, to the protecting state. This was typical of the Indian subcontinent and these practices and notion of sovereignty have disappeared and do not hold validity in the modern state of India.

#### 2.7.2. Recognition and Reciprocity

Reciprocity is the basis of current modern international law - no government can expect its legal claims to be honored unless it demonstrates a corresponding willingness to honor similar claims as its foreign counterparts. The pre-1945 Indian history shows that the reciprocity was expected by native / princely states vis-à-vis the British government and the East India Company, but the latter did not demonstrate the willingness to honor these expectations as they were in more powerful position than the former. However, with the advent of modern international law after the Second World War, the inequality in reciprocity faded away.

In ancient and also during princely states existence, kings exercised full territorial sovereignty over their own lands but in addition, there are instances in which they exercised limited sovereignty over others – protectorates, spheres of influence and leased territories. In ancient India, recognition came in various ways: when a state having achieved independence was invited to participate in great inter-state assemblage like *Asvamegha*, *Vajapeya*, or *Rajasuya*. An invited state thus received an inter-state recognition. The rulers

[127] Lanka Sundaram, "The International Status of India", Read before the *Grotius Society*, 26 March 1931, vol. 17, 35-54 (1931) at p. 50.

[128] It is in this light, one should see the India's leadership of NAM which projected a challenge to the sovereignty oriented consent, deeply rooted in the western countries, to the fulfillment of obligations instead of community oriented consensus, found in NAM nations. Thus, what the pre-1945 shows is that along with consent, consensus should also be recognized as a basis of obligation in international law.

assembled there, by agreeing to take their seats alongside that power, gave virtual recognition to its independence. Here an invitation meant recognition. In the case of inferior or part-sovereign states, consent of the overlord meant recognition.

### 2.8. International Law Making through Treaties

Treaty was an agreement concluded between two kings and they would exercise treaty-making powers on behalf of their states. It is evident that the kings and princes in ancient and pre-1945 India were regarded as the personification of the sovereignty of people. So when in ancient India a king entered into some sort of transaction with another king, it was really a case of two states, and not that of two individuals, entering into an understanding or intercourse. In such a case there was no room for doubt that the king concerned was representing the people (in whom alone resided true sovereignty) and his state. This doctrine has lapsed with the coming into being of independent India. In fact, the transactions, which took place between the kings prior to independence and post-independence evidence this doctrine and must be accorded legal weight. Thus, the principles and norms, which were followed by these principalities and constitute a body of conduct among these principalities ought to be considered as rules of international law or inter-state relations of ancient India. Although modern India can claim out of virtue and ideals, the fact remains that there was no equality among states in ancient and later on 1500-1945 India. States were divided into superior, inferior and equal according to the degrees of power and happiness possessed by the inhabitants. States wished to become all-powerful, states hankered after the attainment of higher status by adding to the qualities of happiness and power. Rulers performed sacrifices like *Asvamedha, Rajasuya,* and *Vajapeya* to further these ideals.

### 2.9. Select areas of international law

#### 2.9.1. Principles and Practices of Criminal law

An examination of criminal law system reveals that several principles and practices of the British era have ceased to exist since independence. Prior to the Warren Hastings reforms,[129] in the area of substantive criminal law, the British tended to exercise much bigger scope of jurisdiction than the current international law recognizes. For example, not only the dacoits but family members of the dacoits were also made slaves and whole villages were fined, all under the pretext of stringent measures which were felt necessary to eradicate the evils of dacoity. The British Empire applied English laws in criminal matters for the circumstances, which were totally different, than those of the English. Similarly, the harshness of English law was a reality in India but the redeeming features of English law and procedure were nowhere to be found.[130]

#### 2.9.2. Religion and international law

Prior to independence, *Koran* and *Shastra* were consulted in deciding the disputes among the Muslims and Hindus. With the independence, reforms have been taking place gradually and although *Koran* and *Shastra* based rules and norms determine the cases such as inheritance, marriage, caste and other religious usages,

[129] Waren Hastings was the first Governor-General of India from 1773 to 1785. He carried out major social, economic, administrative and political reforms

[130] It is not surprising therefore that several nations, including India and China, among others, refute the exercise of international criminal law by international institutions such as the International Criminal Court for regions and realities which are far away from the physical locations of these institutions.

uniform civil code has been entering gradually in the legal system of India. The *Koran* and *Shastra* were consulted because the judges were Englishmen and they did not have knowledge of personal laws of Muslims and Hindus. Moreover, local traditions and customs of these two dominant communities were required to be preserved from English onslaught.

*Dharma* is the core and foci of Hindu philosophical thought and political theory. It is no wonder therefore that Hindu law began with duties (*Dharma*) rather than with rights as in the Western countries. In his study of Kingship and Community in Early India, Drekmeier shows that "in Hindu political speculations, duty occupies the central position and European thought belongs to conceptions of natural rights and freedoms – we are justified in saying that civil obligations rather than civil rights formed the basis of the relation of state and subject."[131] These philosophical pronouncements underpinned the international law practice for the period prior to independence. However, the post-independence and much of today's international law norms observed by India focuses on rights first instead of duties.

International law in ancient India and pre-1945 may be defined as the body of customary rules or ethical principles based on the philosophy of the *Advaita*[132] which regulated the relations of Indian states in their intercourse with one another. The above definition implies the following five pre-requisites, viz: (1) the existence of sovereign independent states, based on the supremacy and universality of law which was the expression of the philosophy of *Advaita,* (2) the sanctity of treaties, (3) the existence of sanction, (4) the inevitability of intercourses among such states, and (5) the need for regulating such intercourse.[133]

### 2.9.3. Diplomacy

There are variations with regards to the pronounced principles and practices of diplomatic law and practices in pre-independence India. It is observed that not all princely states were able to station ambassadors in all other princely states on a permanent basis, the reasons for this significant departure from the fundamentals of the *Arthsastra* differs from one princely state to another state. Instead of permanent stationing, these princely states used *ad hoc* or temporary approaches. This had immediate short and long term implications for the princely states since the lack of permanent stationing disabled them from using these ambassadorial services also in spying, sabotaging and securing defections from the enemy's army. This tradition and use of ambassadors for spying has been substituted by the stationing of attachés in various diplomatic missions of the nation states. These spying agents in form of defence attachés or any other post give direct feedback to home state through the ambassador or directly.[134] Hindu rulers of princely states had conferred numerous privileges on the Christians and Muslims raising them to a position of considerable importance. This is one of the most distinct contributions of India to the principles of international law and to respect the secular and democratic character of international

[131] A. K. Pavithran, "International Law in Ancient India", 5 *The Eastern Journal of International Law*, 220-42 (1973) at p. 230.

[132] *Advaita* are the most influential and dominant sub-school of the Vedas – School of Hindu philosophy.

[133] It should be noted that inter-state rules and principles had religious sanctions rather than legal sanctions as understood in the West.

[134] It is quite interesting in this regard to note that sending spies and using them for securing all possible information from a foreign state was "not considered wrong morally, politically or legally". The current international law does not approve this practice anymore, although operations by spies in foreign nations continue unabated.

law.[135] In this regard, it is remarkable that European ambassadors (whether royal or East India company envoys) who visited the courts of East Indian Sovereigns in the 16th, 17th, 18th centuries found everywhere the same pattern of diplomatic ceremonial and etiquette which reflected diplomatic usages described in the classical literature.[136]

### 2.9.4. Human rights

Is the Indian intervention into neighboring regions, unilateral use of force on human rights grounds, a part of India's rich civilization contribution to the protection and promotion of human rights? In other words, deep-rooted civilization values will come to motivate modern civil state institutions to revisit the current civilization system.[137] With regards to the Bangladesh War of 1971, the realization of the need to evolve norms and principles of international law to cover such situations began to emerge. Pre-independent India was full of social problems and evils; some of them were *sati* (wife setting herself ablaze on her dead husband's pyre), caste system, and untouchability, among other problems. To eradicate these problems, various social reform movements were launched which also attained measurable success. These social reform movements used to reinterpret the sacred texts of the Hindus and appealed to the conscience of people. Thus, the social problems and reforms have made great contribution to modern international human rights law.[138]

The independence movements and corresponding nationalism accelerated the social change. With the progress of the political struggle, the enthusiasm for social reform waned considerably with the result that it was deliberately disassociated from the political movement. While we observe that the current wave of nationalism may be seen as widely utilized for self-determination or independence from unwanted domination of a foreign state or otherwise, a unique contribution of the Indian nationalism has contributed to the social change and social transformation. By contributing in these areas, the nationalism movement also achieved independence from the British colonization. These processes and mechanisms are unique to the Indian Sub-continent. With India achieving independence, these movements have clearly oriented themselves to resist the undue domination of Western influence towards the social changes.

The progress of the struggle for independence provided equal opportunity to women. The Indian National Congress provided a common platform for men and women to play their role. This exposure

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[135] According to three well known Malayali deeds the Head of the Christian Community ranked as a hereditary prince (Utayavar) equal to the Utayavars of Mysore and Coorg (Malabar) C. H. Alexandrowicz-Alexander, "Grotius and India" 3 *Indian Yearbook of International Affairs* (1954) at p. 361.

[136] European Ambassadors often complained about restrictions imposed on their freedom of movement by the receiving courts, which gave the impression of detention but were in principle measures directed against espionage about which Kautilya had so much to say. It is not found whether, during the British colonization period, there had been also envoys or ambassadors from other nations and what were their roles and responsibilities. Alexandrowicz, *supra note* 13 at p. 310.

[137] As Frank and Rodely observe, "international law, as a branch of behavioral science as well as normative philosophy may treat this event as the harbinger of new law that will henceforth, increasingly govern inter-state relations. Perhaps *India*'s example by its success has already entered into the nations' conscious expectations of future conduct." Thomas M. Frank and Nigel Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", 67 *American JIL* 2 (1973) at p. 303.

[138] To promote and protect rights of women across the world, UN have established various machineries. Similarly, during the pre-1945 period, several institutions were established in India to achieve the respectful and proud place of women in the society. Institutions and organizations like the Servants of India Society, Ramakrishna Mission and Vishwabharati have done great deal of works for the spread of education and culture among women to achieve the same ideals which are now found in international instruments, already in the context of India, much prior to the adoption of these instruments at global level.

empowered women to develop their own individualities and crusade for equal rights. The social reform movement lost its exclusive male basis and orientation and women themselves founded an exclusively female association, the All India Women's Conference, in 1926.[139] They crusaded for various rights of women and advocated equality. Thus, the issues and problems unique to the Indian Sub-continent's multiculturalism were addressed by equally unique means and mechanisms. Obviously, the same problems were not found in monoculture societies of the West and the Islamic world. If these means and mechanisms had not contributed to the typical problems, the universal aims of universal human rights instruments would have been difficult to achieve. In other words, the modern universal human rights instruments would have been devoid of universal or a truly multicultural input. If the Indian problems and solutions would not have existed, then modern international law would not have been able to claim universal approach neither would it have been able to appeal to the entire human society.

The Indian joint family system, which is unique to India, has contributed to the modern international business, trade, human rights, humanitarian law and many other branches of international law, as one could observe that practices and customs originated and maintained by the joint family indirectly and directly contributed to the growth of, and reflection in the modern international trade practices. It is to be noted that the joint family system and principles have found inner reflections in the overall Indian legal and judicial system and jurisprudence, which is in tandem with and not necessarily in conflict with modern international law, and jurisprudence centric to the nuclear family.

### 2.9.5. Cooperation among princely states - a metaphor of functioning of international organizations in the post-1945 era

Nation states, after the Second World War, have established several international and regional organizations to address issues of common concern and find solutions. In ancient and pre-1945 India, as mentioned earlier, various religious ceremonies and sacrifices accelerated the process of such intercourse and strengthened people's conviction that greater and closer intercourse, and not isolationism, could alone offer dividends in the long run.[140] These mechanisms were *ad hoc*, unlike the concepts of administrative secretariats which are found in international organisations. By performing these ceremonies on a particular day, the kings and states ensured some form of presence of other kings and state representatives and provided a platform to discuss issues of common concerns and interests on these occasions. Thus, ceremonies were actually (annual) conferences of general bodies to meet and discuss the progress and chalk out future course of action. When the kings met together, they exchanged words of sympathy and fellow feeling. Thus, these occasions served to strengthen inter-state amity and ensure cooperation among states.

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[139] Established in 1926, All India Women's Conference, focused on Indian women's educational improvement but, slowly, it started addressing social and economic concerns of women and certain prohibitive practices like child marriages, purdah system. The organization became influential and started addressing legislative reforms too. AIWC played an important role in the Indian independence movement by involving, training, organizing girls and women to become volunteer and contribute to the call of independence.

[140] A concept of IO was thought as back as during Kautilya period, although a step which was akin neither in Europe nor in Asia prior to the 20th century. But confederations of states appeared in the *India*n sub-continent in the 18th century, to mention only the Maratha state, an association of rulers under the supreme government of the Peshwa at Poona. Moreover, the Moghul Empire at the stage of its decentralization in the 18th century became a composite entity similar to the Holy Roman Empire. Alexandrowicz *supra note* 13 at p. 309.

### 2.9.6. War and peace

Princely states followed Kautilya's advice that, for self-preservation any mode of war[141] is quite justified, including peace treaty (Sandhi), *Mantra Yudha,*[142] a war of intrigues (Cold War), *Kutayudha* and uses of barbarous tribes.[143] The modern international law imposes limitations and prohibition as far as means and methods of warfare are concerned. However, the element of righteousness is unique, found in Indian history of warfare[144] and one, although disappeared in modern international law, which begs to be re-examined, especially, when nations resort to non-prohibited means but still having no regard for righteousness of those deployed means and methods.

Indian philosophers such as Kautilya, Kamandaka and Manu, all were primarily against war from a moral and economic point of view, but turning to it as a last resort was not dismissed as an option. In fact, the Manu *Smriti* suggests that the kings should aspire for victories more glorious than those of war and victories achieved by battles were not spoken of highly by the wise. It is due to this strong influence of the scriptures one would find that unnecessary and aggressive wars were rare in ancient India. The conception of war as an engine for destroying the barbarian, which prevailed in ancient Greece and Rome is seen to operate in India also.[145] In ancient India, it was a practice to declare a war if and when it became unavoidable and that too after exploring all options to seek the peace, including negotiations.[146] The practice has been also found in the West, however, not so consistently. The case of Paraguay and Bolivia declaring war in 1933, when actual war broke out in 1932, is a case in point. The declaration, as mentioned earlier, was crucial to India, as the declaration would pave the way to the enemy to be prepared for war.[147]

The Indian custom of giving notice before engaging in battle[148] has disappeared in the modern rules of warfare.[149] Similarly, the kings were not resorting to war for territorial aggrandizement unless they were forced

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[141] For the princely states, war meant a series of acts of hostility, and not merely a condition.

[142] Yudha implies the employment of organised forces and implements of destruction.

[143] Alekzandrowicz *above* at p. 32.

[144] Warfare in Indian scripture is defined as the affair that two parties who have inimical relations undertake by means of arms to satisfy their rival interests. S. V. Visvanatha, *International Law in Ancient India*, Longmans, Green & Co, 1925, p.109

[145] The Mahabharata says, "War was invented by Indra for destroying the Dasyus, and weapons and armours were created for the same end. Hence merit is acquired by the destruction of the Dasyus. Udyog Parva, 29, 30 and 31.

[146] The Mahabharata: Santi: Rajadharma: 68.26 states that the war should be waged only if all other expedients of bringing about peace have failed.

[147] This practice has ceased to exist especially in modern international law. The wars in Iran and Iraq, Afghanistan, former Yugoslavia are all cases in reference.

[148] The beauty of Indian customs was that initially the envoys would be dispatched with the messages and if the opposite party denies, then a day, keeping in view the climatic conditions and auspicious day will be announced for battle. The climatic conditions were to be as neutral as possible to allow the warring parties to prove their strength in the battle field and in accordance with ideas of chivalry of soldiers, however, this custom is now been completely disregarded because adversary will attack on the enemy when the climatic conditions are in favor of the invading party only. This gives favor to invader in winning a battle instead of proving his strength. Secondly, the *India*n history hardly enables us to read that an attack could take place on an auspicious day, in fact, the auspicious days were deliberately kept out of the battle days to rejoice the culture and tradition. India kept this custom intact when it was engaged in wars with Pakistan in 1947, 1965 and 1971 as well as with China. However, the modern international relations are witness of attacks on "days of celebration" regardless of auspicious nature, the US invasion of Iraq, NATO invasion in former Yugoslavia are proof to this deplorable custom. Former declarations of war were not uncommon – a custom which is completely taken over by "surprise attack" war strategies employed by all nations alike, including *India*. Economic blockade – a modern term, was very much employed in the ancient India. It was considered

and that too after great deliberations and on weighty issues. While war was taken as a last resort, once invoked, the kings would pursue all out efforts to achieve victory at all costs, and death and never dishonor was the fundamental principle.

Prior to 1500 and even during 1500-1945, the rules of warfare observed by Indian kings and princely states were unique to the Indian civilization and have made significant contribution to the modern international humanitarian law.[150] These rules of warfare sources are genuine evidence of ancient chivalry and priestly influence and preaching. This is typical of Indian civilization. There were strong religious sanctions for the observance of these rules, with penalties for breaches in this world and the next (reincarnation). In this regard, it is extremely important to note that once the war began and warring parties engaged in warfare, it was hardly expected that the war would remain inconclusive. This was partly because as per the scriptures, such as Agni Purana and Mahabharata, it was expected that warriors would remain on battlefield and never desert and turn back from battle. The consequences of fleeing away from battle were loss of wealth, infamy and reproach. One could observe that these principles remained heavily influential in the wars which took place between various princely states during the pre-1945 period. For example, those who left comrades in war would face isolation from the society including denial of private rights in family life.

As far as the rights to armed intervention either unilaterally or collectively in the modern days are concerned, one can find good reflections of similar reasons for intervention in the 1500-1945 India.[151] The modern concept of international law is essentially based on one uniform set of rules which, for example, would

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to be better to secure the impoverishment of the foe, to lay an embargo on his merchandise and starve him into submission.

149 *Temperamenta Belli*: Rules for warriors: (1) it is odious for Kshatriyas to make away with those who cannot defend themselves; (2) the ordered conduct of battle; (3) rules against fighting those taken at a disadvantage in the actual combat; (4) Necessity for notice and prohibitions against striking one that is unprepared; (5) prohibition similar to Do not strike below the belt; (6) Rule against fighting one engaged in battle with another; (7) rules against attacking a retreating enemy; (8) rules against slaying one who has asked for quarter; (9) the general rule of sparing refugees and suppliants; (10) differentiation between combatant and non-combatant portions of the army recognized; (11) distinction between non-combatants in general and the fighting forces recognized; (12) prohibition against slaying animals employed in battle; (13) prohibitions against slaying those [suffering] from any natural, physical or mental incapacity whether due to permanent or accidental causes; (14) rules against killing anyone with special qualifications; (15) whole classes exempted from slaughter; (16) prohibitions against slaying certain classes with special sanctity attached; (17) places of special sanctity to be avoided; (18) care of the wounded; (19) night slaughter infamous and horrible; (20) Honour to a fallen foe; (21) pension for widows of slain soldiers; (22) Punishment of deserters; (23) Not to turn one's back in battle.

150 Warfare was classified according to the weapons with which it was conducted, however, this classification seemed to have lost meaning during the princely states warfare days. As per the religious scripture, the weapons were like daivika, asura, manusha. However, one does not find references to these particular classes of weapons in pre-1945 history. For example, chanting of slokas or mantras fall under daivika type of weapons which has found no real use. However, asura which means employment of mechanical instruments have been resorted.

151 Interventions were not outdated but practiced even during the 1500-1945 for various reasons – these reasons are also considered valid in the modern international law (1) Intervention on the strength of an implicit previous understanding (2) Intervention in self-defence i.e. ward off imminent danger to the invading power (3) Intervention on the ground of humanity (4) Intervention to prevent continued misrules in a state (5) Intervention in order to preserve the balance of power (6) Intervention by one or more powers at the request of one of the parties to a civil war (7) It must not be understood that ancient Hindu jurists ruled out all possibilities of war. On the contrary they felt that war was inevitable in dynamic and ever expanding human society…there is, however, one condition that: he (Kshatriya) must fight war according to just principles of war. Indian history allows us to conclude that Indian rulers were fully aware of unjust battle or unrighteous warfare. And their differentiation of a righteous war from an unrighteous war strikingly resembles the Grotian concept of a just and unjust battle. Hiralal Chatterjee, supra note 43 at p. 4.

govern all belligerents in a war. We have such a concept at present, i.e. the Geneva conventions of 1949, which have a universal application irrespective of considerations of different civilizations or opposing political ideologies of different states. This could not be said of medieval India, which became a battleground of two civilizations, each having its own laws to govern inter-state conduct. Independent India has witnessed disappearance of many principles and practices, which were found in the Hindu scriptures and princely states functioning.[152]

The Regulating Act of 1773 made provision for the appointment of a Governor-General and a council of four and centralized the administration of India. Regarding the right to commence war or negotiate peace, the following provisions were made in the act: normally the subordinate presidencies could commence war or negotiate peace only with the consent of the Governor-General, but they could do so without the consent of the Governor-General when there was very urgent necessity provided they received orders directly from the Court of Directors of the British East India Company.

**2.9.7. Trade, commerce and economy**

Rural economy and the self-sufficiency of the village communities, which were disintegrated during the British rules, are typical of the Indian sub-continent. The principle of international commercial, trade and business run contrary to the objective of self-sufficiency, according to David Smith and Ricardo and the Keynesian and the economic principles of world economic integration and interdependence they advocated. During the British rule, a slow but steady emergence of tax regime to meet the needs of the British colonial administration consolidated.

However, this process also witnessed the rural credit and the emergence of the moneylender or micro-financers. This is a unique economic system applicable in India, which finds resonance in the current international financial and fiscal policies and principles. The new versions having new means and mechanisms of financing have emerged but the principle and effective working system can be traced back to the Indian rural economy prior to independence. The British colonization led to the breaking down of the economic and social fabric of Indian self-sufficient village communities and the transformation of the whole pre-capitalist feudal economy of India into a capitalist economy. In other words, the rural economy of India was not powerful enough to withstand the forces of global capitalism which shows weakness of rural financial system and machineries of India and more so, inability of the financial institutions to withstand, is unique of Indian economy. The temples played a rather important role in development of foreign trade in the 15$^{th}$, 16$^{th}$ and 17$^{th}$ centuries. For example, the Kaikkolas (a merchant community in South) being closely associated with the temples were often induced to

152For example, return of dead body of a defeated king to his home country was also practiced. For example, we have the classic example of the return of the dead body of Biswas Rao by Ahmad Shah Abdali after the battle of Panipat of 1761 AD, though according to the Durrani tradition the body should have been taken to the conqueror's country. In context of this example, it may be worthwhile mentioning that in some cases even where the law of the overpowering state which was in a position to enforce it, was more liberal than the law of the victim state, it could happen that as a matter of reprisal the state in a position to enforce its liberal law renounced it in favour of the law of the victim state in order to retaliate. This appeared to be the position arising out of the perpetual wards waged by the kings of Bahmani with the kings of Vijayanagar, both being mediaeval states of South India. This practice has disappeared from modern international law. Nagendra Singh, "International Law in India: (II) Medieval India", 2 *Indian* JIL 65-82 (1962) at p. 71. It has been the general custom in the Decccan to spare the lives of prisoners of war and not to shed the blood of an enemy's unarmed subjects. This is a regional principle but over a period appears to have disappeared.

work within the temple precincts. In fact the association of artisans and merchants with temples can be considered as important tradition for the development of temples in Vijaynagar times.[153]

Even when all obstacles to cooperation were overcome under the pressure of the growing volume of trade, there remained the traditional reluctance of East Indian rulers to conclude treaties, which has its roots in ancient traditions of Hindu polity. This shows preference for informal – less legalistic relations which disappeared but with post colonization it has resurfaced again. It is easier to obtain a unilateral grant than to receive any concessions by treaty, which is considered a limitation to the sovereignty of the conceding ruler. This shows the East versus West approach to international law.

**2.10. Administration of Justice and international law**

India's history till 1947 suggests that there was no clear separation between the executive and judiciary. The judiciary was under the control of the executive. Kings and princes were the lawmakers as well as law interpreters. Due to these historical reasons, the question of judicial independence did not arise in pre-independence India.[154] Thus, the foreign relations between Indian states and the questions with regards to the settlement of disputes between these kingdoms or princely states were settled by the executive only.

Various attempts were made by Great Britain during the colonization period to address difficulties and disputes arising between princely states and between princely states and individuals. However, none of these attempts provided a long-term solution, which could be accepted by the rulers and population at large. For example, the 1781 Act of Settlement had various difficulties and defects such as (1) the jurisdiction of the court over the Indian habitants was vague, (2) the jurisdiction of the court over the actions of the government was not clear, (3) the procedures were considered to be oppressive and harsh, (4) the European British subject would use to their advantage the jurisdiction of the Supreme Court, while the Indian habitants in distant parts of Bengal, Bihar, and Orissa could not avail themselves of the jurisdiction of the Supreme Court. The European British subjects could choose to sue the Indian habitants either in the *Adalats* or in the Supreme Court.

During the Cornwallis reformation process, attempts were made to ensure that all subjects get free and impartial justice. However, these reforms attracted floods of cases against other princely states and British institutions and individuals. These led to inordinate delays. Furthermore, Cornwallis entertained a notion that Indians were not worthy of trust. Probably, his experience in the field of administration of criminal justice led him to this belief.[155] Not only in terms of refining the substance of law and bringing more clarity and expedition in the settlement of disputes, British rulers also attempted to combine functions of all organs into one. However, Lord Hastings reversed the process established by Cornwallis and brought about the reunion of magisterial and revenue functions in the same person. Another important development of the British era (late 18th and 19th century) was that the Indian legal system was faced with confusion, contradictions, and difference. The three Supreme Courts established by British were expected to administer English law as it suited the situation. The

153 http://www.*India*netzone.com/2/coins_princely_states_*India*.htm accessed on 26 December 2010.

154 In early days the administration of justice in the settlements of the East India Company was not of a high order. There was no separation between the executive and the judiciary. The judiciary was under the control of the executive. The judges were not law-experts. The company gave lesser importance to the judicial independence, fair justice and rule of law.

155 It was unfortunate that Cornwallis did not appreciate the fact that corruption was not confined to the Indian and even the English servants were equally, if not, more corrupt. It has been observed that the American and the British subjects were excluded from the jurisdiction of the Indian judges. The reform introduced by Bentick was a great step forward in Indianisation of administration of justice.

interpretation of suitability could vary from court to court and from judge to judge. Therefore, even the principles of English law administered by the three Supreme Courts were not uniform.

It is not surprising because the Privy Council that administered justice to people was separated from it by thousands of miles. They were away from the people and their life, from their customs and traditions. In such circumstances what is surprising is that the administration of justice at the highest level had so few blemishes. The Privy Council tried to inject principle of equity and common law into the realms of the Hindu law and the Mohammedan law. Quite often the decisions of the Privy Council were not in conformity with the accepted customs of the people. Another criticism is that it was too true to the ancient texts of personal laws and thus was responsible for the stagnation of personal laws of the people of India.

The judiciary established in Bombay, Calcutta and Madras contributed to the confusion and uncertainty in the fair and equitable implementation of rule of law, having profound implications for independent India.[156] The Indian judges did not enjoy equal status with the English judges during the British East India Company rule – a principle which has been abolished in 1947 since the independence.[157] What can be unheard in the modern international law was practiced by the British courts during the late 18th and through the 19th century. For example, the Admiralty Court had jurisdiction to determine all cases, mercantile and maritime in nature, all cases of trespasses, injuries and wrongs, committed on the high seas.[158] In Madras, the British East India Company

156 Bombay: The judiciary system of 1668-1684 consisted of the Court of Deputy Governor in Council (an appellate body). Under the Reforms of 1672, a court having jurisdiction in all civil, criminal, probate, and testamentary matters were established. These courts had jurisdiction over all subjects belonging to the state as well as non-state people. During the British domination, the Britishers themselves were very jealous of the independence of judiciary, especially during Dr St John's presiding over of the Admiralty Court. During this period the British East India Company became very hesitant to appoint professional lawyers as judges. The judges had no professional training. It may be mentioned that the British East India Company did not favor the application of the parliamentary acts. It preferred application of the laws of company or the laws of the crown. They preferred application of martial law, civil law and the customs of merchants instead of Acts of Parliament and common law. Rama Jois, *Legal and Constitutional History of India above* at p. 8.

157 They were not counted for the purpose of the quorum of the Court fixed at 3 (there were 5 English and 4 Indian judges, who were called Black Judges) In the record of each day's proceedings, the name of each English judge was specifically mentioned but the Indian judges were collectively described as black justices. The *Indian judges* played more or less a subsidiary role similar to that of assessors. However, with the independence of India, this system disappeared. Unlike the island of Bombay the settlement at madras was not under the sovereignty of the East India Company. The company acquired a plot of land from the local raja in 1639. Under the jurisdiction of the madras settlement, there was a white town within the fort and a black town in the village. This system applied to the citizens of various princely states. It is perhaps incorrect to generalize and state as a matter of truth, however, during the English regime, there was no systematic trial or production of any evidence in some courts such as in Madras. For example, a case in which an accused was a local person was tried for an alleged offence in accordance with the English law. He was sentenced to death on the basis of insufficient evidence. This became an accepted practice or norm several courts. This has now disappeared. The method of trials was ad hoc from case to case. In case of serious offence and particularly when Indian was victim of an offence, the matter would be referred to the Raja. In brief, the system which prevailed was vague, crude and unsystematic. Rama Jois, *Legal and Constitutional History of India* at p. 11. At times, the governor and council would also postpone the trial of cases involving serious cases of crimes as they were aware of their lack of knowledge. Therefore, a story of hesitation and delay continued.

158 It had to decide cases according to the rules of equity and good conscience and the laws and customs of the law merchant. Although all the states are free to use the high seas and although the queen Elizabeth of England to the Spanish ambassador in 1580 emphasized about the freedom of the high seas and that no state can claim over them, the British East India Company significantly differed because the admiralty court tried to exercise jurisdiction over the high seas too. At present freedom of the high seas is a universally recognized principle and all the states subscribe to this view. Under the ITLOS, Article 279 imposes obligation upon state parties to settle dispute by peaceful means and they may agree to settle a dispute concerning the

established the Corporation mainly for the purpose of municipal administration, however, it began to exercise judicial jurisdiction as a Court.[159] This shows that various mechanisms and various *ad hoc* institutions were established to resolve the disputes which invariably involved individuals and institutions of various princely states of India, which although under the suzerainty or colonization of British East India Company, enjoyed independence to a significant extent and were considered state proper, as we know international law today. Thus, the norms and mechanisms for dispute settlement have disappeared with the independence of India.

The Supreme Court, which was established in Calcutta in 1774, had various jurisdictions, which involved national and international private and public law and norms. It had original jurisdiction, equity jurisdiction, admiralty jurisdiction probate and ecclesiastical jurisdiction and jurisdiction to supervise. With the establishment of the Supreme Court of Calcutta, for the first time the principle of separation of the judiciary from the executive established in India. This was a major legal milestone in the Indian civilization as till this time, the executive and judiciary were one and there was no separation of powers between the two. The judges till this time were non-professional men, not conversant with the English laws under which they were administering justice. One could draw a conclusion, therefore, that with the advent of British colonization, the system of administration of justice as practiced between princely states by the king, collapsed and was largely taken over by the non-professional men. These non-professional and non-conversant men in law could hardly be expected to know international law much less the British or Indian laws. This is one of the main reasons why there was a silent collapse of international law during the British era as it was practiced before between the princely states.

**Challenges to Indian Practice of International Law:** While the civilization like India was undergoing administration of justice by these non-professional men, Western Europe was seeing the emergence of great international lawyers like Grotius, Bynkershoek, and Vattel among others. The philosophy and regime of international law promulgated by these Western international lawyers dominated the international scenario as there was no adequate counterforce or strong resistance from the Indian Sub-continent. This conclusion is true because before the advent of the British, there was a robust practice and administration of justice as we understood ancient international law of India and therefore, there was a counterforce in Asia, but this Indian counterforce collapsed and so the collapse or the withdrawal of the great ancient international law traditions during the British time in India.

### 2.11. Private international law

The questions which arose out of the merger of princely states mostly relate to the execution of *ex parte* decrees of the British Indian courts in the courts of the merged states and *vice versa*. What Lord Selborne had laid down

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interpretation or application of the convention by any peaceful means of their choice and also provides for procedure where no settlement has been reached by the parties and also stipulate provisions relating to obligation to exchange views and conciliation. These provisions apply mutatis *mutandi* to the cases involving high seas. However, during the British East India company time, at least in some regions, there were clear rules and sources to decide on the high seas cases. Now a days, there are trained or knowledgeable judges appointed under the Indian Judiciary system to deal with the maritime cases, however, earlier a civil lawyer was to preside over the courts (called Judge-Advocate) and he was considered proper because in those days maritime transactions were regulated by international customary law known as the Law Merchant. Thus, a civil lawyer was to decide the cases in accordance with the law merchant.

[159] It should be noted that the mayor's court used jurisdiction over European population as well as Indian people including religious matters. Incidents such as the case of conversion of a Hindu Woman (in 1730), the Oath in Bombay, Madras clearly evidence of this jurisdictional practice of the mayor's court.

in the well-known case of *Sardar Gudayal Singh v. Raja Faridkote* has become the accepted principle of international law. He observed, "in personal action…a decree pronounced in absence by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity."[160] And it must be regarded as such by the courts of any nation except in the country of the form by which it was pronounced.

Independence of India raised several issues with regards to partition, transfer of property, assets, liability, etc. With regards to the execution of decree, it was observed that the execution of a decree of the court of one country could be directed not only against property in one dominion but also against the property in another. The principle applies not only for the purpose of passing the decree but also for its enactment. Though this interpretation is not in accord with the ordinary rules of international law, it had become somewhat necessary to meet the new situation. This practice, especially restricted to India and Pakistan, does not find acceptance in international law but could be very useful, should such circumstances arise again in future.

When an Englishman died leaving some property in India without leaving any legal representative, the practice followed was that the Governor and Council of the Presidency towns sold the property by public auction. The sale proceeds were deposited for the benefit of the legal representatives of the deceased in England. As the courts established in India had no royal authority, this practice of the Company would lead to litigation in England. Often the Company had to pay damages as a result of the orders of the English courts. The Company very much desired to avoid such complications. The Company requested and was given by the Crown a grant of such powers as conducive to the punishing of vice, administration of justice and a better governing of effects of settlements abroad. This principle has disappeared as the current jurisprudence recognizes a limited right of recognition of foreign decrees in India.[161]

**2.12. State Responsibility**

In ancient and pre-1945 India, defiance of universally respected rules or precepts, whether of warfare, or of peace, or any other kind, was likely to lead to social ostracism and / or religious condemnation. These principles and practices are important in modern international law. In modern international law, when a state defies universally accepted rule or principle (*erga omnes* obligations) that state faces various kind of sanctions including, as a last resort, use of force against the wrongdoing / non-complying state. In ancient India, most states were Hindu states and in the Hindu States – concept of *Dharma* became one with concept of religion to a Hindu ruler. Hence, by observing social ostracism or religious condemnation, complying states were compelling the non-compliant states to comply with the rules, the rules which were found in *Smritis, Shrutis* and *Dharmasashtras* and *Arthsashtra* as well. In other words, these were the means to condemn non-compliance and induce compliance. Social ostracism and religious condemnation are typical of practices of ancient Hindu state and the ones which have disappeared from the modern international law rule books but are still practiced in different variant at domestic level. These practices that were universal in nature in the ancient times are limited to the Indian sub-continent only.[162]

Although India is largely composed of Hindu population, the secularization of the royal function was a phenomenon, which revealed itself in the domain of internal and external affairs – shows separation of influence

[160] S. K. Agrawala, *Law of Nations as Interpreted and Applied by Indian Courts and Legislature above* at p. 451.
[161] Rama Jois, *Legal and Constitutional History of India*, above at p. 16.
[162] Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India*, *above* at p. 6.

of religion on governance. While the sovereign ensured internal public order within his realm with the ultimate help of sanctions – *Danda*, external relations were at the mercy of anarchy. Indian rulers followed an objective, which was to propose a minimum of principles, which could diminish the threat of anarchy. These principles were at first of a political nature but they were outcome of the past experience, derived from the period before the foundation of the centralized Mauryan Empire and they stimulated the gradual establishment of a code of usage and customary rules which was similar to our law of nations in its early stages. This code, based on the Kautilyan and post-Kautilyan tradition, was in principle secular and allowed the sovereigns in India and further India to maintain regular relations *inter se* and later with Islamic rulers, as well as with the European agencies, which first appeared in the east in the beginning of the 16th century.

**2.13. Concluding remarks**

One could conclude that, unlike many other states of Asia and the former Soviet Union and their attitude towards international law which challenged some of the fundamental tenets of modern international law, India and princely states of India never challenged prevailing international law in the same strength as these states did. Rules and institutions, established and practiced in India, China, Egypt, Assyria, in ancient times, have enormous and lasting impacts on international law. According to Anand these earlier systems of China, India, Egypt, Islam or even Greece, were confined to their own civilizations, were not universal, and in any case "have left no trace of continuity of history."[163] This remark is challenged for its inability to grasp and establish the impacts of these civilizations on the current modern international law in various ways. Independent India considered herself bound by the pre-existing treaties, at any rate those relating to extradition, boundary problems and debts, as valid instruments of international law.[164]

The basic tenets which guided the practice of international law suggests that there was a clear difference between two philosophies as espoused by the actors and institutions in their conduct – a philosophy based on the original Hindu concepts of world law and politics and a mixed philosophy containing the Hindu and British concepts. This chapter shows how these differences were observed markedly in the subjects concerning rights and duties relating to independence, equality among princely kingdoms, intervention, jurisdiction, diplomacy and alliance and treaties. The concept of *Swarajya* (i.e. independence), which means that the kings and princes wanted to manage their internal and external affairs on their own without outside control, has undergone a significant change, since the introduction of the British rule. Before advent of the British rule, the kings and princes retained freedom to adopt whatever mode of government they wanted, power to exercise supreme authority over their citizens at home and outside and over aliens within their territories, liberty to determine the external relations between them, power to declare war and peace and conclude treaties without any outside intervention. These features of independence and governance were embodied as international law practiced in ancient India.

It has been observed that during the colonization period, the British and Indian judges adopted English concepts of public and private international law, which has continued to a great extent even since independence of India. The Constitution of India has adopted common law principles and old legal tradition in many ways; this

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[163] R. P. Anand, *Development of Modern International Law and India*, (New Delhi: Indian Society of International Law, 2006) at p. 1.

[164] M. K. Nawaz, *International Law in the Contemporary Practice of India: Some Perspectives*, (Durham, NC: World Rule of Law Booklet Series 275-90, 1963) at p. 281.

is legacy of the British rule. The Indian Constitution adopted the British Cabinet Rule and gave the President more executive powers and gave the powers to the Cabinet to negotiate and conclude treaties.

# CHAPTER III

# LAW OF THE SEA

## 3.1. Introduction

The Law of the Sea is a vast and multi-faceted area of international law. The 1982 United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the implementation of Part XI of the Convention constitute essential instruments of the law of the sea governing a new maritime order for the international community.[165] With its entry into force on 16 November 1994, the Law of the Sea Convention has virtually become the *Magna Carta* of the Oceans, or the Constitution for the Oceans. The Convention has been embraced by more than 160 parties including an intergovernmental organization, namely, the European Union. All South Asian nations are parties to the Convention. These nations have also enacted and promulgated new national legislation to incorporate the provisions of this Convention into their domestic legal orders. The UN Convention is, however, presenting even more challenges than opportunities to these states in their quest for a new maritime order. The maritime security situation in the South Asian region has been and will continue to be extremely volatile due to conflicting claims to maritime areas, disputed boundaries, unregulated pollution of the marine environment and widespread illegal activities at sea.[166] This chapter will examine the following issues: What is India's position on the emerging maritime situation in South Asia? How the emerging maritime situation in South Asia is linked with the evolution of international maritime order? What are the most important issues of the Law of the Sea which find prominent positions of India? What is India's position with regard to non-important issues and why these are considered to be non-important issues? What is the approach and contribution of the Indian judiciary in interpreting and implementing law of the sea obligations at national level? What are the main issues and disputes hindering the establishment of a new maritime order in the South Asian

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[165] UN through the International Law Commission convened a conference in 1958 which came to be known as the Geneva Conventions or UN Convention on Law of the Sea (UNCLOS-I). The four conventions that were opened for signature of UNCLOS-I in 1958 effectively codified the international customary law on the sea existing until that point of time. However, it left a number of issues unsettled. States were selective in becoming party to the conventions and with advancing technology continued to exploit resources beyond the limits envisaged in the conventions. It was only in 1980, with the Vienna Convention, the laws of the sea had been evolved into a hard law from soft law. The UNCLOS-III had consolidated all past treaties, codified customary law and put in place new law for new issues. It was a global agreement as for the first time even land locked states were addressed in maritime affairs. The four conventions were the freedom of the seas; the sovereignty of coastal states in the territorial sea; the ancillary physical, customs, sanitary and immigration rights of coastal states in a contiguous zone. The acceptance by UNCLOS 1 of the Continental Shelf convention enabled the countries bordering the North Sea to divide the sea area for extracting oil and gas. UNCLOS 1 participants remained divided on several issues: - The rights of coalitions of coastal states, land locked states and archipelagic states. - Certain states contested the rights of passage through straits used for international navigation like the Straits of Gibraltar, Hormuz and Malacca. - Land based mineral producers tried to carve out for themselves as much as they could of the newly found seabed mineral resources. UNCLOS 1 completely failed to agree on:-- The precise width of the Territorial Sea (three miles or twelve miles) and the extent of the Exclusive Fisheries Zone. - The prior authorization and/or notification of the passage of foreign warships through the territorial sea of a coastal state. The Second Conference, UNCLOS 2, was therefore convened in 1960 to resolve these issues but failed in major part to do so.

[166] Thomas Mensah, "Protection and preservation of the marine environment and the dispute settlement regime in the United Nations Convention on the Law of the Sea," In Andree Kirchner (ed.) *International marine environmental law*, 9-18 (2003); Donald R. Rothwell, "The International Tribunal for the Law of the Sea and Marine Environmental Protection: expanding the horizons of international oceans governance," 17 *Ocean Yearbook*, 26-55 (2003).

region? What are the present policy options that could contribute to erecting a solid maritime order in the region by peaceful and cooperative means?

The Law of the Sea presents one of the most interesting examples of codification and progressive development of international law. India's historical and contemporary contribution thereto is yet to be analyzed systematically.[167] What started as a principle of *freedom of the seas*, as we all know, now has become the most potent source of economic wealth under the ocean, posing challenges from security to pollution. For a long time, seafaring nations used the seas for navigation and fishing. Coastal states tended to be content with exclusive rights in their narrow belt of territorial waters. India, much like other nations, prior to its independence, was unable to fully exploit the potential of resources in the continental shelf. Since the promulgation of the Truman Proclamation in 1945 extending the US sovereignty over the petroleum and natural gas resources found in shallow waters of the continental shelf and exploitation of fishing and depleting fish stocks in the adjacent waters of coastal states by distant foreign vessels, the whole regime has started to change.[168] After independence, many African and Asian states started to extend national jurisdiction over large adjacent areas to protect their fish stocks.[169] The fact that Indian practice was in disarray is revealed in an example that all questions with law of the sea were dealt with on an *ad hoc* basis in the Ministry of External Affairs. The establishment of the UN International Seabed Authority in 1994 compelled India to constitute an Inter-Ministerial Committee consisting of Cabinet Secretary, Secretaries of Defence, Agriculture, Home, Finance, Mines and Geological Survey of India. This committee served for a long-time until the establishment of the Department of Ocean and Earth Sciences.[170]

This chapter analyses the law and practice of India with regards to the law of the sea and examines which problems India have faced and how it resolved these issues through legal and political mechanisms. It does not analyse the role played by India in the UNCLOS I which resulted in four treaties in 1958: Convention on the Territorial Sea and Contiguous Zone (entry into force 10 Sept 1964), Convention on the Continental Shelf (entry into force 10 June 1964), Convention on the High Seas (entry into force 30 Sept 1962) and Convention on Fishing and Conservation of Living Resources of the High Seas (entry into force 20 March 1966). India did not sign any of these conventions. India did participate in the UNCLOS II in 1960 and did not take any significant

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[167] The personal account of participation in various conferences leading to the final adoption of 1982 Convention by O. P. Sharma, *Law of the Sea: India and the UN Convention of 1982* (Oxford University Press) an excellent and meticulous piece of executive summary on India's position in the UNCLOS 1982 Convention. This chapter draws significant insights from his accounts provided in this book.

[168] Alexander N. Sack, *The Truman Doctrine and International Law*, Washington DC (1947); Osgood, Robert Endicott, *America and the World: From the Truman Doctrine to Vietnam*, (Baltimore: The John Hopkins Press, 1970).

[169] K. Opoku, "The Law of the Sea and Developing Countries", 51 *Revue de droit international, de sciences, diplomatiques et politiques,* 28-45 (1973); R. P. Anand, "Interests of the Developing Countries and developing law of the Sea", 4 *Annales d'études internationals* 13-29 (1973); Lewis M. Alexander, *The Law of the Sea: Needs and Interests of Developing Countries: Proceedings of the 7th Annual Conference of the Law of the Sea Institute 1972*, University of Rhode Island, 1973; A. O. Adede, "Law of the Sea: Developing Countries' contribution to the development of the institutional arrangements for the International Seabed Authority", 4 *Brooklyn JIL* 1-41 (1977); V. S. Mani, "The United Nations Law of the Sea and the Developing Countries," In M. S. Rajan, V. S. Mani and C.S.R Murthy (ed.) *The Non-Aligned and the United Nations,* 56-79 (New York: Oceana, 1987).

[170] India established the Department of Ocean Development in 1981 with an aim of creating a deeper understanding of the oceanic regime of the northern and central Indian Ocean and also development of technology and technological aids for harnessing of resources and understanding of various physical, chemical and biological processes. The Ocean Policy was enunciated in 1982. http://dod.nic.in/dodhead.htm accessed on 29 June 2011.

position.[171] The UNCLOS III resulted into the 1982 Convention which is the primary object of the analysis in this Chapter. The 1982 Convention covered significant issues setting limits, navigation, archipelagic status and transit regimes, exclusive economic zones (EEZ), continental shelf jurisdiction, deep seabed mining, the exploration regime, protection of the marine environment, scientific research and settlement of disputes. This chapter analyzes India's position and practical approach to these issues in the context of international law and national legislations.

In order to analyze India's contribution, it is essential to examine briefly India's state practice on the law of the sea. India, in 1947, proclaimed 3 nautical miles of territorial sea, in accordance with the prevailing traditions of the law of the sea. This proclamation found presidential decrees legitimizing this claim as well as announcing its stated goals to promote its interests. The notification of 30 August 1955 claimed full and exclusive sovereign rights over the seabed and subsoil of the continental shelf adjoining the coast but beyond territorial waters.[172] It should be noted this notification lacked any indication on the depth and the distance from the coastline. By another notification of 22 March 1956, India claimed territorial waters of 6 miles from appropriate baselines. India, through its proclamation of 29 November 1956, claimed a Conservation Zone for fisheries up to a distance of 100 miles from the outer limit of territorial waters. Finally, India claimed on 3 December 1956 a Contiguous Zone.

One of the important weaknesses of these proclamations was that these were based on India's own estimation without any consultation with any of the coastal states. Furthermore, these were general proclamations and India did not lay any claim in action. In other words, India announced the law but did not practice. India participated in the first UN Conference on the law of the sea in 1958 but did not ratify the four conventions as these Conventions failed to accommodate its demand of prior authorization and notification for the passage of warships through the territorial sea. India's initial approach to territorial waters was reactive instead of proactive.[173] This is evident from the fact that India extended its claim over territorial waters to 12 nautical miles in 1967[174] as a reaction to Pakistan's extension of its 3 to 12 miles.[175] While this was the state

[171] UNCLOS II did not result in any new agreements, having failed to address the issue of the delimitation of territorial waters. Generally speaking, developing countries including India participated only as clients, allies or dependents of the USA or the Soviet Union, with no significant voice of their own. http://en.wikipedia.org/wiki/UNCLOS, accessed on 12 November 2009.

[172] According to the notification, the Bays should be considered internal waters and that the base line for measuring territorial waters should be drawn from the mouths of bays/gulfs…the base line should be drawn outside the roadsteads which should be included in internal waters". *ILC Yearbook* 1955, p. 48.

[173] Convention on the Territorial Sea and the Contiguous Zone (entered into force on 10 September 1964), the Convention on the High Seas (entered into force on 30 September 1962), the Convention on Fishing and Conservation of the Living Resources of the High Seas (entered into force on 20 March 1966), and the Convention on the Continental Shelf (entered into force on 10 June 1964). In addition, an Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes entered into force on 30 September 1962.

[174] The number of states extending their territorial seas dramatically increased when the UNCLOS II could not determine a limit for the territorial sea. In this conference, it became clear that the 3 mile limit is not going to be accepted as a solution to settle the question of the outer limit of territorial sea and proposals in support of a 12 mile and 200 miles were gaining favour. While at the time of the UNCLOS II, 40 states claimed a 3 nautical mile limit of territorial sea, at the time of the UNCLOS III, 26 states were in favour of such a limit whereas at the time of the UNCLOS II the 12 mile limit was supported by 16 states and at the time of the UNCLOS III, this limit obtained the support of 52 states including India.

[175] The delimitation of 12 nautical miles had always been the most difficult issue even for states like the USA, which is one of the most important maritime states in the world. USA had remained traditional supporter of the three nautical miles. At the first UNCLOS, it presented its 'six plus six' formula of a six nautical mile territorial zone and a further six nautical mile fisheries zone. However, it joined Canadian proposal for a

practice until the late 1960s, the management or the coordination agencies in India were in disarray as no nodal department was established to comprehensively manage India's affairs in this area. For example, various ministries showed hesitation to deal with one of the aspects, namely, maritime force. Furthermore, India did not have any comprehensive legislation on the law of the sea. Recognizing the need to confirm to the international law, being a major role player in the very evolution of the new international order of oceans, India amended its Constitution enacting the Maritime Zones Act on 25 August 1976.[176] Subsequent to this, a Committee was set up to consider the type of force that should be created to enforce compliance with its provisions. Three options emerged: (a) to entrust the responsibility to the marine wing of the Ministry of Finance, which already had a number of Central Board of Revenue (CBR) anti-smuggling vessels.[177] This option was not pursued as the functions were too onerous; (b) to set up a separate Coastal Command, as part of the Navy, to oversee these functions. This option was seriously considered since it would avoid the expenditure of raising and maintaining a separate armed force. The Ministry of External Affairs, however, felt that patrolling of the EEZ and protection of national assets was a peace time role for which defence assets should not be used; (c) to set up a separate armed force of the Union, along the lines of the US Coast Guard.[178] This option was finally chosen, as it avoided the Navy being distracted from its primary role of preparing for hostilities. Finally, an interim Coast Guard was constituted on 1 February 1977,[179] which operated under the aegis of the Navy until 18 August 1978. A permanent Coast Guard was constituted as an armed force of India on 19 August 1978.[180]

In view of the above, the Indian law and practice with regards to the law of the sea becomes a logical choice in the overall framework of analyzing India's contribution to the codification and progressive development of international law. India has a well-developed state practice in the area of seabed mining, national jurisdiction, and access to the seas, navigation, protection and preservation of marine environment, maritime scientific research, exploitation of the living and non-living resources and the dispute settlement mechanisms.[181]

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similar 'six plus six' formula without any rights for foreign states in the fishing zones. I. A. Shearer (ed.), *D. P. O'Connell, The International Law of the Sea*, (New York: Clarendon Press 1984), p. 163.

[176] After the 3rd UN Conference on the Law of the Sea on 16 November 1994, article 297 of the Constitution of India was amended to state: "Things of value within territorial water or continental shelf and resources of the exclusive economic zone to vest in the Union – (i) all lands, minerals and other things of value, underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union (ii) all other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union (iii) the limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament. The Constitution of India (40th amendment) Act, 1976.

[177] Marine Division of the Directorate General of Logistics – Customs and Central Excises has a separate Marine Division which is entrusted to (a) examine proposals for appropriation/condemnation of vessels received from maritime commissionerates and extending technical support, (b) procure and supply technical and general sea stores through Central Stores Yard, Mumbai, (c) provide overall supervision and control over the four workshops for repair of the vessels, and (d) maintain statistical data pertaining to crafts and crew, (e) to recruit trained and disciplined technical personnel for operating vessels, workshops and Central Stores Yard.

[178] US Coast Guard's missions are to protect the maritime economy, environment, defend maritime borders. It has 11 missions, including, ports, waterways and coastal security; drug interdiction; aids to navigation; search and rescue; living marine resources; maritime safety; defense readiness; migrant interdiction; marine environmental protection; ice operations and other law enforcement. http://www.uscg.mil/top/missions/ accessed on 29 June 2011.

[179] http://indiancoastguard.nic.in/Indiancoastguard/history/morehistory.html accessed on 17 November 2009.

[180] Coast Guard Act of India, 18 August 1978.

[181] Thomas A. Mensah, "Civil liability and compensation for vessel-source pollution of the marine environment and the United Nations Convention on the Law of the Sea (1982)," In *Liber amicorum Judge Shigeru Oda*

The Indian Ocean holds 40% of offshore oil reserves, 65% of strategic raw materials and 31% of gas of India's reserves.[182] Geographic disposition bestows upon India inherent advantages as well as inconveniences that need to be understood and addressed. The 8,118 km long coastline, including the island groups, bestows upon India a large ocean area.[183] Despite such rich maritime heritage, India has been subdued not only in addressing the rights but also in taking any proactive positions in world forum of the UN. Since various ministries are involved in the implementation of the law of the sea provisions and India has enacted several legislations, it becomes important to see whether the national provisions are in harmony with the international obligations.

### 3.2. India and Basic Issues in the Law of the Sea

India has actively participated in the Law of Sea debates, especially since the Caracas Conference of UNCLOS III in 1974.[184] A brief analysis of Indian statements indicates that India's position, unlike many other instruments, was motivated by the overall interests of the international community and to an extent by national interests.[185] However, it is also true, as debates evolved, Indian core national interests, which constitutes continued economic development and political and social stability and essentially non-negotiable came to dominate its position, which remains valid still today.

Why did India need to play a key role in the law of the sea debates? India is a developing country, has a central position in the Indian ocean, possesses a long coast line of around 8,118 kilometers, has 1,280 islands and islets, about half of which constitute the archipelagoes of Andaman and Nicobar islands on the one hand and Lakshadweep on the other. India's interests have been therefore to obtain an archipelagic status; smooth and freer navigation through waters that traditionally have been used for international navigation,[186] protection of essential strategic and security interests in the waters around its coast and to secure the free mobility of naval ships, preservation of marine environment[187] in the sea areas adjacent to its coast since the channels of navigation pass near its long coastline and exclusive rights to conduct and regulate marine scientific research by foreign researchers within exclusive economic zones (EEZs). Indian revenue from the exploitation of fishery

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ed. by Nisuke Ando, Edward McWhinney, Rudiger Wolfrum, 1391-1434 (2002); Van Dyke, Jon M., "The legal regime governing sea transport of ultra-hazardous radioactive materials, 33 *Ocean Development and International Law* (1) 77-108.

[182] B. S. Randhawa, "Indian Shipbuilding: Key to maritime and Economic Security", In 25 *Indian Defense Review* 1, 2010.

[183] The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, 25 August 1976, http://meaindia.nic.in/actsadm/30aa13.pdf, accessed on 17 November 2009.

[184] J. R. Stevenson and B. H. Oxman, "The Third United Nations Conference on the Law of the Sea: the 1974 Caracas Session", 69 *American JIL*, 1-30 (1975); Platzoder, Renate, *Third United Conference on the Law of the Sea: Documents of the Caracas Session 1974*, (Hamburg: University of Hamburg, 1975).

[185] The issue of continental shelf was of considerable importance to "broad margin" states like India as it continental shelf extended hundreds of miles beyond the 200 nautical miles economic zone. India, with other broad margin states, Russian Federation, Brazil, Argentina, US, UK, Canada agreed to pay a portion of their production from this area to a new International Seabed Authority. *Ibid.*

[186] Nahid Islam, '"The Law of non-navigational uses of international water courses: Options for Regional Regime-Building in Asia", 8 *Energy and Environmental Law and Policy Series* (2010).

[187] India has witnessed many marine environment calamities starting from Maersk Navigator off the Andaman and Nicobar Islands. The Maersk Navigator, a Singaporean registered tanker, collided with Sanko Honor at the entrance of the straits of Malacca on 21 January 1993, causing the largest oil spill in the Andaman and Nicobar Islands. The spill was successfully contained by the Indian Coast Guard.

resources has been growing from 1.5 million tons in 1974 to now 7.61 million tons in 2008-09.[188] New areas of rich fishery resources, such as the off-shore areas of the Arabian Sea, the Bay of Bengal, and the Andaman Sea have been found. At domestic level, various committees have been set up to examine the problems of small fishermen, operation of deep-sea fishing vessels, joint venture arrangements and other fisheries issues.[189]

India has been able to identify and hence capitalize its interests in the resource exploration and exploitation. India requires huge quantities of manganese nodules for its long-term development strategy for metals such as nickel, cobalt and copper.[190] India has developed an intensive scientific and investigation program of the manganese nodules on the deep seabed of the Indian Ocean. Indian continental shelf is found to contain enormous storage of gas and oil. Now the continental shelf of India produces huge amounts of crude oil from the offshore oil fields. Besides oil, various sectors, such as Bombay High Region, Godavari and Krishna, Palk Bay Basins and Andaman offshore, are full of gas fields.[191] These gas fields can assure self-reliance to India to a great extent. Thus, India has multiple interests and hence, her position is clearly and solely based on her national interests and shows alliance with the developing world only when it could further her national interests.

### 3.3. Indian position on various issues

**3.3.1. Prior Notification on Territorial sea:** India proposed in 1974 a territorial sea of 12 nautical miles measured from the appropriate baseline along its coast.[192] India advocated that the coastal state may require prior notification to its designated authority for the passage of foreign warships through its territorial sea.[193]

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[188] http://dahd.nic.in, India produced 4.157 million tone fishes in 1991-92 and 2008-09, the tonnage increased to 7.616 million – almost double production and corresponding increase in the revenue. http://dahd.nic.in, accessed on 30 July 2012.

[189] Union Government of India has at least 5 major schemes for development of fish sector and 4 major fisheries institutions in various parts of the Country.

[190] Manganese nodules are rock concretions on the sea bottom formed of concentric layers of iron and manganese hydroxide around a core. The core may be microscopically small and is sometimes completed transformed into manganese minerals by crystallization.

[191] For detailed information on oil and gas fields of India, see, Singh, Lakshman, *Oil and Gas Fields of India*, 1st edition, Dehradun: Indian Petroleum Producers (2000). The book provides useful information on the Oil and Gas fields in the Assam Basin, Bombay Offshore Basin, Cambay Basin, Cauvery Basin, Krishna-Godavari Basin, Tripura-Cachar Basin, and the West Rajasthan Basin.

[192] Third United Nations Conference on the Law of the Sea, Official Records, I: 95-96. It should be noted that this position of India reflected the UK proposal. UN Doc. A/CONF.62/L.4 (1974) and UN Doc. A/CONF.62/C.2/L.3 (1974). This limit includes Andaman, Nicobar and Lakshdweep islands.

[193] The right of foreign merchant ships to pass through the territorial sea of a coastal state has long been an accepted principle of customary international law. India has subscribed to this principle too. However, with regards to the innocent passage of foreign warships, India wanted to impose a requirement of prior notification. This position had to change as article 23 of the UNCLOS required that costal states must not hamper the innocent passage of foreign ships, either by imposing requirements upon them which would have the practical effect of denying or impairing the right or by discrimination. The issue of whether the passage of warships in peacetime is or is not innocent remained one of the most controversial issues. India rejected the principle of innocent passage for warships in the territorial sea. India's position was in stark contrast with position of the US, Western Powers and also the Eastern Bloc. UN Doc., A/CONF.62/WP.8/Part II (1975). The reason for receding from this position was India's self-realisation as a growing maritime nation interested in the freedom of navigation both for itself and the international community. http://indiannavy.nic.in/book/international-law-sea-and-indian-maritime-legislation (accessed on 20 July 2013).

**3.3.2. Contiguous zone:** Indian position was of a contiguous zone of 18 miles adjacent to the territorial sea or 30 miles from appropriate baselines. This position was taken by India to protect its custom, fiscal, sanitary and immigration interests of India as well as like-minded coastal states.[194]

**3.3.3. Exclusive Economic Zone and Continental Shelf:** The EEZ is one of the most revolutionary features of the 1982 Convention and the one which has had profound impacts on the management and conservation of the resources of the oceans. It recognizes the right of coastal states to jurisdiction over the resources of some 38 million square nautical miles of ocean space. To the coastal state falls the right to exploit, develop, manage and conserve all resources – fish or oil, gas or gravel, nodules or sulphur – to be found in the waters, on the ocean floor and in the subsoil of an area extending 200 miles from its shore.[195] About 87% of all known and estimated hydrocarbon reserves under the sea fall under some national economic jurisdiction as a result. So till almost all known and potential offshore mineral resources, excluding the mineral resources (mainly manganese nodules and metallic crusts) of the deep ocean floor beyond national limits. The most lucrative fishing grounds too are predominantly the coastal waters. India favoured 200 nautical miles from the coast in which coastal states would enjoy sovereign rights and exclusive jurisdiction over the resources of the sea and over the seabed and its subsoil.[196] At UNCLOS III, India's stand was that as a developing country centrally located in the Indian Ocean, with a coastline of over 8,118 kilometers, its basic national interests were:-

(a) To obtain assurance of smooth and free navigation through traditionally used waters and straits used for international navigation, outside of India,

(b) To achieve archipelagic status for the Andaman and Nicobar Island group and the Lakshadweep Island group which between them, comprised over 1,280 islands and islets,

(c) To protect essential strategic and security interests in the waters around its coast,

(d) To secure the free mobility of naval war ships,

(e) To preserve the marine environment in the sea areas adjacent to its coast, because the channels of navigation passed near its long coastline, and

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[194] Third United Nations Conference on the Law of the Sea, Official Records, I: 95-96. Prior to 1974, India submitted to the Committee on Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction the only draft articles on the contiguous zone. Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, UN Doc. A/9021 and Corr. 1 and 3 (1973), vol. 4. In the 1974 Caracas conference, India reacting the Mexican suggestion to put that text on hold pending discussion on the concept of patrimonial sea, expressed its doubts whether the concept of an economic zone or the patrimonial sea would confer special jurisdiction on coastal states to prevent infringement of customs, fiscal, immigration or sanitation regulations. Third United Nations Conference on the Law of the Sea. Official Records, 2:121. See also UN Doc./A/CONF.62/C.2/L.78 (1974).

[195] The special interest of coastal states in the conservation and management of fisheries in adjacent waters was first recognized in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas. That Convention allowed coastal states to take "unilateral measures" of conservation on what was then the high seas adjacent to their territorial waters. It required that if six months of prior negotiations with foreign fishing nations had failed to find a formula for sharing, the coastal state would impose terms. Still the rules were disorderly, procedures undefined, and rights and obligations a web of confusion. On the whole, these rules were never implemented.

[196] It should be noted that the Indian delegation had sponsored a comprehensive proposal for fisheries in which the outer limit of the fisheries zone had been left blank and it was suggested that the limit of 200 nautical miles be set at 200 nautical miles since that distance had received general support from developing countries of Asia, Africa and Latin America. UN Doc A/AC.138/SC.11/SR.84 (1972) 2-4. Also see Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, vol. 3; UN Doc. A/CONF.62/C.2/L.4 (1974); UN Doc./A/CONF.62/C.2/L.78 (1974).

(f) To regulate within its EEZ, the conduct of marine scientific research by foreign research agencies.

India's EEZ became the 14th largest in the world as per the Law of Sea Convention.[197] The extension of the continental shelf to 350 miles or 100 miles beyond the 2500-meter isobaths added 2 million square kilometers to India's economic jurisdiction. India originally advocated a uniform limit of 200 nautical miles. Since no other country with a continental margin extending 200 nautical miles had supported that suggestion, India reappraised its position and supported the view that the national seabed of a state should extend to the outer edge of the margin.[198]

**3.3.4. Seabed mining:** India's interest in the mining of polymetalic nodules from the seabed derived from its long term strategy for acquiring access to metals like nickel, cobalt, copper and manganese. In the early 1970, the Indian Government had initiated a programme of scientific investigation and evaluation of the manganese nodule resources in the Indian Ocean.[199]

**3.3.5. Offshore Oil and Gas:** By the early 1970s, India had discovered oil and gas in Bombay High and promising fields were expected in the Godavari, Krishna and Palk Bay basins, as well as the Andaman

[197] India has approximately 2.02 million $km^2$ exclusive economic zone (India's landmass area is about 3.27 million $km^2$. Ministry of Earth Sciences, Government of India, Annual Report, 2009-10, p. 28. Australia, Brazil, Canada, Chile, China, Denmark, France, Japan, Mexico, New Zealand, Norway, Russian Federation, UK, USA have larger EEZ than India.

[198] It is in the area of continental shelf that India managed to obtain much more than it had bargained for. As is evident from the statement of the leader of the Indian delegation, India had earlier advocated a uniform distance of 200 nautical miles as the outer limit of the continental shelf. Since no other country with a continental margin extending beyond 200 nautical miles supported that position, India quickly reappraised her stand and joined the Broad Margineers Group to stake a claim to the outer edge of the continental margin. This group was chaired by Ireland, other members being Australia, Argentina, Canada, India, Norway, New Zealand, the UK and the USA. India actively participated in the deliberations of this group, which eventually succeeded in getting the Conference to accept the Irish formula. The technical formula for determining the outer edge of the continental margin was conceived by R. R. Gardiner, a geologist who was a member of the Irish delegation, and came to be called the Gardiner formula. The formula provided for the cut-off limit of either 350 nautical miles from the baselines of territorial seas or 100 miles beyond the 2,500 meter isobaths.

[199] Ranadhir Mukhopadhyay, Anil K. Ghosh and Sridhar D. Iyer, *The Indian Ocean Nodule Field: Geology and Resource Potential*, Elsevier (2008); _____, "Dynamics of Formation of Ferromanganese Nodules in the Indian Ocean," 37 *Journal of Asian Earth Sciences* 4 394-98 (2010); Rahul Sharma, "First Nodule to First Mine-Site: Development of Deep-Sea Mineral Resources from the Indian Ocean", 99 *Current Science* 6, 750-59 (2010); P. K. Sen, "Processing of sea nodules: status and commercial evaluation of India's programme," In *Workshop on Polymetallic Nodule Mining Technology – Current Status and Challenges Ahead*, ISA, National Institute Ocean Technology (NIOT), Chennai, 18–22 February 2008; P. A. Loka Bharathi and S. Nair, "Rise of the dormant: simulated disturbance improves culturable abundance, diversity, and functions of deep-sea bacteria of Central Indian Ocean Basin," 23 *Marine Georesources Geotechnologies*, 419-28 (2005); M Sudhakar and S. K. Das, "Future of deep seabed mining and demand-supply trends in Indian scenario," In *Proceedings of 8th ISOPE Ocean Mining Symposium*, India, 191-96 (2009); C. Raghukumar, S. Raghukumar, G. Sheelu, S. M. Gupta, B. N. Nath, and B. R. Rao, "Buried in time: culturable fungi in a deepsea sediment core from the Chagos Trench, Indian Ocean," 51 *Deep-Sea Resources I*, 1759-68 (2004).

Offshore.[200] With a view to establish an equitable international regime for the exploitation of seabed resources, the UN General Assembly convened the third conference, UNCLOS III in 1973.[201]

**3.3.6. Common Heritage of Mankind:** India has been a staunch proponent of the implementation of the principle of common heritage of mankind. This position of India clearly found positive expression in the Convention, which has established general obligations for safeguarding the marine environment and protecting freedom of scientific research on the high seas and also an innovative legal regime for controlling mineral resource exploitation in deep seabed areas beyond national jurisdiction through an International Seabed Authority and the principle of common heritage of mankind.[202] In addition to above, enlargement of safety zones around oil installations and designation of special areas for the protection of resources have remained India's additional interest throughout the negotiations.

### 3.4. Indian position and interests and the Law of the Sea Convention of 1982

It can be observed that the 1982 Convention largely accommodated concerns and interests of a country like India by adopting 12 miles as the uniform limit for the breadth of the territorial sea; a 200-mile EEZ within which the coastal state exercises sovereign rights and jurisdiction for certain specified economic activities; and a continental shelf extending to the outer edge of the continental margin to be delimited with reference to either 350 nautical miles from the baselines of territorial waters or 100 nautical miles from the 2,500 meter isobaths.[203] The Indian position can be also considered as positively reflected in the provisions concerning the regime of transit passage through straits used for international navigation.[204] India, hence, could protect its navigational and

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[200] In 2009, India offered 70 blocks of Oil, Gas and 10 for coal-bed methane in the Andaman Offshore. 10 April 2009 *The Hindu Business Line.*

[201] J. R. Silkenat, "Solving the Problem of the Deep Seabed: the Informal Composite Negotiating Text for the First Committee of the UNCLOS III", 9 *New York University JI Law and Politics* 177-201 (1976); Edgar Gold, *UNCLOS III and the Commercial Viability of Shipping: Some Indian Ocean Perspectives*, (Halifax: Dalhousie University, 1979); Dushyant Kamat, *Coastal Zone Management: United Nations Convention on the Law of the Sea – UNCLOS III*, (New Delhi: Jnanda Prakasha (P&D), 2010); N. Balu, "UNCLOS III and the Legal Regime for International Navigation", 19 *Indian Yearbook of International Law* 256-77 (1986); Jonathan Charney, "The Law of the Deep Seabed post UNCLOS III", Eugene: University of Oregon, 63 *A Symposium on the Law of the Sea*, 19-52 (1984).

[202] For more detailed analysis see Jennifer Frakes, "The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach A Compromise?" 21 *Wisconsin International Law Journal* (2003).

[203] Common Heritage of Mankind: This concept "has given a rationale and an identity to the international seabed area beyond national jurisdiction and saved it from being drowned in the attempts at appropriation. The development and emergence of the concept is the nearest that could have happened towards the fair settlement of resources in the region. India has gained to the extent that the availability of international seabed area under the CHM concept has made it possible to acquire an undisputable title to the resources on the basis of norms and regulations laid down by the International Seabed Authority. The surrender of 75,000 km2 i.e. 50% of the allotted area is in fulfillment of the obligations for access to the resources that lay in Indian claim of the international seabed area. The deep seabed regime and the amendments made therein have removed the uncertainty and the 'discovery and occupation' principle in pursuit of undesirable titles to resources in the seabed area beyond national jurisdiction, thus paving the way for opportunities and a possible share from the profits for developing countries". Vijay Kumar, "India and the common heritage concept in the international seabed area", 86 *Current Science* 6, 25 March 2004, p. 787.

[204] The regime of transit passage retains the international status of the straits and gives the naval Powers the right to unimpeded navigation. Ships and vessels in transit passage, however, must observe international regulations and the conditions that ships and aircraft proceeds without delay and without stopping except in distress situations and that they refrain from any threat or use of force against the coastal sate. In all matters other than such transient navigation, straits are to be considered part of the territorial sea of the coastal state.

security interests. India's interests concerning abatement and control of marine pollution, marine scientific research and international seabed were also protected. It can be also argued that when India appeared to have lost its interests, it did not promote the cause of developing countries.[205] The most important, perhaps, securing of interest of India was about the Pioneer Investor. India's inclusion in Resolution II annexed to the Convention as one of the four states named as Pioneer Investor, have surprised the developing and developed world and raised high hopes as to India's technological capacity to engage in seabed mining. India again was the first state to be registered as a Pioneer Investor on 17 August 1987 after satisfying the criteria set forth in the Convention.[206] India's position materialized in response to Sri Lanka's proposal for an exceptional method of delimitation in relation to the seabed to the south or southeast of its coast.[207] Pursuant to the Pioneer Investor status, the International Seabed Authority, in 1987, allotted to India a 150,000 square kilometers mine site in the central Indian Ocean for the seabed mining of polymetalic nodules.[208] The richest area at this site has a density of 21 kilograms of nodule per square meter.

### 3.4.1. India's position on issues of non-significance interests

It is essential to analyse India's policy and practical approach in those issues where it had marginal economic, security and political interests. Such analysis can help to determine whether India has indeed taken a collective leadership role in international law or a leadership of convenience.

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India had maintained a low profile on this issue knowing that its interests were coterminous with the major maritime power position and India's strong stand on transit passage regime might have caused unwarranted misgivings in the minds of the straits states or other developing countries.

[205] Kilaparti Ramakrishna, "North-South Issues, Common Heritage of Mankind and Global Climate Change", 19 *Millennium – Journal of International Studies 3*, 429-45 (1990).

[206] Resolution II of the Conference established a special regime to protect the preparatory investment made by countries and enterprises technologically capable of carrying out sea-bed mining or who already were involved in sea-bed mining. These countries could apply for the status of "pioneer investor". Applicants for such status must ensure that areas in which they intended to operate do not overlap. Three groups were designated eligible to register as "pioneer investors": four States which had 'signed the Convention--France, India, Japan and the Soviet Union--or their private or public corporations; four consortia (Kennecott Consortium, Ocean Mining Associates, Ocean Management Inc., and Ocean Minerals Company) whose components come from one or more of eight States--Belgium, Canada, the Federal Republic of Germany, Italy, Japan, the Netherlands, UK, USA and developing countries which had signed the Convention, or their enterprises.

[207] After the Irish formula was incorporated in the Informal Composite Negotiating Text, in April 1979, Sri Lanka examined the Irish Formula and found that the outer limit of its continental shelf would not go beyond 300 nautical miles. Sri Lanka, however, was advised by the US and Canadian geologists that its continental shelf was covered by sediments that were not very thick but which extended to long distances and that if the criterion of 1 kilometer thickness of sediments, as against the 3.5 kilometers envisaged the Irish formula, were to be applied, Sri Lanka's continental shelf would go beyond 500 nautical miles. Sri Lanka therefore rejected the Irish formula on the ground that it would lose some 50% of its margin and asked for an exception to be made. Sri Lanka concretized its proposal in 1979. Initially, Sri Lanka was prepared to make the exception somewhat general in nature, but later, on the insistence of the then USSR that it would support the exception only if it applied exclusively to Sri Lanka and to no other country including India, it sought Indian support for exclusive application of the exception to Sri Lanka. The matter was discussed between India and Sri Lanka and both agreed to promote a proposal that would apply the Sri Lankan exception equally to India and to Sri Lankan since the geological and geomorphologic features of the Bay of Bengal up to the south of Sri Lanka are the same. The joint proposals was made and finally accepted resulting a significant gain for India to claim much larger continental margins than they can under article 76 of the Convention. Ref. Third United Nations Conference on the Law of the Sea. Official Records, 13:23.

[208] David J. Karl, "India Needs a Sputnik Movement," *Yale Global Online*, 4 March 2011; *National Minerals Policy (1993)*, Ministry of Mines, Government of India.

#### 3.4.1.1. Contiguous zone

As far as this issue is concerned, it is observed that India stood up for a collective interest leadership. India wanted to have a continugous zone extending out to 30 nautical miles from the baselines of territorial waters. This proposal of India was not favoured by other negotiating parties as they preferred to have 12 nautical miles only as addition to the territorial sea. The reason behind 30 nautical miles was primarily to curb smuggling activities that spurred enormous rise in mid 1960s and early 1970s. An enlarged periphery would have helped the custom authorities of India in preventing and dealing with smuggling activities and illegal trade. India showed a compromise in accepting the 24 nautical miles from the baseline of territorial waters as preferred by other nations.[209]

#### 3.4.1.2. Archipelagic status for the Andaman and Nicobar Islands

India persisted to get recognition of an archipelagic status for the Andaman and Nicobar Islands.[210] It took a position that there was no logical basis for drawing a distinction between an archipelago that constituted a single state and an archipelago that formed an integral part of a coastal state, *albeit* at some distance from the coastal state.[211] If India would have obtained the status, it would have been able to draw straight baselines joining the outermost points of the islands and then claim various maritime zones measured outward from them. Subsequently, India would have prevented loss of regulatory control over an area of roughly 23,000 square miles, part of the maritime zones of India had the baselines been drawn on the archipelagic principle. The distance between the Andaman group and the Nicobar group of islands is 76 miles. If an archipelagic status had been granted to these groups of islands, India would have full regulatory control over the navigation of ships and vessels passing through the Ten Degree channel,[212] which would have then been part of India's archipelagic waters subject to the restrictive regime of innocent passage or archipelagic sea lanes passage. These were two important legally significant advantages which India lost.[213] The Indian position, which centered on Andaman and Nicobar Island shows that it wanted to have the right of innocent passage governed by domestic laws and requirement to designate sea lanes and prescribe traffic regulations schemes under the domestic law of India.[214]

According to the Convention, an archipelago, is defined as, "a group of islands, including parts of islands, inter-connecting waters and other natural features which are so closely inter-related that such islands, waters and other natural features, form an intrinsic geographical economic and political entity or which have historically been regarded as such".[215] The Convention has granted status of an archipelago only to those groups

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[209] India has found no difficulty with the smaller contiguous zone because following the formation of the coast guard service in 1978 the smuggling activity was substantially brought under control and the rationale for seeking a contiguous zone of 30 miles disappeared.

[210] R. P. Anand, *Origin and Development of the Law of the Sea: History of International Law* at p. 208.

[211] Third United Nations Conference on the Law of the Sea. Official Records, 1:96 and 9:135.

[212] This channel, which is approximately 150 km wide, separates the Andaman Islands from the Nicobar Islands in the Bay of Bengal.

[213] As Shaw argues, "the fundamental restriction upon the sovereignty of the coastal state is the right of other nations to innocent passage through the territorial sea, and this distinguishes the territorial sea from the internal waters of the state, which are fully within the unrestricted jurisdiction of the coastal nation. Malcolm Shaw, International *Law*, 6th edition (Cambridge, 2008), p. 569.

[214] India is yet to comply with the obligations of due publicity established by the UNCLOS relating to all laws and regulations adopted by India relating to innocent passage through the territorial sea (article 21.3) and all laws and regulations adopted by India bordering straits relatint to transit passage through straits used for international navigation (art. 42.3). Myanmmar and Pakistan have submitted the due publicity obligations.

[215] Currently Article 46 of the Convention.

of islands that are political entities by themselves, such as Indonesia,[216] the Philippines and Maldives.[217] The history of the negotiation on the definition and concerning provisions on the archipelago states shows there were a few elements of dispute. First, the definition of archipelago state itself - the method of drawing straight baselines and the rights and duties of foreign ships passing through archipelagic waters.[218]

### 3.4.1.3. Passage of warships through the territorial sea

Another important loss India's interest suffered was the refusal by the negotiating conference[219] to include in the Convention a prior authorization and notification to the coastal state of passage of foreign warships through the territorial sea of a coastal state. India originally demanded this inclusion in the first law of the sea conference in 1958.[220] As the conference did not meet the demand, India declined to ratify the four Geneva Conventions. It shall be noted that Pakistan, Bangladesh, Sri Lanka and Myanmar, by 1977, had all unilaterally promulgated that prior authorization and notification was required for the passage of foreign warships through their respective territorial waters.[221] India's Maritime Zones Act 1976 also requires foreign warships to give prior notification for

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[216] Indonesia has a total area of more than 3 million square miles, of which only about 730,000 square miles comprise land area. The archipelago has a maximum length of 2,750 miles and maximum width of 1,150 miles.

[217] This was because of fear of interference with the freedom of navigation through archipelagic waters that might be created if the off-lying islands of continental coastal states were to be granted archipelagic status. As stated by H. R. Gokhale, the leader of the Indian delegation, Third UNCLOS, Official Records, p. 96, "the concept of archipelagos was being promoted by several developing countries, and a proposal on that subject had been made by several States with which India had friendly relations. His delegation would give sympathetic consideration to the implication of the concept of an archipelago or archipelagic State if the following provision were given consideration: firstly, the body of water enclosed by drawing straight baselines joining the outermost points on the outermost islands constituting an archipelago should be reasonable; secondly,the channels of navigation traditionally used by international shipping should be respected; and thirdly, the principle should apply to the Andaman and Nicobar Islands and also to the Lakshdweep Islands. No distinction should be made between an archipelago that constituted a single State and an archipelago that formed an integral part of a coastal State." quoted in O. P.Sharma, at p. 94.

[218] Evensen provides an interesting division of archipelago: coastal archipelago and outlying (mid-ocean) archipelago. He explains, coastal archipelago are those situated so close to mainland that they may reasonably considered part and parcel thereof, forming more or less an outercoastline from which it is natural to measure the marginal sea. While outlying archipelago means, groups of islands situated out in the ocean at such a distance from the coasts of firm land as to be considered as an independent whole rather than forming part of an outer coastline of the mainland. Based on this, it appears that the Indian claim was more concerned with the latter type – mid-ocean archipelago than coastal archipelago.J. Evensen, *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters,of Archipelagos,* Preparatory Document No.15, A/CONF.13/18, 29 November 1957, p. 290.

[219] USA and the former Soviet Union vehemently opposed the prior notification before warships transited through territorial waters because it would seriously jeopardize their strategic and security interests.

[220] India, together with other developing nations wanted to have the mineral resources belonging to the entire mankind and under the supervision of an international authority. This demand was rejected. Another reason was the intelligence gathering, security concerns and economic gains to be obtained by the developed nations under the pretext of the marine scientific research. Prior Consent was the demand of the developing nations. Also see R. P. Anand, *Evolution and Development of the Law of the Sea* above.

[221] The issue of passage of warships in peacetime is or is not innocent remains a controversial even today. Some authors contend that "this includes warships by inference, but other authorities maintain that such an important issue could not be resolved purely by omission and inference, especially in view of the reservations by many states to the Convention rejecting the principle of innocent passage for warships and in the light of comments in the preparatorary materials to the 1958 Convention". India's objection was related to the Western states which maintained preponderant naval power. See Malcolm Shaw, *International Law*, 6th edition, p. 573.

passing through India's territorial waters and enjoins all submarines and other underwater vehicles to navigate on the surface and show their flag while passing through these waters.[222]

#### 3.4.1.4. Enlarged safety zones for the Offshore Installations

The 1958 Continental Shelf Convention had provided for a safety zone of 500 meters around artificial islands, installations, or structures on the continental shelf in which the coastal state may take appropriate measures to ensure the safety of both, the navigation and the artificial islands, installations and structures.[223] As the size of modern tankers have increased, their speed and the time taken to stop or divert such huge vessels off their courses, India advocated for a larger safety zone around oil installations and structures.[224] However, this demand was not fully met. Nevertheless, India's stand stood partially vindicated, when the 1982 Convention incorporated a rule allowing a coastal state to promulgate safety zones around artificial islands, installations and structures in excess of 500 meters, if authorized by generally accepted international standards or as recommended by the competent international organization.[225]

#### 3.4.1.5. Establishment of the Designated or Special Areas

India advocated a unilateral establishment of designated or special areas in the EEZ in which the coastal state could take protective measures with regard to the living resources, marine environment and safety of offshore terminals, installations, and structures.[226] This proposal, like the earlier ones, too, did not find support among the negotiating parties.

### 3.5. Maritime Laws of India

India has several acts dealing with maritime matters. The 1976 Territorial Waters, the Continental Shelf, the Exclusive Economic Zone and other Maritime Zones Act included some of the proposals of India, which were opposed or not incorporated in the 1982 Convention. The 1976 Maritime Zones Act describes sovereign rights and the exercise of jurisdiction of India in various maritime zones. It should be noted that the act was deficient and inadequate in view of the establishment of coast guard and other institutional enforcement mechanisms by

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[222] Article 4 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 reads, "foreign warships including submarines and other underwater vehicles may enter or pass through the territorial waters after giving prior notice to the Central Government: Provided that submarines and other underwater vehicles shall navigate on the surface and show their flag while passing through such waters. This is commensurate with Articles 19, 21, 24, 25, and 30 of the Law of the Sea Convention which recognize the rights of innocent passage through the territorial sea and activities and measures which govern the rights and obligations of the Coastal State and the foreign ships.

[223] Art 5 of 1958 Convention on the Continental Shelf.

[224] Article 3 of the Maritime Zones Act of India. Beckman, Robert, "Current International Law Provisions for Safety of Offshore Oil and Gas Installations", 1st Meeting of the CSCAP Study Group on Safety and Safety of Offshore Oil and Gas Installations, 7-8 October, Danang, Viet Nam.

[225] See Art 60(5) of the 1982 Convention.

[226] India proposed that " The coastal state may designate an area of the exclusive economic zone to be referred as the "designated area" in which the coastal state may prohibit or regulate the passage of foreign warships, with such exceptions as the coastal state may specify and take such other measures, as it may deem necessary or appropriate, for the purpose of:- (a) Protecting the mineral and living resources of the designated area which have already been located therein and other economic uses of the area; (b) Ensuring the safety of artificial islands, offshore terminals, installations and other structures and devices; (c) Protecting the marine environment; (d) Preventing smuggling. This proposal was made at the behest of the Ministry of Food and Agriculture of India which suggested that the living resources need to be protected against pollution from vessels.

India. India neither drafted supplementary rules to give further effects to the Act. In view of the above, it enacted the 1981 Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act. It also promulgated detailed rules on 1982 Maritime Zones of India (Regulation of Fishing by Foreign Vessels). In sum, the 1976 and 1981 Acts together with the 1982 Rules constitute the maritime legislative framework of India. Afterwards, India, enacted 1978 Coast Guard Act,[227] 1974 Water Prevention and Control of Pollution Act, 1958 Indian Merchant Shipping Act,[228] amended in 1983, and various statutory notifications.[229]

### 3.5.1. Implementation of the Law of the Sea Convention provisions and possible conflicts

#### 3.5.1.1. Baselines

The 1982 Convention did not accept the Bangladesh proposal to draw straight baselines expressed in terms of certain depths. In view of this, Bangladesh promulgated a straight baseline system all of whose base points are at sea, lying close to the 10-fathom isobaths and in places as far as 50 nautical miles from the nearest land. This promulgation led to diplomatic protests from India as this had serious implications for freedom of navigation and delimitation of boundaries between India and Bangladesh.[230] India deposited a list of geographical coordinates of points defining the baselines of India on 17 February 2010 pursuant to Notification of the Government of India dated 11 May 2009 and 20 November 2009.[231] Pakistan has declared that it does not recognize the Baseline system promulgated by India and has reserved its right to seek suitable revision of its notification, on any claim India makes on the basis of India's notification to extend its sovereignty/jurisdiction on Pakistani waters or extend its internal waters, territorial sea, EEZ and continental shelf.[232]

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[227] The Coast Guard Act 1978 requires the Coast Guard to (a) Ensure the safety and protection of offshore terminals, installations and other structures and devices; (b) Provide protection to fishermen, including assisting them when in distress at sea; (c) Protect the marine environment by preventing and controlling marine pollution; (d) Assist the customs in anti-smuggling activities when patrolling the seas beyond Indian customs waters; (e) Enforce the Maritime Zones Act of 1976; (f) Take measures for the safety of life and property at sea; and (g) Collect scientific data.

[228] This Act aims to foster the development and ensure the efficient maintenance of an Indian mercantile marine in a manner best suited to serve the national interests and to provide for the registration of Indian ships.

[229] Jitin Varghese laments on the "fact that we are still relying on a 163 year old archaic colonial statute, stresses the need for codifying and reforming maritime laws in India... Some other outdated admiralty laws, still existent in India are Admiralty Jurisdiction (India) Act, 1860, The Admiralty Court Act, 1861, Colonial Courts of Admiralty Act, 1890, Colonial Courts of Admiralty (India) Act, 1891. These laws derive their legitimacy from Art.372, Constitution of India, which states ….. all the laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority." In the aftermath of Enrica Lexie case wherein two Indian fishermen were killed by Italian marine, he further empahsises the need that "Maritime law considering its special nature is a sphere wherein domestic laws regularly come in conflict with International legal principles and needs regular updation." Jitin Varghese, *Reforming Maritime Laws in India*, MindText – A Centre for Public Policy Research Initiative 2013; Also see Shrikant Hathi and Binita Hathi, *Maritime Practice in India*, 7th Edition, (Brus Chambers: 2012).

[230] Fietta, Stephen, "Controversy in the Bay of Bengal: Issues Surrounding the Delimitation of Bangladesh's Maritime Boundaries with India and Myanmar", *ABLOS Conference 2010* (2010), Monaco; Masum Billah, "Delimiting Seaboundry by Applying Equitable Principles", *The Daily Star*, 10 March 2009; Saleque, Khondkar, "Bangladesh Claims to UNCLOS", *Pakistan Defense*, 7 April 2011.

[231] Law of the Sea Bulletin No. 71 and 72.

[232] Note Verbale from Pakistan to UN New York, dated 6 December 2011, Ref. Sixth/LS/7/2011.

#### 3.5.1.2. Passage of foreign warships through the territorial sea

As mentioned above, the demand of India for prior authorization and notification was not incorporated into the 1958 Convention. Only the prior notification clause was inserted. However, the neighboring coastal states, Pakistan, Bangladesh, Sri Lanka and Myanmar have stipulated a requirement of prior authorization and notification for the passage of foreign warships through their respective territorial seas.[233] India faced a potential conflict with Sri Lanka owing to this matter. Sri Lanka attempted to put requirement of prior consent for the passage of Indian warships in accordance with its legislation in the Palk Bay waters. India argued that, on the basis of reciprocity, Sri Lanka may require prior notification only as provided for in the 1976 Indian Maritime Zones Act. The matter was not settled through legal means but by mediation of legal advisors of both parties, under which, a blanket clearance for a specified period was to be given by Sri Lankan authorities and Indian warships were to keep the commander of the Sri Lankan navy informed of their movements through the territorial waters of Sri Lanka. Both countries wanted to sign the Memorandum of Understanding but despite a prolonged period, this has not been materialized.[234]

#### 3.5.1.3. Contiguous zone and security

The 1976 Indian Maritime Zones Act prescribes security as one of the purposes for which a contiguous zone may be claimed.[235] India used this reason while advocating a contiguous zone of 18 miles beyond the outer limit of territorial sea. However, later on India dropped this reason from the negotiations. Therefore, it is abundantly clear that the inclusion of security in the Act as one of the purposes for which a contiguous zone could be claimed was improper. In this regard, it should be noted, however, that India still needs to amend its legislation to make it compatible with the 1982 Convention.

#### 3.5.1.4. Delimitation of Maritime Boundary for EEZ and the Continental Shelf

The question of delimitation of the EEZ and the continental shelf between adjacent and opposite states proved to be one of the most difficult issues in the 1982 Convention negotiations.[236] There were two main opposing views; one group favouring equitable principles as the basis of delimitation criteria and other emphasizing the median or equidistance line as the normal boundary. The final text of the Convention uses the language of Article 38 of the ICJ Statute which is vague and cannot be very useful in settling the issues that once arose, with a view to achieve an equitable solution.[237] India has maritime boundaries with seven adjacent or opposite states (Sri Lanka,

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[233] Bangladesh, Section 3(7) of Territorial Waters and Maritime Zones Act 1974; Myanmar, Section 9(a) of the Territorial Sea and Maritimes Zones Law 1977, Pakistan, Section 3(2) of the Territorial Waters and Maritimes Zones Act 1976 and Sri Lanka, Section 3(1) of the Maritime Zones Law, 1976.

[234] V. Suryanarayanan, "Consolidate the Gains of India's Foreign Secretary's Visit to Sri Lanka", *South Asia Analysis Group*, 6 February 2011; *India-Sri Lanka: Furthering Peacetime Engagement*, Indian Military Review, January 2011.

[235] The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act 1976, Section 5(4).

[236] Ted L. McDorman, "The Entry into Force of the 1982 Convention and Article 76 Outer Continental Shelf Regime", 10 *The International Journal of Marine and Coastal Law* 2, 165-87 (1995); D. R. Verwey, "Outer Delimitation of the Continental Shelf under the 1982 Convention on the Law of the Sea: Legal Solution or Legal Confusion? 7 *Leiden JIL* 2, 23-42 (1994); J. Symonides, *Continental Shelf in the Convention on the Law of the Sea 1982*, (Berlin: Akademie-Verlag, 1987); Young Leng Lee, "The 1982 Convention on the Law of the Sea and Continental Shelf Problems in Southeast Asia", 9 *Ocean Management* 61-72 (1984).

[237] The analysis of the jurisprudence on the maritime delimitation in exclusive economic zones based on the Gulf of Maine, North Sea Continental Shelf, Cameroon v. Nigeria, Qatar v. Bahrain cases of the ICJ and the

the Maldives, Myanmar, Indonesia, Thailand, Pakistan and Bangladesh). S. P. Jagota, the Deputy Leader of the Indian Delegation speaking on the delimitation criteria concluded that "in a nutshell, it would appear that by the new proposal of the President, the controversy between the Equity Group and the Equidistance Group regarding the appropriate balancing of the basic elements of delimitation criteria has been resolved by making a reference to applicable international law combined with the goal of delimitation, namely, an equitable solution".[238] It may, however, be contended that this reference to international law and equitable solution is too vague, and that the precise factors to be taken into account in delimitation and the value or effect to be given to them have not been specified or clarified. To that extent, it may be argued that the new proposal would not act as a practicable guide either to negotiators, teachers, and researchers or even to arbitrators or judges concerned with delimitation questions. India has concluded maritime boundary agreements with Sri Lanka (1974 and 1976[239]), Indonesia (1974)[240], and the Maldives (1976)[241] and trijunction point with Thailand/Indonesia (1977),[242] Sri Lanka, India and Maldives[243] and Myanmar (1982),[244] and with Myanmar and Thailand.[245] However, the maritime boundary issues with Pakistan and Bangladesh[246] are yet to yield tangible satisfactory solution. In view of the above

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Barbados v. Trinidad and Tobago Award of 11 April 2006, the Anglo-French Continental Shelf case leads Shaw to conclude that "in all cases, whether delimitation is …economic zone…the appropriate methodology to be applied is to draw a provisional equidistance line as the starting position and then see whether any relevant or special circumstances exist which may warrant a change in that line in order to achieve an equitable result. The presumption in favour of that line is to be welcomed as a principle of value and clarity". Malcom Shaw, *International Law* (6th edition) (Cambridge: 2008), p. 605-06.

238 S. P. Jagota, the Deputy Leader of the Indian Delegation speaking on the delimitation criteria quoted in O. P. Sharma at p. 194.

239 Agreement between Sri Lanka and India on the Boundary in Historic Waters between the two Countries and Related Matters of 26 and 28 June 1974 and Agreement between Sri Lanka and India on the Maritime Boundary between the two Countries in the Gulf of Mannar and the Bay of Bengal and related Matters of 23 March 1976.

240 Agreement between the Government of the Republic of India and the Government of Republic of Indonesia relating to the Delimiation of the Continental Shelf boundary between the two Countries of 8 August 1974.

241 Agreement between India and Maldives Boundary in the Arabian Sea and Related Matters.

242 Agreement between the Government of the Kingdom of Thailand and the Government of Republic of India on the delimitation of the sea-bed boundary between the two countries in the Andaman Sea of 22 June 1978

243 Agreement between Sri Lanka, India and Maldives concerning the delimitation of the trijunction between the three Countries in the Gulf of Mannar of 23, 24 and 31 July 1976.

244 Myanmar has lodged a claim that India's submission made unilaterally by India and based on domestic law of India is not in conformity with the provisions of Article 83 of the UNCLOS and requested the CLCS to consider India's claim without prejudice to the continental shelf areas which Myanmar is fully entitled to claim in accordance with the relevant UNCLOS provisions. See Note Verbale of Myanmmar to UN Secretary-General dated 4 August 2009, ref. No. 391/032017. Bangladesh has also lodged a claim through its NV dated 29 October 2009 (ref. PMBNY-UNCLOS/2009). Oman too has lodged the claim (with regards to Arabian Sea) that the Indian claim overlaps with Oman's claim for continental shelf and therefore the boundaries are subject to delimitation.

245 Agreement between the Government of the Union of Myanmar, the Government of the Republic of India and the Government of the Kingdom of Thailand on the determination of the trijunction point between the three countries in the Andaman Sea of 27 October 1993.

246 Discovery of gas and India and Myanmar claims on continental shelf in the Bay of Bengal has left Bangladesh with less than 200 miles of EEZ and no continental shelf for Bangladesh. Bangladesh does not prefer the 'equidistance principle' preferred by India and Myanmar. This led to Bangladesh and Myanmar to refer the case to the ITLOS, whereas in case of India and Bangladesh, the case is brought before the PCA. India and Bangladesh have three issues which impede the settlement on maritime boundary between two nations. These are ownership of the New Moore (South Talpatti) island, demarcation of sea boundaries, and flow of Haribhanga River. These issues have direct impact on the demarcation of territorial waters, the EEZ and the continental shelves, which are essential for the exploitation of marine resources by these nations. This was important step for the foreign policy establishment of Bangladesh because Bangladesh for long had believed that its maritime area in the Bay of Bengal has been unfairly cut off by India and Myanmmar.

ambiguity in the Convention which ascribes importance to equitable principles and not according primacy to the median or equi-distance line, India will find difficult to settle the maritime boundaries with these neighbours.[247]

#### 3.5.1.5. Exclusive Economic Zone

According to the Article 55 of UNCLOS, the Exclusive Economic Zone (EEZ) is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention. As per its article 56, in the EEZ the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. The above two articles give the coastal states rights over an area beyond and adjacent to the territorial sea, for economic exploitation. But as per its article 57, this EEZ shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

#### 3.5.1.6. Continental Shelf

Article 76 gives rights to the coastal states to go down to some points beyond the EEZ called the continental shelf. As per its sub article 1, the continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. As the limits of sea boundary prolongs towards the deep sea, disputes may arise between adjacent states on their boundaries and claims over their natural resources. So, the sub article 4(a) of the article 76 gives clarifications to resolve the disputes.

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Khurshid Alam, "De-Limitation of the Bangladesh-Myanmmar Maritime Border", 5 *South Asia Journal*, July 2012. Dispute concerning delimitation of maritime boundaty between Bangladesh and Myanmar will have will have strong influence in future litigations, especially, in the Bangladesh v. India case because the tribunal recognized the entitlement of Bangladesh beyond 200 NM and delimited the area by extending the 215° line southwards. In addition, to ensure Bangladesh's access to such area the Tribunal also granted continental shelf right of Bangladesh underneath Myanmar's EEZ in the grey area. Commander M Yeadul Islam, "Maritime Delimitation Case Laws for Upcoming Litigations" 33 *Bangladesh Institute of International and Strategic Studies* 3, July 2012; Dispute Concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh vs Myanmar) Judgement available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1C16_Judgment_14_02_2012.pdf accessed on 19th March, 2012, para.33. Bangladesh has instituted arbitral proceedings concerning the delimitation pursuant to Article 287 and Annex VII, Article 1 of the UNCLOS and the case is being heard by the Arbitral Tribunal established by the Permanent Court of Arbitration.

[247] Although the book does not examine the core content of the maritime dispute between India on the one hand and Bangladesh and Pakistan on the other hand, India continues to assert its core interest to prevail in maritime boundary issues. India can be said to have been using delaying strategy to maintain the claim and has been avoiding using any force and will be reluctant to use any force in the foreseeable future. One of the reasons could be that India's military forces till now have been mostly land-based and it has started developing significant naval capacity only in the recent years. As the maritime boundary issues would pose a significant obstacle to the realisation of the immense importance of securing the ocean resources, the coastlines and sea lanes in the Indian Ocean, Arabian Sea and the Bay of Bengal, India has started augmenting overall strength of its naval forces. Such augmentation will give it more leverage and right to assert its core interests too.

Article 76 sub-section 4(a) provides for the purposes of this Convention. The coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured by either, i) a line delineated in accordance with paragraph 7 by reference to the outer-most fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or ii) line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. This article 76 limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a) (i) and (ii), not beyond 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or not beyond 100 nautical miles from the 2,500 metre isobaths which is a line connecting the depth of 2,500 meters.

India and Bangladesh sharing the common seashore of Bay of Bengal enriched with huge natural resources, have confronting views in order to determine the delimitation of their respective right over common sea-shore of Bay of Bengal. The resolution of Indo-Bangladesh maritime boundary dispute entails addressing two contentious issues – that of the baselines to demarcate maritime areas and the delimitation boundaries including the outer limit of the overlapping extended continental shelf. Following revision, the UNCLOS stipulated that the 'median' or the 'equidistance' be the principle for maritime boundary demarcation which India supports. Bangladesh strongly opposes the 'equidistance' principle given the nature of its coast.[248] The state practice of India, Bangladesh and Myanmar show that (a) Bangladesh had already notified its baseline, which is disputed by both India and Myanmar. It measured its baseline from a distance of 10 fathoms from the shore, arguing that its coastline is unstable. But it was the allotment of offshore blocks by Bangladesh to multinationals ConocoPhillips and Tullow, which led to the aggravation of the dispute. India asked the companies to desist from oil explorations and delimitation in respect of the extended continental shelf until the delimitation was completed on the part of India;[249] (b) Bangladesh disputes the claim made by India in respect of natural prolongation of its landmass through the outer edge of Bay Of Bengal (BOB Sector) and the western Andaman Sector by giving some geographical reason; (c) Bangladesh claims that India's claim is not supported by geographical and geomorphologic evidence. Furthermore, according to Bangladesh the submission of India is liable to be neglected as the submission is made without consultation or consent from the states which are parties to such dispute. Thus, the current dilemma concerns the necessity to explain the implication of the relevant provisions of UNCLOS, to assess the impact of this Convention, to consider and recognize India's rightful claims made in the "Partial submission to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8 of the United Nations Convention on the Law of the Sea" on 11th day of May, 2009 and to find the solution of the following paradox:- the coasts of Bangladesh and India in the Bay follow a curve, there is overlap of the EEZs as well as continental shelves of the two countries, leading to disagreement on where exactly their

[248] In Qatar v. Bahrain, the ICJ held that the appropriate methodology was first to provisionally draw an equidistance line and then to consider whether circumstances existed which mus lead to an adjustment of that line. It also noted that "the equidistance/special circumstances" rule, applicable to territorial sea delimitation, and the 'equidstance/relevant circumstances' rule as developed since 1958 it its jurisdprudence and practice regarding the delimitation of the continental shelf are closely related. Qatar v. Bahrain, ICJ Reports 2001, pp. 110-111. This approach has been further affirmed by the Court in Cameroon v. Nigeria case, I.C.J Reports 2002, pp. 441-42.

[249] http://news.priyo.com/story/2010/dec/06/13565-govt-yet-award-gas-block-tullow-disputed-area accessed on 28 August 2012.

respective maritime borders fall. And last but not the least, to discuss and resolve the present dispute amicably.[250]

### 3.6. Enforcement Challenges

This section analyses issues and challenges India has faced in implementing and enforcing Law of the Sea Convention provisions at the domestic level. Activities in maritime zones in India are monitored and managed by a diverse number of government institutions having differing rights, interests, mandates and responsibilities. Although Section 11 of the Maritime Zone Act 1976 (MZI Act 1976) provides stringent punishment of imprisonment up to three years or unlimited fine or both, the enforcement provisions are encountering a number of stumbling blocks. The lack of statistical data on the number of infringement in the MZI does not actually point to sanctity of the Maritime Zone Act or towards the effectiveness of the Act and its enforcement. It is arguable that this is more a case of lack of suitable provision pertaining to the power/authority to prosecute. This was mainly due to the requirement of obtaining previous sanction of the Union Government before instituting prosecution against any person prescribed under Section 14 of the Maritime Zone Act 1976. Reluctance to try an offender under this Act is probably due to prolonged delay in obtaining the sanction of the MEA, the administrative ministry under this Act.[251]

With the overlapping jurisdictions and the incorporation of freedom of seas through the UNCLOS, boarding a ship without authorization under law may lead the law enforcement agencies for a protracted legal engagement and payment of consequent damages for delay. Further, although Section 15 of the MZI Act 1976 empowers the Union Government to make rules by notification to carry out the purposes of the Act in general and for delegating specific power, the fact remains that India is yet to frame these rules under the said Maritime Zone Act, unlike the MZI Rules, 1982 framed under the Maritime Zone Act, 1981. As of December 2009, India has issued only seven notifications under the Maritime Zone Act 1976.[252] Of them two important notifications issued in 1986 related to notifying "designated area" of oil platforms etc., in the Western coast (ONGC oil platforms of Bombay High North and South near Mumbai) and notification for prohibition of entry of Merchant ships for other sea traffic (except the Indian Naval ships and Indian Coast Guard ships) within 500 meters of these restricted zones, named as "designated areas". The coordinates of the oil platforms notified as designated areas were amended and more oil rigs were added vide the notification issued by the Ministry of External Affairs in 1996.[253] However, with the absence of rules framed under the said Act or any notification authorizing the

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[250] It may be noted, in this context, that India welcomed the decision of the General Assembly enhancing the period of functioning of CLCS from 15 weeks a year to 21-26 weeks a year. With the increased timeframe, the CLCS will be able to consider claim submissions for an extended continental shelf in an expeditious manner. MEA Annual Report 2012-13, p. 103.

[251] Section 14 of the Maritime Zones Act provides that "No prosecution shall be instituted against any person in respect of any offence under this act or the rules made there under without the previous sanction of the Central Government or such officer or authority as may be authorized by that Government by order in writing in this behalf".

[252] S. K. Mishra, *Compliance with the Provisions of the Territorial Waters, Continental Shelf, Exclusive Economic Zones and Other Maritime Zone Act*, 1976, Ministry of Shipping Notification, Government of India, Notification of 14 May 2002; Notification concerning Service Tax, 7 July 2009.

[253] As per the Notification, "the areas in the Continental shelf or, as the case may be, in the exclusive economic zone of the India where the installations, structures, and platforms, the coordinates of which are given in the schedule…and the areas extending up to five hundred meters from the said installations, structures, and platforms as designated areas…". *Pride Foramer v. Union of India*, AIR 2001 Bom 332, 2002 (4) BomCR 751; *Jindal Drilling and Industries Ltd. V. Union of India*, writ petition no. 610 0f 1994; *Hitch Drilling*

Naval Officers or Indian Coast Guard officers with the power of apprehension, arrest etc., the very purpose of imposition of such restrictions, is rendered superfluous. Moreover, there is also a clear absence of listing of offences in the MZI Act 1976.[254]

A critical examination of the MZI Act 76, also reveals that the offences mentioned therein are generalized in Section 11, which states that "whoever contravenes any provisions of this Act or of any notification thereunder shall (without prejudice to other action which may be taken against such person under any other provision of this or of any other enactment) be punishable with imprisonment which may extend to three years or with fine, or with both". While offences related to poaching are dealt with under the MZI Act 1981, smuggling under the Customs Act 1962, offences such as unauthorized research activity, unauthorized operation of any vessel in the Offshore Development Area (ODA), acts aimed at collecting information to the prejudice of the defence or security of India, any activity not having a direct bearing on passage have not been covered under any other Act. In many instances, cases resembling violations of provisions of MZI Act 1976 have been booked under other acts like Indian Penal Code, 1860, Indian Arms Act, 1959, and Indian Passport Act, 1967, etc. and did not yield the desired results.

It is indeed remarkable that no credible statistics are available in the public domain with respect to violations in compliance of 1976 MZI Act. It would be highly unimaginable that in the wide expanse of the EEZ, no violations occur. It may be more likely that the violations occur but are not detected, due to the surveillance constraints, or that enforcements are not actually enforcement in view of inherent lacunae. However, in the few cases that were reported and analyzed, it was amply clear that the maritime enforcement agencies have observed vessels clearly contravening the provisions of 1976 MZI Act of their conduct in territorial waters. The vessels remained apprehended and subjected to measures under various sections of the Indian Penal Code, 1860 Act, Indian Arms Act 1959, Indian Customs Act, 1962 etc. except under 1976 MZI Act as it requires obtaining of sanction from the Union Government with necessary justification.

India has been constantly experiencing increase in the presence of support vessels in the Offshore Development Area, increased movements of coastal vessels and the simultaneous presence of foreign vessels exercising passage in the sea lanes adjoining the coast. Whilst the "Cabotage Rule" is clearly mandated through the Merchant Shipping Act 1958, through Articles 405 to 414,[255] to safeguard Indian interest in coastal shipping and activities, it does permit foreign vessel operating through 'licensing' by adhering to stipulated norms. With the continuous increasing operations of deep sea fishing vessels with foreign crew, regardless of restricted permissions, the Indian coast is becoming increasingly vulnerable and hence requires robust response in form of

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*Services India v. Union of India*, writ petition no. 984 of 1997; *Collector of Customs Calcutta v. Sun Industries*, 1988 SCR (3) 500, 1988 SCC Supl. 342; *Garden Silk Mills India v. Union of India*, writ petition 29 September 1999.

[254] The Act does not specify the list of offenses, however, a close reading of Article 5 of the MZI Act 1976, allows to understand that "No person (including a foreign government) shall, except, under and in accordance with, the terms of any agreement with the Central Government or of a licence or a letter of authority granted by the Central Government, explore, exploit, any resources of the exclusive economic zone or carry out research or excavation or conduct any research within the Exclusive Economic Zone or drill therein or construct, maintain or operate any artificial island, off-shore terminal, installation or other structure or device therein for whatsoever purpose.

[255] Cabotage is the transport of goods or passengers between two points in the same country. Originally, starting with shipping cabotage now also covers aviation, railways and road transport. Cabotage is trade or navigation in coastal waters, or the exclusive right of a country to operate the air traffic within its territory. http://en.wikipedia.org/wiki/Cabotage, accessed on 17 November 2009.

an appropriate amendment to the MZI Act 1976.[256] The problem gets compounded due to the fact that fish caught by the licensed foreign vessels are often shipped to the mother ship for a further illegal transshipment and that such practice cannot be verified by any legal means for the absence of such norms.[257] In this regard, it can be observed that checking tasks along the sea coasts are enormous. Secondly, it is not feasible to seal the maritime route like road areas. Thus, a robust vigilant mechanism backed by strong legal enforceable provisions offers a near ideal solution in this regard. This would inevitably require amendments to MZI Act 1976. As India is set to increase from 2.01 to 3 million square kilometers its continental shelf, India is also required to put in place corresponding legislative and regulatory framework.

### 3.7. Climate Change and Maritime Boundary Issues with Bangladesh, Pakistan and Sri Lanka

Climate change issues have gone beyond the environmental concerns.[258] The issues have direct and significant geopolitical impacts as climate change can alter the national boundaries.[259] Rapidly rising sea-levels,[260] coastal-states and low-lying area between India and neighbouring nations are vulnerable to the impact of the climate change.[261] With the rise in sea levels, coastlines may shift or submerge and will create uncertainties in the outer boundaries and corresponding issues of coastal states' rights. This in turn could lead to claims of altered maritime boundaries, which may affect territorial claims between states.[262] Not only in the sub-continent, but the world across, maritime boundaries, due to the prolonged efforts of the UNCLOS have been settled.[263] However, the climate change issues will undo some of these settlements. Climate change will lead to environmental

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[256] Radhakrishnan Rao, *India's Coastal Security,* http://www.indiastrategic.in/topstories231.htm accessed on 30 June 2011; P. K. Ghosh, "India's Coastal Security: Challenges and Policy Recommendations", *Observer Research Foundation of India Brief 22*, August 2010; Marine News, "Coastal Security Group: Marine Police Stations in Tamil Nadu", 13 April 2009; "Coastal Security Group gets 12-tonne Boat," *The Hindu* 30 May 2009; Saurabh Joshi, "Coastal Security: Navy's Report Card", http://www.stratpost.com/coastal-security-navys-report-card, 30 June 2011.

[257] It has been widely reported and verified that terrorists who carried out attacks in Mumbai on 26 November 2008 used the coastal route for their transit. This clearly shows the level of vulnerability the Indian coast is facing.

[258] Nico Schrijver, "The Impact of Climate Change: Challenges for International Law", In U. Fastenrath (ed.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, pp. 1278-1297. (Oxford: Oxford University Press, 2011).

[259] Aldo Chircop, "Ships in distress, environmental threats to coastal states, and places of refuge: new directions for an Ancien Regime?", 33 *Ocean Development and International Law* 2, 207-26 (2002).

[260] M. Rafiqul Islam, and M. K. Zaman, "Looming Global Warming-Induced Sea Rise and Transfer of Green Technology to the Least-Developed Countries: Challenges and Options for Submersible Bangladesh," 32 *European Intellectual Property Review* 12, 643-652.

[261] Cleo Paskal, "How climate change is pushing the boundaries of security and foreign policy," Energy, Environment and Development Programme, EEDP CC BP/07/01, Chantham House, June 2007; M. D. Nalapat, "UPA Ocean Diplomacy Undermining Indian Interest", *Organiser*, 25 September 2005; Harun Ur Rashid, "Is India taking Advantage?", *Daily Star*, 17 May 2006; Boundary News, Durham University, "Sea Level Rise is blamed for Submerging Disputed Island between Bangladesh and India", 26 March 2010; Rasyidal Hafiz, "Climate Change and Its Further Impact on Maritime Security Interests of Asia-Pacific States", http://www.tandef.net/climate-change-and-its-further-impact-maritime-security-interests-asia-pacific-states accessed on 4 July 2011; Admiral V. S. Shekhawat, "India's Maritime Threats", 22 *India Defense Review* 2, April-June 2007.

[262] http://siteresources.worldbank.org/INTLAWJUSTICE/Resources, accessed on 23 June 2011.

[263] David D. Caron, "Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict*" in* Seoung-Yong Hong and Jon M. Van Dyke eds., *Maritime Boundary Disputes, Settlement Processes and the Law of the Sea*, (Brill: 2008).

refugees to India and will create tension over maritime boundaries in the Bay of Bengal.[264] The climate change may lead to change in sea level which will have direct impact on certain baselines which would further trigger the significant effect on maritime boundaries. The ongoing maritime boundary issue between India and Bangladesh has its part origin in the possible effects of climate change and Bangladesh losing out important offshore oil and other resources in the Bay of Bengal. Under the existing circumstances, if coastline of Bangladesh would squeeze internally, due to climate change, its maritime boundary would retreat correspondingly which may completely squeeze it out of zones that are rich in hydrocarbons.[265] Sri Lanka, India's neighbour in the south, due to climate change is likely to undergo "widespread effects of climate change including, climate variability and sea-level rise, directly affecting the overall abundance and security of endemic species within Sri Lanka" creating challenges of its own to the Indo-Sri Lanka relations.[266] With regards to the ongoing dispute of Sir Creek, it has been suggested that the area may be converted into a Zone of Disengagement or a jointly administered maritime park. Not only such a solution would help prevent fishermen from both countries doing fishing activities in the area without fear but such solution could help in mitigating the effects on sensitive ecology of the 96 km area due to climate change in favour of both countries.[267]

### 3.8. Role of the Indian judiciary and the implementation of the Law of the Sea Convention at national level

The Indian judiciary has been called upon to resolve and clarify several cases pertaining to the implementation of the Law of the Sea Convention with regards to the domestic practice.

#### 3.8.1. *State of Kerala v. Joseph Anton*y case[268]

In this case, the dispute was essentially between the fishermen in the State of Kerala (a state in the south of India) which use traditional fishing crafts such as catamaran, country crafts and canoes which use manually operated traditional nets and those who use mechanized crafts which mechanically operate sophisticated nets like purse senie, ring seine, pelagic trawl and mid-water trawl gears for fishing in the territorial waters of the State. The Court in this case clarified that the operation of fishing by mechanized nets like the purse seine is responsible for destroying the fish stock by killing juvenile fish and fish eggs and thus preventing their breeding. The mechanized nets are thus not only impoverishing the mass of poor fishermen by reducing their catch progressively but also by destroying the standing fish stock itself.[269] There is also a danger of over-exploitation

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[264] Proceedings from the Indian Ocean Maritime Security Symposium, Australia Defense College, Canberra, Australia, 15-17 April 2009; Lusthaus, Jonathan,"Shifting Sands, Sea Level Rise, Maritime Boundaries and Inter-State Conflict", 30 *Politics* 2, 113-8 (2010).

[265] Harun ur Rashid, 'Is India taking advantage?', *Daily Star*, 17 May 2006 quoted in Pascal above at p. 3.

[266] R. Mendelsohn, M. Munasinghe and Seo S Niggol (ed.), "Climate change and agriculture in Sri Lanka: A Ricardian Valuation", 10 *Journal of Environment and Development Economics*, 581-596 (2005).

[267] A solution to Sir Creek could galvanise India-Pakistan relations, http://articles.timesofindia.indiatimes.com/2012-12-05/ accessed on 1 August 2013.

[268] AIR 1994 SC 721.

[269] Pramod Ganapathiraju, "Illegal, Unreported and Unregulated Marine Fish Catches in the Indian Exclusive Economic Zone – Field Report," *Policy and Ecosystem Restoration in Fisheries,* Fisheries Centre, University of British Columbia, Canada, Vancouver, (April 2010); B. Bhathal, "Historical reconstruction of Indian marine fisheries catches, 1950–2000, as a basis for testing the Marine Trophic Index", 13 *Fisheries Centre Research Reports* 5, Fisheries Centre, University of British Columbia, 2005; P. V. Dehadrai, "Utilization of Marine Fisheries Resources in India, Proceedings of the National Symposium on Utilization of Living Resources of the Indian Seas, December 19-21, 1987, CIFE, Bombay,Published by National Academy of Sciences, India, pp. 15-18; B. M. Kurup and R Radhika, "Status of trawl fishery in Kerala, Paper submitted

leading to complete extinction of the pelagic fish within the territorial waters.[270] The Court clarified the adverse impacts of fishing by mechanized nets.

### 3.8.2. *Swan Fisheries (Private) Ltd. and Anr. v. State of West Bengal*[271]

In this case, the West Bengal High Court drew a conclusion that the Indian state machinery's involvement in the harassment of foreign nationals with no fault of their own by way of seizure and their arrest could adversely affect India's foreign relations and hence it would not be in the interests of the state. In this case, the Court examined the argument that there was no *prima facie* case under the Indian Penal Code, the MZI Act 1976, the Indian Forest Act 1927, the Indian Telegraph Act 1885 against the company or its Directors or the crew members who have been arrested and subsequently released.

### 3.8.3. *Commissioner of Income Tax v. Ronald William Trikard and Others*[272]

In this case, the issue was regarding chargeability of income tax on a non-resident working on the continental shelf, outside India at relevant time. Income of non-resident individual working in continental shelf and exclusive economic zone was sought to be taxed for years prior to the issue of notification, which extended Act to the continental shelf. In this case, the Court held that India has limited sovereign powers over the area beyond territorial waters and continental shelf and exclusive economic zone are not part of the Indian territory at the relevant time. Therefore, income arising or accruing there prior to notification extending the Act to such places cannot be taxed. The continental shelf and exclusive economic zone in which the assessed worked were not part of India prior to the Notification[273] of the Government of India in view of the provisions of section 6(6) and section 7(7)of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones, Act, 1976 and consequently the salary income earned by the assessees prior to the notification in 1983 was not chargeable to tax under the Income Tax Act, 1961 in the assessment year 1983-84.[274]

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to Fishery Technology"; J. Kurien and T. R. T. Achari, "Overfishing along Kerala Coast: Causes and Consequences," 23 *Economic and Political Weekly* 35/36, 2011-18 (1990); S. Miglani, "Foreign fishing vessels may be driven from Indian deep seas", *Asia Times*, April 8, 1997; Pramod, G., "Trawl fishery along the India's northeast coast: an analysis of catches, seasonal changes and ecological impacts", Marine Affairs Program, *MMM Project*, Dalhousie University; K. M. Shajahan, "Deep Sea Fishing Policy: A Critique", 31 *Economic and Political Weekly* 5, 263-66 (1996); V. Vijayan, L. Edwin and K. Ravindran, "Conservation and Management of Marine Fishery Resources of Kerala State, India", 23 Naga: The ICLARM Quarterly 3, 6-9 (2000).

[270] "Global Status of Oceanic Pelagic Shark and Rays", Lenfest Ocean Program: Protecting Ocean Life through Marine Sciences, Washington DC, December 2007; Johnston, Paul and Santillo, David, "Conservation of Seamount ecosystems: Application of the MPA Concept", 2002 Annual ICES Conference, Copenhagen, October 2002; D. Pauly, V. Christensen, S. Guenette, T. J. Pitcher, U. R. Sumaila, C. J. Walters, R. Watson and D. Zeller, "Towards sustainability in world fisheries", 418 *Nature* 689-95 (2002); C. M. Roberts, "Deep impacts: the rising toll of fishing in the deep sea", 17 *Trends in Ecology and Evolution* 5, 242-45 (2002); Christopher Moyes, and Nuno Fragoso, "Predicting Postrelease Survival in Large Pelagic Fish", 135 *Transactions of the American Fisheries Society* 1389-97 (2006).

[271] 1998 (60) ECC 36

[272] [1995] 215 ITR 638 (Mad)

[273] Bearing G.S.R. No. 304(E) (see [1983] 142 ITR 11), dated March 31, 1983

[274] Decision followed in the case, *McDermott International Inc. v. Union of India and Ors.* [1988] 173 ITR 155 (Bom)

### *3.8.4. Great Eastern Shipping Company Ltd. v. State of Karnataka and Ors.*[275]

The Indian courts have also clarified the issues regarding the extension of the jurisdiction with respect to the individual states of a Union. The applicability of the legislation of the individual states over this territory has also been disputed in some cases. In the case of *Great Eastern Shipping Company Ltd. v. State of Karnataka and Ors.*,[276] Section 3 of the MZI Act 1976 and Article 297 of the Constitution was interpreted by the High Court of Karnataka, in order to decide the question of whether the use of tug on the territorial waters would amount to use of the tug within the State of Karnataka. In this case, the Court interpreted the provisions of the Indian statutes to hold that the territory of a State consists in the first place of the land within its boundaries. In the case of a State with a sea coast, certain waters which are within or adjacent to its land boundaries, and these waters are of two kinds-national and territorial.[277] The Court also held that the marginal seas 'bore such a relation to the nearest land as to be regarded as appurtenant to it.'[278] 'Notwithstanding, the principle of the freedom of the seas, there are certain portions of the sea along a State's coasts which are universally considered as a prolongation of its territory and over which its jurisdiction is recognized.'[279] With some it is an actual ownership (dominium) because it implies in certain cases, an exclusive enjoyment very characteristic of ownership, especially in the matter of fishing and pilotage, others treat it as a right of limited sovereignty conferring only a right of jurisdiction on the littoral State.[280]

### 3.8.5. *Pride Foramer v. Union of India*[281]

The Indian courts have also examined some aspects of the Customs Act and applicability of its provisions by way of a notification as per Section 6 (6) of the MZI. In the case of *Pride Foramer v. Union of India*,[282] while interpreting the national and international provisions, the Court came to the conclusion that the contiguous zone of India is that part of the sea which is beyond and adjacent to the territorial waters and the zone extends to a line which is 24 nautical miles of the coast. This section specifically recognizes the competence of the Union Government to exercise such powers and take such measures as to consider necessary with respect to (a) the security of India, and (b) immigration, sanitation, customs and other fiscal matters. The Court concluded that the Indian position is consistent with the mandate of the UNCLOS, the territorial sovereignty of the coastal State extends beyond the land territory only up to the outer limits of the territories sea (the equivalent expression in our 1976 Act is "territorial waters") which is 12 nautical miles from the low water mark line of the coast (base line) which is consistent with the UNCLOS, 1982.

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[275] [2004] 136 STC 519 (Kar)
[276] [2004] 136 STC 519 (Kar)
[277] (i) "National waters" : These consist of the waters in its lakes, in its canal, in its rivers together with their mouths, in its ports and harbours, and in some of its gulfs and bays .....(ii) "Territorial waters" : These consist of the waters contained in a certain zone or belt, called the maritime or marginal belt, which surrounds a State and that includes a part of the waters in some of its bays, gulfs, and straits'
[278] Hyde on International Law, Second Edition, Volume 1, page 452.
[279] *Ibid.*
[280] Messrs Higgins and Colombos on International Law of the Sea.
[281] AIR 2001Bom 332.
[282] AIR 2001Bom 332.

### 3.9. Maritime Zone Act 1981

With increase in the poaching activities by the foreign fishing vessels in the Indian EEZ, a need was felt to frame a specific law to deal with the illegal fishing as also to protect the Indian fishermen and other maritime interests of India. [283] Accordingly, the Maritime Zones of India (Regulation of Fishing by Foreign Fishing Vessels) Act, 1981 was enacted to regulate fishing activities by foreign fishing vessels and to provide for deterrent punishment by way of imprisonment, heavy fines and confiscation of the foreign fishing vessels convicted of offences of illegal fishing. This Act complements the Maritime Zone Act 1976 where the rights in the EEZ were protected for exploitation of living resources by the citizens of India and the foreign vessels need to obtain license or permit in accordance to the conditions laid down in Maritime Zone Act 1981.[284] The Act specifically authorized the Union government under Article 9, Chapter III for the enforcement of its provisions. Further, through an amendment, the Navy as well as the police was also subsequently authorized to implement and enforce the provisions of the said Act. With the passage of time, the MZI Act 1981 came to be employed more frequently by the agencies of the Union government such as the Navy and the Coast Guard at Sea. Specific power of apprehension, arrest and seizure were vested with the state police officials in the coastal states and specified ports were also notified in each coastal state where foreign fishing vessels could be taken for being handed over to police for prosecution. Designated courts at specific places of trial with judicial magistrates first class were also empowered, in view of the heavy fines prescribed under the said Act for which the magistrates were not originally empowered under the criminal law of India. The 1981 Act, unlike the umbrella legislation of the Maritime Zone Act 1976 did not have any restriction of obtaining previous sanction of the Union government before initiating prosecutions for the various offences, although the accused persons under the Maritime Zone Act 1981 are all foreigners.[285]

### 3.10. Monitoring and liasioning agency

The Coast Guard of India is the principal agency for enforcing all national legislations in the Maritime Zones of India. During hostilities, India's Coast Guard functions under the overall operational command of the Navy as is

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[283] The lack of robust framework on foreign fishing vessels is not only a subject of legal policy-making and scholarly interest. The fishing community of India and neighbouring countries, Pakistan, Sri Lanka and Bangladesh have been suffering in various ways due to lack of such framework. Even being a most powerful country in the South Asian region, the fishing laws of India continue to enable exploitation of fish stocks in its EEZ. http://www.downtoearth.org.in/content/how-foreign-vessels-exploit-india-s-loopholes-fishing-laws accessed on 31 July 2013.

[284] Although India enacted this act much later than two of its immediate neighbours with which it has unsettled maritime issues, its 1981 Act needs to be critically examined in light of provisions of the Territorial Waters and Maritime Zones Act 1976 of Pakistan; Territorial Waters and Maritime Zones Act 1974 of Bangladesh. Joshua Ho and Sam Bateman analyse economic and security dilemma and challenges in the Asian region including South Asia and raises concerns due to the anomaly and implementation of maritime zones act prevalent between these three countries. Joshua Ho and Sam Bateman (ed.), *Maritime Challenges and Priorities in Asia*: Implications for Regional Security, (Routledge, 2013).

[285] See Charu Gupta and Mukul Sharma (ed.) *Contested Coastlines: Fisherfolk, Nations and Borders in South* Asia, (Routledge, 2012). Gupta and Sharma analyses the plight of foreign vessels and nationals of neighbouring countries of India, especially Pakistan and Bangladesh and apart from raising security and economic concerns, identifies ordinary fishermen's livelihood related problems and challenges and how they fall victim of lack of sound legal framework and enforcement machinery. Cassandara de Young, *Review of the State of the World Marine Capture Fisheries Management: Indian Ocean*, FAO: 2006.

done by other Coast Guards of the world.[286] India established the Department of Ocean Development in 1981 with an aim of creating a deeper understanding of the oceanic regime of the northern and central Indian Ocean and also development of technology and technological aids for harnessing of resources and understanding of various physical, chemical and biological processes.[287]

### 3.11. Role of various executing bodies in fulfilling the obligations

The Department of Ocean Development (now the Ministry of Earth Sciences) of India is the nodal agency for implementation of the provisions of UNCLOS. It ensures that the provisions concerning the framework and mechanisms for management of oceans are fulfilled by India. Indians have been elected on all the institutions established under United Nations Convention on Law of the Sea, International Seabed Authority, and Commission on Limits of Continental Shelf and International Tribunal on Law of the Sea.[288]

### 3.12. Delineation of Outer Limits of Continental Shelf

Since India intends to delineate the outer limits of the continental shelf beyond 200 nautical miles, it is required to submit particulars of such limits along with the supporting scientific and technical data. If delineation is properly undertaken, India would be in a position to gain substantial area beyond the EEZ. It was required to be submitted by May 2009 and was to be examined by the Commission on Limits of Continental Shelf (CLCS).[289]

### 3.13. Inter-governmental Oceanographic Commission

India actively participates in the Inter-Governmental Oceanographic Commission which was established by the UNESCO in 1960 and which promotes global co-operation in marine scientific investigations, ocean services

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[286] The Coast Guard Act, 1978; Emergence of the Coast Guard in India on 01 Feb 1977 as a new service was the result of an awareness that had been growing for some time in the Government for the requirement to enforce National Laws in the waters under national jurisdiction and ensure safety of life and property at sea. It was also considered desirable that these law enforcement responsibilities should be undertaken by a service suitably equipped and modelled on the Coast Guards of advanced nations like USA, UK etc leaving the Navy to exercise the fleet for its wartime role. A committee was, therefore, constituted in Sep 1974 with Mr KF Rustamji as its chairman to study the problem of seaborne smuggling and the question of setting up a Coast Guard type of organization. This committee recommended the setting up of a Coast Guard Service patterned on the Navy for general superintendence and policing of our seas in peace time under administrative cover of the Ministry of Defence. The Maritime Zones of India Act was passed on 25 Aug 1976. Under this Act, India claimed 2.01 million sq km of sea area in which she has the exclusive rights for exploration and exploitation of resources, both living and non-living at sea. Following this a Cabinet decision was taken by which an interim Coast Guard Organization came into being on 01 Feb 1977. The Coast Guard in its present shape was formally inaugurated on 18 Aug 1978 as an independent armed force of the union with the enactment of the Coast Guard Act 1978 by the Parliament with its motto as `VAYAM RAKSHAMAH; which means `WE PROTECT'. http://www.indiancoastguard.nic.in/ accessed on 29 June 2011.

[287] The natural resources, most important among others, mangenese nodules, lie 2 to 3 miles – about 5 kilometers – down, in pitch-black water where pressures exceed 7000 pounds per square inch and temperatures are near freezing. Many of the ocean floors are filled with treacherous hills and valleys. Appropriate deep-sea mining technology is required to accommodate this environment.

[288] In accordance with the provisions of article 2 of Annex II to the Convention, "the Commission shall consist of twenty-one members who shall be experts in the field of geology, geophysics or hydrography, elected by States Parties to the Convention from among their nationals, having due regard to the need to ensure equitable geographical representation, who shall serve in their personal capacities".

[289] The National Centre for Antarctic and Ocean Research (NCAOR) at Goa, an autonomous body under the DOD, is coordinating this national endeavour with active co-operation and participation of all national institutions.

and capacity building in developing countries through the concerted efforts of all the member states.[290] India is considered to have substantial interests in the mandate of the Commission. The Commission has two main functions – ocean science and ocean services. The Ocean Science mandate is important for India, as this deal with the processes and conditions of marine environment and the availability of resources. Furthermore, coastal erosion, identification of phosphate-base and continental margin mineral deposits holds significant environmental and economic interests for India. The Ocean Services mandate deals with the Global Climate Observing System, global sea-level observations, international oceanographic data and exchange, training, education and mutual assistance in marine areas. Under the Marine Living Resources Act, the Ministry of Earth Sciences, the nodal agency, has an objective of assessing a realistic and reliable information on the potential of marine living resources in the Indian EEZ for sustainable development and management and to augment the sea food production and thereby the income of coastal fishing community and the fishing industry. India also has substantial interests in the ocean resources, namely, organisms with pharmaceutical values. Similarly, India has developed polymetallic nodules programme, environmental impact assessment study carried out in collaboration with major sea-faring nations, has designed and developed test seabed mining system and research and development activities to develop and standardise extraction processes for large-scale production of metallic nodules.[291] Furthermore, India has implemented several research programmes viz. Marine Satellite Information Services (MARSIS), National Ocean Information System (NOIS), Sea Level Monitoring and Modelling (SELMAM), Data Buoy Programme and Joint Global Ocean Flux Studies (JGOFS) to understand the role of the ocean and its processes and for generation of user oriented coastal and ocean data and data products like waves, winds, temperature, current, salinity, upwelling, potential fishing zone information, coastal maps etc., for supporting coastal and off-shore developmental activities and oceanographic research.

India has identified 7,858.59 square kilometer of area for potential mining of nodules. Under its 2012-17 approach paper, India plans to design and develop programs and techniques for polymetallic nodules, comprehensive swath bathymetric survey of EEZ, ocean ridge minerals, gas hydrates exploration, delineation of the outer limits of the extended continental shelf, low temperature thermal desalination, deep-sea technology development, among others.[292]

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[290] India has been one of the 40 founding members of the Commission. In accordance with the provisions of article 2 of Annex II to the UNCLOS, the CLCS, "shall consist of twenty-one members who shall be experts in the field of geology, geophysics or hydrography, elected by States Parties to the Convention from among their nationals, having due regard to the need to ensure equitable geographical representation, who shall serve in their personal capacities". In this regard, reference in the Annual Report of the Ministry of External Affairs of India (2012-13) that "Dr S. Rajan, India's nominee"was re-elected in June 2012, is an interesting pointer to the actual composition of the CLCS membership.

[291] Under this program, the Government of India has achieved; inter alia; collection and identification of 200 new marine flora and fauna for chemical extraction and bio-evaluation; continuation of the process of Biological evaluation of 5 organisms possessing anti-viral, anti-diabetic, anti-cholestrol, anti-anxiotic, wound-healing and larvicidal activities; and Initiation of clinical trials of active extracts, regulatory pharma- cology and taxicology. http://dod.nic.in/mardr.htm accessed on 30 July 2012.

[292] Draft Approach Paper for the 12th Five Year Plan (2012-17), Ministry of Earth Sciences, Government of India, pp. 8-12. *Legal Roadmap for Exploration and Exploitation of Resources in the Indian Ocean: Considerations for India*, a policy-paper prepared and given by the researcher to the Ministry of Earth Sciences in July 2013.

### 3.14. COMNAP/SCALOP/ATCM Meetings

After becoming a member of the Antarctic Treaty,[293] India continues to participate in the meeting of the Council of Managers of National Antarctic (COMNAP)[294] and Standing Committee of Antarctic and Logistic Operations (SCALOP), Antarctic Treaty Consultative Meeting (ATCM)[295] and Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).[296] Since 1981, India has been sending scientific research expeditions to Antarctica to learn more about the scientific investigations, especially with relations to climate and weather patterns. India is a founder member of Asian Forum for Polar Science (AFOPS), which is active not only in Antarctica but also in the Arctic. In 2006, India joined Droning Maud Land Air Operators Network (DROMLAN) as one of the founder members. The scientific activities of India, which started on a modest scale, have evolved into a comprehensive ongoing programme that has been subject to continuous updating in accordance with the national priorities and global perspectives.[297]

### 3.15. India at Law of Sea Convention Forums

India has sought an active role in the discussions related to the Law of Sea Convention forums. India has remained a Member of the Council of the International Seabed Authority under the Investors category. The Council is the executive organ of the International Seabed Authority and is concerned with all policy and technical issues concerning the international seabed area. As the first Registered Pioneer Investor, it was a matter of high prestige for India to be elected as a Member of the Council under investors' category, after protracted negotiations and deliberations. India, while engaging in deep seabed mining, needs to have due regard to the special interest and needs of especially the landlocked and geographically disadvantaged states such as Nepal and Bhutan.[298] In the South Asian region, India's neighbouring states' limitations with regards to participation in

[293] India became a full consultative member of the Antarctica Treaty on 19 August 1983. India has established a first scientific investigation station, called DakshinGangotriin 1983 (this was later on abandoned due to subsidence of glaciers) and the second permanent station Maitri was established in 1989. With an aim to make it operational, India has started the third such station called Bharathi. India extensively uses the results of the scientific investigations carried out at these stations in the realm of climate and weather. As of end of 2009-10, India has launched 29 expeditions to Antarctica. Ministry of Earth Sciences, Government of India, Annual Report 2009-10, p. 18.

[294] Created in 1988, COMNAP is the international association that brings together National Antarctic Programs from around the world to develop and promote best practice in managing the support of scientific research in Antarctica. Each country that is a signatory to the Antarctic Treaty 1959 normally establishes a *National Antarctic Program*, which has national responsibility for managing the support of scientific research in the Antarctic Treaty Area on behalf of its government and in the spirit of the Antarctic. https://www.comnap.aq/

[295] India hosted the 30th ATCM in 2007.

[296] http://dod.nic.in/antarc1.html accessed on 30 July 2012.

[297] It is interesting to note that the Antarctica has been declared as a common heritage of mankind, while the Arctic is not declared as such. India has not joined the Arctic Council and has pressed for the "Antarctic Treaty template where the territorial claims of States have been shelved for the duration of the Treaty. The reasons for which the international community accepted the discipline of the Antarctic Treaty are today even more compelling and urgent with respect to the Arctic. Placing this on the U.N. agenda during India's term in the Security Council and initiating international action on it could be a historic contribution by India in its role as a responsible global power." Shyam Saran, *India's Role in Arctic Cold War*, The Hindu, 1 February 2012.

[298] Helmut Tuerk and Gerhard Hafner, "The Land-Locked Countries and the United Nations Convention on the Law of the Sea", 18 *PrinosiZaporedbenoproucavanjeprava I medunarodnopravo,* 58-70 (1985); Hema Pandey, *Transit Right of Landlocked States under International Law: "With Reference to Nepal's Transit Right via India based on Transit Treaty between Nepal and India, Paper presented at the Kathmandu School of Law* (2011), Ramesh Kumar Rana, "*Right of access of land-locked state to the sea by the example of bilateral agreement between land-locked state- Nepal and port state – India*, Masters Thesis, University of

the deep seabed mining will remain and this is mainly due to lack of finances and technology. Neighbouring countries of India are engrossed in various social, economic and political problems. Therefore, their ability to commercially exploit the benefits remains weak. Under the regional cooperation process, neighbouring states should embark upon the fullest exploitation of the resources by entering into cooperative and strategic alliances with India as India has the capacity and technology for such activities. The neighbouring states also need to show more interest in these mining activities and should not withdraw merely because of lack of finances and technology. A regional cooperation approach focusing on deep seabed technology together with marine technology could help the South Asian nations in acquiring the offshore mining technology and could contribute to the overall enhancement of marine technology of the concerned states.[299] India has the highest potential for deep seabed mining in the Central Indian Basin of the Indian Ocean. The fullest exploitation could lead to mitigate India's growing needs for nickel, copper, cobalt and manganese. Therefore, it is of utmost interest that India undertakes deep seabed mining with full financial capacity and technologies. It shall be noted that Law of the Sea Convention negotiations took note of the concerns of the developing countries with regards to the transfer of marine technology. As an outcome, Part XIV of the Convention has provisions on "Development and Transfer of Marine Technology" which aims to assist developing countries in their acquisition of marine technology.[300] Developing countries, including India, expected that the ISA would take full responsibility for guaranteeing transfer of technology to developing countries.[301] These countries also expected that the role of ISA

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Tromso, (2010); Stephen Vasciannie, "Land-Locked and Geographically disadvantaged states", 31 *Commonwealth Law Bulletin* (2005); Ingrid Delupis, *Land-locked states and the law of the sea*, Stockholm Institute for Scandinavian Law 1957-2009; Robert E. Bowen, "The land-locked and geographically disadvantaged states and the law of the sea", 5 *Political Geography Quarterly* 1, (1986); Surya P. Subedi, "The Marine Fishery Rights of Land-locked states with particular Reference to the EEZ", 2 *International Journal of Estuarine and Coastal Law* 4, 277-339 (1987).

[299] It should be noted that the term marine technology is not defined in Part XIV. According to the Secretariat's report, marine technology comprises "the body of knowledge and hardware needed for the uses of ocean space and for surveying and developing marine resources. In its general sense, it includes such components as: technical information, design, know-how, engineering, hardware, processing technology, and management. It encompasses the equipment and technical know-how employed in the traditional marine industries such as naval architecture and shipbuilding, fishing or coastal development, as well as in the newer activities of exploration and exploitation of deep-sea minerals and hydrocarbons." Yuwen Li, *Transfer of Technology for Deep Sea-Bed Mining: The 1982 Law of the Sea Convention* (Leiden: Nijhoff, 1994), pp. 141-42.

[300] Pinto summarises Part XIV as follows: "States have a duty to act directly (i.e., bilaterally with a recipient) and through international organisations and to cooperate with one another and with international organisations in an appropriate manner, in order to promote, facilitate, stimulate, and advance access to – and the development and transfer of – marine science and technology, in particular, by means of coordinated programmes and through national and regional means." Pinto (1986) at p. 265.

[301] According to Article 144 of the Convention, the International Seabed Authority shall take measures in accordance with the Convention:(a) to acquire technology and scientific knowledge relating to activities in the Area; and(b) to promote and encourage the transfer to developing States of such technology and scientific knowledge so that all States Parties benefit therefrom.2. To this end the Authority and States Parties shall cooperate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so that the Enterprise and all States Parties may benefit therefrom. In particular they shall initiate and promote:(a) programmes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area, including, *inter alia*, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;(b) measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area.

would go beyond exploration and exploitation and cover marine scientific research and the transfer of marine technology in general.[302]

### 3.15.1. Law of the Sea Convention and International Cooperation

The records show that India has signed bilateral agreements on marine affairs with a number of Law of Sea Convention states such as the Russian Federation, China, Portugal, and Mauritius.[303] In addition, it has also implemented collaborative programmes in Myanmar, Mauritius, Seychelles in the field of ocean science and technology. India organized 5 days training programme for Sri Lanka and Myanmar on Delineation of Outer Limits of Continental Shelf at NCAOR, Goa.

## 3.16. Ratification issue

India signed the UNCLOS 1982 on 10 December 1982 but ratified the same on 29 June 1995, nearly 13 years after the signature. India attached the declaration, under article 287 of the Choice of Procedure with regards to the Settlement of Disputes, to its ratification, reserving its right to make, at the appropriate time, declarations and on the understanding that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf, military exercises or maneuvers, in particular those involving the use of weapons or explosives without the consent of the coastal State.[304] Similarly, it signed the agreement relating to the Implementation of Part XI of the Convention on 29 July 1994 and ratified the same on 29 June 1995. India ratified the Agreement for the Implementation of the Provisions of the Convention of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks on 19 August 2003.

While enacting Maritime Zone Act 1976, it was also proposed to undertake separate legislation in future, as and when required, for dealing with the regulations for exploration and exploitation of particular resources or particular group of resources as well as with other matters on which India has jurisdiction. However, this has not been followed-up by the Indian Parliament. The 1976 Act, under Section 11, provides for stringent punishment of imprisonment up to 3 years or unlimited fine or both for the offences committed under the Act. However, the Act necessitates the requirement of previous sanction of the Union government of India before instituting prosecution against any person prescribed under Section 14 of the said Act.[305] Further, Section 15 of the Maritime Zones Act 1976 empowers the central government to make rules by notification to carry out the purposes of the Act in general and for delegating specific power for *inter alia* regulation for conduct of any person in the territorial waters, the contiguous zone, the exclusive economic zone or any other maritime zone of India. However, so far no rules have been framed by the central government under the said Act. These can lead

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[302] It is interesting to note that the developing countries considered "transfer of technology" itself as the part of common heritage of mankind, which was opposed by the developed countries during the negotiations. See Y. Li, *Ibid.* p. 156.

[303] These include agreements in the field of political relations, energy, trade, space, science and technology, defense, security, culture, terrorism. For a list of bilateral agreements between India and these nations, see, www.meaindia.nic.in.

[304] According to Article 309 of the Convention on the Law of the Sea, no reservations or exceptions may be made to the Convention unless expressly permitted by other articles of the Convention.

[305] Section 14 reads, "no prosecution shall be instituted against any person in respect of any offence under this Act or the rules made hereunder without the previous sanction of the Central Government or such officer or authority as may be authorized by that Government by order in writing in this behalf".

to a conclusion that India has not been pro-active in enacting necessary legislations at domestic level to fully exploit the potential offered by the oceans.

### 3.17. Challenges of the effective implementation of the law of the Sea

The functioning of the Convention, pre-1982 acts enacted by India, together with issues of extended jurisdiction, new fields of activity and increased uses of the oceans, continue to confront India with important challenges. The challenges impact upon India's ability to apply the new provisions in accordance with the letter and spirit of the Convention and how to harmonize national legislation with it and how to fulfill the obligations at national level.

#### 3.17.1. Lack of admiralty court

India does not have its own maritime statute and it follows the British model of Admiralty Court Act 1861. India should establish a maritime court which can assume jurisdiction by virtue of the presence of the vessel in Indian territorial jurisdiction irrespective of whether the vessel is national or not and whether registered or not and wherever the residence or domicility or their owners may be.[306]

#### 3.17.2. Bureaucratic delays and exploration for peaceful research purposes

Recognizing the inordinate bureaucratic delays, UNCLOS provides some relief regarding exploration of sea for peaceful research purposes. The final provisions of the Convention have represented a concession on the part of the developed nations. According to this, India's jurisdiction within its territorial water remains absolute. It is required to give prior consent within the EEZ and in case involving research on the continental shelf. It shall be noted, though, that such consent for research for peaceful purposes is to be granted 'in normal circumstances' and 'shall not be delayed or denied unreasonably', except under specific circumstances. According to this, if India, for example, does not reply within six months of the date of request, its consent would be implied.

#### 3.17.3. Assistance by developed countries

India, like many other developing countries, faces challenge to benefit from the rights which it has acquired under the 1982 Convention. For example, India has established an EEZ but whether it is able to perform all rights and duties under the Convention is uncertain. Similarly, the delimitation of EEZ, the surveying of its area, its monitoring, the utilization of its resources and generally speaking, its management and development are some of the most important long-term endeavours which can be beyond the capacity of the nation.

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[306] Admiral Capt A. K. Bansal laments on the failure of the Indian Parliament as well as the Supreme Court of India to define the scope and nature of admiralty jurisdiction even after 65 years of indepdencen. He hopes that Admiralty Bill pending before the Indian Parliament can fil this gap. A. K. Bansal, "India Awaits Suitable Admiralty Law", *Maritime* Gateway 2013 (http://www.maritimegateway.com/mgw/index.php?option=com_content&view=article&id=513:india-awaits-suitable-admiralty-law-&catid=34:rokstories accessed on 31 July 2013). Krutikha Prakash reaches the similar conclusion, see K. Prakash http://lawinrem.wordpress.com/2012/11/23/the-need-for-a-new-indian-law-on-admirality/ accessed on 31 July 2013; Robert Force and A. N. Yiannopoulos, *Admiralty and Maritime Law*, vol. 2, (Beard Books: 2006); B. C. Mitra, *An Introduction to the Law Relating to Shipping in India*, (1968: Indian Law Institute); Shrikant Hathi and Binita Hathi, *Maritime Practice in India*, 7th edition, (Brus Chambers: 2012).

### 3.17.4. Robust legislative framework

India has an extensive range of interests and obligations in the coastal and the marine activities occurring within its maritime zones of jurisdiction. While performance of these activities will require operational, political, and technological responses, a sound legal framework is essential in all these spheres. The legal framework must balance its needs, concerns and interests within the overall international legal framework presented by the Law of the Sea Convention.

## 3.18. Concluding remarks

India's major interests have been largely accommodated in the 1982 Convention and India has been able to derive security, strategic and economic benefits from these relevant provisions of the Convention. India now claims the 12th largest EEZ. India's claim with regard to the continental shelf was initially limited to 200 miles, but the Convention has accepted much wider limits extending up to 350 nautical miles or 100 miles beyond the 2,500 meters isobaths and this formula allows India to add 2.02 million sq. km to its jurisdiction.[307] India already has found its continental shelf rich in oil and gas and is producing million tons of crude from its oil fields. India's current strategy is to build self-reliance in offshore exploration and development. India is one of the pioneer investors with France, Japan, China and the Russian Federation. It has been allotted a mine site in the central Indian Ocean to carry out seabed exploration activities for the recovery of polymetalic nodules.

India, unlike disarmament and other regimes, at various junctures, maintained a low profile in the Law of Sea Convention negotiations because its interests in freedom of navigation and security were identical to the interests of the major maritime powers. India does face, however, a challenge of suitably amending the provision of the Maritime Zones Act.

The original position of India at the UN was (31 October 1969) in the first Committee of the UN, that the sea bed and the ocean floor, beyond the limits of the present national jurisdiction, should be reserved exclusively for peaceful purposes and that the activities which are not in consonance with this concept should not be permitted.[308] As per India's argument, the natural resources beyond the national jurisdiction should be utilized to close the gap between developing and developed economies – a natural prolongation of India's consistent stand on the Common Heritage of Mankind which was first propounded by Arvid Pardo.[309]

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[307] On 11 May 2009, the Republic of India submitted to the Commission on the Limits of the Continental Shelf, in accordance with Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea, information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. According to the submitting State, this is a partial submission and, as a coastal state in the Southern part of the Bay of Bengal, India reserves the right to make at a later date, notwithstanding the provisions regarding the ten-year period, a separate submission on the outer limits of its continental shelf, based on the provisions of the Statement of Understanding contained in Annex II to the Final Act of the Third United Nations Conference on the Law of the Sea. On 29 January 2010, India deposited with the UN Secretary-General, pursuant to Article 16 (2) of the Law of the Sea Convention, a list of geographical coordinates of points defining the baselines of India. The list of geographical coordinates of points is referenced to the Indian Geodetic Datuum (Everest Ellipsoid 1956). See UN Maritime Zone Notification, M. Z. N. 76. 2010. LoS of 17 February 2010.

[308] Speech by Mr Sen of 31 October 1969, India's Permanent Representative to the UN.

[309] Arvid Pardo, a national of Malta, is known as the Father of the Law of the Sea Conference. He made a speech at the UN General Assembly on 1 November 1967, and called for international regulations to ensure peace at sea, to prevent further pollution and to protect ocean resources. It was Pardo who first proposed that the seabed constitutes part of the Common Heritage of Mankind, a phrase that appears in Article 136 of the United Nations Convention on the Law of the Sea. He called upon that some of the sea's wealth be used to bankroll a fund that would help close the gap between rich and poor nations. Thanks to his tireless efforts

UNCLOS is not being implemented first by the UN but by the states. The implementing agencies are the International Maritime Organization, International Whaling Commission and the International Seabed Authority in its implementation. India has actively participated in these forums since their establishment.

Despite a major seafaring nation and having vital interests in the law of the sea regime, it is interesting to note that India took a long time to ratify the Convention. This reflects general position of India with regards to the ratification of major multilateral instruments. India's records suggest that India invariably waits for major countries to ratify the international instruments before it signs or ratifies. India recognizing the enormous economic, security, an environmental importance of the seas and the important role played by the UNCLOS in establishing the regime to govern the rights and obligations of stakeholders, has articulated its policy and practice to reinforce the strength given by the seas and the Law of the Sea regime. Secondly, its security interests, including enforcement measures against piracy, narcotic and terrorism operations at sea feature dominantly in its policies. Third, as India has signed and ratified the law of sea related conventions and regulations; its dispute settlement reservations are clearly stipulated, as the case with Bangladesh shows. However, by actively participating in the bodies and commissions established by the Convention, namely, IMO, ITLOS, ISA, CLCS, it is able to exert its influence and protect its long-term interests. Fourth, India is able to play an active role in concert with other coastal states in maritime environmental challenges, ocean acidification, ocean pollution and depleting fishing stocks. As the Law of the Sea Convention provides a blue print covering an entire host of measurable national security, economic and environmental issues of vital national interests to India, it has been able to further its concrete interests and prevent undermining its interests among the convention established bodies, unlike, for example, the USA. Finally, India, being one of the important coastal states, is able to strengthen its influence and further its commitment to the international rule of law and build institutions that create a stable law of the sea regime. As political issues concerning the implementation of the Law of the Sea Convention are ironed out, India is and will increasingly focus on the importance of the "implementation of the provisions of the Convention which regulates all aspects of the oceans from delimitation to environmental control, scientific research, economic and commercial activities, technology and settlement of disputes."[310]

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which culminated in 1982, when the Convention was opened for signatures, and in the early years, he continued a dedicated effort to promote the issue, for instance helping achieve near-unanimous passage of GA Resolution 2749 on December 17, 1970. This resolution embodied principles regarding the seabed and its resources that would later be incorporated into the Convention. Pardo was unhappy with the final instrument's provision for an Exclusive Economic Zone, lamenting that the common heritage of mankind had been whittled down to a few fish and a little seaweed. New York Times, "Maltese at a UN, a Rare Diplomat", 24 January 1965, p. 21; *The New York Times*, "Malta's Imaginative and Erudite U. N. Delegate", 10 December 1969, p. 5; Carl Christol, "In Memoriam", *Political Science and Politics*, 777-8 (1999).

[310] MEA Annual Report 2012-13, p. 103.

# CHAPTER IV
# REFUGEE LAW, POLICY AND PRACTICES OF INDIA

## 4.0. Introduction

This chapter examines some of the most important questions regarding India's policy and practical approach to refugee issues – an essential topic of international human rights law. Is India a refugee heaven?[311] Why the examination of refugee law and practice of India is one of the most important areas of state practice to understand its overall approach to international law? How does India ensure compliance with international obligations at domestic level? Why does India choose to maintain the same administrative and practical arrangements in dealing with the refugee issues? Last but not the least, whether India is likely to sign the Refugee Convention of 1951[312] in near future[313] or will it continue with the practice it has adopted since the independence?[314]

As India is neither a party to the 1951 Convention on the Status of Refugees nor to the 1967 Protocol relating to the Status of Refugees,[315] the legal regime governing the refugees in India is essentially found in the interpretation and understanding of the Constitution. There are several reasons for India's inability in signing the Convention. Among others are financial limitations. As Justice Katju says, "half of our own people are like refugees… how then can we be expected to look after other refugees?"[316] How can India afford to provide hospitality to millions of refugees while the nation itself is unable to provide basic amenities to all its population? India also considers the 1951 Convention as Euro-centric which cannot be implemented in the

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[311] The partition of India in 1947 led to influx of masses of refugees in India and Pakistan. As Schechtman describes it was 'the greatest single refuge trek in world history'. Chimni quoting Schechtman at p. 463, B. S. Chimni, *International Refugee Law: A Reader*, (New Delhi: Sage Publications, 1999), p. 463. The question whether these populations were 'refugees' or not remain debated. For example, Pakrasi and Vernant do not consider them refugees as per the 1951 Convention. K. B. Pakrasi, *The Uprooted: A Sociological Study of the Refugees of West Bengal, India*, S. Ghattack, (Calcutta, 1971). Jacuqes Vernant, *The Refugee in the post-war World*, (New Haven: Yale University Press, 1953), pp. 740-41. In the wake of independence of Bangladesh in 1971, approximately 10 million refugees came to India seeking refuge. Similarly, a large un-estimated number of Chakma refugees came to India in mid 1990s. Speaking on the occasion of the visit of Mrs Sadako Ogata, former UNHCR Commissioner to India on 4 May, the former Chief Justice of India, P. N. Bhagwati highlighted that "This [*lack of legislation*, added] is partly due to a growing concern that those who may have committed crimes against humanity, war crimes or other acts which are incompatible with the humanitarian nature of refugee status may enter and remain on Indian soil under the pretext of being refugees". NHRC Press Note 4 May 2000.

[312] The Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2 to 25 July 1951. The Conference was convened pursuant to resolution 429 (V), adopted by the General Assembly of the United Nations on 14 December 1950. As of 1 November 2014, there were 145 States Parties to the 1951 Convention and 146 States Parties to the 1967 Protocol.

[313] Former Chief Justice of India and former Chair Person of the National Human Rights Commission of India, Mr Justice R. P. Anand observed, while addressing the committee constituted to give opinion on the model national law on refugees, that silence of India in not signing any refugee convention "is being questioned at international fora'. http://www.nhrc.nic.in/disparchive.asp?fno=753 accessed on 5 May 2011.

[314] Only Afghanistan in the South Asian region is a party to the Refugee Convention or the 1967 Protocol.

[315] These two international legal instruments are the *magna carta* of international refugee law. The definition of Refugee as provided in the 1951 Convention is the most widely used refugee definition in the world. The Convention also contains the cardinal principle of international refugee law namely the principle of non-refoulement and the minimum standard of treatment of refugees. The Protocol of 1967 removes certain temporal and geographical limitations of the 1951 Convention.

[316] Justice Markandey Katju, "India's Perception of Refugee Law" 2001 *ISIL Yearbook of International Law*, p. 14.

region which has a distinct geopolitical, demographical and historical past. This lack of formal accession to international instruments and specific national legislation makes a compelling case for studying India's policy and practical approach to refugees.[317] Several states of India which share border with other nations have been more affected by refugee problems than some internal states. Hence, it is also useful to see how the state governments in the 'refugee-prone' region versus 'non-susceptible' regions have dealt with refugee issues. Similarly, what are the differences in the policy and practical approach of 'refugee prone' states at large?[318]

### 4.1. Facts and Figures

As of January 2014, there were 192,070 refugees and 11,879 asylum seekers residing in India.[319] These numbers mainly include refugees and asylum seekers from Tibet (China), Nepal, Sri Lanka, Myanmar, Bangladesh, Afghanistan and Bhutan.[320] The sheer number and origin of refugees suggest that India's foreign policy and practical approach towards these nations are considerably influenced by refugee related issues. Secondly, unlike industrialized nations of the West, internal and external conflicts, violations of human rights, political, cultural, social and religious factors are contributing factors for them to seek refuge in India. Therefore, the impact of refugees is found not only in economic areas but they also contribute to India's overall attitude in areas of foreign and domestic policy. Thirdly, India itself is a developing country and has significant challenges in providing food, clothing, shelter and employment to its own population. Fourth, at domestic level, India neither has a proper legal nor judicial framework to address the refugee issue in its entirety. The problem becomes acute owing to the fact that though executive organs of India like in case of environmental law, human rights etc. does not recognize international refugee law originating from the two international instruments, the Indian judiciary plays a proactive role in reading into the rights of refugees.[321] The Indian judiciary has gone to the extent of

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[317] Prabodh Saxena observes that "the whole of South Asia is devoid of any standards and norms on any dimension of refugee reception, determination and protection. The fact that a quarter of the world's refugees find themselves in a non-standardized, if not hostile, refugee regime is a situation which does not augur well for either the mandate of UNHCR or for any civilized society. The South Asian nations have their own apprehensions, real or imaginary, about the utility of CSR 1951 to their situations. Because of historical mishaps, political ignorance, unstable democracies and exaggerated concern over national security, there is hardly any motivation for, or any environment in which there is a possibility for, the enactment of national legislation". Prabodh Saxena, "Creating Legal Space for Refugees in India: the Milestones Crossed and the Roadmap for the Future", 19 *International Journal of Refugee Law* 2, 246-72 (2007).

[318] T. N. Giri, *Refugee problems in Asia and Africa: Role of the UNHCR* (New Delhi: Manak Publishers), Daniel Kemper Donovan, "Joint U. N.-Cambodia efforts to establish a Khmer Rouge Tribunal," 44 *Harvard ILJ*, 551-76 (2003).

[319] This is more than the total combined population of three Western European nations, San Marino, Monaco and Liechtenstein. The latest figures available show that the number of refugees of concern to UNHCR stood at 10.4 million refugees at the beginning of 2011. http://www.unhcr.org/pages/49e4876d6.html accessed on 4 November 2014. In South Asia, India is the largest recipient and abode for refugees and asylum seekers. World Refugee Survey 2010 prepared by the US Committee for Refugees and Migrants suggest nearly 300,000 persons falling in this category. According to one report, there were around 330,000 refugees and asylum seeking people in India in 2004. Florina Benoit, "India: A National Refugee Law Would Equalise Protection", *Refugees International* (2004). See also, Country Operations Plan for India, United Nations High Commissioner for Refugees, 2006. In the wake of independence of Bangladesh (erstwhile East Pakistan), approximately 16 million refuges sought safety in India.

[320] Sucheta Ghosch, "Crisis in the kingdoms: Refugee question between Bhutan and Nepal", In Omprakash Mishra & Anindyo J. Majumdar (ed.) *The elsewhere people* 169-182 (2003).

[321] It is important that minimum corps of rights to asylum seekers and mass influx entrants shall be included for temporary protection in India.

prescribing norms and rules for the executive organs in this most difficult area of foreign policy.[322] Since India has neither signed the 1951 Refugee Convention nor the 1967 Protocol,[323] it does not need to fulfill the obligations prescribed in these international legal instruments. However, it can ill-afford to undermine the object and purpose of these instruments. The above reasons justify a need to assess India's policy and practical approach to refugee issues.[324] While the history of the Indian civilization and religious scriptures guide India to remain a hospitable land to all men and women of diverse creeds, cultures and races regardless of their origin, the 21st century issues and challenges before India will constrain the nation to afford such hospitality.[325]

### 4.2. International legal regime on Refugees

Although not a party to the international legal instruments on refugees, India has undertaken obligations under various international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), which has direct implications for India's policy and practical approaches towards the refugee issue.[326] In addition, India's attitude towards the UN Declaration on Territorial Asylum (1967), and the Universal Declaration of Human Rights (UDHR, 1948), needs examination to fully appreciate India's position. India is also a member of the Executive Committee of the UNHCR which approves and supervises material assistance programmes of the UNHCR.[327] Thus, while assessing India's policy and practice on the refugee issue, it is essential to keep in mind the legal obligations which flow from these instruments.

In the absence of its signature and / or ratification to the 1951 Convention and 1967 Protocol, India's obligation can be analyzed by examining the applicable customary international law. However, this raises a basic question of relation and effect of international law within the municipal law. The Indian Constitution, as provided in the chapters above, provides few provisions which can be utilized as a guiding source. According to Article 51 of the Constitution, India shall "[e]ndeavour to foster respect for international law and treaty

[322] The Indian judiciary which is quite strict in interpreting legislation on foreigners by refusing to interefere with the Executives, it has shown most sympathetic and liberal approach to protect the rights of refugees.

[323] It is argued that the 1951 Convention is being dismantled in the West and thus could be a good reason for India not to become a party to it. As Chimni argues, any talk of accession should also be linked to the withdrawal of measures which constitute the non-entrée and temporary protection regimes. That is to say, the countries of the region should collectively argue that they would consider acceding to the Convention only if the Western world was willing to withdraw those measures which violate the principle of burden sharing and instead practice burden shifting. B. S. Chimni, *The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia*, RCSS Policy Studies 4, Regional Centre for Strategic Studies, Colombo, (July 1998).

[324] Sumit Sen, "The Refugee Convention and practice in South Asia: A Marriage of Inconvenience?" In Joanne van Selm (et.al), *The Refugee Convention at fifty*, 203-17 (2003).

[325] Indian civilization is perhaps the only civilization in the world which considers Guests as Gods. In fact, the judiciary of India has given a legal character to this dictum. See *Kerala Education Bill* (1959) SCR 995 at 1017-8.

[326] Justice J. S. Verma, former Chief Justice of India and the former Chairperson of the National Human Rights Commission, in a public statement in May 1997, had observed that "In the absence of national laws satisfying the need to protect refugees, the provisions of the 1951 Convention and its Protocol can be relied on when there is no conflict with any provision in the municipal laws". See the Press Note of NHRC 4 May 2000 during the visit of Ms Sadako Ogata, former UNHCR Commissioner to New Delhi.

[327] It is ironical that while India has refused to sign 1951 Convention and 1967 Protocol which brought the UNHCR into existence and which gives the mandate to the UNHCR to operate world-wide, India is occupying a seat in the Executive Committee of the Agency. Of course, India allows the UNHCR to operate in India. Although a seat in the Executive Committee does not require India to sign the convention or the protocol, but can India sustainably maintain its position in the Committee. Perhaps, in the larger interest, India will be well advised to out of the Committee, if it only wishes to steer the mandate of the Committee and protect its national interests and concerns through continuous occupation of a seat.

obligations in the dealings of organized peoples with one another."[328] Normally, respect for international law is displayed by a State by observing the principles of international law in domestic laws. If they are not observed, the courts may apply these principles on the theory of implied adoption provided such principles are not inconsistent with the Constitution of India and the law enacted by the Indian Parliament. Based on the jurisprudence, if there is conflict between international and domestic law, the Indian courts must follow domestic laws.[329]

Thus, Article 51 demarcates obligations those flowing from general international law and those flowing from treaties and conventions. As per the Indian state practice on international law, it can be interpreted that international law is largely perceived as reflecting 'customary international law' and treaty obligations represent international conventional law. Article 51 is placed under the Directive Principles of State Policy in Part IV of the Indian Constitution, which means it is not an enforceable provision. Since the principle laid down in Article 51 is not enforceable and India has merely to endeavor to foster respect for international law, this Article would mean *prima facie* that international law is not incorporated into the Indian municipal law which is binding and enforceable. However, when Article 51(c) is read in the light of other Articles and judicial opinion and foreign policy statements, it suggests otherwise.[330]

Treaties in India are not self-operating. Indian courts do not enforce the terms of a treaty unless a law has been passed by the Parliament. Article 253 of the Constitution provides wide powers to the Parliament for passing a law in order to implement a treaty. Article 253 provisions enable the Government of India to implement all commitments under international law. Treaty-making power has both internal and external aspects. It should be noted that international human rights instruments for protection and promotion of human rights, can be enforced by the courts in India if there is no domestic law contrary to or inconsistent with it.[331] The human rights instruments can be enforced by the courts if there are gaps in the domestic laws which the treaty fills.[332] Such a treaty can also be used to interpret or at times enlarge the contents of fundamental rights in

[328] Article 51 of the Constitution had its source and inspiration in the Havana Declaration of 30 November 1939. The first draft (draft Article 40) provided: [T]he State shall promote international peace and security by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among governments and by the maintenance of justice and the scrupulous respect for treaty obligations in the dealings of organised people with one another. Even though as one of the Directive Principles under Part IV of the Constitution, Article 51 is not enforceable through a court of law, Dr. Ambedkar had said in the Constituent Assembly that the intention was that the executive and legislature should not only pay lip service to these directive principles but "they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of governance of the country". Subhash Kashyap, "Constitution of India and International Law", In Bimal N. Patel (ed.), *India and International Law*, vol. 1, (Leiden: Nijhoff, 2005), at p.20. Article 51 speaks of the State endeavor to "foster respect for international law and treaty obligations", it has to be remembered that under the scheme of the Constitution and the common law system accepted by India during the British rule and continued after the Constitution, international treaties even after being signed and ratified do not become enforceable or automatically part of national law. In order to be legally enforceable and to get implemented these have to be incorporated appropriately in enabling municipal law. If the municipal law is contrary to international law, it is the former that prevails. However, if there is no conflict with national law, the courts in India generally try to so interpret the statutes as to be in harmony with international law rules.

[329] *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey* (1984) 2 SCC 534; AIR 1984 SC 667.

[330] Refugee Protection in India, Paper published by the South Asia Human Rights Documentation Centre, October 1997.

[331] *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

[332] *Ibid.*

keeping with the current international understanding of such rights.[333] International human rights treaties can also be referred to in construing domestic law or in the development of common law doctrines applicable in India.[334]

Till its independence, the Indian courts practiced the British Common Law according to which rules of international law in general were not accepted as part of municipal law. However, if there was no conflict between these rules and municipal law, international law was accepted in municipal law even without any incorporation. Since the doctrine of the Common Law is specific about certain international treaties affecting private rights of individuals, to implement such treaties, the doctrine requires modification of statutory law and the adoption of the enabling legislation in the form of an Act of Parliament.[335] This position has been continuously practiced by the Indian executive, judiciary and legislature in the post-independence era. As per Article 372 of the Constitution, all the laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.[336]

India has adopted the Universal Declaration on Human Rights (UDHR) which proclaimed basic rights for all human beings irrespective of their origin or nationality. UDHR has attempted to ensure that refugee rights are protected by the world community in countries of origin and asylum. Furthermore, peremptory rights defined under Article 6 of the ICCPR are applicable to the refugees. The non-derogable rights of ICCPR are also applicable to refugees. These rights clearly are regarded as possessing special place in the hierarchy of rights. The fact that a right may not be derogated from may constitute evidence that the right concerned is part of *jus cogens.*[337]

As far as the 1951 Refugee Convention is concerned, Article 1 defines a refugee as someone who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality." India is not a signatory to the 1951 Convention but the general principle prohibiting forced repatriation called *non-refoulement* is

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[333] This doctrine of generous interpretation was propounded by the Privy Council, taking the view that a Constituion has to be interpreted broadly to take into account international standards as a part of a generous approach to constitution interpretation. See *Minister of Home Affairs v. Fisher*, 1980 AC 319; (1979) 2 WLR 889; (1979) 3 ALL ER 21 (PC).

[334] *Nilabati v. State of Orissa* (1993) 2 SCC 746*; D. K. Basu v. State of W.B*, (1997) 1 SCC 416; *PUCL v. Union of India* (1997) 3 SCC 433; *Githa Hariharan v. RBI*, (1999) 2 SCC 228; *Apparel Export Promotion Council v. A. K. Chopra* (1999) 1 SCC 759.

[335] Jeevan Thiagarajah, "The Growing IDP Crisis in the Southern World – Tasks from a Rights and Development Perspective", 31 *Refugee Watch*

[336] The expression in this Article includes not only enactments of Indian legislature but also common law of the land as administered by courts in India before its independence. Gurdeep Singh, "Status of Human Rights Covenants in India", 28 *IJIL*, 1988, p.218. Indian state practice in the area of immunity from domestic jurisdiction and law of the sea (high seas, maritime belt and innocent passage) suggests that it has practiced customary international law in the absence of specific municipal legislations. Confirming the common law principle relating to the specific incorporation of certain treaties, Article 253 provides that: "Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." This Article implies that whenever there is a necessity to incorporate international obligations undertaken at international level or under international instruments into municipal law, the Parliament is empowered to do so. This is also acknowledged by the Indian judiciary as early as 1951. While delivering the judgement in the *Birma v. The State of Rajasthan*, the Rajasthan High Court, quoting the English common law principle, observed that certain treaties such as those affecting private rights must be legislated by Parliament to become enforceable.

[337] Malcolm Shaw, *International Law*, 6th edition, Cambridge University Press, 2008, p. 204

considered to have risen to the level of customary international law, such that they bind even non-signatory nations. However, India refutes this position.[338] Being a party to the ICCPR and ICESCR, India is required to accord an equal treatment to all non-citizens with its citizens wherever possible as far as the minimum standard of treatment of refugees are concerned.[339]

Speaking before the Parliament, the first Prime Minister of India affirmed the Indian position to abide by international standards governing asylum by adopting similar, non-binding domestic policies. This position has been practiced consistently and individuals are given asylum on humanitarian grounds. Tibetans and Tamils from Sri Lanka were given refugee status,[340] however, refugees from Bangladesh in the aftermath of the 1971 war were given the status of evacuees. They were however treated as refugees requiring temporary asylum.[341] It should be noted that India claims to observe the principles of *non-refoulement* and thus never to return or expel any refugee whose life and liberty were under threat in his/her country of origin or residence.[342]

Should India enact domestic legislation to realize the core objectives of assistance and protection to refugees?[343] Is it imperative for India to ratify the 1951 Convention, if it is strongly convinced that the country offers better protection and assistance to refugees even in the absence of the ratification? This is possible as

[338] The principle of non-refoulement shall be seen not as a right of the refugee, rather, it shall be seen and treated as an obligation of a host state. There are conflicting conclusions as far as India's adherence to the principle of non-refoulement is concerned. In the phased repatriation of Sri Lankan refugees from India to Sri Lanka, there were conflicting opinions on 'voluntary' repatriation - US Committee for Refugees, 'People Want Peace': Repatriation ad Reintegration in War-torn Sri Lanka, January 1994, p. 26, versus 'forced' repatriation – Asia Watch: Halt Repatriation of Sri Lankan Tamils, vol. 5, no. 11, 11 August 1993) principle which also happens to be an integral part of refugee law. In the Refugee and Asylum (Protection) Bill 2006, the rule of non-refoulement has been clearly stated. The *jus cogens* principle of non refoulement in the Model Law merely prevents the expulsion or return of a refugee or asylum seeker to a place where his 'life and freedom' are threatened. This important rule has been re-stated to clearly and authoritatively to prohibit any action to remove persons to any place where they may face persecution on account of any of the grounds contained in the Refugee Convention, or where their life, physical safety and freedom are threatened on account of any of the grounds set out in the OAU Convention.

[339] As B. C. Nirmal suggests, "by virtue of this reasoning the principle of non-refoulement may be deemed incorporated into the Indian municipal law.' Nirmal at 178. See also *Indian Gramophone Co. v. Birendra Bahadur Pandey and another*, AIR 1954 SC 661; *Vellore Citizens Welfare Forum* case (1996) 5 SCC 746.

[340] India's vote in favour of Resolution at the UNHRC in March 2012 to implement the Lessons Learnt and Reconciliation Commission, appointed by the Sri Lanka government, shows a mixed reaction towards the plight of Tamils in Northern Sri Lanka. Despite displeasure shown by the Sri Lanka's government to India due to vote, India could ill-afford to vote against. The negative or absent voting could have further alienated Tamil refugees in India from the Union government.

[341] India provided almost an unprecedented hospitality to the refugees from Bangladesh. If India had not granted refuge, their return or expulsion would have resulted in compelling them "to return or remain in a territory where there was well-founded fear of prosecution endangering their lives or physical integrity.

[342] Non-refoulement is an important principle to international refugee law, which acts as a complete prohibition against the forcible return of people to a place where they will be subject to grave human rights violations or where their life or personal security will be seriously endangered. The principle of non- refoulement applies equally to refugees at the border of a state and to those already admitted, and it remains in force until the adverse conditions which prompted people to flee in the first place are alleviated.

[343] Refugee and Asylum (Protection) Bill, 2006 is quite weak in relations to the rights of refugees and effective protection. Refugees, who have fled their homes because of conditions of extreme persecution and violence, form a vulnerable community anywhere. As a host country, India often adds to this trauma of flight by dealing arbitrarily with refugees, often denying them the basic right to better their lives. The Refugee Convention, in addition to the political rights of non refoulement and asylum, also requires that countries not discriminate between refugees (Article 3); respect their religious background (Article 4); respect their right to association (Article 15); provide access to courts (Article 16); provide the rights to work, both blue-collar and white-collar (Articles 17 – 19); provide access to public education (Article 22); housing (Article 21); labour equality and social security (Article 24); administrative assistance (Article 25); and, the freedom of movement (Article 26). PLSARC Note 2006, p. 6.

based upon the *Apparel Export Promotion Council v. A.K. Chopra* case. In this case, the Supreme Court clarified that "[t]his Court has in numerous cases emphasized that while discussing constitutional requirements, courts and counsel must never forget the core principle embodied in the International Conventions and Instruments and so far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law".[344] This clarifies that the Courts can resort to the 1951 Convention in interpreting the domestic laws. Considering the official commitment of India at the 4th World Conference on Women in Beijing,[345] the Court, in *Vishaka and others v. State of Rajasthan and others* case ruled that "reliance can be placed on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution".[346] Accordingly, it is expected that the Indian courts will consult the 1951 Convention based upon the official statements made by India in the Executive Committee of the UNHCR.

### 4.4. Legislative and Regulatory Framework of India

After analyzing India's approach to international instruments bearing upon the refugee issues, it is necessary to analyse the relevant provisions of the Constitution of India and relevant domestic legal and regulatory framework. In India, in addition to several provisions of the Constitution, the issues concerning refugees and asylum seekers are governed by, among other laws, the Foreigners Act, 1946; the Foreigners Order, 1948; the Registration of Foreigners in India, 1939 and Rules, the Passport (Entry Into India) Act, 1920; the Passport Act, 1967; the Indian Extradition Act, 1962; the Prevention Detention Act, 1950; the Criminal Procedure Code, 1898; the Citizenship Act 1955; the North-Eastern Areas (Reorganisation) Act 1971; the Citizenship (Amendment) Act, 1985; the Indian Penal Code, 1860; the Maintenance of Internal Security Act, 1971; the Immigrants (Expulsion from Assam) Act, 1950; the Illegal Migrants (Determination by Tribunals) Act, 1983; the Illegal Migrants (Determination by Tribunals) Rules, 1984;[347] the Evidence Act, 1872; the Civil Procedure Code, 1908; the Customs Act, 1962; the Illegal Migrants (Determination by Tribunals) Ordinance 1983; the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981; the Citizenship Rules 1956; the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 of India.

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[344] *Apparel Export Promotion Council v. A. K. Chopra*, (1999) 1 SCC 759.

[345] Ritu Agrawal, "The Present Condition of Indian Women" ( in Chinese ) Yunnan University , Kunming, China, September 2005 Beijing 2005, *Tenth Anniversary Commemoration of the Fourth World Conference on Women*- Beijing, China 29, August – 1 September 2005; Barbara Roberts, "The Beijing Fourth World Conference on Women", 21 *The Canadian Journal of Social Sciences* 2, 237-44 (1996); Centre for Social Research, "South Asia Paper on Beijing +5 Review on Political Empowerment and Governance," New Delhi: Centre for Social Research (1999); Economic and Social Commission for Asia and the Pacific, "Report of the Expert Group Meeting on the Regional Implementation of the Beijing Platform for Action," Bangkok: Economic and Social Commission for Asia and the Pacific (1999); Azza Karam, *Beijing +5: Women's Political Participation: Review of Strategies and Trends* (New Delhi: United Nations Development Program, 1998); United Nations, *Platform for Action and the Beijing Declaration*. New York: United Nations Department of Public Information (1996).

[346] 1997 6 SCC 241

[347] "The Refugees and Asylum Seekers (Protection) Bill, 2006," Public Interest Legal Support and Research Centre, www.pilsarc.org. accessed on 5 August 2013; R. Trakroo, A. Bhat and S. Nandi (eds.), *Refugees and the Law* 68-76 (New Delhi: Human Rights Law Network, 2006); S. Baruah, "Citizens and Denizens: Ethnicity, Homelands and the Crisis of Displacement in Northeast India", 16 *Journal of Refugee Studies* 1, 44–67 (2003); P. Saxena, "Creating Legal Space for Refugees in India: the Milestones Crossed and the Roadmap for the Future", 19 *International Journal of Refugee Law*, 246–272 (2007).

The sheer list of acts, rules and guidelines pose a significant challenge to any member of the executive or judiciary in dealing with the refugee issues, as these issues can have direct or indirect impact on the implementation of these acts, rules and guidelines. Similarly, one shall attempt to ensure a proper understanding and analysis of these legal instruments in analyzing a particular refugee issue. Under the Foreigners Act, 1946, the Union government is empowered to regulate the entry of aliens into India, their presence and departure therefrom. It defines a 'foreigner' to mean 'a person who is not a citizen of India'. The main weakness of this Act is that it was enacted by the British government in India and mainly in response to the needs of the World War II. This Act, which has been in existence for the past 65 years, allows the Executive to use wide powers of removal of foreigners.[348] This Act, owing to several lacunae, has been under severe criticism of the National Human Rights Commission (NHRC) and the Indian judiciary.[349] Under this Act, all aliens temporarily or permanently residing in India are covered under the term 'foreigner' in the absence of the definition or meaning of a term 'refugee'.[350] The lack of definition has a direct bearing on them obtaining privileges under the 1951 Refugee Convention as this Convention considers them as immigrants or tourists. The Act also enables the Executive to refuse entry to an alien for non-fulfillment of entry conditions that invites instant deportation.[351] This Act further enables the Executive to deport a foreigner without complying with any form of extended due process and for giving a hearing to the person to be deported.[352] While practicing the policy, India is likely to come in contravention with the *non-refoulement* principle which is practiced by members who are signatory to the 1951 Convention and 1967 Protocol and jeopardizes the chances of protection of rights of genuine refugees.[353]

As per paragraph 3(1) of the Foreigners Order, 1948, "[N]o foreigner shall enter India--(a) otherwise than at such port or other place of entry on the borders of India as a Registration Officer having Jurisdiction at that port or place may appoint in this behalf; either for foreigners generally or any specified class or description of foreigners, or (b) without leave of the civil authorities having jurisdiction at such port or place." Thus, it is clear that no alien should enter India without the authorization of the authority having jurisdiction over such entry points. As per 1948 Order, if a refugee who enters India on a forged visa or a passport, or an invalid travel document can face serious consequences including the possible non-acceptance of his request for non-

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348 See the statements delivered by Mr Mujeeb and Mrs Kripalani, members of Indian delegation speaking at the 3rd Committee of the UN GA in 1949. An analysis of statements shows that India clearly did not want to have a specialized High Commissioner's Office because India was not convinced till that time to have such an office whose sole task would have been to give refugees legal protection.

349 The NHRC is a statutory body established under the Protection of Human Rights Act, 1993, and is mandated by Section 12(f) of that Act to study treaties and other international instruments on human rights and make recommendations for their effective implementation.

350 Section 2(a) of the Act defines a 'foreigner' as "a person who is not a citizen of India", thus interpreted as covering all refugees within its ambit.

351 The readings of cases like Hans Muller AIR 1955 SC 367 at para 37; Abdul Sattar Haji Ibrahim Patel AIR 1965 SC 810 at pr. 10; Ibrahim AIR 1965 SC 618; Louis De Raedt (1991) 3 SCC 554; and, Sarbananda Sonowal (2005) 5 SCC 665, suggest that the Indian courts have generally upheld deportation orders passed in contravention of the *audi alteram partem* principle.

352 There are many cases but the most prominent among others are Hans Muller AIR 1955 SC 367 at para 37; Abdul Sattar Haji Ibrahim Patel AIR 1965 SC 810 at para. 10; Ibrahim AIR 1965 SC 618 at para. 8; Louis De Raedt (1991) 3 SCC 554 at para. 13; and, Sarbananda Sonowal (2005) 5 SCC 665 at paras. 49-52.

353 The Law Commission of India has made several suggestions to harmonise provisions in the Foreigners Act and the Passport Act through 175th Law Commission Report. It, among others, suggested for the deportation of the foreigner and establishment of a grass root level mechanism to monitor the entry and stay of foreigners.

deportation. He may face even financial hardships, should he be required to bear travel expenses in connection with the deportation as per paragraph 14 of the Order. India has designated 'international zones' at airports and other entry points into the Indian territory, which are considered to be outside the Indian territory and the normal jurisdiction of the Indian courts.[354] In these areas, the refugees have administrative remedies only. No legal remedy is available in these zones. However, the Indian judiciary has liberally interpreted this provision in granting the stay to the refugees, especially, from Afghanistan, Iran and Myanmar. The cases dealing with these refugees show that Indian courts have positively accepted their plea and have stayed deporation proceeding on the grounds that their return to home-country would make them vulnerable to threats to their life and liberty.[355] The courts in such cases have favourably considered India's long-held traditions of hospitality to foreigners.

The Registration Act, 1939 governs the registration of foreigners entering, being present in, and departing from India. The Passport (Entry Into India) Act, 1920 and the Passport Act, 1967 deal with the powers of the government to impose conditions of passport for entry into India, and the issue of passports and travel documents to regulate departure from India of citizens of India and applies in certain instances to other cases too. Refugee, upon violation of the Registration of Foreigners in India 1939 and rules,[356] may face imprisonment and a fine. Refugees are also subject to the Indian Extradition Act, 1962 and bilateral extradition treaties, if an individual is a fugitive refugee. As B. C. Nirmal argues, this in turn raises the question of relationship between extradition and the principle of *non-refoulement*. He argues that "it is clear from Article 33(2) of the 1951 Refugee Convention that in the case of those persons who represent a danger to the security of the country or who have been convicted by a final judgment of particularly serious crimes, the principle of *non-refoulement* may not apply. Article 32 of the European Convention on Extradition provides that a person charged with a lesser crime shall not be extradited, if it is believed that *refoulement* would lead to the threat to the life and freedom of the person concerned."[357]

In addition to the above, it is also important to know that India, in the wake of influx of refugees following the partition in 1947, enacted various acts to deal with the situation. These were the Administration of Evacuee Property Act, 1950, the Evacuee Interest (Separation) Act, 1951, the Displaced Persons (Debt Adjustment) Act, 1951, The Displaced Persons (Claims) Supplementary, Act 1954, the Displaced Persons (Compensation and Rehabilitation) Act, 1954 and the Transfer of Evacuee Deposits Act, 1954. The entry and regulation of alien falls under the Union List,[358] hence, the matter falls under the purview of the Union government jurisdiction. Unlike the pro-active Indian judiciary, the executive organ has been reactive in dealing with the issues of refugees following the episodes of refugee influx and when the influx has acquired political momentum.[359]

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[354] International Zones are demarcated at international airports in all nations where physical presence does not amount to legal presence and from where summary and arbitral removal is possible and practiced. B. S. Chimni, "The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia", *RCSS Policy Studies* 4.

[355] Writ Petitions Nos. 450/83; 605-607/84; 169/87; 732/87; 747/87; 243/88; 336/88; and 274/88; SLP (Cr) Nos. 3261/1987; 274/1988 and 338/1988.

[356] Registration of Foreigners Rules 1939, amended in 1963 and 1965, Registration of Foreigners (Exemption) Order 1957.

[357] B. C. Nirmal, "India and International Humanitarian Law" In Patel (ed.) above at p. 184.

[358] Under the Constitution of India, powers and functions are divided into Union List (Federal Government) and State List (Provincial Government or State Government).

[359] It is important that mass influx situation are met with established procedures free from political compulsion and compulsion and some measure of minimum protection extended to such refugees. Changes have been

Refugees in India may be subjected to arrest by the immigration officials if they enter India without a valid passport or travel document, or illegally depart or attempt to depart from India without a valid passport or travel document, as per Section 30 of the Passport Act, 1920 and Rule 6A of the Indian Passport Rules, 1950. Normally, a refugee, upon detention is transferred into the custody of police and the First Information Report (FIR) is lodged against him/her, as per Section 13 of the Indian Passport Actm 1967 and the Indian Passport Act, 1920.

### 4.5. Policy and Practice by the Executive Organ

It is important to mention at the outset that the Union Government follows a three-category approach towards the refugees. These three primary categories are classified by description of the living conditions faced by each refugee category: (i) refugees who receive full protection according to standards set by the Government of India; (ii) refugees whose presence in the Indian territory is acknowledged only by the UNHCR and are protected under the principle of *non-refoulement*; and (iii) refugees who have entered India and have assimilated into the communities in which they live. Their presence is acknowledged neither by the Indian Government nor by the UNHCR. This creates an important legal question – what is their status – are they Indian national or not?

The Indian Constitution provides rights and obligations for the Union and individual state governments as per the entries mentioned in the Constitution. As mentioned earlier, the refugee (entry and regulation of aliens) comes under the Union government domain. The history of various refugee influxes and handling of the same by the Indian government shows that the position has been a reactive one when the matter goes beyond the Border Security Force of India and issue becomes political. Furthermore, due to lack of a cohesive legal framework and guidelines, the Border Security Forces and the state governments deal with refugees as per prevailing circumstances and abilities of the state agencies. This creates a fragmented and an uneven or non-uniform approach by the Indian states.[360] It is also observed that the practice of Indian states remain at variance with one another. Thus, the refugee faces a double uncertainty – absence of federal legislative framework and non-uniform policies and practices adopted by various states. In cases where refugees do not get recognition status as refugee by the Indian authorities, they are free to apply for the asylum status with the UNHCR, who upon assessment of individual cases accord refugee certificate. These certificates though not recognized by the Indian government, holders of the same are allowed to stay in India in the absence of political opposition. Thus, it is concluded that the Indian government though does not provide *de jure* recognition, it *de facto* considers the status accorded by the UNHCR for their stay in India.

The Indian position with regards to the question of admission and *non-refoulement* merits an analysis. This needs to be reviewed and interpreted in the context of the fact that India accepted the principle of *non-*

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proposed in the Model Law to include provisions to register mass influx refugees and enable the government to impose reasonable restrictions in the public interest. Temporary refugees must also be protected with a basic regime of rights. See *A Prefatory Note on the Refugees and Asylum Seekers (Protection) Bill*, 2006 prepared by the Public Interest Legal Support and Research Centre, New Delhi.

[360] N. Subramanya, *Human Rights and Refugee*, (New Delhi: EBC, 2004); Alborzi, *Evaluating the Effectiveness of International Refugee Law*, (New Delhi: EBC, 2006); Saurabh Bhattacharjee, "India Needs a Refugee Law", XLIII *Economic and Political Weekly* 9, 2008; N. Mishra, *Human Rights: Refugee Problem in India*, (New Delhi: Vij Books, 2011); Chunnu Prasad, *India's Refugee Regime and Resettlement Policy: Chakma's and the Politics of Nationality in Arunachal Pradesh*, Kalpaz Publications: 2013; S. M. Gokhale, *India's Refugee Problem: Causes and Cures*, Prakash Publications: 1948; Arjun Nair, "National Refugee Law for India: Benefits and Roadblocks", *IPSC Research Papers* December 2007.

*refoulement* as including non-rejection at its borders under the Bangkok Principles 1966.[361] India's position is clear in that it deals with the question of admission of refugees and their stay until officially accorded refugee status, under legislations, which deal with foreigners who voluntarily leave their homes in routine circumstances. This can be proven under the interpretation and practice adopted by India pursuant to the Foreigners Act, 1946. The Foreigners Act, 1946 deals with the matters of entry of foreigners in India, their presence therein and their departure therefrom. As per paragraph 3(1) of the Foreigners Order, 1948, the grant or refusal of permission to an entry into India is governed, as like, "[N]o foreigner shall enter India-- (a) otherwise than at such port or other place of entry on the borders of India as a Registration Officer having Jurisdiction at that port or place may appoint in this behalf; either for foreigners generally or any specified class or description of foreigners, or (b) without leave of the civil authorities having jurisdiction at such port or place." Pursuant to this provision, all foreigners can enter India with the authorization of the authority having jurisdiction over such entry points only. This provision was inserted to ensure that the executive machineries curb the problem of illegal entrants and infiltrators. Furthermore, it is required that unless exempted, every foreigner should possess a valid passport or visa to enter India. Thus, any refugee who does not comply with these provisions is liable to prosecution and deportation, as appropriate.

India adopted a gender refugee policy and adopted pro-refugee programs in 1947. However, there are also allegations concerning the differential treatment between women and children and at times between two refugee communities as well.[362] India considers voluntary repatriation of refugees as the most preferred solution to the problem and has successfully repatriated Bangladeshi, Sri Lankan and Chakma refugees.[363] India also allowed non-willing Sri Lankan, Bhutan, Tibet and Nepal refugees to stay back in India. Similar position is also found with regards to the Chakma refugees from Bangladesh.[364] In these cases, the Supreme Court had come to the rescue of the non-willing repatriates.[365]

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[361] "Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees, as adopted on 24 June 2011 at the 40th Session, New Delhi (2001); Sara Davies, "The Asian Rejection? International Refugee Law in Asia", *Australian Journal of Politics and History*, December 2006; Kelly Loper, "Hong Kong's International Legal Obligations toward Refugees and Asylum Seekers", Paper presented by the Centre for Comparative and Public Law, University of Hong Kong, 18 July 2006.

[362] At various instances, India's relatively more favourable treatment to Tibetan refugees and refugees who flew to India in the wake of Bangladesh independence, versus Chakma refugees have come under sharp criticisms from scholars and even an independent statutory body such as the National Human Rights Commission. See *Human Rights Newsletter*, National Human Rights Commission, vol. 3, no. 7, July 1996.

[363] It is required that decision of refugees to return to their homeland shall be written, voluntary, informed and vetted by a quasi-judicial authority to allow a safe and dignified return.

[364] The Chakma community is mainly the ethnic Buddhist Chakmas originating from the Chittagong Hill Tracts of Bangladesh. The Chakma refugee issue is largely due to the effects of partition, dominant development paradigm and religious persecution. The Chakma refugees residing in Arunachal Pradesh of India pose an ethnic and security problem for India as they are also considering themselves to be marginalized and come in conflict with the local population for the land and resources possession. Deepak Singh, *Stateless in South Asia: The Chakmas between Bangladesh and India*, (Sage: New Delhi: 2010).

[365] *P. Nedumaran v. Union of India*, 27 August 1992, (unreported) WPs 12298 and 12313/1992; In *Nedumaran* case, the Court although without specifically and really recognizing the right against non-refoulement, accorded the individuals the rights against forced repatriation. It sets the standards for repatriation including its emphasis on the voluntary character. *P. Nedumaran and Dr S. Ramadoss v. the Union of India and the State of Tamil Nadu* (1992). In the case of *Digvijay Mote v. Government of India* (1994) case, the Karnataka High Court, bringing to the notice government's failure its treatment concerning the refugee children, asked the government to do the needful.

Two main reasons for not enacting a domestic legislation are the perceived threat of terrorism and influx and precipitation of flood of migrants.[366] As India shares a number of difficult political and conflict-generating issues with neighbours, it believes that refugees may fall into the hands of destablisation forces and damage the fabric of stability and security.[367] Secondly, India, like the Western European nations, considers that influx of the migrants will destabilize the local economy and generate intrinsic conflicts.

It must be borne in mind that although the case for uniform legislation is imperative, the situation in different neighboring countries and political-security concerns would hardly enable India to come up with a uniform legislation. One of the most important factors why India has been unable to enact a uniform legislation is the security concern.[368] Because it is believed that a uniform legislation may be unable to provide full-proof guarantee against security threats and that an uncontrolled migration of refugees, by using the judicial activism laid down by the Indian judiciary, may in the long run increase economic as well as social threats to the nation.[369] As far as internal security threats are concerned, one can see that the risk is due to (a) strategic level security when refugees are armed and when the government loses the control over them; (b) structural level security is threatened by increasing demands on and conflict over scarce resources; and (c) regime level security is threatened when refugees enter the domestic political process and create pressures on government.[370] Lawmakers are, therefore, compelled to use these reasons to refrain from enacting a uniform legislation. Furthermore, India believes that "unwanted migrations, including those of refugees, are a source of bilateral and not multilateral relations, and international agreements could constrict her freedom of action."[371] Indian lawmakers also feel contented that India is already working in consonance with the basic features of the model

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[366] The Model Law's exclusion clause departs from conventional exclusion provisions in three ways: (a) it imposes a high standard of proof on the State authority; (b) it omits generalised exclusion grounds; and, (c) it makes reference to the SAARC Regional Convention on the Suppression of Terrorism, 1987 ("SAARC Terrorism Convention"). The standard of proof required – a conviction – to exclude criminals against humanity and peace and war criminals is higher than accepted international norms and is unlikely to be met considering the volatile situations from whence such people flee making it impossible for courts to function freely and fairly. The reference to the SAARC Terrorism Convention will diminish refugee protection by diluting the defences against extradition. Through its Additional Protocol, the SAARC Terrorism Convention deems certain offences as 'non-political offences' and takes away a valuable defence available to a person sought to be extradited or removed from a signatory state, even where the person is simply accused of a terrorist offence. This not only a back-door expansion of the scope of exclusion, but also a contravention of Article 14(2) of the Universal Declaration of Human Rights that denies persons the 'right to seek and enjoy asylum' only "in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." The 'political offence' exception to extradition, contained in Section 7(2) of the Indian Extradition Act, 1963, is also similarly diluted. Therefore, the requirement of a conviction and the reference to the SAARC Terrorism Convention has been removed and substituted with a revised exclusion clause.

[367] For it is the duty of every State to prevent individuals living on its territory from endangering the safety of another State by organizing hostile expeditions or by preparing common crimes against its Head, members of its Government or its property. Oppenheim's *International Law*, vol. 1, Edited by Sir Robert Jennings and Sir Arthur Watts, 9th Edition, Longman Group UK Ltd., 1992, p. 903.

[368] While security concerns are valid, especially in the wake of terrorism in South Asia, it is equally important to bear in mind that the genuine refugees may have to pay an unfortunate price in India, which is otherwise, acclaimed as the Land of Hospitality or we can say, which has impressive records in receiving refugees from the time immemorial.

[369] Ms Sadako Ogata during her visit to India on 4 May 2000 emphasized to the NHRC that it was important that the management of mixed migration includes clear, recognised and practical mechanisms to separate those fleeing from persecution or conflict, and those seeking economic betterment.

[370] Maria Saifuddi Effendi, "Conflict resolution in South Asia: applicable theories and approaches," 55 *Pakistan horizon*, 3, 41-57 (2002).

[371] Paradoxes of the International Regime of Care.

law itself for treating refugees. Hence, there is no reason to enact a separate uniform legislation. These lawmakers refer to various rights that are read into law and practiceed by the Indian judiciary, even in the absence of specific legislation. The lawmakers also believe to be guided with the claim that India affirms the *non-refoulement* principle, which also happens to be an integral part of the refugee law.

### 4.6. Refugee Issue as an Important Factor in the Foreign Policy of India

It is important to analyse the content and import of the statements made by the Indian delegations at various international fora with regards to refugee issues. India showed a lukewarm response to the establishment of an International Organization for Refugees as it is clear from the statement of the Indian delegation during the debate on the topic in the 3rd Committee of the UN General Assembly in 1949.[372] However, this did not mean that India did not want to support the cause of refugees in the world. India would have voted for the establishment of a High Commissioner's Office if it had been convinced that there was a great need to set up an elaborate international organization primarily concerned with giving refugees legal protection.[373]

India considers the 1951 Convention and 1967 Protocol, a partial regime for refugee protection drafted in the Euro-centric context.[374] The basic contention was that the Convention does not deal with the problem faced by the developing countries, as it is drafted mainly to tackle individual cases and not mass influx.[375] India considered the 1951 Convention as a Cold War tool of the Western countries to criticize the former Soviet Bloc by accepting refugees from the Eastern Europe into what was declared to be a free world. This may have been the case prior to the collapse of the Soviet Union, but now the situation has changed, as the Western European nations are also encountering mass influx problems and dealing with the issue under the 1951 Convention or 1967 Protocol. The earlier Indian foreign policy focused on opposing the Western nations and favoured the former Soviet bloc policy. Its own Non-Aligned Movement leadership constituted its main focus to abstain from voting on UNGA resolution 319(IV) of 1949, which created the UNHCR. In the initial years of the UNHCR existence in India, the Indian executive expressed displeasure and even summoned the UNHCR representatives to express its unease with the Refugee Convention and the UNHCR itself.[376] In this regard, it is important to note that India and the UNHCR have established an Annual Open-Ended Bilateral Consultation mechanism – the fourth of such consultations took place in December 2012.[377]

As mentioned earlier, India has received hundreds of thousands of refugees over the last 65 years. Barring the last decade, the refugee issue has been one of the important foreign policy issues for India in general. India received Tibetan refugees in 1959, refugees from Bangladeshi in 1971, the Chakma influx in 1963, the

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[372] Summary Records of the Third Committee Meeting 259 (19 November 1949), GAOR, 6th Session, p. 8143.

[373] Prime Minister Nehru, as early as in 1953, stated his commitment to abide by international standards governing asylum by adopting similar, non-binding domestic policies.

[374] In the modern history of international law, the refugee problem can be traced back to 1921-22 in the aftermath of the First World War, the breakup of the Austro Hungarian Empire and the Russian Revolution. The real progress to protect and promote rights of refugees began with the adoption of the Universal Declaration of Human Rights which defined the human rights of people regardless of nationality and citizenship. 1951 Convention was a response to a regional situation and as such it was perceived and drafted keeping mind the western European nations. 1967 Protocol removed the geographical and chronological limitations, however.

[375] UN Division, Ministry of External Affairs, Refugees (No. UI/1515/9/99), quoted in Chari et. al pp. 55-59.

[376] Foreign Secretary R. K. Nehru met UNHCR representative Amir Ali in 1953-1954 and conveyed India's displeasure with the politics of the Refugee Convention. See, Rajeev Dhavan, *Refugee Law and Policy in India*, (New Delhi: PILSARC, 2004); B. S. Chimni, "The Legal Condition of Refugees in India", 7 *Journal of Refugee Studies*, 4, 394-98 (1994).

[377] Ministry of External Affairs Annual Report 2012-13, Government of India, p. x.

Tamils from Sri Lanka in 1983, 1989, and again in 1995, Afghan refugees from the 1980s and from Myanmar too in the same period.[378] With the end of the Cold War and rise of new types of internal conflicts which have often resulted into mass influx of refugees in many of the developing countries, the Indian position has started changing. This is also due to the fact that India, unlike previous decades, has not witnessed any mass influx of refugees in its own territory. The current policy and practice is based on the treatment of individual refugees or asylum seekers, similar to what the Western European nations are facing.[379]

Is India shying away from its responsibilities in the area of proper refugee protection? Is Indian approach perceived to be working adversely against its assertion as an emerging global power?[380] The analysis reveals that India perhaps does not want its voice on the world's most persecuted to be heard so as to mould future policy.

India has undertaken obligations by signing and/or ratifying various human rights instruments that require India to fulfill its obligations towards refugee as well. India is a party to the Genocide Convention, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights[381] (ICESCR), the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Convention on the Rights of Child. India, as a member of various human rights organisations, has also a moral, if not a legal obligation to ensure that those eligible for benefits of human rights treaties are given protection, and promoted for refugee status.

While there is no specific monitoring mechanism to ensure the protection and promotion of refugee rights, the National Human Rights Commission (NHRC), the supervisory bodies of human rights treaties including the Human Rights Commissions at state level, NGOs and other institutions and individuals render direct and indirect monitoring services for the same. In recent years, India has focused on very few issues of refugees, namely, the UNHCR capacity of protection, reinforcement of protection capacity, refugees in urban areas and strengthening of rapid response in emergency situations.[382] India has reiterated support for the

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[378] Rajiv Dhavan, "India's Refugee Law and Policy", *The Hindu*, 25 June 2004.

[379] Statement of Ambassador H. S. Puri at the Executive Committee Meeting of the UNHCR, October 2003. Mr. H. S. Puri, the Indian Permanent Representative at the Executive Committee of the UNHCR said that, "…the international legal framework [of refugee protection] still falls short of dealing with massive flows and mixed migration. In the absence of appropriate adjustments to match these realities, countries such as India will find it difficult to accede to this framework, their commitment to hosting refugees notwithstanding… For example, in some instances in the past, the UNHCR has closed its offices at the peak of crisis situations, leaving countries to single-handedly bear the burden of hosting millions of refugees." Although in statistical terms, India may still have higher number of refugees and asylum seekers, the Western European nations are facing more heat as these nations are getting refugees and asylum seekers from Asia, Africa and Latin American nations.

[380] Rajiv Dhawan analyzing India's Refugee Law and Policy concludes that India wants a leadership profile but does not assume concomitant responsibilities.

[381] India has made reservation to these two Covenants which reads, "With respect to Article 13 of the International Covenant on Civil and Political Rights, the Government of the Republic of India reserves its right to apply its law relating to foreigners". According to Article 13 of the Covenant, "An alien lawfully in the territory of a State Party to the present Covenant may be expelled, therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

[382] Statement made by Ambassador A. Gopinathan, Permanent Representative of India to the UN (Geneva) on 5 October 2010 before the Executive Committee of the UNHCR.

UNHCR advocacy on repatriation, reintegration, rehabilitation and reconstruction. In other words, India's focus remains on solutions after refugees have arrived in a state territory. India has made it clear that the role of developing countries that are host to a large number of refugee movements, has to be recognized and their concerns addressed in direct proportion to the magnitude of the burden they carry.[383]

India considers, even today, that 1951 Convention is a discriminatory convention. India emphasizes that the role of UNHCR should be confined to international protection of refugees, instead of widening of its mandate to cover disaster relief activities, statelessness and internally displaced persons.[384] This position of India reflects its consistent approach of not allowing international agencies to interfere into internal matters of any nation state. While this is the position of the Indian Executive, the Indian judiciary has pronounced judgments that can be considered to be at variance with the position of the Indian executive organs. In appreciating the Indian executive policy on refugees, it is important to keep in mind the political factors, or what is known as the vote bank policy, which often uses the refugee problem for electoral gains.[385]

### 4.7. Role of the Judiciary on International Refugee Law

The Indian judiciary, like in the case of the environmental regime, has been creatively interpreting Article 21 of the Constitution, which guarantees the right to life and liberty to all persons and *not merely to citizens*.[386] Although refugees are not citizens, they are given various rights under Article 21 of the Constitution. Indian jurisprudence clearly evidence that refugees are persons who are entitled under Article 21 to have a dignified life. It is important to consider that according to the jurisprudence of the Supreme Court of India, the right to life encompasses and includes many rights, which together constitute a dignified life,[387] and same applies to the principle of personal liberty. The Supreme Court jurisprudence has widened the scope of rights under Article 21 to include the right to privacy,[388] the right to go abroad,[389] the right to legal aid,[390] the right to speedy trial,[391] the

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[383] A. G. Mezerik, *The Refugee Problem in the Middle East (*New York: 1957)*:* Amnesty International, *Bosnia-Herzegovina, All the Way Home: Safe "Minority Returns" as a Just Remedy and for a Secure Future* (1998); Penderel Moon, *Divide and Quit,* (Berkeley: University of California Press, 1962); Ebright Fossett, *Free India: the First Five Years: An Account of the 1947 Riots, Refugees, Relief and Rehabilitation* (Nasvhille: Parthenon Press, 1954); Michael M. Cernea and Chris McDowell, *Risks and Reconstruction: Experiences of Resettlers and Refugees* (World Bank, 2000).

[384] MEA Annual Report 2010-11, p. 135.

[385] For example, by repealing the Illegal Migrants (Determination by Tribunals) Act of 1983, the refugees from Bangladesh have been benefited to a large extent that are also alleged to be supporting the Congress Government in forming the governments in the north-eastern state of Assam.

[386] Chimni concludes that Article 21 encompasses the principle of *non-refoulement* which requires that a State shall not expel or return a refugee 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[386] Article 21 of the Constitution encompasses the principle of non-refoulement which requires that a State shall not expel or return a refugee, 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Chimni argues that *even the principle of non-refoulement is not an absolute principle.* Article 33(2) states: the benefit of the present provision may not, however, be claimed by a refugee who there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[387] *Francis C. Mullin v. Administrator*, AIR 1981 SC 746.

[388] *Govid v. State of MP*, AIR 1975 SC 1378.

[389] *Satwant Singh v. Assistant Passport Officer, New Delhi*, AIR 1967 SC 1834.

[390] *M. H. Hoskat v. State of Maharastra*, AIR 1978 SC 1548.

[391] *A. R. Antulay v. R. S. Nayak*, AIR 1992 SC 1701.

right against the bar fetters,[392] the right against solitary confinement,[393] the right to shelter,[394] the right to free education up to the age of fourteen years,[395] the right to livelihood,[396] the right to live with dignity free from exploitation,[397] the right to protection against torture,[398] the right to a safe and decent environment[399] and the right to protection from sexual harassment.[400] These guarantees are unique and reinforce a conclusion that the Indian judiciary has been playing a very important role in the protection and promotion of rights of the refugees. In addition to the above, refugees can also benefit by the judicial review.[401]

Various judgments of the Supreme Court have clarified and have given legal characteristics to governmental practices on refugees as an emerging or acceptable norm. In *the Chairman, Railway Board & Ors. V. Mrs Chandrima Das & Ors.*, the Supreme Court, required the Indian state to respect international covenants and the UN declarations and also apply the provisions of the UDHR into domestic jurisprudence.[402] The Court also clarified that the fundamental rights stipulated under the Indian Constitution are available to all citizens and some of them are also available to 'persons' and that 'person' would include citizens as well as non-citizens for the purposes of Article 14 of the Constitution. Furthermore, the Court concluded that Articles 3 and 7 and Article 9 of the UDHR and Articles 20, 21 and 22 of the Constitution are in consonance with each other, hence, the state must respect the same. In this particular case, the Court came to a conclusion that Hanuffa Khatoon, despite being a non-citizen of India, cannot be subjected to a treatment below her dignity, nor could she be subjected to physical violence. The Court, concluding that her rights under Article 21 of the Constitution were violated, required the state to pay compensation to her. The Court made reference to the opinion of Lord Diplock in *Salomon v. Commissioners of Customs and Excise*, to consider a presumption that the Parliament does not intend to act in breach of international law, including specific treaty obligations.[403] It further relied upon *Lords Bridge in Brind v. Secretary of State for the Home Department*, which observed that "in construing any provision in domestic legislation, which was ambiguous in the sense that it was capable of a meaning which either conforms to or conflicts with the international convention, the Courts would presume that the Parliament intend to legislate in conformity with the Convention and not in conflict with it." [404]

Through *Giani Bakshish Singh v. Government of India and Ors.*, the Supreme Court clarified various principles in regard to the detention of a foreigner in the Indian territory when it was established that his repatriation would enable him to undertake activities which would be detrimental to the Indian state. In this case, the Court clarified that the Union government had the right to make arrangements for expulsion including the right to make arrangements for preventing any breach or evasion of the order. The Court also suggested that the Preventive Detention Act, 1950, confers the power to use the means of preventive detention as one of the

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[392] *Charles Sobhraj v. Superintendent Central Jail*, AIR 1978 SC 1574.
[393] *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675.
[394] *Sheela Base v. State of Maharastra*, AIR 1983 SC 378.
[395] *Parmanand Katara v. UOI*, AIR 1989 SC 2039.
[396] *Shantistar Builders v. N. K. Totame*, AIR 1996 SC 786.
[397] *Unnikaishnan v. State of A. P.*, AIR 1993 SC 2178.
[398] *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.
[399] *Francis C. Mullin v. Administrator*, AIR 1987 SC 746.
[400] *D. K. Basu v. State of West Bengal*, AIR 1997 SC 610.
[401] One of the most important basic features of the Constitution is power to judicial review.
[402] John F. Sawyer, "Shipbreaking and the North-South debate: economic development or environmental and labor catastrophe?", 20 *Penn State International Law Review* 3, 535-62 (2002).
[403] (1996) 3 AII ER 871.
[404] (1991) 1 AII ER 720.

methods of achieving this end. It is quite interesting to see that the Court placed significant reliance upon the legal literature instead of conventions or treaties. For example, quoting from Starke's *Introduction to International Law* (7th edition, 1972), the Court stated that the detention prior to expulsion should be avoided, unless the alien concerned refuses to leave the State or is likely to evade the authorities. It also referred to Oppenheim's *International Law* (7th edition, 1948), quoting, just as a State is competent to refuse admission to an alien, so, in conformity with its territorial supremacy, it is competent to expel at any moment an alien who has been admitted into its territory. The Court in this case also ruled that to detain a foreigner who has come to the country with a passport would be a breach of international amity. This interpretation apparently stretches the limits of liberal interpretation. The Court, while on the other hand, as seen above, reads customary law into domestic law, whereas in this case, fails to recognize the importance of customary international law in extradition matters. According to the Court, even persons, whether they are Indian citizens or foreigners, who have committed crimes in this country but have escaped to another country, could be brought back only if there are extradition arrangements with the country to which they have escaped and the offence is an extraditable offence. Thus, in the same case, the Court creatively interpreted the norm of international amity at one juncture and on the other juncture, disregarded the object of international amity, which also applies in the case of extradition.[405]

In *Anwar v. the State of Jammu and Kashmir*, the Court ruled that the Constitutional protection against illegal deprivation of personal liberty construed in a practical way cannot entitle non-citizens like the petitioner to remain in India contrary to the provisions of the law governing foreigners.[406] In *Hans Muller of Nuremburg v. Superintendent, Presidency Jail, Calcutta and Others*,[407] the Court clarified that the power of the Government to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion. The power of the government to deport is absolute, as clarified by the Supreme Court in *Louis de Raedt v. Union of India.* According to the Court, "the power of the Government in India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion…the executive Government has unrestricted right to expel a foreigner."[408]

The *Khudiram Chakma v. State of Arunachal Pradesh and Others*,[409] was important for clarifying the position with regards to the property rights of aliens in India. In this case, the Court believed that the general international law provides that aliens should not be discriminated against in their enjoyment of property rights once they have been acquired. If alien property is nationalized whereas the property of nationals remains unaffected then the act is discriminatory and prohibited under international law. It further held that fundamental right of a foreigner is confined to Article 21 for life and liberty and does not include the right to reside and stay in India, as mentioned in Article 19(1) (e) which is applicable only to the Indian citizens.[410] This judgment is

[405] Vijayakumar Veerabhadran, "Judicial Responses to Refugee Protection in India", 12 *International Journal of Refugee Law* 2, 235-243 (2000).
[406] 1971 AIR 337, 1971 SCR (1) 637.
[407] AIR 1955 SC 367.
[408] AIR 1991 SC 1886 at p. 1890.
[409] 1994 Sup (1) 615.
[410] The Supreme Court in *Louis de Raedt and Ors. V. Union of India and others* also clarified this position, namely, the fundamental right of the foreigner is confined to Article 21 for life and liberty does not include the right to reside and settle in India which applies only to the citizens of India. AIR 1991 SC1886. This pronouncement of the Court has been criticized in which it held that the government had an absolute right to deport aliens. See Sumbul Rizvi, "Response of the Indian Judicial System to the Refugee Problem", 2

widely seen as the bedrock in the immigration debates. It is to be noted that Chakmas are not granted citizenship. It has been suggested that, in addition to recognizing the rights of the original Chakma refugees to remain in Arunachal Pradesh, the government should work to protect the legal Chakma refugees' rights and help them apply for and receive citizenship under the terms of the Supreme Court judgment in the NHRC as discussed below.[411]

The *National Human Rights Commission v. State of Arunachal Pradesh and Anr.*,[412] is considered one of the landmark judgments in the history of the Indian judiciary as far as the position and clarification of refugee law is concerned. The case concerned the persecution by sections of citizens of Arunachal Pradesh of Chakma/Hajong Tribals who hailed originally from Bangladesh. The Supreme Court directed the state of Arunachal Pradesh to ensure the lives and personal liberty of Chakmas. It included seeking the assistance of the Union forces. This prohibited the government from evicting them from homes and occupations, asked to deal with the sections of Arunachal Pradesh who were threatening these Chakmas in accordance with law and required the government to pay compensation. This case has been also considered important as the Court ruled that it is the duty of the State to protect the life and liberty of all human-beings regardless of their citizenship and emphasized the State's obligation to do all necessary to prevent its citizens from threatening the lives and liberties of such people. In its judgment, the Court also clarified that the earlier decision of the Court in the *Khudiram Chakma* case did not foreclose the consideration of the grant of citizenship to Chakma.

In *Kubic Dariusz v. Union of India* case,[413] observing that the detention of the person was rendered illegal by non-consideration of the representation of the petitioner by the government, according to law resulting into violation of Article 22(5)[414] of the Constitution referred India's obligations in the context of preventive detention of a foreign national. It further observed that the preventive detention of a foreign national who is not a resident of the country involves an element of international law and human rights and the appropriate authorities ought not to be seen to have been oblivious of its international obligations in this regard. Furthermore, the Court clarified that when an act of preventive detention involves a foreign national, though from the national point of view the municipal law alone counts in its application and interpretation, it is generally a recognized principle in national legal system that in the event of doubt the national rule is to be interpreted in accordance with the state's international obligations.

In *Gramophone Co. of India v. Birendra Bahadur Pandey*, the Court clarified that

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*Bulletin on International Humanitarian Law and Refugee Law*, 1 65-7 (1997).The National Human Rights Commission judgment came against the backdrop of rising tensions between the Chakmas and local indigenous peoples, causing the Court to worry that the Arunachal Pradesh government was deliberately trying to prevent legal Chakma residents from obtaining citizenship. The Court affirmed the right of certain Chakma residents of Arunachal Pradesh to apply for citizenship, demanding that the state forward legitimate applications to the Union government under the procedures listed in Sections 8 and 9 of the Citizenship Act of 1955. Although the Court never explicitly stated that arrival in 1964 was a criterion for citizenship, the length of the Chakmas' habitation in India was employed as a justification for the decision several times.

411 http://www.morungexpress.com/mobile/analysis/60592.html accessed on 5 May 2011.

412 1996(1) SCC 742; AIR 1996 SC 1234.

413 1990 AIR 605; 1990 SCR (1) 98.

414 Article 22 (5) reads, "Protection against arrest and detention in certain cases… When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order… Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose".

> "the Comity of Nations requires that Rules of international law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognizes the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of Nations or no, Municipal Law must prevail in case of conflict."[415]

In view of this the questions arises whether the principles of customary international law impose any limitation on the Indian state to constrain its absolute power under the Foreigners Act, 1946 to expel a foreigner?[416] The Union Government may by order make provision either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure there from or their presence or continued presence therein. Although prior to 1983, the Government's power could have been considered unfettered but these will be subject to whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable.[417] Thus, the Court in 1955 only had to consider whether an action taken complied with the procedure laid down in the Foreigners Act, it has now to consider whether the same was fair, just and reasonable. It is useful to quote what the Supreme Court had to clarify. The Court clarified and held that, "these decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedures and for the Court to follow it, that it is for the legislature to provide the punishment and for the courts to impose it… the last word on the question of justice does not rest with the legislature. It is for the courts to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable."[418] The Committee constituted to draft a model refugee protection bill, under the Chairmanship of former Chief Justice P. N. Bhagwati, defined the term refugee while formulating the model law. According to this bill,[419] the term *refugee* is "any person who is outside his/her Country of Origin and is unable or unwilling to return to, and is unable or unwilling to avail himself/herself of the protection of that country because of a well-founded fear of persecution on account of race, religion, sex, ethnic identity, membership of a particular social group or political opinion owing to external aggression, occupation, foreign domination, serious violation of human rights or events seriously disrupting public order in either part or whole of his /her Country."[420]

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[415] P. Chandrasekhara Rao, *The Indian Constitution and International Law*, (Delhi: Taxman, 1993) at p. 143.

[416] Section 3, 1946 Act reads, Power to make orders.

[417] *Mithun v. State of Punjab*, (1983) 2 SCR 690.

[418] *Maneka Gandhi v. Union of India* (1978) 2 SCR 621; *Sunil Batra v. Delhi Administration* (1979) 1 SCR 392; and *Bachan Singh* v. State of Punjab (1980) 2 SCC 684.

[419] The model law, drafted by the P. N. Bhagwati Commission has never been tabled before the Parliament of India. This shows clear apathy of the Indian legislature towards the refugee issue. During the visit of UNHCR Commissioner Antonio Gueterres in 2006, the acting Chairperson of the National Human Rights Commission informed that the Government has accepted in principle the necessity of legislation. See NHRC Press Note 27 December 2006.

[420] The first draft of the model refugee protection law was presented at the 1997 SAARC Law Seminar in New Delhi and it was modified and adopted by the 4th Annual Meeting of the Regional Consultation at Dhaka in 1997. This model law is, however, India-specific. This model law is largely perceived as a useful framework

The Indian judiciary has by creative interpretation accorded various rights to refugees as examined earlier. The Indian judiciary had at times prevented the executive from executing deportation proceedings to refugees from Afghanistan, Iran and Myanmar, by the way of a creative interpretation of the Foreigners Act 1946, especially paragraph 3[421] and 14.[422] In these cases, the Court prevented the executive from further proceedings on the ground of the possible suffering of threats to life and liberty by these refugees in their country of origin. The Supreme Court in the *National Human Rights Commission v. State of Arunachal Pradesh* held that Chakma refugees who had come from Bangladesh due to persecution cannot be forcibly sent back to Bangladesh as they may be killed there and thus they would be deprived of their right under Article 21 of the Constitution.[423]

Refugees have access to the Indian courts for judicial protection against arbitrary and illegal action of India in violation of their rights.[424] Furthermore, the NHRC and NGOs can also intervene on their behalf and the unique feature of the Indian litigation system, namely, the public interest litigation[425] can also be accessed by the refugees or on their behalf by individuals and institutions.[426] The Judiciary's liberal approach also reflects in the cases concerning illegal entry,[427] illegal activities in India, releasing detainees pending determination of refugee status, staying deportation, giving them opportunity to interact with the UNHCR in India. The judiciary has attempted to ensure that if refugees need protection and access to the UNHCR, it is available to them. The Indian courts have given a certain measure of socio-economic protection to refugees in special circumstances as seen in the case of *Digvijay Mote.*[428]In addition to the Indian judiciary, the role of the NHRC is valuable in understanding its position and influence in the domain of executive and judiciary. NHRC, among others, has a mandate to study treaties and other international instruments on human rights and make recommendations for

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for refugee protection. See Florina Benoit, "India: A National Refugee Law Would Equalize Protection", *Refugees International*, 2000; Rajeev Dhavan, "Treaties and People: Indian Reflections", 44 *Journal of Indian Law Institute*, 362-76 (1996).

421 Article 3 reads, The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into 1[ India] or their departure therefrom or their presence or continued presence therein.

422 Article 14 reads, Penalties. If any person contravenes the provisions of this Act or of any order made thereunder, or any direction given in pursuance of this Act or such order, he shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine and if such person has entered into a bond in pursuance of clause (f) of sub- section (2) of section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof, or show cause to the satisfaction of the convicting Court why such penalty should not be paid.

423 AIR 1996 SC 1234.

424 B. C. Nirmal, "India and International Humanitarian Law", In Patel above at p.178.

425 The Public Interest Litigation protects and promotes public interest through litigation – which is introduced by the court of law or by any other private individual. This is again a unique feature of the Indian judicial activism which is almost non-prevalent in any other part of the world. A person filing the PIL must prove that the litigation is for public interest and not a frivolous litigation. Supreme Court of India, recognizing the misuse of the system, has introduced heavy penalty for those who are using the mechanism for frivolous purposes.

426 NHRC brought the matter of the Chakma Refugees to the attention of the Supreme Court through the instrument of Public Interest Litigation, using its right to take up their cause.

427 *State v. Teresi* case, no. 406 of 1996, 2 January 1990, accessed on 22 March 2011. The Chief Judicial Magistrate adopted a lenient approach and granted imprisonment for 45 days and payment of fine of 1 thousand rupees. In *State v. Md. Hashim*, the Court took a lenient approach in imposing punishment towards the Afghan national who was charged under Sections 420/471 of the Indian Penal Code and Section 14 of the Foreigners Act. In State v. Benajamin Tang Neng (1994) case, the refugee, even after having completed the imprisonment for illegal entry was detained/in jail due to "apathy on the part of the state authorities."

428 Digvijay Mote (unreported) WA 354/1994, High Court of Karnataka.

their effective implementation.[429] It has from time to time, brought pressure on the Indian executive to ratify the 1951 Convention. The above analysis suggests that the Indian judiciary is more inclined to read human rights treaties and soft-laws and has apparently not insisted on the requirement of their transformation into the municipal laws.[430]

### 4.8. Concluding remarks

The above examination leads us to make following concluding remarks. First, India is indeed a refugee heaven especially for persons from neighbouring countries. The refugee problem is one of the most important issues which determine India's relations with its neighbouring nations as well as with several UN agencies, dealing with human rights and refugee issues. It has been seen that India has been subjected to severe criticisms from the neighbouring countries and the international community on its approach. The Indian state practice shows relatively more favourable treatment of refugees from Tibet, Afghanistan and Myanmar.[431] This favourable tilt must be seen in the wider context of India's relations with these nations. As the neighbouring countries continue to experience political upheavals and the Indian economy and political situations are becoming better, it is likely that India will remain the most sought-after place for refugees from these and other distant nations of Asia and Africa.

India's preference and consistent position to maintain its administrative and practical arrangements in dealing with refugee issues is likely to continue in foreseeable future. However, the pressure brought by the refugees and the international community may compel India to draw guidelines. The guidelines will enable India to provide fair and equal treatment to all refugees. As there are no other than benefits of political mileage, India is unlikely to sign the 1951 Convention or 1967 Protocol.[432] A uniform legislation giving effect to international norms in a uniform manner by all states is desired. As refugees directly affect the democratic polity and institutions of political, social, cultural and economic governance, it is desired that such legislation will be of certain guiding assistance to these institutions. In the absence of a central framework, the refugee issues are

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[429] Article 12(f), NHRC Act 1993.

[430] Indian Judiciary has been insisting on the requirement of incorporation of human rights treaties into the municipal law, as seen in the cases like, *Jolly George Verghese v. Bank of Cochin*, AIR 1980 SC 970; *Xavier v. Canara Bank Ltd*. 1969, Vigilance Rights Committee case AIR 1983; *Bishambhar Singh v. State of Orissa*, AIR 1957 Orissa 1957 247. As Nirmal argues, "the application of the doctrine of incorporation in the case of human rights treaties, though laudable, ignores Article 253 of the Indian Constitution and the prerogative of the Union Government to become or not to become a party to any international convention and even overlooks the issues of state responsibility in international law for the violation of any treaty".

[431] Anne-Sophie Bentz, "Being a Tibetan Refugee in India", 31 *Refugee Survey Quarterly* 1, 80-107 (2012); Lydia Aran, "The Forgotten Dead: Representations of the Past in the Tibetan Refugee Community in India", in Graham C. Kinloch, Raj P. Mohan (et. al). *Genocide: Approaches, Case Studies and Responses*, 289-304 (New York: Algora Publishing, 2005).

[432] Although it is agreed that the "refugee" is one of the most pressing concerns of the globe and that the ratification will pave way for the UNHCR to broaden the base of state support and that it will further enhance universal treatment and protection to refugees, the potential security, economic and socio-political costs outweigh the perceived benefits. It will indeed certain increase demonstration of India's commitment to the international law on refugee in particular and international law in general. If India will be a member, the world refugees may easily find refuge in India and it will avoid political conflicts between far-distant states. However, the refugees in India are from the neighbouring nations only, it is doubtful whether the signing of the Convention will lead to less friction. One can possibly argue that signing of the Convention will have positive impacts on receiving financial aid from the international community towards the refugee protection. As the Convention lacks a carrot & stick regime, country like India will continue to remain outside the ambit of the Convention and still ensure the refugee protection as per the political and administrative conveniences.

subject to the administrative discretion of various state authorities, which must be given some uniform guidelines. It can be concluded that the pro-refugee jurisprudence of the Supreme Court and the High Courts remains irreconciliable with the Foreigners Act and India's overall practice. The lack of uniform legislation does create a number of anomalous situations. Despite the potential benefits, which a uniform legislation will bring in easing the tension between the host and origin countries of refugees, the lawmakers currently remain unconvinced of such an argument. Such legislation would provide greater relief to genuine refugees and asylum seekers and necessary guidelines to the authorities concerned and to all whose work is to apply the humanitarian principles of refugee law. It would also introduce transparency, accountability and fairness in India's refugee policy.[433] Despite the Supreme Court's efforts, there are dim prospects as far as the legislature is concerned. As former Chief Justice Verma had to say, "the attempt to fill the void by judicial creativity can only be a temporary phase. Legislation alone will provide permanent solution".[434] The Refugee and Asylum Seekers (Protection) Bill of 2006 is pending before the Parliament and is likely to provide answers to various questions posed in this chapter.[435]

It is clear that India needs to conduct a comprehensive review its refugee policy, evolve a regional approach and enact legislation to protect persecuted refugees. It also needs to revive the examination process of joining the 1951 Refugee Convention that started in 2004 under the chairmanship of former Chief Justice of India, Justice P. N. Bhagwati and pushed further by Justice A. P. Anand who speaking through the platform of the NHRC repeatedly called upon the Indian government to ratify the Convention. It can be concluded that the Indian position towards the refugee dominantly considers the national origin of refugees and political concerns (relations) with the country in handling and treating the refugees, which at times is alleged for its differential treatment within the refugee communities.[436] In absence of a national legal framework, one of the important conclusions that emerges is that India is and will continue to be prone to the differential and (sub) standard human treatment to various categories of refugees. If a legal framework is available, India's practices could be well measured against the benchmarks. Therefore, it is imperative that India enacts the legislation in order to avoid unnecessary criticisms and remove legal, political and administrative uncertainties. A good legal framework will curtail the political *ad hoc* approach which often is critized for forcible repatriation of refugees.

It can be observed that individual members of judiciary have frequently taken an assertive and bold independent view. For example, the former Chief Justice of India Justice Verma speaking at the Inaugural

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433 B. C. Nirmal, *"India and International Humanitarian Law"* in Patel (ed.) above at p. 185.

434 Chimni above at *International Refugee Law: A Reader* above at p. 464. Chimni mentions that "Indian courts have been generally helpful when approached with respect to individual cases, albeit they have done so without discussing in any manner the content of international refugee law.

435 The refugee definition set out in the Model Law reproduces both the five chief grounds of the 1951 Convention Relating to the Status of Refugees ("Refugee Convention") and the four additional grounds of the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 (OAU Convention). In addition, the Model Law adds three new grounds to claim refugee status: a well-founded fear of persecution on account of (a) sex, (b) ethnic identity; and, (c) serious violations of human rights. However, in the case of an asylum seeker with multiple nationalities, a clause has been added to ensure that India is not mandated to provide protection unless the asylum seeker faces a well-founded fear of persecution in all the countries in which he is a citizen. In addition to the 'multiple nationalities clause', it may be advisable to incorporate an explanation extending refugee protection to victims of persecution committed by non-State actors also.

436 India's practice and approach towards the Tamilian refugees before the assassination of the former Prime Minister Rajiv Gandhi and Tibetan refugees are often contrasted with the treatment given to other refugee communities originating from the other neighbouring nations. The Tibetan community is considered to be the most well-treated refugee populace among all refugee communities.

Address delivered at the Conference on Refugees in SAARC region on 2 May 1997 in New Delhi said, "in the absence of national laws satisfying the need, the provisions of the [1951] Convention and its [1967] Protocol can be relied on when there is no conflict with any provision in the Municipal Laws." Justice Verma goes on to declare "it is more so, when the country is a signatory to the international convention which implies its consent and obligation to be bound by the international convention, even in the absence of expressly enacted Municipal Laws to that effect". The zeal of the Indian judiciary[437] to find a solution under the municipal laws for protection of human rights is a welcome trend. This zeal should be read with caution as there is a clear division between rights of citizens and state's obligation to protect and promote and rights of a refugee, which mainly arises from state's international obligations.

It can also be concluded that the Indian judiciary though has creatively and liberally interpreted the provisions of the Indian constitution in providing protection and promoting the rights of refugees, the fact remains that the approach is non-systematic and highly dependent upon the exigencies of the situation. It can be also concluded that refugee protection system in India almost wholly depends upon the actions of the executive organs.

An important reason why India is not signing the Convention is that a specific legislation will attract a surge of refugees and see more economic migrants across the borders posing as refugees that would add more pressure on scarce resources and opportunities.

The Bills drafted in 1997 and 2006 do not appear to see the light mainly due to security concerns. The series of terrorist attacks on India further consolidates the opposition against the Bill. Due to porous borders and consistent threat of external militancy, India can be hardly willing to abide by pressure that can impinge upon its discretion to regulate the entry of foreigners into its territory. It can be concluded that there was a lack of political will earlier and even today, hence, India is unlikely to sign the Refugee Convention or 1967 protocol. Nor it will have a specific legislation on the refugee and asylum protection. The examination of the role of the Indian judiciary and the National Human Rights Commission leads us to a conclusion that their role is and will remain essentially a remedial one.

[437] See above Justice Verma at SAARC, 1997, p. 3-9.

# CHAPTER V

# EVOLVING LAWS AND PRACTICES OF INDIA ON HUMAN RIGHTS

## 5.0. Introduction

This chapter examines the evolution and implementation of various human rights principles and practice in the context of India.[438] This chapter will address the following issues: how laws and practices of India recognize, regulate and provide for the enforcement of human rights? How deep is the influence of the civilization in today's context and contemporary circumstances? What are the prominent provisions in the Constitution of India and how do these provisions guide the three organs to legislate, execute, implement and enforce human rights? The universality, indivisibility and interdependence of human rights and development of human being are well known and well established.[439] The holistic aim of the Indian human rights practice is to ensure a dignified place of each and every human being in the society. Which laws, practices and means and mechanisms has India implemented to achieve this holistic aim, since its independence? What shortcomings can be noted? This chapter will focus on major human rights issues and analyse these from practical and policy perspective. [440]

India's approach to international human rights law needs to be appreciated on the basis of its ancient civilization. The Indian approach neither emphasizes too much on civil and political participation in the process of government,[441] as seen in West Europe nor is it obsessed with the approach where state plays the most

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[438] Sabira Khan, *Human Rights in India: Protection and Violation* (Delhi: Devika Publications: 2004); Indu Singh, *Human rights in India and Pakistan*, (New Delhi: Deep and Deep publications: 2004); B. P. Singh, *Human Rights in India* (New Delhi: Deep and Deep publications: 2004); K. P. Saksena, *Human Rights: Fifty years of India's independence* (New Delhi: Gyan Publishing House: 1999); Chiranjivi Nirmal, *Human Rights in India* (Oxford : Oxford University Press: 2012).

[439] Arambulo demonstrates the indivisibility and interdependence of human rights and shows the justiciability of economic and social rights. Her emphasis on core obligations by using the right to food and right to education are excellent examples, even in the context of India. She extensively refers the Vienna Declaration and Program of Action which was one of the key results of the World Conference on Human Rights held in Vienna 1993. The Conference established the interdependence of democracy, economic development and human rights. Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights, Theoretical and Procedural* Aspects, (Oxford: Intersentia, Hart Publishers, 1999). The work of Toebes Birgit also establishes the principle of interdependence and indivisibility of economic, social and cultural rights and justiciability of the same. C. A. Toebes Birgit, *The Right to Health as a Human Right in International Law*, (Oxford: Intersentia, Hart Publishers, 1999). Tomas Amparo, "A Human Rights Approach to Development", Primer for Development practitioners, April 2005, Website referred: http://www.unifem.org.in/PDF/RBA%20Primer%20.pdf accessed on 28 September 2009.

[440] It shall be kept in mind that although the Indian human rights laws, practice and jurisprudence do not expressly refer the *Magna Carta* (1215), Petition of Rights (1627), and the Bill of Rights (1688) in England, and the Declaration of the Rights of Man and Citizens (1791) in France, Philadelphia Constitutional Convention (1787) of the USA, Soviet Bill of Rights of "bread, land and all power to the Soviets", these landmark documents have enormous value underpinning in the evolution of the civil and political rights system in modern (to be specific post 1947) India. The Indian human rights system in the post 1947 era has been impacted by thus, a Western as well as Soviet human rights system. As Chaubey mentions, "…"The Philadelphia constitutional convention (1787), and the French national assembly (1789-91) were convened at the height of two major national revolutions, the constituent assembly of India, on the other hand, came through a deal that was backed by the strength of a mass movement, but was not exactly a product of it", quoted in Aswini Ray, *Ibid*, p. 3412. Shibani Kinkar Chaubey, *Constituent Assembly of India*, New Delhi (1973). The Philadelphia Convention is known to have identified social justice as vehicle for ensuring peace and prosperity in the world.

[441] R. Hauser, 'A First World View', in D. P. Kommers and G. Loescher (eds.), *Human Rights and American Foreign Policy*, (Notre Dame, 1979).

important role in basic rights and freedoms for international peace and security, as observed in the former Soviet bloc countries.[442] Unlike the Soviet theory, which emphasized that rights and obligations are defined solely by the state, the Indian system is based on the sources of human rights as derived from the functioning of the communities. As communities vary from region to region, the nature and context of Indian human rights also vary and needs to be appreciated in the social system of communities of the particular region.

The Constitution of India is widely considered a Rights-based Constitution.[443] The Preamble, the Fundamental Rights and State Directive Policy provisions direct the state to protect and promote human rights, including women and children rights.[444] Part III and Part IV of the Constitution of India stipulate the law of land in the realm of human rights, specifically, fundamental rights and directive principles of the state policy.[445] The Indian constitution has made a unique division between civil and political rights on the one hand and economic, cultural and social rights on the other hand.[446] While the first set of rights find expression in what is called fundamental rights under Part III and which is enforceable, the second set of rights are incorporated in Part IV which is called Directive Principles of State and is a non-justiciable part of the Constitution. With the proactive role of the Indian judiciary,[447] one can observe that the division has blurred and the judiciary has made significant contribution to the process of enforcing the economic, cultural and social rights in India. The third generation of rights, such as the rights relating to development, environment,[448] gender-justice, minority rights,[449] education,[450] child and bonded labour, refugees and displaced persons have become more pronounced since the 1970s and acquired significant momentum since 1991, i.e. since the liberalization of the Indian

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442 G. Tunkin, *Theory of International Law*, (London, 1974).

443 Granville Austin, *The Indian Constitution Cornerstone of a Nation* (New Delhi: Oxford University Press, 1972); B. Shiva Rao, *The Framing of India's Constitution*, Vol. 1 (New Delhi: Indian Institute of Public Administration, 1968); Arthur Berriedale Keith: *A Constitutional History of India 1600-1935* (New Delhi: DK Publishers, 1996).

444 The Indian human rights model, especially immediately after the independence is largely inspired by the Irish model.

445 Although for a populist, the fundamental rights in the Indian constitution are unique model, the provisions on Fundamental Rights have been subjected to severe criticisms. See A. R. Desai, *Violation of Democratic Rights in India*, (*Bombay:* Popular Prakashan, 1986); Gobind Mukhoty "The Indian Constitution and Civil Liberties" in A. R. Desai, *Violation of Democratic Rights in India* (1986); P. Padmanabham, "Undemocratic Heart of Indian Constitution" in A. R. Desai, *Violation of Democratic Rights in India* (1986).

446 The first ever resolution on civil rights was passed by the Congress Party at its Karachi Session in 1931 which demanded civil liberties and equal rights for citizens. It appears that the rights of individuals had been of a less concern in the pre-independence era. For example, Gandhiji's efforts were focussed on the rights of communities, such as village community. Aswini Ray, *Ibid.* p. 3411.

447 P. Hemlataha Devi, *Impact of Judicial Pronouncements on the Status of Women in India and USA a Comparative Study* (Hyderabad: Indian Institute of Public Administration, 2003).

448 M. C. Mehta, *In the Public Interest: Landmark Judgments and Orders of the Supreme Court of India on Environment and Human Rights, Vol. I* (New Delhi: Prakriti Publications, 2009);_____ *In the Public Interest: Landmark Judgments and Orders of the Supreme Court of India on Environment and Human Rights, vol. II* (New Delhi: Prakriti Publications, 2009); SAHRDC, *Handbook of Human Rights and Criminal Justice in India* (Oxford: OUP, 2010).

449 UN established the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1947. M. Weller, *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*, (Oxford: 2007); J. Rehman, *The Weaknesses in the International Protection of Minority Rights*, (the Hague: 2000).

450 While these rights are called third generation human rights, it may be noted that Annie Besant's draft on Commonwealth India Bill, 1925 envisaged right to education and equal access to roads, courts and other public places.

economy.[451] This does not in any way mean that the Indian system has minimized the importance of civil and political rights, as perceived mainly by the Western countries and their authors. Their perception that developing countries including India have tended to lose the priority of civil and political rights due to general developmental issues is equally questionable.[452] India and countries in similar situations face a challenge of striking a balance between universalism of human rights and the relativism of socio-cultural-religious traditions.

Protection and promotion of human rights is an integral element of India's foreign policy. Intervention and efforts of India in Bangladesh in the early 1970s, Sri Lanka in the late 1980s and Nepal in late 2010, Myanmar,[453] and Pakistan, all can be seen in the larger perspective of India's support for the assertion of peoples' right.[454] India is also actively pursuing her efforts to respect the rights of aboriginal populations and minorities in its immediate neighbourhood. India's support for the establishment of democratic rights and preservation of human rights is likely to become and remain a very important element of its foreign policy.[455]

For the promotion of human rights, India has enacted the Right to Information Act, 2005 (No. 22 of 2005), the Protection of Human Rights (Amendment), Act (No. 49 of 2000) and the National Human Rights Commission (Procedure) Regulations, 1994. For terrorism menace, it has enacted the Armed Forces Special Powers Act (AFSPA) and the Disturbed Areas Act, the National Security Act, the Public Safety Act, the Unlawful Activities (Prevention) Act and the Religious Institutions (Prevention of Misuse) Act. For women, a

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[451] Following the emergency in India, the NGO movements grew and demanded for the civil and political democratic rights whereas since 1991, the NGO movements have focussed more on third generations of human rights. This is in consonance with the process of the stabilisation and consolidation of the democratic institutions of governance in India and outcomes of the liberalisation process, respectively. This, however, not to suggest that the civil and political democratic rights movements are becoming less important. The four events since 1970s have had singularly unique contribution to the growth and development of the human rights laws, practice and jurisprudence in India. The Emergency period 1975-77, the appeasement policy in form of implementation of the Mandal Commission report concerning the quota system by the Minority Government in late 1980s, first wave of liberalisation of Indian economy in early 1990s and the assertion of Indian supremacy in the wake of Nuclear explosion in late 1990s, have made singular impacts and any historian of human rights in India can observe that the current human right systems in India have found significant inspirations from these political, social, economic and military watershed events of India.

[452] M. Nawaz, "The Concept of Human Rights in Islamic Law" Symposium on International Law of Human Rights, 11 *Howard Law Journal*, 1965, p. 257; T. van Boven, "Some Remarks on Special Problems Relating to Human Rights in Developing Countries", 3 *Revue des Droits de l'Homme*, 1970, p. 383; V. Vereshchetin and R. Müllerson, "International Law in an Interdependent World", 28 *Columbia Journal of Transnational Law* 1990, pp. 291, 300; R. Emerson, "The Fate of Human Rights in the Third World", 27 *World Politics*, 1975, p. 201; G. Mower, "Human Rights in Black Africa", 9 *Human Rights Journal* 1976, p.33; M. Nawaz, 'The Concept of Human Rights in Islamic Law' Symposium on International Law of Human Rights, 11 *Howard Law Journal*, 1965, p. 257.

[453] India took the lead in supporting democracy and the elected leaders in Myanmar. The Indian Embassy often provided shelter to students escaping the military regime and provided food and shelter. India, at times, stopped its technical assistance, used the Reserve Bank of India to stall trade and economic contacts with Myanmar. I. P. Khosla, "India and Myanmar", *Indian Foreign Policy: Challenges and Opportunities* (New Delhi: Foreign Service Institute, 2007), p. 604.

[454] Madhup Mohta, "An Inquiry into India's International Identity", in *Indian Foreign Policy: Challenges and Opportunities*, (New Delhi: Foreign Service Institute, 2007), p. 42. It can be seen that India has been influential in restoring democracy in the distant countries like Fiji, Trinidad and Tobago, former Yugoslavia and Cambodia, Middle East and Africa.

[455] Ross N Berkes, and Mohinder S Bedi, *The Diplomacy of India: India's Foreign Policy in the United Nations* (Stanford: Stanford University Press, 1958); B. V. Govinda Raj, *India and Disputes in the United Nations 1946-54* (Bombay: Vora& Co, 1958); Ernst Haas, *Beyond the Nation State: Functionalism and International Organisation* (Stanford: Stanford University Press, 1964).

range of enactments are existing, such as the Dowry Prohibition Act, the Domestic Violence Act;[456] the Equal Remuneration Act, 1976; the Prevention of Immoral Traffic Act, 1956; the *Sati* (self-immolation upon death of husband) Prevention Act of 1987; Maternity Benefit Act 1961 (No. 53 of 1961); the Employees' State Insurance (Central) Rules, 1950, among other acts. Thus, the overview aims to analyse how many international instruments India has ratified, how India has fulfilled its obligations under these conventions and what are the main difficulties or challenges before India in implementing some of these instruments.

The role of the judiciary in protecting and promoting as well as clarifying provisions on human rights is significant. Justices V. Krishna Iyer and P. N. Bhagwati, notably, have played an important role in expanding the scope of human rights and gave much-needed legitimacy. Their judgments on prisoner's rights,[457] rights of landless labours, release of bonded labours,[458] are some of the most cited case-laws in the analysis of the role of the Indian judiciary in the promotion of human rights. The Indian judiciary has directed the State to protect rights and equally, the participation of people in securing rights and giving them meaning.

### 5.1. Rights of the Marginalised

While the human rights activism for the rights of marginalised acquired a speedy momentum simultaneously with the first round of economic reforms and liberalization in the early 1990s, the 1970s already marked a slow but steady emergence of demands for the rights of the marginalized. This was partly due to the government policies and partly due to the Stockholm conference in 1972. The Groups' rights, collective rights and people's right were largely based on the Stockholm Conference on the Human Environment. Along with these rights, the rights of women movement also gained a significant momentum in the 1970s,[459] and this may be connected to the rise of power by the late Prime Minister Mrs Indira Gandhi. However, the major boost to the movement came with the initiation of several NGOs working for women's rights, namely, the Self Employed Women's Association (SEWA), Manushi and Joint Women's Forum. These movements or organisations focused on women's status, domestic violence,[460] dowry, rape, custodial violence, trafficking and labour of women[461] in

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[456] F. Agnes, 'Violence against Women: Review of Recent Enactments' in S Mukhopadhyay (ed.), *In the Name of Justice: Women and Law in Society*, Manohar Publishers and Distributors, (New Delhi: 1998).

[457] S. P. Pandey, *Women prisoners and their dependent children* (New Delhi: Serials Publications, 2006); Walikhanna Charu, *Supreme Court & High Court Judgments relating to women & children* (New Delhi: Serials publications, 2005).

[458] Kamala Sankaran: "Human Rights and the World of Work", 40 *Journal of the Indian Law Institute*, 1-4, (2009): *Freedom of Association in India and International Labour Standards* (Nagpur: LexisNexis ButterworthsWadhwa).

[459] Flavia Agnes, *Law and Gender Inequality: the Politics of women's Rights in India*, (New Delhi: Oxford University press, 2001).

[460] The 2005 Act on Domestic Violence brings to fore a new civil law on domestic violence, which provides immediate emergency remedies for women facing violence such as protection orders, non-molestation orders, the right to reside in the shared household, etc. It may be noted that domestic violence has been recognised as a crime as back as in 1983, however, the specific remedies and measures applicable for women were codified through 2005 Act – a long duration of 22 years. The 2005 Act contains remedies such as ex parte injunctions without the need for filing for divorce or maintenance, protection orders, non-molestation orders and non-contact orders, which would help the woman while criminal action is being taken against the abuser to prevent him from making contact with her and inflicting more violence. Jayana Kothari, "Criminal Law on Domestic Violence: Promises and Limits" in *The Economic and Political Weekly*, 12 November 2005, p. 4848; Savitri Goonesekere, *Violence, law and women`s rights in south Asia* (Delhi: Sage Publications, 2004); Sheela Varghese, Employment *of women in the unorganized manufacturing sector* (Jaipur: University Book house (P) Ltd., 2003); V. R. Choudhari, *Commentary on Protection of Women from Domestic Violence act, 2005 and Rules with Allied Laws* (Allahabad: Premier Publishing co., 2009); Surinder Mediratta, *Crimes*

household works. What began with the domestic issues of women's rights acquired a significant political momentum when India enacted the 73rd and 74th Amendment to its Constitution introducing the reservation of 33% of the seats for women in local self-government institutions. With these amendments, women's participation in the governance and electoral process began actively.[462] Along with the women's rights movements, the mobilization efforts to bring marginalized communities in the mainstream such as Dalits (the so-called outcasts), Adviasis (tribal people – constitute approximately 8.3% of population of India), nomadic tribes and landless labours also saw major activism. One of the direct effects of these movements was their rights to land cultivated by them. As the successive governments of India began to adopt the development agenda more vigorously, several issues concerning the economic, social and cultural rights of these communities came to be more pronounced. The large scale displacements due to construction of large dams, development projects, forestry projects and, mining projects, while indirectly contributed to the economic development of these communities, these projects also impacted upon their rights. Thus, one could see that since the 1970s, the human rights movements got more integrated, acquired vision and also enabled the consolidation of various groups and movements across the country seeking comprehensively all rights – civil, political, economic, cultural and social rights. These movements also had found support in their Western counterparts.

### 5.2. Economic, Social and Cultural Rights (ESCR)

ESC rights became more pronounced since the early 1970s. Unlike civil and political rights,[463] the Indian judiciary has been the most instrumental in realizing the ESC rights. Justices Krishna Iyer and P. N. Bhagwati have been largely credited for expanding the scope of Article 21 of the Indian Constitution which guarantees the Right to Life. Drawing from the Western jurisprudence and practices and deploring the state of affairs in India, the Indian judiciary contributed to the realization that the concept of the Right to Life means also the right to live with dignity including the right to livelihood, the right to education and the right to health. The active judiciary combined with human rights activists and groups contributed to the creation of institutions and mechanisms to protect human rights. Human rights studies and research also required successive governments in India to be more sensitive to the concept of integrated human rights. Participation of the Indian NGOs and the role of judiciary got even further consolidated with the Rio Conference on Environment and Development in 1992 and the Vienna Summit on Human Rights in 1993, as these conferences brought the agenda of ESC rights into nation states' daily agenda. These conferences expanded the scope and reach of human rights which found resonance also in India. The fundamental right to education, rights of self-employed women in the unorganised sectors,

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*against Women and the Law* (Delhi: Delhi Law House, 2010); Suman Nalwa, *Law relating to Dowry, Dowry Death, Cruelty to Women & Domestic Violence* (New Delhi: Universal Law Publishing, 2011); Subhash Chandra Singh, *Recent issues concerning Violence against Women* (New Delhi: Serials Publications, 2011).

461 Sunanda Goenka, *Immoral trafficking of women and children* (New Delhi: Deep and Deep publications, 2011).

462 P. Gurjeet and M K Shah, (ed.) *The Myth of Community: Gender Issues in Participatory Development* (London: Intermediate Technology Publications, 1998); Naila Kabeer, "Resources, Agency, Achievements: Measurement of Women's Empowerment", *Development and Change*, 30, 435-63 (1999).

463 It is important to note that India signed the UN Covenant on the Civil and Political Rights (1966) in 1976 after the lifting of the emergency in India, which is considered as the darkest period of the Indian democracy and human rights in India. During the emergency period, practice of these rights was effectively suspended. India's signature of this Covenant is perceived to be "softening" the harsh critics of the Western democracies to the Indian emergency situation. Aswini K Ray, *Ibid*, p. 3411.

health care related rights,[464] got wider and intense attention and efforts in India subsequent to these global conferences.

**5.2.1. Right to Food**,[465] if read into the larger ambit of the Right to Life[466] under Article 21 of the Constitution, is being enforced. However, the food distribution governance system remains inefficient. Hence, despite the well-intentions of the drafters of the Food Security Act and the executive authorities, the Right to Food is yet to be materialised in any meaningful sense.[467] One of the issues concerning the Right to Food is who shall have the entitlement to heavily subsidized food items distributed by the government at its stores. The debate concerning the eligibility criteria for the entitled people, namely below poverty line, is unsettled. Therefore, it is difficult to implement the provisions of the Act in full spirit with intended benefits.[468] Under the Right to Food, three questions are most noteworthy, which were being posed by the People's Union of Civil Liberties (PUCL). First, starvation deaths occur while there is a surplus stock of food grains in government storage houses. Does the Right to Life mean that people who are starving and who are too poor to buy food grains free of cost by the State from the surplus stock lying with the State can claim this food, particularly when it is lying unused and rotting? Secondly, does not the Right to Life under Article 21 of the Constitution of India include the Right to Food? And third, does not the Right to Food which has been upheld by the Supreme Court imply that the State has a duty to provide food especially in situations of drought to people who are drought affected and are not in a position to purchase food? To ensure the most effective implementation of the Food Security Act, India needs to employ various measures, ranging from provision of quality seeds to farmers to

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[464] Veena Shatrugna, *Taking charge of our bodies: a health handbook for women* (New Delhi: Penguin books India Pvt Ltd., 2004).

[465] Various meaning are applied to the Right to Food, one of them is the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.

[466] Food and nutrition is a human right and this is being accepted across the world. States have obligation to ensure that all people are adequately nourished. As early as in 1948, the *Universal Declaration of Human Rights* of 1948 asserted in article 25(1) that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food . . . .". In addition, ICESR also reaffirms these rights. As per article 11 of the ICESR "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing . . ." and also recognizes "the fundamental right of everyone to be free from hunger . . . ". Furthermore, Convention on Rights of Child also affirms the right to food and nutrition. As long back as in 1999, the UN Committee on Economic, Social and Cultural Rights commented that "Fundamentally, the roots of the problem of hunger and malnutrition are not lack of food but lack of *access to* available food, inter alia because of poverty, by large segments of the world's population." George Kent poses a question in this regard, whether the reference here is to the fundamental distinction between *availability* (is there food around?) and *access* (can you make a claim on that food?). Paragraph 6 presents the core definition: The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. See Paragraph 5 of the General Comment 12 (UN Committee on Economic, Social and Cultural Rights) 12th Session, The Right to Adequate Food (Art. 11). http://www.earthwindow.com/grc2/foodrights/HumanRightToFoodinIndia.pdf accessed on 27 June 2012.

[467] Sampurna Gramin Yojana, Mid-day Meal Scheme, Integrated Child Development Scheme, National Benefit Maternity Scheme for BPL pregnant women, National Old Age Pension Scheme for destitute persons of over 65 years, Annapurna Scheme, Antyodaya Anna Yojana, National Family Benefit Scheme and Public Distribution Scheme for BPL & APL families directly or indirectly contribute to the realisation of the Right to Food, however, the implementation of these schemes are unable to bring desired results always and secondly, the scheme themselves are subject to misuse and implemented in far from effective manner.

[468] As per the Global Hunger Index of the FAO, India ranked 66 in of 88 countries considered under this index in 2010.

long-term sustainable government storage system and revamping the public food distribution system, putting in place community and social audit systems to monitor the progress on the implementation. Issues like control food prices, clean drinking water, preservation of bio-diversity, farmers rights over land and productive resources, promotion of organic farming, public distribution system, transportation network, economic reforms, condition of landlessness, social disadvantages and political powerlessness among the most affected vulnerable groups are some of the key challenges that need to be overcome to fully realise the Right to Food.

**5.2.2. Social security** for employees in the unorganised sector informal economy is one of the most important economic rights related issues because a large percentage of work forces are employed in the unorganised sector.[469] According to one estimate, there are around 430 million workers contributing to as much as 60% to India's GDP, in the unorganised sectors of Indian economy.[470] The landless labours constitute however, the majority of this work force and do not have social security benefits to them.[471] The Government of India has enacted various schemes, among others the Rashtriya Bima Yojna (National Insurance Scheme) and Aam Admi Bima Yojna (Common Man Insurance Scheme) which aim to provide life insurance and health insurance coverage to the landless labours and their families.[472] The extension of these benefits can be considered as contributing to the overall realisation of the Right to Life, in its full and complete form, as interpreted by the Supreme Court of India.[473] Furthermore, the government is planning to introduce a Comprehensive Social Security Package which will add more benefits such as maternity care, disability and pensions.[474] These workforces need protection from the detrimental conditions of old age, poverty and unemployment and attendant problems of full and complete access to food, cloth, shelter, education, medical facilities. People in unorganised sectors, like any other areas of law suffer from lack of effective enforcement of provisions of laws.[475]

**5.2.3. Public health** is one of the important cornerstones for the meaningful realization of the Right to Life. The UDHR and the ICESCR stipulate that everyone has the right to a standard of living adequate for the health

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469 V. Nirmala, "Indian Informal Sector Labour Market: The Formalising Problems", Paper presented for the Special IARIW-SAIM Conference on *Measuring the Informal Economy in Developing Countries*, Kathmandu, 23-26 September 2009.

470 NCEUS, *Contribution of the Unorganised Sector to GDP: Report of the Sub-Committee of a NCEUS Task* Force, Working Paper No. 2, New Delhi (2008); C. P. Chandrashekhar and Jayati Ghosh, "Recent Employment Trends in India and China: An Unfortunate Convergence", 50 *Indian Journal of Labour Economics* 3, 383-406 (2007); G. S. Bhalla, "Globalisation and Employment Trends in India", 51 *Indian Journal of Labour Economics* 1, 1-24 (2008); Himanshu , "Employment Trends in India: A Fresh Look at Past and Recent Evidence", Paper Presented at Conference on *Sustainable Developments and Livelihoods*, Delhi School Economics, New Delhi, 6 February (2007).

471 Rama Martin, "The Gender Implications of Public Sector Downsizing: The Reform Program of Viet Nam", 17 *World Bank Research Observer* 2, 167-189 (2002); _____"Globalization and Labour Market", 18 *World Bank Research Observer* 2, 159-186 (2003).

472 Jeemol Unni and G. Raveendran, "Growth of Employment (1993-94 and 2004-2005): Illusion of Inclusiveness?" 42 *Economic and Political Weekly* 3, 196-199 (2007).

473 K. P. Kanan, *Informal Economy and Social Security: Two Major Initiatives in India*, 13 October 2007, National Commission for Enterprises in the Unorganised Sector, Government of India, http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_policy/documents/accessed on 3 August 2013. NCEUS, *Social Security for Unorganised Workers*, New Delhi (2007).

474 Shruti Pandey, *Disability and the law: human rights law network in India* (New Delhi: Human Rights Law Network, 2005).

475 S. Sakthivel and Pinaki Joddar, "Unorganised Sector Workforce in India: Trends, Patterns and Social Security Coverage", 41 *Economic and Political Weekly* 27, 2107-2114 (2006).

and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood,[476] old age or other lack of livelihood in circumstances beyond his control and motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. Thus, adopting the analogy of the Supreme Court's judgment and clarification on Right to Life, this includes health as well as access to medical care. This right is an economic, social and cultural right to attain meaningful standards of health.[477] However, public spending on health is substantially low in India.

**5.2.4. Education** rights are important mechanisms to realise the Right to Life with dignity.[478] However, the fact remains that the primary and secondary education sectors in India have been constantly facing the problems of lack of proper infrastructure, literature resources and human resources.[479] It is not surprising that even after 65 years of independence, the literacy rate in India is one of the poorest in the world. As per UNESCO statistics, 61% of children who enroll in primary education survive through to grade 5 and 85% transit of these children from primary to secondary education.[480]

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476 Anil Bhuimali, *Rights of disabled women and children in India*, (New Delhi: Serials Publications, 2009); Rameshwari Pandya, *Women in the unorganized sector of India*, (New Delhi: New Century Publications, 2010); Ravi Prakash Yadav, *Women workers in India*, (New Delhi: New Century Publications, 2012); Abdul A Raheem, *Women empowerment through self-help groups (SHGs)*, (New Delhi: New Century Publications, 2011); D. Nagaya, *Women entrepreneurship and small enterprises in India*, (New Delhi: New Century Publications, 2012).

477 Augustine Veliath provides 10 public health suggestions on human rights; namely, (1) Implement equity-based social protection systems and maintain and develop effective publicly provided and publicly financed health systems that address the social, economic, environmental and behavioral determinants of health with a particular focus on reducing health inequities, (2) Use progressive taxation, wealth taxes and the elimination of tax evasion to finance action on the social determinants of health, (3) Recognise explicitly the clout of finance capital, its dominance of the global economy, and the origins and consequences of its periodic collapses, (4) Implement appropriate international tax mechanisms to control global speculation and eliminate tax havens, (5) Use health impact assessments to document the ways in which unregulated and unaccountable transnational corporations and financial institutions constitute barriers to Health for All, (6) Recognise explicitly the ways in which the current structures of global trade regulation shape health inequalities and deny the right to health, (7) Reconceptualise aid for health from high income countries as an international obligation and reparation legitimately owed to developing countries under basic human rights principles, (8) Enhance democratic and transparent decision-making and accountability at all levels of governance, (9) Develop and adopt a code of conduct in relation to the management of institutional conflicts of interest in global health decision making, and (10) Establish, promote and resource participatory and action oriented monitoring systems that provide disaggregated data on a range of social stratifiers as they relate to health outcomes. http://publichealthglobal.org/index.php?option=com_myblog&show=10-public-health-suggestions-on-the-human-rights-day.html&Itemid=92 accessed on 22 May 2012

478 Philip Alston and Nehal Bhuta, "Human Rights and Public Goods: Education as a Fundamental Right in India", in Philip Alston and Mary Robinson, *Human Rights and Development: Towards Mutual Reinforcement*, 242-265 (Oxford: Oxford Uni Press, 2005); M. Afzal Wani, "Education as a Human Right: Policy and Action in India", 40 *Journal of the Indian Law Institute* 1-4, 243-262 (1998); Yoginder Sikand, "Bridging Deen and Duniya: the "Modernisation" of Islamic Education in India", 29 *Journal of Muslim Minority Affairs* 2, 237-247 (2009); Kishore Singh, "Non-Discrimination and Equality of Opportunity in Education and UNESCO's Convention Against Discrimination in Education: Recent Developments in International Law, with Reference to India", 49 *Indian Journal of International Law* 2, 213-237 (2009); Bimal N. Patel (ed.), *Explaining and Understanding Research Methodologies in Legal and Interdisciplinary Education Fields in India*, Gujarat National Law University (2012).

479 T. S. N. Sastry, *Introduction to Human Rights and Duties*, 2011.

480 UNESCO Institute for Statistics, Education (all levels) Profile India. http://stats.uis.unesco.org/unesco/TableViewer/document.aspx?ReportId=121&IF_ accessed on 20 July 2013.

**5.2.5. Right to Habitat,** although often not considered as such, is an integral element to realise the full and dignified living of a life. To realise this, successive governments of India have been implementing various schemes with mixed success. Displacement of population, especially native or tribal population, in the areas witnessing massive industrialisation and mining, are common and the rights and responsibilities of the government and the displaced communities generate interesting questions of India's compliance with their human rights.[481] One suggestion would be to set up individual Human Rights Court in each of the Indian states and a central Human Rights Court at the national level. This is one of the most desperately needed measures to uphold the letter and spirit of the entire legal framework on human rights.

### 5.3. Right to transparent and accountable governance

The right to transparent and accountable governance is the latest entry in the evolution of human rights law and jurisprudence in India. While ancient India and the history of the Indus civilization illustrates the regime of transparent and an accountable governance system, the tenor and elements of the current regime reflects right-based and people-centric approaches. The evolution of this regime can be attributed to the era since the first round of economic reforms and liberalization began in early 1990s which were also decisively influenced by the Bretton Woods institutions. Hence, the early 1990s became the amalgamation period of convergence and integration of various rights and it can be said that the law, policy and jurisprudence on human rights in India came to be more reflective of the Western human rights values, approaches and the systems. The right to accountable and good governance emerged in the backdrop of the economic failures, including corruption,[482] misappropriation and mismanagement international borrowings and political instability in late 1980s. The NGOs working in the other fields of human development like social, cultural, environmental, economic fields expanded their scope of their activities and activism. The Right to Information (also known as RTI)[483] and the right to participate in governance are clearly attributed to the significant works and campaigns carried out by various NGOs in India, such as the Mazdoor Kisaan Shakti Sangathan (MKSS) in Rajasthan, Kerala Shastra Sahitya Parishad (KSSP), Jan Sunwais (public hearings) and social audits initiated by MKSS in Rajasthan, the Community Learning Movement for accountable governance, promoted by the National Centre for Advocacy Studies (NCAS). These NGOs through advocacy and programs have been working for ensuring government accountability as part of the citizen's right to know and the right to participate in governance. With the activism of NGOs and governmental policies, such as Right to Information Act, the human rights regime in India focuses on peoples' right to participate in the governance and development to ensure people-centered governance and development. The legislations in post-1991 era, the policies and the jurisprudence all have strengthened the

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[481] Although India has a robust system of environmental clearance and National Rehabilitation and Resettlement Policy to address the problems of displaced people, an impact analysis of working of these policies can only provide correct picture of effectiveness of the policy measures. Such analysis shall include efforts of policy-makers, judiciary and civil society institutions to retain desirable credibility among national and international stakeholders, including agencies which fund developmental programs.

[482] C. Raj kumar, *Corruption and Human rights in India* (Oxford: OUP, 2011).

[483] Raja Muzaffar, *Concern of Human Rights and RTI: Can the RTI provisions be used with regard to human rights in J & K.* https://mail-attachment.googleusercontent.com/attachment, accessed on 20 August 2012; V. Naik & S. Paul, *RTI: Restore Full Rights*, Deccan Herald, 6 May 2008; Human Rights Commission of Pakistan, *Global Trends on the Right to Information: A Survey of South Asia*, Article 19, Centre for Policy Alternatives, Commonwealth Human Rights Initiative, July 2001; M. Daruwala and V. Nayak, *Our Rights, Our Information: Empowering People to Demand Rights through Knowledge*, Commonwealth Human Rights Initiative, 2007.

current people-centered governance and development human rights policy and practices in India. It can be said that the current human rights regime is based on legal entitlements and constitutional guarantees supported by the ever-active Indian judiciary. With the introduction of the Right to Information (RTI) and Public Interest Litigation (PIL),[484] a true process of civil and political empowerment among all sections of citizens has begun.[485] It is observed that NGOs in all fields of human rights have claimed and promoted the realization of these rights for ordinary citizens. The NGOs active in social, cultural, health, development, education fields have challenged and changed the power structures that have been largely responsible for perpetuating patriarchy, casteism and poverty. In this way, these organisations together with the judiciary have contributed to a political transformation in which true empowerment of people through right-based, people-centric approaches have taken deep roots and justice system is responding accordingly.

The emergence of the environmental and consumer movements in the 1980s paved the way for a series of new legislations and policy interventions to protect the rights of consumers and people. The resurgence of the Adivasi (tribal) movement and the marginalisation of the minority communities have brought cultural rights into public debate and policy discourse.

While the 1970s can be termed as the decade of the emergence of the civil liberties movement, the 1980s witnessed the emergence of group rights and people's rights over resources and livelihoods. It is in the 1990s that ESC rights came at the centre stage. Various factors including rights-based reorientation by international development agencies and organisations, political compulsions on the ground and the increased visibility of the rights discourse provided the right conditions for advocating ESC rights. However, it is ESC rights that are most elusive. This is because the rhetoric of economic and social rights is not necessarily reflected in policies, programmes and budgetary allocations. As a result, the State can pretend to promote economic and social rights, while systematically undermining these rights under the pressures of the global institutions, IMF, World Bank and WTO, among others. This situation leads to a growing sense of disillusionment and cynicism about the so-called rights-based approach. As a result, the political content and policy feasibility of the rights-based approach is increasingly questioned, particularly because it is more often used as a development strategy than as a means for political empowerment of the people and policy transformation.

Till 1993, India did not have a comprehensive legislation on human rights. With the enactment of the Protection of Human Rights Act, 1993, India set up a comprehensive machinery to ensure monitoring of the

[484] The Public Interests Litigation has virtually covered all aspects of social, economic, politics and cultural life of the Indian citizens and has opened new ways of enforcing the fundamental rights and securing the protection and promotion of directive principles of state police, i.e. economic, social and cultural rights. The PIL movements have contributed to the consolidation of social and political transformation process and have been employed to secure third and fourth generation of human rights. Some groups rights such as prisoners' rights, rights of electorates, etc. have found new meaning in the wake of these movements. The efforts of the NHRC are now supplemented by the spontaneous activists and civil groups which promote PILs.

[485] Although civil and political rights are pronounced by India in its constitution and the Indian state has been influenced by the signing of the UN Covenant on Civil and Political Rights (1966), it is important to recognise that the vast majority of illiterate population of India remain quite unaware of these rights. Without their democratic consciousness of these rights, the programmes and practices of the Indian state are bound to remain ineffective. Similarly, the majority and minority-oriented social and religious institutions and movements, under the pretext of protecting and promoting the civil and political rights of the respective communities, can continue to exploit their democratic unconsciousness. Unlike social and economic rights movements, the civil and political rights movements are often divided along the religious feelings, which in turn, fail to make necessary impacts on the promotion of the social and economic rights of various religious communities and groups. These movements succeed in creating social violence and state coercion in tune with the divisive agenda of the specific religious communities and fundamental forces.

implementation of human rights through the National Human Rights Commission (NHRC).[486] Various states of India have been also required to establish state human rights commissions to achieve the same purpose at state level.[487]

### 5.4. Specific Human Rights Issues

The following section provides a broad analysis of India's stated position and practice in selected areas of human rights, namelym children, disabilities, education, freedom of association, labour, marriage, minorities, nationality, health, race, refugees, slavery, terrorism, torture and women.

**5.4.1. General Human Rights**, Under this section, five major international instruments are selected, namely, the Universal Declaration of Human Rights,[488] International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESR), the Optional Protocol to the ICCPR and the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty. UDHR – India has been the proponent of the UDHR and participated in the drafting of the UDHR. India initiated and implemented various programs under the UDHR. With regards to the ICCPR and ICESR, India ratified the ICCPR on 10 April 1979, i.e. 13 years after it was adopted and three years after it came into force. It enacted the Protection of Human Rights Act, 1993 (No. 10 of 1994) which is an overarching human rights legislation of India. India

[486] NHRC has been playing a crucial role in the protection and promotion of human rights despite the inherent structural weaknesses and political limitations which often hinder the creation of correct perception about its effective and efficient handling of various major human rights violations episodes in the country. NHRC order to pay 2.8 crore rupees of interim relief to 89 men and women affected by acts of torture, rape, encountered death and illegal detention in the wake of death of one of the most wanted persons in the history of India, namely Veerapan and its brigade is widely considered as a landmark event in the history of universalization of human rights in India in the recent years. Jordan Fletcher and Subhradipta Sarkar, "The Limits of Justice: An Indian Human Rights Story", *Economic and Political Weekly*, November 17, 2007, at p. 35. In this article, the authors shed "…light on a tale of suffering and struggle largely ignored by the Indian media during the decade-long hunt for Veerapan." One of the criticisms of the Indian government with regards to the establishment of the NHRC is that India enacted the Act and established the NHRC under the Western governments' pressure, in the backdrop of economic crisis of early 1990s. For a critical summary of weaknesses of the NHRC, see, Sumanta Banerjee, "Human Rights in India in the Global Context" in *The Economic and Political Weekly*, 1 February 2003, pp. 424-25; Ray, Arun, National human rights commission of India, Vol. 1: formation, functioning and future prospects, (Delhi: Khama Publishers, 2003).

[487] While 21 states (Assam, Andhra Pradesh, Bihar, Chattisgarh, Gujarat, Goa, Himachal Pradesh, Jammu and Kashmir, Kerala, Karnataka, Madhya Pradesh, Maharastra, Manipur, Odisha, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh, West Bengal, Jharkhand and Sikkim) have established State Human Rights Commission, 8 states (Arunachal Pradesh, Haryana, Manipur, Meghalaya, Mizoram, Nagaland, Tripura, Uttarakhand) are yet to create the machinery.

[488] The UDHR has seen human rights as an indivisible whole. The 1966 Covenants does largely reflect what the Indian Constitution reflects – enforceable civil and political rights and economic, social and cultural rights to be realised gradually. The negotiation of UDHR shows that India advocated for the bifurcation of two sets of rights. Kamala Sankaran, "Fundamental Principles and Rights at Work: India and the ILO" in the *Economic and Political Weekly*, 5 March 2011, p. 71. India, owing to financial and economic weak position, opposed the inclusion of the economic, social and cultural rights in 1951. In the words of Father Jerome D'Souza, member of the Indian delegation, "…In putting the political and civil rights first, we imply not only that those civil and political rights are of their nature capable of receiving an exact expression which will facilitate enforcement by law; not only do we imply that it is not possible to give to the more difficult and less tangible elements of the social and economic rights a similar expression to facilitate enforcement. We go further...and say that according to our way of looking at life, liberty and society, it is by the exercise of these civil, political and individual fundamental rights that the improvement of social, cultural and economic standards can take place (Berkes and Bedi 1958: 148)." Quoted in Sankaran *Ibid* at p. 71.

signed the ICESCR signed on 3 January 1976 and acceeded to on 10 April 1979, simultaneously with the ICCPR.

**5.4.2.** For **Freedom of Associations**,[489] India has enacted several legislations, namely, the Trade Unions (Amendment) Act (No. 31 of 2001), the Industrial Dispute (Banking Companies) Decision (Repeal) Act (No. 19 of 2011), the Essential Services Maintenance Act, 1981 (No. 40 of 1981), the Industrial Disputes (Amendment) Act, 1968 (No. 32 of 1976), the Essential Services Maintenance Act 1968 (No. 59 of 1968), the Central Trade Union Regulations and the Trade Unions Act, 1926, among others. Under category of human rights for labour, India has enacted the the Bonded Labour System (Abolition) Act, the Minimum Wages Act, the Trade Unions Act, the Essential Services Maintenance Act, the Industrial Disputes Act, and the Factories Act. For human rights of minorities, India has enacted the Scheduled Castes and Schedules Tribes (Prevention of Atrocities) Act and, the Protection of Civil Rights Act.

To place the entire analysis in a proper perspective, the report prepared by the National Human Rights Council of India for the Second Universal Periodic Review 2012 (2 UPR) provides a good starting point.[490] This report starts with an important observation that, "any assessment of India's human rights record must begin with the acknowledgment that no other country as large and populous or as diverse, ethnically and economically, has had to tackle the challenges of development using only democratic methods".[491] In other words, one is required to understand and appreciate the historical, political, economic and cultural situation of India first, before tackling the subject. But doing so may itself jeopardise the critical evaluation from an international legal perspective because the international legal perspective is understood to have catered to the needs, interests and positions of individual nations. The role and views of the Indian judiciary and the media is also very important to understand India's position in this respect.

**5.4.3. Civil and political rights.** One finds a major weaknesses of the Indian system in the area of civil and political rights. India has signed and ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment on 14 October 1997. It took India 12 years to sign the Convention. The

[489] Although freedom of association is a fundamental right, as Sankaran explains it is a limited one for government employees in that they can only form autonomous organisations (not trade unions) that are separate for each grade of employees and these cannot be affiliated to other trade unions. In this regard, it may be useful to note that the Indian Government in 1978, reported to the Parliament that "…Government of India has not so far been able to ratify Convention No 87 concerning Freedom of Association and the Protection of the Right to Organise, and Convention No 98 concerning the Right to Organise and Collective Bargaining, mainly because the existing law and practice pertaining to the public servants do not fully meet the requirements of these two Conventions. Article 6 of Convention No 98 states that the Convention does not deal with the position of public servants engaged in the administration of the State. The supervisory bodies of the ILO have observed on a number of occasions that some Governments have applied these provisions in a manner which excludes large groups of public employees from coverage by Convention No 98. Quoted in Sankaran at p. 72.

[490] While appreciating the Universal Periodic Review Process undertaken by the Council, India has shown some apprehension, based on its colonial past that the Council "continues to function in a non-selective, non-politicized and transparent manner". . Statement by Member of Parliament and Member of the Indian Delegation to the UN Dushyant Singh on Agenda Item 69 – Promotion and Protection of Human Rights [A] Implementation of Human Rights Instruments, [D] Comprehensive Implementation of and Follow up to the Vienna Declaration and Programme of Action at the Third Committee of the 66th Session of the UN General Assembly. New York, October 18, 2011.

[491] http://www.mea.gov.in, accessed several times since June 2012.

Cabinet of India in 2010 approved the Bill which ratified the Torture Convention.[492] However, India is yet to enact a law which gives powers to the authorities to enforce the provisions of the Convention at the domestic level. However, this task is very difficult because enacting any anti-torture laws would embrace the Indian authorities with plethora of complaints incessantly. The reasons could be backlash of public, as Indian public want tough stance against the rising internal insurgency, such as the Naxalism in the Eastern states of India. Similarly, the Indian police forces will come under detailed scrutiny of the provisions, especially in those areas where there are widespread issues of insurgency. The torture by security and police forces, especially, are subject to deeper cynicism and critics from media and NGOs. While India could ill-afford to let insurgents get away with their mercies, Indian security forces working under difficulty terrains and situations may invariably come under public wrath for their alleged conduct amounting to torture. By resisting insurgent forces, India places itself in a difficult situation. At domestic level, it is required to do so for ensuring social and political stability and national integration while at the international level, its reputation gets under scrutiny if it involves heavily with violence into such resistance. To prevent unnecessary political criticisms, especially inter-linking terrorism and human rights, India has adopted a consistent position to ensure that the human rights debate is not "misused for the pursuit of political agendas, or to fulfill territorial ambitions as part of States with destructive foreign policy objectives".[493] The Prevention of Torture Bill has detailed mechanisms to investigate facts of torture and protection of witnesses. Unlike, earlier period, where police forces of individual states were employed, now such incidents will be investigated by the independent agency. The Bill has one important weakness, namely, the reporting of the torture cases have to be within 6 months which in Indian society and culture may become a stumbling block. For example, a rape victim from a village or particular section of society may remain silent even for a longer duration due to the society's stigma. The bill fails to get notice of sexual offences by women in prison which shows further weakness of the bill. The Armed Forces Special Powers Act (AFSPA) is applied in Jammu & Kashmir and the North-Eastern States, which confer special impunity but also alleged to be the cause of violation of human rights.

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[492] UN General Assembly adopted the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment on 9th December, 1975. UN General Assembly Resolution No. 3452 (XXX). India signed the Convention on 14th October, 1997. As per Article 2, state parties are required to enact a legislation to give effect to the Convention at the domestic level and fulfil the obligations under the Convention. This was especially important in context of India as the Indian Penal Code has not defined the meaning of "torture" nor the torture was considered a criminal offence as understood per Article 4 of the Convention. To meet this important legal gap, India was required to provide necessary definitions as well make the Indian legislations consistent with the said Convention. India, instead of amending the existing legislations, preferred to enact a new legislation consisting of precise definitions of various terms, punishment provisions and time limit for taking cognizance of the offences - The Prevention of Torture Bill, 2010, Bill No. 58 of 2010. The delay by India to ratify the Torture Convention is largely due to India's internal political compulsions. In the process, Indian government has met with serious criticisms from international and NGOs, especially the complaints against Indian forces in disturbed areas on systematic torture, enforced disappearances, arbitrary arrests and detention, extrajudicial killings and sexual violence. This was very evident on the eve of India's participation in the 2nd Universal Periodic Review in May 2012. Article 21 of the Indian Constitution and the Indian Penal Code aim to provide adequate safeguards, however, as the Indian jurisprudence suggest, the weaknesses in the implementation of these laws remain a continuous challenge contributing to valid criticisms.

[493] Statement by Member of Parliament and Member of the Indian Delegation to the UN Mrs. Viplove Thakur on Agenda item 69 (b) Human rights questions, including alternative approaches for improving the effective enjoyment of Human Rights and Fundamental Freedoms and (c) Human Rights situations and reports of Special Rapporteurs and Representatives. New York, 26 October 2011.

**5.4.4. Torture in prison:** Torture in prison by police authorities, is one of the most alleged grievances. The records maintained by the NHRC are one of the best evidences in this regard. Custodial deaths, illegal detention, under trial prisoners, inordinate delays are some of the strongest concerns which the Torture Bill, once it becomes the law, will be able to address this challenge. Here it would be important to note that India shall soon ratify the Convention on Enforced Disappearance, especially now that the enforced disappearance is not codified as a criminal offence in the Indian penal code. The state practice in this regard, too, is abysmal. In the area of minority rights, despite availability of strong legal framework, complains regarding the abuse of human rights of vulnerable communities are not receding significantly.[494]

**5.4.5.** With regards to **labour rights**, India has an impressive record of ratifying the ILO Conventions and also enacting necessary legislations at the domestic level. However, the implementation of these acts fails to bring the desired results expected under these acts. In this regard, it is important to note that India is yet to ratify ILO Convention 138 concerning the minimum age for admission to employment and work and ILO Convention 182 vocational guidance and vocational training in the development of human rights.[495] The reasons for the inability of India to ratify these Conventions are difficulties and challenges posed by the varying level of socio-economic situations across various regions of the nation. Subsequent to the passage of the Right to Education Act 2009, the future of implementation of bonded child labour appears to be bright. It may be noted that education is the primary responsibility of States in India, as such, Indian states are responsible to materialise the Right to Education for their concerned populations. Together with the Right to Education for children till the age of 14, these two acts are important milestones in realising the fundamental rights of children in India.

### 5.5. Rights of Indigenous People

India is a country of multi-ethnic and multi-religion communities.[496] One of the important communities is the Indigenous groups which comprise 8% of the overall population of India and are called Adivasi (tribal people).[497] The most important right of these communities is the right to belong to their place of origin or habitat. However, the unique heritage right, as claimed by Rohit Priyadarshi and others is at risk: "(I)ndigenous communities, peoples and nations are those which having a historical continuity with pre-invasion and pre-colonial societies that have developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and

[494] One of the important reasons for tension between developing and Western European nations, especially is, the emphasis by later to consider that article 27 of the ICCPR apply to all members of minorities within a state party's territory and not just nationals. The UN Human Rights Committee used to express concern with regard to the treatment of minorities within particular states based on this position. This position is reflected in the Committee's analysis of *Lovelace* case and *Kitok* case. See *Selected Decisions of the Human Rights Committee*, 1985.

[495] ILO Convention 138 concerns the minimum age for admission to employment and work, while ILO Convention 142 concerns vocational guidance and vocational training in the development of human rights.

[496] P. K. Mohanty, *Encyclopedia of scheduled tribes in India*. (New Delhi: Isha Book, 2006); A. B. Chaudhuri, *State Formation Among Tribal : A Quest for Santal Identity* (Gyan Publishing House, 1993); W. Crooke, *Tribes and Castes of the North Western India,* (London, 1974); J. K. Das, *Human Rights and Indigenous people* (New Delhi: A. P. H. Publishers, 2001); P. S. Narayana, *Commentaries on the Scheduled Castes and the Scheduled Tribes.* (Hyderabad: Asia law House, 1991).

[497] About 8% of the Indian population belongs to a ST community, roughly 80 million people from some 450 communities.

their ethnic identity, as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems".[498]

It is interesting to note that India has adopted somehow ambivalent positions concerning the international instruments which have codified or promulgated the rights of these people.[499] The most important among these are:

- Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169)[500]
- UN Declaration on the Rights of Indigenous Peoples[501]
- Indigenous/ Tribal people's recommendations at the UNESCO workshop – cultural challenges of the International decade of the world's indigenous people, 1999, France
- Beijing declaration of Indigenous Women, 1995, Beijing, China.

Mr Justice Y.K. Sabharwal, former Chief Justice of India, while addressing the International Law Association Biennial Conference in Toronto provided excellent discourse on India's position with regards to the indigenous people. It is useful to reproduce the core of what he had to say. To begin with, he explains that, "it is not easy to identify indigenous peoples in India. For there have been continuous waves of movement of populations with different languages, race, culture, religion going back centuries and millennia. Tribal communities have been a part of this historical process. In the circumstances the question arises as to how far back in history should one go to determine the identity of 'indigenous peoples'? Whatever the nature of determination it is likely to be extremely arbitrary and controversial."[502] Secondly, tribal and non-tribal peoples have lived in India in close proximity for over centuries leading to, as one author puts it "much acculturation and even assimilation into the larger Hindu Society". Thirdly, in the case of India some tribes are no longer tribes but have become, as the

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[498] Rohit Priyadarshi, Suman Sahai and Raghu Velankar, "*Understanding Declarations of Indigenous Peoples*", UN ECOSOC 1986, http://www.genecampaign.org/Focus%20Area/PROJECT/GC_IK_BP3%20.pdf, accessed on 11 July 2012.

[499] H. C. Upreti, *Indian Tribes: Then and Now* (Jaipur: Pointer Publishers, 2007); G. C. Rath, *Tribal Development in India: Contemporary Debate*. (SAGE, 2006); The International Labour Organization: *A Handbook for Minorities and Indigenous People.* (London: Minority Rights Group International, 2002);

[500] The Indigenous and Tribal Peoples Convention, 1989 could not agree upon the definition of indigenous and tribal people. It is more based on practical approach and provides criteria for describing the peoples which it aims to protect. India's objection to the self-identification as a fundamental criterion for the identification of indigenous and tribal peoples is based on the fact that it has well codified means to recognise the tribal people. The Constitution of India, the national legislations and jurisprudence stipulate mechanisms to ensure full and proper integration and development of the indigenous and tribal peoples. E. Thurstone, *Commentaries on the Scheduled Castes and Scheduled Tribes Prevention of Atrocities Act 1989*, Edn 2. (Allahabad: Law Publishers India, 1989).

[501] A/RES/61/295 of 13 September 2007. India is one of 144 members which voted in favour of the Declaration. India supported the Resolution on the basis that the Declaration does not define indigenous peoples. India views that "the issue of indigenous rights pertains to peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. This is precisely the definition used in ILO Convention 169. Consistent with this definition, we regard the entire population of India at the time of our independence, and their successors, to be indigenous". Furthermore, India has insisted upon the differentiation between indigenous and tribal peoples. See Statement by Arindam Bagchi, Counsellor, Permanent Mission of India to the United Nations, New York, in Explanation of Position of India on the report of the 8th Session of the Permanent Forum of Indigenous Issues to the ECOSOC at the 2009 Substantive Session of ECOSOC, at Geneva, on 30 July 2009.

[502] Virginius Xaxa, "Tribes as Indigenous People of India", XXXIV *Economic & Political Weekly"* 51, December 1999, p. 3591.

eminent sociologist. Fourthly, tribal peoples in many cases may have settled in India long after some non-tribal peoples in other parts of India. Finally, attention has been drawn to the serious national sovereignty issues involved revolving around question of "self-determination" and ownership of lands." The Indian position and practice is unique due to its long rich civilization and may be not acceptable to the non-Indian culture. He argues therefore that the Indian experience is an experience of assimilation of the tribal people rather than to make them separate identity which ensures their cultural identity. In India, the practice shows that treatment to tribal people as separate identities is not necessary.[503] The Constitution of India provides a comprehensive framework for the protection of rights and promotion of well-being of scheduled tribes. Read together with Articles 15, 16, 17 and 23 and Article 46, the Law of the Land is clear and affirms guarantee for their overall promotion through special care and protection of injustice. Article 330 of the Indian Constitution provides for the reservation of the scheduled tribes in the House of Peoples, Article 335 provides for reservation in union government employments. There are provisions for reservation in educational institutions for the tribes. In this regard, Betteile concludes that India has one of the oldest and most extensive programmes of positive discrimination or affirmative action.[504] The role of the Indian judiciary is equally affirmative. In *Samantha v. State of Andhra Pradesh*, the Supreme Court of India observed that, "[A]griculture is the only source of livelihood for scheduled tribes, apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribals derive their sustenance social status, economic and social equality and permanent place of abode and work and living. It is a security and source of economic empowerment. Therefore, the tribes too have great emotional attachment of their lands. The land, on which they live and till, assures them equality of status and dignity of person and means to economic and social justice and is a potent weapon of economic empowerment in a social democracy."[505] Justice Sabharwal in his concluding remark mentions that "it seems that the Indian experiment is another model, which can be tried in other parts the world to protect the rights of indigenous peoples."[506]

Although the de-notified and nomadic tribes (DNTs) are an integral part of the Indian society, the fact remains that there is dearth of literature analyzing the human rights situation of these communities.[507] Unlike several other casts, the DNTs are not categorized as a class under the constitutional schedules like the Scheduled Castes (SCs) and Scheduled Tribes (STs). However, some of these communities have been enlisted by the individual states of the Union of India. It is important to note that they are not covered under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, under which the SCs and STs are protected. This is one of the reasons why it is difficult to trace the protection and promotion of human rights of these

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[503] Robert S Anderson and Walter Huber, *The Hour of the Fox: Tropical forests, the World Bank and indigenous people in Central India* (New Delhi: Vistar, 1988); C. R. Bijoy, *India and the rights of indigenous people: Constitutional, legislative and administrative provisions concerning indigenous and tribal people.* (Chiang Mai: Asia Indigenous People Pact, 2010); Bhupinder Singh, *Democratic decentralization in tribal areas: Approach and paradigms in the context of the constitution seventy-third and seventy-fourth amendments* (New Delhi: Rajiv Gandhi Institute for Contemporary Studies, 1995); Kumar Sarit Chaudhuri, *Constraints of tribal development* (New Delhi: Mittal Publications, 2004).

[504] See Betteile, 1998, above at p. 187.

[505] *Samantha v. State of A.P* (1997) 8 SCC 191.

[506] Address by Mr Justice Y. K. Sabharwal, Chief Justice of India, ILA Biennial Conference, Toronto, p. 12.

[507] Arup Maharatna, *Demographic perspectives on India's tribes* (Oxford University Press, 2005); James Massey (ed.), *Indigenous people: Dalits issues in today's theological debate* (New Delhi: ISPCK, 1994); Radhakrishna Meena, *Dishonoured by history: Criminal tribes & British colonial policy* (New Delhi: Orient Longman, 2001).

communities. It is equally, if perhaps not more, difficult to find that these communities are not having uniform reservations for concessions across the nation. Similarly, a violation of human right of these communities is tried under the Criminal Procedure Code, as no separate code exists to punish or take remedial measures for those who violate the rights of DNTs. It may be noted that this problem is not an isolated problem, as similar problem arose in the working of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 in the beginning,[508] *Ujjagarsingh & Ors v. State of Haryana & Anr*,[509]and *Moly & Anr V. State of Kerala*.[510] The Indian Constitution prescribes protection and promotion of customary laws of tribal communities and their rights, the effectiveness of the protection and promotion of these rights depend on the execution of the same and there are wide ranging perceptions on the effectiveness of the enforcement.[511]

### 5.6. Issues concerning women

The rights of women and family law reforms are the most closely connected subjects which need detailed analysis to see how the economic reforms have been and will be able to materialize the rights of women. First of all, there is a need to disconnect the discourse of women's rights from minority rights. Secondly, the rights of women across all the communities must be objectively seen without confining a conservative look from any religion. Thirdly, social customs and practices are the major source as well as means which protect and promote or prejudice women's rights. The Indian polity has made continuous efforts to empower the downtrodden, deprived and backward classes of women. One of the most important such measures is the 73$^{rd}$ and 74$^{th}$ amendment to the Constitution of India which provides for the reservation of 1/3 seats in all election bodies for women. At national level, a bill envisaging 1/3 seats reservation for women in the Indian parliament is pending. Health, gender inequality, lack of education, economic freedom and political freedom are some of the most important human rights issues concerning women of India.[512]

How the Fourth World Women Conference has contributed directly or indirectly to women's rights in India? There had been four world conferences on women, however, the Fourth World Conference, held in Beijing has been considered by far the most effective as far as women's rights in India are concerned. The Platform for Action which was declared and accepted by participating governments highlighted the most important areas of concerns.[513] The Convention for Eradication of all forms of Discrimination against Women (CEDAW) has also contributed significantly to protection and promotion of women's rights in India. The

[508] 2002(1) Criminal Court cases 150.

[509] 2003(1) Criminal Court Cases 406.

[510] 2004(2) Criminal Court Cases 514.the trial of all the cases under the Prevention of Atrocities Act were stopped and all the cases were sent to the Courts of jurisdictional Magistrates. Thereafter the respective Magistrates took cognizance of the cases and committed them to the Special Courts. The Special Courts started trying the cases after they were committed to them. The Act was later amended giving the Special Courts the power to take cognizance of the offences under The Protection of Human Rights Act, 1993.

[511] Christoph von Furer-Haimendorf, *Tribes of India: The Struggle for Survival* (New Delhi: Oxford University, 1982); Bimala Charan, Law, *Ancient Indian Tribes* (London: Luzac, 1934).

[512] It is important warning that mere equal right to vote and be elected in various legislative bodies cannot bring panacea to problems related to women rights. Equality with equity in true sense can bring women empowerment.

[513] These concerns though of general nature are applicable to condition of women in India: (a) the persistent and increasing burden of poverty on women; (b) Inequalities and inadequacies in and unequal access to education and training; (c) Inequalities and inadequacies in and unequal access to health care and related services; (d) Violence against women; (e) The effects of armed or other kinds of conflict on women, including those living under foreign occupation; (f) Inequality in economic structures and policies, in all forms of productive activities and in access to resources.

Convention codified and set out international legal principles on the women's rights which are applicable to women in all fields. The Committee established to monitor the implementation of the Convention, under Article 17 of the Convention, reviews obligations of nation states under the Convention. Despite international political tensions, especially the North-South Division, this Committee has been able to set up various policies for the implementation by the nation states, among other concerning;

- The need to make legal and policy changes would have to be undertaken to ensure elimination of all forms of gender discrimination by 2005.
- Developing the country budgets to include provisions for achieving the commitments made at the international level.
- Ratification of CEDAW and the optional protocol to CEDAW.
- Implementation of "Equal Pay for Equal Work".
- Promotion of a nationwide campaign for elimination of violence against women.

The above high-sounding assurances mandatory under the Policy Framework and Plan of Action (PFPA) have not achieved any significant results. The fact that the 5th World Conference on Women Rights is yet to take place shows that the women's right movement not only in India but across the world has slowed down which may have detrimental impacts on the continuous evolution of women's rights. Empowerment of women has remained a major objective for the successive Five Year Plans of India. Since the 9th Five Year Plan, women organization and activists have been involved in the consultative process to formulate the recommendations for implementation. For the first time, the Indian government, through the 9th Plan, adopted the 'National Policy for Empowering Women' along with a well-defined 'Gender Development Index' to monitor progress made towards improving women's status in the society.[514]

Women's empowerment is one of the avowed goals of the women's rights, so it is important to analyse the major issues facing the journey of women empowerment in India. As mentioned in the introduction, women rights in India have distinctive features resulting through the confluence and divergence of historical, social, economic, cultural and religious norms and practices.

**5.6.1. The growing feminization of poverty:** Women are the immediate and continuous victim of poverty.[515] Compared to men, women in India are poorer and found living below the poverty line. However, the abject poverty of women is more noticeable among indigenous communities and other marginalized sections of the society. The most important reasons are; need for them to earn livelihood as well carry out household functions, patriarchal system and unfair practices towards women in ancestral wealth. According to one estimate, around the world and more so in India, while women work nearly 67 % of working hours they earn only 10 % of the income and own less than 1 % of it and poverty often leads to economic exploitation and sexual abuse of

[514] G. Palanithurai, *Dynamics of new panchayati raj system in India: Empowering women, Vol. 4,* (New Delhi: Concept Publishing company, 2004).

[515] Kumkum Bhavnani, *Feminist futures: re-imaging women, culture and development* (London: Zed Books, 2003).

women.[516] The most debilitating effect it has is in the fact that if the woman is unable to come out of poverty the cycle is perpetuated through her children, especially the girl child.[517]

**5.6.2. Lack of full participation in decision making processes and institutions:** While the 73rd and 74th Amendment to the Constitution of India which have reserved 33% of the seats in local units of governance (called Panchayats) and municipalities, the meaningful access in form of reservation for women at the state and national level decision making bodies and processes are absent in India. This can deprive women from fully and meaningfully participating in national development in an integral way.

**5.6.3. Violation of basic rights of women remains unabated:** Physical, sexual and psychological assaults, female foeticide, infanticide, trafficking,[518] dowry death, rape, depending upon as well as notwithstanding the socio-economic-cultural background of families are subjected to violation.

**5.6.4. Inadequate access and participation in education and literacy:** Due to alarmingly low levels of education,[519] and the inability of the governmental institutions and socio-cultural background across various communities, women often remain unable to find gainful and equal pay for equal work, compared to men, in the Indian society. It is important to note that a girl child between the age of VI to XII is eligible for free education. Similarly, the University Grants Commission of India has introduced post-graduate scholarship scheme for girl students to empower them to pursue higher studies.

**5.6.6. The Role of Indian Judiciary and Women's' Rights:** Like in the environment and development field, the Indian judiciary has been playing the most instrumental and decisive role in codifying, according and enforcing the rights and execution of women's rights in India. The Indian judiciary has read into the hard and soft-international law instruments prevalent in human rights in favour of women while pronouncing the judgments.

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[516] Not only economic growth per se, but the re-engineering of social and cultural institutions is essential to contribute to the economic empowerment of women and thus to improve their lives in general. Women participation and decisive influence into economic productive assets, is one of the essential means to achieve this objective. In a country like India, these three institutions need to work or progress in tandem, otherwise, the socio-economic growth of women will tend to be low. Despite existence of legal instruments (despite amendment to the Hindu Succession Amendment Act, 2005) and mechanisms, the reality remains that women does not enjoy equal status in property inheritance, control of residential and agricultural assets and other means of her livelihood. Kelkar analyses a "notable missing link, between women's right to productive assets and HIV/AIDS." Kelkar *ibid.* p. 61. Kelkar argues that instead of women's right to productive assets, organisational arrangements at the local level are needed to strengthen women's economic rights and address the lack of implementation. Kelkar at p. 67.

[517] Working out of Poverty, Report of the Director General, International Labour conference, 91st session, Website referred:http://www.ilo.org/public/english/standards/relm/ accessed on 20 August 2012.

[518] S. P. Pandey, *Rehabilitation of disadvanced children and women sex workers* (New Delhi: Serials Publications, 2008).

[519] Female literacy rate in India is much lower compared to the male literacy rate. As per one estimate, male Literacy rate is 82.14% while female literacy rate is 65.46%. http://www.indiaonlinepages.com/population/literacy-rate-in-india.html accessed on 20 August 2012.

The Supreme Court in *Githa Hariharan v. Reserve Bank of India*,[520] concerning the elimination of discrimination against women, reading the provisions of the CEDAW and the Beijing Declaration, directed the domestic courts in India to give due regard to international conventions and norms for construing domestic laws when there is no inconsistency between them. In *Madhu Kishwar and Ors. v. State of Bihar and Ors*., the Supreme Court upheld the fundamental right of the tribal women to the right to livelihood and also that the State is under an obligation to enforce the provisions of the CEDAW which provided that discrimination against women violated the principles of equality of rights and respects for human dignity. [521]

The most important and landmark judgment concerning women' rights was the *Vishaka and Ors. V. State of Rajasthan and Others*[522] in which the Supreme Court of India elaborated the international perspective or global scenario and applied international law. The case dealt with the issue concerning the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India with the aim of finding suitable methods for realization of the true concept of gender equality and preventing sexual harassment of working women[523] in all work places through judicial process to fill the vacuum in existing legislation.[524] The Court directed the employers to frame the guidelines and norms that not only ensure the prevention of sexual harassment but also uplifts the dignity of women overall in consonance with the CEDAW and gender equality as provided in the Constitution of India. The Court upheld that the judiciary shall construe the norm with regard to the international conventions and norms when the domestic law is absent. Furthermore, the Court held that if there is no remedy under the Indian law then the international law shall be looked upon for such measures. While giving the guidelines, the Court directed the states authorities to comply with its guidelines till the time the legislations are passed. It is pertinent to note some of the CEDAW recommendations which the Court upheld through this case:

> "1. Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the work place.[525]
>
> 2. Sexual harassment includes such unwelcome sexually determined behavior as physical contacts and advances, sexually colored remarks, showing pornography and sexual demands, whether by words or actions.
>
> 3. States should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the work place."

Pronouncing through the *Municipal Corporation of Delhi v. Female Workers (Muster Roll) & Anr*,[526] the Supreme Court used the doctrine of social justice as codified through the practice of the UDHR and Article 11 of the CEDAW and held the Right to Maternity Leave for working women and also directed the Municipal

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[520] 99(2) SCC, p. 228.
[521] AIR 1996 5 SCC 125.
[522] JT 1997 (7) SC 384.
[523] Tom Dannenbaum, *Combating sexual harassment at the workplace: a handbook for women, employers and NGOs* (Maharashtra: India Centre for Human Rights and Law, 2005).
[524] Monmayee Basu, *Legalizing gender inequality: courts, markets and unequal pay for women in America*, (New York: Cambridge University Press, 1999); Marjorie Agosin, *Women, gender and human rights: a global perspective* (Jaipur: Rawat Publications, 2003); A. S. Anand, *Justice for women: concerns and expressions* (New Delhi: Universal Publishing House, 2002).
[525] Surinder Mediratta, Handbook of Law, Women and Employment (New Delhi: Oxford University Press, 2009).

[526] (2000) 3 SCC 224

Corporation to read the provisions into the service contracts. The Supreme Court clarified in the case *Randhir Singh v. Union of India &Ors*,[527] that non-observance of the principle of 'equal pay for equal work' for both men and women under Article 39(d) of the Constitution is a violation of Article 14 and 16 of the Constitution and a violation of the principle that has been by all various systems of law including the Preamble to the Constitution of the International Labour Organization. In *Anuj Garg & Ors v. Hotel Association of India &Ors*, the Supreme Court gave a broad overview of the international perspective of Human Rights of Women. Highlighting that "a statute could be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also the international arena, such a law can also be declared invalid."[528] The Court made it clear that the Right to Development of Women as adopted by the World Conference on Women's Right shall be read into all provisions and subsidiary legislations.

### 5.6.7. Economic Rights – a way forward for women empowerment in India

Women's participation in economic productive activities[529] is one of the surest ways to their empowerment. However, the country is beset with the large population of illiterate women, especially in the rural areas and who are dependent on the farming for their livelihoods. Unless, the efforts to eradicate the economic deprivation are taken on in coordinated ways from grass root or bottom levels, the true economic empowerment of large population of Indian women will remain a distant hope. Whether the economic reforms in India have contributed to mitigate gender and social inequalities remains a source of inspiration for innumerable scholarly and practical papers and reports. The focus needs to be on their empowerment leading to their ownership and control of productive assets, i.e. in the Indian context, even today, it means, their control over farming sources, namely the land. According to Articles 15 and 16 of CEDAW, India is required to "[R]ecognise women's rights to own; inherit and administer property in their own names; and provide equal rights for both spouses in respect to ownership, acquisition, management, administration". India, pursuant to the CEDAW, has passed legislation protecting women's rights, including in agricultural land, however, as Govind Kelkar mentions, "…social practices based on traditions and customs work to women's disadvantage and further act to influence women's ideology of economic dependence on men and a general reluctance to use the courts for legally provided asset rights…"[530]

## 5.7. Rights of Children

With the coming into force of the UN Convention on Rights of Child, there has been significant progress and debates in India concerning their rights. All three organs of the state at the union and state level have been sensitized and appear to be ever more aware to protect and promote their rights. Indeed, a cursory look at the

[527] 1983 – I L.L.J. 344

[528] 2007 INSC 1226.

[529] Dev Nathan and Ahmed Niazappu, "Women's Independent Access to Productive Resources: Fish Ponds in Oxbow Lakes Project, Bangladesh" in 2 *Gender Technology and Developmen*t 3, 397-413 (1998); SAARC Regional Poverty People 2005: *Poverty Reduction in South Asia through Productive Employment*, SAARC Secretariat, Kathmandu; C. P. Sujaya, *Climbing a Long Road: Women in Agriculture in India – Ten Years after Beijing* (Chennai: M S Swaminathan Research Foundation, 2006).

[530] Govind Kelkar, "Gender and Productive Assets: Implications for Women's Economic Security and Productivity" in *Economic and Political Weekly*, 4 June 2011, pp. 59-69; Standing Hilary, Dependence and autonomy: women`s employment and the family in Calcutta (London: Routledge, 1991); Bina Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia* (Cambridge: Cambridge University Press, 1994).

primary and secondary legislations together with the ever active Judiciary, India has come a long way in creating the necessary legal and regulatory framework and, in many instances, it has been able to place an executive and monitoring mechanism to ensure the compliance with the laws and norms by the stakeholders. In the area of legislation, India enacted the Juvenile Justice (Care and Protection of Children) Act 2000 (JJ Act), amended in 2002 and 2006. Despite a range of legal measures, the protection and promotion of rights of child story of India may remain incomplete without analysing the concrete problems.

**Areas of concerns**

**5.7.1. Child marriages –**Child marriage, despite the 1929 Act, remains sporadically present in certain parts of India. However, it is noted that there is a significant decrease in the instances of child marriages. Not only the government and the judiciary, but the role of NGOs and individuals are becoming ever more important in this crucial area.

**5.7.2. Child Labour-**Child labour is one of the most politically sensitive human rights issues[531] which confront the Indian state internally and externally with grave ramifications. The child labour issue cannot be simply seen from current economic and political realities.[532] The practice prevalent in Indian state over the rich civilization of thousands of years must be appropriately studied and the criticisms and suggestions must be made on the basis of a thorough review. The prevalent norms of criticizing the state of India either by internal or external stakeholders must be assessed and answered in a historical perspective instead of just post-Independent developments. At the time of the adoption of the Indian Constitution, the Subcommittee on Fundamental Rights decided to draft a provision prohibiting the employment of children below 14 years of age in mines, and factories and in other hazardous occupations. This draft was adopted after a very brief discussion and with no modification by the Constituent Assembly. There is thus a constitutional embargo on the employment of children below 14 in factories, in mines and in work that is considered hazardous. This constitutional position is at variance with the ILO Conventions requiring prohibition of child labour below the age of 14 years and prohibition of all hazardous work for children until the age of 18.[533]

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[531] India ratified the UN Convention on the Rights of the Child on 11 December 1992. India is yet to ratify the ILO Convention on Worst Forms of Child Labour (No. 182). Addressing a conference on child labour in August 2010, Minister of State for Labour and Employment Harish Rawat announced that the Government is making a roadmap towards ratification of ILO convention 182 on worst forms of child labour that bars employment of children under the age of 18. "Even if there is a single child engaged in child labour, it is a challenge for us as government and to all of you as citizens and civil society partners," Rawat told the South Asian Regional Consultation on Child Labour on Agriculture held here last week. However, this momentum gained has been lost. India is one of the few countries that is yet to ratify this Convention. This state of affairs, despite being adequate preparation on part of India at national level to implement the provisions of the Convention remains inexplicable. India has in place Child Labour (Prohibition and Regulation) Act 1986 prohibits the employment of children under the age of 14 in 18 occupations and regulates the working conditions for children in the occupations and processes. It stipulates provisions for regulated working hours, hours of rest, weekly holidays, provision for furnishing of information regarding employment of a child labour to Inspector etc.

[532] The most common types of child labour are rag-picking, collecting firewood, tending to animals, street vending, dyeing cloth, begging, prostitution and domestic labour.

[533] K. Sankaran notes that it took until 2002 for the Constitution to be amended to provide the right to education as a fundamental right, and until 2009 for the Right of Children to Free and Compulsory Education Act to be passed, which operationalised this right. These two measures are seen to provide an impetus to doing away

**5.7.3. Street Children:** The issue of Street children is one of the important issues concerning child rights. According to one estimate, India has 11 million street children.[534] Child beating and sexual abuse are prevalent in urban and rural India. In the recent years, several institutions at national level (with majority of them in metro cities such as Mumbai, Kolkatta, Delhi, Chennai, Bangaluru) have come up which give shelter, counseling, basic education as well as vocational training to street children with a view to integrate them into mainstream children. Women in prostitution have faced the possibility of their children being forcibly separated from them, following an order of the Supreme Court in *Gaurav Jain v. Union of India*.[535]

**5.7.4. Child Abuse**-There has been increasing evidence of child abuse and more particularly child sexual abuse, being pervasive. The perpetrator is a near relative or someone close to the family.[536] This adds to the vulnerability of the abused child and apart from the confusion and sense of shame which the child experiences, it is also that there is a problem with a refuge which the child can access. Following the intervention of the Supreme Court in the *Vishaka Guidelines* regarding sexual harassment in the workplace, the matter of child abuse has also been taken to the court and the Law Commission of India has been inducted into setting the parameters for care and action in cases of child sexual abuse.

**5.8. Legislations for Child Rights**

**5.8.1. Minimum Wages Act, 1948:** It provides for the fixation of minimum time rate of wages by state government. It also includes the fixation of minimum piece rate of wages, guaranteed time rates for wages for different occupations and localities or class of work and adult, adolescence, children and apprentices. The Act is aimed at occupations which are less well-organised and more difficult to regulate where there is much scope for exploitation of labour. The Plantation Labour Act - the employment of children between the ages of 12 years is prohibited under the Act. However, the Act permits the employment of children above 12 years only on a fitness certificate from the appointed doctor. The Mines Act, 1952, states that no child shall be employed in any mines nor shall any child be allowed to be present in any part of mine, which is below ground, or in any open cast

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with child labour since "no-where" children who are not at school could be deemed to be part of the huge child labour force in the country. Sankaran *Ibid* at p. 73.

[534] UNICEF's estimate of 11 million street children in India is considered to be a conservative figure. The Indian Embassy has estimated that there are 314,700 street children in metros such as Bombay, Calcutta, Madras, Kanpur, Bangalore and Hyderabad and around 100,000 in Delhi alone. Railway Children, 'Our work in India', [online]. Available at www.railwaychildren.org.uk/asia.asp. Accessed 20 August 2012. A study in 2007 in India found the following: (a) 65.9% of the street children lived with their families on the streets. Out of these children, 51.84% slept on the footpaths, 17.48% slept in night shelters and 30.67% slept in other places including under flyovers and bridges, railway platforms, bus stops, parks, market places. (b) The overall incidence of physical abuse among street children, either by family members or by others or both, was 66.8% across the states. Out of this, 54.62% were boys and 45.38% were girls. (c) On a study in India, out of the total number of child respondents reporting being forced to touch private parts of the body, 17.73% were street children. 22.77% reported having been sexually assaulted. Kacker, L, et al (2007), Study on Child Abuse: India 2007, p 38-39. Ministry of Women and Child Development, Government of India, [Online] Available at: http://wcd.nic.in/childabuse.pdf. Accessed on 20 August 2012.

[535] 1990 Supp SCC 709

[536] Pinki Virani, *Bitter Chocolate: Child Sexual Abuse in India* (New Delhi: Penguin Books, 2000); Indu Bansal and Monika Chaudhary, *Patterns of Child Sexual Abuse and Relationship among Secondary School Students in Rajasthan*, http://www.booksie.com/young_adult/book_review/monika_chaudhary/child-sexual-abuse-in-india accessed on 5 August 2013; Child Abuse in India Increased According to the Report of NCPCR - See more at: http://www.jagranjosh.com/current-affairs/Child-Abuse-in-India/accessed on 5 August 2013.

working in which any mining operations being carried on. The Merchant Shipping Act, 1958 prohibits employment of children below the age of 14 in a ship except a training ship, home ship or a ship where other family members work. It also prohibits employment of young persons, below the age of 18, as trimmers and stokers except under certain specific conditions.

**5.8.2. The Apprentices Act, 1961:** It states that no person shall be qualified for being engaged as an apprentice to undergo apprenticeship training in any designated trade unless he is 14 years of age and satisfied such standards of education and physical fitness as may be prescribed. However, across India, millions of children do extremely hazardous work in harmful conditions, putting their health, education, personal and social development, and even their lives at risk resulting in facing circumstances as full-time work at a very early age, work in dangerous workplaces, excessive working hours, subjection to psychological, verbal, physical and sexual abuse, obliged to work by circumstances or individuals, limited or no pay, work and life on the streets in bad conditions, inability to escape from the poverty cycle, no access to education etc. In this regard, it is pertinent to observe that in case of *Ajay Goswami vs. Union of India &Ors*,[537] the petitioner requested the Court to direct the authorities to strike a reasonable balance between the fundamental right of freedom of speech and expression enjoyed by the press and the duty of the Government, being signatory of United Nations Convention on the Rights of the Child, 1989 and Universal Declaration of Human Rights to protect the vulnerable minors from abuse, exploitation and harmful effects of such expression.

### 5.9. Concluding remarks

It has been ages that the governmental and civil society institutions are looking for solutions to tackle the problems concerning human rights.[538] Reviewing India's practice at national and international level in the context of the developing jurisprudence, it can be concluded that even though there are municipal laws for protection of human rights yet the plight of the vulnerable groups remains a matter of serious concern. The concern of the international community to deal with the obstacles to access to justice in matters of human rights violation, especially for vulnerable groups, can be appreciated because the oppressed and the wronged that are denied justice may resort to revolt and violence or helplessly face extinction, especially in countries like India where the situation is far more serious. In this regard, India's position vis-à-vis violation of human rights in other countries is an important pointer for current and future direction of its overall position. India does not regard "spotlighting and finger -pointing at a country for human right violations as helpful".[539] India's bilateral position is well reflected in its multilateral position too, as it considers that "targeting countries for intrusive monitoring is only indicative of a bias and does not further the cause of human rights. There is no doubt that human rights abuses must be addressed but it should be done in a comprehensive manner through cooperation, dialogue and

[537] (2006) RD-SC 947

[538] The rise and role of Western NGOs in perceiving, appreciating, reporting and holding accountable various countries for shaping and implementing has had an immense effect through their public debates, comments, reports, inter-state or petition procedures, etc. C. Chinkin, 'The Role of Non-Governmental Organisations in Standard Setting, Monitoring and Implementation of Human Rights', in J. J. Norton, M. Andenas and M. Footer (eds.), *The Changing World of International Law in the 21st Century*, (The Hague, 1998).

[539] Explanation of Vote by India in the Human Rights Council on the Resolution on Syria. Geneva, 24 August 2011. Although India abstained on HRC resolution, it hoped that its position on the vote would not be misconstrued as condoning violations of human rights in any country, including Syria.

consultation".[540] The primary concern of policy-makers should be to remove the internal obstacles to access to justice which lie under the cover of power in the hidden forms of lack of understanding the law, inability to deal with cases, prejudices, amenability to political and other influences, and insensitivity to human sufferings.[541] The other obstructions hampering access to justice in the delicate areas of human relationship and peaceful co-existence which disturb the very fabric of a multicultural society are racial and religious intolerance, mob violence, extreme poverty, flaws in the legal system, propaganda of hatred and they call for a concerted effort of an enlightened judicial system and the governance that interest of all the citizens to its heart without searching for cleavages providing ropeways for journey to power. The neglect in removing obstacles to access to justice is fraught with grave dangers that may perpetuate strife and miseries thwart all progress and encourage mercenary activities giving rise to criminal acts of a terrorist nature.

One of the major criticisms of human rights protection and promotion is that protection of rights of victims and witnesses have been very poor compared to the rights of the accused in India. While the Judiciary has become relatively sensitive in recent years, the credit to campaign for right of victims and witnesses goes essentially to the thousands of NGOs.[542] As Fletcher and Sarkar conclude, "…without the NGOs, the victims [during the investigation and process leading to the death of most wanted bandit Veerapan] never could have presented their claims before an NHRC panel…"[543] Based on their experience of analyzing the reports of the Sadashiva Panel constituted by the NHRC in the *Veerapan* case,[544] the authors makes an important suggestion that "… particularly where victims are the poorest and most marginalised sections of society, state actors need to recognise NGOs as viable partners and intermediaries rather than adversaries."[545] One of the major weaknesses of the Indian Human Rights System is the often perceived imbalance between the rights of the accused versus rights of victims and witnesses. In this regard, it is important to conclude that the Indian judiciary needs to

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[540] Statement by Member of Parliament and Member of the Indian Delegation to the UN Dushyant Singh on Agenda Item 69 – Promotion and Protection of Human Rights [A] Implementation of Human Rights Instruments, [D] Comprehensive Implementation of and Follow up to the Vienna Declaration and Programme of Action at the Third Committee of the 66th Session of the UN General Assembly. New York, October 18, 2011.

[541] Although states have no right to encroach upon internal affairs of other states and remains one of the fundamental principles of international law as enshrined in the UN Charter through article 2(7), the subject of human rights needs a systematic reinterpretation because state machinery shall not plead this principle as giving them blanket prohibition from barring international community to remain moot spectators when gross and systematic violation of human rights become a norm in their territories.

[542] Sadashiva Panel which was established by the NHRC to undertake fact-finding mission concerning the commitment of atrocities and compensation to the victims in the wake of death of most wanted criminal in India, namely Veerapan, paid least attention to the rights of victims and witnesses in its inquiry. In the words of Fletcher and Sarkar, the Commission discredited "…the testimony of scores of victims. And as is so often the case in India, the authorities responsible for abuses have demonstrated complete impunity…", Fletcher and Sarkar, *Ibid* at p. 35.

[543] Fletcher and Sarkar*I bid* at 41.

[544] The Veerapan and other similar cases also bring to fore the oppressive practices and tactics, subjugating and destroying essential human fundamental rights, that can be employed by governmental and military forces under various legal instruments such as Maintenance of Internal Security Act, 1971; Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974; OFEPOSA, Essential Services Maintenance Act, 1968; Terrorists and Disruptive Activities (Prevention) Act, 1985 (amended in 1987); and Prevention of Terrorism Act, 2002. Similarly, provisions of legal instruments such as the Border Security Force, 1965; Indo-Tibetan Police Force, 1962; Rapid Action Force, 1991; Central Reserve Police Force, 1949; Central Industrial Securities Force, 1969; and agencies like Central Bureau of Investigation (CBI) and Research and Analysis Wing (RAW), are subject to misuse by the executing authorities and can be detrimental to the human rights system of innocent civilians.

[545] *Ibid.*

become more sensitive towards the rights of victims and witnesses and read the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[546] into its jurisprudence.

The contribution of the human rights movements in India has been enormous especially after the emergency period of the 1970s.[547] As Aswini Ray concludes, "…the civil and democratic rights movement in India, with its very obvious influences drawn from Western democracies, had rather fortuitous beginnings in India. From a largely limited activist base from the emergency period of the 1970s, it has since moved into newer areas, with newer sources of support especially among more marginalised sections. But the movement, unlike its counterpart in the West, remains constantly challenged by prevailing complexities of the political process. The emergence of newer identities and shifting quality of these identities shaped by the very nature of politics and electoral processes in India coupled with the paucity of similar experiences in western liberal democracies ensures that civil and democratic rights movement has to often formulate its own responses, make its own theoretical and conceptual innovations to meet such challenges."[548]

As mentioned in the introduction, the Indian civil and politics rights law and practice has been impacted by the Western as well as the Soviet system and as such a unique Indian model of human rights has started to emerge only after 1970s.[549] Since the beginning of the globalisation, privatisation and liberalisation of the Indian economy, the Indian human right system is more and more tilted towards the Western system and still lacks a unique indigenous response.[550] Along with the Indian judiciary, various international organisations, especially the United Nations and its Specialised Agencies and Committees, have played an important role in promoting normative concerns on various rights within the Indian state.

Although India continues to play an active and constructive role in all Human Rights related bodies and issues in the UN, there are certain tension areas which need analysis. The analysis is important because the expectations of the international community expressed through the UN system and responses or actions taken by India vis-à-vis the same can only validate India's stand with meaningful acceptance at global level. It may be noted that India extended a standing invitation to Special Procedures Mandate Holders in September 2011. India has been regularly receiving UN Special Rapporteurs. India's cooperation with the UN bodies can be seen through the Action Taken Report, integral part of India's report to the 2nd UPR.[551]

While efforts of India on several issues of human rights have been appreciated, there are various areas where the UN bodies have expressed deep concerns. For example, with regards to the CEDAW, the Committee regretted long overdue report of India which contained limited and vague information and did not address all

[546] GA 40/34, annex, 40 UN GAOR Supp (No 53) at 214, UN Doc A/40/53 (1985).

[547] During the emergency period 1975-77, four amendments were incorporated into the Indian Constitution, 1st, 4th, 16th and 42nd which aimed to constrict the fundamental rights.

[548] Aswini K Ray, "Human Rights Movements in India: A Historical Perspective", *Economic and Political Weekly*, 9 August 2003, pp. 3409-3415.

[549] Human Rights laws and practices of India have been also influenced by the international politics of the Cold War. The Soviet support effectively provided immunity or shielded Indian position in international forums from attacks by the Western democracies and the NGO movements.

[550] It is important to note, in this context that, despite frequent criticisms by select Western nations on human rights laws and implementation by India, these criticisms do not get in the way of cooperation on financial and security cooperation between India and these nations, as these countries find a common ground to see how India could become an important factor in maintaining an overall political and strategic balance in the Asian region vis-a-vis China.

[551] Second Universal Periodic Review of India, 2012.

questions raised by the Committee earlier and the report reached just two days before the dialogue.[552] Although this could be considered an administrative weakness, it is important to note that unless and until a timely submission enabling a thorough review of the report is made, India would continue to face such criticisms.

With regards to the Economic, Social and Cultural Rights implementation, the Committee regretted the absence of necessary domestic legislations and non-implementation of decisions of the Supreme Court, which the Committee appreciated. Another major failure of India is reported to be its inability to "coordinate and ensure, at both the federal and state levels, administrative and policy measures relating to economic, social and cultural rights, which constitutes a major impediment to the equal and effective implementation" of the ICESCR. Absence of district courts to enforce Human Rights at district level and alleged harsh actions against individuals and institutions working for the human rights by the officials and enforcement agencies, lack of adequate justice to victims of HIV/AIDS, lack of inability to combat the persistent *de facto* caste-based discrimination, persistent inequality among men and women, disproportionate representation of women in the informal labour market and significant wider disparities in wages, insufficient enforcement of existing labour legislations, inadequate translation of economic growth into the generation of employment opportunities, among others, constitute major criticisms against India in its ability to meet with obligations flowing from the ICESR.[553]

As Aswini Ray concludes, "…since the inception of the Constitution, no new right has been added to Part III, while most of the seven components in the part have been constricted by periodic amendments; and citizens' duties included in it through the 42nd Amendment of the emergency era."[554]

The analysis also shows that India, despite having freedom of association, equality and non-discrimination, freedom for forced labour and child labour which are guaranteed as fundamental rights under the Constitution, has very poor records in ratifying international instruments pertaining to these subjects. Social, economic and political factors are also important reasons for India's non-ratification of several conventions of the ILO, as shown above. It is therefore not surprising that "the granting of rights subject to caveats is a feature of the Indian Constitution, where rights are often granted or recognised only to be subject to myriad restrictions and exceptions that take away their universality."[555] India's position to link human rights with development issues in developing countries has remained consistent. In view of the Millennium Development Goals, India has viewed and will continue to link the synergy between the protection and promotion of human rights and the rule of law with human welfare and socio-economic development, including the achievement of the MDGs.[556]

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[552] CEDAW/C/IND/CO/SP.1, 47th Session, 4-22 October 2010.
[553] Economic and Social Council, E/C.12/IND/CO/5, May 2008, 40th Session, May 2008.
[554] Aswini Ray, *Ibid*, p. 3414.
[555] Sankaran *ibid*. at p. 73.
[556] Statement by Deputy Chairman of the Rajya Sabha and Member of the Indian Delegation to the UN K. R. Rahman Khan on Agenda Item 110 – Report of the Secretary General on the Work of the Organization at the 66th Session of the UN General Assembly. New York, October 4, 2011.

**Status of Participation of India**
**Multilateral Treaties on Human Rights Deposited with the UN Secretary-General**
**Status as of 1 November 2014**

| General | EIF | Signature/Ratification/ Accession |
|---|---|---|
| **Universal Declaration of Human Rights** | | |
| International Covenant on Civil and Political Rights | 23 March 1976 | 10 April 1979(a) |
| International Covenant on Economic, Social and Cultural Rights | 3 January 1976 | 10 April 1979(a) |
| Optional Protocol to the International Covenant on Civil and Political Rights | 23 March 1976 | - |
| Optional Protocol to the International Covenant on Economic, Social and Cultural Rights | 5 May 2013 | - |
| Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty | 11 July 1991 | - |
| **Children** | | |
| Convention concerning Minimum Wage for Admission to Employment (Minimum Age Convention, 1973) | 19 June 1976 | - |
| Convention on the Rights of the Child | 2 September 1990 | 11 December 1992 |
| Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour | 19 November 2000 | - |
| Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts | 12 February 2002 | 15 November 2004 (S)<br>30 November 2005 (R) |
| Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography | 18 January 2002 | 15 November 2004 (S)<br>16 August 2005 (R) |
| **Disabilities** | | |
| Convention Concerning Vocational Rehabilitation and Employment (Disabled Persons) | 20 June 1985 | - |
| Optional Protocol to the Convention on the Rights of Persons with Disabilities | 3 May 2008 | - |
| **Education** | | |
| Convention Against Discrimination in Education | 22 May 1962 | - |
| Protocol instituting a Conciliation and Good Offices Commission to be Responsible for Seeking a Settlement of any Disputes which may arise between State Parties to the Convention against Discrimination in Education | 24 October 1968 | - |
| Convention on Technical and Vocational Education | 29 August 1991 | - |
| Freedom of Association and Protection of the Right to Organise Convention | 4 July 1950 | - |
| Convention on the International Right of Correction | 24 August 1962 | - |
| **Labour (ILO Conventions)** | | |
| *Convention concerning the Protection of Wages, 1949, No. 95* | 24 September 1952 | - |
| Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951, No. 100 | 23 May 1953 | 25 September 1958 |
| Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949, No. 98 | 18 July 1951 | - |
| Convention Concerning the Abolition of Forced | 17 January 1959 | 18 May 2000 |

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| Labour, 1957, No. 105 | | |
| Convention Concerning Forced or Compulsory Labour, 1930, No. 29 | 1 May 1932 | 30 November 1954 |
| Convention Concerning Discrimination in Respect of Employment and Occupation, 1958, No. 111 | 15 June 1960 | 3 June 1960 |
| Convention Concerning Basic Aims and Standards of Social Policy, 1962, No. 117 | 23 April 1964 | |
| Convention Concerning Employment Policy, 1964, No. 122 | 9 July 1965 | 17 November 1998 |
| Convention Concerning Minimum Wage Fixing, with special reference to Developing Countries, 1970, No. 131 | 29 April 1972 | - |
| Convention Concerning Protection and Facilities to be afforded to Workers' Representatives in the Undertaking, 1971, No. 135 | 30 June 1973 | - |
| Convention Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, 1978, No. 151 | 25 February 1981 | - |
| Convention Concerning the Promotion of Collective Bargaining, 1981, No. 154 | 11 August 1983 | - |
| Convention Concerning Occupational Safety and Health and the Working Environment, 1981, No. 155 | 11 August 1983 | - |
| Convention Concerning Employment Promotion and Protection Against Unemployment, 1988, No. 168 | 17 October 1991 | - |
| **Marriage** | | |
| Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages | 9 December 1964 | - |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families | 1 July 2003 | - |
| **Minorities** | | |
| Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989, No. 169 | 5 September 1991 | - |
| **Nationality** | | |
| Convention Relating to the Status of Stateless Persons | 6 June 1960 | - |
| Convention on the Reduction of Statelessness | 13 December 1975 | - |
| Vienna Convention on Consular Relations | 19 March 1967 | 28 November 1977 (a) |
| Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality | 19 March 1967 | 28 November 1977 (a) |
| Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes | 19 March 1967 | 28 November 1977 (a) |
| **Race** | | |
| International Convention of the Elimination of All Forms of Racial Discrimination | 4 January 1969 | 2 March 1967 (s)<br>3 December 1968 (R) |
| **Refugees** | | |
| Convention Relating to the Status of Refugees | 22 April 1954 | - |
| Protocol Relating to the Status of Refugees | 4 October 1967 | - |
| **Slavery** | | |
| International Agreement for the Suppression of the "White Slave Traffic" | 18 July 1905 | 9 May 1950<br>9 January 1953 (R) |
| Slavery, Servitude, Force Labour and Similar Institutions and Practices Convention of 1926 | 9 March 1927 | 18 June 1927 |
| Protocol amending the International Agreement for the Suppression of the "White Slave Traffic" signed at Paris on 18 May 1904 and the International Convention for the Suppression of the "White Slave Traffic" signed at Paris on 4 May 1910 | 4 May 1949 | 12 May 1949<br>28 December 1949 (a) |

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|---|---|---|
| Protocol Amending the Slavery Convention | 7 December 1953 | 12 March 1954 (s) |
| Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery | 30 April 1957 | 7 September 1956<br>23 June 1960 |
| Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the UN Convention Against Transnational Crime | 28 January 2004 | 12 December 2002 |
| **Torture** | | |
| Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment | 26 June 1987 | 14 October 1997 (Signature) |
| Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment | 22 June 2006 | - |
| International Convention for the Protection of All Persons from Enforced Disappearance | 28 March 1996 | - |
| **Women** | | |
| Convention for the Suppression of the Traffic I Persons and of the Exploitation of the Prostitution of Others | 25 July 1951 | 9 May 1950<br>9 January 1953 |
| Convention on the Political Rights of Women | 7 July 1954 | 29 April 1953<br>1 November 1961 (r) |
| Convention on the Nationality of Married Women | 11 August 1958 | 15 May 1957 |
| Convention on the Elimination of All Forms of Discrimination Against Women | 3 September 1981 | 30 July 1980<br>9 July 1993 |
| Optional Protocol against the Convention on the Elimination of All Forms of Discrimination Against Women | 22 December 2000 | - |
| Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, supplementing the UN Convention Against Trans-National Organized Crime | 25 December 2003 | 12 December 2002 |

# CHAPTER VI
# INTERNATIONAL ENVIRONMENTAL LAW AND THE LORDS OF THE GREEN BENCH

## 6.1. Introduction

As far as international environmental law is concerned, India's contribution is vital in terms of the codification as well as progressive development.[557] This has been abundantly highlighted during the Stockholm Conference in 1972, the Rio Conference in 1992, Johannesburg in 2002, the Rio Conference in 2012 and various Climate Change conferences. India has played an active role in international forums and has been at the forefront of these forums for canvassing the needs, concerns and interests of developing countries at large. At national level, the executive and more importantly, the judiciary has been active in clarifying and implementing international environmental jurisprudence. In fact, the Indian judiciary, unlike other regimes of international law, has effectively and decisively read into emerging principles of international environmental law and has been successful in ensuring that the executive implements those norms. Post-independence India had to deal with immediate problems of socio-economic-political nature, and so its voice was significantly first heard at the Stockholm Conference in 1972, which is also considered to be the first and foremost major debate on international environmental law.[558] India's contribution can be found in international environmental law *per se*, and in all related disciplines with respect to sustainable development and climate change.[559] This chapter examines the following issues: How India has contributed to the emergence of international environmental law? How India has implemented the norms of international environmental law at domestic level specifically? What has been the role of the Indian judiciary in evolving various legislations and bye-laws? What has been the position and approach of the Indian judiciary in directing the compliance, implementation and enforcement of international environmental law norms at domestic level?

## 6.2. Evolution of environmental law in India

A brief review of various domestic acts, prior to Indian independence, suggests that these acts embody environmental concerns as well as remedial and penalty measures for the violations thereof. For example, the

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[557] C. M. Abraham, *Environmental Jurisprudence in India*, (The Hague: Kluwer Law International, 1999); Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh*, (The Hague: Kluwer Law International, 2004); Ambrose, David A., "International Environmental Law and India", In Bimal N. Patel (ed.) *India and International Law*, The Hague: Kluwer Law International, 249-64 (2005); Kisan Khoday, "Global Constitutionalism in a Multi-Polar World: China, India & the Shaping of International Environmental Law in the 21st Century", 5th International Conference of the *Indian SIL*, (New Delhi: 2007); S. C. Gupta, "Emerging International Environmental Regimes and India's Policy", 5th International Conference of the *Indian SIL*, New Delhi (2007); Sanjay Parikh, "Sustainable Development, International Environmental Law and the Legal Developments in India", In R. K. Dixit (ed.), 1 *International Law: Issues and Challenges* 268-279 (New Delhi: Hope Publications, (2009).

[558] The then Prime Minister of India Ms Indira Gandhi emphasised the interlinkages between economic, social and environmental issues, during Stockholm Conference. She outlined eight principles for securing global action which could achieve the interlinked goals.

[559] Indian position, at domestic, regional and global level is clear that "sustainable development, as illustrated by the Rio Declaration on Environment and Development, Agenda 21, the Johannesburg Plan of Implementation and multilateral environmental treaties, should be an important vehicle to advance economic growth." Sanya Declaration issued at the end of the Summit of the BRICS countries. Sanya (China), April 14, 2011

Indian Penal Code, 1860 prescribes punishment to people responsible for causing defilement of water at a public spring or reservoir with imprisonment or fines.[560] In addition, the Code also penalized negligent acts with poisonous substances that endangered life or caused injury. The Indian Easements Act, 1882 protected riparian owners against unreasonable pollution by upstream users.[561] The Indian Fisheries Act, 1897 penalized the killing of fish by poisoning water and by using explosives. The Indian Forest Act, 1927 granted the government uncontested rights over natural resources, with state governments authorized to oversee protection of the forests and grant licenses to lumber contractors.[562] In this regard, it may be noted that the Shore Nuisance (Bombay and Kolaba) Act of 1853,[563] was one of the earliest laws concerning water pollution, which authorized the collector of land revenue in Bombay to order removal of any nuisance below the high-water mark in Bombay harbors.

A major breakthrough in international environmental law regime started evolving significantly from 1972 with the United Nations Conference on the Human Environment, otherwise known as the Stockholm Conference.[564] Pursuant to Article 21 of the Summit Declaration, the Conference called upon and emphasized the need for enacting national legislations which can comprehensively address the health and safety issues of people, flora and fauna. This conference also marked a beginning of an important monitoring mechanism in the realm of international environmental law by calling upon all states to provide country reports.[565] For any country, health and safety issues of people, flora and fauna remain of vital importance, as Mrs. Gandhi, the then Prime Minister of India said,

> "On the one hand the rich look askance at our continuing poverty and on the other; they warn us against their own methods. We do not wish to impoverish the environment any further and yet we cannot for a moment forget the grim poverty of large numbers of people. Is not poverty and need the greatest polluters? For instance, unless we are in a position to provide employment and purchasing power for the daily necessities of the tribal people and those who live in and around our jungles, we cannot prevent them from combing the forest for food and livelihood; from poaching and from despoiling the vegetation. When they themselves feel deprived, how can we urge preservation of animals? How can we speak to those who live in villages and in slums about keeping the oceans, the rivers and the air clean when their own lives are contaminated at the

[560] Indian Penal Code, 1860 (Central Act 45 of 1860). The Indian Penal Code penalizes person(s) responsible for causing defilement of water of a public spring or reservoir with imprisonment or fines. In addition, the code also penalizes negligent acts with poisonous substances that endangered life or caused injury.

[561] Indian Easements Act, 1882, Act No. 5 of 1882, 17th February, 1882.

[562] The Indian Forest Act was a product of British rule in 1927. The legislation granted the government uncontested rights over natural resources, with state governments authorized to grant licenses to lumber contractors and oversee protection of the forests.

[563] The Shore Nuisances (Bombay and Kolaba) Act, 1853.Act No. 11 of1853.This Act relates to the removal of any obstruction, impediment or public nuisance affecting, or likely to affect the navigation of the port of Bombay. It aimed to facilitate the removal of nuisances and encroachments below high-water mark in the Islands of Bombay and Kolaba, in view of the large sea-shore in the islands of Bombay and Kolaba and with a view to the safe navigation of the harbor of Bombay, and to the public interests generally, to facilitate the removal of nuisances, obstructions and encroachments below high-water mark in the said harbor or upon or about the shores of the said islands.

[564] Bhabatosh Banerjee, *Corporate Environmental Management: A Study with Reference to India*, (New Delhi: Prentice-Hall, 2009); Gurdeep Singh, *Environmental Law in India*, (New Delhi: MacMillan, 2005); Alice Palmer and Cairo A. R. Robb, *International Environmental Law Reports: International Environmental Law in National Courts*, (Cambridge: Cambridge University Press, 2005); Philippe Sands and Paolo Galizzi, *Documents in International Environmental Law*, (Delhi: Manohar Publishers, 2004).

[565] Thomas E. Sulivan, "The Stockholm Conference: A Step towards Global Environmental Cooperation and Involvement" In 6 *Indiana Law Review* 2, 267-282 (1972).

> source? The environment cannot be improved in conditions of poverty. Nor can poverty be eradicated without the use of science and technology".[566]

India, forecasting that emerging norms will place a burden on the state machinery, speaking through the Prime Minister, argued that the ecological crises should not add to the burden of the weaker nations by introducing new considerations in the political and trade policies of rich nations. It would be ironic if the fight against pollution were to be converted into another business, out of which a few companies, corporations, or nations would make profit at the cost of the many. India's global voice representing developing countries kicked off from the highest political office and ever since then has always remained.

Since this time, the twin issue of environment and the economic development has surfaced in each and every national act passed by the Indian government. Another major development that occurred in terms of the coordination of environmental issues was that they were dealt with by different government departments and were seen as 'isolated' and requiring 'independent attention' before 1972, but since 1972 they came to fore at the Union level. As will be observed and analyzed in subsequent sections, Indian acts started making direct reference to the 1972 Conference. For example, the preamble of the Air Act[567] and the Environment Act[568] refer to the 1972 Conference. This needs to be seen in the context of interpretation of Article 253 of the Indian constitution which requires the Indian parliament to enact laws to fulfill international obligations. India effected 42nd amendment in 1976 which brought two important changes in the way the whole regime of international environmental law was to be implemented in India.[569] It introduced Article 48A11 and 51(A) (g) aimed at protecting and improving the environment. Furthermore, various entries included in the state list were transferred to the concurrent list, empowering the Union parliament to legislate on environmental issues such as forests, wildlife, population control etc.

In February 1972, a National Committee on Environmental Planning and Coordination (NCEPC) was set up in the Department of Science and Technology, which was established as National Committee on

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[566] Maurice F. Strong, "Hunger, Poverty, Population and Environment". The Hunger Project Millennium Lecture, April 7, 1999, Madras, India.<http//www.thp.org.reports/strong499.html> accessed on 12 Sept 2009.

[567] Air (Prevention and Control of Pollution) Act, 1981, No. 14 of 1981, the Preamble reads, "An Act to provide for the prevention, control and abatement of air pollution, for the establishment, with a view to carrying out the aforesaid purposes, of Boards, for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith…Whereas decisions were taken at the United Nations Conference on the Human Environment held in Stockholm in June 1972, in which India participated, to take appropriate steps for the preservation of the natural resources of the earth which, among other things, include the preservation of the quality of air and control of air pollution…"

[568] The Environment (Protection) Act, 1986, No. 29 of 1986, the Preamble reads, An Act to provide for the protection and improvement of environment and for matters connected there with: Whereas the decisions were taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972, in which India participated, to take appropriate steps for the protection and improvement of human environment…"

[569] Article 51(c) of the Constitution sets out a Directive Principle requiring the state to foster respect for international law and treaty obligations. Article 253 of the Constitution empowers Parliament to make laws implementing India's international obligations as well as any decision made at an international conference, association or other body. Article 253 states : 'Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body'. Entry 13 of the Union List covers: 'Participation in international conferences, associations and other bodies and implementing of decisions made thereat.' In view of the broad range of issues addressed by international conventions, conferences, treaties and agreements, Article 253 read with Entry 13 apparently gives Parliament the power to enact laws on virtually any entry contained in the State List.

Environmental Planning (NCEP) in April 1981, based on the recommendations of the Tiwari Committee.[570] The NCEPC functioned as an apex advisory body in all matters relating to environmental protection and improvement. However, due to bureaucratic problems, which NCEPC faced due to coordination with the Department of Science and Technology, it was replaced by a National Committee on Environmental Planning (NCEP) with almost the same functions. In terms of domestic acts, various developments took place.[571]

The Water Prevention and Control of Pollution Act, 1974 (The Water Act) has been considered as "India's pioneer legislation to deal with industrial pollution".[572] The Water Act contains elaborate provisions for the constitution of administrative agencies both at national and state level. It empowered the state governments to make rules prescribing conditions and standards to control water pollution to be achieved through a consent system of administration.[573] The Act itself did not initially bring about any change in the state of the environment. The Water Act more or less remained dormant, apart from the creation of a bureaucratic agency. Also, due to many inherent defects & various other reasons, this legislation was rendered inefficient and mostly unenforceable. There existed some very important provisions in India's Criminal Procedure Code and the Indian Penal Code. The most widely used provision was the Section 133 of the Criminal Procedure Code of 1973. This section empowers a District Magistrate or a Sub-divisional Magistrate to stop the nuisance on receiving the information.[574] But in case of disobedience of the order, the Court can impose penalties provided under Section 188 of Indian Penal Code which includes an imprisonment for a period of six years and fines up to 1,000 rupees. There have been instances of many judgments where these provisions have been used. The *Ratlam Municipality Case* holds great significance, where the Court used the provisions of the Criminal Procedure Code due to the fact that the Water Act and the Air Act do not provide the affected person a right to prosecute violators of the provisions. Another significant factor is that corporate bodies like companies and corporations can also be held responsible for pollution nuisance under these provisions. There were also other major decisions where this provision was successfully used. But a very important fact to be noticed is that all these cases had arisen during the 1980s and 1990s.

Thus, 1972 is a watershed in the history of political, executive and legislative activities of India in the field of international environmental law. Since 1972, India is seen to have played a major role in the contribution to international environmental law debates and enactment and implementation of measures at domestic level, in commensurate with its international obligations or as a part of its well-orchestrated strategy of foreign policy in this area.[575]

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[570] The NCEPC was established to perform (i) preparation of an annual" State of Environment Report" for the Country, (ii) establishing an Environmental Information and Communication System to propagate environmental awareness through the mass media, (iii) to sponsor environmental research, (iv) arranging public hearings or conferences on issues of environmental concerns. In 1985, the NCEPC gradually evolved as a separate department of Environment and reached the full-fledged stage of Ministry of Environment and Forests.

[571] http://envis.mse.ac.in/Environmenta70's.asp accessed on 5 August 2013.

[572] Balram Pani, *Textbook of Environmental Chemistry, (*I. K. International Ltd. 2007).

[573] Control of water pollution is achieved through administering conditions imposed in consent issued under provision of the Water (Prevention & Control of Pollution) Act, 1974. These conditions regulate the quality and quantity of effluent, the location of discharge and the frequency of monitoring of effluents. William Howarth, "Water Pollution: Improving the Legal Controls", 1 *Journal of Environmental Law* 1, 25-38 (1989) at p. 25.

[574] Nuisance is defined in very liberal terms and includes construction of structures, disposal of substances.

[575] Tolba, Mostafa, *Global Environmental Diplomacy: Negotiating Environmental Agreements for the World, 1973-1992*. As former Executive Director of the UNEP, he illustrates with succinct memories how India took

The most important development was perhaps the introduction of public interest litigation and changes in the environmental justice system. Indian judiciary's stance with regard to environment and development was such that it started entering the domain of legislature.[576] In addition to interpretation, clarification and adjudication of environmental law related issues, it started laying down norms, principles and practices to protect the environment, reinterpreted environmental laws, created new institutions and structures, and conferred additional powers on the existing ones through a series of illuminating directions and judgments. Indeed, some critics of the Supreme Court of India describe the Court as the "Lords of Green Bench"[577] or "Garbage Supervisor". International legal experts have been unequivocal in terming the Indian Courts of law as pioneer, both in terms of laying down new principles of law and also in the application of innovative methods in the environmental justice delivery system.[578]

This chapter critically examines how the environmental legislation as well as jurisprudence grew hand in hand since 1972 and how it further made contribution to India's overall position at international debates and became a source of guidance to countries of similar position. India enacted the Air Prevention and Control of Pollution Act (the Air Act) in 1981 to combat air pollution. This Act was a corresponding enactment to the Water Act passed earlier. The preamble of the Act referred, as mentioned earlier to the 1972 Stockholm Conference, that it has been enacted to take appropriate steps for the preservation of the natural resources of the earth, which include the preservation of the quality of air and control of air pollution. It also contained elaborate provisions for constituting administrative bodies and empowering them to make rules for the purpose of

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leadership role in various negotiations in a number of landmark agreements such as the Vienna Convention on Ozone and its Montreal Protocol, the Basel Convention on Hazardous Wastes, and the Biodiversity Convention. India's contribution during the negotiations of these conventions indicate its role in bringing the concerns of developing countries as well as emerging economies of Asia to the world forums, especially, in light of development v. protection of environment concerns and technology transfers.

576 Tarumoy Chaudhari, "Relations of Judiciary and Executive in India", Social Science Research Network, 20 September 2007, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672222; Sinha, Shikhar, "Indian Judiciary – A Pillar Above All," http://legalservicesindia.com/article/print.php?art_id=238; Lal, Paresh, Bihar, Fencing The Parameters: (The Strongest Critique Of Judicial Activism: The Supreme Court); http://www.allindiareporter.in/articles/index.php?article=1218; Justice Markandey Katju in *State of U.P and Ors. V Jeet. S. Bisht and Anr*; (2007) 6 SCC 586; *Asif Hameed v State of Jammu and Kashmir*, AIR 1989 SC 1899; *Trop v. Dulles* (1958) 356 US 86; affirmed in *Manoj Sharma v State and Ors*., Criminal Appeal No. 1619 of 2008 (Arising out of S.L.P. (Crl.) No. 5265 of 2007); *Common Cause (A regd. Society) v Union of India*; (2008)5 SCC 517; *Divisional Manager, Aravali Golf Club and Anr. V Chander Haas and Anr*, 2007(14); *State of Uttar Pradesh and Anr. V Jeet Bisht and Anr*.; (2007) 6 SCC 586; Noorani, A.G, "Judicial Activism v Judicial Restraint", *SPAN*, April 1997; *Indian Drugs & Pharmaceuticals Ltd. v. The Workman of Indian Drugs and Pharmaceuticals Ltd.* (2007)1SCC408; *S.C. Chandra and Ors. v.State of Jharkhand and Ors*., AIR 2007 SC 3021.

577 However, India in 2009 started considering the removal of green bench. *Centre wants Green Bench disbanded*, a famous article published in the Times of India, a leading Indian News Paper, analyses how the judiciary interventions which earned applause is now being seen an unwanted intrusion in the executive domain, especially in the area of preservation of forests. http://timesofindia.indiatimes.com/India/Centre_wants_Green_Bench_disbanded/articleshow/2222042.cms accessed on 9 April 2010. Also see, Saha, Arpita, Judicial Activism in Curbing the Problem of Public Nuisance to Environment in India, Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1439704, accessed on 9 April 2010. India has been envisaging a new Environmental Monitoring and Assessment Authority, however, this is yet to be materialized.

578 Shyami Fernando Puvimanasinghe, "An Analysis of the Environmental Dimension of Public Nuisance, with particular reference to the role of the Judiciary in Sri Lanka and India", 9 *Sri Lanka Journal of International Law* June Issue, 143-171 (1997); Ayesha Dias, "Judicial Activism in the Development and Enforcement of Environmental Law: Some Comparative Insights from the Indian Experience", 6 *Journal of Environmental Law* 2, 243-262 (1994).

controlling air pollution along with empowering the governments of individual states of India to designate air pollution control areas and the type of fuel to be used in those areas. Section 21 of the Act provides that no person may operate certain kinds of industries without the consent of the State Board. In due course, the administrative agencies established under the Air Act, merged with the functionaries established under the Water Act to form the Pollution Control Boards at the centre and state. Introduction of Public Interest Litigation into environmental legal framework paved the way for executive and judiciary to make major pronouncements and take bold steps for the preservation of environment. Prior to the introduction of the Public Interest Litigation,[579] due to lack of *locus standi*,[580] third party could not resort to the court if it was not the directly affected party. But with the new mechanism, the court's approach changed and it has been ruled that any member of the public having sufficient interest, was allowed to initiate the legal process in order to assert diffused and meta-individual rights. Public Interest Litigation is one of the most important contributions which India has made to international environmental law and jurisprudence. This innovative mechanism, through institutions with civil society approach, shows India's contribution in this vital area. Several landmark cases, such as *Dehradun Lime Stone Quarrying* case,[581] *Ganga Water Pollution* Case,[582] *Delhi Vehicular Pollution* Case,[583] *Oleum Gas Leak* Case,[584] *Tehri Dam* Case,[585] *Narmada Dam* Case,[586] *Coastal Management* Case[587] *Industrial pollution in Patancheru*

[579] Public Interest Litigation is an Indian variant of judicial activism. As Upendra Baxi believes, "Judicial activism, of the type witnessed through the imposing Social Action Litigation (SAL), commonly miscalled Public Interest Litigation (PIL) has been made possible by the emergence of 'activists' , especially after the catharsis of the 1975-1976 emergency. All kinds of groups now activate courts through letters treated as writs (epistolary jurisdiction – a unique contribution of Indian jurisprudence to humankind)." Upendra Baxi, *Public Interest Litigation* (3rd edition), New Delhi: Ashoka Law House: 2012, p. 258. See also R. Venkatramani, *Restatement of Indian Law / Public Interest Litigation*, New Delhi: Universal Publishing House: 2012; Surya Deva, "Public Interest Litigation in India: A Critical Review", 28 *Civil Justice Quarterly* 1, 19-40 (2009); *Jamie* Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible? 37 *American Journal of Comparative Law*, 495-519 (1989).

[580] Susan D Susman, "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation", 13 Wisconsin International Law Journal 1, 57-103 (1994).

[581] Rural Litigation and Entitlement Kendra v. State of U. P. (30.08.1998 – SC); Rural Litigation and Entitlement Kendra, Dehradun and Ors. V. State of U. P. and Ors. (12.03.1985 – SC).

[582] State of Uttaranchal vs. Balwant Singh Chaufal and Ors. (18.01.2010 - SC); D.D.A. vs. Rajendra Singh and Ors. (30.07.2009 - SC); U.P. Pollution Control Board vs. Dr. Bhupendra Kumar Modi and Anr. (12.12.2008 - SC).

[583] The Secretary and Curator, Victoria Memorial Hall vs. Howrah Ganatantrik Nagrik Samity and Ors. (09.03.2010 - SC); State of Uttaranchal vs. Balwant Singh Chaufal and Ors. (18.01.2010 - SC); Bharat Petroleum Corporation Ltd. vs. Sunil Bansal and Ors. (18.09.2009 - SC); Supri Advertising and Entertainment Pvt. Ltd. vs. Dr. Anahita Pandole and Ors. (02.09.2008 - SC); Ashoka Kumar Thakur vs. Union of India (UOI) and Ors. (OBC Judgment) (10.04.2008); In Re: Noise Pollution - Implementation of the Laws for restricting use of loudspeakers and high volume producing sound systems (18.07.2005 - SC); M.C. Mehta vs. Union of India (UOI) and Ors. (18.03.2004 - SC); M.C. Mehta vs. Union of India (UOI) and Ors. (Regd. Link Road Filling Station) (07.04.1998 - SC); M.C. Mehta vs. Union of India (UOI) and Ors.(24.03.1998 - SC); Dharam Pal Goel (dead) by L.Rs. vs. State of Haryana and others (13.01.1997 – SC).

[584] M.C. Mehta vs. Union of India (UOI) and Ors. (07.05.2004 - SC); Indian Council for Environ-Legal Action and Ors.vs. Union of India (UOI) and Ors. (13.02.1996 - SC); Charan Lal Sahu vs. Union of India (22.12.1989 - SC).

[585] N.D. Jayal and Anr. v. Union of India (UOI) and Ors.(01.09.2003 - SC); Continental Construction Ltd. vs. Tehri Hydro Development Corpn.Ltd. and Anr. (05.09.2002 - SC); Narmada Bachao Andolan vs. Union of India and Others (18.10.2000 - SC); Tehri Bandh Virodhi Sangarsh Samiti and Ors. Vs. State of U. P. and Ors. (7. 11.1990 – SC.).

[586] State of Kerala and Anr.vs. Peoples Union for Civil Liberties, Kerala State Unit and Ors. (21.07.2009 - SC); National Council for Civil Liberties vs. Union of India (UOI) and Ors. (10.07.2007 - SC); Intellectuals Forum, Tirupathi vs. State of A.P. and Ors. (23.02.2006 - SC); Narmada Bachao Andolan vs. Union of India (UOI) and Ors.(15.03.2005 - SC); Tessta Setalvad and Anr.vs. State of Gujarat and Ors. (12.04.2004 - SC);

Case[588] and *T.N. Godavarman* Case[589] bear testimony to the importance of the public interest litigation. Each of these cases has made specific contribution to the implementation of statutory acts and constitutional provisions to protect environment and have sought to enforce fundamental rights and codified Indian practice at national level. Over the period of time, the Indian judiciary has interpreted the Right to Environment as a part of the fundamental Right to Life such as public nuisance as a challenge to the social justice component of the rule of law, no economic growth achievement at the cost of environmental destruction and people's right to healthy environment, thus expanding the scope of the existing fundamental Right to Life. Furthermore, it has read into that the Right to Life includes Right to live in healthy environment with minimum disturbance of ecological balance and without avoidable hazard to them and to their cattle, house and agriculture land and undue effects of air, water and environment. It has also suggested that the Right to Life includes the right to defend the human environment for the present and future generations. Environmental pollution and industrial hazards are not only potential civil torts, but also violation of right to health. These clarifications have led the Indian judiciary to convert formal guarantees into positive human rights. This indeed is a landmark contribution made by any judiciary in the world. Unlike other areas of international law, in this field, the Indian judiciary has played all-in-one role of a legislative, executive and judiciary.

### 6.3. Right to healthy environment

The right to healthy environment as a fundamental Right to Life may at one instance, appear to be impossible in a developing country like India. However, the Indian judiciary has read into this and reviewed the fundamental Right to Life to include different strands of environmental rights that are at once individual and collective in character. Thus, through environmental jurisprudence, India has made an important contribution to international laws on human rights. As can be observed in the case of Spain, Portugal, Brazil and Ecuador, it is possible that

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M.C. Mehta vs. Union of India (UOI) and Ors.(18.03.2004 - SC); Chairman and M.D., B.P.L. Ltd. vs. S.P. Gururaja and Ors.(13.10.2003 - SC); N.D. Jayal and Anr.vs. Union of India (UOI) and Ors. (01.09.2003 - SC); In Re: Arundhati Roy (06.03.2002 - SC); BALCO Employees Union (Regd.) vs. Union of India and Ors. (10.12.2001 - SC); J.R. Parashar, Advocate and Ors.vs.PrasantBhushan, Advocate and Ors. (28.08.2001 - SC); A.P. Pollution Control Board Ii vs. Prof. M.V. Nayudu (Retd.) and Ors.(01.12.2000 - SC); Narmada BachaoAndolan vs. Union of India and Ors.(23.11.2000 - SC); Narmada BachaoAndolan vs. Union of India and Others (18.10.2000 - SC); Narmada BachaoAndolan vs. Union of India (UOI) and Ors. (15.10.1999 - SC); M/s. M.K. Shah Engineers & Contractors vs. State of Madhya Pradesh (05.02.1999 - SC); M.P. Dwivedi and others (11.01.1996 - SC); KhedatMazdoorChetnaSangath vs. State of M.P. and others (09.09.1994 - SC).

[587] Goan Real Estate and Construction Ltd. and Anr.vs.People's Movement for Civic Action and Ors.(31.03.2010 - SC); Goan Real Estate and Construction Ltd. and Anr.vs.People's Movement for Civic Action and Ors.(31.03.2010 - SC); Goan Real Estate and Construction Ltd. and Anr.vs.Union of India (UOI) through Secretary, Ministry of Environment and Ors. (31.03.2010 - SC); M. Nizamudeen vs. Chemplast Sanmar Limited and Ors. (10.03.2010 - SC); State of Uttaranchal vs. Balwant Singh Chaufal and Ors. (18.01.2010 - SC); M.K. Balakrishnan and Ors.vs. Union of India (UOI) and Ors.(28. 04. 2009 - SC); Fomento Resorts and Hotels Ltd. and Anr.vs.Minguel Martins and Ors.(20.01.2009 - SC); Goan Real Estate and Construction Ltd. and Anr.vs.People's Movement for Civic Action and Ors.(28.08.2008 - SC).

[588] Akhil Bharat Gosewa Sangh vs. State of A.P. and Ors.(29.03.2006 - SC); Akhil Bharat Gosewa Sangh and Ors.vs. State of A.P. and Ors.(25.10.1994 - SC).

[589] Maruti Clean Coal and Power Ltd. vs. Alok Nigam and Anr. (31.03.2010 - SC).T.N. Godavarman Thirumulpad vs. Union of India (UOI) and Ors.(08.10.2009 - SC); All India Anna Dravida Munnetra Kazhagam vs. L.K. Tripathi and Ors.(01.04.2009 - SC); Nature Lovers Movement vs. State of Kerala and Ors.(20.03.2009 - SC); Veeru Devgan vs. State of Tamil Nadu and Anr.(11.09.2008 - SC); A. Chowgule and Co. Ltd. vs. Goa Foundation and Ors.(18.08.2008 - SC); Patel Rajnikant Dhulabhai and Anr.vs. Patel Chandrakant Dhulabhai and Ors. (21.07.2008 - SC); M.C. Mehta vs. Union of India (UOI) and Ors. (14.05.2008 - SC); T.N. Godavarman Thirumulpad vs. Union of India (UOI) and Ors.(28.03.2008 - SC).

the legal system may guarantee a constitutional Right to Environment and statutes may accord the right to participate in environmental protection for citizens. However, when no methods for their participation are made available, they are as good as non-existent. Although there is no direct articulation of the Right to Environment anywhere in the Indian Constitution or, for that matter, in any of the laws concerning environmental management in India, the Indian judiciary, with environmental institutions, have found ways to construct environmental rights. It should be noted, however, that the expansion of the fundamental right by the Court, recognizing the Right to Environment as a part of the Right to Life has neither been statutorily established nor has it been recognized in national environmental policy programmes. Therefore, it is interesting to analyse how an individual judge and case has achieved the above objective. The judges have tried their maximum and used various techniques, such as visit of towns,[590] dam sites to provide justice by using the existing legal principles, but altering them so as to make these principles relevant to give more effective and efficient remedies. The Indian courts have also utilized a tool of *mandamus*[591] by which the Court issues a series of directions to the administration, to implement within a time-frame, and report back to Court from time to time about the progress in implementation, to ensure the implementation of court order.

During the 1980s, India adopted far-reaching legislations and undertook stringent measures for environmental protection, especially in the aftermath of the Bhopal Gas Tragedy. The Government of India established the Ministry of Environment and Forests (MoEF). MoEF was more comprehensive and institutionalized, and had a Union Minister and Minister of State, two political positions answering directly to the Prime Minister. Environment Protection Act, 1986, was an umbrella legislation designed to provide a framework for the Union Government to coordinate the activities of various central and state authorities established under previous laws, such as the Water Act and Air Act. It was also an enabling law, which articulated the essential legislative policy to frame necessary rules and regulations. The Act served to back a vast body of subordinate environmental legislation in India. During the intervening years, it addressed acts of specific

[590] Municipal Council *Ratlam v. Vardhichand* and ors. , AIR 1980, SC 1622. "In this case, the Supreme Court through J. Krishna Iyer, upheld the order of the High Court and directed the Municipality to take immediate action within its statutory powers to construct sufficient number of public latrines, provide water supply and scavenging services, to construct drains, cesspools and to provide basic amenities to the public. The Court also accepted the use of sec. 133 Criminal Procedure Code for removal of public nuisance. A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability". http://www.ceeraindia.org/documents/caselawsummary.htm accessed on 5 August 2013.

[591] *T.N. Godavarman v. Union of India*, AIR 2005 SC 4256. Mandamus is a command issued by a court asking a public authority to perform a public duty belonging to its office. "For example, when a tribunal omits to decide a matter which it is bound to decide, it can be commanded to determine the question which it has left undecided. Mandamus can be granted only when a legal duty is imposed on the authority in question and the petitioner has a legal right to compel the performance of his duty". Sanjeev Sirohi, *Writ of Mandamus: A Brief Analysis*, http://www.legalera.in/blogs/entry/writ-of-mandamus--a-brief-analysis; *Mysore vs. Chandrasekhara*, AIR 1965 SC 532; *NHRC vs. State of Arunachal Pradesh* AIR 1996 SC 2351; *N.S. Ziyauddin Ahmed vs.Union of India*, AIR 1995 Mad 129; *K. Vaithianathan vs. Union Territory of Pondicherry*, AIR 1995 Mad.197; *Parry & Co., vs. Commercial Employees Ass.*, AIR 1952 SC 179; *Bhopal Sugar Industries vs. Income Tax Officer*, AIR 1961 SC 182; *Madhya Pradesh vs. Mandavar*, AIR 1954 SC 493; *SohanLal vs .India*, AIR 1957 SC 529; *K.V. Rajyalakshmi Setty vs. Mysore*, AIR 1967 SC 993; *T.G. Goakarvs.R.N. Shukla*, AIR 1968 SC 1050; *Bombay Union of Journalists vs. State of Bombay*, AIR 1964 SC 1617.

issues, such as, the Atomic Energy Act[592] and the Wild Life Protection Act,[593] which were passed. The Atomic Energy Act governs the regulation of nuclear energy and radioactive substances. Under this Act the Union Government is required to prevent radiation hazards, guarantee safety of public and of workers handling radioactive substances, and ensure the disposal of radioactive wastes. The Wild Life Protection Act provides a statutory framework for protecting wild animals, plants and their habitats. The Act adopts a two−pronged conservation strategy: protecting specific endangered species regardless of location, and protecting all species in designated areas called sanctuaries and national parks.[594]

The Indian judiciary has also been proactive and quick enough to underline the importance of the emerging environmental principles, namely, the *Polluter Pays* and *Precautionary Principle* which have assumed a great significance as part of sustainable development in the recent times with a growing awareness amongst the common masses for the preservation of environment and biological diversities.[595] Beginning from the *State of Himachal Pradesh V. Ganesh Wood Products* case in 1995, the Supreme Court, in a number of cases, has included within the purview of sustainable development the *Polluter Pays Principle* and *Precautionary Principle*.[596]

With the onset of liberalization regime in India, India started reducing the industrial regulation, lowered international trade and investment barriers and encouraged export-oriented enterprise. MoEF completed its Environmental Action Plan to integrate environmental considerations into developmental strategies, which, among other priorities, included industrial pollution reduction. It also decided to shift from concentration to load-based standards. This would add to a polluter's costs and remove incentives to dilute effluents by adding water, and strengthen incentives for adoption of cleaner technologies. It also issued water consumption standards, which were an additional charge for excessive water use. Targeting small-scale industries has been an important task since these facilities greatly added to the pollution load. The Ministry provides technical assistance and limited grants to promote the setting up of central effluent treatment plants. It has also created industrial zones to encourage clusters of similar industries in order to help reduce the cost of providing utilities and environmental services.

### 6.4. India's contribution to the important international environmental law principles

#### Strict and absolute liability

The case-law analysis below will aim to show that the Indian judiciary has deviated from the principles enunciated in *Ryland v. Fletcher*[597] judgment and has scraped the defences so as to make a company carrying

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[592] The Atomic Energy Act, 1962, No. 33 of 1962 - an Act to provide for the development, control and use of atomic energy for the welfare of the people of India and for other peaceful purposes and for matters connected therewith.

[593] The Wildlife (Protection) Act, 1972, No. 53 of 1972. An Act to provide for the protection of [Wild animals, birds and plants] and for matters connected therewith or ancillary or incidental thereto.

[594] Aryal, Ravi Sharma, The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) & Nepalese position, 15 *NLR* 1-2, 220-30 (2002).

[595] Andri G. Wibisana, *Three Principles of Environmental Law: The Polluter-Pays Principle, the Principle of Prevention and the Precautionary Principle in Environmental Law in Development: Lessons from the Indonesian Experience*, (Elgar, 2006).

[596] *Himachal Pradesh v. Ganesh Wood Products*, AIR 1996, SC 149.

[597] Australian High Court held by a majority that the rule in Rylands having attracted many difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of Australian Common

hazardous activity responsible for any damage caused because of that activity. This principle of higher liability was imposed because the judiciary felt that the decades old principle of *Ryland v. Fletcher* case would not hold good in the present scenario where science and technology has advanced to the extent that they could be used to prevent or avoid any such accident.

### 6.5. Indian Judiciary

Prior to the Bhopal Gas Tragedy, the judiciary used to rely on Section 133 of the Code of Criminal Procedure[598] and Section 188 of the Indian Penal Code[599] to impugn the liability. However, the Bhopal gas leak disaster in 1984 brought to forefront the inadequacy of the existing legal framework for imparting responsibility especially with regard to the computation of compensation and criminal liability. In addition to huge loss of life, the absence of a clear legal framework to bring relief to the victims was an important wake up-call to India.

**6.5.1. Bhopal Gas Disaster and its Importance on the International Environmental Law and Jurisprudence:**[600] The Union of India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act of 1985[601] and took upon itself the right to sue for compensation on behalf of the affected parties and filed a suit for realization of compensation. Following the Bhopal Gas Tragedy, India suffered yet another chemical disaster, leakage of lethal gas from a fertilizer company in New Delhi in 1985. These major accidents led the judiciary to impose stringent liability with regard to any industry carryings that were hazardous and inherently dangerous.[602] In view of the importance of clarification of this principle, it is useful to note the opinion of the former Chief Justice of India P. N. Bhagwati, who while deciding the liability in *Oleum Gas Leak* case held that:

> "We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm

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Law, as absorbed by the principles of ordinary negligence, *Burnie Port Authority v. General Jones Pvt. Ltd*., (1994) 179 CLR 520.

598 Section 133 of the Code of Criminal Procedure, 1973, provides a speedy and summary remedy in case of urgency where damages to public interest or public health etc. are concerned. The order under this section is only conditional and no final order is passed under section 133.

599 Cases are registered under this Section of the Indian Penal Code for any kind of act of disobedience or order issued by a public servant who is legally authorized to promulgate such orders.

600 Abraham, C. S. and Abraham, Sushila, "The Bhopal Case and the Development of International Law in India", 40 *International and Comparative Law Quarterly* 2 (1991), pp. 334-365; _____, *Environmental Jurisprudence in India*, The Hague: Kluwer Law International (1999); Chopra, Sambhu, *The Bhopal Gas Tragedy: Issues and Options: A Case Study*, Bhopal (1992).

601 Bhopal Gas Leak Disaster (Processing of Claims) Act of 1985, Act No. 21 of 1985. An Act to confer certain powers on the Central Government to secure that claims arising out of, or connected with, the Bhopal gas leak disaster are dealt with speedily, effectively, equitably and to the best advantage of the claimants and for matters incidental thereto.

602 David L. MacFadden, "A Selected Bibliography on Hazardous Activities, Technology and the Law: Bhopal and Beyond", 19 *International Lawyer* 1459-75 (1985).

> and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm, the enterprise must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profits, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not….We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in *Ryland v. Fletcher* .”[603]

Further the Court held that the measure of compensation in the preceding paragraph must be correlated to the magnitude and capacity of the enterprise so that such compensation must have a deterrent effect.[604] The larger and more prosperous the enterprise, greater must be the amount of compensation payable by it for the harm caused due to an accident in the conduct of the hazardous or inherently dangerous activity by the enterprise. Summarizing the judgment of *Oleum Gas Leak* Case the Supreme Court, in its final hearing, held that[605]: (1) any company carrying on hazardous or inherently dangerous activity for private profit would have to indemnify all who suffer on account of such activity, (2) such liability would be absolute and no defense of *force majeure* or due care etc. would be available to the company and (3) while computing compensation, prosperity of the company would be taken into account. So, a company who earns more by creating risk for others would have to bear equally high level of compensation. Though the Supreme Court refused to entertain petitions due to lack of jurisdiction, the Court devised a new principle of liability, i.e. absolute liability applicable to industries which carry on hazardous activities.

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603 *M.C. Mehta v. UOI*, 1987 1 SCR 819

604 Paul R. Kleindorfer and Kunreuther Howard, *Insuring and Managing Hazardous Risks: From Seveso to Bhopal and Beyond*, (Berlin: Springer, 1987); Allin C. Seward III, “After Bhopal: Implications for Parent Company Liability”, 21 *The International Lawyer* 695-707 (1987); Lori Ann Olejniczak, “Bhopal Disaster Litigation: A Jurisdictional Odyssey”, 2 *Emory Journal of Int Dispute Resolution* 205-221 (1987).

605 AIR 1996 SC 1446: Para 59. Bhat,J., however, points out that in the said decision, the question whether the industry concerned therein was a 'State' within the meaning of Article 12 and, therefore, subject to the discipline of Part-Ill of the Constitution including Article 21 was left open and that no compensation as such was awarded by this Court to the affected persons.

**6.5.2. Absolute Liability Principle:** With regard to the principle of absolute liability, the Indian judiciary analysed its applicability in an Indian scenario. Here the court compared the English and Australian scenario, in which the England courts follow the principle of strict liability as devised in *Ryland v. Fletcher case,* whereas the Australian Courts follow the principle of ordinary principle of negligence.[606] After analysing the foreign scenario, the Court held that:

> "...we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country. We are convinced that the law stated by this Court in *Oleum Gas Leak* Case is by far the more appropriate one - apart from the fact that it is binding upon us. According to this rule, once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. ……It is that the enterprise [carrying on the hazardous or inherently dangerous activity] alone has the resource to discover and guard against hazards or dangers - and not the person affected and the practical difficulty [on the part of the affected person] in establishing the absence of reasonable care or that the damage to him was foreseeable by the enterprise."[607]

Thus this case has accepted the principle of absolute liability as binding. This judgment was used for impugning liability in further cases. Principle 21 of the Stockholm Declaration stresses that "[S]tates have the responsibility to ensure that activities under their jurisdiction or control, do not cause damage to the environment of other states or areas beyond their jurisdiction". Principle 22 of the Stockholm Declaration states that the "[S]tates shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction". The Stockholm Conference resulted into the Stockholm Declaration on Human Environment, a statement having 26 principles and 109 recommendations, from which a body of international environmental law has developed over the period of decades. Principles 21 and 22 are most important for the purposes of studying the evolution of liability regime in international environmental law. It is important to note that the Rio Declaration built upon the principles 21 and 22 of the Stockholm Declaration which resulted into further development of the law bearing on environmental liability and compensation. Furthermore, while the Stockholm Declaration refers to international law, the Rio Declaration goes beyond and stipulates requirement to govern the regime of liability at national as well as international level. Taken together the work of the International Law Commission, especially its Draft Principles on Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, and the 2010 UNEP Guidelines for the Development of Domestic Legislation on Liability, Response Action and Compensation for Damages Caused by Activities

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[606] Australian High Court held by a majority that the rule in Rylands having attracted many difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of Australian Common Law, as absorbed by the principles of ordinary negligence, *Burnie Port Authority v. General Jones Ptv. Ltd*., (1994) 179 CLR 520. *Research Foundation for Science Technology and Natural Resources Policy v. Union of India and Anr*, JT 2007 (11) SC 49; *Deepak Nitrite Ltd. v. State of Gujarat and Ors*, (2004) 6 SCC 402.

[607] *Ibid.*

Dangerous to the Environment,[608] the international and (national) legislative process concerning the principle of liability which was first stipulated in 1972 has been coming to the realization slowly but steadily after the passage of nearly 40 years. Thus, it can be argued that the developments ushered in a process of assimilation of rules of State Responsibility into international environmental law, in a gradual manner.[609]

**6.6. Sustainable development**

The earliest public interest litigation in which the Supreme Court recognized the concept of sustainable development was S*tate of Himachal Pradesh and others etc. v. Ganesh Wood and others* in 1996.[610] The Supreme Court, in this case, for the first time, acknowledged the existence of the concept of sustainable development. It appreciated the report of the World Commission on Environment and Development constituted by the United Nations and chaired by the then Prime Minister of Norway, Gro Harlem Brundtland and quoted the same;

> "There has been a growing realization in national governments and multilateral institutions that it is impossible to separate economic development issues from environment issues; many forms of development erode the environmental resources upon which they must be based, and environmental degradation can undermine economic development. Poverty is a major cause and effect of global environmental problems. It is therefore futile to attempt to deal with environmental problems without a broader perspective that encompasses the factors underlying world poverty and international inequality...Meanwhile, the industries most heavily reliant on and polluting environmental resources are growing most rapidly in the developing world, where there is both more urgency for growth and less capacity to minimize damaging side effects. Ecology and economy are becoming ever more interwoven - locally, regionally, nationally, and globally - into a seamless net of causes and effects…The other great institutional flaw in coping with environment-development challenges is government's failure to make the bodies, whose policy actions degrade the environment, responsible for ensuring that their policies prevent that degradation."[611]

The Court also noted the observation of the Commission which *inter alia* was that "developing countries face the challenges of desertification, deforestation, and pollution, and endure most of the poverty associated with environmental degradation - the next few decades are crucial for the future of humanity. Pressures on the Planet are now unprecedented and are accelerating….".[612] The Court for the first time recognized the challenges faced by governments and their duty to balance economic development with environment protection. The Court also referred to Article 51-A of the Constitution which makes it a duty of every citizen to protect and improve the

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[608] UNEP Guidelines for the Development of Domestic Legislation on Liability, Response Action and Compensation for Damage Caused by Activities Dangerous to the Environment, Annex to Decision SS.XI/5 B (2010).

[609] M. Gandhi, "State Responsibility and International Environmental Law", B. N. Patel (ed.) India and International Law, Vol. 1 (Leiden, Nijhoff: 2005), p. 226. Gandhi argues that "Academic writings are replete with commentaries on the evolution of international environmental law of State responsibility hinting at the emergence of stronger rules including the strict liability rule against a State for the pollution caused by it to the places outside the State territory. This view is built upon the soft law instruments which sprang out of the political process in the Stockholm and Rio conferences., *ibid. p. 228.*

[610] *State of Himachal Pradesh v. Ganesh Wood Products*, AIR 1996 SC 149.

[611] Report of the World Commission on Environment and Development: Our Common Future, paragraph 15.

[612] *Ibid.*

natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures. The Court observed that it:

> "…was necessary to put in proper perspective the obligation of the State and the significance of the concept of sustainable development and inter-generational equity vis-à-vis the legal submissions made on the basis of principles of natural justice, estoppel…".

In *Bichri village* case,[613] the Court accepted the *Polluter Pays* principle which is known today as an important element of sustainable development. It noted that in *Vellore Citizens Welfare Forum v. Union of India and others,*'[614] the Court discussed in depth the principle of sustainable development and noted its emergence in the international arena. It noted that;

> "… The traditional concept, that development and ecology are opposed to each other, is no longer acceptable. Sustainable Development is the answer. In 1991 the World Conservation Union, United Nations Environment Programme and World Wide Fund for Nature, jointly came out with a document called "Caring for the Earth …"[615]

This is a strategy for sustainable living. In June, 1992, the Earth Summit held at Rio saw the largest gathering of world leaders hitherto ever in the history - deliberating and chalking out a blue print for the survival of the planet. The Rio Conference witnessed the opening for signature of the Biodiversity Convention and Climate Change Convention.[616] The delegates at the Rio Conference also approved by consensus three non-binding documents namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a Programme of Action into the 21st century in areas like poverty, population and pollution. Thus, it is seen that during the two decades from Stockholm to Rio, Sustainable Development has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life by living within the carrying capacity of the supporting ecosystems. Sustainable Development as defined by the Brundtland Report means, development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.[617] Rio+20 Summit, of 2012 had sustainable development as one of the objectives, having three pillars, economic development, social development and environmental protection.[618] The Summit identified seven priority areas, namely, jobs, energy, cities, food, water, oceans and disasters. India, as per its development plan and trajectory focused on better and reasonable access to transfer of

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[613] *Indian Council for Environment-Legal Action v. Union of India (UOI) and Ors*., (1996) 5 SCC 281.

[614] AIR 1996 SC 2715.

[615] Caring for the Earth: A Strategy for Sustainabl Living. International Union for Conservation of Nature and Natural Resources, United Nations Environment Programme, published in partnership by IUCN, UNEP and WWF (1991).

[616] Shalini Bhtani, and Ashish Kothari, "The biodiversity rights of developing nations: a perspective from India", 32 *Golden Gate University Law Review* 4, 587-627 (2002).

[617] Lei Shen, Shengkui Cheng, Shuzong Gu and Yao Lu, "Environmental policy and law for sustainable natural resources development: issues and challenges", 32 *Environmental Policy Law* 2, 91-98 (2002).

[618] In the backdrop of emergence of G20 as a forum to deal with immediate global financial crisis and Rio+20 pledging to salve sustainable development agenda, it is important to note that India (together with China, Brazil and Russian Federation) faced criticisms from environmental and sustainable development civil society institutions for pledging $ 75 billion through the IMF to save the failing Eurozone economy from imminent collapse and relying on the unsustainable consumption of the western economies for their own obsession with perverse growth makes, making the BRIC nations willing accomplices. "India, Russia, Brazil, South Africa, China are no victims, they just seem eager to sustain the lifestyles of the rich. Lifestyle emissions today account for nearly two thirds of total emissions." http://www.dnaindia.com/analysis/1709255/column-climate-change-meets-global-hypocrisy accessed on 22 July 2013.

green technology, stimulus package for green environment, resistance on subsidy as well as eco-tax reform and independence in sectoral priorities. Sustainable development, according to Indian Prime Minister Dr. Manmohan Singh, "… mandates the efficient use of available natural resources. We have to be much more frugal in the way we use natural resources. A key area of focus is energy. We have to promote, universal access to energy, while, at the same time, promoting energy efficiency and a shift to cleaner energy sources by addressing various technological, financial and institutional constraints…"[619]

The Indian Judiciary has almost implied that it has no hesitation in holding that sustainable development, as a balancing concept between ecology and development, has been accepted as a part of the customary international law, though its salient features have yet to be finalized by the international law jurists. The Judiciary has observed that some of the salient principles of sustainable development, as culled-out from the Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays principle, Obligation to assist and cooperate, Eradication of Poverty and Financial Assistance to the developing countries. The Judiciary has also observed that remediation of the damaged environment is part of the process of sustainable development. One of the significant directions given by the Supreme Court was contained in an order passed in 1995 whereby some of the industries were required to set up effluent treatment plants. It is to be noted here that the Court suspended all the initial orders of closure of tanneries and stated that only those which fail to pay the fine shall be closed down. Therefore, the Court did not adopt an orthodox opinion on environment protection of directly ordering closure of all the tanneries. In fact, it was amongst the first few cases that a balanced far-sighted approach was followed by directing for establishment of effluent treatment plants prior to tanneries. In *S. Jagannath v. Union of India and others Case*,[620] the Court clarified that sustainable development of shrimp aquaculture should be guided by the principles of social equity, nutritional security, environmental protection and economic development with a holistic approach to achieve long-term benefits. In *M. C. Mehta v. Kamal Nath and Ors*.Case,[621] the Court, promulgating public trust doctrine, contributed to the aim of sustainable development. In the *Taj Trapezium* Case, the Court clarified that:

> "The old concept that development and ecology cannot go together is no longer acceptable. Sustainable development is the answer. The development of industry is essential for the economy of the country, but at the same time the environment and the eco-systems have to be protected. The pollution created as a consequence of development must commensurate with the carrying capacity of our eco-systems."[622]

In *Narmada Bachao Andolan v. Union of India and Ors.* case, the Court said that sustainable development means the type or extent of development, which can be sustained by nature/ecology with or without mitigation. It took an interesting approach towards applicability of the principle, stating that

> "…where the effect on ecology or environment of setting up of an industry is known, what has to be seen is that if the environment is likely to suffer, then what imitative steps can be taken to offset the same. Merely because there will be a change is no reason to presume that there will be ecological disaster. It is when the effect of the project is known then the principle of

[619] Statement by the Prime Minister of India at the Rio+20 Summit, 23 June 2012.
[620] AIR 1997 SC 811.
[621] (1999) 4 CompLJ 44 (SC).
[622] *M.C. Mehta v. Union of India and others*, AIR 1997 SC 734.

> sustainable development would come into play which will ensure that imitative steps are and can be taken to preserve the ecological balance…".[623]

In *A. P. Pollution Control Board v. Prof. M. V. Nayadu (Retd.) & Others*[624] case, it noted that "environmental concerns… are …of equal importance as Human Rights concerns". In fact both are to be traced to Article 21 which deals with fundamental right to life and liberty. While environmental aspects concern 'life', human rights aspects concern 'liberty'. In *M. C. Mehta v. Union of India & Ors.*, the Court stated that:

> "While it is true that in a developing country there shall have to be developments, but that development shall have to be in closest possible harmony with the environment, as, otherwise, there would be development but no environment, which would result in total devastation, though however, may not be felt in presently but at some future point of time, but then, it would be too late in the day, however, to control and improve the environment. Nature will not tolerate us after a certain degree of its destruction and it will, in any event, have its toll on the lives of the people. Can the present-day society afford to have such a state and allow the nature to have its toll in future - the answer shall have to be in the negative. The present-day society has a responsibility towards the posterity for their proper growth and development so as to allow the posterity to breathe normally and live in a cleaner environment and have a consequent fuller development. Time has now come therefore to check and control the degradation of the environment and since the Law Courts also have a duty towards the society for its proper growth and further development, it is a plain exercise of the judicial power to see that there is no such degradation of the society and there ought not to be any hesitation in regard thereto...".[625]

In *K.M. Chinnappa and T.N. Godavarman Thirumalpad v. Union of India (UOI) and Ors.,*[626] the Court while making observations on the provisions of the 1992 Biological Diversity Convention, noted that the fundamental requirement for the conservation of biological diversity is the *in-situ* conservation of ecosystems and natural habitats and the maintenance and recovery of viable population of species in their natural surroundings.[627] In its view, sustainable development is essentially a policy and strategy for continued economic and social development without any detriment to the environment and natural resources on which continued activity and further development depend. The Court emphasized that current citizens owe a duty to future generations and a bleak tomorrow cannot be countenanced for a bright today. The Court further emphasized that there is a dire need to learn from the mistakes for a better future. Most importantly the Court noted that a duty has been cast upon the Government to protect the environment under Article 21 of the Constitution and it highlighted that India has acceded to the Convention on Biological Diversity and therefore, it ought to implement the same. Substantiating this position, it stated that

> "As was observed by this Court in *Vishaka and Ors. vs. State of Rajasthan and Ors.,* in the absence of any inconsistency between the domestic law and the international conventions, the rule of judicial construction is that regard must be had to international convention and norms

[623] 2002 (4) SCC 353.
[624] AIR 1999 SC 812.
[625] AIR 2001 SC 1544.
[626] AIR 2003 SC 724.
[627] Chudal, Kumar, "Convention on biological diversity: some thorniest issues for developing countries", 15 *NLR* 1-2, 144-158 (2002).

> even in construing the domestic law. It is, therefore, necessary for the Government to keep in view the international obligations while exercising discretionary powers under the Conservation Act, unless there are compelling reasons to depart from there." [628]

This case made direct reference to the need for the construction of domestic laws in a manner fulfilling international obligations of the Indian State and emphasized explicitly on the duty of the State to implement the same. Although the previous judgments based their decisions upon the internationally accepted principle of sustainable development, the need for implementation was never an obligation to the international community rather than the continued economic progress of the country for many years to come, in order to compete with other developed nations of the world. In *N. D. Jayal and Anr. v. Union of India (UOI) and Ors,*[629] the Court made important observation regarding the Right to Development,[630] wherein it stated that it encompasses, with its definition, guarantee of fundamental human rights and the adherence of sustainable development as *sine qua non* for the maintenance of balance between rights to environment and development. In another judgment, the Supreme Court clarified that disaster management cannot be separated from sustainable development.[631] In *Bombay Dyeing and Mfg. Co. Ltd. v. Bombay Environmental Action Group and Ors,* the Court discussed in detail the sustainable development and planned development vis-à-vis Article 21 of the Constitution of India. It opined that:

> "It is often felt that in the process of encouraging development the environment gets side-lined. However, with major threats to the environment, such as climate change, depletion of natural resources, the eutrophication of water systems and biodiversity and global warming, the need to protect the environment has become a priority. At the same time, it is also necessary to promote development. The harmonization of the two needs has led to the concept of sustainable development, so much so that it has become the most significant and focal point of environmental legislation and judicial decisions relating to the same."[632]

In *Research Foundation for Science Technology and Natural Resource Policy v. Union of India (UOI) and Ors*.,

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[628] AIR 1997 SC 3011.

[629] (2004) 9 SCC 362.

[630] Arjun Sengupta, "On the theory and practice of the right to development", 24 *Human rights Quarterly* 4, 837-889 (2002).

[631] In 2005 question pertaining to applicability of Precautionary Principle and Polluter Pays Principle arose over presence of hazardous waste oil in 133 containers lying at Nhava Sheva Port and other questions relating to illegal import of the same in *Research Foundation for Science Technology and Natural Resources Policy v. Union of India (UOI) and Anr*., (2005)13SCC186 . The Court here went on to discuss in depth the precautionary and polluter pays principles and in turn the concept of sustainable development, they explicitly stated the precautionary principle to be *"a part of principle of sustainable development, it provides for taking protection against specific environmental hazards by avoiding or reducing environmental risks before specific harms are experienced.* The Court relied upon the *Vellore Citizens' Welfare Forum case* which accepted the principles to be a part of our domestic law. Reference was also made to *A.P. Pollution Control Board* which emphasized upon principle of good governance an accepted principle of international and domestic laws. Reference was also made to Article 7 of the draft approved by the working group of the International Law Commission in 1996 on Prevention of Trans-boundary Damage from Hazardous Activities‟ to include the need for the State to take necessary ‗legislative, administrative and other actions' to implement the duty of prevention of environmental harm. Environmental concerns have been placed at same pedestal as human rights concerns, both being traced to Article 21 of the Constitution of India. After considering the above Precautionary principle and Polluter Pays Principle were held to be fully applicable and a direction was given for destruction of 133 containers expeditiously by incineration at the cost of importers. The importers were held liable on basis of precautionary principle and polluter pays principle.

[632] AIR 2006 SC 1489.

the Court clarified the concept of balance under the principle of proportionality and sustainable development. According to Justice Pasayat,

> "…while applying the concept of sustainable development one has to keep in mind the principle of proportionality based on the concept of balance. It is an exercise in which we have to balance the priorities of development on one hand and environmental protection on the other hand."[633]

It also stated that recycling is a key element of sustainable development and dismantling should be given importance considering the fact that it was an industry with high return. Increasing economic gains, it can be noted, was given essential importance, and the activity was regularized in order to avoid compromise with the environment. In *T.N. Godavarman Thirumalpad v. Union of India (UOI) and Ors*, the Court observed that development needs of the present without compromising the ability of the future generations to meet their own needs is called sustainable development, a concept based on the principle of inter-generational equity. Furthermore, in the same case and in *Re: Vedanta Aluminum Ltd*,[634] it held that adherence to the principle of sustainable development is now a constitutional requirement. In *M. C. Mehta v. Union of India (UOI) and Ors*.,[635] the Court held that the natural sources of air, water and soil cannot be utilized if it results in irreversible damage to environments. There has been accelerated degradation of environment primarily on account of lack of effective enforcement of environmental laws and non-compliance of the statutory norms. In *Narmada Bachao Andolan* Case, the Court held that the

> "Development and the protection of environments are not enemies, if without degrading the environment or minimizing adverse effects thereupon by applying stringent safeguards, it is possible to carry on development activity applying the principles of sustainable development. In that eventuality, the development has to go on because one cannot lose sight of the need for development of industries, irrigation resources and power projects etc. including the need to improve employment opportunities and the generation of revenue. A balance has to be struck."[636]

In *Andhra Pradesh Pollution Control Board* Case, while discussing the concept of sustainable development, the Court, referring to the Principal 15 of Rio Conference of1992, observed that,

> "…If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to economic interest. In case of doubt, however, protection of environment would have precedence over the economic interest…"[637]

The Court, in this case also held that Right to Life is a fundamental right, guaranteed under Article 21, included within its purview the right to pollution free water and air for full enjoyment of life. Since mining operations are hazardous in nature, as they impair ecology and people's right to natural resources, the Court declared that although measures for protecting environment could be undertaken without stopping mining operations, considering enormous degradation of environment, safer and proper course needed to be adopted.

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633 JT 2007 (11) SC 49.
634 (2008) 2 SCC 222.
635 2009 (6) SCC 142.
636 AIR 2000 SC 3751.
637 AIR 2005 SC 4256.

In sum, the Indian judiciary has accepted the concept of sustainable development through these judgments and has made it an essential part of Indian environmental jurisprudence; by adopting a balanced approach in environmental pollution matters and taking into account both economic development and environment protection concerns.

### 6.7. Precautionary and Polluter Pays Principle

**6.7.1. The Precautionary Principle** was first of all used in the Second North Sea Ministerial Conference in 1987 with respect to marine pollution but its scope was widened later in many international documents, like the Montreal Protocol on Substances That Deplete the Ozone Layer (1987), the Convention on Biological Diversity (1992), the Framework Convention on Climate Change (1992) and Rio Declaration on Environment and Development (1992).

One can observe that the development of these concepts has been an outcome of judicial development rather than legislative one. The Supreme Court, since the inception of its use in India, has given them a very frequent and wide application. The Principles of Polluter Pays and Precautionary Principle have contributed a lot in environment protection through judicial interpretations. The Polluter Pays Principle was brought out in *M. C. Mehta v. Union of India* [*Oleum Gas Leak* case][638] for the first time. It was used for determining the amount of compensation and fixing the liability of the polluter in absolute terms. In the words of the Constitution Bench of the Supreme Court, "such an activity can be tolerated only on the condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not".[639] The Constitution Bench also assigned the reason for stating the law in the said terms that the enterprise [carrying on the hazardous or inherently dangerous activity] alone has the resource to discover and guard against hazards or dangers - and not the person affected - and the practical difficulty [on the part of the affected person] in establishing the absence of reasonable care. The Court appreciated the suggestions put forth by the Report and went on to discuss the principle. It observed,

> "The Polluter Pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution. Under the principle it is not the role of government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer."[640]

The Court emphatically held that the law stated by Supreme Court in *Oleum Gas Leak* Case was by far the more appropriate one - apart from the fact that it is binding upon the present. It held that once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The Court went to the extent of straightforwardly holding that the law declared in the said decision was the law governing this case. The Court recognized the principle as an internationally accepted one and thus acknowledged its Indian obligation. The polluter industries were asked to close down and pay the amount for the

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[638] *M.C. Mehta v. UOI*, 1987 1 SCR 819.
[639] *Ibid.*
[640] *Ibid*.

loss to environment and the cost of restoration. The Court asked the government to decide the amount and to recover it in accordance with law. In *Vellore Citizens Welfare Forum v. Union of India and others*, the Court made it clear that the Precautionary Principle and the Polluter Pays principle are essential features of sustainable development.[641] It went on to define the Precautionary Principle in the context of the municipal law as: (i) "Environmental measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation, (ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation, and (iii) the onus of proof is on the actor or the developer/industrialist to show that his action is environmentally benign."

The Polluter Pays principle was highlighted by the Court by referring to the matter of *Indian Council for Environ - Legal Action v. Union of India*.[642] The Court held that as the polluters are absolutely liable to compensate for the harm caused by them to villagers, soil and the underground water in the affected area, they are bound to take all necessary measures to remove sludge and other pollutants lying there. The Polluter Pays' principle as interpreted by Court meant that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also to restore the environmental degradation. Remediation of the damaged environment is part of the process of sustainable development and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. The Court went on to declare the Principles as having been accepted as part of the law of the land. It referred to Article 21 of the Constitution of India which aims to guarantee protection of life and personal liberty. Regard was also paid to Article 47,[643] 48A7[644] and 51A (g)[645] of the Constitution which are the duties of state for protecting the environment and maintaining a decent standard of living.

In view of the above mentioned constitutional and statutory provisions, the Court held that the Precautionary principle and the Polluter Pays principle are part of the environmental law of the country. Even otherwise, the Court held that, once these principles are accepted as part of the customary international law there would be no difficulty in accepting them as part of the domestic law. It is an almost accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law. Similar steps were also taken by the Apex Court in the next *M. C. Mehta v. Union of India*, wherein the Court reiterated that the precautionary principle and the polluter pays principle have been accepted as part of the law of the land. The Supreme Court has thus settled that one who pollutes the environment must pay to reverse the damages caused by his acts. The

[641] AIR 1996 SC 2715.
[642] 1996 (5) SCC 281.
[643] Article 47- Duty of the State to raise the level of nutrition and the standard of living and to improve public health. - The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the State shall endeavour to bring about prohibition of the consumption except from medicinal purposes of intoxicating drinks and of drugs which are injurious to health.
[644] Article 47- Duty of the State to raise the level of nutrition and the standard of living and to improve public health. - The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the State shall endeavour to bring about prohibition of the consumption except from medicinal purposes of intoxicating drinks and of drugs which are injurious to health.
[645] Article 51A(g)- To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

landmark decision with regard to these principles is *A.P. Pollution Control Board v. Prof. M.V. Nayadu (Retd.) & Others*.[646]

**6.7.2. Precautionary Principle Replacing the Assimilative Capacity Principle:**

In a matter pertaining to the pollution caused by the by-products of a company called M/s Surana Oils and Derivatives (India) Ltd., which was denied the No Objection Certificate essential for the production of certain products, after referring to the case of *Vellore Citizen's* Case, the Court held that it was necessary to explain their meaning in more detail, so that Courts and tribunals or environmental authorities can properly apply the said principles in the matters which come before them. The Court went on to trace how the concept of Precautionary Principle replaced the Assimilative Capacity principle.[647] It observed that a basic shift in the approach to environmental protection occurred initially between 1972 and 1982. Earlier the concept was based on the 'assimilative capacity rule' as revealed from Principle 6 of the Stockholm Declaration of the U.N. Conference on Human Environment, 1972. The said principle assumed that science could provide policy-makers with the information and means necessary to avoid encroaching upon the capacity of the environment to assimilate impacts and it presumed that relevant technical expertise would be available when environmental harm was predicted and there would be sufficient time to act in order to avoid such harm. Further the Court traced that in the 11th principle of the U.N. General Assembly Resolution on World Charter for Nature, 1982,[648] the emphasis shifted to the 'Precautionary Principle', and this was reiterated in the Rio Conference of 1992 in its Principle 15. With regard to the cause for the emergence of this principle, the Court referred to an article by Charmian Barton, which said:

> "There is nothing to prevent decision makers from assessing the record and concluding there is inadequate information on which to reach a determination. If it is not possible to make a decision with "some" confidence, then it makes sense to err on the side of caution and prevent activities that may cause serious or irreversible harm. An informed decision can be made at a later stage when additional data is available or resources permit further research. To ensure

[646] AIR 1999 SC 812.

[647] The use of economic instruments, tradable pollution rights and environmental standards all assume that the environment has a certain capacity to absorb waste materials without long-term damage: in other words, they assume that the environment has an assimilative capacity. This idea is based on the fact that some wastes, such as organic wastes that occur naturally, will decompose and break down in the environment if there are not too many of them in the one place at the one time. Other materials, such as some metals, may exist naturally in the environment at very low concentrations. http://www.uow.edu.au/sharonb/STS300/science/regulation/infoprinciple.html accessed on 23 June 2011.

[648] Activities which might have an impact on nature shall be controlled,and the best available technologies that minimize significant risks to nature or other adverse effects shall be used; in particular: (a) Activities which are likely to cause irreversible damage to nature shall be avoided; (b) Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed; (c) Activities which may disturb nature shall be preceded by assessment of their consequences, and environmental impact studies of development projects shall be conducted sufficiently in advance, and if they are to be undertaken, such activities shall be planned and carried out so as to minimize potential adverse effects; (d) Agriculture, grazing, forestry and fisheries practices shall be adapted to the natural characteristics and constraints of given areas;(e) Areas degraded by human activities shall be rehabilitated for purposes in accord with their natural potential and compatible with the well-being of affected populations.

> that greater caution is taken in environmental management, implementation of the principle through judicial and legislative means is necessary."[649]

It also observed that the inadequacies of science result firstly from identification of adverse effects of a hazard and then working backwards to find the causes. Secondly, clinical tests are performed, particularly where toxins are involved, on animals and not on humans, that is to say, are based on animal studies or short-term cell testing. Thirdly, conclusions based on epidemiological studies are flawed by the scientist's inability to control or even accurately assess past exposure of the subjects and do not permit the scientist to isolate the effects of the substance of concern. The latency period of many carcinogens and other toxins exacerbates problems of later interpretation. The timing between exposure and observable effect creates intolerable delays before regulation occurs. It then observed that inadequacies of science are the real basis that has led to the precautionary principle of 1982. It is based on the theory that it is better to err on the side of caution and prevent environmental harm which may indeed become irreversible. It observed that the principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. The Court asserted that environmental protection should not only aim at protecting health, property and economic interest but also the environment for its own sake. Precautionary duties must be triggered both by the suspicion of concrete danger and (justified) concern or risk potential.[650] Further tracing the development, the Court observed that the precautionary principle was recommended by the UNEP Governing Council (1989). The Bamako Convention also lowered the threshold at which scientific evidence might require action by not referring to "serious" or "irreversible" as adjectives qualifying harm.

### 6.7.3. Precautionary Principle and Burden of Proof

The Supreme Court discussed the special burden of proof referred to in the *Vellore Citizens* case. The Court here vehemently observed that while the inadequacies of science have led to the 'precautionary principle', they said 'precautionary principle' in turn, has led to the special principle of burden of proof in environmental cases where burden as to the absence of injurious effect of the actions proposed, is placed on those who want to change the status. This is often termed as a reversal of the burden of proof, because otherwise in environmental cases, those opposing the changes would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the *status quo* by maintaining a less-polluted state should not carry the burden of proof and the party, who wants to alter it, must bear it. Further, the Court opined that the precautionary principle suggests that,

> "Where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution as major threat to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment. It is also

[649] Barton Charmian "The Status of the precautionary Principle in Australia*"*, 22 *Harvard Environmental Law Review* 509-511 (1988).

[650] Harald Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law: The Precautionary Principle: International Environmental Law between Exploitation and Protection*, (London: Graham &Nijhoff, 1994); Luciano Butti, *The Precautionary Principle in Environmental Law: Neither Arbitrary nor Capricious if Interpreted with Equilibrium*, (Milan: Giuffre, 2007); Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law*, (the Hague: Kluwer, 2002); David Freestone, *The Precautionary Principle and International Law: The Challenges of Implementation*, (the Hague: Kluwer, 1996).

> explained that if the environmental risks being run by regulatory inaction are in some way "certain but non-negligible", then regulatory action is justified. This will lead to the question as to what is the non-negligible risk'. In such a situation, the burden of proof is to be placed on those attempting to alter the status quo. They are to discharge this burden by showing the absence of a 'reasonable ecological or medical concern'. That is the required standard of proof. "The required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a 'reasonable persons' test."[651]

Thus, this case came up as the first case which discussed at length the jurisprudential aspect of the Precautionary Principle. The need for such a detailed discussion by the Supreme Court was long felt by the lower courts as there was no fixed standard for applying the burden of proof for the application of Precautionary and Polluter Pays Principles. Such a standard for burden of proof becomes necessary especially when an absolute liability has been attached to the polluter. The analysis on the point of inconsistencies of science was essential for establishing a reason for application of precautionary principle when there has been no fully certain scientific proof. This perspective is of a very relevant nature when the courts are faced with the cases where no scientific study has been conclusive for determining the cause of the pollution.

In 2000, the Indian government endorsed that maintaining the ecological balance of the environment is the responsibility of every human being. It ambitiously proposed a National Environmental Policy in order to bring about sustainable development. The Narmada Bachao Andolan stirred the environmental consciousness of the people. However, the judiciary's laxity with regard to protecting the environment was surfaced when it apparently flawed in ruling that the construction of the dam should continue which is contrary to the precautionary Principle. It was only in 2004 that the Precautionary Principle was again discussed in *N.D. Jayal and Anr. V. Union of India (UOI) and Ors*.[652] In this case, a petition under Article 32 of the Constitution of India was filed in connection to the safety and environmental aspects of Tehri Dam before the Supreme Court. The petitioners urged to issue necessary directions to conduct further safety tests so as to ensure the safety of the dam. They also alleged that the Respondents have not complied with the conditions attached to environmental clearance. The Court in this case referred to the *A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.) and Ors.*[653] and *Narmada Bachao Andolan* case.[654] The Court on the safety aspect of the dam said that since location of the dam is in a highly earthquake - prone zone in the valleys of Himalayas, all additional safeguards are required to be undertaken on the precautionary principle as contained in the Rio Declaration on Environment and Development as India is bound by it. The Court further held that the precautionary principle in Rio Declaration reads:

> "In order to protect the environment, the precautionary approach shall be widely applied by State according to their capabilities. Where there are threats of series of reversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environment degradation. The precautionary principle, accepted by India being a party and signatory to international agreement and understandings in the field of

[651] *Ibid.*
[652] 2004 (9) SCC 362.
[653] 2000 Supp 5 SCR 249.
[654] AIR 2000 SC 3751.

> environment, has become part of domestic law i.e. Environmental (Protection) Act. The Governmental authorities in India cannot be permitted to set up plea of scientific uncertainty of 3-D Non-Linear Analysis of the dam. On the safety aspect, pleas like *res judicata* based on earlier decision of the Supreme Court cannot be allowed to be raised when further developments and events in the course of the project require further precautions to be taken before filling the dam to the optimum capacity."

In *M.C. Mehta v. Union of India* (Trapezium matter),[655] the Supreme Court applied that Polluter Pays principle and Precautionary principle of International law as law of the land of India as India being party to the United Nation Conference and signatory to International Declarations and Agreements.

It can be thus concluded that in this judgment the Court accepted the Precautionary principle as a well - recognized international law principle which has been acknowledged by other countries. The Court explicitly accepted that precautionary principle and polluter pays are to be treated as laws of the land of India. This effort of the Supreme Court is laudable because the judiciary through this ruling has made it clear that it is the duty of the state to apply and adhere to the principles. It has emphasized upon the obligations of the country which come with ratification of international conventions. The Court referred to the concepts of precautionary principle and polluter pays discussed in *Vellore Citizens' Welfare Forum v. Union of India and Ors*[656] and the *Environ-Legal Action v. Union of India.*[657] The Supreme Court, referring to Articles 48A and 51A (g) of the Constitution of India, observed that the aforementioned principles are part of the constitutional law. It also referred to *Intellectual Forum, Tirupathi v. State of A.P. and Ors*., wherein it was stated,

> "In the light of the above discussions, it seems fit to hold that merely asserting an intention for development will not be enough to sanction the destruction of local ecological resources. What this Court should follow is a principle of sustainable development and strike a balance between the developmental needs which the respondents assert, and the environmental degradation, that the appellants allege. Consequently the polluting industries are absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas".[658]

The Polluter Pays Principle as interpreted by the Supreme Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Thus, the Indian judiciary has made contribution by clarifying that remediation of the damaged environment is part of the process of sustainable development and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. Though the doctrine of sustainable development indeed is a welcome feature, a delicate balance between ecological impact and the necessity for development must be struck. When it is not possible to ignore inter- generational interest, it is also not possible to ignore the dire need which the society urgently requires. The Supreme Court has further clarified that in a case of this nature,

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[655] AIR 2002 SC 1696.
[656] AIR 1996 SC 2715.
[657] 1996 (3) SCC 212.
[658] AIR 2006 SC 1350.

> "An endeavour should be made in giving effect to the intention of the legislature. For the said purpose, it is necessary to ascertain the object the legislature seeks to achieve. It may also be necessary to address questions regarding the nature of the statute. Does the statute *ex facie* point out degradation of the environment? Would, by change of user envisaged by the legislature, the existing open space be decreased? Would it be necessary in view of the legislative scheme to invoke the precautionary principles? Answers to the said questions in this case are to be rendered in the negative. The main purpose of the legislation is revival of industry *inter alia* by modernization and shifting of industry. Article 21 guarantees a right to a decent environment and, thus, what should be the parameters therefore would essentially be a legislative policy. Undoubtedly, different criteria may be laid down to achieve different purposes. When the discretionary power under a statute is arbitrarily exercised, one can say that evidently the court will not tolerate the same and strike it down."[659]

**6.8. Polluter Pays Principle**

The question of liability of the respondents to defray the costs of remedial measures can be looked into from another angle, which has come to be accepted universally as a sound principle, viz., the 'Polluter Pays' principle. The Polluter Pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the polluting goods. As per this principle, it is not the role of Government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because it would shift the financial burden of the pollution incident to the taxpayer. The 'Polluter Pays' principle was promoted by the Organization for Economic Cooperation and Development (OECD) during the 1970s when there was great public interest in environmental issues. During that time there were demands on Governments and other institutions to introduce policies and mechanisms for the protection of the environment and the public from the threats posed by pollution in a modern industrialized world. Since then there has been considerable discussion of the nature of the Polluter Pays principle, but the precise scope of the principle and its implications for those involved in potentially polluting activities have never been satisfactorily agreed, also not in Indian court judgments.

In the Rio Conference of 1992 great concern was shown about sustainable development- development which can be sustained by nature with or without mitigation. In other words, it is to maintain delicate balance between industrialization and ecology. While development of industry is essential for the growth of economy, the environment and the ecosystem are also required to be protected. The pollution created as a consequence of development must not exceed the carrying capacity of ecosystem. The Courts in various judgments have developed the basic and essential features of sustainable development. In order to protect sustainable development, it is necessary to implement and enforce some of its main components and ingredients such as- Precautionary Principle, Polluter Pays and Public Trust Doctrine. One can trace foundation of these ingredients in number of judgments delivered by the Supreme Court and the High Courts in India after the Rio Conference, 1992.

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[659] *Ibid.*

### 6.9. Concluding remarks

The analysis of the various judicial pronouncements leads to the conclusion that the role of the judiciary has been immense in the arena of environmental law. The judiciary has persistently tried over the decades to imbibe the international environmental principles in domestic environmental jurisprudence. The Indian judiciary has been a pioneer and can be credited for introducing new principles such as the 'Absolute Liability principle.' The judiciary, while doing so, had not only deviated from the settled international principle of strict liability but also evolved stringent new principle providing no exception. These are the major grounds on which this principle of strict liability has been criticized. In fact the Indian judiciary itself in *UCC v. UOI*[660] did not accept the principle on the ground that it is not internationally accepted and would not be in conformity with due process as per US laws. However, it can be concluded that the principle which was devised by the Indian judiciary is appropriate in the contemporary affairs. The rule of strict liability which evolved decades ago would not be apt in today's world where with the advancement of science and technology it is not impossible to prevent accidents and hence defences of *force majeure* etc. should not be allowed to be taken. Moreover, it should be noted that this liability was basically developed for the acts which does not fall under category of wrong which are neither intentional nor result of gross negligence. Basically this principle takes the victim into account, with a motive that no one should suffer because of dangerous activity carried on by others for personal profit. This principle requires any person who carries out the hazardous and inherently dangerous act to indemnify all who would be affected by such act, whether the damage was done intentionally or not. Further this principle has been criticized being repulsive to foreign investment and economic development. It can be argued that strict and absolute liability is imposed not to punish the legal persons but is to indemnify the common people from any damage caused by such activity. Indeed it places much higher degree of responsibility on the legal persons but this is done in order to strike a proper balance between economic development and environment protection. Moreover, this principle is to be applied only in cases of hazardous and inherently dangerous activity and thus is not a general rule of imposing liability. Concerns regarding environment protection arise due to increased interaction between humans and environment. Human - environmental interaction depends upon the level of technology and institutions nurtured by a society. The development in technology facilitates economic advancement and this in turn accelerates human involvement with environment which causes environmental imbalance and degradation. This is when sustainable development as a concept gains importance. An analysis of the cases challenging acts causing environment degradation reveals that the Supreme Court has gathered the concept of sustainable development from international instruments and has not hesitated in applying the same in India. The Supreme Court in its judgments has discussed the evolution of the concept of sustainable development and has stated that India's international obligations demand the application of the concept in Indian scenario. An examination of the decisions relating to sustainable development reveals a trend in the judicial approach. The Court has, in rare circumstances, outrightly directed for permanent closure or relocation of activities that pollute the environment, such as the *Tehri Dam* Case. Had similar tendency been followed in most decisions, the approach would have been an orthodox one, blindly supporting environment conservation and giving a setback to economic advancement. Moreover if the judiciary had blatantly supported the liberalization policy of the 1990s, it would have led to economic progress at an advanced pace initially, which would have later suddenly been put to rest due to exhaustion of resources essential for development. The judiciary probably realized this in the early 1990s.

[660] AIR 1990 SC 273275.

In most of the decisions it can be observed that although temporary injunctions were always granted to stop any further harm to the environment, the final judgments usually gave certain regulations and guidelines, whereby the industries were permitted to continue with their activities by following the same. The judiciary has followed a balanced approach towards environmental concerns and gave prime importance to the principle of sustainable development. Consequently, in the decisions made by the Supreme Court it can be noticed that the judiciary has always attempted to issue guidelines first, that could resolve issues regarding pollution or unsustainable use of resources, and only when situations reached a stage wherein the activity could not be carried on without further degrading the environment, the Court ordered for closures or relocation of the same. Therefore, in the first attempt of the Court to resolve the matters, development took precedence over environment protection, though not absolutely, in consonance with the economic situation existing in India.

Although there are several judgments which can have not discussed in depth the jurisprudence of the concept of sustainable development before applying it to the issue before the Court, it can however be noticed that the approach followed by the Supreme Court in almost all the decisions beginning in 1995 has been a strategically adopted one. It has kept in mind the essential fact that India then and even today is a developing country[661] which has to fulfill the needs of an ever rapidly increasingly population without compromising on its Gross Domestic Production (GDP) and overall economic progress in order to enable itself to stand in league with the developed nations of the world, while not compromising with environment for achieving the same. The Supreme Court by accepting the positive obligations under the international environmental instruments has rendered itself greatly prone to the uncertainties of these international principles.[662] The precautionary principle has been widely accepted to be rather vague and unclear, which caused its sluggish development, and in turn gone on to deter the courts from applying it. In India the courts have discussed this principle but have not been

[661] Although according to the United Nations and for all official purposes India is a developing country, analysis of official statements coming from governmental sources and Indian population clearly consider that India should be recognised as a great power by virtue of its history, culture, economic prowess, democratic institutions, population and like to cherish a dream of rising power status. Undoubtedly, India has achieved remarkable economic progress in the last decade, especially but, it is not at all an exaggeration to state that at least few decades would require before India would be able to become a significantly modern and developed state. See more analysis on this remark in the chapter concerning India and the UN Reforms below.

[662] ICJ, in its judgment on the *Pulp Mill Case*, interpreting the 1975 Statute between Argentina and Ecuador clarified that, "…The purpose of the provision in Article 41 *(a)* is to protect and preserve the aquatic environment by requiring each of the parties to enact rules and to adopt appropriate measures. Article 41 *(a)* distinguishes between applicable international agreements and the guidelines and recommendations of international technical bodies. While the former are legally binding and therefore the domestic rules and regulations enacted and the measures adopted by the State have to comply with them, the latter, not being formally binding, are, to the extent they are relevant, to be taken into account by the State so that the domestic rules and regulations and the measures it adopts are compatible ("con adecuación") with those guidelines and recommendations. However, Article 41 does not incorporate international agreements as such into the 1975 Statute but rather sets obligations for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and preservation of the aquatic environment of the River Uruguay. Under Article 41 *(b)* the existing requirements for preventing water pollution and the severity of the penalties are not to be reduced. Finally, paragraph *(c)* of Article 41 concerns the obligation to inform the other party of plans to prescribe rules on water pollution." The Court further observed that "it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations laid down by the 1975 Statute."

very successful in their approach.[663] The reason, for one, could be that the judiciary takes cognizance of the matter only when the situation has become very grave or almost irreversible. What could possibly be the use of the Precautionary Principle if there is nothing left to take precautions about? Secondly, even when the judiciary does take such matters into consideration it passes such orders which are difficult to be realized. For instance, in the *Bichhri Village case*,[664] the Supreme Court had ordered for the treatment of the water in the wells which had become black, thanks to the hazardous factory effluents. The scientific community had voiced their serious doubts about the possibility. Further, the Court failed to look into the point that the farmers had to use the same water for the irrigation purposes, which would spoil even the top layer of soil, as if not enough damage has already been done. The course for the Polluter Pays principle has been a more effective one. The judiciary has not been very eager about putting any amount of compensation. It has taken reasonable and rational steps for deciding the amount. The Supreme Court has not limited itself to just a simple notion that the polluter shall pay for the damage caused. It has extended the concept to include even the cost of restoration and reversal of environmental degradation. This idea has been repeated in almost all the cases of environment in the past four decades, with appreciable judicial response, till now, but certain questions still need to be answered. What will be the judicial response when the polluters belong to small informal sectors and do not cause pollution to seek any benefits but to carry on the only vocation to which their primary education has exposed them? The damages are bound to result in an increased price. How does the judiciary plan to solve the problem when the result of this is seen in the exports sector where the demand is already dwindling? The path ahead does not look very easy. The judiciary has thus been instrumental in filling the loopholes created by the executive and the legislature. Through various instruments like public interest litigation and writ petition the judiciary has successfully fulfilled the role of imparting justice.

It has been the judiciary which took the forefront in applying international environmental law principles into the environmental jurisprudence of the country. It has successfully used these international principles in accordance with the socio-economic conditions of the Indian society. In fact it is because of the active role taken by the judiciary that the common man is able to seek his redresses through these principles. It also leads to appraisal of the environmental consciousness of the people of India. The environmental principles which evolved in the Stockholm and Rio declaration have been implemented in the domestic laws only due to the vibrant role played by the judiciary. Despite the drawbacks of the judiciary, the role played by it in shaping the environmental law jurisprudence in India is worth emulating by countries in similar situations.[665] The chapter shows the often conflicting and complimenting approaches of India as to what, within the field of environmental

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663 Joakim Zander, *The Application of the Precautionary Principle in Practice: Comparative Dimensions*, (Cambridge: Cambridge University Press, 2010); Nicolas De Sadeleer, "The Precautionary Principle as a Device for Greater Environmental Protection: Lessons from EC Courts", 18 *Review of European Community and International Environmental Law* 1, 3-10 (2009); Andri G. Wibisana, "Three Principles of Environmental Law: the Polluter-Pays Principle, the Principle of Prevention and the Precautionary Principle" In Michael Faure (ed.), *Environmental Law in Development: Issues from the Indonesian Experience*, 24-76 (Cheltenham: Elgar, 2006).

664 AIR 1996 SC 1446.

665 J. Otto, "International Law and Environmental Legislation in Developing Countries with Special Reference to India and Indonesia", 4 *Leiden JIL* 1, 110-117 (1991); Kilaparti Ramakrishna, "The Emergence of Environmental Law in Developing Countries: A Case Study of India", 12 *Ecology Law Quarterly*, 907-935 (1985); Bharat Desai, (ed.), *Environmental Laws of India*: *Basic Documents*, (New Delhi: Lancers Books, 1994); Eileen N. Wagner, "Bhopal's Legacy: Lessons for Third World Host Nations and for Multinational Corporations", 16 *North Carolina Journal of International Law and Commercial Regulation* 3, 541-585 (1991).

law, constitutes "rules" or "principles"; what is "soft law"; and which environmental treaty law or principles have contributed or shaped its particular approach.[666] Proving customary international law requires evidence of consistent state practice, which practice will only rarely provide clear guidance as to the precise context or scope of any particular rule. The time India took to ratify some of the important international environmental instruments and enact corresponding domestic legislations, statements made at various international forums shows the difficulties faced by the Indian executive in implementing positive international obligations in the area of environmental law.

Based on the analysis and interpretation of laws by the Indian judiciary, this Chapter has demonstrated that, in the field of international environmental law, India's contribution is mainly through the Indian judiciary rather than legislative and executive organs. Not only the Judiciary has clarified various emerging and existing principles of environmental law but it has treaded into the territory of legislative through its judicial activism in the area of environmental law. One could therefore see a tension between the judiciary and the executive as far as enforcement of environmental norms are concerned, the former being establishing high standards and the latter being in a difficult situation to adhere to judiciary on the one hand and need to reconcile environmental concerns with economic developmental needs on the other. This tension is likely to continue. However, it has been observed that the Indian judiciary will be paying more attention to the executive concerns in the light of latter's need to deliver economic governance. While the tension between two organs of the state will remain to exist at national level, India is likely to push for softer environmental standards at international level in its negotiations with developed world. It is, furthermore, likely that civil society institutions which have been empowered by the public interest litigation mechanism, and actively using it to address environmental issues, will continue to add into the tension between the judiciary and executive.[667] Civil society institutions in the area of environment and development need to be more sensitized to the developmental needs of the country, without, however, compromising the concerns of preservation of clean environment. Until and unless, these organs and civil society institutions work in tandem, India's contribution at international level in the development of international norms will continue to be inadequate.

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[666] Philippe Sands (ed.), *Principles of International Environmental Law*, (Cambridge: Cambridge University Press, 2003), p. 112.

[667] Lavanya Rajamani, "Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability", 19 *Journal of Environmental Law* 3, 293-321 (2007); Shaikh, "Environment and Sustainable Development: the Evolution of Public Interest Litigation by the Supreme Court of India", Indian Society of International Law, *Fifth International Conference on International Environmental Law*, 8-9 December 2007, 572-590 (2007); Jona Razzaq, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (the Hague: Kluwer Law International 2004); Bharat Desai, "Enforcement of the Right to Environment Protection through Public Interest Litigation" 33 *Indian JIL*, 27-40 (1993).

# CHAPTER VII
# INTERNATIONAL CLIMATE CHANGE LAWS, POLICY AND PRACTICES OF INDIA

## 7.1. Introduction

There are some issues which are essentially two sides of the same coin. Environment and climate change is one such closely linked and inter-related issue.[668] India has well recognized that the "climate change is impacting the natural ecosystems and is expected to have substantial adverse effects in India, mainly on agriculture on which 58% of the population still depends for livelihood, water storage in the Himalayan glaciers which are the source of major rivers and groundwater recharge, sea-level rise, and threats to a long coastline and habitations. Climate change will also cause increased frequency of extreme events such as floods, and droughts. These in turn will impact India's food security problems and water security".[669] Therefore, it is essential to examine how the position of India is being shaped and how India shapes the climate change regime at the national and the international levels. This chapter aims to analyse India's participation in the negotiations of relevant international legal instruments; the obligations under these instruments and their implementation at the domestic level; the challenges and issues which define India's position on the climate change debates and concluding remarks.

Indian economy is one of the fastest growing economies in the world and is on its way to ensure a sustainable economic and social growth, as well as development of its 1.2 billion people. The success story of India's economic growth is closely intertwined with the energy use and the carbon emissions. India is the 5$^{th}$ largest carbon gas emitter after China, US, EU and the Russian Federation. Although its overall energy use and carbon emissions is less than 5% of the world, the post-1991 liberalization of economic development shows that the carbon emission has increased by 58% between 1994 and 2007.[670] India's per capita emission is about 1 tonne per year which is at least four times less than the world average. However, the per capita emission too, is showing significant increase since 1994. Thus, India faces a major challenge - how to comply with the goals of the climate change regime without compromising the need to push for rapid industrialization, urbanization and overall ecological and socio-economic development. The most important challenge India faces is the prevention and control of pollution at various levels while developing into a powerful world economy. The question for India is how much it can commit to improving itself and implementing climate change mitigation strategies.

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[668] As per the UNFCC, climate change is "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods." Article 1 of the Climate Change Convention adopted in 1992. Environmental security was one of the most important issues identified by the Prime Minister of India during his address to the Indian Foreign Service Probations on 11 May 2011. See Press Release issued by Ministry of External Affairs on the call by IFS Probationers on Prime Minister Dr. Manmohan Singh. New Delhi, May 11, 2011.

[669] Climate Change – India's Perspective, Lok Sabha Secretariat, Reference Note No. 25/RN/Ref./August 2013.

[670] The emissions indicate an annual growth of 4.2% from the levels in 1994. Whereas India's CO2 emissions are only about 4% of total global CO2 emissions and much less if the historical concentrations are taken into account. Still India has been conscious of the global challenge of Climate Change L. Srivastava and N. Pahuja, "Emission reduction targets: a Pandora's Box in climate negotiations" *In* Pachauri R K (ed.) *Dealing with climate change: Setting a global agenda for mitigation and adaptation* 211-227 (2010).

During the Copenhagen Summit in 2009, India pledged to reduce by year 2020, its emissions per unit of Gross Domestic Product (GDP) called emission intensity, by 20 to 25 percent below that of the year 2005 levels. This would exclude the emissions from the agriculture sector, by increasing fuel efficiency standards by 2011, forest cover, and its electricity output derived from wind, solar, and small hydro projects to 20 percent, from the current level of 8 percent. India believes that it should take serious steps to curb its GHG (Green House Gas) emissions, but it also believes that the developed countries must work with the developing countries, under the principle of common but differentiated responsibilities (CBDR).[671] India needs to work on controlling pollution, and the industrialized countries need to invest in India in a more sustainable way, so as to ensure that they don't just use the country for manufacturing and developing technology but also help curb its emissions. India's ability to implement environmental policy on climate change at home is critical to its ability to participate in climate change law and policy at the international level. India needs to show domestic compliance with and support of international treaties, in order to lead by example. Thus, unlike other major carbon emitters, India has a unique set of challenges and issues which play a most crucial role in understanding India's climate change policy and practical approach.

### 7.2. Issues and Challenges

India faces a mammoth challenge in preventing and controlling pollution caps to mitigate GHG emissions and committing to such caps in international treaties. As mentioned earlier, India, like many developing countries, faces significantly higher level of tension between economic development and environmental protection than the developed countries. Global environmental issues, although they occupy the minds of policy-makers, require urgent attention on the most pressing matters like safe drinking water, providing arable land, indoor air quality, adequate housing, and accommodating populations. This makes India less demonstrative than the developed countries in terms of proposing environmental solutions to be codified in international agreements. Nevertheless, it has recognized its crucial role in the climate change debates and has been influencing the debates increasingly. In view of the above, India's participation in treaty negotiations and enforcement of agreed provisions at domestic level are crucial for the success of the operation of the climate change regime. The issues which shape India's position on climate change can be clubbed into three main categories: (1) ecological, socio-economic, (2) technological and financial, and (3) political.

#### 7.2.1. Ecological and Socio-Economic Challenges

[671] At the G8 meeting in June 2005, Prime Minister Manmohan Singh pointed out that per capita emission rates of the developing countries are a tiny fraction of those in the developed world. India wants a fair and equitable agreement based on the Principle 7 of the Rio Declaration, that "[i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities." India maintained that the developed countries have the major responsibility to curb emissions because of their past emissions and respective capabilities. India emphasizes the need for an "equitable and efficient solution to climate change and suggest that efficiency can be obtained through a system of tradable emission quotas and equity through equal allocation of global environmental space to all human beings". This position of "common but differentiated responsibilities" is in consonance with India's leadership of developing world, especially in the areas of international economic and sustainable development laws. Jyoti K. Parikh and Kirit Parikh, *Climate Change: India's Perceptions, Positions, Policies and Possibilities*, *OECD Climate Change and Development*, 2002, p. 1. Under the Common but Differentiated Responsibility, country like India, is expected to gain from technology transfer and foreign investment in environmental friendly manner.

Forestry and technology provisions of any climate instrument are the most important ones as far as India is concerned.[672] This will require funding by the rich nations to developing nations to compensate for the deforestation drives which they inevitably carry out for the economic growth. On the one hand, India cannot afford to watch the destruction of forest unabated, and on the other hand, it cannot afford to overcome the domestic economic constraints. Climate change has and will continue to impact India's food security, water security, coastal security and the overall health and well-being of the Indian economy. This is a somber conclusion assessed from the 2004 NACC analysis on the effects of climate change in India. Climate change undoubtedly will create similar threats in the neighbouring regions of India which will directly impact the stability, security and India's overall relations with these neighbours. [673] Like many other nations in similar geographical situations, India does and will continue to experience declining crop yields, availability of fresh water supplies, rising sea-levels with their concomitant marine and coastal consequences, increased natural disasters like floods and droughts, biodiversity loss, and a greater risk of spread of various diseases.[674]

### 7.2.2. Technological and financial Issues

Like any other environmental treaty, India's stand on availability and transfer of sound environmental technology,[675] innovation and cooperation to deal with the adaptation and mitigation is fully appreciable. India pursues a regime, which could facilitate developing countries to obtain technological capacity-building as well as financial assistance to mitigate the concerns arising from the fullest implementation of the international climate change regime at the domestic level, vigorously at bilateral and multilateral level.[676] For example, although the Copenhagen Accord recognizes a fund to cater to these issues of the developing countries, the actual

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[672] N. W. Arnell, M.J.L. Livermore, S. Kovats, P.E. Levy, R. Nicholls, M.L. Parry and S.R. Gaffin, Climate and socio-economic scenarios for global-scale climate change impacts assessments: Characterizing the SRES storylines. *Global Environment Change*, 14, 3-20 (2004); R. J. Nicholls, "Coastal flooding and wetland loss in the 21st century: changes under the SRES climate and socio-economic scenarios", *Global Environment Change*, 14, 69-86 (2004).

[673] P. R. Shukla, M. Kapshe and A. Garg, *Development and climate: impacts and adaptation for infrastructure assets in India, OECD Global Forum on Sustainable Development: Development and Climate Change*, (Paris: OECD, 2005).

[674] The Energy Research Institute (TERI) – BCSD India: Corporate Action Plan on Climate Change: White Paper, 2009. The White Paper has been appreciated for marking "a fine beginning in identifying the challenges and opportunities that the National Action Plan on Climate Change (NAPCC) presents to the private sector", as mentioned by Mr Jayram Ramesh, Minister for Environment and Forest, Government of India in his message for the report. The Energy Research Institute (TERI) – BCSD India: Corporate Action Plan on Climate Change: White Paper, 2009, p. 2.

[675] Yahya A. Moin, "Emission Trading and the Kyoto Protocol: Not a Panacea but a Good Start", CISDL, *Legal Working Paper Series*, (Montreal: Centre International Sustainable Development Law, 2007); John Drexhage, Deborah Murphy and Jenny Glesson, *A Way Forward: Canadian Perspectives on Post-2012 Climate Policy*, (Winnipeg: International Institute for Sustainable Development, 2008); Ravi K. Srinivas, "Climate Change, Technology Transfer and Intellectual Property Rights", *Research and Information System for Developing Countries (RIS)*, New Delhi, *RIS Discussion Paper* 153 (2009); Joelle de Sepibus, "Reforming the Clean Development Mechanism to Accelerate Technology Transfer", (Bern: NCCR and World Trade Institute, 2009); Elizabeth Burleson, "Energy Policy, Intellectual Property and Technology Transfer to Address Climate Change", 18 *Transnational Law and Contemporary Problems* 1, 69-93 (2009).

[676] In 2010, the Adaptation Fund became operational following the COP/MOP in Poland. Since the Adaptation Fund generates proceeds via a levy on developing country projects rather than developed world donations, developing countries insisted that the fund board should have the capacity to distribute funds rather than the Global Environment Facility. While this was a successful argument, agreement to expand the sources of financing stalled. It is expected that future meetings may reassess expanding the adaptation levy to the Kyoto Protocol's emissions trading mechanisms.

implementation including pledges is yet to be fully materialized. This leaves a country like India in a mood to resist any climate change talks.[677]

### 7.2.3. Political Issues

India's stand on specific emission reduction requirements on the part of the developing nations,[678] details on funding to the developing nations and lack of agreement on monitoring, reporting and verifying (MRV) it, is understandable as the future of climate change rests on these three important pillars.[679] India and China have called upon developed nations to adhere and carry out specific measures to reduce the greenhouse gas emissions and provide funding to the developing nations. Furthermore, India, like China, considers that verification of Indian emission targets by developed nations or any international mechanism is an infringement of its sovereignty.

As per the International Energy Agency (IEA), China, US, EU, India and the Russian Federation, the major five greenhouse gas emitters, shall be included in any legal instrument "for chances of any success of such instrument".[680] India believes in not allowing the current financial crisis to push climate change debates aside. It asserts that if major powers could find ways and means to avert financial meltdown, these nations shall also ensure a similar commitment in ensuring the climate change goals, including providing means to the developing countries. As with similar issues, India emphasizes the importance of focusing on climate change adaptation as well as mitigation.[681]

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[677] Benedict Kingsbury and Bruce Rudyk (ed.), *Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development*, (New York: New York University Press, 2009).

[678] India along with BASIC members have opposed "unilateral approaches, such as the inclusion of emissions from the aviation sector in the EU Emissions Trading Scheme or establishing unilateral carbon accounting rules are inimical to multi-lateralism, and clearly not in line with the provisions and principles of the Convention, particularly the principles of equity and common but differentiated responsibilities and respective capabilities". Joint Statement issued at the conclusion of the Seventh Basic Ministerial Meeting on Climate Change. Zimbali, Durban, May 29, 2011.

[679] Henry D. Jacoby, Ronald G. Prinn and Richard Schmalensee, "Kyoto's Unfinished Business", 77 *Foreign Affairs* 4, 54-66 (1998); Daniel Egan Levy, "Corporate Political Action in the Global Polity: National and Transnational Strategies in the Climate Change Negotiations", in Richard Higgott and Geoffrey R. Underhill *Non-State Actors and Authority in the Global System*, 138-153 (London: Routledge, 2000); Harro van Asselt, "Dealing with the Fragmentation of Global Climate Governance: Legal and Political Approaches in Interplay Management", *Global Governance Working Paper No. 30*, (Amsterdam: Global Governance Project, 2007); Christopher K. Penny, "Greening the Security Council: Climate Change as an Emerging Threat to International Peace and Security, 7 *International Environmental Agreements: Politics, Law and Economics* 1, 35-71 (2007); Steve van der Heiden, *Atmoshpheric Justice: A Political Theory of Climate Change*, (Oxford: Oxford University Press, 2008).

[680] Elisabeth Burleson, Energy *Policy, Intellectual Property and Technology Transfer to Address Climate Change* above at p. 558. India's energy policy and strategies are directly affected by the climate change issues. Here the main challenge lies regarding the abandoning of coal, the most abundant source of energy found in India and use non-conventional/renewable energy sources, such as wind energy, nuclear energy as well as oil and gas. It also *impacts on which type of energy we use, how we generate power, how to reduce methane emissions by agriculture practices or forestry and so on. India's negotiations are important for us as a means to reduce or postpone future vulnerability by getting the developed countries to reduce their emissions.*

[681] "Developing countries must be supported financially, technologically, and with capacity-building resources so that they can cope with the immense challenges of adaptation," Foreign Minister S. M. Krishna said in a statement to the U.N. General Assembly, Statement by Foreign Minister S. M. Krishna, UN General Assembly, 2009.

**7.2.3.1. Bali Summit:** The Bali Summit held in 2007 is known for its decision on climate-change adaptation fund, a victory for the vulnerable countries. India, at the Bali Summit, emphasized that the Action Plan should be comprehensive and must advance actions together on all of its building blocks - i.e. adaptation, mitigation, technology and finance. It further advocated that any outcome that erodes the differentiation among developed and developing countries as set forth in the United Nations Framework Convention on Climate Change (UNFCCC) and the Bali Action Plan or creates new differentiation among the developing countries, is not acceptable to India. According to India, UNFCCC and the Bali Action Plan should continue to be the basis for further work and for constructing a legally binding outcome at a future date.[682] The Summit agreed to have the Adaptation Fund separated from the Global Environment Facility (GEF), having its own structure and representatives. The Action Plan adapted disaster reduction strategies and means to address losses and damages associated with climate change impacts on developing countries, which are particularly vulnerable to the adverse effects of the climate change. At the Bali Summit too, India advocated the principle of common but differentiated responsibility and took forward the concept of equalizing per capita emissions of countries. India opposed the clubbing of India together with the three big polluters - including China. India attempted to ensure that the climate change issue is not overplayed as cautioned by the UNDP.[683] The Indian position took into consideration, the issues of climate change related to development and finance, as outlined in the Department of Economic Affairs paper.[684]

**7.2.3.2. Cancun Summit:** India's insistence to avoid a 'legally binding agreement' prevailed at the Cancun Summit.[685] The Indian standpoint that all countries must agree to a legally-binding agreement was shared by Brazil, South Africa, India and China – (BASIC),[686] Alliance of Small Island States (AOSIS), Least Developed Countries (LDCs) and SAARC members. Indian position was to take binding commitments on an appropriate legal form.[687] The Cancun Agreement contains seven main objectives, namely: (i) mitigation (ii) transparency of actions (iii) technology (iv) adaptation (v) forests (vii) capacity building and (viii) finance. India has adopted a definite position with each of the objectives. With regards to the emission cut, Indian position remained

[682] See Paper Submitted by India to AWG-LCA on Organisation and Methods of Work in 2010, p. 2. India articulated specific measurable indicators of achievement for the Bali Summit in its position paper.

[683] The HDR Report 2007/2008 of UNDP has also warned that "climate change will undermine international efforts to combat poverty..... Climate change is hampering efforts to deliver the MDG promise. .....Looking to the future, the danger is that it may stall and then reverse progress built up over generations not just in cutting extreme poverty but also in health, nutrition, education and other areas". This danger needs to be guarded against with full commitment and zeal.

[684] H. A. C. Prasad and J. S. Kochher, "Climate Change and India – Some Major Issues and Policy Implications" *Working Paper No. 2/2009-DEA*, Department of Economic Affairs, Ministry of Finance, India.

[685] The Cancun Agreements form the pillars of the largest collective effort the world has ever seen to reduce emissions, in a mutually accountable way, with national plans captured formally at international level under the banner of the UNFCCC. http://164.100.47.134/intranet/CLIMATE_CHANGE-INDIA's_PERSPECTIVE.pdf accessed on 16 March 2013.

[686] Ms Bomo Edith Edna Molewa, Minister of Water and Environmental Affairs, Republic of South Africa, said, "We had good discussions as BASIC group and regarding Agreements arrived at Cancun our emphasis will be on the issues of finance, technology and capacity building etc. We have to emphasis on finance to avoid some challenges which might arise at Durban." Press Release issued by Ministry of Environment and Forests on the Speech of Minister of State for Environment and Forests at the Basic Countries Conference. New Delhi, February 27, 2011.

[687] The delicate position of India was under severe criticisms at the domestic level. The then Minister of Environment and Forest, Mr Jairam, defended that "…nuancing of India's position will expand negotiating options and give India an all-round advantageous standing". *The Hindu*, 25 December 2010

consistent. That is, India will undertake voluntary mitigation actions, including reducing the emissions intensity of its GDP by 20-25 per cent by 2020 on a 2005 reference year; India will not take on any emission cuts or agree to any peaking year for its emissions.[688] Similarly, another matter of achievement for India on behalf of the developing countries was that the Summit agreed on "equitable access to sustainable development".[689] In the area of mitigation, India considered that its position was a major breakthrough as it led to "detailed formulation on international consultation and analysis (ICA) of developing countries' mitigation actions in a manner that is non-intrusive, non-punitive and respectful of national sovereignty". This broke an important deadlock and helped achieve progress on issues related to mitigation.[690] India also advocated strongly and successfully to create the Green Climate Fund to disburse $100 billion per year by 2020 to developing countries to assist them in mitigating Climate Change and adapting to its impacts.

**7.2.3.3. Durban Summit**: Unlike the three previous summits, the Durban Summit in 2011 saw a major turn-around for India. Its inability to ensure the "equity" and "common but differentiated" responsibility in the final text – the Durban Platform for Enhanced Action - became a major source of criticisms at the domestic level.[691] India, unlike at the Cancun Summit, lost the opportunity to drive the negotiations process and was unable to meet the resistance offered by the EU, which came out with an agenda that was scientifically unambiguous and directed its efforts to bring in fold a large number of developing countries.[692] India's non-acceptance of the binding commitments by 2015 is seen as a big setback for the country as well as for the whole world.[693] Regarding emissions, the Durban summit postponed making deep emission cuts beyond 2020. The principle of common but differentiated responsibility which has been in existence since 1992 (Rio Summit) was negated at the Durban Summit. India adopted a position to ensure that all governments commit to a comprehensive plan that would set in motion finally the realization of the Climate Change Convention: to stabilize GHG in the atmosphere at a level that will prevent dangerous interferences by human beings with the climate system and at the same time will preserve the right to sustainable development. Like other summits, India at the Durban Summit, too, advocated for much higher and sustainable support on part of developed countries towards developing countries for latter's abilities to meet the objectives of the Climate Change Convention.

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[688] Tobias F. Engelmeier and Isabelle-Jasmin Roth, "After Copenhagen and before Cancun: India on the Way to a Global Agreement on Energy and Climate Policies", *Dialogue on Globalisation*, Friedrich Ebert Stiftung, p. 2

[689] *Ibid.*

[690] *Ibid.*

[691] European Union, to the dismay of the USA and having isolated India and China succeeded in getting agreement from the LDCs and large number of developing countries.

[692] T. Jayraman, "Post-Durban, India has its task cut out", *The Hindu*, 20 December 2011. It is important to note that during pre-Durban press conference, the Indian Minister of Environment and Forests, Mrs Jayanti Natarajan, reiterated that "..".."…a long-term binding agreement cannot be a quid pro quo for a second commitment period. Can not. Should not. A new legally binding agreement is not required for climate change talks to continue, because a framework based on the principle of equity and common but differentiated responsibilities already exists in the form of the UNFCCC and the Kyoto Protocol." http://www.trust.org/alertnet/blogs/climate-conversations/indias-back-to-the-wall-at-durban/ accessed on 25 August 2012. It was quite clear that Indian position was to be built upon the equity.

[693] Praful Bidwai, "India was a big loser at Durban climate talks", *One World South Asia*, 7 January 2012.

### 7.3. Implementation of climate regime at domestic level

Although India has many domestic problems to address, it does have a strong legal framework for addressing environmental protection. India has a long history of environmental laws. Ordinary Indians can rely on the constitutional right to a healthy environment. Professor Badrinarayana writes, "[C]limate change presents a serious challenge to the Constitutional rights of Indians; rights which can only be taken away by the State and by proper legal procedure."[694] As mentioned above, India is a country where climate plays a pivotal role because its climate is tied to the economic welfare of the country in four major ways. Firstly, agriculture, which is very much climate-dependent, accounts for over 18% of the GDP and 65% of the employment provided in India.[695] Secondly, due to climate change, the Himalayan glaciers are in retreat, which is a threat to water security and to the perennial rivers in the North India. Thirdly, India is a fossil fuel dependent economy with the third largest coal reserve in the world. Since these are largely within India's forests, mining for the coal creates deforestation. Fourthly, India is peninsular and especially susceptible to sea level rise.[696] India is committed to curb reduction measures, but India would rather use a per capita plus approach that involves voluntary measures to include mandatory fuel efficiency standards, renewable energy initiatives, clean coal technologies, and lower methane farming, rather than having to reduce emissions based on its population alone.[697]

India has adopted various legal and institutional structural mechanisms to address the issue of climate change. India's National Environmental Policy adopted in 2006 provides an overview of all essential elements that responds to India's position on Climate Change.[698] The 2006 Policy advocates the principle of common but differentiated responsibility and respective capabilities of different countries. It identifies key vulnerabilities of India, namely, effect of climate change on water resources, forests, coastal areas, agriculture and health. It assesses the Climate Change adaptation need and encourages the Indian industry to participate in the Clean Development Mechanism. At structural level, the Prime Minister's Council on Climate Change has developed a coordinated, multi-stakeholder national level mechanism which oversees key policy decisions and has also developed the plans for the climate assessment, mitigation and adaptation. India has adopted a National Action

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[694] Deepa Badrinarayana, "The Emerging Constitutional Challenge of Climate Change: India in Perspective," 19 *Fordham International Law Review*, 1, 2 (Spring 2009).

[695] India has advocated that "emissions by poor who live on the margin of subsistence should be considered a basic human right and should be counted when ascribing responsibilities for emission reduction". Indian economy depends on agriculture which includes traditional practices to a large extent, which among other leads to the increase of carbon in the atmosphere. However, India cannot provide proactively concessions on this front as any concession can lead to aggravation of the intertwining problems of human rights, economic development associated with such practices. *Ibid.* 1.

[696] Rise in sea level will have direct positive correlation with the influx of environmental refugees in the inner part of India. This will add into socio-economic and cultural stability and order of the nation. Thus, in addition to the increased salinity in the ground water, directly attributable to sea-rise level, the environmental refugee problem directly affects and will continue to affect India's position in negotiating forums. India is facing various problems due to internally displaced persons, so this problem will aggravate India's dilemma further.

[697] See the statement of Mr Jayram Ramesh, Minister of Environment and Forest at the COP-15 Copenhagen Conference 2009.

[698] The Union Cabinet of India adopted the National Environmental Policy on 18 May 2006. This policy is considered to be the outcome of extensive consultations with experts in different disciplines, Central Ministries, Members of Parliament, State Governments, Industry Associations, Academic and Research Institutions, Civil Society, NGOs and the Public. See the National Environment Policy, 2006, Ministry of Environment and Forests, Government of India.

Plan on Climate Change, containing 8 national missions.[699] Apart from the ministerial or departmental efforts and those by the Planning Commission of India, India has established an Expert Group to prepare a strategy for a low-carbon economy for the 12th Five Year plan.[700]

India's interest and investment in climate change mitigation measures are increasing substantially. India has taken 24 initiatives to address climate change at home which are part of India's larger NAPCC. These initiatives consist of initiatives in the area of science and research; policy development; policy implementation; international cooperation and forestry. Reforestation is a priority on India's environmental agenda.[701] The Solar Mission and the Mission for Enhanced Energy Efficiency are also part of the NAPCC. Under the Plan, a National Environmental Protection Authority is also envisaged which would monitor and evaluate the implementation of environmental efforts in India. It is hoped that such efforts would add to the accountability and transparency in governmental efforts to deal with climate change issues.

India's ability to implement environmental policy on climate change at domestic level is critical to its ability to participate in negotiating climate change law and policy at the international level.[702] It can be concluded that India has sought to protect its environment and public health while still fostering economic development and growth. India, like any other developing country, can ill-afford to de-link the developmental needs such as poverty, health, energy access and education. As Prasad argues, India's "economic growth may not be associated with proportionate GHG emissions, though its emissions are bound to grow in short as well as medium term with the upsurge of the manufacturing sector and need for industrialisation to meet the growing demands of its huge population."[703] India, despite having a strong presence of service sector which will have much less impact on emissions as compared with the manufacturing and agriculture sectors, in the overall economic development, is bound to have significant GHG emissions as a result of cumulative growth in manufacturing and agriculture sectors. Furthermore, India's argument that sustainable patterns of production and

[699] The 8 National Missions are: National Solar Mission, National Mission on Enhanced Energy Efficiency, National Mission on Sustainable Habitat, National Water Mission, National Mission for Sustaining the Himalayan Eco-system, National Mission for a Green India, National Mission for Sustainable Agriculture and National Mission on Strategic Knowledge for Climate Change.

[700] The Planning Commission of India constituted the Expert Group which submitted its interim report in June 2011. India has already announced that it will reduce the emissions intensity of its GDP by 20-25 percent over the 2005 levels by the year 2020, through pursuit of proactive policies. India's Twelfth Five Year Plan, to be launched on 1st April, 2012 will have, as one of its key pillars, a low carbon inclusive growth. The Planning Commission Expert Group has been set up to develop a strategy for the same. "The hallmarks of India's inclusive growth and development strategy, which have a direct bearing on its foreign policy, include: A quest for rapid growth for wealth-creation for our peoples in order to bring to them the fruits of development – particularly education, health and social security; Pursuit of a growth model that creates employment and equal opportunities, and that is regionally balanced and sustainable; Construction of a modern, knowledge and science-based society; and Achievement of the development objectives within a democratic framework and through responsive governance." Speech made by Special Secretary (Public Diplomacy) Jayant Prasad at the Workshop on Science, Diplomacy and Policy at the National Institute of Advanced Studies and American Association for the Advancement of Sciences, Bangalore, 12 January 2011.

[701] India aims to add 0.8 million hectares of forest per year as well as improved forest management, conservation, and regeneration and to boost local capacity and job creation for some of India's poorest communities

[702] Although India, like in other areas, has good laws in climate change too, but the fact remains, that "even though we have the best laws of the land even from an international perspective, they have been characterized by on observance." Address of Minister of Environment and Forests Jairam Ramesh at the India Today Conclave: "THE WAY TO A GREEN GDP". New Delhi, March 18, 2011. This assessment by the highest authority in the field of environment and climate change raises serious concerns with regards to India's ability to meet climate change goals.

[703] Prasad and Kochhar at 16.

consumption are fully consistent with high living standards and human well-being, including health standards, needs to be backed by strong empirical analysis.[704]

Some pertinent questions are: Is India able to exercise restraint and endeavour to cap the carbon emissions at the cost of rapidly developing economy? It is well known that the climate change is taking place as a result of the cumulative impact of the accumulated GHGs in the atmosphere created by the carbon-based industrial activities in the developed world over the past two centuries. Does the Indian position demonstrate its firm standing as far as the level playing field in curbing the greenhouse gases by developed countries is concerned, i.e. historic responsibility of developed countries?

Although India is not a major emitter of GHGs, either as total volume of emission or as per capita or per GDP basis, it is known that the planetary atmosphere is a common resource and each citizen should have an equal share leading to the concept of convergence of per capita emissions by different countries. In this regard, it is important to observe that India informed the UNFCCC Secretariat announcing a target to reduce emissions per unit of Gross Domestic Product (GDP) (called emission intensity) by 20 to 25 percent below 2005 levels by 2020; excluding the emissions from the agriculture sector. To meet and exceed this goal, India pledged to increase fuel efficiency standards by 2011, forest cover, and electricity output derived from wind, solar, and small hydro projects to 20 percent from the current level of 8 percent by 2020.

**7.4. India and the Implementation of the Kyoto Protocol at the national level:** Kyoto Protocol requires reduction of six major GHGs, namely, Carbon Dioxide, Methane, Nitrous Oxide, Hydro Fluorocarbons, Perfluoro carbon and Sulphur hexafluoride.[705] UNFCC agreed with common but differentiated responsibilities. It has been known that the largest share of historical and current global emissions of GHGs have originated from industrialized countries. As mentioned earlier, the per capita emissions of developing countries, including India are relatively low, however, the share of these nations will increase in the process of social and economic development.

The Clean Development Mechanism (CDM),[706] defined in Article 12 of the Kyoto Protocol, allows a country with an emission-reduction or emission-limitation commitment under the Protocol (Annex B Party) to

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[704] National Rural Health Mission is one of the important strategic missions India has adopted which will partially address the climate change debate, as health is one of the specific areas of concerns for India. The Indian position on adaptation fund and strategies combined with capacity building of developing countries shows that the India has to incur enormous expenditure which would have direct impact on health improvement and prevention of diseases. Thus, unless the developed countries or the global community at large have pool of resources to address problems raised due to lack of adaptation fund, developing countries like India may have to divert very useful resources otherwise meant for areas like health. J. P. Majra and A. Gur, "Climate Change and Health: Why Should India be concerned?" 13 *Indian Journal of Occupational and Environmental Medicine* 1, 11-16 (2009), p. 1.

[705] The detailed rules for the implementation of the Kyoto Protocol were adopted at COP 7 in Marrakesh, Morocco, in 2001 and also known as "Marrakesh Accords".

[706] The Article 12 of the Kyoto Protocol defines the Clean Development Mechanism as "The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3."The clean development mechanism (CDM) defined in Article 12 provides for Annex I Parties to implement project activities that reduce emissions in non-Annex I Parties, in return for certified emission reductions (CERs). The CERs generated by such project activities can be used by Annex I Parties to help meet their emissions targets under the Kyoto Protocol. Article 12 also stresses that such projects are to assist the Developing country host Parties in achieving sustainable development and in contributing to the ultimate

implement an emission-reduction project in developing countries. Such projects will generate revenue from sale of saleable certified emission (CER) credits, each equivalent to one tonne of CO2, which can be counted towards meeting Kyoto targets.

India undertook several measures to give effect to the Kyoto Protocol. Under the UNFCC, State Parties are required to send national communications reporting on their carbon emissions and climate mitigation activities. India, however, has not been required to send these reports as regularly or in as much detail as rich nations, especially for those actions that are not internationally funded. Here too, India is prepared to provide more detailed information, including self-funded actions on climate change, which show India's growing interest, especially in the view of the pre- and post-Copenhagen efforts.

The Indian GHG Inventory covers five sectors, namely, energy, industrial processes, agriculture, forestry and wastes. India has developed emission factors for methane emissions from paddy cultivation, CO2 emissions from Indian coal, etc. India has established a Technology Information Forecasting and Assessment Council which aims to foster capacity building in the areas of environmentally sound technology transfer. With an aim to preserve forests and biodiversity, India has intensified its efforts for the rehabilitation of degraded areas, conservation of biodiversity and protected areas including 75 national parks and 421 wildlife sanctuaries covering 146,000 square km.[707] To protect and monitor prevention of erosion of its fragile ecosystems, India has established a Standing Committee under the Coastal Zone Regulation Notification of 1991. At academic and research institutions level, India has been developing climate change scenarios which would be useful to forecast necessary strategies for the country in collaboration with the Indian Meteorological Department and independent research agencies. Furthermore, to benefit from global research and policy developments, India's scientific institutions and scientists have been actively participating in the International Indian Ocean Expedition, Monsoon Experiment, Indian Ocean Experiment, World Climate Research Project, Global Observing System and International Geosphere-Biosphere Programme.

By introducing several new measures in the last decade, India is keeping itself prepared for various climate change scenarios, including, the capacity of renewable energy installations; improving air quality in major cities; and enhancing afforestation. These measures contribute to the sustainable development through climate-friendly path. The Kyoto Protocol has envisaged three innovative flexibility mechanisms which aim to reduce the overall costs of achieving emission targets, namely Emission Trading[708] (article 6),[709] joint

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objective of the Convention. CDM has three goals, namely, to contribute to the achievement of sustainable development, contribute to the achievement of UNFCC goals and help Annex B parties in meeting their emission targets.

[707] More detail facts and figures available at www.moef.nic.in.

[708] The proponents of carbon trading believe that such markets can be useful in gaining experience and developing standard framework for monitoring emissions. It can also help in discovering the price of reducing GHGs [greenhouse gases]. But opponents feel that stress should be on undertaking real reductions by cutting fossil fuel use causing GHG emissions rather than on purchasing the right to pollute by buying emission allowances. *Carbon on sale, Equity Watch, Centre for Science and Environment,* 15 June 2001.

[709] "For the purpose of meeting its commitments under Article 3, any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy."

implementation (article 6)[710] and clean development mechanism (article 12).[711] CDM, although at the nascent stage, has enormous potential.

### 7.5. Climate Change Negotiations and India

As far as India's negotiating position and strategies are concerned, it centers around three main interests. First, it would like to have no legally-binding emissions reduction target. Second, it would not like to have legally-binding peaking year for the country. Third, a distinction between supported and unsupported mitigation actions by the developing countries with respect to measurement, reporting and their verification (MRV). Although India's statement at Copenhagen ensured that the developing countries' mitigation actions will be subject to domestic MRV, and that respect for national sovereignty will be safeguarded under its provisions for international consultations and analysis of the domestic mitigation actions that are implemented with their own resources and independent from international finance and technology support,[712] India and China are wary of such an implementation.

These three interest areas are in direct conflict with the demands and expectations of the Industrialised West. During the Copenhagen Summit, it became apparent that any major achievement would be possible on the basis of a majority or two-thirds majority voting, as consensus[713] was impossible to reach. By adopting the voting

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[710] Joint implementation (JI) under Article 6 of the Kyoto Protocol provides for Annex I Parties to implement projects that reduce emissions, or remove carbon from the atmosphere (Carbon sequestration), another Annex I Parties, in return for emission reduction units (ERUs). The ERUs generated by JI projects can be used by Annex I Parties towards meeting their emissions targets under the Protocol.

[711] CDM is largely seen as a program for sustainable development, involving Hugh opportunities for foreign investment. Kiran Nair provides latest status on the flexibility mechanism. The paper concludes that "the flexible mechanisms are still in their infancy stages and will require more time and changes in the system in order to mature into an efficient method of encouraging the abatement of GHGs at the lowest possible cost. The development of more emissions trading systems similar to the EU ETS will see the maturing of the carbon market, and eventually, would ideally lead to a unified global emissions trading system. This would yield the benefits of encouraging the abatement of GHGs across the globe by providing low emitters with a financial incentive to do so and will also encourage the implementation and adoption of cleaner and more sustainable technologies. The Clean Development Mechanism has so far provided the opportunity for an information exchange between Annex B countries, which, generally speaking possess greater expertise with regards to renewable energy technologies, and non-Annex B countries. The numerous CDM projects that have already been implemented have already seen this exchange of expertise in the field of renewable energy technologies, especially in countries such as India, China, Brazil and Mexico. With the improvement in the efficiency and organization of the CDM system to be brought about by future changes, there exists a great potential for CDM projects to promote the successful implementation of renewable energy technologies all over the globe. Like the other flexible mechanisms included in the Kyoto Protocol, Joint Implementation has so far only produced mediocre results, although there exists a lot of room to improve the system. It probably has been the least successful of the flexible mechanisms, but there exists a lot of potential to implement environmentally sustainable projects, especially in Russia, once the system of approval and implementation streamlines its organizational procedures and improves its efficiency. http://www.nowum-energy.com accessed on 25 August 2012.

[712] R. K. Pachauri, *Climate Change and Technology Transfer*, (The Energy Resource Institute, 1998).

[713] It is quite interesting to note that during the Copenhagen conference, the Accord prepared by the US, China, India, Brazil, and South Africa make no mention of a legally binding instrument. It has not been surprising then the Accord was simply 'recognised' instead of 'adopted' by the participating nations. At the Copenhagen Conference, [t]he three-page accord that Mr. Obama negotiated with the leaders of China, India, Brazil and South Africa and then presented to the conference did not meet even the modest expectations that leaders set for this meeting, notably by failing to set a 2010 goal for reaching a binding international treaty to seal the provisions of the accord. Elisabeth Burleson, *Energy Policy, Intellectual Property and Technology Transfer to Address Climate Change* above at p. 551. India together with several developing countries succeeded in getting Kyoto Protocol from completely killed off at Copenhagen.

strategy, developed nations can tackle the resistance of countries like India and China. However, India has resisted and is ought to resist such moves because of its experience with disarmament or arms control is a disappointing one. As countries like India and China are on the receiving end on the climate change issue, it is expected that they will strongly prefer consensus on substantive matters. Thus, a deadlock is likely to follow and which in turn, will have significant adverse impact on moving ahead with the predictable, stable and adequate funding for mitigation, adaptation, capacity-building[714] and innovation cooperation. India, together with China and Brazil, has demanded that the developed countries allow the developing countries equitable space for development as well as providing them with finance, technology and capacity-building support, based on their historical responsibility for climate change.

Some of the pertinent issues on which India needs to take an active stand and create consent of developing countries are – the acceptable concentration levels to the developing nations, reducing the risks for both developed and developing nations and thus obtaining a fair share of the global environmental space.[715] It is known that developing countries' share in emission levels is much below (almost un-comparable), but they are most vulnerable to rising impacts of global warming. Their development is ought to come at the cost of increasing emissions, a situation which is clearly unacceptable to the developed world. India, therefore, needs to champion the cause of developing nations in consultation with emerging economies of China, Brazil, South Africa, Malaysia, among other countries.[716]

India needs to take a strong and assertive stand because climate change has significant adverse impacts on agriculture of many developing countries. Not only this, but climate change has impact on agriculture yields, GDP and welfare.[717] Therefore, India can ill afford to lag behind in taking aggressive stand at the policy forums.

Having experienced large scale disasters like cyclones, earthquakes, irregular monsoon and heavy economic and human losses in the last decade; India can ill afford not to highlight these problems in its negotiating positions. India has well laid-out its energy plan of action. However, the plan focuses on the use of coal, even as other non-conventional and renewable sources of energy are being pursued with definite strategies, plan of action and economic investments. On the one hand, India has to bear higher costs due to import of non-

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[714] Donna G. Craig, Nicholas A. Robinson and Koh Kheng-Lian, Koh (ed.), *Capacity building for environmental law in the Asian and Pacific region: approaches and resources*, 261-271 (Manila: Asian Development Bank, Manila, 2002).

[715] Through delays, rich OECD countries are occupying global environmental space. During 1990 to 2020 (during which period they were supposed to act, haven't acted and are not likely to act) OECD countries would have emitted more than India would emit in the next 30 years, assuming a 5% increase in India's GHG emissions every year. Parikh at 19.

[716] Climate change, if it is permitted to happen, will impose a heavy burden on future generations in all countries not just on the citizens of developed countries. Even after 50 years, Indian nationals are likely to be poorer than those of the OECD today. Thus, by not taking actions now the burden is transferred not just to rich citizens of the OECD of the next generation but also to poorer Indians of tomorrow who would be poorer than today's citizens of OECD.

[717] Considering a range of equilibrium climate change scenarios which project temperature rise of 2.5$^{o}$C to 4.9$^{o}$C for India, Kumar and Parikh (2001a) estimated that (a) without considering the carbon dioxide fertilization effects yield losses for rice and wheat vary between 32 and 40%, and 41 and 52%, respectively; (b) GDP would drop by between 1.8 to 3.4%. Their study also showed that even with carbon fertilization effects, losses would be in the same direction but somewhat smaller. Using an alternative methodology Kumar and Parikh (2001a) showed that even with farm-level adaptations, the impacts of climate change on Indian agriculture would remain significant. They estimated that with a temperature change of +2°C and an accompanying precipitation change of +7 %, farm level total net-revenue would fall by 9%, whereas with a temperature increase of +3.5°C and precipitation change of +15%, the fall in farm level total net-revenue would be nearly 25 %. *Ibid*. p.6.

coal energy sources, while on the other hand, its reliance on and easy and cheaper availability of coal as the sustainable source of energy, will continue. The poor masses of India will continue to rely on coal as the sole energy source, which will directly add to CO2 emission. As per the ongoing negotiations, India needs to sell carbon quotas and make maximum benefits out in the next two decades. Thus, India can not afford to waste time by contributing to the prolongation of negotiations, but at the same time, it is not in position to extract maximum benefits in the current scenario. Hence, India's negotiating strategy largely depends upon how the Indian negotiators carve out an interest-protection based position for India. As far as India's emissions profile is concerned, it is governed by different sectors, such as power, steel, transport, by different expenditures groups like rural, urban, low, middle and high income as well as different purposes such as different fuels – coal, oil and gas. These actors and sources contribute India's domestic and international position on the issues directly. Therefore, India's position with regards to the emission profile rests on how India is able to deal with these actors and sources.

Infrastructure is considered to be the most important user sector in the current economic growth scenario of India and it directly adds to the carbon emissions, as this sector uses energy intensive materials such as aluminum, bricks, cement, glass, lime and so on. As the infrastructure remains and will remain the most important source of economic growth and likely to attract huge foreign direct and indirect investments, India's position is constrained to this extent. Although Indian policies and plans chalk out various means and methods for energy conservation, renewable energy sources promotion, afforestation and waste land development, fuel substitution, India can achieve sustainable economic growth only by increased energy usage. There is a negative correlation between India's needs and world's expectations in this regard. The more and more India relies upon the energy sources, especially the traditional ones and promotes infrastructural growth, less and less will it be able to meet the world's expectation. Therefore, India needs to carve out a position, which, while promoting India's economic growth also caters to the world's demands.[718]

One important domestic area which has significant importance for India's position at international level, concerns to price reforms, subsidy removal and joint ventures in consumer goods. India has withstood the demands of developed countries with regards to the subsidy regime which has been applicable to the energy sector. However, with the import liberalization and growing energy needs, India is facing tough competition and efficiency upgrades. India has adopted various reform measures to gradually remove subsidy from coal, diesel and electricity. However, these removals create civil unrest among the subsidy beneficiary groups which Indian policy-makers, regardless of the government, can ill-afford to stop. Hence, India is forced to take a very tough stand in the international negotiations.

### 7.6. Concluding remarks

India has signed or ratified 14 international conventions which have a direct or indirect bearing on the climate change regime. The signature and ratification of the major legal instruments on environment and climate change show India's affirmative stand and commitment to create international consensus on these issues, despite the heavy burden expected of it and several emerging market economies. The Indian position shows that it has adopted a comprehensive approach to the climate change issue, namely by announcing legal and policy measures

[718] Most, if not all, energy saving methods will come at the cost of human welfare, which India can ill-afford to ignore.

to mitigate, adapt, fund and innovate the measures to mitigate the climate change. The Indian position has moved away from reactive to proactive and cooperative. India earlier stood up to the previous position that it would be unable to quantify the targets for reducing greenhouse gases emissions as that will impact its poverty reduction goals.[719] However, since then India has inclined towards adopting broad indicative numbers, without being obliged by international law. India, despite its reservations with regards to the domestic MRV, also agreed to provide more detailed and regular information on the domestic climate change efforts which would contribute to additional transparency.

It can also be concluded that despite its increasingly proactive engagement on climate issues, India has not wavered from its position - that equity concerns must underlie the international climate negotiations.[720] This position of a common goal of global climate stabilization, with each country having a different responsibility to address the problem reinforces India's consistent position on such other issues in international law at large. A note of caution on India's inflexible stand is essential that although India's inability and avowed developmental goals are appreciable, it shall be clear that the cost of inaction would be higher than the cost of mitigating climate change. Thus, it needs to make a judicious balance between these two equally important options.

Although it is in India's interest to act to mitigate the impacts of climate change, India cannot and shall not allow other countries to overlook the history and unequal responsibilities of the developed versus the underdeveloped countries. Any approach other than this can lead to India's subjugation and compromise its obligation to meet national developmental goals. India cannot afford the climate change diplomatic niceties to sell out its commitment to vast poverty. The Indian approach in climate change shall be having same fundamental tenets as its nuclear doctrine policy which respects India's overall stand, concerns and vulnerability. The climate change is no way lesser important to strategic security issues. Hence, India shall have the same affirmative stand.

Damages, mitigation costs and discount rates, will remain the three most important factors in determining the domestic policy on climate change for India.[721] After examining various climate change solutions for India, it can be concluded that India must utilize a holistic approach to address climate change that includes domestic and international components.

It is important that solving the climate change problem needs to be linked to enhancing socio-economic development and sustainable consumption and production. India has dual-responsibility, it must commit, both domestically and internationally, to curb emissions and protect the environment. It can be seen that the principles of equity, the right to development, full compensation for the incremental costs of mitigation and commitments

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[719] "India cannot and will not take emission reduction targets because poverty eradication and social and economic development are first and over-riding priorities," Environment Minister Jairam Ramesh said in June 2010, Bangkok.

[720] The major emitter nations are bound to proactively engage India and China to reach Climate Change Convention goals.

[721] Professor Hsu winnows down all of the variables of climate change down to just three – damages, mitigations costs, and discount rates – to help policymakers and analysts keep their eye on what it is that can change a country's decision environment. Professor Hsu's theory describes the decision for nations considering mitigation measures to reduce GHG emissions as consisting of four simple factors: (1) its perceived damages from climate change, (2) its costs of mitigation, (3) the rate at which it discounts the welfare of future generations, and (4) the prospect of other countries agreeing to mitigation.193 He says that it is critical to include the U.S, China, and others because the future of the negotiations and an effective global climate regime depend on the ability of the developed nations such as the U.S. and rapidly developing economies such as China and India to agree on emissions reduction targets and binding mitigation obligations and for the developed countries to provide adequate financial and technological aid to the developing countries.

of industrialized nations to greater reductions, remain the core negotiating international law principles for India. India is unlikely to take any substantial commitments in future. Energy is the critical source for India's economic development and thus remains a main cause for its willingness to take on further emission reduction commitments. It can be also concluded that climate change has become a very important domestic agenda and India's vulnerability to climate change is growing. However, the climate change still can be considered a major foreign policy issue than an exclusive domestic issue.

The Climate Change negotiations suggest that India would continue to adhere to the principle of equity and Common but Differentiated Responsibilities (CBDR).[722] While India's insistence upon the implementation of these principles is understandable, India is yet to set specific measurable guidelines and criteria which would define its overall legal and policy framework. The question remains how India would be able to achieve its own target without having a firm framework in place, the framework which complies with international obligations without comprosmising its traditional position. International pressure is unlikely to yield much substantial results. It is also unlikely that India will align its position with US in return for long-term benefits.[723] As the analysis of India's policy and practical approach to international environmental law shows, India as a nation aspires to ensure environmental and climate justice at international level. Serving industrialized nations by exporting cheaply manufactured goods is not in a long term interest of India. Industrial energy needs and rising living standards will continue to create higher and higher energy demands in various core and ancillary sectors. India needs to work on both approaches - a top-down and bottom-up approach and the challenges in deploying both approaches are far more serious as mentioned above than previously thought. A top-down command-and-control approach will enable India set caps within India for controlling emissions while the bottom-up approach employed by civil society institutions, industrial houses, will help these actors and institutions to achieve goals of socio-economic development. Finding alternative sources of energy will have positive results in this regard. A robust framework with concerted and coordinated approach will ensure and maintain a stronger voice of India at the climate change negotiations. India lacks coherent negotiating strategy in climate change area and this is one of the weaknesses over which India will have very little say due to compulsions of political economy. This sustainable ambivalent position will directly and negatively affect India's credibility and leadership role in holding up the principles of sustainable development and climate change, especially among developing countries. As Arun Sukumar argues, "New Delhi would do well to reassess its notion of equity, as other developing nations have rightfully done. When, in 2011, Ethiopia announced its intentions to be 'carbon neutral' by 2025, it effectively abandoned the premise that low emitters can forever point fingers at industrialised countries. Just as developed nations bear responsibility to assume more ambitious commitments, India should treat its differentially positioned population in equitable terms. The pernicious effects of climate change will be

[722] India considers these principles 'non-negotiable" and made this clear at Durban Summit in 2011. See the statement of Environment Minister Ms Jayanthi Natarajan at Durban Summit. India considers that "the global efforts to address climate change must be anchored to the basic principles of "equity" and "Common but differentiated responsibility (CBDR) and respective capabilities. Equitable burden sharing that provides for an equal sharing of the resource of the atmosphere for all human beings is a natural expectation we have from the on-going negotiations". Address by Foreign Secretary Mrs. Nirupama Rao on 'Key Priorities for India's Foreign Policy' at the International Institute for Strategic Studies. London, 27 June 2011.

[723] A strategic report produced by Deloitte, *Shale Gas: A Strategic Imperative for India"*, October 2010 provides necessary statistical details which can be used to draw a conclusion as to how and why India and US will work together for shale gas exploration and export for mutual benefits and how in the process both countries are likely to dilute the climate change goals and objectives, similar to their bilateral agreement dealing with non-surrender of each others' national diluting the effectiveness of the Rome Statute.

most acute among India's vulnerable sections. If the West owes a historic obligation to the rest in confronting climate change, so too does India towards its impoverished."[724] An independent study carried out to assess India's National Action Plan on Climate Change suggests few significant concerns. First, the focus of India will remain on sustainable development with mitigation as a co-benefit. However, the policies to implement the obligations will lead to avoided emissions, without clear emission targets in the mission. Secondly, there is no mention of the mitigation level. In general, the plan lacks link between sustainable development goals and objectives which is the central to India's overall international position.[725]

[724] http://www.thehindu.com/opinion/lead/change-the-climate-for-indias-poor/article4788457.ece accessed on 31 July 2013.

[725] Sujatha Byravan and Chella Rajan, 'An Evaluation of India's National Action Plan on Climate Change', www.indiaclimatemissions.org. Accessed on 31 July 2013.

**Status of India in Multilateral Treaties on Environment and Climate Change**

**As on 10 September 2013**

| No | Legal Instrument | Entry into Force | Accession / Ratification |
|---|---|---|---|
| 1 | Vienna Convention for the Protection of the Ozone Layer | 22 September 1988 | 18 Mar 1991 (A) |
| 2 | Montreal Protocol on Substances that Deplete the Ozone Layer | 1 Jan 1989 | 19 Jun 1992 (A) |
| 3 | Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer | 10 Aug 1992 | 19 Jun 1992 (A) |
| 4 | Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer | 14 Jun 1994 | 3 Mar 2003 (A) |
| 5 | Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer adopted by the Ninth Meeting of the Parties | 10 Nov 1999 | 3 Mar 2003 (A) |
| 6 | Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer | 25 Feb 2002 | 3 Mar 2003 (A) |
| 7 | Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal | 5 May 1992 | 24 Jun 1992 (R) |
| 8 | United Nations Framework Convention on Climate Change | 21 Mar 1994 | 1 Nov 1993 (R) |
| 9 | Kyoto Protocol to the United Nations Framework Convention on Climate Change | 16 Feb 2005 | 26 Aug 2002 (A) |
| 10 | Convention on Biological Diversity | 29 Dec 1993 | 18 Feb 1994 |
| 11 | Cartagena Protocol on Biosafety to the Convention on Biological Diversity | 11 Sep 2003 | 17 Jan 2003 (R) |
| 12 | United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought And/Or Desertification, Particularly in Africa | 26 Dec 1996 | 17 Dec 1996 (R) |
| 13 | Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade | 24 Feb 2004 | 24 May 2005 (A) |
| 14 | Stockholm Convention on Persistent Organic Pollutants[726] | 17 May 2004 | 13 Jan 2006 (R) |

[726] India (28 March 2006) Declaration: "Any amendment to Annex A, B or C shall enter into force only upon the deposit of its instrument of ratification, acceptance, approval or accession with respect thereto."

# CHAPTER VIII

# LAWS OF DISARMAMENT OF THE WEAPONS OF MASS DESTRUCTION: A CASE STUDY OF CHEMICAL WEAPONS CONVENTION

## 8.1. Introduction

India has been a staunch proponent of disarmament[727] and has vehemently advocated its stated position in international political and legal forum. For example, in the area of nuclear weapons, it has actively worked for the full and complete prohibition of nuclear weapons as long back as its independence. It did not sign the treaties banning tests, including the Comprehensive Test Ban Treaty (CTBT) and the earlier treaty banning nuclear proliferation, even though it supported that concept as part of a larger scheme of comprehensive prohibition of nuclear weapons. Its emphasis has always been on eventual elimination of nuclear weapons and general and complete disarmament. In the area of biological weapons, India became a party to the Biological Weapons Convention.[728] However, as there has not been any verification protocol,[729] it is difficult to determine whether

[727] For some of the latest international and national scholarship on the issue, see, Mario, E Carranza, "Avoiding a nuclear catastrophe: Arms Control after the 2002 India-Pakistan Crisis", 40 *International Politics* 3, 313-339 (2003); Brahma Chellaney, "India's Nuclear Planning, Force Structure, Doctrine and Arms Control Posture", 53 *Australian Journal of International Affairs* 1, 57-69 (1999); Sumit Ganguly, "India's Pathways to Pokhran II: the Prospects and Sources of New Delhi's Nuclear Weapons Programme", In Sumit Ganguly, *Going Nuclear: Nuclear Proliferation and International Security in the 21st Century*, 147-175 (Cambridge: MIT Press, 2010); Shiv R. S Bedi, "The Development of India's Nuclear Weapons Policy in the Framework of the Development of International Humanitarian Law by the International Court of Justice", Shiv R. S. Bedi, *International Criminal and Human Rights*, 155-200 (New Delhi, Manak: 2010); Amitabh Singh and Ginu Zacharia Oomen, "Towards a World Free of Nuclear Weapons: Reporting an International Conference", 64 *India Quarterly* 2, 1-26 (2008); Waheguru Pal Singh Sidhu, "India's Nuclear Use Doctrine", *Planning the Unthinkable: How New Powers will use Nuclear, Biological and Chemical Weapons,* 125-157 (Ithaca: Cornell University Press, 2000).

[728] India signed the BWC on 15 January 1973 and ratified the same on 15 July 1974. India has a well-developed biotechnology infrastructure that includes numerous pharmaceutical production facilities bio-containment laboratories (including BSL-3 and BSL-4) for working with lethal pathogens. It also has highly qualified scientists with expertise in infectious diseases. Some of India's facilities are being used to support research and development for BW defense purposes. India has ratified the BWC and pledges to abide by its obligations. There is no clear evidence, circumstantial or otherwise, that directly points toward an offensive BW program. New Delhi does possess the scientific capability and infrastructure to launch an offensive BW program, but has chosen not to do so. In terms of delivery, India also possesses the capability to produce aerosols and has numerous potential delivery systems ranging from crop dusters to sophisticated ballistic missiles. In 2001, after Indian Postal Services received 17 "suspicious" letters believed to contain Bacillus anthracis spores, a Bio-Safety Level 2 (BSL-2) Laboratory was established to provide guidance in preparing the Indian government for a biological attack. B. anthracis is one of many pathogens studied at the institute, which also examines pathogens causing tuberculosis, typhoid, hepatitis B, rabies, yellow fever, Lassa fever, Ebola, and plague. The Defense Research and Development Establishment (DRDE) at Gwalior is the primary establishment for studies in toxicology and biochemical pharmacology and development of antibodies against several bacterial and viral agents. Work is in progress to prepare responses to threats like Anthrax, Brucellosis, Cholera and Plague, viral threats like smallpox and viral hemorrhage fever and biotoxic threats like botulism. Most of the information is classified. Researchers have developed chemical/biological protective gear, including masks, suits, detectors and suitable drugs. India has a 'no first use' policy. India has ratified the BWC and pledges to abide by its obligations. There is no clear evidence, circumstantial or otherwise, that directly points toward an offensive BW program. New Delhi does possess the scientific capability and infrastructure to launch an offensive BW program, but has not chosen to do so. In terms of delivery, India also possesses the capability to produce aerosols and has numerous potential delivery systems ranging from crop dusters to sophisticated ballistic missiles. However, no information exists in the public domain suggesting interest by the Indian government in delivery of biological agents by these or any other

India possesses these weapons and what are its plans for destruction, if possessed the biological weapons. On one hand, India possessing of nuclear weapons have not joined any nuclear weapons treaty, on the other hand, lack of verification protocol for Biological Weapons Convention offers a bleak picture[730] as far as India's letter and spirit compliance of international conventions on weapons of mass destruction are concerned.[731] This chapter examines the following issues: What are the obligations on India under the Chemical Weapons Convention and how it has attempted to fulfil these obligations? Which challenges India has faced during the negotiations of the Convention and while implementing the Convention at domestic level? How India can be considered to have contributed to the promotion of non-proliferation regime envisaged under the Convention? What has been India's position and approach with regard to the provisions of international cooperation and assistance to promote peaceful uses of chemistry? What role India has played in the creation of the OPCW and how it has contributed to the legal, administrative, and other organizational issues of the Organisation?

### 8.2. Overview of the Chemical Weapons Convention

Before embarking on the analysis, a brief but analytical overview of the CWC and the Organization for the Prohibition of Chemical Weapons which oversees the implementation of the Convention is essential. CWC is a disarmament agreement which outlaws the production, stockpiling and use of chemical weapons[732]. As of 15 July 2013 189 states were party to the CWC. India is one of the 65 original members of the Organization.[733] OPCW is mandated to prohibit development, production, stockpiling, and use of chemical weapons and to accomplish their destruction. The Organization mandates each member state to harmonise its laws in line with the obligations under the CWC. The implementation of the Convention affects world trade in chemicals[734] as well as has impact on the security of member states. The CWC requires States Parties (military and industry sectors alike) to submit sensitive and confidential business and military information, thus conceding a small thread of sovereignty. Activities of natural and legal persons belonging to States Parties are also regulated by the legislations implementing the Convention. To achieve these objectives, the Organization is endowed with an independent international and municipal legal personality, human and financial resources, etc.

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means. To reiterate the latter point, in October 2002, Indian President Dr Kalam asserted that "we [India] will not make biological weapons. It is cruel to human beings..."

729 Daniel Feakes, Evaluating the CWC verification system, 4 *Disarmament Forum*, 11-21 (2002); Sebestyhn Gork and Richard Sullivan, Biological toxins: a bioweapon threat in the 21st century, 33 *Security dialogue* 2 141-56 (Oslo: International Peace Research Institute, 2002).

730 Onno Kervers, Strengthening compliance with the Biological Weapons Convention: the protocol negotiations, 7 *JCSL* 2, 275-292 (2002).

731 Jez Littlewood, "The Verification Debate in the Biological and Toxin Weapons Convention", in 3 *Disarmament Forum*, 15-25 (Geneva: UNIDIR: 2011); Piers Millet, "The Biological Weapons Convention: Securing Biology in the 21st Century", In 15 *Journal of Conflict and Security Laws* 1, 25-43 (2010); Jack M Beard, "The Shortcomings in the Indeterminacy in Arms Control Regimes: the Case of the Biological Weapons Convention", 101 *American JIL* 2, 271-321 (2007).

732 Its full name is the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. The Convention is administered by the Organisation for the Prohibition of Chemical Weapons (OPCW), which is an independent organization and often mistaken as being a department within the United Nations.

733 India signed the Convention on 14 January 1993 and submitted the instrument of ratification on 3 September 1996.

734 Doaa Abdel Motaal, "Reaching REACH: the Challenge for Chemicals Entering International Trade," 12 *Journal of Int Economic Law* 3, 643-662 (2009); Carter Ashton, John Deutch and Philip Zelikow, "Catastrophic Terrorism: Tackling the New Danger", 77 *Foreign Affairs* 6, 8-94 (1998).

Six States Parties including India have declared a total of (originally) approximately 70,000 tonnes of CW chemical agents. Twelve States Parties including India have declared 64 chemical weapons production facilities – Bosnia and Herzegovina, China, Yugoslavia (now Serbia and Montenegro), France, the Islamic Republic of Iran, Japan, Libya, the Russian Federation, UK, USA, and one other State Party – CWPF past capabilities.[735]

Whether India has complied with essential obligations under the CWC? Whether the compliance fully meets the letter and spirit of the Convention provisions? Which problems India encountered and whether in resolving the challenges, India compromised with its obligations? How the Indian compliance can be compared vis-à-vis other States Parties possessing CW and CWPFs? Finally, does Indian position and practice suggest evolution of any new norm or consolidation of an existing norm? These are the critical questions which need to be answered in order to defend a central argument of this chapter that Indian position and practice with regard to the laws of disarmament for weapons of mass destruction merely reflects a power and interest paradigm of a dominant state's position in the development of international law.

### 8.2.1. Regime on the destruction of chemical weapons and destruction and or conversion of chemical weapons production facilities

What are the obligations for India as far as destruction of chemical weapons and destruction and or conversion of chemical weapons production facilities are concerned? Destruction of chemical weapons and destruction and or conversion of chemical weapons production facilities are the fundamental obligations. Under Article III, India was obliged to submit, not later than 30 days after the Convention has entered into force for it (i.e. 29 May 1997), an initial declaration stating whether it owns or possesses any chemical weapons in any place under its jurisdiction or control. It was also required to specify the location, the aggregate quantity and a detailed inventory, and declare whether it has transferred or received, directly or indirectly, any chemical weapons since 1 January 1946. For reasons unknown,[736] India denied possession of chemical weapons.[737] This position attracted a lot of media and political queries after the immediate entry into force of the CWC. In this regard, it is quite interesting to note that the Joint Declaration of India and Pakistan of 1992 categorically mentions non-possession of chemical weapons by either party.[738] Based on this joint declaration, it may be inferred that production of chemical weapons may have taken place after 19 August 1992.

Along with its initial declaration, India was required to provide a general plan for the destruction of those chemical weapons, together with an overview of the national destruction programme and information on

[735] In addition, nine States Parties declared OCW - Belgium, Canada, France, Germany, Italy, Japan, Slovenia, UK and USA. Three States Parties China, Italy and Panama – have declared abandoned chemical weapons (ACW). www.opcw.org.

[736] In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, India declared that it did not possess chemical weapons, Reply to a NV of the UN Secretary-General, referred to in Report of the Secretary-General in respect for the right to life: elimination of chemical weapons, prepared in accordance with the UN Sub-Commission on Human Rights Resolution 1988/27, UN document, E/CN.4/Sub.2/1989/4, 17 August 1989, para. 98.

[737] According to a 1991 DIA assessment, India has the technical capability and industrial base needed to produce precursors and chemical agents, and it is expected to acquire chemical weapons over the next two decades. Development is expected to be "paced by the parallel Pakistani program." E. J. Hogendoorn, "A Chemical Weapons Atlas", September/October 1997 pp. 35-39 (vol. 53, no. 05) © 1997 Bulletin of the Atomic Scientists

[738] "…reaffirming their respective unilateral declarations of non-possession of chemical weapons…", India – Pakistan Joint Declaration on the Complete Prohibition of Chemical Weapons of 19 August 1992.

its efforts to fulfil the Convention's destruction requirements.[739] India submitted the required information and covered all the requisite norms with adequate emphasis. Thus, India fully met its first procedural obligation to provide initial declaration in a timely manner to the OPCW.

### 8.2.2. Initial declaration on CW programmes

One of the primary obligations under the CWC is to destroy the CW, ACWs, OCWs, CWPFs. India has declared possession of CW[740] and CWPFs, accordingly, it is required to destroy the stockpiles and facilities in accordance with extensive and complex provisions that stipulate principles, methods, deadlines and order of destruction.[741] By fulfilling these obligations in letter and spirit, India has been able to strengthen the first ever truly multilateral non-discriminatory disarmament regime.[742] The norms for destruction of CW are also to be followed keeping in good faith the environmental consequences of such behaviour. For example, CW destruction shall not be carried out by dumping in any body of water, land burial or open-pit burning. India has conducted destruction of CW at specifically designated and appropriately designed and equipped facilities. India designed the facilities and carried out the destruction processes in the manner laid down in the provisions of the Convention. As the information pertaining to Indian CW destruction programme are highly confidential, the exact facts and figures are not available in the public domain.

### 8.2.3. Annual Plans, Reports and Detailed Facility Information

India was obliged to submit detailed annual plans for destruction, facility information, and annual reports. In addition, it was also required to submit detailed facility information to enable the OPCW Technical Secretariat to develop preliminary inspection procedures. It should be noted that such facility information is not part of the detailed annual plans, but is to be submitted just once, for each facility, as long as no changes occur. Detailed annual plans are required for each facility, specifying the types of chemical weapons that will be destroyed, a site diagram, and a schedule of activities for each annual destruction period. These plans are to be submitted not less than 60 days before the annual destruction period begins. India was also required to submit annual reports on the

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[739] According to this Plan, India was required to provide a general schedule for the destruction, together with details of the number of destruction facilities existing or planned, of the plans and training programmes for the personnel who will operate those facilities, national safety and emissions standards; information on the development of new methods of destruction and on the improvement of existing methods; estimates of the costs of the destruction programme; and information of any issue that could have an adverse impact on the national destruction programme.

[740] India unilaterally decided to throw open its chemical weapons stockpile for international expert inspection, complying with the Chemical Weapons Convention. It should be noted that the most important thing about India's chemical weapons programme was that it has maintained very high secrecy with regards to its declaration and destruction programme.

[741] It is believed that during the Cold War, India developed and produced limited quantities of CW agents as part of an offensive CW program. However, it abandoned its offensive CW program at some point prior to 1997. http://www.nti.org/e_research/profiles/india/chemical/index.html, accessed on 2 November 2009.

[742] India has submitted declarations on its "testing and development of chemical weapons and their related facilities which were developed only to deal with the situation arising out of the possible use of chemical warfare against India." Chinese defense researchers have claimed that India possesses 1,000 tons of chemical warfare agents, which are located at five chemical weapons production and storage facilities. It is indicated that these agents include mainly mustard and there are several possible delivery munitions. http://www.nti.org/e_research/profiles/india/chemical/index.html, accessed on 2 November 2009.

destruction of their stockpiles, which will enable the Secretariat to assess the rate of progress – and reasons for the lack thereof – at each destruction facility.[743] Based on the annual reports and statements made by the Director-General during Executive Council, it is considered that India provided such information in a timely manner.

**8.2.4. Declarations with regards to CWPF programme**

India was required to declare, not later than 30 days after entry into force for it, any chemical weapons production facilities (CWPFs) it owns or possesses, or which are located in any place under its jurisdiction or control at any time since 1 January 1946. It was also required to declare whether it has transferred or received, directly or indirectly, any equipment for the production of chemical weapons, specifying the dates of transfer or receipt. Along with its initial declaration, India was also required to provide a general plan for destruction, specify what actions will be taken to close each facility, and provide a general plan for its temporary conversion to a destruction facility. India fulfilled these obligations by submitting its initial declaration on 28 May 1997. Furthermore, under the norms of the Convention, India was required to destroy all equipment, buildings, and facilities for producing unfilled chemical munitions, and all equipment for chemical weapons (Verification Annex Part V, paragraphs 26 and 27). India was required to start the destruction of CWPFs no later than one year after EIF, and must complete no later than 10 years after the EIF of the Convention.[744] Under the terms of the Convention, it could however request for the conversion of a CWPF for purposes not prohibited under the Convention, whether the facility was already being used for such purposes at EIF of the convention, or it is planned to use it for such purposes. India availed this option to use its CWPF for Chemical Weapons Destruction Facility (CWDF) purposes on a temporary basis. In order to do so, India was required to fulfil various conditions for conversion stipulated in paragraphs 70 to 72 of Part V of the Verification Annex of the CWC. For example, it was required to submit a detailed plan for conversion of each facility not less than 180 days before conversion is planned to begin, including measures for the verification of conversion.[745] India took more than 10 years after entry into force of the Convention to fully meet the obligations under the CWPF destruction/conversion regime. Once India submitted its initial declaration, it was obliged to allow OPCW inspectors access to all declared facilities. From the OPCW perspective, the aims of the initial inspection are first of all to verify the information declared and to obtain any additional information needed for planning future verification activities at the facility. Next, the Convention requires the OPCW and India to enter into a facility agreement within 180 days after EIF. This agreement should include details of the inspection procedures for the facility, and arrangements for the conduct of verification activities by the Secretariat, under Articles IV, V and VI. The facility agreement is in fact intended to supplement the Convention's inspection procedures with site-specific requirements. Thereafter, the OPCW conducts routine inspections throughout the year. This procedure becomes important since the decision of India to convert all the CWPF into CWDF has mandated inspections of the above nature, and India in the various inspections conducted, has been successful in proving its commitment to the abhorrence of Chemical Weapons. India announced on 26 March 2009 the destruction of its declared chemical weapons, in accordance

[743] VA, Part IV(A), para. 36.

[745] The Convention details the procedures for review and consultation with regard to such combined plans for conversion and verification. The verification measures should not unduly interfere with the conversion process, and should be conducted in the presence of OPCW inspectors to confirm the conversion

with its obligations under the CWC, becoming the third nation to completely and verifiably destroy all of its chemical weapons and associated facilities.[746]

### 8.3. CW Defense Programme of India

India has a defensive CW program, overseen by the Ministry of Defense. The main research institutes overseeing India's military and civilian involvement with chemicals and dual-use materials are the Defence Research and Development Organization (DRDO) and the Department of Chemicals and Petrochemicals respectively. With regards to the routine inspections, India was, like all other States Parties, required to undertake main six tasks regarding the selection and treatment of inspectors; (1) approve inspectors, (2) provide visas, (3) extend diplomatic privileges and immunities to inspectors, (4) inspect equipment brought by inspectors and permit authorised equipment to accompany inspectors, (5) designate national points of entry and facilitate inspectors' safe transit to the inspection site, and (6) arrange for and provide necessary amenities for the inspection team. These are some of the most sensitive issues from the security and intellegence matters. The available public records show that India has not faltered on any of these obligations nor there any concern from the OPCW with regards to India's full cooperation with regards to the inspection procedures.

### 8.4. Non-proliferation of chemical weapons and chemical industry of India

While India declared the CW and CWPF and complied with the obligations, albeit beyond 10-year period, another most fundamental obligation laid down under the CWC is the prevention of proliferation of chemical weapons.[747] It is interesting to analyse whether the Indian chemical industry poses a challenge to an international organization to achieve the task, whether Indian companies, like the governmental actors, are in full compliance with the non-proliferation regime, which challenges India faces with regard to this aim and how it has been overcoming the same. This examination is essential, as the Indian chemical industry is one of the oldest domestic industries, contributing significantly to both the industrial and economic growth of the country since it achieved independence in 1947.

The Indian chemical industry produces nearly 70,000 commercial products, ranging from cosmetics and toiletries, to plastics and pesticides. The wide and diverse spectrum of products can be broken down into a number of categories, including inorganic and organic (commodity) chemicals, drugs and pharmaceuticals, plastics and petrochemicals, dyes and pigments, fine and specialty chemicals, pesticides and agrochemicals, and fertilizers.[748] The Indian pesticide industry has advanced significantly in recent years, producing more than 1,000 tons of pesticides annually. India is the 13$^{th}$ largest exporter of pesticides and disinfectants in the world, and in terms of volume, is the 12$^{th}$ largest producer of chemicals. The Indian agrochemical, petrochemical, and pharmaceutical industries are some of the fastest growing sectors in the economy. With an estimated worth of $28 billion, it accounts for 12.5% of the country's total industrial production and 16.2% of the total exports from the Indian manufacturing sector. With a special focus on modernization, the Indian government takes an active

[746] As of 31 July 2013, 55,939 or 78.57% of world's declared stockpile of 71,196 metric tons of chemical agent have been destroyed. www.opcw.org accessed on 5 August 2013.

[747] Timothy L. H. McCormack, "Some Australian Efforts to Promote Chemical Weapons Non-Proliferation and Disarmament", 14 *Australian YbIL* 157-178 (1993); Randall Forsberg, *Nonproliferation Primer: Preventing the Spread of Nuclear, Chemical and Biological Weapons*, (Cambridge: MIT Press, 1995); Graham Pearson, *The UNSCOM Saga: Chemical and Biological Weapons Non-Proliferation*, Basingstoke: MacMillan Press (1999); Bailey, Kathleen, *Strengthening Nuclear Nonproliferation*, Westview Press (1993).

[748] http://www.indianchemicalportal.com/chemical-industry-overview, accessed on 9 May 2010.

role in promoting and advancing the domestic chemical industry. The Department of Chemicals & Petro-Chemicals, which has been part of the Ministry of Chemicals and Fertilizers since 1991, is responsible for policy, planning, development, and regulation of the industry. In the private sector, numerous organizations, including the Indian Chemical Manufacturers Association (ICMA), the Indian Chemicals and Petrochemicals Manufacturers Association (ICPMA), and the Pesticides Manufacturers and Formulators Association of India, all work to promote the growth of the industry and the export of Indian chemicals. The Indian Chemical Manufacturers Association, for example, represents a large number of Indian companies that produce and export a number of chemicals that have legitimate commercial applications, but also can be used as precursors and intermediates for chemical weapons production.

### 8.4.1. Challenges to prevent proliferation of chemical weapons

The first and foremost important challenge is that India's capability to produce chemical weapons is greatly enhanced by the sophistication of its domestic chemical industry. A number of government-owned and private sector companies, as mentioned before, produce an array of dual-use chemicals that are potential chemical weapons precursors and intermediates. A number of the domestically produced chemicals can be found on the CWC lists of Schedule 2 and Schedule 3 chemicals[749], as well as on the Australia Group's chemical export control list (India is not a member of the Australia Group).[750] For example, Indian companies are capable of producing, 2-chloroethanol and thiodiglycol (both mustard precursors), phosgene, hydrogen cyanide (blood agent), and trimethyl phosphite and thionyl chloride (nerve agent precursors). United Phosphorus Ltd., for example, a Mumbai-based company, produces a number of precursor chemicals that are listed on Schedule 3 of the CWC, including phosphorus trichloride, phosphorus pentachloride, triethyl phosphite, and trimethyl phosphite. In 1992, United Phosphorus's export license was suspended for shipping trimethyl phosphite to

[749] The CWC requires states-parties to declare chemical industry facilities that produce or use chemicals of concern to the convention. These chemicals are grouped into “schedules,” based on the risk they pose to the convention. There are three schedules of chemicals – Schedule 1, Schedule 2 and Schedule 3. Schedule 1 is a list of chemicals which have been developed and used as chemical warfare agents and such chemicals must be destroyed. Schedule 2 contains chemicals that pose a significant risk to the Convention. These chemicals are highly toxic or incapacitating, or may be used as a precursor in the final stages of making of Schedule 1 chemical. Schedule 3 chemicals which pose a risk but which are produced and used in large quantities in industry. In addition, India like any other State Party was required to declare OCPF (Other Chemical Production Facilities). OCPFs comprise of two different categories of organic chemicals and these are Discrete Organic Chemicals (DOCs) and PSF chemicals. "Discrete organic chemical" is defined as any chemical belonging to the class of chemical compounds consisting of all compounds of carbon except for its oxides, sulfides and metal carbonates, identifiable by chemical name, by structural formula, if known, and by Chemical Abstracts Service (CAS) registry number, if assigned. "PSF-chemical" is defined as an unscheduled discrete organic chemicals containing one or more elements phosphorus, sulfur or fluorine. The last types of chemicals are included for declaration because facilities producing OCPF can easily be misused for production of Chemical Weapons. In order that the Convention provides an effective disarmament mechanism, monitoring of facilities capable of producing chemical weapons is essential.

[750] The United States wanted India to require licenses for the export of all 54 chemicals listed by the Australia Group, a consortium of 25 countries that have agreed to combat chemical weapon proliferation. The Australia Group controls about 20 more chemicals than the Chemical Weapons Convention. India, like many developing countries, has vehemently opposed the parallel existence of a machinery which also oversees the non-proliferation of CW. It may be noted that during the final days of negotiations, it was understood by the developing countries that once the CWC comes into effect, other multilateral machinery performing some functions of the CWC will cease to exist, which has not happened as yet even today.

Syria.[751] Another Indian company, Transpek Industry Ltd., also produces a number of dual-use chemicals, including thionyl chloride and sulfur dichloride.[752] In 1990, Transpek Industry Ltd. won a bid to install and commission a turn-key chemical plant in Iran, worth an estimated $12.5 million, and in 1996 the company built the world's largest manufacturing facility for thionyl chloride outside of Europe[753]. Similarly, the Indian government indicted the privately owned NEC Engineers Ltd. for illegally exporting chemical weapons-related technology to Iraq in 2002.[754]

### 8.4.2. Government control and problem of enforcement with non-proliferation[755]

In view of the above, it can be argued that it is very difficult to exercise full and 100% effective control over the non-proliferation of CW and/or CW precursors.[756] With thousands of chemical manufacturing units located throughout the country managed by one national authority placed in New Delhi, it may not be an exaggeration to

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[751] "India Punishes Firm for Allegedly Selling Syria Weapons-Grade Chemicals," *United Press International*, 24 September 1992; "Indian Firms Probed for Alleged Weapons Technology Sales to Iraq: Report," Agence France Presse, 26 August 2002, in Lexis-Nexis Academic Universe, 14 February 2002, www.lexis-nexis.com.

[752] "Weapons Grade Chemicals Made in Gujarat Factories (Over 50% of India's Discrete Organic Chemical Units are Located in Gujarat)," *Business Insight,* February 11, 2004; In Lexis-Nexis Academic Universe, 16 February 2005, www.lexis-nexis.com.

[753] The threat was demonstrated graphically in April, when a U.S. intelligence official displayed two sales brochures from an Indian company called Transpek Private Ltd. to a gathering of American exporters. The first brochure, published sometime before India began tightening its export control laws in 1990, frankly advertised dual-use chemicals for mustard gas. A later brochure omitted mention of mustard gas precursors, but offered procurement services. http://www.wisconsinproject.org/countries/india/india-chemical-export.html, accessed on 2 November 2009.

[754] http://www.nti.org/e_research/profiles/india/chemical/index.html, accessed on 9 May 2010; http://www.armscontrol.org/print/3252; http://www.cnn.com/2003/WORLD/asiapcf/south/01/25/sprj.india.iraq.

[755] One of the important pillars of the CWC is non-proliferation of chemical weapons. The Convention provides a detailed mechanism to find and deal with any breach of non-proliferation regime of the CWC. It restricts the transfer and use of certain chemicals according to their potential to pose a threat to or to damage the object and purpose of the CWC. Certain types of chemicals cannot be traded outside the OPCW community, and thus, non-member states with higher dependence on these chemicals may face economic problems. To implement the non-proliferation principle of the Convention, the States Parties provide their detailed information on imports and exports of chemicals, the Technical Secretariat checks all declared information and provides necessary information to the policy-making organs. If there is any discrepancy or cause of concern, the Technical Secretariat and concerned State Party or the States Parties themselves, as the case be, undertake clarification and consultation with a view to reach a resolution of the problem. Enactment of national implementation measures facilitates this task, among others.

[756] Bimal N. Patel, "*Resolution 1540 and the Non-Proliferation of Weapons of Mass Destruction"* 2003 African Yearbook of International Law (2003); UN Security Council Resolution S/1540 was adopted at 4956th meeting of the Council on 28 April 2004. In terms of substance and procedure, resolution 1540 has many similarities with resolution 1373 which was adopted to fight the terrorism. Resolution 1373 imposes binding obligations on all States, with the aim of combating terrorism in all its forms and manifestations. _____*Theory and Practice: Implementation of the Chemical Weapons Convention Destruction Regime under the Chemical Weapons Convention,* 11 The Non-Proliferation Analysis Journal Summer (2000); There are a number of countries, not party to the CWC, that have publicly been associated with proliferation ambitions. It would cause serious concerns if experts formerly involved in offensive CW programmes would be hired by countries suspected of having clandestine offensive CW programmes. This is particularly true in the early phases of such clandestine programmes, when indigenous expertise will be limited. Mehmood, Amna, "American policy of non-proliferation towards Pakistan: a post-cold war perspective" In 56 *Pakistan horizon* 1, 35-58.

believe that some intentional or unintentional violations in this regard are bound to occur.[757] Developed countries, too, may be facing the same complexity. So far, there has not been any report on significant breach of non-proliferation.

### 8.4.3. Lacunaes in Indian CWC Act

To give effect to its international obligations at national level, India enacted the CWC Act.[758] However, the Indian Act, like the CWC itself, lacks the definition of the term "activity prohibited", although it is safe to consider that at minimum, this term encompasses the prohibitions of article 1, paragraphs 1 and 5 of the Convention. However, the Act provides for penalties for activities that undermine CWC enforcement at national level. India has chosen to apply criminal and financial penalties for CWC violation. One glaring observation is that the Act does not cater for redressing concerns over rights to privacy, protection from self-incrimination and the admissibility of evidence as well as due process concerns. The Act has given the National Authority of India administrative tasks and envisages appointment of enforcement officers for the purposes of the act.

It is important to note that in the area of CW non-proliferation, controls exercised by India over export of dual-use chemicals are stricter than the provisions of the Convention in some areas. For example, the exports of Schedule 3 chemicals to other States Parties to the CWC, which are permissible under the Convention, are also controlled and are subject to submission of requisite documents by the exporters, including end-use cum end-user certification. Also emphasis has been laid down to cover important facet of terrorism. Amendment Ordinance, 2004 promulgated on 21 September 2004 *inter alia* covers terrorism and its links with weapons of mass destruction. India, in the wake of possible use of CW by terrorists, released guidelines on the Management of Chemical Terrorism.[759] These guidelines deal with several issues like counter-terrorism strategies, surveillance and environmental monitoring, prevention of illegal trafficking of hazardous waste, and human resource development, which includes education and training, knowledge management and community awareness.

## 8.5. International Cooperation and Assistance and the Promotion of peaceful uses of chemistry[760]

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[757] India appears on the U.S. Commerce Department control list (supplement 5 to Part 778 of the Export Administration Regulations) which names countries and projects of concern for chemical and biological proliferation. India has the world's eighth largest pool of dual-use chemical suppliers, according to Canada's Chemical Weapons Convention Verification: Handbook on Scheduled Chemicals. India does not control the following chemical precursors that are controlled by members of the Australia Group: 3-Hydroxyl-1-methylpiperidine; Potassium Fluoride; 2-Chloroethanol; Dimethylamine Dimethylamine Hydrochloride; Hydrogen Fluoride; Methyl Benzilate; 3-Quinuclidone; Pinacolone; Potassium Cyanide; Potassium Bifluoride Ammonium Bifluoride; Sodium Bifluoride; Sodium Fluoride; Sodium Cyanide Phosphorus Pentasulphide; Di-isopropylamine; Sodium Sulphide Triethanolamine Hydrochloride. http://www.wisconsinproject.org/countries/india/india-chemical-export.html, accessed on 2 November 2009

[758] "Penal Provisions in Chemical Weapons Bill," *The Hindu*, August 24, 2000, www.hinduonnet.com.

[759] See National Disaster Management Guidelines on Management of Chemical (Terrorism) Disaster. These guidelines focus on counterterrorism, surveillance, environmental monitoring, and prevention of hazardous waste smuggling. http://nidm.gov.in/PDF/guidelines/chemical_terrorism_disasters accessed on 5 July 2011.

[760] This is another important pillar of the Convention. One can immediately think of the so-called Peace Dividend: when a State Party gives up its arsenals of chemical weapons and undertakes obligation of the Convention, it may wish to also gain certain benefits in return. The Convention aims to promote economic and technological development among States Parties through various means. Furthermore, the Convention requires that measures taken to implement the Convention in no way hamper the economic and technological

International cooperation and assistance and the promotion of peaceful uses of chemistry remains an important pillar along with the pillars of CW destruction and CW non-proliferation.[761] It is, therefore, imperative to see what have been India's activities and pronouncements in this area. India, throughout the CWC negotiations, had advocated for the peaceful uses and promotion of technology and development through the peaceful uses of chemistry. In fact, this has been the Indian position in all multilateral negotiations concerning the arms control and disarmament.[762] What were the Indian positions during the negotiations phase and implementation phase? How India has reconciled the gap between the demands and actual results since 1997? Which challenges India faces to promote its agenda of technology and development through the peaceful uses of chemistry? Despite the fact that India has reiterated its call for Article XI support,[763] it has never been elected or taken a lead to chair a committee to foster international cooperation for peaceful purposes.

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development of the States Parties and each State Party has a right to participate in the exchange of chemicals, equipment and information to the fullest possible extent.

[761] During the current phase of the treaty implementation, the emphasis is obviously on the implementation of the provisions related to the destruction of chemical weapons. This is partly the result of the time lines established by the Convention, partly a reflection of the character of the Convention as a global disarmament treaty. Over time, the relative weight of the non-proliferation measures and, simultaneously, the benefits to be expected from cooperation in the chemical field would be expected to increase. Measures related to assistance against the use of chemical weapons should be of a temporary nature, reflecting on the one hand the degree of confidence reached by the participating States in the regime stability, and on the other hand the perceived capabilities associated with those States that have not (yet) joined the Convention. Trapp, Ralf, "The Duality of Chemistry: Chemistry for Peaceful Purposes versus Chemical Weapons", 80 *Pure and Applied Chemistry 8*, 1763-72 (2008); The CWC and OPCW After 10 Years An update and commentary on the 10th anniversary of the entry into force of the CWC, 2007, http://www.reachingcriticalwill.org/legal/cw/cwc10thanniversary.html; Yepez-Enriquez R. and Tabassi, Lisa (ed.), *Treaty Enforcement and International Cooperation in Criminal Matters: With Special Reference to the Chemical Weapons Convention*, The Hague: T.M.C. Asser Press (2002).

[762] J. B. Tucker, *Verifying a Multilateral Ban on Nuclear Weapons: Lessons from the CWC*, 5 *The non-proliferation Review* 2, 81 (1998).

[763] An effective implementation of article XI that speaks about economic and technological development is one of the key yardsticks in measuring the success of the CWC. Article XI reflects two supplementary principles pursued in multilateral disarmament efforts in the UN context: that disarmament accords shall not hamper the economic and technological development of SPs and that disarmament, as the result of implementing such accords, shall generate a 'peace dividend'. The Convention follows an objective that is quite common in other multilateral disarmament instruments. The BWC, ENMOD Conventions also have similar provisions. One can argue that this provision establishes a link between disarmament and development in an appropriate manner and thus contributes to the evolving principle of disarmament law. Indeed, this article can be seen as providing most important stimuli for attracting universal membership to the Convention. Article XI stipulates the associated rights to the general obligations that shall be implemented in a manner which avoids hampering the economic or technological development of States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention. The article aims to provide guidance on how to implement the Convention towards achieving the broader goals of economic and technological development of States Parties. This article stipulates, subject to the CWC and without prejudice to the principles and applicable rules of international law, that each State Party, have the right to conduct research to develop, produce, acquire, retain, transfer and use of chemicals. The States Parties shall undertake to facilitate and have the right to participate in the exchange of chemicals, equipment, and information to the fullest possible extent. The article also establishes the principle that there will be no justification for the application of any trade restrictions for reasons of non-proliferation of chemical weapons vis-à-vis States Parties in full compliance with the Convention. It also specifies the general requirement under article VII to review all existing legal and administrative measures of States Parties in order to implement the Convention, and hence become consistent with the object and purpose of the Convention.

### 8.5.1. Indian initiative on the establishment of international cooperation committee

India, together with Bangladesh, Cameroon, Cuba, Ethiopia, Indonesia, Iran, Pakistan, Saudi Arabia and Sri Lanka,[764] supported the establishment of International Cooperation Committee for the implementation of Article XI and mandated that the OPCW Executive Council prepares terms of reference, composition and functions of the said committee. It should be noted, however, that this committee never came into being thereafter.[765]

### 8.5.2. Legislative assistance

While there is lack of specific provision on legal cooperation and assistance, the National Authority of India is required to interact with the OPCW and other states parties for the purpose of fulfilling the obligations of the Government of India under the Convention. Kellman identifies six types of legal assistance which a state party might be asked to provide and which also applies to India. The forms of legal assistance most immediately relevant to CWC implementation are mutual legal assistance and immobilisation and forfeiture of illicit proceeds.[766] In addition, extradition, transfer of proceedings, recognition of foreign penal and administrative judgements and transfer of prisoners are also included. Although India does not have a specific statute which covers international assistance in criminal matters with all other states, it has concluded bilateral treaties with various states on mutual legal assistance in criminal matters.[767] The Indian Act, like the Convention, does not shed any light on what is the appropriate form of legal assistance under the CWC and what is the extent of its obligation as to legal assistance. In view of this, it is safe to assume that whenever a need for legal cooperation and assistance will arise, it will be provided in the context of international relations and take into account the particular needs of India and its legal system as well as the needs and legal system of other States Parties.

## 8.6. Administrative, legal, and organizational matters

Which are the major positions of India with regards to the administrative, legal, and organizational matters of the OPCW?

### 8.6.1. As a member of Executive Council

The Executive Council, which is the main executive organ of the CWC, consists of 41 members, with each State Party having the right, in accordance with the principle of rotation, to serve on the Council. The members of the

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[764] OPCW document EC-XXIV/Nat.6, 6 April 2001.

[765] OPCW document EC-XXIV/DEC/CRP.8 dated 6 April 2001.

[766] For a detailed understanding of the structure, power and role of national authority in the implementation of the Convention see Barry Kellman, *Manual for the National Implementation of the Chemical Weapons Convention*, 14-19 (1993)._____, "The Advent of International Chemical Regulation: the Chemical Weapons Convention Implementation Act", 25 *Journal of Legislation* 2, 117-39 (1999); Kellman, Barry and Tanzman, Edward (ed.), *Implementing the Chemical Weapons Convention: Legal Issues*, Washington DC: Lawyers Alliance for World Security (1994); _____, "Legal Implementation of the Multilateral Chemical Weapons Convention: Integrating International Security with the Constitution", 22 *New York University Journal of Int Law and Politics* 3, 475-518 (1990).

[767] India has concluded extradition treaties with Belgium (1958); Nepal (Old Treaty - 1963); Canada (1987); Netherlands (1989); U.K. (1993); Switzerland (1996); Bhutan (1997); Hong Kong (1997); USA (1999); Russia (2000); UAE (2000); Uzbekistan (2002); Spain (2003); Turkey (2003); Mongolia (2004); Germany (2004); Tunisia (2004); Korea (ROK) (2004); omen (2005); France (2005); South Africa (2005); Bahrain (2005); Poland (2005); Ukraine (2006); Bulgaria (2007); Kuwait (2007); Belarus (2008); Mauritius (2008); Portugal (2008); Mexico (2009); Tajikistan (2009) and arrangements with Sweden (1963); Tanzania (1966); Australia (1971); Singapore (1972); Papua New Guinea (1978); Sri Lanka (1978); Fiji (1979); Thailand (1982); Italy (2003).

Council are elected by the Conference of the States Parties for a term of two years. (For the first election of the Executive Council, 20 members shall be elected for a term of one year.) In order to ensure the effective functioning of the CWC, the composition of the Council is made up in a way that gives due regard to equitable geographical distribution, to the importance of the chemical industry, and to political and security interests. The Council is responsible to the Conference of the States Parties for its actions. In this capacity, the Council carries out the powers and functions entrusted to it under the CWC, as well as those functions delegated to it by the Conference. In so doing, it acts in conformity with the recommendations, decisions, and guidelines of the Conference and assures their proper and continuous implementation. In addition to promoting the effective implementation of and compliance with the CWC, the Council supervises the activities of the Technical Secretariat, cooperates with the National Authority of each State Party, and facilitates consultations and cooperation among States Parties at their request. The Council has the right and duty to consider any issue or matter within its competence affecting the CWC and its implementation, including concerns regarding compliance and cases of non-compliance, and, as appropriate, inform States Parties and bring the issue or matter to the attention of the Conference. In cases of particular gravity and urgency, the Council will bring the matter, including relevant information and conclusions, directly to the attention of the United Nations General Assembly and the United Nations Security Council.[768] At the same time, the Council will inform all States Parties of its action. India has been always elected as a member of the EC in accordance with article VIII. India was elected as the Chairman of the Executive Council (EC) for the year 1997-1998. India chaired the EC from the first to seventh sessions.[769] Under this Chairmanship, various important decisions were taken and policies framed with regards to the furtherance of the Convention. As no Indian has ever-occupied senior post at director level and above in the Technical Secretariat, India has expressed its desire to be represented at the top structure of the Secretariat. It has also, at times and again, expressed lack of transparency and information sharing on the issue having financial, political and legal implications and long-term consequences for the entire organization. It shall be noted that India has never been a vice-chair or coordinator for cluster of issues on important matters such as CW issues, chemical industry and article VI issues, administrative and financial issues and legal, organizational, and other matters. India's call for equitable geographical distribution throughout the Secretariat was echoed again through a joint statement together with some other Asian Member States.[770] Despite India's possession of chemical weapons, chemical weapons production facilities and large chemical industry, the fact remains that none of the senior members, i.e. at minister level, of the Indian establishment has paid a visit to the OPCW. The highest leader of the Indian delegation so far has been the Secretary in the PMO. India has participated in the administrative, budget and financial committee, an advisory body of the OPCW, since 1997[771]. India (Mr. V. K. Shunglu, Auditor-General) was appointed as the first External Auditor of the OPCW (1997-2000) for a single term of three years. However, India did not contend for the subsequent terms. Like most other international

[768] Article XII of CWC.

[769] The then Indian Ambassador Prabhakar Menon chaired the sessions - 13 May 1997 to 12 May 1998, covering nine sessions. Ambassador B. Mukherjee of India was elected as the Chairman of the EC in 2011.

[770] EC-XXI/NAT.4, 5 Oct 2000.

[771] First Indian, B. N. Jha from 27 August 1997, Pawan Chopra (when to when). Ms Manimekalai Murugesan participated in place of Mr Jha during the 7th session of the ABAF meeting which took place from 24-27 January 2000. Mr N. S. Sisodia replaced Mr Chopra with effect from 9 April 2001 on the ABAF. India was not a member of the first meeting of the ABAF (EC-V/ABAF.1) which met from 15 to 19 Sept 1997.

organisations, India has emphasized the principle of equitable geographical distribution, especially in the top structure and has expressed necessity to uphold transparency and full information sharing.[772]

### 8.7. Implementation of international obligations at national level:

Under the Convention, the Government of India has created a National Authority (NA). India has established this exclusive dedicated body at national level to effectively implement the provisions of the Convention. Unlike most other Member States who do not possess CW, India has to have strong cooperative relationship between the NA at the centre and various CW and related facilities, such as CWSF, CWPF, and CWDF. The latter falls under the mandate of the Defence Research and Development Organization (DRDO) of India and personnel related to these facilities will implement the obligation physically, whereas NA personnel serve as liaison. As far as fulfillment of substantive obligation with regards to the CW destruction is concerned, the National Authority is required to identify and oversee the closure and destruction of chemical weapons. Although not expressly mentioned, it is logical that the national authority will also oversee the closure of chemical weapons destruction facilities once the destruction operations are over. NA India consists of a chairperson, directors, enforcement officers and other employees.[773] The chairperson of the NA is of the rank of a Secretary– the second highest civil service rank after the Cabinet Secretary. The Act does not specify the qualification of enforcement officers or any other members of the NA. The NA is to interact with the OPCW and other States Parties for the purpose of fulfilling the obligations, monitor compliance with the provisions of the Convention, regulate and monitor the development, production, processing, consumption, transfer or use of toxic chemicals and precursors, make or receive request a State Party for assistance under Article X of the CWC, manage routine inspection or challenge inspection received from the OPCW. It is mandated to interact with the OPCW in respect of acceptance of request of India for challenge inspection or to counter any frivolous or defamatory request made by any State

[772] For example, India on behalf of the Asian Group submitted a statement at the 11th meeting of the EC held on 1 September 2000 concerning the implications of the decision of the ILO on the first classification exercise of posts within the Secretariat. Citing that it states the views of most delegations of the Asian Group, it stated that the principle of equitable geographical distribution should be maintained, only the Conference can decide and change decisions on top structure, expressed lack of transparency and information sharing on the issue having financial, political and legal implications and long-term consequences for the entire organisation, and supported that the second classification should be carried out in accordance with the ICSC guidelines (EC-MXI/NAT.1). India's call for equitable geographical distribution throughout the Secretariat was echoed again through a joint statement together with some other Asian Member States (EC-XXI/NAT.4, 5 Oct 2000).

[773] National Authority, Chemical Weapons Convention (CWC) was set up by a resolution of Cabinet Secretariat dated 5 May 1997 to fulfil the obligations enunciated in the Chemical Weapons Convention for the purpose prohibiting of the development, production, execution, transfer, use and stockpiling of all chemical weapons by Member-States is a non-discriminatory process. To fulfil its obligations, each State Party has to designate or establish a National Authority to serve as the national focal point for effective liaison with Organisation for Prohibition of the Chemical Weapons (OPCW) and other State Parties and hence the NA, CWC under the administrative control of the Cabinet Secretariat was set-up. A high-level steering committee under the Chairmanship of the Cabinet Secretary with Secretary (Chemical and Petrochemicals), Foreign Secretary, Secretary, Defence Research and Development, Defence Secretary and Chairman, National Authority as its other members would oversee the functions of the National Authority. The NA, CWC is responsible for implementation of CWC Act, liaison with CWC and other State Parties, Collection of data fulfilling of declaration obligations, negotiating facility agreements, coordinating OPCW inspections, providing appropriate facilities for training national inspectors and industry personnel, ensuring protection of confidential business information, checking declarations for consistency, accuracy and completeness, registration of entitles engaged in activities related to CWC, etc.

Party against India to the OPCW, scrutinize and accept list of inspectors and verify the approved equipment brought by the teams; provide escort to the inspection team and observe within the Indian territory, identify and oversee the closure of CWDFs, CWPFs, OCWs or ACWs, negotiate managed access during the challenge inspection, ensure decontamination of approved equipment after inspection completion, advise Union Government for laying down safeguards for transportation, sampling or storage of CW and fixation of standards for emission or discharge of environmental pollutants arising out of the destruction of CW, CWPFs, OCWs or ACWs.

India has a substantive corpus of domestic laws, regulations and administrative measures to prevent the proliferation of weapons of mass destruction, their means of delivery, and related materials. As a State with strong and unwavering tradition of democracy and the rule of law as well as a strong and unyielding sense of responsibility, India has over the years enacted effective laws and regulations and has institutionalized an array of administrative mechanisms to prohibit WMD access to non-State actors and terrorists. Among the many acts, the few prominent are - The Unlawful Activities (Prevention) Amendment Ordinance, 2004, the Atomic Energy Act, 1962 and the orders issued thereunder; the Environment Protection Act, 1986; the Chemical Weapons Convention Act, 2000; the Customs Act, 1962; the Foreign Trade (Development & Regulations) Act, 1992; Detailed regulations and procedures are notified by the Government of India under the above Acts. The Government of India has also specified a List of Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET), the export of which is either prohibited or permitted only under license. One can expect that the sheer existence of several uncoordinated pieces of legislations and regulations, and a number of identified institutions activities impinge on CWC chemicals management, regulation and enforcement. Each of these institutions may have either/or a combination of usage, management, or regulatory functions. Their functions may not be coordinated, with some institutions experiencing conflicts in the execution of duties leading to duplication of efforts, gaps in regulation and controls, and wastage of resources. Such commitment to the Convention *sans* domestic legislation on matters of that regard is futile. Breakthrough legislation is required to ensure that the provisions of the CWC are not breached at the micro-domestic level. India has taken the forefront in these matters. In addition, India as a country has taken the mantle to ensure such compliance with the terms of the Convention. It has stipulated extensive and detailed provisions on offences and penalties for the breach of CWC act at domestic level.[774] As mentioned above, the Indian Act, like the Convention itself, lacks the definition of term "activity prohibited", although it is safe to consider that at minimum, this term encompasses the prohibitions of Article 1, paragraphs 1 and 5. However, the Act provides for penalties for activities that undermine CWC enforcement at national level. India has chosen to apply criminal and financial penalties for CWC violation. One glaring observation is that the act does not cater for redressing concerns over rights to privacy, protection from self-incrimination and the admissibility of evidence as well as due process concerns. The Act has given the national authority of India administrative tasks and envisages appointment of enforcement

[774] These provisions can be grouped into the following major headings: (1) Punishment for failure to register; (2) Punishment for contravention in relation to development, production, etc. of CW or riot control agents; (3) Punishment for contravention in relation to toxic chemicals as listed in schedule 1 of the Convention; (4) Punishment for contravention in relation to transfer of toxic chemicals as listed in schedule 2 of the Convention; (5) Punishment for contravention in relation to export or import of toxic chemicals; (6) Punishment for contravention in relation to disclosure of confidential information; (7) Punishment for contravention in relation to denial of access; and (8) punishment for contravention in relation to failure to furnish information, declaration or return (9) Punishment for contravention in relation to disclosure of confidential information.

officers for the purposes of the act. The Indian Act envisages a person guilty of a punishable offence if he refuses without reasonable excuse to comply with the request made by the OPCW inspector or team members for the purpose of facilitating the conduct of that inspection, or delays or obstructs any member of the inspection team, inspector, enforcement officer or the observer in the conduct of inspection, removes or tampers with any on-site instrument of approved equipment installed by the enforcement officer, inspector or inspection team with the intention of adversely affecting the operation of such instrument or equipment. These provisions enable India to meet its treaty obligations. These unqualified obligations to answer relevant questions contain in these provisions raise potential problems of self-incrimination. Nearly every nation's laws protect persons from being forced to give testimony that may later be used against him/her. Moreover, representatives of NA will accompany the inspectors and may overhear responses that may implicate violations of national laws (e.g. environmental or narcotics violations) even though these replies may be innocent with the OPCW context. It is crucial, therefore, for India to establish legal mechanisms to protect persons who cooperate with CWC inspectors from incriminating themselves, including grants of immunity from prosecution based on the evidence so revealed. It would have been useful if the Act was to provide that a self-incriminating statement made or given under the Convention is not admissible as evidence in criminal proceedings against that person except on a charge of perjury in relation to that statement. It is an interesting lacuna that the CWC Act provides that where the Union Government considers any inspection of a CWPF in India under this CWC Act to be against the interest of national security or economic interests of India, it may deny the request for such inspection. This can pose a serious problem in fulfilling the obligations of India under the Convention. It must be noted that by undertaking the obligations, national security or economic interests cannot prevail over its obligations under the Convention.

### 8.7.1. Safety and security of environment and people

CWC requires each State Party to assign the highest priority to ensuring the safety of people and to protecting the environment.[775] In this regard, the Indian CW lays down that the Union Government should lay down safeguards for transportation, sampling or storage of CW and fixation of standards for emission or discharge of environmental pollutants arising out of the destruction of CW, OCA, ACW and CWPFs. It also provides for ensuring protection of environment, health and safety of the people during the process.

### 8.7.2. Confidentiality

Confidentiality is of the utmost importance with regards to the CWC and is to be protected by the OPCW.[776] Accordingly, India is required to treat the information according to the level of confidentiality assigned by the OPCW. When requested, India must furnish details as to its handling of such information. In view of this, national implementation measures need to account for these requirements.[777] The CWC Act provides to ensure

[775] The strict respect for safety of the people and protection of the environment in implementing the Convention is pursuant to Article VII, paragraph 3, an important obligation of the States Parties.

[776] Chemical Weapons Convention has one of the most stringent regimes concerning the confidentiality and protection of confidential business information. The Convention provides a whole annex on the Confidentiality regime, envisages dispute settlement mechanism dedicated to the confidentiality, establishes the Confidentiality Commission, and has regularly updated rules of procedure for accessing confidential information.

[777] The CWC requires each State Party to enact national implementation measures to carry out its obligations at the national level, in accordance with the national constitutional procedures. The CWC requires States Parties to prohibit natural or legal person, under its jurisdiction from undertaking any activity prohibited to a State

data base confidentiality and maintain secrecy of confidential information and technology collected or received by the National Authority under the Act. Furthermore, whoever, in contravention of any provision of the Act, divulges any confidential information obtained by the National Authority from any declaration or return furnished or any statement made, information supplied to, or obtained by, an enforcement officer during the course of any inspection carried out under the provisions of this Act to any other person, can be punished with imprisonment for a term which shall not be less than one year but which may extend to term of life and shall also be liable to fine which may extend to one lakh rupees.

### 8.7.3. Challenge inspections

The Convention has set forth basic rights and obligations with regard to consultations, cooperation and fact-finding during the implementation of the Convention. Compliance with the arms control regimes and assurance on the part of all parties to the agreement that all other states parties are fully complying with their undertakings is a key to the successful implementation of any arms control/disarmament regime.[778] It may happen that India may have doubts regarding the compliance of another state party to the same regime. In such cases, a mechanism is needed to resolve the ambiguity, which may persist. It is obvious that this becomes even more so important in those disarmament regimes where the regime is dealing with dual-purpose weapons such as chemical weapons. It is well possible that a state party under the disguise of peaceful activities (purposes not prohibited under the Convention argument) may produce deadly chemical weapons. To avoid such violations, the Convention elaborates a regime of consultation, cooperation and fact-finding. The basic purpose is to stipulate means to resolve any ambiguity persisting with regards to compliance of the Convention by the states parties. Article IX requires States Parties to set out clarification procedures, which can be used, by a State Party, which has concerns regarding the compliance of another State Party. A State Party, which receives a request from another State Party for the clarification of a matter, which has concern about compliance, must provide sufficient information to clarify the situation. Nothing in the Convention must affect the right of any two or more State Parties to arrange by mutual consent for inspections or other procedures among themselves to clarify and resolve questions of compliance. In addition, each State Party has the right to request the OPCW an on-site challenge inspection[779] for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the Convention. The purpose of challenge inspection is to provide the State Party with additional

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Party, to enact penal legislation (which may provide administrative or criminal penalties or both), to cooperate and afford appropriate legal assistance to the OPCW, to assign highest priority to ensuring the safety of people and to protecting the environment in implementing the CWC. In order to facilitate smooth communication between the OPCW and State Party on one hand between a State Party and other States Parties on the other, the Convention requires States Parties to designate a national authority. Last but not least, the Convention requires States Parties to cooperate with the Organization in the exercise of its functions and to provide assistance to the Technical Secretariat.

[778] Masahiko Asada, "The Challenge Inspection System of the Chemical Weapons Convention: Problems and Prospects", Thakur, Ramesh Chandra and Haru, Ere (ed.), *The Chemical Weapons Convention: Implementation, Challenges and Opportunities*, 75-100 (Tokyo: UNU Press, 2006); Tom Z. Colina, "The Chemical Weapons Convention (CWC) at a Glance, http://www.armscontrol.org/factsheets/cwcglance; Jean Pascal Zander, John Hart, Frida Khulau and Richard Guthrie (ed.), *Non-Compliance with the Chemical Weapons Convention: Lessons from and for Iraq*, SIPRI Policy Paper No. 5, (Stockholm: SIPRI, 2003).

[779] Verification procedures included in previous arms control and disarmament agreement are slightly comparable with it: the 'unannounced inspections' in the control regime of the IAEC, the inspection in the framework of the CSCE, the 'short-notice inspections' in the INF Treaty and the 'inspections on suspicion' in the CFE Treaty. Krutzsch and Trapp at 175

information on problems, which have not been resolved through routine verification or through consultation and co-operation. Challenge inspections are therefore aimed at maintaining or restoring confidence in the Convention at critical moments.[780] Another purpose that challenge inspections[781] serves is that the requested State Party will have the right and obligations to demonstrate its compliance with the Convention. Challenge inspections can take place anytime, anywhere, at short notice and without the right to refusal will be conducted by the OPCW Technical Secretariat. In addition to many of the activities required for routine inspections, an inspected State Party will have additional tasks to perform during challenge inspections, such as: determining whether to allow an observer from the State Party requesting the inspection; implementing managed access to protect information not related to the Convention; participating in the determination of the final perimeter; providing the appropriate level of access to the site; and assisting the inspection team in securing the site and exits and in monitoring the perimeter. The challenge inspections concept aims to assure full confidence in compliance with the Convention. As the United Nations Institute for Disarmament Research (UNIDIR) mentions, challenge inspections are regarded by most countries as an indispensable element of arms control regimes.[782] Challenge inspection regime is envisioned to be operated in an accountable manner. First, on the one hand it provides a right to a State Party to invoke right to request challenge inspection, on the other hand, it provides mechanism to prevent and treat appropriately abuse of this right by any State Party. Thus, it aims to build up confidence among State Parties that any concerns on non-compliance will be taken up seriously as well as serve as deterrence to prevent the abuse. Secondly, request of challenge inspection can be made by any State Party, which has serious doubts, concerns about another State Party compliance. Furthermore, a requested State Party does not have a right to refuse challenge inspection on its territory. Thus, the Convention treats requesting and requested state parties in a fair and equal manner, regardless of political, economic and military strength and weaknesses. Thirdly, as mentioned above, challenge inspection is considered as an indispensable element of arms control regime. Examples of International Atomic Energy Agency (IAEA) provide important evidence to the evolution of this rule in arms control regimes. It is argued that an absence of such mechanism can be considered as a significant drawback for any arms control verification system. Fourth, the decision-making of the OPCW Executive Council is quite regulated in order to prevent the abuse of right and to take decisions on allowing challenge inspection. Because if concerns of a requesting state party are not founded, not only that State Party has to bear the consequences, but the role of the OPCW Executive Council can also come under political and/or legal of scrutiny. Fifth, the scope of challenge inspection is specific.[783] A State Party shall make request with the sole purpose of clarifying and resolving any questions concerning possible non-compliance with provision of the Convention. Last but not the least, the element of transparency is permeated through this regime. The challenge inspection will be carried out in the presence of an observer either of the requesting state party or of a third State

[780] UNIDIR, *The Projected Chemical Weapons Convention: A Guide to the Negotiation in the Conference on Disarmament*, 175 (1989).

[781] Verification procedures included in previous arms control and disarmament agreement are slightly comparable with it: the 'unannounced inspections' in the control regime of the IAEC, the inspection in the framework of the CSCE, the 'short-notice inspections' in the INF Treaty and the 'inspections on suspicion' in the CFE Treaty. Krutzsch and Trapp at 175.

[782] *Ibid.*

[783] Article IX, paragraph 8, CWC.

Party. It should be noted, however, that the requested State Party can refuse the observer but such refusal shall be recorded in the final inspection report.[784]

The concept of 'challenge inspections' has failed owing to the widespread fear that the challenged country might retaliate with a *quid pro quo*. For this formula to succeed, it is necessary to understand that it is not an antagonistic, but a cooperative process. On the other hand, without use of challenge inspections, the CWC will not be robustly implemented and verified. In the context of this principle of international law on disarmament, it shall be noted that India has opposed and taken a firm stand against launching challenge inspections. India has been often supported or has supported developing countries including China, Iran, and Pakistan on this issue.[785] Although there has not been any incidence of formal request of challenge inspection either vis-à-vis India or any State party, it will be interesting to see how India would comply and cooperate with the OPCW, if the challenge inspection is to take place.

Article IX, paragraph 22 (c) leaves no doubt that abuse of the right to request a challenge inspection will be a case of non-compliance and will have to be treated as such, when the review of the report on a challenge inspection brings to light such abuse by the requesting State Party. The EC is discharged with an important responsibility with assisting the State Party to resolve its concern, particularly in serious situation like challenge inspection.[786] But at the same it also has a right to decide against carrying out challenge inspection if it considers that the request is frivolous. In view of this textual situation it can be concluded that the prevention of any abuse of rights granted under the Convention is to be a general principle especially emphasized with regard to the abuse of the right to request a challenge inspection.[787] It can be concluded that provisions of Article IX will apply if there are doubts or ambiguities concerning compliance, which cannot be solved by the routine verification scheme.[788] They can therefore be regarded as *safety net* to ensure compliance in the Convention if other means of verification fail or do not produce the information necessary to solve a problem.[789] It can also be argued that consultation is the least intrusive approach to solve the problem of compliance while challenge inspection is the most intrusive tool.

### 8.8. Universality of the CWC and role of India

Universality of CWC is considered as one of the most crucial political challenge for the OPCW and indispensable for the ultimate success.[790] In fact, chemical weapons destruction, non-proliferation of CW, universality and national implementing legislations are the four main pillars of the success of the CWC. As of 15 July 2013, there are 189 states parties to the CWC and additional two states have signed but yet to ratify the CWC. This leaves only five states that have yet to sign and ratify the instrument. No international arms control

[784] Article IX, paragraph 12, CWC.

[785] http://www.idsa.in/cbwmagazine/CWCfirstDecade_alele_0907, accessed on 9 May 2010; http://www.acronym.org.uk/dd/dd71/71cwc.htm; Jonathan Tucker, "Strengthening the CWC Regime for Transfer of Dual-Use Chemicals", *Pugwash Meeting* no. 324(2007); David P Fidler, "The Chemical Weapons Convention after Ten Years: Successes and Future", 11 *ASIL Insights* 12 (2007).

[786] Article IX, paragraph 4, CWC.

[787] Krutzsch and Trapp at 194.

[788] Article IX, paragraph 3, CWC.

[789] UNIDIR at 173.

[790] Jean Pascal Zanders, "The Chemical Weapons Convention and Universality: A Question of Quality or Quantity?", 4 *Disarmament Forum*, UNIDIR: Geneva (2002), pp. 23-31; Michael Bothe, Natalino Ronzitti, and Allen Rosas, *The New Chemical Weapons Convention: Implementation and Prospects*, (Leiden: Nijhoff, 1999).

treaty has ever attracted universal adherence like the CWC. Universality is an important principle of multilateral instruments, especially, as the success and effectiveness of such instruments depend crucially on the adherence to them by all actors. CWC serves the purpose of reconciling heterogeneous values and expectations by means of international law. As far as CWC is concerned, universality is a critical goal for the CWC because it underscores the rejection of chemical weapons by the international community and increases global security through the verified destruction of chemical weapons and elimination and prevention of chemical weapons capabilities, as well as monitoring of peaceful use of toxic chemicals and chemical weapons precursors. The Second Review Conference of the CWC emphatically invited all state parties to play an important role in bringing the universality aim closer.[791] The role of India in persuading other nations who were not members of the CWC is not known, however, India has embraced the CWC because of its universal, non-discriminatory, and multilateral character.[792] As such, its association with the calls of the OPCW and other States Parties can be considered as its role in the promotion of universality. Interesting enough, a close neighbor of India, Myanmar is yet to become a member of the CWC. India has close bilateral relations with Myanmar but how far India is pursuing it to become CWC member is not known.

### 8.9. India, Chemical Weapons and International Law

By declaring and destroying CW, India has strengthened the CWC but also contributed to the strengthening of international humanitarian law.[793] It is well established that according to international humanitarian law, the use of CW is prohibited.[794] One of the most important obligations of the CWC is the General Purpose Criterion (GPC).[795] This defines the substances to which its prohibitions apply. According to this, all State Parties are obliged to ensure that toxic chemical and their precursors are used only for purposes not prohibited under the CWC. The GPC allows the Convention to keep up with technological change and, in the case of dual-use

[791] Olivier Meier, "CWC Review Conference Avoids Difficult Issues", http://www.armscontrol.org/act2008_05/CWC; Monalisa Joshi, "The Second CWC Review Conference", http://www.idsa.in/backgrounder/secondCWCreviewconference.

[792] In 1987, during a debate in the First Committee of the UN General Assembly, India stated that its efforts to ban chemical weapons predated the birth of the UN. Statement of India before the 1st Committee of the UN General Assembly, UN document A/C.1/42/PV32, 4 November 1987, p. 33.

[793] International Institute of Humanitarian Law, *The Chemical Weapons Convention: Between Disarmament and International Humanitarian Law*, Sanremo: Villa Nobel (2008); Pedrazzi, Marco, "The Chemical Weapons Convention and International Humanitarian Law: A Brief Overview of Some Critical Issues, in International Institute of Humanitarian Law, *The Chemical Weapons Convention: Between Disarmament and International Humanitarian Law*, Sanremo: Villa Nobel 81-87 (2008); Smallwood, Katie, "Challenges for the Chemical Weapons Convention", In *The Proliferation of Weapons of Mass Destruction and International Humanitarian Lawi*, Sanremo: International Institute for Humanitarian Law 33-36 (2008).

[794] This norm is based on the ancient taboo against the use in war of "plague and poison", which has been passed down for generations in diverse cultures. It was most recently codified in the 1925 Geneva Protocol and subsequently in the 1972 Biological Weapons Convention and in the 1993 Chemical Weapons Convention. The great majority of States are parties to these three treaties. The prohibitions based on these texts cover not only the use, but also the development, production and stockpiling of biological and chemical weapons. It should be emphasized that in situations of armed conflict this absolute prohibition applies to all biological and chemical agents, whether labeled "lethal" or "non-lethal". For example, even the use of riot control agents which is permitted for domestic riot control purposes is prohibited in situations of armed conflict. http://www.icrc.org/web/eng/siteeng0.nsf/html/5KSK7Q accessed on 2 November 2009.

[795] Julian Philip and Perry Robinson, "Some Consequences of the General Purpose Criterion having to define the Scope of the Chemical Weapons Convention", Pugwash Meeting no. 207, 3rd Workshop of the Pugwash Study Group on Implementation of the Chemical and Biological Weapons Convention, 19-21 May 1995, Noordwijk, The Netherlands (1995).

chemicals, to exempt application for peaceful purposes from its prohibitions. The Convention lists 43 chemicals and families of chemicals for the application of special procedures, but, by virtue of the general purpose criterion, the prohibitions of the treaty are not restricted to them. CWC has far reaching significance for civilian chemical industry, in terms of intrusion, verification requirements, and attendant costs. India, having one of the largest chemical industries, obviously has to provide comprehensive declarations on its chemical industries as well as bear all inspection related costs for national personnel at domestic level.[796] By complying with these obligations, India contributed not only to the CW destruction regime but also to non-proliferation regime by allowing a successful inspection regime of its civilian chemical industry.

### 8.10. India, CWC, and Peace Dividend[797]

8.10.1. As any disarmament instrument is perceived to contribute to the establishment and maintenance of peace and security, it is first of all important to examine how Indian state practice has contributed through the CWC to the concept of peace dividend.[798] Six principles emerge from the analysis of India's contribution to the CWC. First, CW disarmament for India has (had) major economic consequences involving costs as well as benefits. On the cost side, it required a fundamental reallocation of resources for destruction of CW and CWPFs as well as from military to civilian production. This resulted in a major problem of allocation of funding for CW and CWPF destruction or conversion process as well as unemployment or underemployment of labour, capital and other resources in the process of disarmament. As a result, the economic dividends of CW disarmament are rather negligible but in fact costly. Ultimately, however, in the long term, CW disarmament can lead to significant and worthwhile benefits through the production of civil goods and services as resources are allocated to the civilian sector. Thus, in its economic aspects CW disarmament is like an investment process involving short-run costs and long-run benefits. Thus, India, without expectations of significant economic benefits, adhered to the CWC and has promoted this first principle of peace dividend of the CW.[799] CW disarmament does not restrict pursuance of industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes, protective purposes, military purposes not connected with the use of CW and not dependent on the use of the toxic properties of chemicals as a method of warfare and law enforcement including domestic riot control purposes.[800] This means that while defence

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[796] The costs of destruction of CWs and CWPFs have to be borne by the possessor State Party. Accordingly, India has been required to bear all the expenses applicable under the Chemical Weapons Convention. Willett, Susan, *Costs of Disarmament – Rethinking the Price Tag: A Methodological Inquiry into the Cost and Benefits of Arms Control*, United Nations Publication, UNIDIR/2002/4.

[797] Bimal N. Patel, "*The Concept of Peace Dividend and the Chemical Weapons Disarmament,* 45 *Indian JIL* 2 153-79 (2005).

[798] Inga Thorsson, *In pursuit of Disarmament: Conversion from Military to Civil Production in Sweden*, 2 vols., Stockholm: Liber, (1984-85), at p. 301.

[799] Jörn Brömmelhörster shows a comparative analysis of various definition of peace dividend. Peace dividend is the "return of confidence and the consequent rise in investment following the establishment of peace after an armed conflict has ended" (Billenness 1995 citation from Dommen and Loukakos 1995, p. 4). The peace dividend [is seen] in terms of the conversion of talent, expertise, and technologies from the production of weaponry to commercial products and processes, which will have positive effect on the …economy (Ettinger, 1993, p.107). Jörn Brömmelhörster, "Peace Dividends Resulting from Defense Budget Cuts," In Bonn International Center for Conversion Report 12: *Converting Defense Resources to Human Development*, Proceedings of an International Conference, 9 – 11 November 1997 at 67-68.

[800] Chemical Weapons Convention, Article II (9).

spending will be reduced for the prohibited purposes, costs will increase or grow for the purposes of non-prohibited purposes such as non-prohibited purposes and destruction of CW stockpile. The direct effect of this change is that national aggregate demand and employment in prohibited-purposes area will slowly reduce, while, either an increase or stability in the aggregate demand and employment in the non-prohibited area may occur, albeit, in a no-proportionate manner. A state, therefore in order to minimize the dislocations and unemployment effects of CW disarmament may adopt compensating aggregate demand policies with reduction in non-armament spending which are gradual and predictable.[801] According to the neo-classical economy model, defence spending for prohibited purposes (production, development, stockpiling of CWs) involves a sacrifice of civil goods and services such as education, health, housing etc. Based on this model, a reduced defence spending will eventually be associated with a greater output of civil goods and services, which mean, in a long term, this should be regarded as an investment process. Such transition is bound to create short-term employment and dislocations. However, knowing that investment involves current sacrifices in return for expected future benefits, civil society of member States would regard such investment a worthwhile, even more so, if the future benefits exceeded the current costs.[802]

8.10.2. Secondly, by eliminating CW expenses and disarmament, India has led to make feel all other member states that their national security and economies are not threatened by their process. In fact, the threat of use of CW is eliminated from the OPCW community of states. Thus, declaration and eventual destruction of CW stockpile by India has significantly contributed to reducing the risk and threat of CW in the immediate region as well as the whole world.

8.10.3. Third, CW disarmament involves general problems of disarmament: overcoming the economic, technological, and environmental constraints on destruction and conversion of past CW production facilities required financial commitments, managerial innovations, manpower training, capital retooling, and other initiatives to minimize the costs and maximize the benefits of disarmament. In addition, the physical conversion of defence plants and equipment can be difficult and costly. India, like other CW possessor States Parties, did encounter such problems.

8.10.4. Fourth, CW disarmament contains unprecedented economic problems for certain countries, particularly, when it is occurring simultaneously with a shift from a centrally planned to a market economy. Although the funding spent by India for the destruction of CW is unknown, it is safe to assume, based on the perceived impressions that 1:10 funding ratio required to produce and destroy CWs, that India must have spent huge amounts of funds to eliminate its stockpile.

8.10.5. Fifth, since the Indian government provides defence expenditures, the government machineries needed to be involved in the adjustment process. Public policies which assist change and resource allocation can help to minimize the costs of disarmament. Examples include manpower policies which provide information on alternative employment opportunities and assistance for retraining and mobility, and incentives for creating new civil industries and for undertaking civil scientific and technological

[801] This analysis is based on Keynesian model of macro and micro economics which focus on defence spending as a component of aggregate effective demand.

[802] An analysis of this chapter shows that civil society is not necessarily concerned with narrow cost and benefit analysis of CW disarmament in economic sense. Thus, the civil society is prepared to pay any *economi*c cost for a better and safer future for humankind.

projects in areas such as energy, environment, and space exploration. Such problems and issues are not reported in the literature concerning India's CWC program.

8.10.6. Sixth, military research and development promotes a growth in the cost of defence equipment and creates pressures for increased defence spending. It generates technological expectations that promote large-scale investments which in turn create rigidities resisting reductions in military expenditure. Thus, disarmament requires control of military technology, especially military research and development. Real disarmament preventing future rearmament requires control of military development work. Upon completion of CW destruction program, it is possible that Indian military research is now diverted to other advanced programmes of military.

### 8.11. Concluding remarks

Above analysis of Indian state practice with regards to the implementation of the CWC leads to the following concluding remarks. An overall contribution of India in the codification and progressive development of international law of disarmament – Chemical Weapons Convention: India has fulfilled its commitment to the CWC in *letter and spirit*.[803] Although it announced in 1992 that it did not have chemical weapons, the subsequent events leading to India's ratification and declaration of possession of CW initially created doubts about India's commitments.[804] However, once declared, it destroyed all declared chemical weapons, although, it took more than ten after the entry into force of the CWC (29 April 2007) to complete the CW destruction. The reasons for delayed destruction, apart from possible political bargain as the USA and Russian Federation are yet to destroy their whole stockpile, were of technical nature. Having fulfilled the obligations on CW destruction, India strengthened the basic premises of the CWC and contributed to the promotion of multilateral, non-discriminatory international disarmament instrument. By allowing inspections at declared civilian chemical industry throughout the implementation of the CWC and by submitting declaration on civilian and military chemicals to the OPCW, India further strengthened the regime of non-proliferation of the CWC.

It has not played a remarkable role, however, in the implementation of promotion of chemical science and technology through the peaceful purposes in the benefit of developing countries, as lack of submission of clear policy papers, lack of chairing important clusters on the subject evidence this conclusion. Although CWC does not factor significantly in Indian establishment's security and military agenda, it could have played a significant role in this area and could have promoted in a much-strengthened fashion the principle of international cooperation for the development of science and technology through peaceful uses of chemicals.

Except that the first chairperson of the Executive Council of the OPCW was from India, it has never obtained any significant position in the implementing structure of the CWC, namely, the OPCW Techical Secretariat. Despite the remarkable track record of compliance, India's absence in the higher echelons of OPCW suggests that India has not been effective in driving new policies, which is normally done by the secretariats of international instruments, in this case, the Technical Secretariat.

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[803] Felix Calderon, "Obligations and Rights of States Parties under the Chemical Weapons Convention", Organisation for the Prohibition of Chemical Weapons, The Hague Basic Course for National Authority Personnel, 6 (1994).

[804] Anthony Cordesman, "Weapons of Mass Destruction in India and Pakistan," Center for Strategic and International Studies, www.csis.org.

It is highly possible that India will fully support any multilateral arms control and disarmament instrument, which would have similar kind of provisions. Its opposition for NPT and CTBT are case in instance.

# CHAPTER IX

# INDIA AND THE UNITED NATIONS REFORM (2005-2012)

## 9.1. Introduction

As an original member and staunch supporter of the United Nations, it was the natural expectation that India would play an active part in the reform exercise which began in 2005. A majority of the members were actively pursuing this and some progress in this direction has been seen. It is likely that some more results will appear in the due course of time. This chapter examines the following questions: (i) what has been India's position on various reform issues? (ii) what are the reasons for forwarding these proposals and what have been the challenges and prospects in their implementation? (iii) which strategies has India employed and what have been its public relations campaigns to achieve the stated objectives of its proposals?[805] (iv) which proposals India should have made but has not made and why? It appears that no other country has received as much attention as India in the reform exercise, especially in the context of the reforms of the Security Council. This chapter is an attempt to create a balance sheet for India showing where it has made concrete achievements and where it has failed. Although the entire analysis is based on India's proposals since 2005, some earlier proposals, if these continue to be significantly relevant, are also analyzed.[806] This chapter aims to provide analytical insights and examine how true ideals of international law have been reflected in the reform proposals of India.

## 9.2. Linkage between UN Reforms and International Law in General and Laws of International Organisations in particular

The United Nations reforms have been subjected to variety of analyses at various levels.[807] In fact, as early as 1947, the US Senate Expenditure Committee examined and found that the UN is having serious problems of overlap, duplication of efforts, weak coordination, proliferating mandates and overly generous compensation for the international civil service. Hence, the Senate suggested various institutional, administrative and financial

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[805] Abdul Nafey, "Permanent Membership in the Security Council: India's Diplomatic Initiatives and Strategies", 61 *India Quarterly* 4, 1-38 (2005).

[806] M. S. Rajan, "India and the Making of the UN Charter – II (from British sources)", 36 *International Studies* 1 (1999), 3-16; C. S. Jha, "Fifty Years of UN and the Future", 53 *India Quarterly* 1-2, 1-20 (1997); M. L. Sondhi, "Reshaping India's Agenda in the UN System in the post-Cold-War Era", In 53 *India Quarterly* 3-4, 1-8 (1997); Hari Mohan Mathur, "India in the United Nations and United Nations in India", Kruase, Keith and Andy Knight W. (ed.) *State, Society and the UN System: Changing Perspectives on Multilateralism* 61-97 (1995); Arthu Lall, "Problems and Prospects of the UN Charter", 31 *India Quarterly* 111-120 (1975); S. J. R. Bilgrami, *India's Role in the United Nations: with special reference to trust and non-self-governing territories*, (New Delhi: Jamia Milia, 1969).

[807] Although a very few complete volumes have been dedicated to exclusively to the reform of the UN topic, a considerable number of work exists and still being produced discussing individual topics concerning the UN reform. Joy Hyvarinen, "The 2005 World Summit: UN Reform, Security, Environment and Development", 15 *Review of European Community and International Environmental Law* 1, 1-10 (2006); Thomas Giegrich, " A Fork in the Road: Constitutional Challenges, Chances and the Lacunae of UN Reform", 48 In *German Yearbook of International Law*, 29-76 (2006); Vesselin Popovski, "UN Reform Process and Multi-Stake Holders", Report of the Third Tokyo Colloquium edited by Tatsuro Kunugi, *Towards a New Partnership of the United Nations System and Global Civil Society*, 28-33 (2006); Kunio Katakura, "The Significance of US-Canada-Japan Trilateral Research on UN Reform", Kunugi (ed.), p. 95; Dimitris Bourantonis, *The History and Politics of UN Security Council Reform*, Routledge (2005); Luk, Edward C., The UN Reform Commissions: Is Anyone Listening? In Thakur, Cooper and English (eds.), *International Commissions and the Power of Ideas*, 277-287 (2005).

reforms, which the then Secretary-General, Lie, was expected to carry out.[808] Since then, calls for reform and exercises have been doing rounds of the UN. It is important and vital that international organizations (IOs), like any governmental institution or corporate body, undergo reforms. While large-scale reforms have been initiated after every eight years on an average, smaller reform measures have been undertaken each year throughout the UN system. In order to analyze the current topic in proper context, it is useful to have a brief evaluation of all the major reform exercises. The second Secretary-General, Dag Hammarskjold, established a Group of Eight Experts in 1960 to define what should be the future of the UN Secretariat.[809] The third Secretary-General, U Thant, during his tenure, formed a Committee of Experts to study the ways of increasing the efficiency and effectiveness of the UN whose recommendations were acted upon and implemented by the General Assembly.[810] In 1975, the Group of Experts presented a report on the New UN Structure for Global Economic Cooperation in wake of the adoption of the new international economic order resolutions in the UN General Assembly. During the tenure of the fourth Secretary-General, Kurt Waldheim, the General Assembly established a rather high-sounding Committee of government experts to evaluate the Secretariat structure in the administrative, financial and personnel areas.[811] Throughout the term of the fifth Secretary-General Javier Perez de Cuellar, economic development featured in all small and big reform-oriented exercises.[812] While all these reform proposals were subjected to fierce opposition by the Cold War structure, the sixth Secretary-General, Boutros Boutros-Ghali, seized the opportunity to propose two important reform exercises when the Cold War started to disappear: *Agenda for Peace* and towards the end of his tenure, *Agenda for Development*[813] and the *Agenda for*

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[808] Lie, Trygve, *Measures for International Economic Stability: Report by a Group of Experts Appointed by the Secretary-General* [Trygve Lie], (United Nations, 1951); Lie, Trygve, *Public Papers of the Secretaries-General of the United Nations*, (Columbia University Press, 1969-1978); Anthony Gaglione, *The United Nations under Trygve Lie1949-1953*, (Lanham: MD: Scarecrow Press, 2001); James Barros, "Trygve Lie and the Cold War: The UN Secretary-General Pursues Peace, 1946-1953", 24 *Canadian Journal of Political Science* 1, 208-209 (1991).

[809] Mark Zacher, *Dag Hammarskjold's United Nations* (Columbia University Press, 1970); The Hague Academy of International Law, *Séminaire Dag Hammarskjold*, 1963-66; Richard Miller, *Dag Hammarskjold and Crisis Diplomacy* (Oceana, 1961); Urquhart, Brian, *Hammarskjold*, (New York: Norton 1994); A. P. Vijapur, *The Dynamic Conception of the UN Purposes: The Relevance of Dag Hammarskjold's Model* (1985); _____, *Dag Hammarskjold's Conception of the United Nations: A Study of the Significance, Potentialities and Limitations of the World Organisation* (1981); Goodrich, L.M., "Hammarskjold, the UN and the Office of the Secretary-General" 28 *International Organization* 467-483 (1974).

[810] Bernard Firestone, *The United Nations under U Thant, 1961-1971* (Scarecrow Press, 2001).

[811] James Daniel Ryan, *The United Nations under Kurt Waldheim, 1972-1982*, (Scarecrow Press, 2001); Kurt Waldheim, *The Challenge of Peace* (London: Weidenfeld and Nicolson, 1980); Sydney Bailey, *The Secretariat of the United Nations* (Pall Mall Press, 1964).

[812] George Lankevich, *The United Nations under Perez de Cuellar, 1982-1991*, (Scarecrow Press, 2001).

[813] Boutros Boutros-Ghali, *The Papers of United Nations Secretary-General, Boutros Boutros-Ghali* (Yale University Press, 2003); Stephen Burgess, *The United Nations under Boutros Boutros-Ghali, 1992-1997* (Scarecrow Press, 2001); James D. Wolfensohn, "Boutros Boutros-Ghali: diplomat for development", 1 *Boutros Boutros-Ghali: Amicorum discipulorumque liber*, 75-77 (1998); David Hamburg and Karen Ballentine, "Boutros-Ghali's Agenda for Peace: the Foundation for a Renewed United Nations", 1 *Boutros Boutros-Ghali: Amicorum discipulorumque liber*, 489-509 (1998); Ismail Serageldin, "The Formation of a Global Development Agenda", 2 *Boutros Boutros-Ghali: Amicorum discipulorumque liber*, 1345-1368 (1998); Yogesh K. Tyagi, "The United Nations in the New World Order: A Critique of an Agenda for Peace", 31 *International Studies* 3, 265-286 (1994); Boutros Boutros-Ghali, *An Agenda for Peace 1995*, 2nd edition (United Nations, 1995); Maurice Bertrand, "The United Nations as a Core Structure of International Peace and Security", Hufner Klaus, *Agenda for Change: New Tasks for the United Nations*, 199-208 (1995); Anne-Marie Slaughter, "The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations", 4 *Transnational Law and Contemporary Problems* 2, 377-419 (1994); Yves Daudet, "An

*Democratization*.[814] All these exercises generated a huge interest among governments and civil society institutions throughout the world. The previous Secretary-General Kofi Annan largely based his reform exercise on his predecessor and during his first term, came up with the *Renewing the United Nations: The Need for Reforms* in 1997, the *Agenda for Democratization* in 2000, the *In Larger Freedom* reform exercise in wake of the 60th anniversary of the UN.[815] The current reform exercise is largely an outcome of the work of the five working groups, which the General Assembly established in 1993 during the tenure of Boutros Boutros-Ghali. These were the:

a) Working Group on the Questions of Equitable Representation on and Increase in the Membership of the Security Council[816] and other matters related to the Security Council - This group has been examining proposals for increase in the permanent and non-permanent seats in the Security Council, the regional rotation of permanent seats and the use of veto.

b) Working Group on Agenda for Development[817] - This *ad hoc* open-ended working group, which was created in 1994, has been able to come up with some consensus on how the UN should proceed with work on the agenda for development report, which was presented by Secretary-General Boutros Boutros-Ghali.

c) Working Group on Agenda for Peace – This Group has been reviewing suggestions for strengthening the UN peacekeeping capacities and has submitted resolutions to the General Assembly to improve preventive diplomacy and early warning capabilities. This group consisted of subgroups, which focused on the issues of post-conflict peace building and use of sanctions. The recent establishment of the Peace Building Commission (PBC) should be largely credited to the work of this group, which has been working since early 1990s.

d) Working Group on the financial situation of the UN[818] – This group has been addressing long standing financial crisis caused by non-payment of dues by several member states.

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Agenda for Peace as a New Means of Settling Conflicts", Yves Daudet (et. al) *Conflict Resolution: New Approaches and Methods*, 21-46 (2000).

814 Agenda for Democratisation was presented to the General Assembly by Boutros Boutros-Ghali and supplemented his earlier two reports on the Democratisation. This was circulated as an official document – Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, A/51/761.

815 Kofi A. Annan, ""In Larger Freedom": Decision Time at the UN", 84 *Foreign Affairs* 3, 63-74 (2005); _____, *In Larger Freedom: Towards Development, Freedom and Security for All: Report of the Secretary-General*, (United Nations, 2005); Joachim Muller, *Reforming the United Nations: The Struggle for Legitimacy and Effectiveness* (Leiden: Nijhoff, 2006). The UNSG's Report "In Larger Freedom", is considered to be the "most far-reaching and comprehensive, in the series". See also, J. Muller (ed.), *Reforming the United Nations: New Initiatives and Past* Efforts, The Hague, 1997, vols. I-III; *Reforming the United Nations: the Quiet* Revolution, The Hague, 2001, vol. IV. Described in the Board of Editors, "Reforming the United Nations: A Closer Look at the Annan Report", NILR, p. 319.

816 See General Assembly Plenary Meeting Official Records, 48th Session (1993), 49th Session (1994), 50th Session (1995), 51st Session (1996).

817 Jorge Heine, "A UN Agenda for Development: Reflections on the Social Questions in the South", Ramesh Thakur, *Past Imperfect, Future Uncertain*: *The United Nations at Fifty*, MacMillan, 85-92 (1998); Sumitra Chisti, "UN: An Agenda for Development: A Critique", 35 *IJIL*, 45-50 (1995).

818 Secretary-General Calls for the 1996 Special Assembly Session on UN Finances in Statement to High-Level Group on UN Financial Situation, ST/DPI/Press/SG/SM/5892, GA/9060; Position Paper of the G-77 and China on the Financial Situation of the UN, A/WGFS/33; The Financial Situation of the Organization, ST/SGB/278; The Financial Situation of the Organization, ST/SGB/215 (1986).

e) Working Group on Strengthening of the UN in general[819] – This group's focus has been to review mandates and functioning of various bodies and propose measures to strengthen the UN.

Thus, starting with the first General Assembly session in 1946, we have seen the proposals for restructuring[820] and streamlining of the organization and that every Secretary-General, the chief facilitator of these exercises, had to contend with these exercises to some degree or other. The notable aspect of the last reform exercise can be traced back to the 1986 financial crisis of the UN. Since late 1986, the need for UN reforms has intensively occupied the minds of the UN leadership as well as its critics and supporters. The current round of reforms is a response to the "increased demands…from the multiple expectations of a role of the United Nations in maintaining or restoring peace and security, combating international terrorism,[821] fighting poverty and promoting sustainable development and respect for human rights."[822]

### 9.2.1. UN Reforms: Definition and Meaning

While evaluating the UN reforms, it is imperative to bear in mind what we mean by reforms in general and the UN in particular, as the whole analysis should be seen in the framework of what we mean by the UN reform.

Reform may mean improving the existing processes, structures, functions, etc. and in that sense, reform implies a continuous process. On the other hand, reforms can be seen as a broad concept that includes an alteration, if necessary, in the very premise and institutional structure of the UN itself. Reforms in the UN system are important as, "[R]eform is an essential ingredient in the process of the evolution of any institution, be it local, national, regional or international like the United Nations. Reform is an inevitable process of readjustment, repositioning, renewal and reinvigoration of an institution….for an international organization like UN, it is also important to adjust to the emerging power equations and power play in the international arena."[823] According to the Oxford dictionary, reform means make or become better.[824] In this light, reform can be considered as a way to enhance the organization's capabilities to meet its objectives. This chapter considers that the UN reforms mean changes in the political, legal, administrative and financial functioning of the organization to deliver the

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[819] Venkata Raman, "Strengthening the United Nations on the Eve of Twenty-First Century: the Imperatives of the Legal Perspective", 35 *IJIL*, 1-15 (1995); Erskine Childers, *In a Time Beyond Warnings: Strengthening the United Nations System* (London: Catholic Institute of International Relations, 1993); Joseph Baratta, *Strengthening the United Nations: A Bibliography on UN Reform* (New York: Greenwood, 1987); T. T. B. Koh, "The Non-Aligned and Strengthening the United Nations", M. S. Rajan, V. S. Mani and C. S. R. Murthy, *The Nonaligned and the United Nations* 287-293 (New Delhi: Oceana, 1987); Edward Thomas Rowe, *Strengthening the United Nations: A Study of the Evolution of the Member States Commitments* (London: Sage, 1974).

[820] Vijay K. Nambiar, "Strengthening and Restructuring the United Nations", Banerjee, Dipankar, *Rethinking Security: UN and the New Threats*, 71-78 (New Delhi: India Research Press, 2005); Jan Woroniecki, "Restructuring the United Nations: A Response to New Tasks or a Substitute for Action?", 59-84 Hufner (1995); Walter Hoffmann, *United Nations Security Council Reform and Restructuring* (Livingstone: Centre for UN Reform Education, 1994); R. I. Meltzer, "Restructuring the United Nations System: Institutional Reform Efforts in the Context of North-South Relations", 993-1018, *International Organization* (1978).

[821] Faiza Patel-King and Swaak-Goldman, The applicability of international humanitarian law to the "war against terrorism," In 15 *Hague Yearbook of International Law* 39-49 (2010).

[822] Board of Editors, "Reforming the United Nations: A Closer Look at the Annan Report", *Netherlands International Law Review*, 317-344 (2005) at p. 317.

[823] Muchkund Dubey, "Reform of the UN System and India", Atish Sinha & Madhup Mohta (eds.), *Indian Foreign Policy: Challenges and Opportunities*, 139-92 (New Delhi: Foreign Service Institute, Academic Foundation, 2007).

[824] The Little Oxford Dictionary of Current English, 1992.

mandate in a more effective and efficient manner and should be seen as such by all stakeholders. The UN reforms need to be seen as a sum of what all member states wanted it to be. UN reforms may also mean the substance, which the UN delivers, and the way it delivers, which takes into account the contemporary needs and caters to the perceived future needs, interests, and aspirations of all member states and their populations *together*. The UN was not so much in limelight during the Cold War. However, since 1992, due to the end of Cold War, environmental agenda, invasion of Kuwait, civil wars in Africa and Europe, rise of Non-Governmental Organizations (NGOs) and Multinational Corporation lobbies, the civil society has started taking an active interest into the UN work and conversely the UN is also looking to the civil society institutions for inspiration and cooperation.

Reform ideas can be broadly classified as those contained in and generated from within the UN (for example, the General Assembly, Joint Inspection Unit,[825] ECOSOC, Secretary-General) and outside the UN (for example countries like Nordic Project,[826] United Kingdom, USA, Canada, Japan etc.) and also from individuals and agencies.

Generally, developed countries have taken lead in the reform process of the UN and developing countries have been on defensive or reactive to such proposals.[827] The UN reforms are also seen by the developing nations as a continuing threat to their position and interests in the UN. Whether these assertions remain true in the current round of reforms which started in 2005?

### 9.3. India's role in the reform exercise - Understanding the aspirations of a rising global power

Against this broad background on fundamental requirements and practice on the UN reforms, this chapter focuses on India's role in the current reform exercise of the UN and how Indian proposals aim to contribute, through these proposals, to the progressive development of international law. In order to put India's contribution into a proper context, it is imperative to be aware of her current position in the contemporary world affairs. This could help us to see why India has proposed particular reforms. There have been fundamental changes in the polity and economy of India. India is emerging, and to an extent has emerged in certain sectors, as an important global power,[828] especially after its successful nuclear tests and economic boom.[829] The economic boost and

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[825] Wolfgang Munch, "The Joint Inspection Unit of the United Nations and the Specialized Agencies: The Role and Working Methods of a Comprehensive Oversight Institution in the United Nations System", 2 *Max Planck Yearbook of International Law* , 287-306 (1998).

[826] Nordic UN Project, *The United Nations in Development: Reform Issues in the Economic and Social Fields: A Nordic Perspective* (Stockholm:Almqvist & Wiksell International, 1991); _____, *Perspectives on Multilateral Assistance* (1990); _____, *The United Nations: Issues and Options: Five Studies on the Role of the UN in the Economic and Social* Fields (1991); Chadwick Alger, Gene Lyons and John Trent (et. al) *The United Nations System: The Policies of Member States* (Tokyo: United Nations University Press, 1995).

[827] Muchkund Dube, *Reform of the UN System and India*, p. 140.

[828] Ashley J. Tellis, *India as a New Global Power: An Action Agenda for the United States* (Carnegie Endowment, 2006); "India: A Rising Power", *Power and Interest News Report*, 18 August 2004; "India as a Global Power", *Deutsche Bank Research* Report, 16 December 2005; "Will India become a Global Power", *Council on Foreign Relations* debate, 19 June 2006.

[829] Shashi Shukla, "Humanitarian Intervention: Power Politics and Global Responsibility", 57 *India Quarterly* 3, 79-96 (2001); Ross Babbage, *India's Strategic Future: Regional State or Global Power?* (Basingstoke: MacMillan, 1992); Baldev Raj Nayar, *India in the World Order: Searching for Major Power Status* (Cambridge University Press, 2003); Jyotirmoy Banerjee, "Power on the Sea: India's Power Projections in the Indian Ocean", Rao, P.V., *India and Indian Ocean: In the Twilight of the Millennium: Essays in Honour*

economic independence of the nation, together with its enhanced and proven abilities to provide assistance to other developing countries[830] have given its political structure a new confidence that it should exercise more leverage at the international level, through multilateral forums, especially the United Nations. In the areas of environment and development, it has been felt that India could be on the receiving end in the long run; it is, therefore using its developing country status and *a chief spokesperson of developing countries* card to call upon the industrialized countries to live up to the legitimate expectations of the developing countries. In the UN peacekeeping operations, its strength has stretched all areas of functioning of the operations,[831] hence, it is in a sound position to propose far-reaching reforms in this area. The Indian media is also playing an important role in this respect.[832] It has created a strong perception among the Indian masses and the international fraternity that the world body should embrace the proposals of India.[833] Internationally, in the context of the Security Council reform, India has effectively aligned itself with Japan, Brazil, and Germany and has been seen as a permanent friend of the African countries. Worth a mention is the Indian initiative since 1995 for a global anti-terrorism agenda. India has been under the siege of terrorist attacks under various causes, such as political causes in the North Eastern States of India, Assam and Tripura, economic causes Andhra Pradesh, Madhya Pradesh, Odisha and Bihar and religious causes, Punjab and Jammu and Kashmir, much before 2001. 9/11 and other terrorists events have played an important role in favor of India.[834] Ever since the world in general and the Western countries in particular, are paying significant attention to the long pending calls of India for elimination of terrorism supported by governmental or any machineries. It has been realized that no reform measures in the UN, can succeed without the complete and active involvement of India.

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*of Professor Satish Chandra*, 50-70 (2003); Mira Kamdar, "India and the New American Hegemony", 19 *Connecticut Journal of International Law* 2, 335-344 (2004).

830 Government of India has a dedicated department called Indian Technical and Cooperation and Assistance Division which provides bilateral assistance to other developing countries. It spends about Rupees 500 million annually on ITEC activities. Since 1964 (its inception), India has provided over USD 2 billion worth of technical assistance to developing countries. See http://itec.nic.in/about.htm (accessed 20 July 2007); See Statement by Mr Lal Dingliana, Joint Secretary (Technical Cooperation), Ministry of External Affairs on *South-South Cooperation for Development* at the 14th Session of High Level Committee on South-South Cooperation.

831 www.indianembassy.org/policy/Peace_Keeping/history_india_UN_peace_keeping (accessed 20 July 2013); Since 1948, UN Peacekeepers have undertaken 64 Field missions. There are approximately 93,368 personnel serving on 14 peace operations led by UNDPKO, in four continents. This represents a nine fold increase since 1999. A total of 114 countries have contributed military and police personnel to UN peacekeeping. Currently more than 80,879 of those serving are troops and military observers and about 12,489 are police personnel. So far India has taken part in 43 Peacekeeping missions with a total contribution exceeding 1,60,000 troops and a significant number of police personnel having been deployed Secretary-General Praises India's Peacekeeping Contributions in Remarks at New Delhi Training Centre, SG/SM/7741, 16 March 2001.

832 The continuous economic growth and enhanced military capacity has generated a peculiar sense of sustained confidence in the Indian population and the successive governments have been too pleased to exploit this mass appeal as far as UN reforms are concerned, especially India's membership in the expanded Security Council. The writings in Indian media too have contributed to government's increased confidence to confront the major powers in this regard. Sustained economic growth has created huge economic, political and even social expectations of India's population for India's success and more effective achievement during the latest round of UN reforms.

833 "India and the Problem of UN Reform", *The Hindu*, 26 April 2005; "UN Reform Useless without UNSC Expansion, warns India", *International Business Times*, 19 April 2007; "India Proposes Panel of 3 Names for Choosing Next UN Sec Gen", *Global Policy Forum*, 18 May 2006.

834 Much before 2001, India had suffered from the first large scale terrorist attacks in 1993, when 13 bombs in Mumbai were blasted in series and killed 257 people. Mumbai alone has witnessed 9 incidents directly related to spread of terrorism in the city.

### 9.3.1 Why India views the current reform exercise an extremely important one?

The general analysis above paints a bright picture of India and leads us to the next question of why India argues that the current reform exercise is extremely important and what contribution an effectively reformed UN would make to the peace, security and development of the world?

The UN, like any IO, is subject to critical assessment, and needs changes and renewal to retain its relevance and vitality.[835] India views the current reform process in these broad terms. The Indian case convincingly argues that unless the UN, in a time bound manner, caters to the interests and aspirations of the developing countries, the reformed UN is bound to have significantly lost its credibility and relevance. Hence, India seized the 60th anniversary opportunity to add life into the overall reform exercise. Reform of the Security Council has been in sharper focus than any other areas. The ambitious nature of the Security Council mandate, together with its power-sharing arrangements and its accomplishments at any point in time has seriously disappointed the world community. In view of the absence of any strong alliance or force, India together with Brazil, Germany, and Japan have taken up a much-needed lead in this regard.[836] It is this persistent disappointment of disenfranchisement, which has led to the demand of a point of no return for the expansion of the Council. In addition to the Council reform, India has proposed that issues of concerns to developing countries like financial flows, the multilateral trading system, and external debt should be at the heart of the renewed UN. The reformed UN should be addressing these issues with new vigor and commitment. India has also underlined the importance of enhancing the voice and participation of developing countries in the decision-making processes in global trade, financial and monetary institutions that need to be urgently addressed.[837] Thus, the Indian proposals address the substantive mandates delivered by the UN and call upon the measures within the UN and inter-organizational relations to fill in the democratic deficits in the decision-making processes.[838] These proposals reflect all critical elements of the progressive development of international law, which aim to respond the contemporary and future needs of international affairs.

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[835] Reform in a timely manner is essential for retaining relevance and vitality. In case of the UN, as "skepticism as to the relevance of the Organisations results from its failure to act timely and decisively in situations such as Rwanda, former Yugoslavia and Darfur.", Board of Editors, Netherlands Int Law Review, *Reforming the United Nations*, p. 317.

[836] Ricardo Sennes and A. Barbosa, "Brazil's Multiple Forms of External Engagement: Foreign Policy Dilemmas", John English, Ramesh Thakur and Andrew Cooper (ed.), *Reforming from the Top: A Leader's 20 Summit*, Tokyo: UNU Press, 201-29 (2005); Celso Amorim, "Current Challenges to Multilateralism and the United Nations: A View from Brazil" In Uday Bhaskar, *United Nations: Multilateralism and International Security*, New Delhi: IDSA 29-36 (2005).

[837] The conflict is due to the fact that the developing nations wish that UN have a decisive influence in determining the shape and structure of the emerging international financial architecture which is becoming more discretionary and less regulatory and rule-based. While on the other hand, the IMF, World Bank, the WTO would not like to have any reduced effectiveness of their role of intervention and intermediation in the international monetary and financial systems. Developing countries wish further that the ECOSOC becomes a main forum for discussing the coordination of the global macroeconomic policies of member states, which developed countries obviously would not like to concede.

[838] "Bridging the Democratic Deficit: Double Majority Decision Making in IMF", *Bretton Woods Project*, 2 February 2007; Shairi Mathur, "Voting for the Veto: India in a Reformed UN", *Foreign Policy Centre 2005;* Prime Minister of India, Mr Manmohan Singh, Address delivered at the Commonwealth Meet on Development and Democracy, 25 August 2005

### 9.4. India's proposals in the current reform exercise

In the past, India actively participated in almost all of the UN reform exercises. Its notable contributions are seen in the permanent establishment of the UNICEF,[839] UNDP,[840] and restructuring of the economic and social agenda of the UN since 1952.[841] In the current round, India has called upon the UN to identify concrete goals for the promotion of development, cooperation, disarmament and financing of the UN so that the UN is able to effectively deliver its mandate. It has called upon the UN member states that principles of transparency, non-discrimination, consensus, and equal respect for the dignity of all individuals, societies, and nations, are fully adhered to by the comity of nations. Furthermore, these principles should guide the world community in the issues of trade,[842] environment, development, debt crisis, and economic assistance for the poorest members. However, the focus of the Indian proposal is centered on the reform of the Security Council.

#### 9.4.1. India's proposals rooted in outdated and contemporary theories of international relations

How Indian proposals are rooted in various international relations theories? It is instructive to see how India has used various theories of international relations during the current reform exercise. The Indian response to environment and development is based on two theories: pluralism and structuralism. Talking of pluralism,[843] India has launched an offensive that all international treaties need to be abided by. India pointed to the large number of comprehensive and binding multilateral treaties, which already serve to maintain environmental quality. The Indian standpoint has been to drive home the point of the industrialized countries abiding by the provisions, especially those that favor the development of developing countries (like India). In fact, statements by India at various forums concerning the UN reform have emphasized the need for implementation of various existing hard law (international treaties, conventions, protocols) and soft law (resolutions, declarations) instruments. On the one hand, India has sought to ensure that industrialized countries maintain their Overseas

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[839] UNICEF was created in December 1946 by the United Nations to provide food, clothing and health care to children, after the World War II, as the European children faced famine and diseases. UNICEF became permanent part of the UN in 1953.

[840] M. K. Kamala, *The UN development co-operation and the Third World: a study with special reference to the UNDP and India*, New Delhi: Manak, 257-71 (2002).

[841] UN Report on the "Measures for the Economic Development of Under-Developed Countries", May 1951. This Report is also termed as UN Primer for Development. The report elaborates on the concept of progress, the cure for unemployment, development planning, need for external capital, private investment, government landing and intergovernmental grants. S. H. Frankel, "United Nations Primer for Development" LXVI *Quarterly Journal of Economics* 2, August 1952, p. 301. In 1949, Mr V. K. R. V. Rao of India, came up with a proposal for UN Economic Development which would finance basic economic development. India played an important role in the 1950s in influencing the norms and policies of the Expanded Program of Technical Assistance (EPTA). It may be noted that, between 1959 and 1965, India made significant contribution on development funding issues and made substantial contributions too, owing to its high political profile.

[842] Hardeep Puri, "How and under what conditions can developing countries be enabled to receive a better share of a benefit of trade facilitation?," In United Nations Economic Commission for Europe (ed.) *Sharing the gains of globalization in the new security environment*, 29-35 (2010).

[843] India has a strong civilisational history of pluralism. India is a pluralist state, having people from different backgrounds and cultures, different religions and languages. India advocates a more plural international order which will make global governance structures of the UN more effective by providing a greater variety of solutions to the diverse problems facing states. Stephen Chen, *Theories of International Relations: Volume II: Approaches to International Relations: Pluralism*, London: Sage (2006); William W. Burke-White, "International Legal Pluralism", 25 *Michigan JIL* 4, 965-979 (2004); Oriol Casanovas, *Unity and Pluralism in Public International Law*, (Leiden: Nijhoff, 2001); Gardiol van Niekerk, "State Initiatives to incorporate Non-State Laws into the Official Legal Order: A Definition of Legal Pluralism?", 34 *Comparative and International Law Journal of Southern Africa* 3, 349-361 (2001).

Development Assistance (ODA) at the rate of 0.7% of the GDP (soft rule) and on the other, attempted to secure limits to the greenhouse gas emissions level (Kyoto protocol) by the industrialized countries. What India has also sought is to set clear priorities in the environmental agenda at the UN.[844] It has been observed that the overall Indian approach has been laid out in the theory of structuralism,[845] in the sense that it has always viewed environmental degradation as an inevitable characteristic of the capitalist world system. From this perspective, India has viewed poverty, racism and neo-colonialism as products of imperialism, which has created an unequal world.

India has envisaged a further expansion of competence for international organizations, both as forums for the negotiation of agreements and as executive agencies for administration in the functionalist manner in the technical areas such as environment, development, and cooperation. In the current reform exercise, India has continued to reiterate the importance of the implementation of functionalist theories and delivery of goods by international organizations as main vehicles (implementation of fundamental elements of neo-functionalist theories[846]) for realizing the aims and objectives of this theory.[847]

As far as realism[848] is concerned, it is hardly deniable that the Indian approach to the Security Council reform fully reflects the basic tenets of this theory. India has viewed that the Council tends to behave in a manner wherein the P5 try to maximize their national interests. By becoming a permanent member of the Council, the new status would also offer India an opportunity to maximize its own national interests. Evaluating in terms of the Rational Choice Model,[849] what India has tried to do is to take advantage of opportunities to overcome challenges posed by the existing international environment. The 60th anniversary and few years thereafter was an ideal opportunity to take advantage and this opportunity, which became a good platform to generate the necessary political will necessary for forwarding far-reaching proposals. For example, concerning the expansion

[844] Indian stand on insistence of pluraslim is essential for the meaningful reforms of the UN system, as developed countries' real purpose for reforms has been "to maintain the *status quo* in international economic relations, *eliminate pluralisam* (emphasis added), and stem dissent inconvenient to them, tighten their control over UN institutions, and restrict the democratic functioning of the UN institutions." Muchkund Dubey argues that "reforms have also been used to dilute the pluralistic and democratic character of the UN." Muchkund Dubey, *Reform of the UN System and India*, p. 141.

[845] S. P. Sathe, "India: From Positivism to Structuralism", Goldsworthy, Jeffrey *Interpreting Constitutions: A Comparative Study*, 215-265 (2006); Stephen Chen, *Theories of International Relations: Volume III: Approaches to International Relations: Structuralism*, (London: Sage, 2006).

[846] Thomas Gehring, *Integrating Integration Theory: Neofunctionalism and International Regimes*, San Domenico: European University Institute, (1995).

[847] Voting strength of developing countries is one of the important assets in the reform process. However, this strength has severe limitations too. For example, their calls for conferences focusing on development issues have been realized, but they have been far from successful in achieving the aims. Similarly, the developing nations would like to achieve structural changes by way of legislating such changes in the field of trade, development assistance and finance, however, such changes are impossible to be materialized. See, Vincente Blanco-Gaspar, "Differential voting strength", In T. Buergenthal (ed.) *Contemporary Issues in International Law: Essays in Honour of Louis B. Sohn*, Kehl: N. P. Engel, 313-23 (1984).

[848] Adriaan Bos and Hugo Siblesz, Hugo (eds.), *Realism in Law-Making : Essays on International Law in Honour of Willem Riphagen* (Martinus Nijhoff, 1986); Charles Hobbes Covell, *Realism and the Tradition of International Law*, Palgrave MacMillan (2004); Pieter H. Kooijmans, "International Law: Placebo or Medication?", Willem van Genugten (ed.), *Realism and Moralism in International Relations: Essays in Honour of Frans A.M.Alting von Geusau*, 87-92 (the Hague: Kluwer Law International, 1999); Jack Goldsmith and Stephen D. Krasner, "The Limits of Idealism In Berman Paul Schiff", *The Globalization of International Law*, London: Asghate, 2005; Wilfred Jenks, "Idealism in International Law", Momtaz Nawaz and Krishna K. Rao, *Essays on International Law in Honour of K. Krishna Rao*, (Leiden: Sijthoff, 1976).

[849] D. P. O'Conell, "Rationalism and Voluntarism in the fathers of International Law", 13 *The Indian Yearbook of International Affairs* 2, 3-32 (1964).

of the Security Council permanent membership, if it would have been the sole proponent, it would have also easily lost the battle half way through. However, by aligning with three other countries, it has tried to overcome the challenges, which would otherwise have been difficult to handle alone.

### 9.5. India & Reform of the Security Council - Essence of various proposals and justifications thereof

Unlike the 1960s, there is widely held consensus among all countries that reform, especially of the composition of the Security Council, with or without the veto power is necessary. The Security Council increased its membership in 1963-65, from 11 to 15. It should be noted that India's proposal in 1979 to increase the non-permanent members from 10 to 14 got nowhere.[850] Italy's idea[851] to replace France and UK with Japan and the EC has been clearly unacceptable to France and the UK.[852] Brazil's 1989 proposal to create an additional category of membership (that of permanent members, but not with veto powers) has not been accepted universally; and the developing countries' demand for the gradual withdrawal of the veto power is a dead-on-

[850] UN Doc. A/34/246 (14 November 1979).

[851] Uniting for Consensus, *Draft resolution on the Reform of the Security Council*, 21 June 2005, In his introduction, Marcello Spatafora (Italy) said that the G-4 model was structured in such a way as to benefit just six "happy few", at the detriment of all the other 180 Member States, and with a tremendous divisive impact on the membership. He was sure that Member States would not accept "to be taken for a ride". Arrogance never paid. No reform would be able to enhance the effectiveness and efficiency of the Organization if it was not rooted in the principle of fair and equal opportunities to be granted to all its Members. Only then would they be able to strengthen and enhance their sense of ownership of the United Nations, their sense of belonging to an organization of which they could be proud. It was along those lines that the Uniting for Consensus draft resolution intended to offer a constructive non-divisive platform for discussion and decision, a platform extremely flexible and centred on a strong regional empowerment. Continuing, he approached "a very delicate issue" that risked -- if not addressed properly -- to "bring shame upon this house" and to destabilize the whole process of reform. That ethical issue related to the G-4 resorting to financial leverage and financial pressures in order to induce a government to align or not to align itself with a certain position, or to co-sponsor or vote in favour of a certain draft, he said. Not later than yesterday morning –– and that was just the latest example -- a G-4 donor country had informed a government that had co-sponsored the Uniting for Consensus resolution that, because of that, the donor would put an end to a development project already in place in that country and would never start another important infrastructural project that had already been decided. Such improper and unethical behaviour was a shame. After the "oil-for-food" scandal, the Organization could not afford the luxury of another scandal, much more serious and destabilizing than oil-for-food, he said. Here, it was not a question of pocketing money. It was a question of ethics and moral values. It was a question of blackmailing some sectors of the membership, taking undue advantages from others' vital needs. "Enough is enough", he said. "In the United Nations, we should promote a public culture in which responsible political advocacy, with no distortions or abuses, becomes the operative norm; a culture in which legitimate political advocacy or lobbying does not trespass an undoubtedly thin borderline, and becomes blackmail and corruptive practice." He was sure that Member States and the Secretary-General would not turn their heads, he continued. They would not want to be responsible in front of the international community "in deciding to sweep the dust under the carpet" and not to go into an in-depth assessment of the situation through an independent committee of inquiry, or any other initiative deemed appropriate. At stake was the credibility of the Organization and of its process of reform. Reforms could not be dictated by power or money. They had to be dictated by principles, and it was the Assembly's duty to strengthen the hand of those Member States who relied on the Organization and who must know that they would be able to say "no" to improper and unethical requests without fear or suffering financial consequences. UN Press Release GA/10371 dated 26 July 2005, 59th GA Plenary , 115th Meeting, "Uniting for Consensus' Group of State Introduces Text on Security Council Reform to General Assembly" proposes maintaining permanent 5 with 20 Elected Members.

[852] See generally, Gabriella Venturini, "Italy and the United Nations: Membership, Contribution and Proposals for Reform", 20 *Hamline Law Review* 3, 627-639 (1997); Ando Salvo, "The New International Situation and Its Implications for the Italian Defence Policy", 28 *International Spectator* 3, 23-32 (1993); Italian Society for International Organization, *Italy and the United Nations*, (New York: Manhattan, 1959).

arrival proposal. Thus, what are the prospects and challenges to the current efforts of India to succeed with the expansion of the permanent members of the Security Council?

The focus of India on the Security Council reform has centered on the composition of the Council and its working methods, use of veto and relations with other principal organs, such as the General Assembly.[853] Why did India stake a claim for permanent membership of the Security Council? What did it want to achieve by the reform of the composition and relational issues? How did it pursue this specific goal? These questions are analyzed in the following sections.

### 9.5.1. Expansion of the Composition of the Permanent Membership of the Security Council

While there are various debatable reasons for the expansion of the Council's composition, as professed world over, the Indian claim focuses on manifold issues. India has strongly contended that the Council, the size of which was expanded in 1965 from 11 to 15, without any expansion in the permanent members' category, has remained frozen. Secondly, developing countries constitute an overwhelming majority of the principal plenary organ of the UN, namely, the General Assembly and it is these countries, which are also most often the objects of the Council's actions. Hence, they must have a role in shaping those decisions, which affect them. The present composition, especially the permanent membership of the Security Council category, is weighted heavily in favor of industrialized countries. This imbalance must be redressed by an expansion of the Council, through enhancing the representation of developing countries in both permanent members and non-permanent members' categories. Thirdly, the success of the Council's actions depends on political support of the international community, thus, the restructuring of the Council should be broadly based. Members of the Council must feel that their stakes in global peace and prosperity are factored into the UN decision-making process.[854] The fourth reason is that the expansion of the membership is a relevant and important, albeit indirect, factor in bringing about changes and improvements in the Council's working methods. That is because its impacts would no doubt being felt, including breathing a new life into its *modus operandi*.

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[853] Dimitris Bourantonis, *The Politics and History of UN Security Council Reform* (Routledge, 2005); Karel van Kestern, "Reform of the Security Council: A No-Win Situation?", Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force: Theory and Reality: A Need for Change?* 261-268 (Leiden: Nijhoff, 2005); Yehuda Blum, "The Proposals for the Security Council Reform", 99 *AJIL* 3, 632-649 (2005); Jan Wouters and Tom Ruys, "Security Council Reform: A New Veto for New Century?", 44 *Revue de droit militaire et de droit de la guerre* 1-2, 139-174 (2005); Mark W. Zacher, "The Conundrums of International Power Sharing: The Politics of Security Council Reform", Richard Price and Mark W. Zacherm *The United Nations and Global Security*, Palgrave MacMillan, 211-226 (2004); Igor Bailenm "In Search of a Southern Agenda toward the Imperative of UN Security Council Reform", 77 *Philippine Law Journal* 2, 158-190 (2002); Morris, Justin. "UN Security Council Reform: A Council for the 21st Century", 31 *Security Dialogue* 3, 265-277 (2000); Fitzgerald, Amber, "Security Council Reform: Creating a More Representative Body of the Entire UN Membership", 12 *Pace International Law Review* 2, 319-365 (2000); Bardo Fassbender, *UN Security Council and the Right of Veto: A Constitutional Perspective* Kluwer Law International, 1998); Ingo Winkelmann, "Bringing the Security Council into a New Era: Recent Developments in the Discussion on the Reform of the Security Council", 1 *Max Planck Yearbook of International Law*, 35-90 (1997).

[854] Paul C. Szasz, The Security Council starts legislating, 96 *AJIL* 4, 901-905 (2002); Peter Hulsroj, "The legal function of the Security Council", 1 *Chinese JIL* 1, 59-93 (2002).

### 9.5.2. Why India would like to become a permanent member of the Security Council?

In addition to the above reasons, there are several critical factors, which should be counted in understanding the Indian claim.[855] First, since the Council is the first among the principal organs of the UN and enjoys preeminence in all peace and security matters, India, as a rising global power, obviously would like to have a seat, so that its interests and aspirations are catered to. India, in its new status, is likely to face enormous political challenges; hence, by becoming a permanent member of the Security Council, it could very well do what other permanent members have done so far.[856] Secondly, there is a broad consensus the world over that India, by any measurement whether objective criteria or global credentials, appears to be more or less the only UN member, which would be easily accepted by the world community as a new permanent member of the Security Council.[857] India has been the only member, which has successfully garnered support of several EU member states, the entire African union,[858] and key Asian and Latin American states. US President Obama affirmed that, "in the years ahead, the United States looks forward to a reformed UN Security Council that includes India as a permanent member."[859] Thirdly, in addition to a broad universal support, India possesses political, military, and economic influences on a global scale, which allows it to take up an important role in the Council. Last but not the least, India has categorically emphasized and agreed to assume new obligations and responsibilities,

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[855] Right from the days of San Francisco Conference, India has been vehemently arguing for the proper composition of the Security Council. For example, one of the India sponsored amendments to Dumbarton Oak Proposals related to the criteria for the selection of the non-permanent members in the Security Council and inclusion of observers in the Security Council. The Indian delegation was quite concerned about the selection of states to sit on the council which, it argued, should be based, inter alia,, on population, industrial potential, willingness and ability to contribute to international security arrangements and past performance. It supported the Yalta formula regarding the veto, but suggested that the provision should be open to revision after 10 years. A. Lall, "The Asian Nations and the United Nations" in N. Padelford and L. Goodrich (eds.), *The United Nations in the Balance* (1965) at 365.

[856] The underlying interests, for obviously understandable reasons are clear: UN is not facing the crisis to adjust to the existing global power structure nor the crisis is due to the non-consensus on the nature of the threats to international security or on the methods to meet these threats. "The real crisis is that the more powerful among the member states now want to go back on this body of international law and on the common values and are bent upon perpetuating the obvious inequities and imbalances in the rules and regime which govern international relations." Muchkund Dubey, *Reform of the UN System and India* above at p. 156. Indian position and ideological fighting heavily depends on these tenets.

[857] It is well known that all permanent member candidates face strong rivalries. For example, Japan and Germany, despite their post-World War II credentials and records, industrial status and contribution to the world peace and stability would not be easily accommodated unless there is sufficient addition of new permanent members from Asia, Africa and Latin America. India is likely to get opposition from its regional rival, Pakistan, while Japan is likely to be opposed by China and Korea. Similarly, Brazil faces rivalry of Argentina and to an extent Mexico, and Italy opposes Germany. Three candidates from Africa, namely, South Africa, Nigeria and Egypt, do not have easy ride within Africa. However, despite the presence of these rivalries, it is safely assumed that India does enjoy broad support and there is no real public statement from Pakistan explicitly opposing India's candidature.

[858] The annual report of the MEA of India, various statements of visiting foreign leaders leave no doubt that India, among all the aspirants enjoy the full support for its membership. In fact, it can be said that the world community has realized that India should have been a permanent members much earlier. It was stated by the Minister of State in the MEA (Mr. Sharma) on 10 May 2006 that there has been a steady accretion of support to India's candidature since it was announced in 1994. Support for India's candidature has been expressed in various forms and fora. Some countries have expressed support confidentially in bilateral discussions with Government of India. The Government continues its engagement with other member states of the UN on the issue of reform and expansion of the Security Council. In both permanent and non-permanent categories of membership and its efforts to mobilize further support for India's candidature for a permanent seat in the UN Security Council.

[859] The Joint Statement by US President Obama and Indian Prime Minister Singh of 8 November 2010, New Delhi.

including financial obligations, if it is made a permanent member of the Council. This is in line with the long pending proposals reiterating that the permanent members should bear heavier burdens than what they are carrying. Summing up, in the current international environment, the legitimate claim is bound to ensure that India is the first natural candidate of an expanded permanent member category of the Security Council.

The words of the ex-Foreign Secretary of India, Shyam Saran, summarize India's legitimacy of claim for a permanent position in the Council, "We believe that India, with its large population, dynamic economy, long history of contribution to international peace-keeping operations and other regional and international causes, deserves to be a permanent member of the Security Council. At the same time, we also realize that there is a resistance to change among several powerful countries. However, this is the first time in many years that a certain momentum has been built up for a comprehensive reform of the UN, which should not be allowed to wither away".[860]

### 9.5.3. Use of Strategy to justify the Claim and thus achieve the Objective

Which strategies has India employed to garner the support and overcome challenges to its candidature for the permanent membership of the Security Council? India employed bilateral, regional, and multilateral strategies to promote its claim. It has continued to utilize bilateral meetings with different countries to mobilize further support besides participating actively in the Security Council reform debates. India has also shown flexibility over the use of veto power.[861] As regards the issue of veto power, India believed that the existing and new permanent members of the Council should have the same responsibilities and rights. This principle is underlined in the G4 Framework Resolution. However, based on extensive consultations and keeping in view the wide divergence of views on the issue of veto, the G4 resolution provides for a decision on this issue at a review, which is envisaged 15 years after the entry into force of the amendments to the UN Charter for the expansion of the Security Council.[862] Thus, one could conclude that the first target of India is to ensure its membership in the permanent members' category. India's alignment with other aspirants of the Council's permanent membership has also helped boost its claim further.

India has vehemently opposed the idea of immediate re-election of non-permanent members because such a situation would not address the long held grievances against the Council by the world community. In the view of India, the re-election of the non-permanent members would …(i) not address the issue of the accountability deficit which is existing in the Council, (ii) not be able to prevent continuous encroachment by the Security Council led by current permanent members of the General Assembly, (iii) be seen as reforms for the sake of reforms, (iv) not address the problems of the working methods, (v) not ensure access of small and

[860] This was a straightforward proposal by the highest Indian diplomat in an academic think tank forum of P5 but not same in other P5 members. Why India did not do the same in other countries. (11 Jan 2006, Ambassador Shyam Saran talking "Present dimensions of the Indian Foreign Policy – at Shanghai Institute of International Studies, Shanghai).

[861] A suggestion has been made and analysed to make agree the permanent members to apply veto only to peacekeeping and enforcement measures. "The United Nations in its Second Half Century", *The Report of the Independent Working Group on the Future of the United Nations*, Yale University Press, (1995).

[862] Statement of Minister of State for External Affairs of India, Mr. Anand Sharma, in the Parliament of India on 10 August 2006.

vulnerable states to the Council and their participation in its subsidiary bodies, and (vi) would also anyhow require a Charter Amendment,[863] among other issues.

### 9.5.4. Indian proposals on Security Council Reform and Strengthening of International Law

What is the position of India on the holding of veto by the current permanent members[864] as well as possibility of introduction of the same to the new permanent members, working methods and its relations to international law? This analysis would help us see whether the suggestions forwarded by India are likely to contribute to the strengthening of international law.

On the working methods of the Council,[865] the Indian stand clearly points at the strengthening of international law.[866] It has expressed disappointment that even after 60 years, the Council has not been able to adopt rules of procedure.[867] India has strongly opposed the fact that the Council continues to encroach upon the General Assembly. Thus, the Indian position has strongly advocated the concerns of the world community about the rule of law within the Security Council. By not having the rule of law followed, the Indian position suggests that the Council has continued to fail to deliver its main mandate, namely, maintenance of international peace and security. It is expected that one of the tasks of India, if it becomes a permanent member, would be to ensure that it works with the other permanent members to have definite rules of procedure in place, which would allow the world to hold the Security Council.

Another major concern of India, which reflects the eminence of the plenary organ of the UN, namely, the General Assembly vis-à-vis the Security Council, is regarding the reporting method and content of the Council to the Assembly. It has been observed that the reports of the Council to the Assembly are trite in language, lack analysis of its work, and are obscure in content. Furthermore, the reports hardly allow an understanding of how a particular decision of the Council has been reached and does not mention disagreement, if any, between the members. These reports are questionable in the context of working methods.

Thus, India has made a comprehensive proposal which would cover all aspects of reforming the Security Council, namely, new permanent members, more restrained and effective Security Council, balance

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[863] Article 27 of the UN Charter reads as follows: (1) Each member of the Security Council shall have one vote. (2) Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. (3) Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

[864] "Forget the Veto Power, Kofi Annan tells India", *The Times of India*, 29 April 2005; "Putin Votes Veto Power for India", *The Times of India*, 4 December 2004; "No Veto Power for You", http://varnam.org/blog/archives/2005/04/no_veto_power_for_you.php (accessed 12 January 2007); "India should have Veto Power", *The Hindu*, 27 January 2005; "Why West don't Want to give Veto Power to India in UN Security Council?", http://intellibriefs.blogspot.com/2004/12/why-west-dont-want-to-give-veto-power.html (accessed on 12 January 2007); "India Refuses to Accept Permanent UN Security Council Membership Without Veto Power", *India Daily*, 20 May 2005; "UNSC Aspirants Drop Veto Right", http://www.vetoright.com/VetoRecht/unsc-aspirants-drop-veto-right-p-4.html (accessed 12 January 2007).

[865] "Security Council Reform", http://www.globalpolicy.org/security/reform/ (accessed several times in 2006 and 2007); "Debate on Security Council Reform Continues", *Centre for UN Reform Education*, 15 March 2007.

[866] An expansion of the Council will make it much more difficult for getting decisions in the Council taken under bilateral pressure or other coercive means which will contribute to restoring the letter and spirit of the UN Charter to maintain international peace and security as per the Charter's philosophy.

[867] Bailey and Daws provide excellent analysis on the topic of the procedure of the Security Council. See Sydney Bailey and Sam Daws, *The Procedure of the UN Security Council*, 3rd edition, (Oxford: Oxford University Press, 1998).

between the principal organs of the UN, definite rules of procedures - a Security Council which is accountable to the General Assembly,[868] transparent and without veto (although ambiguously stated). Thus, the Indian proposal pleaded a strong case for an institutional balance of power, an important yardstick of accountability of IOs, a contemporary topic of international law and global governance.[869]

In conclusion, India has advocated such Security Council reforms, which would strengthen UN in general and the Security Council in particular, and international law broadly. It has employed diplomatic strategies, including forming alliance, which was otherwise outcast in its idealistic philosophy, which has given worldwide support towards its candidature. It has shown flexibility concerning the final number of permanent members and veto, has shown leadership in the sense to work for a consensus so that reforms would be accepted by the international community and will be adhered to by all the members. At the same time, it has not shied away from condemning the misuse of veto power and categorically rejecting the fact that the idea of non-permanent members getting immediately re-elected would defeat the very purpose of the reforms. And this would in no way contribute to alleviate the democratic deficiency of the Security Council.[870] India's reform proposals were well-articulated, logical, result oriented, and practical. This has further enhanced its international standing. India reiterated its traditional viewpoints, which it has held since 1979 and even before.

### 9.6. Economic Development

India seized the reform year to put enormous pressure on industrialized countries to accept its proposals in the areas of trade, environment, and overall economic development. Befitting its role of a leading member of the developing countries groups, such as, Non Alligned Movement (NAM) and the Group of 77 (G77), it made a number of proposals, which attracted significant focus in the debates. It has made significant and sustained attempts to see that most pressing concerns of developing countries, like India are reflected in the reformed UN. Although one could see the qualitative imbalance in the statements of the government machineries and media between its calls for reforms of the Security Council and proposals on trade, environment, and development, its proposals touched virtually all the elements of concern to the developing countries.[871]

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[868] Statement by Mr. Ajit Malhotra, Permanent Mission of India to UN (New York), 61st Session, 13 December 2006, 6 April 2006, , Statement by Mr. Tariq Anwar, Member of Parliament of India, 61st Session, 16 October 2006, Statement by Ambassador Sen, Permanent Mission of India, 19 April 2006, 16 March 2006, 16 February 2006.

[869] Razali Plan of the UN Security Council proposed, among others, an extension by nine further members (of 5 permanent and 4 non-permanent); permanent seats are to be allotted as one seat for Africa, Asia and Latin America/Caribbean each, two further seats is not to be supposed by industrial nations to be occupied; non-permanent seats on regions to be distributed (Africa, Asia, Eastern Europe and Latin America/Caribbean); new permanent members receives right of veto, and the changes of Charter to be made by a conference after 10 years of functioning. Razali Reform Paper, Paper by the Chairman of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council; General Assembly Official Records, Fifty-First Session, Supplement No. 47, A/51/47.

[870] N. White, "Accountability and Democracy within the UN: A Legal Perspective", 6 *International Relations* 13, 1-17 (1997); C. Bellman and R. Gerster, "Accountability in the World Trade Organisation*",* 30 *Journal of World Trade Law*, 31-74, (1996); S. Brown and L. Fabian, "Toward Mutual Accountability in the Non-Terrestrial Realms", 29 *International Organisations*, 877-892, (1975); S. Williams, "Sovereignty and Accountability in the European Community", In R. Keohane and S. Hoffmann (ed.) *The New European Community*, 155-176 (1991).

[871] Veena Jha, "Trade and environment: Doha and beyond," In Aaditya Mattoo and Robert M. Stern (ed.) *India and the WTO*, World Bank, 299-325 (2003).

India did not fail to point out, wherever possible, to the failure of industrialized countries in living up to their promises, be it in the area of overseas development assistance, technology transfer, additional financing for development, capacity building, and so on. To redress this malaise, it has demanded a non-discriminatory, open, transparent, and equitable financial, monetary, and trading system and full and effective participation of developing countries in the international norm-setting and rule-making processes. However, these demands have been on the plates of developing countries for a long time already, so one hardly can distinguish between earlier and current calls and does not see any value added calls by India during the current round of reforms.

### 9.6.1 Rationale of the Indian position on reforms on economic issues

Since the area of economic and social affairs in the UN is being increasingly marginalized, India has pushed for reforms in this area.[872] In its view, the UN is marginalized when it comes to matters that are economic. In that context, then, the question of international security is being divorced from that of its social and economic context. What India wants to reinforce is the link between maintenance of peace and security and the development of developing countries.

Realizing, that by merely calling for greater cooperation between the ECOSOC and the Bretton Woods institutions (BWIs), but not actually concretizing particular efforts, the previous Secretary-General Annan's agenda has not really contributed much to the development function of the UN reforms. India has tried to address the democratic decision-making deficiency of the BWIs. Within the BWIs, it called upon for the removal of conditions imposed by the International Monetary Fund (IMF) (which are even found in the Policy Support Instrument of 2005), addressed how it has failed to address the imbalance at the core of the current financial and economic instability. The Indian proposition has reinforced that accelerated development is a right and a legitimate expectation of the developing countries. At the institutional level, India has proposed, together with G77, that the UN Secretariat work focuses more on social and economic development.

Overseas Development Assistance (ODA) and debt cancellation were the most important demands of India, especially to reduce the poverty to half by 2015, which was the first goal of the Millennium Development Goals (MDG). In the view of India, the MDGs[873] cannot be achieved without implementing the 0.7% ODA target in a time-bound manner and innovative financing, deeper debt relief, enhanced market access and improved global economic governance. This call of India is worth noticing in view of the fact that even though the aggregate ODA has reached a record high of US $ 106 billion in 2005, only a small fraction of this nominal increase has actually represented additional finances to support real investments in the neediest of countries. Thanks to efforts coordinated by India, an agreement has been reached to monitor the fulfillment of commitments made to provide development assistance. Furthermore, Indian efforts have had favorable results on the efforts by industrialized countries to offer deeper debt relief and cancellation to various countries in Africa, which has been complemented, with the sharp increases in ODA.

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[872] "Dialogue on Globalisation", http://www.fes-globalization.org/ (accessed on 12 July 2007); "UN Reform, Regional Security and HIV/AIDS Top Subjects of Annan's Talks in India", *UN News Center*, 27 April 2005; "South Fights for a Fairer UN System", *Third World Network*, 5 June 2006; "New G77 Ministers Voice Concerns on UN Reform", http://www.choike.org/nuevo_eng/informes/4473.html (accessed 12 January 2007); Address by Defence Minister of India Mr Pranab Mukherjee at the Institute for Defense Studies and Analyses, New Delhi, 3 June 2006.

[873] "India and the Millennium Development Goals", empowerpoor.com/backgrounder.asp, accessed on 12 July 2007.

### 9.6.2. Deficit of democracy in Bretton Woods Institutions (BWIs) and role of the UN in addressing this deficit

Although the elements of some of India's initiatives have had positive effects, especially in the area of new agreements on financing for development, Indian proposals are nowhere close to consideration as far as addressing the democratic deficit in international finance architecture is concerned. It continually believes that by redressing the international finance architecture, a lot can be achieved. For this to happen, it has demanded a fundamental reform of the quota structure,[874] an absolute necessity for the credibility and legitimacy of international financial institutions, UN encouraged implementation of the second stage of the IMF quota reform, subsequent increase of quotas for all under-represented countries and amendment to the Articles of the IMF. These proposals, which are echoed by several other developing countries, face stiff opposition from industrialized countries and it may not be an exaggeration to assume that there will be hardly any improvements in this regard. This assumption is reinforced in view of the fact that the latest discussion between the UN Secretary-General and the executive heads of the Chief Executive Board of the World Bank Institutions, to proactively engage the WBIs on these issues has failed to reach any understanding between the executive heads of the WBIs on the one hand and the UN leadership on the other.

### 9.6.3 Trade and development

Although outside the immediate jurisdiction of the UN, the Indian position on suspension of the Doha Round for Development[875] talks is unlikely to lead to any improvement in the negotiations, at least in the immediate future. This is caused by the continuous distortion in agriculture production and trade, due to high-levels of subsidies and production by the industrialized countries. Furthermore, its demand to provide additional resources to the United Nations Conference on Trade and Development (UNCTAD), so that the International Task Force on Commodities works on to build consensus on commodity-related issues, has gone unheeded.[876]

India wished that the World Trade Organization (WTO) should focus, with the UN encouragement, favorably on natural movement of persons in view of the welfare gains, which developing countries accrue from liberalization of the temporary movement of natural persons, which is in the range of 150 to 200 billion USD.[877] Effective and commercially meaningful access to the developed countries under Mode 4 framework, for the suppliers of services from the developing countries,[878] is the area where the largest gain is expected and would

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[874] "IMF Quota Reform Needs to be Hastened: Chidambaram", *The Hindu*, 14 September 2006; "IMF Quota Reform Poses Risks to Developing Countries", http://www.brettonwoodsproject.org/art.shtml?x=545872 (accessed 12 July 2007); "Quota Formula of IMF Flawed: Chidambaram", *The Tribune*, 14 September 2006.

[875] Aditya Matoo and Arvind Subramaniyam, "India as User and Creator of Intellectual Property: The Challenges Post-Doha", Aditya Matoo and Robert M. Stern, *India and the WTO*, Washington: World Bank, 327-366 (2003); Veena Jha, "Trade and Environment: Doha and Beyond", Matoo and Stern (eds). *India and the WTO*; Pradeep R. Mehta, *WTO and India: An Agenda for Action in Post Doha Scenario* (Jaipur: CUTS Centre for International Trade, Economics and Environment, 2002).

[876] Nill Lante Wallace-Bruce, "Global trade and sustainable development: two steps forward in the WTO?", 35 *Comparative International Law Journal of South Africa* 2, 236-255 (2002).

[877] Suggestions have been made that the WTO should be brought under association with the UN according to Article 57 of the Charter. Dubey, Muchkund Reform of the UN System and India above at p. 157.

[878] The GATS defines four modes of trade in services. Mode 4 refers to the temporary migration of workers, to provide services or fulfill a service contract. Because the current framework of Mode 4 allows for only temporary movement of workers across borders to provide services, and their visa as well as their right to stay and work are tied to their original terms of employment or contract and to their employer. Although India has taken a consistent position on various issues, the actual practice of implementation on this subject

contribute to the achievement of MDGs. It could be a win-win situation as restricting the movement of professionals across the world is un-natural and ultimately detrimental for the industrialized countries themselves.

India has also called for the implementation of the International Conference on Financing for Development's results. The Conference, which was held from March 18 to 22, 2002, in Monterrey, Mexico, following the General Assembly resolution 54/196 of December 1999; was mandated to promote international cooperation in six key areas. These are mobilizing the domestic resources, increasing private international investments, strengthening ODA, increasing market access and ensuring fair trade and solving the debt burden. The sixth one being improvement in the coherence of global and regional financial structures and promotion of fair representation of developing countries in global decision-making.[879] However, an analysis of Indian achievements in shows that proposals by developing countries like India are far from being implemented in the period starting from 2002. In fact, the failure of the Doha Round is one such telling example.[880] While acknowledging the fact that the ODA has been increasing, it has fallen far short of the estimated US$ 150 billion needed for the developing countries to attain the MDGs. In this regard, India has welcomed the progress made in finding innovative sources of financing and demanded a robust and efficient mechanism to track ODA flows, especially in the context of debt relief initiative. On a positive note, a monitoring mechanism has been mooted to monitor these flows.[881] One of the Indian proposals to scale up the aid level at the conference has found affirmative results as well as the debt relief programmes announced by the industrialized countries, but its proposal that these programmes should be condition-free has not been accepted.

In relation to India's wish that UN be more proactively engaged in the international finance structures, it must be noted that an agreement has been reached in the context of strengthening of the ECOSOC taking lead

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has remained illusory. It has been seen that the actual history of implementation since the conclusion of the Uruguay Round Agreements does not evidence the extension of favourable treatment to the developing countries. In particular, the commitments made by the developed countries in the area of temporary movement of natural persons are far from satisfactory. It is suggested that an assessment by the Council for Trade in Services (CTS) under Article XIX should be mandatory before embarking on negotiating guidelines for the new round of negotiations. With regard to the temporary movement of natural persons, it has been advocated that there is a need for making substantially higher commitments by the developed countries in this area if the balance of benefits under GATS is to be preserved. Verma, S. K. "Trade in Services, World Trade Organisation and India", in Bimal N. Patel (ed.), *India and International Law*, vol. 1, Nijhoff-Kluwer Law International, 2005, p. 90.

879 UN A/RES/61/191: *Follow-Up and Implementation of the Outcome of the International Conference on Financing for Development;* A/59/826: *Implementation of the Monterrey Consensus: A Regional Perspective*, Note by the Secretary-General (2005); United Nations Department of Public Information, *Financing for Development: Monterrey Consensus of the International Conference on Financing for Development: The Final Text of the Agreements and Commitments Adopted at the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002.* See also United Nations Intellectual History Project, Ralph Bunche Institute for International Studies. The Project contains among others interviews with those individuals who have made significant contributions to UN history and ideas. In interview called, *UN Voices: The Struggle for Development and Social Justice*, with Virendra Dayal, the Project records the UN's contribution to global economic and social policy and development discourse and practices across the developing nations. Virendra Dayal served at the UN from 1965 to 1993 and served as *Chef de Cabinet* for two Secretary-Generals, Pérez de Cuéllar and Boutros Boutros-Ghali.

880 Rajesh Chadha, "Computational analysis of the impact on India of the Uruguay Round and the Doha development agenda negotiations" In Aaditya Mattoo and Robert M. Stern (ed.), *India and the WTO,* World Bank, 13-46 (2003).

881 India emphatically suggested that a mechanism to track these flows is vital in the context of debt relief initiative. Statement by Permanent Representative of India to the UN, Mr Sen, 10 October 2005.

in this matter.[882] Thus, a long pending call of developing countries, including countries like India, that ECOSOC periodically evaluates the international economic policies which include the policies of the BWI institutions under the guidance of the General Assembly, have found a positive response during the reform year. By emphasizing the significant shift from the Security Council to the General Assembly in most pressing issues facing the world as seen by developing countries, India has tried to ensure that the plenary organs become more vital in leading the UN reforms. This is one of the concrete areas where India's contribution has been remarkable and has ushered in several positive changes. India has highlighted the need for enhanced allocation for developmental activities of the UN in the regular budget.[883] Indian advocacy focuses on curtailing the progressive replacement of funding through the assessed budget by funding through voluntary contributions.[884]

The overall conclusion India wishes is that the UN takes lead in the coordination of economic and trade matters with the close cooperation from the BWIs, and thus remains valid in its suggestions on the reform of BWIs. By reinforcing the importance of the UN in these matters, India has obviously addressed the problem of democratic deficit in the financial architectures and has tried to ensure that the UN decision-making, which is based on sovereign equality of members (against weighted voting of the BWIs), guides these institutions. By doing so, the Indian position has been to ensure that the letter and spirit of the relationship agreements between the UN and the WB, especially, are lived up to by the respective memberships.[885]

The above analysis offers a mixed picture as far as the impact of India's voice is concerned in issues related to trade, economic assistance and development and its eventual contribution to the achievement of the MDG. This has become quite evident in the statements made by the Indian representative at the UN.

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[882] Commission on Global Governance proposes that the ECOSOC shall be replaced to become an Economic Security Council with the mandate to: (a) continuously assess the overall state of the world economy and the interaction between major policy areas; (b) provide a long-term strategic policy framework in order to promote stable, balanced and sustained development; (c) secure consistency between the policy goals of the major IOs, particularly the World Bank, IMF and the WTO; (d) give political leadership and promote consensus on international economic issues. Commission on Global Governance (1995), *Our Global Neighbourhood*, The Report of the Commission on Global Governance, Oxford University Press, pp. 155-156.

[883] Jose Antonio Ocampo, "Rethinking the Development Agenda", 26 *Cambridge Journal of Economics* 3, 393-407 (2002); Neil Gardiner, "Reform the United Nations", *The Heritage Foundation Leadership for America*, 27 October 2003; Isabelle Grunberg and Sarbuland Khan (ed.) "Globalisation: The United Nations Development Dialogue: Finance, Trade, Poverty, Peace-Building", *UNU Policy Perspective* 4 (2000).

[884] While in 1960s and till mid-1970s, assessed contributions provided more than 80% of funding of development related organizations/agencies and programs, the trend have reversed since mid-1970s. Majority of the UN Specialised Agencies, Regional Economic Commissions and Development Programs are becoming donor dependent as voluntary contributions now account as much as 80% of the funding of these institutions. The objectives of these agencies are mainly to contribute to the overall social, economic development of the developing nations.

[885] Although India did not refer to it but the Relationship Agreement between the International Bank for Reconstruction and Development (IBRD) and UN clearly require consultations between the two organizations. It is well known that consultations between the two have remained far from satisfactory. The Bank's relationship was finally and grudgingly approved by the ECOSOC after prolonged negotiations (according to Richard Demuth who drafted the document later remarked that it was more a declaration of Bank independence from than cooperation with the UN). Demuth, Richard H., *Relations with Other Multilateral Agencies* In John P. Lewis and Ishan Kapur (eds.) The World Bank Group, Multilateral Aid in the 1970s (1973). Patel, Bimal N., *The Regime of Legal Obligations between International Organisations: An Integral Part of Framework of the Responsibility of International Organisations (unpublished research study of the author).* On the other side, there is a need for these agreements with the IMF and the World Bank to be brought in line with those concluded with other Specialised Agencies. Such an approach can further partially contribute to fill the deficit in democratic structures and decision-making.

Highlighting success in some areas of UN reforms, Mr. Sen, Permanent Representative of India to the UN (New York) had to say,

> "if we are honest, we have to acknowledge that significant unfulfilled tasks and challenges lie ahead, particularly, in unaddressed issues, including reform of the architecture of our multilateral bodies that oversee security, trade, financial flows, and development. Without this reform, the discontents of globalization would only deepen. Without it, there cannot be substantially enhanced and assured resource and technology flows to developing countries, necessary for real economic development and to achieve the MDGs."[886]

### 9.6.4 A critique

Unlike its position on the Security Council reform, India has not proposed a concrete plan of action to realize its reform proposals. Most, if not all, of these proposals were already on the agenda since the adoption of the new international economic order resolution in early 1970s. Hence, one is led to conclude that the Indian position was a ritual call rather than being a concerted and determined attempt to seize the opportunity to realize some of the expected gains from the spin of the reform exercise.

It is well known that the flow of aid and investment from the industrialized countries to the developing countries has been more than reversed by the flow of interest and capital repayments by developing countries on their previously acquired debts. At the bilateral level (direct aid between a developed and ODA recipient country), the aggregate of ODA extended by the Organization for Economic Cooperation and Development countries in 2012 was 125.6 billion dollars, representing 0.29% of their gross national income 874. The financial crisis and euro zone turmoil led many governments to implement austerity measures and to reduce their aid budgets. However, despite the current fiscal pressures, some countries have maintained or increased their ODA budgets in order to reach the targets they have set.[887] However, it is clear that ODA alone is not a sufficient answer to the linked problems of debt and environmental degradation, the failure of development and the intractability of many countries' security dilemma. India's overall position should be seen against this background. India has argued that such an aid would significantly help developing countries to achieve their environmental solutions and development links. India has proposed that poverty, compounded by the burden of repayment, directly impacts on numerous aspects of environmental quality. Hence, India demanded that restoring the ODA, poverty level could be reduced, which in turn, would enhance the overall environmental quality in the developing countries.[888]

It would have been a welcome development for her, if India had pressed for reforms and provided concrete measures in environment and development on a number of issues, most obviously debt relief, action on desertification, technology transfer, non-discriminatory environmental practices,[889] and standards, improved

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[886] See the Statements of Permanent Representative of India, Ambassador Sen, www.un.int/india.

[887] Aid to poor countries slips further as governments tighten budgets, OECD analysis on ODA for 2012 and forecast for future. Visit www.oecd.org/dac/stats.

[888] Against the commitment of 0.7% of national income for the overseas development assistance aid, only 0.3% of the developed-country combined national income as of 2008 was given as ODA by these nations. UN has recommended and urged these nations to meet the intermediate target of 0.5% by 2010, and to increase the aid to 0.7% by 2015. UN document, End Poverty Millennium Development Goals 2015, Make it Happen. UN Dept. of Public Information, September 2009.

[889] S. P. Godrej, *Ecological Imbalances and Environmental Issues: Issues of the Cultural Development of India and the World Civilization* (Indian Council of World Affairs, 1998); India Book House, *External Debt of*

terms of trade, preferential access for semi-manufacturers, and compensation funds for the best available technologies. The issues of democratic deficit of BWIs, lack of increase of ODA, UN encouraged coordination of international financial policies are the cornerstones and these issues are equally important for the sustainable growth of most of the developing countries. Concrete proposals by India could have done better job in the reform year.

### 9.6.5 Balance of power and division of tasks between principal organs, accountability, and good governance

One of the far-reaching contributions of India in the current reform process has been its emphatic and consistent proposals in the area of balance of power between the principal organs,[890] prevention of encroachment into jurisdiction by one organ or the other, infusion of principles of accountability and good governance throughout the UN System.[891] In this regard, its focus on the sole plenary organ of the UN, namely, the General Assembly and revitalization thereof needs analysis.

The essence of the Indian proposals is that the General Assembly cannot be revitalized by mere rationalization of its agenda or meetings, but by focusing only through action, through taking decisions according to the approved rules of procedure, through asserting control over long term questions of peace and security, including arms control and disarmament (Articles 11 and 14 of the Charter), by elaborating international law and human rights, including oversight of all human rights machinery (Art 13.1), by controlling Secretariat restructuring, including finance, personnel and management,[892] by setting the international economic agenda and by establishing the principles of oversight and accountability through actually selecting the heads of the UN and its bodies. It is not surprising that India argued for the intertwined problems of revitalization of the General Assembly with the Security Council reform and that its frustrations are noticed in both areas. India has contested that the resort to thematic debates in the Security Council on issues that very often fall within the purview of the General Assembly or the ECOSOC remains an area of concern to many delegations. Hence, India

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*Developing Countries: A Case Study of India* (1995); Burra Srinivas, "Foreign Direct Investment and Foreign Debt: Experience of India and China", 49 *Economia Internazionale* 2, 275-292 (1996); Elizabeth Hoddy, "From Debt Bondage to Self-Reliance", 1 *D and C: Development and Cooperation* Jan-Feb 21-23 (1985); Nirvika Singh and Sujata Marjit (eds.), *Joint Ventures, International Investments and Technology Transfer* (Oxford: Oxford University Press, 2003); UNCTAD, *Transfer of Technology for the Successful Integration into the World Economy* (2003); Vijay Ramchandran, "Contractual Arrangements for the Transfer of Technology: Evidence from India in the 1970s", 12 *Development Policy Review* 3, 303-317 (1994); P. S. Sangal, "Intellectual Property: Transfer of Technology to Asia and Pacific with the Special Reference to India", 42 *Foreign Affairs Reports* 8/9, (1993).

[890] Edward McWhinney, "Separation of Complementarity of Constitutionality of Law-Making Powers of the United Nations Security Council, General Assembly and International Court of Justice", Gaetano Aranguio-Ruiz, *Studi di diritto internazionale in onore di Gaetano Aranguio-Ruiz*, Napoli: Ed Scientifica, 339-354 (2003).

[891] Mikoto Usui, "Corporate Accountability and UN Norms: Are We Moving Towards a "Mecca" Pathway?", Tatsuro Kunugi, *Towards a New Partnership of the United Nations System and Global Civil Society: Report of the Third Tokyo Colloquium*, 16 March 2006, Osaka: International Cooperation Research Association, 45-46 (2006); Marten Zwanenburg, *Accountability of Peace Support Operations*, (Leiden: Nijhoff, 2005); _____, "Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations", *Meijers Instituut, Instituut voor Rechtwetenschaplijk Onderzoek*, 2004; Karl Theodor Pasche. "Accountability and the Role of Internal Oversight in the United Nations", Yassin El-Ayouty, Kevin Ford, and Mark Davies (eds.), *Government Ethics and Law Enforcement: Towards Global Guidelines*, Westport: Praeger, 3-20 (2000); Amnesty International Publications, *The UN Human Rights Norms for Business: Towards Legal Accountability*, London, (2004).

[892] "Menon Discusses UN Reforms with Ban", *The Hindu*, 28 February 2007.

proposed that thematic debates should be held by General Assembly instead of the Security Council, but the most important thematic debates are held by the Council. The General Assembly's role and institutional balance is highlighted, because in the new world order, while the Security Council becomes more important, the General Assembly cannot be left to see the results post-facto.

## 9.7. Peacekeeping operations

### 9.7.1 Consultations with the Troop-Contributing Countries

As mentioned in the introduction, India's involvement in the peacekeeping operations has been found in almost all areas pertaining to peacekeeping requirements. As a leading contributor of the peacekeeping troops,[893] it is obvious that India would propose certain reform measures in this vital area of the UN work too.[894] This section briefly examines India's main concerns, proposals, successes, and failures, as achieved so far on these proposals.[895]

India's concerns have been mainly related to the chronic cash deficits faced by some PKOs missions and predictability of troop cost and contingent-owned equipment reimbursements to member states. Furthermore, it has echoed its frustrations over the lack of filtering down of information gathering, assessment and sharing by the Joint Operations Centers and Joint Mission Analysis Centers (JOC/JMAC). It has emphasized that the information should not be lost in the jungle of the cohesive integrated headquarters, which is far remote from the actual places of events. India's emphasis was on regionalization of the mechanisms instead of integration at one place, namely, the HQs. India has expressed these concerns, because despite being one of the largest contingent contributing countries, the troop contributing countries are not fully involved in all aspects and in all stages of mission planning. This concern has been expressed by other troop contributing countries too. It has been rightly claimed that the Security Council, which normally decides on the mandate, has its members, especially the P5, with the exception of France and the UK, infrequently participate in their implementation (UK often in UNFYCYP and West Africa, France in UNIFIL, Chad and Mali etc.), because it is not their troops who have to translate the Council's words into action or endure the most of criticisms if things go wrong. In recent years, there have been several improvements noted in the peacekeeping operations, especially after the

[893] In 2012, India was the third largest troop contributor with 8093 troops located in 10 peacekeeping missions in Democratic Republic of Congo (MONUSCO) which is India's largest peacekeeping mission with 4026 troops, Lebanon (UNIFIL), Golan Heights on Syria-Israel Border (UNDOF), Liberia (UNMIL), Cote d' Ivore (UNOCI), Cyprus (UNFICYP), East Timor (UNMIT), Haiti (MINUSTAH), Abyei (UNISFA) and the latest being in South Sudan (UNMISS), where India is contributing 2244 troops. MEA Annual Report 2012-13, p. 96.

[894] Prakash Shah, "Strengthening UN Role in Peace Keeping Operations", Banerjee, Dipankar, *Rethinking Security*, 55-60 (2005); Rup Hingorani, "United Nations Peace Keeping Operations: An Overview", 53 *India Quarterly* 3-4, 9-38 (1997).

[895] "Future Role of the United Nations within the Framework of Global Security: Japan's Perspective", Address delivered by Professor Tatsuo Arima at *Munich Conference on Security Policy*, 13 February 2005; "Responsibility to Rebuild: Challenges faced in Capacity Building of State Institutions and Security Agencies in a Post Conflict Country", Address by Sukehiro Hasegawa at the *International Conference on Emerging Challenges in Peacekeeping Operations*, New Delhi, 6-8 February 2005; Joint Statement issued by India-US Joint Working Group on UN Peacekeeping Operations, Press Release, Embassy of India, Washington D.C, 2 November 2000.

deployment of forces in East Timor and Bosnia.[896] First, the UN has been paying more attention to conflict prevention by addressing the causes of conflict and attempting to fix these problems before they result in further escalation of conflict. Secondly, improvements are also seen in giving more clear mandates and goals, and the military and financial resources to match the goals. Thirdly, the UN gives more attention to define the peacekeeping mission, bring the force needed for the purpose, and do what is required to get the job done. [897] It is important to remember that when it comes to peacekeeping itself,[898] it should be underlined that UN operates in the context of a multi-actor system encompassing the NATO and regional organisations.[899] While the Cold War started to end during the last years in the office of Mr Perez de Cuellar, Mr Boutros-Boutros Ghali was at the helm of the UN, when the Cold War ended in a significant way. In view of this, he proposed a vigorous role for regional organizations. He believed that it is better that local disputes be solved in a local or a regional framework. He also suggested that through the regional organizations, the UN could implement certain sanctions against an aggressor. He clearly identified a need for division of labour between the regional organizations and the UN, in that the former pursues the political aspects of a problem, i.e. peacemaking, while the UN's mandate is limited to peacekeeping operations to maintain the cease-fire. Finally, he suggested that since the UN may be overtaxed by the very many conflicts it may be called upon to deal with, regional organizations should be encouraged to help in the solution of the problem.[900] To realise this aim in an effective manner, he strongly emphasised the need for decentralising the responsibilities for peacekeeping and peacemaking to the regional

[896] Hugo Dobson, *Japan and United Nations peacekeeping: new pressures, new responses*, (Routledge: Curzon, 2003); Michael Smith and Moreen Dee, "Peacekeeping in East Timor: the path to independence" (Rienner, International Peace Academy occasional paper series, 2003).

[897] Albrecht Schnabel and Ramesh Thakur. "Cascading Generations of Peacekeeping: Across the Mogadishu line to Kosovo and Timor," In *United Nations Peacekeeping Operations*. Ed. Albrecht Schnabel and Ramesh Thakur 3-25 (ed.), (Tokyo: United Nations University Press, 2001)

[898] Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary and criminal matters. This may have consequences with regard to attribution of conduct." *ILC Commentary on RIO* 2009, at p. 64.

[899] Two sets of partnerships look most likely to deepen in coming years. The first is with the European Union, which is building its rapidly deployable security capacity and has plans to develop its civilian capacity. The EU has a structured relationship with the UN over peacekeeping, based on a 2004 joint declaration, and the two have cooperated in military, police and civilian missions (most obviously in Chad, DRC and Kosovo). The EU can often provide resources the UN lacks, but the 2008 DRC crisis – when the European Council chose not to fulfill a request for reinforcements by the UN Secretary-General – is a reminder that the UN cannot expect *automatic* support from European forces. This creates a degree of uncertainty for the UN in planning and sustaining missions where it might need high-order capabilities. Close cooperation between the two organizations in Kosovo threw up technical differences, which may complicate future collaboration. Second is the African Union. Though the UN still deploys eight times more soldiers on the African continent than does the AU, the AU has taken on a new importance for two broad reasons: political legitimacy on the continent, during a period when UN legitimacy was strained due to divisions over Iraq; and willingness to act, during a period when western states have shown modest will at best to act – at least through the deployment of their own forces – on the African continent. Two factors currently constrain the relationship and will have to be worked through if this potential partnership will prosper. The first is predictability. The UN Security Council has felt boxed in when the AU has deployed operations and signaled that it is counting on UN operations to replace them – but without prior negotiations with the Security Council. The flip side of this argument is a different version of predictability: the AU has felt that the UN has been unreliable in terms of its willingness to authorize forces, or adequate forces, to meet some of the continent's most traumatic challenges – to wit, Darfur and Somalia, and before that Rwanda. The question of predictability can only be resolved by the UN Security Council – AU Peace and Security Council negotiations or discussions, which will start in later 2009. *Building on Brahimi- Peacekeeping in an era of Strategic Uncertainty*, A report by the New York University Centre on International Cooperation, April 2009.

[900] B. Rivlin, B., "Regional Arrangements and the UN System for Collective Security and Conflict Resolution: A New Road Ahead?" 111 *Foreign Relations*, 95-107 (1992).

organizations. His interest was combined with some caution because regional organizations had almost no experience and lack the necessary structures and procedures.[901] At another occasion, he emphasised that the new division of labour should enable the UN to retain its primacy in the maintenance of international peace and security, while its burden is lightened and its mission reinforced and underlined by the active involvement of appropriate regional agencies. The exact modalities of this division of labour remain to be worked out, as regional organizations, no less than the UN itself, redefine their missions in the post-Cold War period.[902]

### 9.7.2 Conduct and discipline of the Peacekeeping Troops

One important issue, that has become a serious problem, is the conduct and discipline of PKO troops.[903] The PKO troops of the reformed UN cannot be accepted to violate the basic conduct and discipline; otherwise the credibility of the UN forces in particular, and the role of the PKO in general, can be lost. Hence, this issue has been one of the important issues in the reform process of the PKOs. India, being one of the largest contingent providers, is ought to raise its concerns.[904] It should be noted, however, that there has not been any incident related to sexual exploitation by Indian troops. In this background, India has supported the establishment and implementation of a policy of zero tolerance and proposed that careful preparatory training in terms of a multi-cultural, pluralistic, and tolerant outlook is as important as is subsequent swift punitive action, once culpability is established.

### 9.7.3 Structural reforms

India has also addressed structural reforms in the PKOs.[905] The in-depth planning and lack of availability of equipment are major problems faced in the recent years by the troops. Therefore, India has underlined the strategic priorities, especially the focus on reform, resources, training, modernization, and accountability, i.e. the need for improving communication technologies and IT capacities to enhance the safety and security of personnel in the field. India has further underlined the importance of the mechanism of triangular consultations between troop-contributing countries, the Security Council and the UN Secretariat with a view to partially resolving the problem. Furthermore, it has asked for an early and full involvement of the Troop Contributing Countries (TCC) in all aspects and stages of mission planning to contribute to further enhancing the design, execution, and effectiveness of PKOs.

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[901] UN document: SG/SM/4718 of 10 April 1992.

[902] An Agenda for Peace, A/47/277-S/24111, New York, June 1992.

[903] Stanislas Horvat, "Causes of Violence against Local Populations by Western Soldiers of Peace Keeping Operations", 40 *Revue de droit militaire et de droit de la guerre* 1-2, 87-113 (2001); Michael Doyle, *Keeping the Peace: Multidimensional UN Operations in Cambodia and El Salvador* (Cambridge University Press, 1997); Jasgit Singh, "United Nations Peace-Keeping Operations: The Challenge of Change", M. S. Rajan, *United Nations at Fifty beyond*, 139-157 (New Delhi: Lancer Books, 1996); I. J. Rikhye, *United Nations Peace-Keeping Operations Higher-Conduct* (International Information Centre on Peace-Keeping Operations, 1967); Anthony Miller, "Legal Aspects of Stopping Sexual Exploitation and Abuse in UN Peace-Keeping Operations", 39 *Cornell International Law Journal* 1, 71-96 (2006).

[904] India is among the longest serving and largest troop contributors to UN's peacekeeping activities. More than 85,000 Indian troops, military observers and civilian police officers have participated in 42 out of the 60 peacekeeping missions established since the inception of the UN. 116 Indian soldiers have made the supreme sacrifice while serving in UN peacekeeping operations, and have been awarded the Dag Hammarskjöld Medals.

[905] Statement by Mr Anil Basu, Member of Parliament of India, 61st Session, 23 October 2006; Statement by Ambassador Sen, Permanent Mission of India, 27 February 2006.

A new element of PKOs is the role of civilian police in the recent years.[906] The role of Civilian Police in peacekeeping has grown substantially.[907] The role of civilian police elements within UN peacekeeping and peace building operations is crucial.[908] Almost one-fifth of the men and women currently serving in UN operations now are police officers. They play a key role in both peacekeeping and peace building activities and in institution building, *inter alia*, by training national police and by monitoring respect for law enforcement standards, criminal justice standards, and human rights. Given the Organization's wide experience in the field, the UN is considered as being the primary institution for civilian police missions and long-term institution building. There has been growing support for a strong CIVPOL capacity in DPKO. In addition, Member States are firmly encouraged to provide well-qualified and trained personnel and the importance of enhanced cooperation among Member States in the area of civilian police has been stressed.[909] India has supported the UN Secretary-General's proposal on the creation of a Standing Police Capacity[910] and has been actively participating in facilitating the task of the Police Adviser[911] and Department of PKO to get it operational. Although the standing police capacity is not to be equated with the standing military force, the versatile role of the standing police force in the emerging conflict situations will become far more important than the military forces. To avoid these competitions and coordination problems, it emphasized that due attention be paid to the coordination between the police and military components of the UN Peacekeeping Missions on field.[912] India is among the top three troop contributing countries with around 9,000 troops deployed in 2010, in nine peacekeeping missions and it has continued its contribution and participation in UN Peacekeeping.[913]

As far as the overall role of the Security Council in PKOs is concerned, India has once again challenged the monopoly exercised by the Council in setting up and running of PKOs. It emphasized that a peacekeeping operation instrument is jointly invented and perfected by the Council and the General Assembly and not just an

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[906] Nassrine Azimi, *The Role and Functions of Civilian Police in United Nations Peace-Keeping Operations; Debriefing and Lessons*¸ Report and Recommendations of the International Conference, Singapore, December 1995, (the Hague: Kluwer Law International, 1995).

[907] Dominick Donald, "Neutrality, impartiality and UN peacekeeping at the beginning of the 21st century", 9 *International Peacekeeping*, 4, 21-38 (2002).

[908] Ho-Won Jeong (ed.), "Approaches to peacebuilding, Basingstoke [etc.]: Palgrave Macmillan (2002); Albrecht Schnabel Post-conflict peacebuilding and second-generation preventive action", 9 *International Peacekeeping* 2, 7-30 (2002).

[909] For more analysis and facts and figures, see www.un.org/Depts/dpko

[910] This initiative was proposed at the World Summit in September 2005.

[911] Ms Kiran Bedi, a renowned police officer of India was appointed as the Police Advisor of the SG. India has contributed significant number of police forces in various operations. These forces are performing those functions some of which were earlier performed by the military forces. In view of the evolving nature of conflicts, the reinforcement of civilian component, especially the police forces, is one of the important welcome developments in the UN PKO in the recent years.

[912] Ramesh Thakur, *United Nations Peacekeeping Operations: Ad Hoc Missions, Permanent Engagement* (United Nations University Press, 2001); Rocky Williams, "From Peacekeeping to Peacemaking? South African Policy and Practice in Missions", 6 *International Peacekeeping* 2-3, 77-83 (2000); Alexandre S. Kamarotos, "Building Peace, Democracy and Human Rights: International Civilian Missions at the End of the Millennium", 2 *International Peacekeeping* 4, 483-509 (1995).

[913] India continues to be one of the largest and consistent contributors to the UN peacekeeping operations. As of 28 June 2011, India was the third largest troop contributor with 8,691 personnel deployed with nine UN Peacekeeping missions in Lebanon (UNIFIL), Democratic Republic of Congo (MONUSCO), Golan Heights on the Syria-Israel border (UNDOF), Liberia (UNMIL), Sudan (UNMIS), Ivory Coast (UNOCI), Cyprus (UNFICYP), East Timor (UNMIT) and Haiti (MINUSTAH). The largest Indian presence was in the UN Mission in Democratic Republic of Congo (4,248), followed by the UN Mission in Sudan (2,636). Opening Remarks by Nirupama Rao, Foreign Secretary of India, on "Key Priorities for India's Foreign Policy", International Institute for Strategic Studies, 27 June 2011, p. 4.

attribute of power given to the Council by the Charter. In the view of India, it should be the General Assembly, a plenary organ that ought to be responsible for the setting up and running of the operations in an overall sense. Basing its arguments on the famous *Certain Expenses* advisory opinion of the International Court of Justice, it has suggested that the General Assembly is "competent to organize peacekeeping operations at the request or with the consent of the States concerned" under Article 11 (2) of the Charter.[914]

### 9.8. Peace Building Commission (PBC)

Although a supporter to the PBC, India has vehemently opposed, although unsuccessfully, the creation of the PBC under the aegis of the Security Council and the General Assembly.[915] The Peace Building Commission (PBC) was established in 2006 as an intergovernmental advisory body to support peace efforts in countries emerging from conflict, and as a key addition to the capacity of the international community in the broad peace agenda. The Peace Building Commission plays a unique role in (1) bringing together all of the relevant actors, including international donors, the international financial institutions, national governments, troop contributing countries; (2) marshaling resources and (3) advising on and proposing integrated strategies for post-conflict peace building and recovery and where appropriate, highlighting any gaps that threaten to undermine peace. India would have preferred that the PBC, like the Human Rights Council[916], be responsible to the General Assembly instead of to the Security Council. The Indian concern was based on the fact that the establishment process of the PBC took refuge in technical legality of the Council, in terms of the spirit of the matter and illegality went against the will of the General Assembly (in inserting the definite article "the" in the notorious resolution of 1646 on the P5 being permanent members of the Commission). It has criticized that the permanent members have instituted dualism by making the Commission subsidiary to the Security Council and by ensuring that, only with their approval, would any country on their agenda approach the Commission for assistance. It is clear from this criticism and concern that all this clearly undermines, from the beginning, the Commission's capacity for optimal advice, and it's functioning.

India has also addressed concerns that the Commission should not be spending disproportionate time on "housekeeping issues", that the PBC should not continue to keep indefinitely discussing preliminary issues such as reporting responsibilities, participation, and operational matters to the detriment of the larger goal of assisting in the consolidation of peace in post-conflict societies. India's important contribution can be seen in its efforts to harmonize the two important areas of work, namely, how the work of the organizational committee and the country-specific configurations can be harmonized and made more complementary. The Indian position has been

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[914] International Court of Justice, *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter): Advisory Opinion of 20 July 1962* (1962); A Donat Pharand, "Analysis of the Opinion of the International Court of Justice on Certain Expenses of the United Nations", 1 *The Canadian Yearbook of International Law* 272-297 (1963).

[915] C. S. R. Murthy, "New Phase in UN Reforms: Establishment of the Peacebuilding Commission and Human Rights Council", 44 *International Studies* 1, 39-56 (2007); Giuseppe Nesi, "The UN Peacebuilding Commission", 15 *Italian Yearbook of International Law*, 43-52 (2006); Carsten Stahn, "Institutionalizing Brahimi's Light Footprint: A Comment on the Role and Mandate of the Peacebuilding Commission", 2 *International Organizations Law Review* 2, 403-415 (2006).

[916] Nazila Ghanea, "From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways?", 55 *The International and Comparative Law Quarterly* 3, 697-705 (2006); Manoj Kumar Sinha, "Commission on Human Rights to Human Rights Council: A Long Journey", 46 *Indian JIL* 2, 267-271 (2006); Manfred Nowak, "How Shall UN Human Rights Council Deal with Country Situations?", 31 *NJCM Bulletin* 6, 812-822 (2006); Christopher Le Mon, "Security Council Action in the Name of Human Rights", 11 *African Yearbook of International Law* 263-298 (2005).

to assist candidate countries with funding, mobilize donor support, and design policies that would consolidate peace. It has emphasized that to really contribute fundamentally and be truly relevant, the PBC should examine in depth and advise on the most urgent problems. Such as, how to promote understanding among a country's regional and ethnic leaders, assess the pace of economic reform or elections, which, if embarked upon too early or at the wrong time, may actually retard institution-building and plunge a country back into a civil war. On the other hand, one size clearly does not fit all and what works in a small and more homogeneous country may not work in a large and fractured State. Above all, it has emphasized the concentration of the resources in the institution building of the candidate countries. These are some of the eminent challenges, which India believes PBC is facing while delivering its mandate.

The Commission is a dedicated advisory organ that brings together the government of a specific country together with all the relevant international and national actors to discuss and decide on critical priorities to be addressed and a long-term peacebuilding strategy with the aim of preventing a relapse into conflict. Over the past eight years since its inception, the Peacebuilding Commission has gained experience from engaging countries on its agenda that are at different stages of their peacebuilding process, facing different challenges and emphasizing different priorities. That experience has further focused the Commission's activities around three main functions, namely: (a) political accompaniment, advocacy and support; (b) resource mobilization; and (c) fostering coherence. However, the Commission is also facing serious challenges mainly because of its very nature as a non-operational and advisory body based in New York. The challenges include (a) working through operational actors in the field who are deriving their respective mandates from different legislative sources; (b) non-existence of quantifiable peacebuilding outcomes; and (c) difficulty to assess the credibility of peacebuilding processes within a limited time frame. In order to ensure its effectiveness, the 2012 Report suggests that the success of the Commission will "critically depend on its ability to leverage the unique composition of its membership, offer an international political framework within which national actors could lead a peacebuilding process, bring coherence and elicit sustained support from operational actors and partners. To this end, the Commission needs to continue and develop its substantive focus, instruments and organizational structures in order to bridge the divide between its potential valued added, on one hand, and its limitations, on the other hand."[917]

India has made a pledge of USD 2 million to the PBC. Similarly, it has also contributed USD 10 million to the UN Democracy Fund. This shows that India has taken concrete measures to strengthen the UN machinery, especially during the reform period.

### 9.9. Humanitarian intervention and relief

Humanitarian relief is perhaps the most sensitive area of the UN operation, as it has to continuously strike a delicate balance between the need to assist war-torn or disaster-struck countries and their political sensitivities.[918]

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[917] UN Security Council Document: S/2012/511 – Post-conflict peacebuilding: report of the Peacebuilding Commission, p. 3.

[918] Rex Martin, "Walzer and Rawls on Just Wars and Humanitarian Interventions", Lee, Steven, Intervention, *Terrorism and Torture: Contemporary Challenges to Just Wars Theory*, Berlin: Springer, 75-88 (2007); Taylor B. Seybolt, *Humanitarian Military Intervention: The Conditions for Success and Failure*, Oxford University Press (2007); Fischer David, "Humanitarian Intervention" Reed, Charles and Ryall, David, *The Price of Peace: Just War in the Twenty-First Century*, Cambridge University Press, 101-17 (2007); Terry Nardin, *Humanitarian Intervention*, (New York University Press, 2006); Pratap Bhanu Mehta, "From State

Hence, it is not surprising that the reform year would have elapsed without witnessing calls for reform, which place high importance to the sovereignty, territorial integrity, and national unity of states in the humanitarian relief operations.

India has called upon the Emergency Relief Coordinator to continue efforts to address the issues of administrative delays and streamline application processes.[919] This streamlining of process, in its view, should not create an excessive burden of paper work on developing countries especially when the capacities of their authorities are stretched in coping with the aftermath of a disaster. The concerns of field level coordination abound, hence, it called for improved coordination of UN activities at the field level. Wary of the cluster lead approach, it has demanded that perspectives of developing countries (recipient countries) where this approach has been implemented so far should be heeded. In keeping with the basic principles that guide the work of the UN at the country level, it has underlined the importance of implementing it locally with the consent and under the leadership of the national government of the affected state.

**Humanitarian interventions:** About the humanitarian interventions, it has recalled that guiding fundamental principle should be that sovereignty, territorial integrity, and national unity of states[920] must be fully respected and that humanitarian assistance should be provided with the consent of the affected country, and in principle, based on an appeal by the affected country. In this context, it has expressed concern at the recommendations of the report on humanitarian access, which are not in line with the scope of the guiding principles of resolution 46/182, in the aftermath of humanitarian relief efforts to Somalia and Sudan. By emphasizing that the UN only can retain the credibility of achievements in this area by retaining the neutrality and non-political character of UN humanitarian assistance, it has seized the UN reform year to reinforce its consistent rejection of unilateral intervention in internal affairs of a country, under the pretext of the humanitarian assistance to its population.[921]

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Sovereignty to Human Security (via Institutions)?" Nardin Terry, *Humanitarian Intervention*, 259-285 (2006).

[919] Statement by Ms Reva Nayyar, Secretary, Dept of Women and Child, Government of India, Ministry of Human Resources Development at Plenary Session, 18 January 2006, Statement by Ambassador Sen, Permanent Mission of India of 13 November 2006, Statement by Mr Mufti Mohammed Syed, Member of Parliament of India, 61st Session, 8 November 2006, Statement by Mr. Ravi Shankar Prasad, Member of Parliament, 61st Session, 9 October 2006.

[920] Helen Stacy, "Humanitarian Intervention and Regional Sovereignty", Lee, Steven, *Intervention, Terrorism and Torture: Contemporary Challenges to Just War Theory*, 89-104 (2007); Henry Shue, "Limiting Sovereignty", Welsh, Jennifer, *Humanitarian Intervention and International Relations*, 11-28 (2006); Robert O Keohane, "Political Authority After Intervention: Gradations in Sovereignty", J. L. Holzgrefe and Robert Keohane, *Humanitarian Intervention: Ethical, Legal and Political Dimensions*, 275-298 (2003); Jennifer Czernecki, "The United Nations' Paradox: The Battle between Humanitarian Intervention and State Sovereignty", 41 *Duquesne Law Review* 2, 391-407 (2003): Michael Davis, "The Emerging World Order: State Sovereignty and Humanitarian Intervention", Michael Davis, *International Intervention in the Post-Cold-War World: Moral Responsibility and Power Politics*, 3-19 (2003); Thomas Nicolas, "The Utility of Human Security: Sovereignty and Humanitarian Intervention", 33 *Security Dialogue* 2, 177-192 (2002).

[921] The UN High-Level Panel has promulgated "the emerging norm that there is a collective international 'responsibility to protect', exercisable by the Security Council authorizing military intervention, as a last resort in the event of genocide and other large scale killings, ethnic cleansing or serious violation of international humanitarian law which sovereign governments have proved powerless or unwilling to prevent". India has objected to such approach, especially viewing a possible use of the norm by powerful nations for the purposes of political convenience and national interests. Although Indian stand is appreciable vis-à-vis the world community, it is difficult to reconcile India's own experience in dealing with Sri Lanka and Bangladesh in the wake of internal conflicts there and the new position. Ispahani Mahnaz, "India's Role in Sri Lanka's Ethnic Conflict", Ariel E. Levite, Bruce Jentleson and Larry Berman (eds.), *Foreign Military*

### 9.10. Terrorism

India has been a strong supporter of multilateral efforts to eliminate the scourge of terrorism.[922] What opportunity better than a combination of terrorist attacks and 60th anniversary of the UN could provide a platform to India to make its concerns loudly heard? It addressed the issues of human rights and its linkage with its long pending calls for the Comprehensive Convention on International Terrorism (CCIT). The CCIT is a foremost foreign policy weapon having strong international legal dimensions, which was used during the UN reform process.[923]

India, being a victim of terrorism to its innocent civilizations,[924] has been in the forefront to suggest that the UN focuses on the human rights victims of terrorism,[925] and the need to provide them protection and assistance, the relationship of terrorism to other threats, such as organized crime, proliferation of weapons of mass destruction, extremism and tolerance.[926] Despite its repeated calls, especially in the reform year, India, once again, has failed to have its long standing demand for the CCIT to be adopted by the UN General Assembly. In

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*Intervention: The Dynamics of Protracted Conflict*, 209-239 (New York: Columbia University Press, 1992); Sumantra Bose, *States, Nations, Sovereignty: Sri Lanka, India and the Tamil Eelam Movement*, (New Delhi: Sage, 1994); Neil De Votta, "When Individuals, States and Systems Collide: India's Foreign Policy Towards Sri Lanka", Sumit Ganguli, *India's Foreign Policy: Retrospect and Prospect*, 32-61 (New Delhi: Oxford University Press, 2010).

922 India has signed/ratified all 13 major international legal instruments dealing with terrorism. Despite its criticisms of various acts by the Security Council, where the Council fails to ensure democratic character in decision-making and consulting all concerned states, India has deposited 5 national reports till today to the UN Counter Terrorism Committee. India also has in place legal, regulatory and administrative framework to address the causes and effects of terrorism. India has also constituted Joint Working Groups with 25 States, and regional organizations including EU and BIMSTEC, for coordinating and cooperating in counter-terrorism efforts. At regional level, India is a party to the SAARC Regional Convention on Suppression of Terrorism which provides for extradition of persons accused of terrorist activities. Similarly, India has concluded bilateral treaties with several nations to extradite terrorists.

923 Hmoud Mahmoud, "Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention", 4 *Journal of International Criminal Justice* 5, 1031-1043 (2006); P. Rietjens, "The Role and Attitude of the EU Regarding a Comprehensive Terrorism Convention", Fijnaut, C (ed)., *Legal Instruments in the Fight Against International Terrorism: A Trans-Atlantic Dialogue*, Nijhoff, 589-602 (2004); Arunabha Bhoumik, "Democratic Responses to Terrorism: A Comparative Study of the United States, Israel and India; Halberstam, Malvina, "The Evolution of United Nations Position on Terrorism: From Exempting National Liberal Movements to Criminalizing Terrorism Wherever and by Whomever Committed", 41 *Columbia Journal of International Law* 3, 573-584 (2003); Nilendra Kumar, "The Role of Indian Judge Advocates in the War on Terrorism", 3 *Amity Law Review* 1, 16-26 (2002); Suman Lata and Sameer Saran. "A Critical Analysis of International Terrorism", 7 *M.D.U Law Journal* 1-2, 109-126 (2002); V. S. Mani, "Future Strategies in the War against Terrorism and Proliferation of Weapons of Mass Destruction: An Indian Perception", 44 *IJIL* 2, 221-259 (2004).

924 Joshua Kastenberg, "The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defence (and) Preemption", 55 *Air Force Law Review* 87-125 (2004); Yoshikazu Sakamoto, "The Politics of Terrorism and "Civilization": How to Respond as Human Being", Gokay, Bulent and Walker, R.B.J, *War, Terrorism and Judgment*, 30-45 (London: Cass, 2003).

925 Steve Tsang, "Stopping Global Terrorism and Protecting Rights", Tsang, Steve, *Intelligence and Human Rights in the Era of Global Terrorism*, Praeger Security International, 1-14 (2007); Luban David, "The War on Terrorism and the End of Human Rights", Larry May and Eric Rovie (eds.), *The Morality of War: Classical and Contemporary Readings*, 413-421 (New York: Pearson Prentice Hall, 2006); Pojmans Louis, *Terrorism, Human Rights and the Case for World Government* (Rowman and Littlefield, 2006).

926 It is fair to say and observe that most of the literature, scholarly and non-scholarly originating from India, analyzing the issue of terrorism, including international terrorism, somehow tends to have a narrow focus and over obsession with terrorism and Pakistan. This narrowness can very well hinder the global perspective and corresponding efforts on the issue. Afsir Karim, "International Terrorism: the Indian Response", *Indian Foreign Policy: Challenges and Opportunities*, 955-979 (New Delhi: Foreign Service Institute, 2007).

view of this and keeping in mind the importance of flexibility, it has gone along with the Global Counter Terrorism Strategy (GCTS).[927] One could say that it had no option but to go along. In its view, the CCIT could provide requisite legal framework to the GCTS.[928] India has been a chair of the UN Counter Terrorism Committee and the Working Group concerning threat to international peace and security by terrorist acts. India could play an important role, in its capacity as a Chair of the Committee, in the adoption of a document which has called for 'zero tolerance' of terrorism and terrorist acts in the Security Council. India while critically analyzing and also appreciating the role played by the UN at international and regional level in dealing with the menace of the terrorism reiterated its long pending call for the adoption of the CCIT.[929]

India's opposition to the establishment of Counter Terrorism Committee (CTC) is known for a fact.[930] Nevertheless, its compliance has been well noted. Here, it has demanded that the CTC should have an effective monitoring mechanism of member states' compliance with the provisions of Security Council Resolution 1373.[931] India is opposed, however, to Counter Terrorism Executive Directorate (CTED) within the Security Council. It has lodged its serious concerns in this respect as regards to the precedence set by creating the Directorate within the Security Council (a non-plenary organ), rational for a separate structure within the UN secretariat, the effectiveness of a large body of 20 experts in terms of costs and performance. Besides there are concerns about the accountability of the CTED, its institutionalized accessibility, appropriate consultation with

[927] Statement by Mr. Malhotra, Permanent Mission of India, 8 September 2006, 30 June 2006, 11 May 2006.

[928] India had to take satisfaction with the 2006 UN Global Counter Terrorism Strategy which identified the need to express solidarity with innocent victims and specifically addressed terrorism victims.

[929] Statement by Ambassador Hardeep Singh Puri, Permanent Representative, Briefing on Threats to peace and security by terrorist acts, at the United Nations Security Council, on May 04, 2012

[930] The definition of terrorism itself is full of conflicts between developed and developing nations, not least to say the divergence of opinion among the developing countries themselves because divergent national and strategic interests of various countries, communities and ethnic groups frustrate all attempts of defining terrorism in precise terms. Eric Donnelly, "Raising Global Counter-Terrorism Capacity: The Work of Security Council's Counter-Terrorism Committee", Paul Eden and Therese O'Donnell, *September 11, 2011: A Turning Point in International and Domestic Law*, 757-779 (2005); Ward A. Curtis, "The Counter-Terrorism Committee: Its Relevance for Implementing Targeted Sanctions", Peter Wallensteen and Carino Staibano (eds.), *International Sanctions: Between Words and Wars in the Global System*, 167-180 (2005); Walter Gehr, "The Counter-Terrorism Committee and Security Council Resolution 1373 (2001)", Wolfgang Benedek and Alice Yotopoulos (eds.), *Anti-Terrorist Measures and Human* Rights, 41-44 (2004); Rosand Eric, "Security Council Resolution 1373, the Counter-Terrorism Committee and the Fight Against Terrorism", 97 *AJIL* 2, 333-341 (2003).

[931] Resolution 1373 established the Counter-Terrorism Committee (the CTC), made up of all 15 members of the Security Council. The CTC monitors the implementation of resolution 1373 by all States and tries to increase the capability of States to fight terrorism. The CTC has asked all States to report to the Committee on steps taken or planned to implement resolution 1373. All reports received by the CTC are considered in one of the CTC's three Sub-Committees. Each of these is chaired by one of the three Vice-chairmen. As part of the review process, the relevant Sub-Committees have also invited the States concerned to attend part of the Sub-Committee's discussion of the report. The Sub-Committees are advised on the technical aspects of States' reports by a group of independent Expert Advisers appointed to support the work of the CTC with expertise in the legislative, finance; customs, immigration, extradition, police, illegal arms laws and practice. Based on its analysis of reports and any other available information, the CTC assesses States' compliance with resolution 1373. The CTC then sends a letter to each State, prepared with guidance from its Experts. These letters ask further questions of States on issues considered in their reports, and any other matters the CTC may consider relevant to the implementation of resolution 1373. States are requested to respond to the CTC in a further report, within three months. Implementation of resolution 1373 is an ongoing process. Eric Rosand, "Security Council Resolution 1373, the Counter-Terrorism Committee, and the fight against terrorism", 97 *American Journal of International Law* 2, 333-341; Sreekantan Nair, R., "Terrorism and strategic options for India", G. Gopa Kumar (ed.) International terrorism and global order in the twenty first century, 241-249; E. Sudhakar, "War on terrorism and its impact on South Asia" In G. Gopa Kumar (ed.) *International terrorism and global order in the twenty first century*, 225-240 (2003).

member states on their concerns and priorities, the financial implications of the establishment of the CTED over a period of three years, and the need for its consistency with regular budgetary, administrative and financial practices.

Thus, one could see that although its strategy on terrorism has been marked with a certain flexibility and harmony, its long-term demand is not being materialized. The only parallel one could draw is its incessant failure to garner support for a Comprehensive Convention on Elimination of Nuclear Weapons.[932] The UN Counter-Terrorism Strategy,[933] which was adopted by the UN General Assembly in September 2006,[934] has four main pillars; addressing the conditions conducive to the spread of terrorism; preventing and combating terrorism; building states' capacity to prevent and combat terrorism and to strengthen the role of the UN system in this regard; and ensuring respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.[935] Despite the repeated calls of the UN Secretary-General, the UN has been unable to appoint a central coordinator who could contribute to enhancing the efficiency and coordination of the efforts and avoid overlapping. [936]

### 9.11. Administrative and inter-institutional reforms

It is quite interesting to note that the core of the former Secretary-General's (Mr Kofi Annan) agenda focused on the reform of the UN Secretariat[937] and the Western states have also demanded the same,[938] while India's

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[932] Anurag Deep and Namrta Rastogi, "Conceptual Contour of Terrorism "vis-a-vis"Armed Conflict: A Perspective" In 46 *Civil & Military law journal on Rule of Law, Military Jurisprudence and Legal Aid* 4, 32-32 (2010); Jeet Singh Mann, Global War against Terrorism : Need for a Global Anti-Terrorism Agency for Fighting Terrorists In 46 *Civil & Military law journal on Rule of Law, Military Jurisprudence and Legal Aid* 3, 179-318 (2010); Karthika Sasikumar, State Agency in the Time of the Global War on Terror: India and the Counter-Terrorism Regime in 36 *Review of international Studies* 3, 615-638 (2010).

[933] India pushed several activities in the area of counter-terrorism efforts during its term as a non-permanent member of the Security Council from 2011 to 2012, such as, imparting a renewed momentum to global counter-terrorism efforts as the Chairperson of the Counter-Terrorism Committee, special meeting of the Security Council on suppression of terrorist financing (November 2012), open debate of the Council on maritime piracy, which resulted in the adoption of a Presidential Statement that "stressed the need for a comprehensive response to suppress piracy and called for all States to cooperate to secure an early release of hostages including through sharing of information and intelligence". MEA Annual Report 2012-13, p. ix.

[934] A/66/L.53; A/66/762; GA/11259; GA/11261.

[935] Third Biennial Review of the UN Global Counter Terrorism Strategy, 28-29 June 2012.

[936] The appointment of the central coordinator has been facing several issues, namely, the rank in the UN Secretariat, its impact on the UN Counter-Terrorism Committee Executive Directorate and Counter-Terrorism Implementation Task Force (CTITF) and the balance on the issues between the Security Council and the General Assembly. It may be noted that the UN appointed David Scharia as the Legal Coordinator for the CTCED. http://www.thejc.com/news/world-news/70199/israeli-appointed-un-counter-terrorism-body accessed on 27 August 2012.

[937] Sumihiro Kuyama, "UN Reform and Institutional Governance", Tatsuro Kunugi (ed.), *Towards a New Partnership of the United Nations*, 71-72 (2006); S. Verhoeven, "The UN High-Level Panel Report and the Proposed Institutional Reform of the UN: Would the UN Be Ready to Face the New Challenges", 7 *International Law Forum du droit International* 2, 101-107 (2005). A close reading of this article leads to a cynical conclusion that the High-Level Panel Report and its Terms of Reference are often becoming the white-wash to the developing nations, as developed nations determine the terms of reference which pay negligible attention to substantive reform proposals which address the developing countries concerns.

[938] The history of the UN Reforms since mid-1950s shows that "most of these reforms have related to organizational structure, content, policies and method of carrying out operational activities." Muchkund Dubey, *Reform of the UN System and India* above at p. 146. However, these reforms have success in one common area – administrative and financial procedural reforms, which are driven by developed countries.

proposal has centered around the reforms of the Security Council and other subject areas, which were not the foremost preoccupation for these states.[939]

The main concerns of India, which are also shared by other members, concern improving the efficiency, avoidance of duplication, and the minimization of waste in the functioning of the entire UN system. Furthermore, it has emphasized the intensification of efforts to achieve these objectives and payment of arrears by all countries in full and within time, without any conditions. India, however, has not presented a comprehensive paper on the reforms in the bureaucratization and politicization of recruitments. In contrast, the United States and a number of Western European members worked hard through to press reforms on these issues.[940] Why India did not raise these issues in a comprehensive manner, begs a question. An immediate explanation could be that India has focused on few areas (namely the reform of the Security Council and the economic agenda) and has employed concentrated efforts to press reforms in these areas. With its limited political and financial influence, it would not have been able to garner reasonable support in all areas. Another explanation is the scarcity of literature showing the link between the bureaucratization and UN reforms and its impact on the delivery of substantial mandate.

Nevertheless, India's preoccupation and emphasis on retaining the plenary decision-making has remained evident, as it has continued to emphasize the importance of the existing structure of administrative and budgetary decision-making based on the primacy of the General Assembly and its fifth Committee. It rejected the proposal by Western states to alter the all-inclusive character of the fifth Committee.[941] What is meant by this – participation of all members? The underlying reasons for this rejection were to ensure the inter-governmental character of the UN and respect the sovereign equality of all member States to participate in the decision-making process of the UN. In view of the strong opposition of the developing countries, including India, it is unlikely that the plenary decision-making character of the fifth Committee will alter towards a system in which the major financial contributors will have a larger say. In the area of recruitment, procurement and administration of justice, India did not have any specific concrete proposals except reiterating the need for a fair, transparent and rule-based selection process based on equitable geographical representation and with due regard for gender balance. One would have expected a strong Indian call to ensure a balance between developing and developed countries at the executive management level positions in the UN organs, sub-organs, and affiliated organizations. Similar calls were also made by other leading developing countries. It should be noted that the composition of the current UN Secretary-General Senior Management Group consists of 14 members from developing countries[942] out of a total of 30 members.

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[939] Statement by Ambassador Sen, Permanent Mission of India, 7 February 2006, 25 January 2006.

[940] Statement by Ambassador Mark Wallace, US Representative for UN Management and Reform, 10 October 2006, 16 June 2006, 3 April 2006; Statement by Ambassador Sir Emyr Jones Parry, Reforming the UN: Challenges for the 21st Century, UK Mission to UN, Statement dated 13 February 2007; Statement by Ambassador Perry at John F Kennedy School, 20 October 2005; Statement by Ambassador Kenzo Oshima of Japan, Permanent Mission of Japan to UN, 15 February 2006; 7 February 2006, 30 January 2006, 25 January 2006, ; Fact Sheet: US Priorities for a Stronger, More Effective United Nations, 17 June 2005.

[941] It should be noted that India has been the Vice-Chair of the ACABQ (5th Committee) in 2004-2005 and Chair in 2006-2007.

[942] Ramesh Thakur, former Senior Official of UN demonstrates how Western countries occupy almost all powerful and big-budget posts in the organisation, and sadly developing countries, despite their numbers, have allowed the bias to persist. Out of 94 special representatives and envoys of the UN Secretary-General 16% are from Asia, 30% Africa, 2% from Latin America and the Caribbean and 52% from Europe, North America and Australia. He argues, "Why, with numbers to put a stop to it, do developing countries put up

An important contribution of India could also be found in its demand for the selection process of the Secretary-General.[943] Despite India's and other developing countries' call for greater involvement of the General Assembly in the selection process of the Secretary-General, no concrete step has been taken, especially the amendment of General Assembly Resolution 11(1) of 1946.[944] It is quite evident that the Indian proposal was nowhere heeded in the selection process of the current Secretary General. It is purely a speculative assumption, but had the Indian proposal been heeded, its candidate (Dr Shashi Tharoor, who was serving as the UN Under Secretary-General and stood as a candidate for the election as the UN Secretary-General) for the Secretary-General's position in 2006 would perhaps have stood a remote but better chance of being elected.[945]

### 9.12. UN Outreach

Expectations of the developing countries for overall growth and development from the UN have remained always high. The work, successes, and failures of the UN need to be seen by the entire world population, not only the privileged masses. Hence, India's proposal that the public information machinery of the UN must intensify its efforts to meet the concerns and special needs of developing countries in the field of information and communication technology.[946] Furthermore, its demand for this machinery to expand its partnership with local and national broadcasters, especially in the developing world should also be seen in this context. Highlighting the importance of priority issues of her concern such as HIV/AIDS, human rights, new partnership for Africa's development, the millennium development goals, Palestine, etc.; India has demanded that public information machinery continues to focus on these issues and work of the UN in addressing them. Hence, India's proposal on

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with such clear and heavy bias and permit it to persist? One dispiriting answer might be that a particularly insidious consequence of the century of European colonialism is that non-westerners have themselves internalised the sense of racial superiority of westerners. My own extensive experience suggests that the immigration, customs and security officials in developing countries are more obviously racist than in the West. Part of India's national identity is the self-belief in being a champion of developing countries. Is it prepared to take the lead in demanding an explanation-cum-correction of this anomaly in the U.N. system?" Ramesh Thakur, "Is the United Nations racist?" in The Hindu 19 July 2013; http://www.thehindu.com/opinion/lead/is-the-united-nations-racist/article4928624.ece accessed on 20 July 2013.

943 Statement by Ambassador Kenzo Oshima, Permanent Mission of Japan to UN New York, 19 April 2006; Statement by Ambassador Sen, Permanent Mission of India, 19 April 2006; Joseph R. McCarthy, "The Third United Nations World Conference on the least developed countries: a global agenda for the new millennium", 18 *New York Law School Journal of Human Rights*, 3, 487-97 (2002).

944 UN General Assembly Resolution 11(1) of 24 January 1946 provides for the Terms of Appointment and Selection Process of the UN Secretary-General.

945 Several Indians were elected or appointed in various UN organs, bodies and mechanisms in 2012. Justice Dalveer Bhandari, former Judge, Supreme Court of India, as a member of the International Court of Justice; Narinder Singh, Member, International Law Commission; S. Rajan, Member, Committee on the Limits of Continental Shelf (CLCS); Ishita Roy, as Secretary-General of the International Sericulture Commission. India was elected to the Governing Council of the UN-Habitat, the Commission on Sustainable Development and International Sea-Bed Authority (ISBA). India was re-elected to the Councils of Universal Postal Union i.e Council of Administration and Postal Operations Council. As of October 2012, India was represented in all the major UN bodies - UN Security Council, Human Rights Council (HRC), Economic and Social Council (ECOSOC) and the International Court of Justice (ICJ). In the area of human rights, several Indian, in personal capacity or nominee of the Government, as appropriate have been recently serving, such as, Dilip Lahiri (Member, CERD); Indira Jaisingh (Member, CEDAW); Chandrashekhar Dasgupta (Member, CESC), Anand Grover, as the Special Rapporteur on the Right of Everyone to the enjoyment of the Highest Attainable Standard of Physical and Mental Health; and Kishore Singh as the Special Rapporteur on the Right to Education. MEA Annual Report 2012-13, p. 102.

946 India co-sponsored the UNHRC resolution on the Promotion, Protection and Enjoyment of Human Rights on the Internet. UNHRC - A/HRC/20/L.13 of 5 July 2012.

the intensification of UN efforts to meet the concerns and special needs of developing countries in the field of information and communication technology should be seen in this light.

Although sharing views on the UN financial crisis, India has proposed adequate resources to secure effective functioning of the UN Information Centers (UNICs) in developing countries. It has wished for the consolidation of the UN Department of Public Information (DPI) with the network of the UNICs and that the development of websites in local languages must remain a primary DPI concern. It also suggested that the subscription to the UN News Centre email service from the UN home page should be worth considered.[947] There are several indicators, which enable one to see the extent of accommodation of Indian proposals. The UN website, UN Chronicle, the Press Events organized in the last five years have significantly focused on these issues and problems and how the partnership between the UN and the civil-society especially could contribute to the resolution thereof.

### 9.13. Use of strategies and public relations campaign to achieve the objectives: A critical appraisal

This section analyses the strategies and platforms that India has employed to convey its reform proposals. The focus is on prioritization of the reform proposals, employment of machineries and resources, bilateral and diplomatic efforts and role of media and civil society institutions. The main methodology employed is comparative analysis, namely, how India has gone about pursuing the efforts as compared with another potential contender of the permanent membership of the Security Council also an Asian state, namely, Japan.

#### 9.13.1 Overall approach of India

The Indian approach was partly conservative and partly radical, especially, as far as the reform of the Security Council was concerned. The conservative view can be summarized, as there is nothing wrong with the way the UN is structured and as such, is supposed to focus on revitalizing, rather than restructuring the organization. We have seen that India has emphatically called for the revitalization of the organization. The moderate approach indicates that there should be efforts to do away with some of the structural shortcomings and mismanagement in the organization. Whereas the radical approach believes in substantive and meaningful structural and functional changes to keep the institute effective in maintaining international peace and security, a key component of which is the economic development of the developing countries.

**9.13.2. Importance of UN Reform as a Priority – A comparison of Mission and Execution Plan between India and Japan:** It is perhaps more relevant to compare the Indian example vis-à-vis Japan, although the size and economic factors cannot give any objective comparison. It has been seen that Japan has prioritized its reform proposals in a systematic and coherent manner and has tried to pursue them accordingly.[948] Institutional reforms

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[947] India has been active in promoting Hindi as an official language. In the words of Mr Anand Sharma, Minister of State for External Affairs, "Hindi should be included in the United Nations. A substantial percentage of world population uses this language." The Ministry of External Affairs has launched a website in Hindi as part of an effort to make available the country's foreign policy to a much wider populace. *The Times of India*, 20 August 2006.

[948] Kiyotaka Takahashi, "The Public Forum in Japan for Accountable UN Reform – NGOs Input", Kunugi Tatsuro (ed.), *Towards a New Partnership of the United Nations System and Global Civil Society – Report of the Third Tokyo Colloquium, 16 March 2006*, International Christian University Center of Excellence and International Cooperation Research Association, Tokyo, 90-91(2006); Ian Taylor, "South Africa: Beyond the Impasse of Global Governance", John English, Ramesh Thakur and Andrew Cooper (ed.), *Reforming from*

have remained at the highest priority level, in the order of priority, followed by the development, security, and human rights, in case of Japan.

In the area of institutional reforms, Japan has concerned itself with the Security Council, management issues, equitable and fair scale of assessments and system-wide coherence. As shown above, Indian efforts focused heavily and solely on the first subject. Most of the Indian proposals were hard to measure in terms of success or failure. For example, Japan submitted a proposal to introduce minimum assessment for permanent members of the Security Council of either 3 or 5 percent, in view of their special status and responsibilities. Indian proposals could have very well employed such a detailed approach.

In the area of development, Japan has made concrete proposals in the area of MDGs, assistance for Africa, health, and disaster reduction. India simply adhered to the subject of increase of 0.7% ODA in a time-bound manner, and a traditional argument of linking environment with sustainable development. A concrete proposal, outlining clearly the expectations of developing countries, time-frame, concentration of assistance, etc., would have been more welcome, as far as the measurement of achievement of these objectives are concerned.

In the area of security, Japan had concrete proposals on the Peace Building Commission, disarmament and non-proliferation and counter terrorism measures.[949] Similarly, in the area of human rights, its priorities were well organized: Human Rights Council, human security,[950] and restructuring of humanitarian assistance mechanism.

### 9.13.3. Structural proliferation and inadequacies

It is quite interesting to note that India has not made any substantive proposal on this issue. As an emerging global power, one could have expected the country to make comprehensive reform proposals instead of sticking to a very few.[951] Although one would agree that, any system-wide comprehensive reform would have sounded too ambitious and therefore, a focused approach had more chances of obtaining the results, in this sense, Indian strategy was very calculative.

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*the Top: A Leader's 20 Summit*, 230-259 (Tokyo: UNU Press, 2005); Scarlett Cornelissen, "Displaced Multilateralism? South Africa's Participation at the United Nations: Disjunctures, Continuities, and Contrasts", In Donna Lee, *The New Multilateralism in South African Diplomacy*, 26-50 (Basingstoke: Palgrave MacMillan, 2006).

949 Michael N. Schmitt, "Counter-terrorism and the use of force in international law," In 32 *Israel Yearbook of Human Rights*, 53-116 (2003).

950 Japanese position focused on enabling the UN institutions to play a positive pro-active leadership role in the area of human security. The Commission on Human Security was established in January 2001 through the initiative of the Government of Japan and in response to the UN Secretary-General's call at the 2000 Millennium Summit for a world "free of want" and "free of fear." The HSU was established in September 2004 in the United Nations Secretariat at the Office for the Coordination of Humanitarian Affairs (OCHA). The overall objective of the HSU is to place human security in the mainstream of UN activities. Currently, Ambassador Yukio Takasu of Japan serves as the Special Advisor on Human Security to the UN Secretary-General. Mrs Sadako Ogata, former UN High Commissioner for Refugees, serves as the Chair of the UN Advisory Board on Human Security. Rojas, Aravena F, "Human security: emerging concept of security in the twenty-first century", 2 *Disarmament Forum*, 5-14 (2002); Thomas, Nicholas and Tow William T., "The utility of human security: sovereignty and humanitarian intervention," In 33 *Security dialogue* 2, 177-192 International Peace Research Institute, Oslo (PRIO) (2002).

951 A serious global power may not always been seeking to maximize its rights and minimise its responsibilities. Only through exercising this regime state policy over a long duration of period, one could think of considering a state as a serious global power. In this context, whether India is able as well as is willing to live up to this global political reality requires a detailed analysis.

The problem of lack of coordination is a serious weakness of the UN. This not only means duplication of efforts, wastage of funds but a serious inability of the organization to deliver the mandates, the fundamental purpose for which it has been created. Bertrand cites the examples of lack of communication between FAO and UNESCO in relation to agriculture education, or between IMF, ILO, and UNICEF in relation to social impacts of structural adjustment policies.[952] These are the issues at the heart of India's growth and development in the end. Thus, India should have made some proposals in this regard.

### 9.13.4 Lack of strong institutional and systematic scholarly attempts to study the subject

No national institution of stature organized debates in the late 1990s or years since 2000, focusing exclusively on UN reforms. For example, one would have expected that the Indian Council of World Affairs (ICWA), Indian Society of International Law (ISIL), or the UN Institute would have taken a lead in this regard. In contrast, in Japan and the USA, there were systematic efforts, such as the US-UN Association and Japan Economic Research Council which published in April 1992 a report *To think about a Grand Design of the World: In Search of a Better Human Survival (Uchida 1999: 81).*[953] Thus, one can see the lack of systematic effort at the institutional level in India to put forward the UN reform proposals. In fact, as far as the media was concerned, it focused exclusively on the inclusion of India in the expanded Security Council. Nor are there any significant documents available on the Ministry of External Affairs of India webpage on the topic, except the website of the permanent mission of India to the UN, which contains all statements made by India at the UN.[954]

Nor the Indian Government brought together a group of eminent people to recommend the government as to how it should go about pursuing the objective of its UN reform proposals. Japanese Government established an Eminent Persons' Group on UN reform, which delivered its report on 28 June 2004, entitled the *Role of the UN in the 21st Century*, and approaches to strengthening the UN. The Group focused on four main issues, Security Council reform, the removal of the enemy state clause from the Charter, assessed contribution to the UN and increasing the number of Japanese staff in the UN Secretariat. The Group was composed of professors, editors of newspaper, President of the Japan Foundation, President of the Confederation of Japan Automobile Workers Union, a member of the board and senior corporate advisor of Mitsubishi Corporation, and the Director of the UNDP Tokyo office. This group believed that reforming the UN, with a more active role of Japan in the Organization, would heighten the effectiveness of the UN in the region and would also lead to strengthening of the framework of the Japan-US security treaty, which is the basis of Japan's peace and security as well of that of the Asia pacific region as a whole.

The Group proposed that it is necessary to add a limited number of countries that are willing and able to assume global responsibility for the maintenance of international peace and security as permanent members of the Security Council.[955] In particular, it is necessary to add non-nuclear states in order to enhance the legitimacy

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[952] Bertrand, Maurice, *The United Nations: Past, Present and Future*, The Hague: Kluwer (1997) at p. 80.

[953] Takeo Uchida, "Some Reflections on the Leadership of the UN System", *Towards a New Partnership of the United Nations System and Global Civil Society: Report of the Third Tokyo Colloquium*, 16 March 2006, 41-42 (Osaka: International Cooperation Research Association, 2006).

[954] On the MEA website, just over 100 documents referred to the term 'UN reforms' as of 6 July 2011.

[955] The analysis of various chapters shows that India is definitely able to assume more international responsibilities as a rising global power, however, these responsibilities will have to be commensurate with India's core interests in a relatively narrow sense. For example, one would be quite yet reluctant to imagine India deploying its military and economic resources, unilaterally or in consortium with a few states, in distant regions such as Latin America or the Caribbean or Balkans.

of the UN.[956] Several of the recommendations of the Group reflected upon the policy documents and speeches of the Government of Japan. Perhaps the Indian government machinery does not recognize the role of these types of actors as significantly important and relevant in achieving the governmental aims at the UN level.

In case of the USA, several foundations and societies were active, for example, the Heritage Foundation, Stanley Foundation, and the US-UN Association. However, none so in India. Not only this, but the Government did not organize even a single conference to exclusively discuss the issue of the UN reforms.

At the diplomatic level, India could have learnt from Japan's example. The Government of Japan, learning from the Group's recommendations that a post should be established at ambassador level in charge of strengthening of the United Nations, established six envoys. Japan appointed a special envoy for UN reforms and six other envoys; their appointments were made in view of the need to work more closely with the regions concerned in gathering as much support and cooperation as possible from each country for the UN and the Security Council reform, to which Japan attached the highest priority in its diplomacy. Whether India attaches the highest priority in its diplomacy remains a question. Furthermore, India could have well employed its full force in the area of development, environment, debt relief, health, by dispatching envoys to work out specific plans in these areas. Of course, no other country went to the extent of the Japanese public relations and strategy, but it showed full and complete commitment of Japan for the UN reforms.

The Foreign Ministry of Japan's webpage has devoted a full section to UN reforms with analyses and information, whereas, the Ministry of External Affairs website of India, has no such dedicated section. It is quite interesting to note that even the telephonic talks between the Japanese establishments and the UN Secretary-General were released to the media. India's Public Relations Division of the Ministry of External Affairs did not go to this level of detail. It is important to note that such approach can create public awareness, which is a vital tool in the current world.

### 9.13.5 Regional diplomacy

While it was clear that India faced strong challenges within the immediate region, it employed regional strategies to pursue the matter, especially in its case for the permanent membership of the Security Council. India, believing in the strength of regional organizations and regional machineries, attempted to mobilize as much political support as possible. It is to be noted that India garnered good support from Latin America and Africa regarding its permanent membership of the Security Council. This was part of the Indian strategy. ECOWAS provided support strongly to India. The visiting delegation of ECOWAS said clearly on April 5, 2006, "in the African Union there is no country that is opposed to the candidature of India for a permanent position in the Security Council."[957]

### 9.13.6 Regime change in India

One should also keep in mind that during the reform process, two governments have been formed in India, one by the Bharatiya Janata Party and its allies as National Democratic Alliance – NDA and the other one by Congress as United Progressive Alliance – UPA. Thus, while the groundwork and initial thinking were done

[956] Despite the fact that history will record that, Japan could not achieve all suggestions, but its efforts would be fully recognized and emulated by countries in the future.

[957] Joint Press Conference by Minister of State for External Affairs and the Leader of ECOWAS Delegation, New Delhi of 5 April 2006.

during the BJP regime, the actual playing has been done during the Congress regime. Intensive diplomatic activities took place especially in case of the Security Council reforms issue. During the NDA regime, the world came to see India as a nuclear power, thus, the Indian position on the reform process was driven by its newly acquired nuclear power capacity too, despite one's immediate inclination to reject this link.

### 9.14. Limitations of India

Unfortunately, India has no tools to use as weapons to make sure that its reform proposals are fully accepted. Concerning the individual international instrument or membership to an individual organization, it can play hardball but as far as overall reforms are concerned, it does not have the resources and means to ensure results. This has also been the case as far as the overall reforms of the UN are concerned.

India has played a marginal and tactical role in utilizing various actors such as regional organizations, but not influential Indian multinational corporations and NGOs. Since the partnership between the governmental machinery and multinational corporations and NGOs is not as intense as in the industrialized countries, the government machinery could not employ these agencies to promote the Indian cause at the UN level. This approach applies for all other organizations. In order to achieve more voice, India should have intensified the relations with these actors, which can use their resources and platforms to propagate the Indian cause in reforms.

### 9.15. Achievements

India reiterated the proposal on the Comprehensive Convention on Terrorism and also on nuclear disarmament. These were the two biggest contributions at the 60th anniversary and the world community should have embraced them *in toto*. Both the proposals directly and indirectly contribute to the resolution of the number of contemporary problems in the world. India garnered support from developing countries and virtually all the five permanent members of the Security Council that India should be a member of the Security Council. This was a clear and strong victory for India as far as its efforts to obtain permanent membership of the Security Council is concerned. India's abiding commitment to democracy is amply reflected in its support to the UN Democracy Fund, which was set up at the UN General Assembly's 59th session. India wished that the UNDF would help nations to build and strengthen democratic institutions and practices to result into fruits of globalization for the betterment of their people. This is certainly a very strong contribution to the progressive development of international law within the context of UN reforms. In fact, India was the donor that paid huge sums in the establishment of the fund.[958]

### 9.16 Indian state practice on international law in wake of functioning of Group of 20 (G20)

Before concluding the chapter on India and UN Reforms, it is very useful to explain and understand India's state practice with relation to the newly emerging G20 group of countries.[959] As argued above, India has always

[958] Indian contribution is USD 10 million. Japan has also contributed the same amount, while the US contribution is USD 17 million.

[959] India's inclusion owes to its capacity to pump money in the global economy which has been useful in creating an economic stimulus package created by the G20. India's faster economic growth with a continuous political stability and effective functioning of the strong democratic institutions can be considered another important reason for its inclusion. India could deploy its enormous state capacity to ensure a sustained economic growth despite global economic crisis. In addition to bring immediate benefits in the global economy, the Indian political-economic system itself may perhaps be considered as an effective model for these nations which also directly consolidate India's claim as a major power.

preferred multilateral forum in addressing global issues. This research also takes the same position, however, the establishment and functioning of G20 and India's role thereto is proving anti-thesis. G20 is a non-treaty based association of 20 nations and international organizations including India. Despite the fact that the legitimacy of G20 remains challenged, India has adopted a state practice of convenience and is contributing to the legitimacy of the Group in international law. Neither India nor other members are considering legitimacy as a challenge let alone a problem. The problem of the G20 legitimacy as an international institution and its actions is not a priority either for G20 itself, its member states, global business community or for public opinion.

As Steven Slaughter argues, "while the G20 is important to contemporary global governance and efforts to create a common framework of rules for global capitalism, the legitimacy of the G20 is fundamentally uncertain and problematic because the G20's membership and connection to existing forms of multilateralism remain contentious... G20 leaders need to consider these issues in light of the prevailing expectations of states in contemporary international society".[960] From law of international organization perspective, G20 is an association of certain governments which have proclaimed self-assumed role to restore the wrongs of economic and financial crisis generated in 2008. As mentioned above, G20 fails to meet any criteria of a classic intergovernmental organization. Neither it is a treaty-based organization, nor does it have a secretariat and it possesses no independent capacity to work outside the member states. The sole criterion for its creation is effective global economic response as desired and coordinated by G20 nations. Through the dynamism of "right shape that combines the efficiency and capacity for action with inclusiveness", G20 can achieve the stated goals in current format", as said by President Obama during G8 Meeting in 2009. The absolute freedom of states to create and deal with one another is not questioned, however, the acceptability of the decisions taken by them at G20 forum needs credibility and legitimacy which may be less forthcoming. While the criticism towards the legitimacy is acknowledged, there is nothing wrong for these states to act in the way they are acting. As we move from nation-state to a market-state economy, such forces at global and regional level are bound to emerge and may be desired too. Otherwise, a very formalistic approach will never allow such global missions to function and in fact it may prevent them from meeting with the expectations of the world community as a whole.

G8 was not deemed legitimate in terms of membership. As Slaughter argues, the G system is adaptable to changing dynamics in the global economy. [961] The same may be said for various mini-arrangements in areas of disarmament, trade and energy. G system's management of global integration encompasses both the policy coordination of its political leaders and efforts to publicly legitimise economic globalization.[962] Although other countries resent with the functioning and composition of G20, some of these groups also wish for inclusion of their concerns in the deliberations of G20. For example, the Global Governance Group, led by Singapore, has urged for systematic consideration and representation of that group.

Statistically speaking G20 comprises 90 per cent of the global GDP, 80 per cent of world trade and 66 per cent of the world population and therefore it is bound to fail in meeting expectations of non-members. It is similar to what India has been arguing about democratic deficit of the Security Council and its legitimacy. To counter the legitimate challenge of G20, Nikolai Kosopalov anticipates, "the G20 establishment at the Finance Ministers level and its further upgrading to the heads of states and governments' status complies with the

[960] S. Slaughter, "Debating the International Legitimacy of the G20", Global Policymaking and Contemporary International Society. *Global Policy*, 4 43–52 (2013).
[961] Slaughter at p. 45.
[962] *Ibid.*

international law and does not in any way impair the status and authority of previously established intergovernmental international organizations. In a long run, the legitimacy problem of the G20 decisions and its activities is likely to acquire more significance." G20 needs to take decisions and set examples that would help create the fundamentals of legitimacy for the emerging system of global self-government. Unless, G20 functions in accordance with the international law, its global executive economic and financial authority will remain substantively challenged.

The G system is considered to be complimentary to 'universal' multilateralism. In fact it is a true multilateralism of limited scale, size and scope. It can be argued that G20, like many other arrangements, is simply a 'coalition of the willing'. G20 can also be seen as a response to inability of the entire UN membership to agree on an Economic and Social Security Council making the ECOSOC more effective and dissolving the outdated Trusteeship Council. It can also be said that G20 presents a blow to UN's efforts to coordinate, in harmony with the Bretton Woods Institutions (BWIs), economic and financial stability and development in the world. With G20 playing an active role, the UN machineries focusing on financial and economic development agenda are ought to become moribund and less effective. Challenges like Climate change and economic and financial crisis, are looming large and due to multilateral approach and need for all countries to join the consensus, is another major development which perhaps has led to powerful influential countries to avoid the lesson while dealing with economic issues. Whether India will be willing to accept this evolving reality in long run is an interesting question? The question whether G20 can influence, shape and implement emerging norms of international law is irrelevant so long as the G20 countries deliberate, negotiate, agree and execute financial and economic norms. No challenge can be posed to the international legal capacity of states to decide on the issues which matter them the most.

Against this challenge to the legitimacy of G20, the fundamental question that arises is the logic for G-20. Why, India, which has criticized arrangements parallel to multilateral treaties or organization like the OPCW, has become a willing member of G20? Furthermore, although India is a member of G20, it is important to note that there persists within G20 a discriminatory attitude among more powerful nations vis-à-vis India. For example, despite India's track record on peaceful uses of nuclear technology, Australia denied to sell enriched Uranium for uses in nuclear reactors to India while it gave a deal to the Russian Federation. From nuclear non-proliferation and climate change (carbon emission target), India would have been better off with such deals as it could have made further contribution on both important global issues. While India let this happen in the sidelines of Seoul Summit in 2010, will India be able to tolerate such discriminatory treatment in G20 summits in the long-run?

How India is practicing its membership of G20 and thus contributing to the legitimacy of G20 regime in some form? As G20 has emerged as the premier international forum of economic cooperation, support structure in the Government of India has also been strengthened with the establishment of a separate secretariat to provide secretarial and technical support on all G20 matters. G20 India Secretariat also provides secretarial and technical support to the Apex Council on G20 Issues, under the Chairmanship of the Finance Minister, established to provide direction to the preparation of policy and country response to issues contemplated in the G20 and to advice the Prime Minister as required; and to consider any other issues of international economic relations or issues that may have wide policy ramifications that may be referred to the Apex Council by the Department of

Economic Affairs.[963] India's position on the G20 platform is formulated through discussions and involvement of all Government of India Ministries and Departments. Inputs from external experts are also taken on various issues. The Secretariat also coordinates the work of other Ministries involved in specific areas of work under G20 Agenda in which they represent India in the G20 Ministerial meetings and Working Groups. G20 India Secretariat also receives inputs from external expertise on various issues through Advisory Groups of eminent scholars and also through DEA Research Programme on the G20 Issues currently undertaken with the Indian Council for Research on International Economic Relations (ICRIER).[964]

G20 has moved towards more long-term agenda including infrastructure, job creation, food security and financial inclusion. This inclusion of new items demand that G20 is ought to be extremely careful in ensuring some form of legitimacy and including the sensitiveness of all states, civil society and business actors, in order to infuse confidence in the global community. G20 India Dialogue Series, while appreciating the issues concerning legitimacy, keeps hope that the G20 shall deal with important issues such as trade, agriculture, climate change and investment. Similarly, it also hopes that the G20 can push the conclusion of Doha Round of development.[965] This platform also believes that the G20 can offer a better solution to stop hunger and price swings than the UN FAO and WFP as neither has authority nor the resources, to respond adequately to the cause of global food crises.[966]

In addition to above, as the former Foreign Secretary Nirupama Rao said, "[W]e see the G-20 process as a move towards a more representative mechanism to manage global economic and financial issues. The Group has taken some positive steps in this direction, for instance by committing a shift in the IMF quota share to dynamic emerging markets and developing countries. Simultaneously, the new global realities require that we revisit and reorganize existing governance models which were put in place over six decades ago."[967] The sentiments and hopes for G20 playing a more important role in overall global governance were couched by Mr Mukherjee, then Finance Minister of India and currently the President of India.[968] In the wake of G20 Toronto

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963 India and Its Foreign Relations, Annual Report of the Ministry of External Affairs, Government of India (2010).

964 It is interesting to note that India did not have a dedicated webpage for its efforts on the UN Reforms, however, the Government of India has created a separate webpage on its website for the G20, www.g20india.gov.in.

965 With regards to climate change, COP-18 concluded at Doha in December 2012 achieved an important milestone which was amendments to the Kyoto Protocol to operationalise the 2nd commitment period, a key demand of developing countries.

966 www.youthpolicy.in/india-g20-dialogue series 3 accessed in July and August 2013.

967 Address by Foreign Secretary Smt. Nirupama Rao at South Asia Initiative, Harvard University on "India's Global Role". Boston, September 20, 2010.

968 In the words of then Finance Minister, "the designation of the G20 as the premier forum for international economic cooperation has brought together advanced and emerging market economies at the same table on an equal footing. This has been a major step in the direction of improving global governance and shared responsibility for larger public good. We welcome this and commend the US and other developed nations in taking and supporting this step. Indeed, it is not surprising that the G20 could concert the decisive response to enable the world economy to move on the path to recovery. The G20 spearheaded a commitment to implement coordinated macroeconomic policies, including fiscal expansion of US $ 5 trillion and the use of unconventional monetary policy instruments. It took the initiative to significantly enhance financial regulations, notably by the establishment of the Financial Stability Board and strengthened the International Financial Institutions, including the expansion of resources and the improvement of precautionary lending facilities. We need to persist with and strengthen this mechanism as we move forward to create a more dynamic and equitable economic architecture for global trade and sustained growth." Address of the Finance Minister Pranab Mukherjee at the Woodrow Wilson Centre for Scholars. Washington (D. C.), 8 October 2010.

Summit, the former Prime Minister Mr Singh observed in 2009 that "the G20 framework or mechanism had helped overcome the immediate financial crisis, but had now to move ahead to deal with the larger issue of global imbalances and reforms of the international financial institutions". [969] This shows that India believes that G20 is going to last long and will play more important role in other areas of foreign policy and international governance issues too. During the same time, the former Indian Prime Minister and Singaporean President Lee agreed for the need for meeting not just to take decisions but to have a system of systematic implementation of those decisions so that they are carried forward over several years. The G20 Finance Ministers at St Pittsburgh in 2009 reiterated their support for the G20 as the premier forum for international economic cooperation and welcomed the decisions of the G20 summit in Seoul including on IMF quota reform. They reiterated that the goal of the reform of international financial institutions was to achieve, step by step, equitable distribution of voting power between developed and developing countries. This development suggests that the economic cooperation is going to be taken over by the G20 and the G20 may eventually replace in a different form, similar economic and financial institutions.[970] These developments and commitments, some of which are made at the highest level of decision-making, reinforce that the G20 is and will become a forum to contribute towards sustainable development and that decisions taken at the G20 will be earnestly implemented too. Whether those decisions are in form of declarations or communiqué, these declarations will be given effect in domestic setting suggests that India is ready and willing to read soft law declarations in giving effect to the principles and preamble of the Indian Constitution, especially in the areas of the Directive Principles.

### 9.17. Does the G20 impose obligations and what is the reaction of the G20 members to implement the same?

The G20 Summits have moved from simple forum discussing the global issues to a Summit where Heads of the States or Governments make statements committing their respective nations to implement the obligations undertaken at the G20 summits. As Indian Foreign Secretary mentioned at the G20 Summit in 2010, "[B]ut generally speaking, the G20 have declared that they should cut their fiscal deficits by half, by the end of 2013. Most countries have committed to this and are sure that they will be able to do this. We have independently, even prior to the G20 coming to this understanding, (created) a roadmap which is designed to cut our fiscal deficit, Indian fiscal deficit, to half by 2013-14". This shows that the G20 members, including India, are taking obligations flowing from the G20 declarations to implement certain domestic measures. G20 members plan to legislate norms which would be required for implementation by various sectors of world economic community as it appears from the declarations and their proceedings. This becomes quite clear from the statement of the former Indian Foreign Secretary Rao, who said at Toronto Summit that "[I]t is working together even in the area of regulations, where, as they decided over the last few summits; there would be international benchmarks and regulations, but to be enforced, to be implemented, and to be supervised nationally".

As Foreign Secretary Rao said at the Toronto Summit, said, "[O]ne issue which engaged the attention of the G20 and the financial community has been the proposal to levy some kind of tax on financial institutions and banks so that the burden is not borne by the governments or the taxpayers if such crises occur in future. There

[969] Media Briefing by National Security Advisor Shivshankar Menon on Prime Minister's bilateral meetings on the sidelines of the India-ASEAN Summit. Hanoi, October 29, 2010.

[970] Joint Communiqué issued at the conclusion of the 10th Russia-India-China (RIC) Ministerial Meeting. Wuhan (China), November 15, 2010.

were divergent views on this even prior to the Summit. What has come out in the Summit is that this is something which some countries will do, some will take other steps or continue with the kind of steps that they have, which need not necessarily involve specific levies of taxes."[971] It plans to create permanent structures of governance such as fund for small and medium enterprises, called SME Financial Challenge. The commitments declared at the G20 summits have even specified timelines, in other words, members are undertaking obligations as well as ensuring the fulfillment by certain specified dates, such as, raising of no trade barriers by the G20 members at least through end of 2013 to contribute to the conclusion of the Doha Round. However, a note of caution overstating the qualification of commitment as obligation is to be observed.[972] For example, the Foreign Secretary at the same Toronto Summit said, "[B]ut the spirit of cooperation, the spirit of working in coordination - coordination does not necessarily mean that they will align their policies with each other or with what the G20 would want to do - the spirit of coordination continues."

The growth and evolution of the G20 as a latest entrant in global organizations raises some important questions. First, whether the question of legitimacy is too premature? Should we not allow the G20 to function for some substantial duration and then depending upon its functioning and ability to take care of global financial and economic problems, pose the question of legitimacy? By overestimating the value of legitimacy at this nascent stage, the world community might be missing a chance to let a unique institution emerge consisting of North-South states with the resemblance of global representation and dealing with the urgent problems. We shall wait and watch. It can be argued that once the global financial crisis is over, the G20 may take back seat. However, an emergence and effective handling of such a global problem may inspire States and IOs in future to come up with temporary solution-forum which is legitimate and expected from them. Except the issue of legitimacy and participation of civil society, the G20 remains immune from severe attacks from intellectual community at this stage.

### 9.18. Concluding remarks

A most important conclusion emerging from the analysis is that the reform proposals of India were invariably formulated in broad philosophical terms: India wished that the principle of multilateralism was strengthened, the interest of the developing countries is safeguarded, and the development returns as a central item on the UN agenda. UN reforms are seen as the capacity of the UN to meet with new challenges. The current international environment is conducive to undertake far-reaching UN reform, especially when there is absence of tension between the great powers. The general trend is towards greater multipolarity in the world. The trend is towards a peaceful environment. India should use this opportunity before it is lost.

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[971] Briefing by Foreign Secretary Mrs. Nirupama Rao, Finance Secretary Ashok Chawla and Secretary (West) Vivek Katju on the G-20 Summit. Toronto, June 27, 2010.

[972] In this regard, US position concerning non-binding international agreement between states is worth noting, according to which, "it has long been recognised in international practice that governments may agree on joint statements of policy or intention that do not establish legal obligations. In recent decades, this has become a common means of announcing the results of diplomatic exchanges, stating common positions on policy issues, recording their intended course of action on matters of mutual concern, or making political commitments to one another. These documents are sometimes referred to as non-binding agreements, gentlemen's agreements, joint statements or declarations." See Memorandum of the Assistant Legal Adviser for Treaty Affairs, US State Department, quoted in 88 American JIL 1994, p. 515.

India and UN reforms provide a good basis to understand why India has attempted to contribute to broader goals of international law through the only universal forum the world community has.[973] India's role in the current round of UN reforms is an example of excellent mixture of the contribution to the ideals of international law and promotion of national interest in the most affirmative manner. India used both assertive and nationalistic position in pursuing its core interests and has even been able to effectively use popular sentiments in the negotiating forums. The main aim for India was to seize the opportunity of the 60th anniversary, as a platform, to advocate its permanent membership in the Security Council, with the help of the favourable environment of alliance with three other Member States and its increasing political, economic and military influence in world affairs. As we all know, India has failed in achieving this aim so far.

The Indian proposals have reflected broad ideals of international law, based on natural law and its civilisational values, and underlined the fundamental philosophy that the only multilateral and universal forum needs to be governed by rule of law in the 21st century. However, with the emergence of the G20 and the Indian state practice thereto has started giving ambivalent signals and showing a dichotomy in its fundamental approach to the laws of international organisations. In the area of the Security Council reforms, the principles of balance of power and division of responsibility between the Security Council and the General Assembly, need for definite rules of procedure, representative character of the Council, abolition of the veto power, accountability of the Council towards the Assembly, were highlighted. In the area of economic development, India tried to emphasise the importance of the UN taking lead in the economic matters and UN encouraged reforms in the Bretton Woods Institutions as well as the accountability of these organisations towards the UN, increase of Overseas Development Assistance in a systematic and timely manner. In the Peacekeeping operations, it highlighted the principle of active involvement of troops contributing countries in the planning and execution of the operations, consultation between the troop-contributing countries, the Security Council and the UN Secretariat. Consensus building on substantive and procedural issues on all issues of disarmament and arms control and call for complete nuclear disarmament were the major proposals in the areas of disarmament and the arms control. While underlining the necessity of multilateral intervention only under the UN authority, it reiterated the old age principles of sovereignty, territorial integrity, and national unity of states. It emphatically rejected the unilateral intervention under any reason of humanitarian assistance. In the area of terrorism, its call for a Comprehensive Convention on International Terrorism reflected her desire of the entire international community. However, it is beyond any comprehension, why this Convention is subjected to refusal by a few members. The principles of transparency in the recruitment and procurement process, better representation of developing countries at senior management level, were among the most important ones which it propounded during the reform year. In a nutshell, as far as international law was concerned, all the proposals and demands were truly in line with the broad ideals of international law and supported the rule of law in the 21st century.

The balance sheet of India's participation shows that it has achieved some long-term goals in the economic and trade areas, however, no significant achievements are seen in the political and security areas.[974]

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[973] Bimal N. Patel, "International Court of Justice and India" in Bimal N. Patel (ed.), *India and International Law*, 289-319 (2005) at p. 313.

[974] While India has remained relatively less active in the previous rounds of reforms, its activism since 2005 has been more prominent. In fact, since 2005, a more concerted approach of developing countries to the UN reforms has been seen, although with mix result of success. This disproves a widely held perception that these countries "do not see any possibility of reversing the trend and, therefore, they have not taken any initiative in this direction." Muchkund Dubey, *Reform of the UN System and India* above at 141.

Two important achievements which could be attributed to India led efforts are – the UN encouraged implementation of the second stage of the IMF quota reform and promise of the increased ODA from developed to developing countries. India's disappointments are clearly noted in the Security Council reform, the Peace Building Commission, Peacekeeping Operations and last but not the least, terrorism. Although India has outlined substantive and procedural reforms of the Council, in a comprehensive manner, none of the proposals have been accepted. With regards to the Peace Building Commission and the Human Rights Council, India has to remain content with the fact that the Peace Building Commission is responsible to Security Council while the Human Rights Council is accountable to the General Assembly.[975] As mentioned in the analysis, India's clarion call for the Comprehensive Convention on International Terrorism is yet to find the full support of the international community. Nor its proposal for the Elimination of Nuclear Weapons has been accepted.

Why India could not achieve results on its proposals? It is not surprising that some of the disappointing results were due to the fact India did not employ full machinery and resources to garner the support of the international community as done by Japan. Lack of concentrated and focussed efforts, lack of sufficient political and economic clout, absence of systematic discussion involving all actors influential in the reforms process, heavy focus on the Security Council reforms, are some of the glaring weaknesses which could be considered as responsible reasons for the outcome.

The chapter demonstrates that the reform momentum has been largely lost within the UN Secretariat, within the few active Member States, within the civil society institutions and perhaps most importantly within the media.[976] The few big achievements of the UN Reforms have already been known. These achievements in terms of creation of new institutions are creation of the Peace Building Commission, the Human Rights Council and the UN Democracy Fund. In terms of restructuring, there would be restructuring of the Disarmament machinery (from Department of Disarmament to the High Representative of the Secretary-General on Disarmament,[977] a large reduction of importance of the subject), Peacekeeping Department, in terms of management, employment of more women and attempt to balance the representation of developed and developing countries in the senior management group.

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[975] The expectations of nations like India to put the new Council on a higher pedestal of the UN institutional hierarchy have been well reasoned. As Nico Schrijver puts, "[T]he founding Resolution 60/251 has certainly endowed the Council with a somewhat higher institutional status within the UN system, being a subsidiary organ of the General Assembly, the mother organ of the United Nations which is politically more prominent than ECOSOC. After all, the General Assembly has a Charter duty of 'assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". Nico Schrijver, "The UN Human Rights Council: A New 'Society of the Committed' or Just Old Wine in New Bottles? 20 *Leiden Journal of International Law*, 809-823 (2007) at p. 822.

[976] The Security Council expansion seems impossible: perhaps, this is the case. Japan, for example, has demanded that the enemy clause be deleted from the Charter as a part of its comprehensive strategy to achieve its national goals. Since the Security Council expansion entails amendment to the Charter, it proves to be extremely difficult; because Japan would like to have the enemy clause deleted, so there may be some radical suggestions and the entire momentum can be lost.

[977] This round of reform reinforces a general conclusion about the history of the UN Reform which suggests that each round of reform brings in "the proliferation of bodies and institutions to control, monitor, and do internal surveillance at the cost of those designed to harmonise policies, negotiate agreements and find common grounds on substantive issues of global concern." Muchkund Dubey, *Reform of the UN System and India above* at p. 141.

# CHAPTER X
# INTERNATIONAL COURT OF JUSTICE AND INDIA

## 10.1. Introduction

This Chapter examines how India has contributed to the development of jurisprudence and to the functioning of the International Court of Justice (hereinafter referred as either ICJ or the Court). It analyses India's contribution to the advisory jurisdiction of the Court, examines the contentious cases in which India was involved as a party, and considers the general attitude of India towards the Court.[978] It also briefly describes and analyses information on the judges from India who served the ICJ as a judge or judge *ad hoc*.

Though the literature on India and the ICJ is very limited, the few contributions Indian authors have made thus far have been important; especially those of Nagendra Singh and R. P. Anand stand out.[979] What little has been produced focuses more on cases in which India was involved rather than on the general functioning of the ICJ. There are a few direct references to ICJ judgments in the domestic case law of India – and the same can be said of many other UN Member States. The lack of literature can be explained in part by the small number of cases before the ICJ in which India has been either an applicant or a respondent. That in turn can be attributed to the importance India has attached to settling international disputes through negotiation rather than litigation, which it has tended to regard as an option of last resort. This attitude can also find reflection in President Nagendra Singh's book '*The Role and Record of the International Court of Justice'*.[980] He advocates that recourse to the ICJ is and should be a normal and natural step in the face of any dispute not resolved by negotiation.[981]

Should we look at the contribution of India as an isolated product of thinking or as inspired and influenced by contemporary theories and phenomena elsewhere? What have been the exact influence and the judicial legacy? The pursuit of these issues seems an indispensable exercise when we discuss the contribution of India to the functioning of the ICJ and the jurisprudence.

## 10.2. India's Position on the Role and Functioning of the Court

In this section, an attempt is made to examine India's approach on the judicial settlement of international disputes, its general attitude towards the functioning of the ICJ and the Indian representation in the membership of the ICJ.

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[978] Ko Swan Sik, "The attitude of Asian states towards the International Court of Justice revisited," In Nisuke Ando, Edward McWhinney, Rudiger Wolfrum, (ed.) *Liber amicorum* judge Shigeru Oda, 165-76 (2002).

[979] R. P. Anand, *International Courts and Contemporary Conflicts*, (Popular Press, 1974); _____ The International Court of Justice and Impartiality between Nations In XII *The Indian Yearbook of International Affairs* (1963), World Rule of Law Booklet Series, No. 26; _____*Compulsory Jurisdiction of the International Court of Justice*, (Asia Publishing House, London: 1961); J. N. Singh, International Justice, (New Delhi: Harnam Publications, 1991); Ramesh Thakur, (ed.) P*ast Imperfect, Future Uncertain*, (New York: MacMillan Press Ltd., 1998); Nagendra Singh, The *Role and Record of the International Court of Justice*, (Dordrecht: Nijhoff, 1989).

[980] Judge Nagendra Singh served as Judge *ad hoc* and a member of the Court from 1973 to 1988, including as the President from 1985 to 1988.

[981] Nagendra Singh, *The Role and Record of the International Court of Justice*, (Dordrecht: Nijhoff, 1989) at p. 83.

### 10.2.1. Preferred Means of Dispute Settlement

It is interesting to note that the Indian Constitution makes it the duty of the government to foster respect for international law and encourage settlement of international disputes by arbitration.[982] India has taken a principled position and consistently followed the practice of resolving legal disputes or questions through negotiations instead of adjudication. It has preferred negotiation which does not involve an element of compulsion to any third party's binding judgment, as in arbitration and adjudication. In fact, the observation of Professor Wright *(*commenting on new nations of Asia and Africa) -"the Orient has preferred government by good men applying institutions of justice to the facts rather than government by law that is government by magistrates bound by rules making for certainty and predictability in decisions"- is very much applicable in the case of India.[983] The Indian attitude of preferring less adjudication is not typical of India, in fact, the Asian-African states have generally preferred negotiations assisted by conciliatory measures in their conflicts. Has there been any marked change in this basic posture of India? In the last decade, the preference for diplomatic solutions or negotiations is also imbibed in India's general lack of pro-active support for the establishment of international courts and tribunals, like the International Criminal Court (India has not signed the Rome Statute establishing the ICC).[984]

The scholastic community explains the advantages of these preferred means of India for the settlement of disputes. Anand cites an example of the Canal Water dispute of 1950 between India and Pakistan where India strongly advocated a resolution tribunal consisting of judges from the two countries and failing to find a solution for a part of the dispute, submitted to arbitration or to the ICJ. Writing in 1961, Anand argues that "rarely have such disputes, such as Kashmir, affecting such vital interests of the states, been submitted to any judicial procedure. Such matters may be decided by negotiation or conciliation or mediation, but not by a judicial tribunal. It can be confidently stated that any country in India's position would have behaved in the same way as she has done."[985] Thus, scholars also indicate the preference for other peaceful means to adjudication. In one of the earliest reports on India and the UN, report of a study group set up by the Indian Council of World Affairs, New York, 1957, the conclusion was drawn that India's policy is one of caution and of eagerness to safeguard India's sovereignty when it comes to accepting any additional legal obligations in the international field. This conclusion is largely valid even today.

### 10.2.2. Role of the Court in the Contemporary World

Is India pro-actively interested in the overall functioning of the Court? The following two examples are indicative of its interest. The leaders of the Indian delegations at the UN General Assembly's annual sessions

[982]Part IV, Directive principles, Article 51 of the Constitution of India.

[983]Quincy Wright, "The Influence of the New Nations of Asia and Africa upon International Law," In *Foreign Affairs Reports*, New Delhi, (March at 1958), p. 38.

[984]Since the end of the Second World War in general and the collapse of the former Soviet Bloc, there is a proliferation of intergovernmental committees and organs and courts to deal with human right violations, whether by public debate, states' reports, individual petition procedures, truth and reconciliation commission, etc. The establishment and functioning of this mosaic of machineries is largely of Western European origin in terms of philosophy establishing these mechanisms, rules of procedure, members and functionaries in these structures. This human rights ideological domination once again fails to augur consolidation of international human rights law in which large nations like India, China and several prominent developing countries can also actively participate and embrace them with some sense of acceptance. India actively follows the ICC work and gave legal opinions on request for cooperation in investigations by the ICC as well as keeps preparing briefs on the cases in the docket of the Court. MEA Annual Report 2012-13, p. 105.

[985] R. P. Anand, *Compulsory Jurisdiction of the International Court of Justice*, New Delhi: Indian School of International Studies, Jawaharlal Nehru University, (1961) at p. 256.

have made very few references in their speeches regarding the role and importance of the ICJ and those few references are related to a particular case or opinion.[986] Furthermore, India did not provide its comments on the General Assembly resolution on the review of the role of the Court. The UN Secretary-General prepared the questionnaire pursuant to Resolution 2723 (1970) of the General Assembly which among other topics contained the aspects of: (1) the role of the ICJ within the framework of the UN (2) organization of the ICJ (3) jurisdiction of the ICJ (4) procedures and methods of Work of the ICJ, and (5) future action by the General Assembly. These two sporadic examples can indicate that India is not as pro-active as one would have expected of it.[987]

### 10.2.3. Representation on the Bench of the Court

What is India's record as far as its representation on the Bench of the Court is concerned? The available records show that India has never made any reference regarding the composition of the ICJ Bench in its speeches at the UN General Assembly except when India advocated the case of China's representation in various organs of the UN including the ICJ.[988]

Three Indian nationals have been elected as a member of the ICJ, namely, Sir B. Rau, Dr Nagendra Singh and Justice R. S. Pathak. In addition, Justice Chagla, Nagendra Singh, Reddy and P. S. Rao have served as *ad hoc* judges in the *Right of Passage over Indian Territory*, *ICAO Appeal*, the *Aerial Incident of 10 August 1999* cases, and *Pedra Branca/Pulau Batu Puteh (Malaysia/Singapore)* respectively. It is interesting to observe that all of these Judges including the *ad hoc* judges have served the Indian government in various capacities before joining the Court.[989] Sir Benegal Rau (1952-1953) and Dr. Nagendra Singh (1972) were elected during the time when India was holding a non-permanent membership in the Security Council.[990] Dr. Pathak was elected upon the death of Judge Nagendra Singh. Although India was not a member of the Security Council during the election in 1988, following the tradition of the ICJ, a judge from the same nationality of the preceding judge who died during the service of the ICJ, was elected.[991] Justice Dalveer Bhandari, sitting Judge of the

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[986] The website of the Permanent Mission of India to the UN, New York, reproduces the text of landmark speeches by the leaders of the Indian delegation to the UN GA annual session. Reference to the ICJ is found in six speeches, namely, (8th Session 448th Plenary Meeting, 28th September,1953 ; Eleventh Session 611th Plenary Meeting, 6th December, 1956; 12th Session 703rd Plenary Meeting, 8th October, 1957; Fourteenth Session 823rd Plenary Meeting, 6th October, 1959; 26th Session 1940th Plenary Meeting, 27th September, 1971; Address by H. E. Mr I. K. Gujral, Prime Minister of the Republic of India to the 52nd Session of the UN General Assembly, 24th September 1997.

[987] Patel, Bimal N., "Recommendations on the Enhancement of Role and Effectiveness of the International Court of Justice and the State Practice: Gap between Recommendations and Practice (1971 – 2006)," 11 *Singapore YbIL* 99-122 (2007).

[988] Statement of V. K. Krishna Menon, 8th Session, 448th Plenary Meeting of the UN General Assembly, 28 September 1953.

[989] Judge Benegal Rau was the first Indian Judge to sit on the bench of the ICJ, he was the Prime Minister of Kashmir, he participated in two contentious cases and gave one dissenting opinion in the *Rights of US Nationals in Morocco* case. Judge Nagendra Singh was Secretary to the President of India prior to his election as a member of the Court. He participated in 15 contentious cases and 6 advisory opinions and appended six declarations and ten separate opinions. Judge Pathak was the Chief Justice of India prior to his election as a member of the Court. He participated in five contentious cases and one advisory opinion. He appended no opinion.

[990] Sir Benegal Rau was elected in 1951 while Judge Nagendra Singh was elected in 1972 and assumed the functions in the following years respectively. Judge Nagendra Singh served as the President of the ICJ between 1985 and 1988. Judge Dalveer Bhandari, was elected, upon the vacancy created by Judge Al-Khasawneh of Jordan resignation for a term expiring in 2018.

[991] Sir Benegal Rau was nominated as a candidate in October 1948 and December 1951. He was elected on 6 December 1951 at the triennial election along with Judges Armond-Ugon, Golunsky, Klaestad and

Supreme Court of India (as he was then) became the fourth person from India to occupy the post of Judge in the ICJ. Justice Bhandari was elected in 2012, filling the vacancy created by the resignation of Justice Al-Khaswaneh of Jordan. His term will be for the duration of 6 years till 2018.

### 10.2.4. Views of the Indian Academicians on the Functioning of the Court and its Members

Indian writers have held the independence, impartiality and objectivity[992] of the judges in high esteem, have never challenged it in the slightest, and have believed that the judges are custodians of international law and justice.[993] All official positions of India speak highly of the judges and the ICJ, even in the fierce arguments of the South-West Africa cases.[994] The fact that the national judges and the *ad hoc* judges usually give judgment in favour of their country or friendly countries, especially on important issues, is not a healthy trend and it certainly reflects on the degree of their objectivity.[995] The position of *ad hoc* judges is invidious as standing somewhere between independent judges and representative of the parties. They have to give a solemn declaration to act as judges, but they are probably expected by their nominating countries to defend their interests and are chosen because their past opinions indicate that they will. In this regard, it can be observed that Judge *ad hoc* Nagendra Singh rendered an individual separate opinion in the *Trial of Pakistani Prisoners of War* - interim measures of protection phase - and Judge *ad hoc* Reddy supported the Court's rejection of its jurisdiction in the *Aerial Incident 10 August of 1999* and issued an individual opinion. Judge *ad hoc* Chagla issued a dissenting opinion in the *Right of Passage over Indian Territory* case – preliminary objection and merits phases.

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Hackworth. Following the death of Sir Benegal Rau, India nominated Radha Binod Pal during the supplementary election in 1954 and in triennial election in 1957, however, he was not elected. Dr. Nagendra Singh was nominated 27 October 1969 for the triennial election of judge starting office from 6 February 1970. However, he was elected on 6 February 1973, following the expiry of the term of Sir Muhammad Zafrulla Khan on 5 February 1973. Sir Zafrulla Khan was not nominated for re-election at this stage. Dr. Pathak was elected on 18 April 1989 at the supplementary election caused by the vacancy following the death of Judge Nagendra Singh. The other Asian candidates were Messrs S. Kraichitti, D. Patel and M. C. W. Pinto. His term of office expired on 5 December 1991. Justice Pathak was nominated for the second term at the triennial election but was unsuccessful. Instead, Judge Weeramantry (Sri Lanka) was elected.

[992] Mani, reflecting on the weakness in favour of one's own country, says that the fact can hardly be denied that it is very difficult for a man to resist the affiliations of the people and the country with which his interests are so much bound up. As a committee of the Permanent Court itself, consisting of Judges Loder, Moore and Anzilotti said: "…of all influences to which men are subject none is more powerful, more persuasive, or more subtle, than the tie of allegiance that binds them to the lands of their homes and kindred and to the great sources of honours and preferments for which they are so ready to spend their fortunes and to risk their lives. This fact, known to the world, the Statute frankly recognizes and deals with." P.C.I.J Series E, No. 4, p. 75.

[993] Anand succinctly justifies that the Court's criticism regarding the possible partiality and political motivation is unfounded. Although, he refrains from giving a categorical denial to the criticism, as he mentions that *although impartiality is a characteristic, which is universally prized in a judicial tribunal, it must never be forgotten that the impartiality of tribunal is always relative, never absolute.* However, in his final analysis, he shows even more optimism and holds a view that *distrust of the competence and impartiality of the International Court of Justice is* scarcely the reason why Governments do not submit their cases to the tribunal. Anand In *International Courts and Contemporary Conflicts* at 193.

[994] It should be noted that there was no judge from India on the bench whenever India presented its written statement during any of the advisory proceedings.

[995] Although ad hoc judges have normally supported the nominating state, there are few instances which deviate from this, for example, *Application for Revision and Interpretation of the Judgment* made in the *Tunisia/Libya* case and the *Great Belt* (Finland v. Denmark) case.

### 10.2.5. Records on the Declarations and Opinions of Indian Members

Sir Benegal Rau appended only one opinion, namely, joint dissenting opinion in the *Rights of Nationals of United States in Morocco* (France *v.* USA). Judge Nagendra Singh appended declarations in *Fisheries Jurisdiction* (United Kingdom *v.* Iceland – merits); *Fisheries Jurisdiction* (Federal Republic of Germany *v.* Iceland – merits); *Nuclear Tests* (Australia *v.* France - interim measures of protection); *Nuclear Tests* (New Zealand *v.* France - interim measures of protection) as well as to two advisory opinions *Application for Review of UNAT Judgment No. 158* and *Western Sahara*. Judge Nagendra Singh also appended an individual opinion in *Trial of Pakistani Prisoners of War* during interim measures of protection ruling (Pakistan *v.* India); *Aegean Sea Continental Shelf* during interim measures of protection ruling (Greece *v.* Turkey); *Continental Shelf* (Libya/Malta – intervention); *Military and Paramilitary Activities in and against Nicaragua* (intervention, preliminary objections and merits – Nicaragua *v.* USA); and in one advisory opinion *Application for Review of UNAT Judgment No. 273*. Judge Nagendra Singh appended a dissenting opinion in the *Appeal Relating to the Jurisdiction of the ICAO Council* (India *v.* Pakistan). Judge Pathak did not append any opinion in the two contentious cases in which he participated (*Land, Maritime and Island Frontier Dispute*, El Salvador/Honduras; and *Arbitral Award of 31 July 1989*, Guinea Bissau v. Senegal). In both the cases, he voted with the majority.

## 10.3. India as a Party in the Contentious Cases: A Short Description

India has appeared before the ICJ as the respondent in three cases, namely, the *Right of Passage over Indian Territory*,[996] the *Trial of Pakistani Prisoners of War*,[997] and the *Aerial Incident of 10 August 1999*.[998] In each of these, it has challenged the jurisdiction of the Court. The *Trial of Pakistani Prisoners of War* case was removed

[996] Portugal instituted proceedings against India on 22 December 1955. The case lasted for 4 years, 3 months and 21 days and the final judgment was delivered on 12 April 1960. The Portuguese possessions in India included the two enclaves of Dadra and Nagar-Aveli which, in mid-1954, passed under an autonomous local administration. Portugal claimed that it had a right to passage to those enclaves and between one enclave and the other to the extent necessary for the exercise of its sovereignty and subject to the regulation and control of India; it also claimed that, in July 1954, contrary to the practice previously followed, India had prevented it from exercising that right and that that situation should be redressed. A first judgment, delivered on 26 November 1957, related to the jurisdiction of the Court, which had been challenged by India. The Court rejected four of the preliminary objections raised by India and joined the other two to the merits. In a second Judgment, delivered on 12 April 1960, after rejecting the two remaining preliminary objections the Court gave its decision on the claims of Portugal, which India maintained were unfounded. The Court found that Portugal had in 1954 the right of passage claimed by it that such right did not extend to armed forces, armed police, arms and ammunition, and that India had not acted contrary to the obligations imposed on it by the existence of that right. Source: *the International Court of Justice* (1986), p. 92.

[997] Pakistan instituted proceedings against India concerning 195 Pakistani prisoners of war on 11 May 1973, whom, according to Pakistan, India proposed to hand over to Bangladesh, which was said to intend trying them for acts of genocide and crimes against humanity. India stated that there was no legal basis for the Court's jurisdiction in the matter and that Pakistan's application was without legal effect. The case lasted for 7 months and 4 days. The case was removed from the General List on 15 December 1973. Pakistan having also filed a request for the indication of interim measures of protection, the Court held public sittings to hear observations on this subject; India was not represented at the hearings. In July 1973, Pakistan asked the Court to postpone further consideration of its request in order to facilitate negotiations. Before any written pleadings had been filed, Pakistan informed the Court that negotiations had taken place, and requested the Court to record discontinuance of the proceedings. Accordingly, the case was removed from the list by an order of 15 December 1973. Source: *the International Court of Justice* (1986), p. 98.

[998] Pakistan instituted proceedings before the Court against India in respect of a dispute concerning the destruction on 10 August 1999 of a Pakistani aircraft. India raised preliminary objections to the jurisdiction of the Court. The Court declared, by a vote of fourteen to two, that it had no jurisdiction to adjudicate upon the dispute brought by Pakistan.

from the General List of the Court in 1973. The *Aerial Incident of 10 August 1999* case was discontinued because of the lack of jurisdiction of the ICJ. The ICJ rejected the preliminary objections of India in the *Right of Passage over Indian Territory* case and handed down its judgment on the merits. India has also brought a fourth case to the ICJ - the ICAO appeal.[999] In this case, the ICJ found that it had jurisdiction to deal with the case lodged by India. Three of the four cases were concerned with disputes between India and Pakistan; the exception was the *Right of Passage over Indian Territory* case, which was brought by Portugal.

### 10.3.1. Basis of jurisdiction

All four cases were brought before the ICJ through a unilateral application under Article 40 of the ICJ Statute. Portugal invoked Article 36(2)[1000] of the Statute in the *Right of Passage over Indian Territory* case, Pakistan invoked Article IX of the Genocide Convention and Article 36(1) of the Statute in the *Trial of Pakistani Prisoners of War* case, and Pakistan invoked Article 36(1)[1001] and (2) of the Statute, the General Act of 1928 and declarations of Pakistan and India accepting the jurisdiction of the ICJ in the *Aerial Incident of 10 August 1999* case. India, in its sole case as an applicant, invoked Article 84 of the Convention on International Civil Aviation of 7 December 1944, Article II of the International Air Services Transit Agreement of 7 December 1944, and Articles 36 and 37 of the Statute.

## 10.4. The Position of India on the Legal Rules and Principles in the Contentious Cases

How have the cases concerning India contributed to the clarification of legal principles and rules and the emergence of new ones, and how have they affected practices followed by the ICJ and the member States of the UN. The following section examines the position of India concerning the elements of political motives in the contentious cases; its standpoint on reciprocity, mutuality and equality before the Court; its emphasis on the *prima facie* jurisdiction and consent for the purposes of interim measures of protection and its views on the compulsory jurisdiction of the Court.

### 10.4.1. Political Motives

India has been quite sensitive to the political use of any legal instrument in the proceedings of the Court. It has vehemently objected, whenever the opposing party had relied on political connections of the legal disputes. For

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[999] The case lasted for nearly eleven months and 12 days (from 30 August 1971 to 18 August 1972). In February 1971, following an incident involving the diversion to Pakistan of an Indian aircraft, India suspended over flights of its territory by Pakistan civil aircraft. Pakistan took the view that this action was in breach of the 1944 Convention on International Civil Aviation and the International Air Services Transit Agreement and complained to the Council of the International Civil Aviation Organization. India raised preliminary objections to the jurisdiction of the Council, but these were rejected and India appealed to the Court. During the ensuring written and oral proceedings before the Court, Pakistan contended, *inter alia*, that the Court was not competent to hear the appeal. In its judgment of 18 august 1972, the Court found that it was competent to hear the appeal and that the Council had jurisdiction to deal with Pakistan's case. Source: *the International Court of Justice* (1986) at 98.

[1000] Art. 36(2) ICJ Statue reads: The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.

[1001] According to article 36(1), the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

example, India made it clear that the *Trial of Pakistani Prisoners of War* case could have been instituted against another state, namely, Bangladesh, which was not yet a Member State of the UN. Since India had nothing to do with the crimes or trials that were at the centre of the case, "it could not be made a party to the application and request for interim measures just in order to enable the respondent to seek extraneous political advantages."[1002] It also alleged that Pakistan had had political motives in bringing the case and had thus "shown utter disregard for the object and purpose of the Genocide Convention.[1003]

### 10.4.2. Principles of Reciprocity and Equality

The contribution of India has enabled a clarification of the legal principle of reciprocity, mutuality and equality through its pleadings in the *Right of Passage over Indian Territory* case. India argued that the Portuguese application had been filed before the lapse of brief period. In the normal course of events, the UN Secretary-General would have, in compliance with Article 36 (4), transmitted copies of the Portuguese declaration to the other parties of the Statute. By doing this, Portugal violated equality, mutuality, and reciprocity to which India was entitled under the optional clause and the express condition of reciprocity contained in its own declaration of 1940; and consequently, the conditions did not exist to entitle Portugal to file the application. This argument led the Court to clarify and reinforce its jurisprudence of Article 36 (4) of the Statute which has two parts; the deposition of the declaration, a mandatory requirement; and transmission of the declaration to the States, an administrative/procedural obligation of the UN Secretary-General. In other words, the Indian argument necessitated that the Court clarified an important point of law - namely, whether the lapse of time is necessary between depositing the declaration with the UN Secretary-General under Article 36(4) of the Statute and filing of an application against some state. The ruling of the Court reaffirmed that "as soon as a State Party to the Statute deposits a declaration with the UN Secretary-General, it may invoke the compulsory jurisdiction against any other State party to the Statute, and every other State is likewise bound by its acceptance of the jurisdiction. It is immaterial whether those other states know that the declaration has been deposited."[1004] The ICJ clarified that there is no additional requirement that the information transmitted by the UN Secretary-General must reach the parties to the Statue or that some period must elapse subsequent to the deposit of declaration before it can become effective. Although the Indian argument of an entitlement to expect a reasonable degree of certainty with regard to the obligations imposed on them by the declarations of other states was put aside by the Court, this clarification of the Court had useful effects as far as similar situations were concerned.[1005] Furthermore, several Member States following the judgment of the Court in this matter modified the content of their declaration accepting the compulsory jurisdiction of the Court.[1006] This case also gave an important challenge to determine the relevant time period at which to ascertain the legal rights and obligations in question. The general

[1002] Pleadings, Oral Arguments and Documents, *Trial of Pakistani Prisoners of War*, p. 152.
[1003] *Ibid.*
[1004] Case concerning *Right of Passage over Indian Territory* (Preliminary Objections), Judgment of November 26th, 1957: I.C.J. Reports 1957, p. 145-147.
[1005] This position also played an important role in Maritime Boundary Dispute between Cameroon and Nigeria. *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 13.
[1006] Pleadings, Oral Arguments and Documents, *Right of Passage over Indian Territory*, p. 111.

rule the Court considered in such circumstances is, in a dispute, the claim or situation in question shall be examined according to the conditions and rules in existence at the time it was made and not at a later date.[1007]

**10.4.2.1 Reciprocity**

India has consistently mentioned in its declaration, accepting compulsory jurisdiction, that it has accepted the jurisdiction only on condition of reciprocity. This shows India's general attitude towards international law wherein it believes that rules of law ought to reciprocally bind the parties. India, invoking this clause in the *Right of Passage over Indian Territory* case, argued that Portugal violated India's reciprocal right by filing an application against it on 22 December 1955, before India knew, or had any means of knowing, the terms of the conditions of the Portuguese Declaration. Furthermore, Portugal violated India's reciprocal right, with respect to the third condition in the Portuguese Declaration which reserved to itself the right to exclude from the scope of Portugal's acceptance of compulsory jurisdiction, any given category or categories of dispute, at any time by mere notification to the UN Secretary-General. From the view of India, the instantaneous filing of the application was inconsistent with India's right to reciprocity and was wholly incompatible both with the terms of the optional clause and with the express conditions of India's own declaration.

The above position of India has helped to understand that the relation created between states by adherence to the clause is a consensual relation involving reciprocal rights and obligations. Therefore, in its view, it was "essential for the operation of this consensual relation that the contractual nexus between any two states should become effective only in law when the action of the UN Secretary-General under Article 36(4) of the Statute has had its appropriate effects with respect to other states which have previously adhered to the optional clause."[1008] This principle is of particular importance with respect to a state against which the state making the declaration already, intends to file an application. Although India offered a set of lengthy arguments on this principle, they were far from convincing to the Court, as it is clear from the Court's rejection of India's arguments.

**10.4.2.2. Equality**

India has shown determination to uphold the principle of equality of states, in fact, even in law, before the ICJ. Thus, India holds that a correct procedure should be followed to ensure equality of all states before the ICJ. In the *Right of Passage over Indian Territory* case, its arguments showed that the principle, that states have a right to be in a position of complete equality before the Court with regard to access to the Court and Court jurisdiction, is fundamental. In the words of India's counsel, "the principle of equality finds particular expression in Article 35 (2) of the Statute, which expressly provides that the conditions laid down by the Security Council under which states, not parties to the Statute, may have access to the ICJ, shall in no case place the parties in a position of inequality before the ICJ."[1009] It also finds particular expression in Article 36 (2) of the Statute, which provides equality in relation only to that state accepting the same obligation. In India's view, the purpose of transmission by the UN Secretary-General of declarations under the optional clause to the Court and all Member States is to protect the interests of all other parties to the Statute and with this end in view to ensure that all states that have accepted the optional clause have equal knowledge of the scope both of their obligations and rights

[1007] See ICJ Reports 1957, pp. 6, 37.
[1008] Case concerning *Right of Passage over Indian Territory* (Preliminary Objections), Judgment of November 26th, 1957: I.C.J. Reports 1957, p. 141-5.
[1009] Pleadings, Oral Arguments and Documents, *Right of Passage over Indian Territory*, pp. 210-213.

under the optional clause. Thus, India considered the lack of sufficient elapse of time period between depositing the declaration and the filing of the case in the Court as a manifest infringement of the principle of equality.

### 10.4.3. Necessity for Jurisdiction and Consent of State for the Judgment on Interim Measures

As far as the issue of interim measures is concerned, the Indian position shows that the question of interim measures of protection does not arise in the face of the patent and manifest lack of jurisdiction, and more so where the Court is not properly seized of the matter.[1010] This was apparent in the Indian argument in the *Trial of Pakistani Prisoners of War* case. India argued that "there is an inextricable link between an application and a request for interim measures which can only follow the application. The request cannot go beyond the scope of the application. The request must be founded on the application and the application alone, and the state making an application is not entitled to urge any point, particularly regarding jurisdiction, beyond what is contained in its application."[1011] To prove its point further, it relied upon case law of the ICJ in the *Fisheries Jurisdiction* case, where it was argued that "when the absolute absence of jurisdiction is so patent and manifest at the threshold of the institution of proceedings, the question of summoning the parties for a hearing to determine its jurisdiction does not arise…the only proper action for the ICJ to take…is to remove the application from the list by an administrative order."[1012]

### 10.4.4. Consent of State

India declined to give consent to the ICJ in the *Trial of Pakistani Prisoners of War* case. India had made a reservation under Article IX of the 1948 Genocide Convention, according to which India declared that, for the submission of any dispute in terms of this Article to the jurisdiction of the ICJ, the consent of all the parties to the dispute is required in each case.[1013] India, accordingly, presuming that the application and request of Pakistan which were submitted to India sought the consent of India, regretted that it could not give consent and informed the Court that it could not be in proper seizing of the case[1014] and proceed with it. It was also of the opinion that there was no legal basis whatsoever for the jurisdiction of the Court. It provides that any dispute relating to the interpretation or application of the treaty in question may be referred to the Court; however, the consent of the respondent is required to perfect the jurisdiction of the Court in any concrete case.

India submitted a written statement elaborating its position declining the consent through its letter dated 28 May 1973. It detailed its reasoning for refusing the consent to the jurisdiction of the Court by clarifying that its views did not constitute preliminary objections within the meaning of Article 67 of the Rules of the Court, despite Pakistan's assertion to the contrary. It made clear that its views are those of a sovereign state that refuses to give its consent to frivolous and vexatious proceedings instituted against it for interim measures for an ulterior

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[1010] Pleadings, Oral Arguments and Documents, *Trial of Pakistani Prisoners of War*, p. 131.
[1011] *Ibid.*, p. 140.
[1012] Fisheries Jurisdiction (Federal Republic of Germany *v.* Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972, p.33.
[1013] Pleadings, Oral Arguments and Documents, *Trial of Pakistani Prisoners of War*, p.132.
[1014] The case-law suggests that the Court in interpreting the relevant texts has reached the conclusion that it allows a unilateral seisin. Once the court has been validly seized, both parties are bound by the procedural consequences which the statute and the rules make applicable to the method of seisin employed. Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995, p. 23.

purpose and to seek extraneous political advantages against the object and purpose of the Genocide Convention[1015] and the Statute and Rules of the Court.

### 10.4.5. Compulsory Jurisdiction of the ICJ

India has accepted the compulsory jurisdiction of the Court in 1940 (prior to independence) and in 1956 (after independence) and has made eleven separate reservations in its current declaration which has been in effect since 1974. Each of the revisions to the original declaration shows the new ways and ingenious reservations of India to avoid the Court as far as possible in a concrete case. Which are the factors and how has the Indian position on compulsory jurisdiction evolved over time? An evolution of India's acceptance of compulsory jurisdiction dating back from the Permanent Court of International Justice is annexed at the end of this chapter.

The first significant revision of the declaration by India was made in the wake of the ICJ judgment in the *Right of Passage over Indian Territory* case. As mentioned above, India was unaware of the deposit of the declaration of Portugal and immediate filing of the case in the Court which had long-term implications for the equilibrium of the compulsory jurisdiction. Not only India, but several other states also made significant changes in their declaration subsequent to this judgment.[1016] Bulgaria, Cyprus, Hungary, Israel, Malta, Mauritius, New Zealand, Philippines, Poland, Somalia, Spain and the United Kingdom introduced changes to their reservations to the compulsory jurisdiction, subsequent to this judgment. India made a change on 14 September 1959 according to which disputes in respect of which any other party to a dispute has accepted the compulsory jurisdiction of the Court exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court.

There is one particular aspect of India's reservation, namely, its reservation for the Commonwealth countries. A close reading of India's 1959 and 1974 Commonwealth reservations gives the impression that the reservation is made against a particular state – *ratione personae*, properly so described.[1017] There may be an argument about whether this reservation may somehow defeat the purposes which it hoped to achieve by means of the purposes of Article 36 (2) and (6) of the Statute.

British India accepted the compulsory jurisdiction of the Permanent Court of International Justice on 19 September 1929 with a number of reservations. The declaration was revised on 28 February 1940 and continued to be in force after the formation of the ICJ under Article 36 (5) of the Statute. It was the *Right of Passage over Indian Territory* case which awakened the Indian government to make an appropriate change to the declaration.

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[1015] Pleadings, Oral Arguments and Documents, *Trial of Pakistani Prisoners of War*, p. 124.

[1016] As Rosenne says, "Since that decision (Right of Passage over Indian Territory), several states previously bound by compulsory jurisdiction have made new declarations containing stipulations designed to counteract the two novel features of the declaration of Portugal and of the decision upholding it in the Right of Passage over Indian Territory case – the unexpected and unknown deposit of a declaration very shortly after a state became a party to the Statute and the equally sudden introduction of proceedings by that state before the respondent could have known that the declaration had been deposited". Shabtai Rosenne, *The Law and Practice of the International Court*, 3rd ed. (Leiden: Nijhoff, 1997), at p. 799.

[1017] India modified its reservation in 1959 reading *disputes with the government of any state which, on the date of this declaration, is a member of the Commonwealth of Nations.* This reservation omitted *all of which disputes shall be settled in such manner as the parties have agreed or shall agree* which were contained in previous declarations. In 1974, India modified again the reservation reading *disputes with the government of any state which is or has been a member of the Commonwealth of Nations.* Dissenting opinion of Judge Al-Khasawneh, Aerial Incident, paragraph 9 In the Case Concerning the *Aerial Incident of 10 August 1999* (Pakistan *v.* India), Judgment, I. C. J. Reports 2000, p. 50.

India withdrew the previous declaration and a new declaration under Article 36 (2) on 9 January 1956 was submitted which was terminable immediately without any notice, and contained, apart from other reservations, the most sweeping reservation on the American lines (the Connally reservation - under this reservation, the USA has excluded disputes with regard to matters which are essentially within the domestic jurisdiction of the USA as determined by it). India excluded disputes with regard to matters which are essentially within the domestic jurisdiction of India as determined by India. Such a reservation leaves very little scope for a case to be brought before the Court without the will of the country making it and is in fact against the very spirit of the compulsory jurisdiction of the Court. Realizing this fact, it seems, India in its 14 September 1959 declaration withdrew the most objectionable part of this reservation by which it was India and not the Court which had the authority to decide whether a matter was within the domestic jurisdiction of India or not. The new declaration, which has again been made terminable on notice provided that it applies only to disputes arising after 26 January 1950 with regard to situations or facts subsequent to that date.

In the *Right of Passage over Indian Territory* case, the declaration of Portugal had a reservation according to which it had the right to exclude from the scope of its declaration, at any time during its validity, any given category or categories of disputes, by notifying the UN Secretary-General and with effect from the moment of such notification. India maintained that this condition gave Portugal the right, by making a notification at any time to that effect, to withdraw a dispute from the jurisdiction of the Court, which had been submitted to it prior to such notification. It argued that the notification had retroactive effect and asserted it to be incompatible with the principle and notion of compulsory jurisdiction as established in Article 36 of the Statute. The Court rejected India's argument and its rejection enabled it to draw a conclusion that when an application has been regularly filed in a particular case while the declarations of both states were current, the subsequent lapse of one of the declarations, whether by the expiry of a fixed period or by denunciation under the terms of the declaration does not deprive the Court of jurisdiction over the case. On the other hand, the prior lapse of a declaration by however brief a period, suffices to prevent the establishment of the Court's jurisdiction by means of an application based upon the expired declaration. This is an important clarification which this case brought to bear in the subsequent cases.

Several Indian scholars have shown hesitation towards the advocacy of the acceptance of unqualified compulsory jurisdiction. For example, Anand says the maxim *calculate the limits of the possible* should be observed. He is cautious in showing optimism that the acceptance of the jurisdiction of the Court in essentially legal disputes is the first step towards the establishment of the rule of law in international society. Anand outlines the factors which keep Member States away from accepting the unqualified compulsory jurisdiction. Some of the most important are: the absence of any machinery for the execution of the Court's judgments, the fact that not all conflicts of interests are capable of being terminated by judicial techniques within the existing legal framework, the alleged insufficiency and the uncertainty of the rules of international law to deal with all situations arising between the states and the lack of confidence in the impartiality of its judgments.[1018] He

[1018] The Court suffered from a perception of lack of confidence in early 1970s, however, since then, the use of the Court in resolving disputes has steadily been increasing. Dugard John, "1966 and all that. The South West Africa Judgment Revisited in the East Timor Case" In 8 African Journal of International and Comparative Law 3, 549-563 (1996); Anthnoy Gaglione, *Anti-Colonoliasm and the South West Africa case: a study in Majoritarianism at the United Nations*; Lejeune, Anthony, *The Case of South West Africa* (1971); W. G. Friedman, *"The Jurisprudential Implications of the South West Africa case",* 6 *Columbia Journal of Transnational Law*, 1-16 (1967).

predicted optimism in the late 1950s that the ICJ will gain the confidence of the legal community and play an ever more useful role when world tension eases to some extent and states are more willing to entrust the solution to their differences to impartial judgment.[1019] Although the ICJ has gained significant confidence and prominence, particularly since the 1990s, and more and more states are bringing their disputes to the Court, it would be difficult to imagine whether this trend will have positive spill over effect on India's reservations to the compulsory jurisdiction.

There is no doubt that the practice of attaching more and more reservations and exclusions has reduced the usefulness of the optional clause system and of the Court itself.

### 10.5. Preference for Diplomatic Negotiations

As mentioned above in the introduction, India has consistently and strongly advocated its preference for the method of negotiation in all types of disputes. This position has been reinforced in its pleadings at the Court in all four cases involving India.

For example, one of its objections to the Court in the *Right of Passage over Indian Territory* case was that Portugal filed its application when the diplomatic negotiations had not yet reached the point at which they could no longer be profitably pursued. India contended that it is a rule of customary international law that the filing of a unilateral application must be preceded by a full trial of diplomatic negotiations. It held that "[T]he reason why customary law requires a state to undertake negotiations and continue them until they can no longer profitably be pursued is that states which accept the system of compulsory jurisdiction of the Court do not wish to be brought before the Court without first having made every reasonable effort to obtain a settlement through the diplomatic resources available to them, or to be obliged to appear before the Court in cases except those in which settlement by negotiation is not possible. It is for this reason that many treaties of compulsory jurisdiction and arbitration contain an express condition that there should be previous negotiations."[1020] The ruling of the ICJ on this point of India in the *Right of Passage over Indian Territory* case shows that it is not essential to have diplomatic means fully exhausted and that only the failure in reaching diplomatic settlement will enable any institution of the proceedings in the Court.[1021]

This preference for diplomatic negotiations and the predictable attitude of India during the *Trial of Pakistani Prisoners of War* case helped Pakistan to remain engaged in the diplomatic dialogue. Hoping that diplomatic negotiations would result in the resolution of the dispute, Pakistan requested the Court to discontinue the proceedings in this case. In the *ICAO Appeal* case, India, having been left with no alternative by the deliberations of the ICAO Council, took recourse to the Court. This move also furnished an interlude which ultimately helped to resolve the dispute to the satisfaction of both parties.

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[1019] R. P. Anand, *International Courts and Contemporary Conflicts*, (Popular Press, 1974).

[1020] Pleadings, Oral Arguments and Documents, *Right of Passage over Indian Territory*, at p. 117.

[1021] India raised the objection that, "unless negotiations had taken place which had resulted in a definition of the dispute between the Parties as a legal dispute, there was no dispute, in the sense of Article 36(2) of the Statute, the existence of which had been established in the Application and with respect to which the Court could exercise jurisdiction." After analyzing the content of both, India and Portugal on this matter, ICJ held that, "the legal issue was sufficiently disclosed in the diplomatic exchanges, and considers that the Government of Portugal has complied with the conditions of the Court's Jurisdiction as laid down in Article 36(2) of the Statute. Accordingly, the Court must dismiss the Third Preliminary Objection. Case concerning right of passage over Indian territory (Preliminary Objections), Judgment of November 26th, 1957: I. C. J. Reports 1957, p. 125 at p. 148.

### 10.6. ICJ Advisory Proceedings

India has been active in promoting recourse to the Court, especially through the advisory proceedings, as can be seen through its participation in the general debates in the Sixth Committee of the General Assembly and voting records on the General Assembly resolutions requesting the Court to deliver advisory opinions. It has also been active in filing written submissions in the advisory proceedings with its written statements in eight advisory proceedings, starting from 1948,[1022] and presented oral statement in one advisory proceeding. If participation is measured in terms of written and oral statements, India has been the most active state in Asia followed by China which has submitted written statements in seven proceedings and none in oral hearings. India ranks fourth, after the USA, UK and France, in terms of submission of written submissions in the advisory proceedings. It should be noted that India has never challenged the Court's jurisdiction to entertain the request of the requesting organ in any of the advisory proceedings. India filed its written statements in the advisory proceedings concerning the *Conditions of Admission of a State to Membership in the UN*, *Reparations for Injuries*, *International Status of South-West Africa*, *Voting Procedures on Questions Relating to Reports and Petitions concerning the Territory of South-West Africa*, *Constitution of the Maritime Safety Committee, Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,*[1023]*Legality of the Threat or Use of Nuclear Weapons.* It presented an oral statement in the advisory opinion concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia.*

While India has been active in filing written statements, it has been an original proponent of only one resolution which requested the advisory opinion, namely *International Status of South-West Africa*. The other original proponents were Denmark, Norway, Syria and Thailand of Resolution 338 (IV) of 6 December 1949. In the advisory proceedings concerning *Voting Procedure on Questions relating to Reports and Petitions concerning the territory of South-West Africa*, India, along with Mexico, Norway, Syria and the US, submitted the formal proposal (Resolution 904 (IX) of 23 November 1954). It should be noted that the Hyderabad question (1949) and the question of Kashmir (1949) were mooted in the Security Council for the advisory opinions of the Court, but no formal request emanated from the Security Council.

In the *Nuclear Weapons* advisory opinion, India did not participate in the oral hearings despite its staunch support and advocacy for the elimination of nuclear weapons. As Mani argues, "[I]ts physical presence before the Court might have given an added weight to the cause of nuclear disarmament. By not participating at the hearings, India lost an opportunity to formally address the international community on such an important aspect of its foreign policy. Or, was the decision on non-participation deliberate, reflecting a desire to assume a low profile on the issue?"[1024] Mani's observation needs some analysis. As mentioned above, India made oral statement only in one advisory proceeding, namely, the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* where it strongly condemned the illegal presence of South Africa in Namibia. In those advisory proceedings where India filed written statements and refrained from making oral statements, the opinions rendered by the Court were more or less reflective of the Indian position. Although whether the physical presence of India would have decisive effects on the Court's consideration of the matter is a

[1022] India submitted its written observation in the advisory opinion concerning *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* through a letter dated 28 January 1948.

[1023] R. S. Shiv, "The Development of India's Nuclear Weapons Policy in the Framework of the Development of the International Humanitarian Law by the International Court of Justice", in M. K. Sinha (ed.) *International Criminal Law and Human Rights*, 155-200 (New Delhi: Manak Publications, 2010).

[1024] V. S. Mani, "The Nuclear Weapons and the World Court", 37 *IJIL* (1997), p. 167.

subject of separate scrutiny, one thing is clear, that the physical absence definitely reflects India's low profile in the subject, particularly, seen in the context of the subsequent nuclear explosion in 1998. In the same way, India's lack of written or oral submission in the *Wall* advisory proceedings in 2004 also leads to believe that the Indian decision was influenced by foreign policy interests, namely, the growing relations with Israel.

In view of the conspicuous absence in filing oral statements, it becomes interesting to see why India did not file written or oral submissions in some of the important landmark advisory proceedings which concerned the broad objectives of development of international law. India participated in eight advisory proceedings, but one would have firmly expected its active participation in the *Competence of the General Assembly for the Admission of a State to the UN, Certain Expenses,*[1025]*Reservation to the Genocide Convention, Application of Article VI, Section 22 of the Convention on the Privileges and Immunities of the UN and Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights opinions, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion).* These advisory opinions have significantly contributed to the codification and progressive development of international law in the matters dealt with by the opinions. The advisory opinions concerning *Western Sahara*, *WHO-Egypt Agreement*, *Interpretation of Peace Treaties*, *Application of Article VI, Section 22 of the Convention on the Privileges and Immunities of the UN*, *Applicability of the Obligation to Arbitrate under section 21 of the UN HQ Agreement of 25 June 1947* could be considered as having no significant foreign policy interest. In the *Admissibility of hearing* advisory proceedings, India did not consider it necessary to submit any written statement, in view of the fact that its views in the matter were already indicated in the relevant records of the tenth Session of the General Assembly. India did not file any submissions in the five advisory proceedings that dealt with the administrative law matters either.[1026] Thus, the brief examination of records shows that India actively participates in the Court's advisory proceedings when the outcome of the opinion or proceedings themselves may have potential impacts on India's national interests, in particular, the foreign policy.

As far as the use of substantive laws in the written submissions of states is concerned, India has shown heavy reliance on the general principles of international law. This is partially led by India's firm belief that the general principles of law are principles expressing legal ideas common to the legal systems of civilized states which the Court is authorized to apply in Article 38 of the Statute.

### 10.6.1. India's Position on the Legal Rules and Principles in the Advisory Proceedings

What contribution has India made towards the substantive law and procedures dealing with the advisory opinion rendered by the Court? Has India's position contributed to the clarification of legal principles and rules involved in the advisory opinion? The following section analyses India's position in each of the advisory proceedings where she has filed a written statement.

[1025] It is known that although the issue involved the interpretation of Article 17(2) of the UN Charter, the obligations of the members was the real matter of dispute.

[1026] *Effect of Awards of Compensation made by the UNAT*; *Judgments of Administrative Tribunal of ILO upon Complaints Made against UNESCO*; *Application for Review of UNAT Judgment No. 158*; *Application for Review of UNAT Judgment No. 273* and *Application for Review of UNAT Judgment No. 333*.

In the advisory opinion concerning,the *Reparation for Injuries*,[1027] India submitted that" if it is established that the United Nations, as an Organization, is competent legally to bring an international claim against the responsible State for reparation of damage caused to the victim, the Government of India considers that the only way to deal satisfactorily with the rights of the State of which the victim is a national and of the United Nations of which he was agent is to make the State as well as the United Nations parties to the proceedings in order that the rights of both may be worked out in the same proceedings."[1028]

In the advisory proceedings of the *Admission of a State to UN Membership*,[1029] India suggested that it adheres to the view that the Members of the United Nations are entitled to take into consideration only those points which are specified in Article 4 of the Charter and it is wrong to import extraneous considerations into this matter. Consequently, India forwarded that the ICJ should negatively answer the question contained in the resolution.[1030]

#### 10.6.1.1. Advisory opinion - *IMO Safety Committee*[1031]

In this advisory proceeding, India submitted a lengthy written statement covering among other things the legal points concerning the nationality of the ship, protection of ships, the standards to be applied to ascertain the "largest ship-owning nations", the term "ship-owning nations", ownership by nationals as a criterion and the object behind the provision on the functions of the Maritime Safety Committee.

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[1027] The question referred by the General Assembly Resolution of 3 December 1948 to the Court: (1)In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him? (2) In the event of an affirmative reply on point 1(b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national? This is one of the most quoted advisory opinions of the ICJ and is considered to be one of the most important judicial pronouncements. If statistics are any significant indication of the most-quoted advisory opinion of the Court in its case law then, the Court up to 31 December 2000, has quoted directly or indirectly this advisory opinion six times in the advisory opinion and three times in its contentious cases. One would agree that this advisory opinion in several respects has significantly aided the international organizations law. Bimal N. Patel, *The World Court Reference Guide*, (the Hague: Kluwer Law International, 2002).

[1028] Letter from the Deputy Secretary to the Government of India to the Registrar of the International Court of Justice dated 28 December 1948.

[1029] UN General Assembly Resolution 296(IV) of 22 November 1949: Can the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend? The decision to submit the question to the Court grew out of the debates in the General Assembly concerning the refusal of the (then) Soviet Union to support in the Security Council the admission of certain States. As Oliver Lissitzyn concludes, "nothing was gained by the submission of this question to the Court. There is no indication that the opinion gave any substantial political or moral advantage to the Western nations over the Soviet bloc." Oliver James Lissitzyn, *The International Court of Justice: Its Role in the Maintenance of International Peace and Security*, p. 91-92 (New York: Carnegie Endowment for International Peace: 1951). It is important to note that India voted against the draft resolution seeking the advisory opinion of the ICJ.

[1030] Letter from the Joint Secretary to the Government of India, Ministry of External Affairs and Commonwealth Relations, to the Registrar of the Court of 28 January 1948.

[1031] Resolution of the Assembly of Inter-Governmental Maritime Consultative Organization of 19 January 1959: Is the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on 15 January 1959, constituted in accordance with the Convention for the Establishment of the Organization?

Regarding the nationality of the ships, India suggested that the ICJ should base its opinion in the light of international practice and through the reasoned application of the generally accepted principles of international law. It cited Article 5 of the High Seas Convention of the 1958 Geneva Convention, as one such principle which reads that each state is free to fix conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. India argued that the registration of ships and the need to fly the flag of the country where the ship is registered are considered essential for the maintenance of order on the open sea, since it is easy to enforce the rule that a vessel not sailing under the maritime flag of a State enjoys no protection whatsoever.[1032]

On the question of protection of vessels, India relied on the case-law of *Noim Molvan v. Attorney-General for Palestine* in which it was established that a vessel not sailing under the flag of any State has no right to protection just as a vessel sailing under the flags of two different States is deprived of any protection whatsoever.[1033] India contended that Article 6 of the Geneva Convention on the High Seas of 1958 rule has now become part of the treaty law.

One can also say that the Indian position is based on general principles of law as it substantially used these principles to justify its position. For example, in establishing the relationship between a ship and the state whose flag it flies, it used a principle propounded by the majority in the *Lotus* judgment, according to which "a corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the state the flag of which it flies, for, just as in its own territory, that state exercises its authority upon it, and no other state may do so … By virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory."[1034]

India argued that it is the law of the flag unconnected with the ownership of the vessel, which provides the necessary authority to the master of a ship to deal with the cargo during the voyage and the manner in which he should execute it. India argued, "[T]he term has been used to convey the idea of jurisdiction and authority over the ship and not that of ownership of the ship in its literal sense."[1035] To ascertain the nationality of the ship, one has to look to the flag and the registry of the ship. Another major argument India forwarded was that the intention for the inclusion of Article 28(a) of the Convention seems to be to restrict membership of the Maritime Safety Committee to nations having the powers to enforce rules and regulations for maritime safety; this certainly could be done only under the law of the flag of state and under no other way. India took strong exception and considered that the test of ownership which could change at will of shareholders at a moment's notice is totally unsuited with reference to the question of formulation and enforcement of maritime safety rules.[1036] India considered that the economic success of ship-owning and ship-operating business depends upon a reasonably reliable forecast of the laws and regulations which will apply to the ship. The law as to the nationality of the ship must be definitely known in advance. India argued that the election which took place on 15 January 1959 to elect the members of the IMCO Maritime Safety Committee was not in accordance with the Convention and Liberia and Panama should have been elected. Belgium, France, Switzerland, Italy, Denmark, UK, Norway and the Netherlands stated that the Council was duly elected, whereas India, Liberia, Panama and the USA

[1032] Pleadings, Oral Arguments and Documents, *Composition of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, p. 253.
[1033] *Ibid*., at 254.
[1034] *Ibid.*, at 256.
[1035] *Ibid.*, at 258.
[1036] *Ibid.*, p. 259.

refused to agree with them. Ultimately, the ICJ ruled by nine votes to five that the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on 15 January 1959, was not constituted in accordance with the Convention for the Establishment of the Organization.

#### 10.6.1.2. Advisory opinion - *Voting Procedures*[1037]

The UN General Assembly, on 11 October 1954, adopted a special Rule for voting procedure to be followed by the Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South West Africa. According to this Rule, such decisions were to be regarded as important questions within the meaning of Article 18(2) of the UN Charter and would therefore require a two-thirds majority of Members of the UN present and voting. The Indian statement in this advisory proceeding displayed its active advocacy for holding up the principle of absolute sovereignty. It articulated the relationship between the principle of sovereignty and voting methods. According to India, a world where national sovereignty is so widely stressed, the principle of unanimity as opposed to the more convenient doctrine of a majority decision has a natural appeal. India argued that "[T]he UN Charter has not accepted the principle of unanimity except in the Security Council and believed that the results of the rule of unanimity in international conferences have not been reassuring. It has proved to be highly dilatory in some cases and intolerably obstructive in others."[1038] It is interesting to note that these two arguments of India were substantially based on the researchers' opinion than on treaty or customary international law or the general principles of law. The Court unanimously confirmed that the decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations, the correct interpretation of the Advisory Opinion of 11 July 1950. Thus, the Indian position was vindicated.

#### 10.6.1.3. Advisory opinion - *International Status of South-West Africa*[1039]

This Advisory Opinion was concerned with the determination of the legal status of the Territory, the administration of which had been placed by the League of Nations after the First World War under the mandate of the Union of South Africa. The League of Nations had disappeared, and with it the machinery for the supervision of the mandates. Moreover, the UN Charter did not provide that the former mandated Territories should automatically come under the trusteeship. In its written statement for this advisory proceeding, India did not make any particular pronouncement but its submission attempted to provide a detailed interpretation of the resolution of the League mandate. It submitted that a reservation made during the discussions of a multilateral treaty does not affect the operation of the treaty unless reservation has also been made at the time of the signature of the treaty and duly attached to the signature and recorded in a process-verbal or unless reservation is

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[1037] UN General Assembly Resolution 904 (IX) of 23 November 1954 : Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950: "Decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations'?" that the said rule is the correct interpretation of the Advisory Opinion of July 11th, 1950.

[1038] Pleadings, Oral Arguments and Documents, *Voting Procedures on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, p. 77.

[1039] UN General Assembly Resolution of 6 December 1949: What is the international status of the Territory of South-West Africa and what the international obligations of the Union of South Africa arising therefrom.

attached to the ratification. A reservation is the refusal of an offer. But an offer is not made in the case of a multilateral treaty until the treaty is offered for signature. Therefore, a reservation made preceding to the making of an offer cannot have any legal effect. It argued that the Union of South Africa having not renewed its reservation at the time of signing of the UN Charter or of its ratification under Article 110 of the Charter (which, at any rate, does not provide for a limited ratification), "cannot derive any advantage from the reservation made during the drafting of the Charter."[1040] The subsequent codification by the Vienna Convention on the Law of Treaties lends support to this position of India which was pronounced back in the 1960s. Furthermore, the Vienna Convention on the Law of Treaties has formulated the principle on this aspect in Article 19 which provides that a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation. The position of India was well reflected in the final opinion of the Court.

#### 10.6.1.4. Advisory Opinion - Namibia[1041]

The UN General Assembly decided on 27 October 1966 that the mandate for South West Africa was terminated and that South Africa had no other right to administer the Territory. The Security Council in 1969 called upon South Africa to withdraw its administration from the Territory, and on 30 January 1970, it declared, the continued presence of South African authorities there was illegal and all acts taken by the South African Government on behalf of or concerning Namibia after the termination of the mandate were illegal and invalid. India advocated three basic principles in its oral statement. In the viewpoint of India, the inalienable right of the colonial people to self-determination and independence, the non-acquisition of territory by threat or use of force or any other form of aggression, the non-recognition of the fruits of aggression or illegal occupation of territory, and the duty to fulfil international obligations in good faith, are the foundations of international legal order. India explained that these principles have universal value and are therefore in the interest of the international community of states as a whole. India emphasized that the Court should recognize and apply these principles in its opinion so that the principles strengthen and promote the rule of law in international relations. The Court found that the continued presence of South Africa was illegal and it was under an obligation to withdraw its administration immediately. It also found that State Members of the UN were under an obligation to recognise the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain any acts implying recognition of the administration.[1042]

#### 10.6.1.5. Advisory Opinion -World Health Organization's Request on the Question of *Use of Nuclear Weapons in Armed Conflicts*[1043]

India submitted its one and half page statement on the last date of filing of the statement, i.e. 20 July 1995. In its statement, India strongly advocated the elimination of nuclear weapons and outlawing of the use of these

[1040] Written statement of India in the advisory proceedings concerning the *International Status of South-West Africa*, p. 150.

[1041] What are the legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)? Security Council Resolution 276 (1970) of 29 July 1970.

[1042] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p.16 at p. 58, paragraph 133.

[1043] World Health Assembly Resolution WHA 46.40 of 14 May 1993: In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?

weapons as a first step. India argued that based on the understanding that the international community has agreed that the use of nuclear weapons constitutes a crime against humanity and violation of the Charter, it has already been generally accepted as illegal. It also considered that the use of nuclear weapons is a violation of international humanitarian law, however, the Indian statement did not mention anything on the possession of nuclear weapons. It invited the Court to confirm the generally accepted view among nations that the use of nuclear weapons is illegal. In this proceeding, India, arguing the importance of the question on the future well-being of the international community, advocated that the Court should give its considerate opinion on the question posed by the WHO, which the Court ultimately declined. It found that it was not able to give the advisory opinion. In this opinion, the Court found that, according to its Constitution the WHO was authorised to deal with the health effects of the use of nuclear weapons, of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in. But the question put to the Court did not relate to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons in view of their health and environmental effects. The Court applied the principle of speciality and found that the request for advisory opinion submitted by the WHO did not relate to a question arising "within the scope of [the] activities of the WHO."[1044]

#### 10.6.1.6. Advisory Opinion -UN General Assembly Request on the Question of the *Use or* Threat of Use of Nuclear Weapons[1045]

The UN General Assembly asked an advisory opinion: Is the threat or use of nuclear weapons in any circumstances permitted under international law? It concluded that it had jurisdiction to render an opinion on the question put to it and that there was no compelling reason to exercise its discretion not to render an opinion. It also found that the most directly relevant applicable law was that relating to the use of force, as enshrined in the UN Charter, and the law applicable in armed conflict, together with any specific treaties on nuclear weapons that the Court might find relevant. India submitted a seven-page statement on the last date of filing of the written statement, i.e. 20 July 1995. India argued that "the use of force is prohibited by Article 2(4) of the UN Charter and the prohibition is so comprehensive and fundamental as to be regarded as a *jus cogens* or an obligation of an absolute character. On the basis of this principle it is clear that any use of nuclear weapons as a measure of use of force to promote national policy objectives would be unlawful."[1046] The qualification that the use of force to promote national policy objectives is prohibited lends support to the argument that in case of a survival crisis, a state may resort to the use of force including nuclear weapons. Is it possible that the lack of argument of a categorical denial to use nuclear weapons in any circumstances enabled the ICJ to find support of its argument in the Indian position?

India reinforced its position in this advisory proceeding that the right of self-defence is to be regarded as a provisional measure or a remedy and hence as soon as other means or measures become available, the resort to self-defence through use of force has to cease. It advocated that the use of nuclear weapons in any armed conflict as a first attack would be unlawful under international law. This legal argument derives support from India's

[1044] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996, p. 66 at p. 84 (32).

[1045] UN General Assembly Resolution 49/75K of 15 December 1994: Is the threat or use of nuclear weapons in any circumstances permitted under international law?

[1046] Written statement of India in the advisory proceedings concerning the *Legality of the Threat or Use of Nuclear Weapons,* p. 1.

political position on this issue. In its view, nuclear weapons could not be used by way of reprisal against another state if that state did not commit any wrongful act of *delict* involving use of force. Second, when a state commits such a wrongful act or *delict*, the use of force by way of reprisal would have to be proportionate and as such if the wrongful act did not involve the use of nuclear weapons, the reprisal could also not involve the use of nuclear weapons. Even where a wrongful act involves use of a nuclear weapon the reprisal action cannot involve use of a nuclear weapon without violating certain fundamental principles of humanitarian law. In this sense, prohibition of the use of a nuclear weapon in an armed conflict is an absolute one, compliance with which is not dependent on corresponding compliance by others but is a requisite in all circumstances. But India was a little hesitant when it argued that the use of nuclear weapons by way of reprisal or retaliation a*ppears* to be unlawful. One can note a lack of categorical denial of the use of nuclear weapons in this position of India.

It emphasized that the use of nuclear weapons in an armed conflict is unlawful being contrary to the conventional as well as customary international law. In its view, if peace is the ultimate objective there can be no doubt that disarmament must be given priority and has to take precedence over deterrence. India went to the extent of arguing that "since the production and manufacture of nuclear weapons can only be with the objective of their use, it must follow that if the use of such weapons itself is illegal under international law, then their production and manufacture cannot under any circumstances be considered as permitted."[1047] In a nutshell, in the viewpoint of India, the use of nuclear weapons which is otherwise contrary to international law could only be effectively prevented by eliminating completely their production, manufacture and by ensuring the dismantling of existing nuclear weapons. India submitted that the threat or use of nuclear weapons, in any circumstance, whether as a means or method of warfare or otherwise, is illegal or unlawful under international law.

All in all, the Indian argument neither fully justified that use of nuclear weapons in armed conflict would be illegal or that use of nuclear weapons in a survival case is legal. It can be observed that the ICJ's opinion in some respects was in balance with Indian arguments. In view of the subsequent nuclear testing in 1998, the Indian position, retrospectively viewed, is not surprising. In this respect, Falk summarizes in an apt manner that "ever since India exploded a nuclear device in May 1974, the Indian relationship to nuclear weaponry has been ambivalent and controversial."[1048] His analysis is quite correct because India has maintained a dual posture of staking its claims as a threshold nuclear weapons state, by claiming it's upgrading of geopolitical status that follows there from, on the one hand and strong advocacy for complete nuclear disarmament as a moral and political imperative for all countries on the other. The Indian government, regardless of its political leadership, has for several decades sustained this dual posture: a virtual member of the exclusive club of nuclear weapons states and a leading critic of *nuclearism (italics added)* and advocate of comprehensive denuclearization.

The decision of the ICJ gives strong support on the basis of international law to the abiding Indian view that nuclear weapons states are under an obligation to move prudently, but insistently, toward the implementation of nuclear disarmament. The ICJ opinion apparently has not any discernible impact on the policy of India with respect to the role assigned to nuclear weapons and the duty to seek nuclear disarmament through self-restraint. The opinion underlined an offer to India of an important instrument with which to support its

[1047] Written statement of India in the advisory proceedings concerning the *Legality of the Threat or Use of Nuclear Weapons*, p. 6.

[1048] Richard Falk, "Nuclear Weapons, International Law and the World Court: A Historic Encounter," 37 *IJIL* (1997) at p. 149.

central contention that nuclear armament abolition is the proper legal path for international society. It also offered support to advocates of the Comprehensive Test Ban Treaty, who contend that the end of testing is a step on the path to nuclear disarmament and this path now enjoys a prescriptive status in international law.

India following the advisory opinion strongly advocated for the phased program for the complete elimination of nuclear weapons at the Non-Aligned Movement (NAM). The NAM also urged nuclear weapons states to commence negotiations on a legally binding international instrument to provide unconditional assurances to all non-nuclear weapons states against the use or threat of nuclear weapons.[1049] The Indian position was vindicated in a number of respects. First, the ICJ accepted that it should comply with the request for an advisory opinion from the General Assembly despite strong arguments against from nuclear weapons states. The final opinion of the ICJ seemed to endorse the strongly held Indian view which insists upon a time-bound program for nuclear disarmament. The Court in this opinion seemed to recognize a state of legal vacuum or *non liquet* governing the status of nuclear deterrence in international law. In this regard, the views expressed by some judges that accord with the Indian position must be noted: that the ICJ is not justified in expressing the existence of *non liquet (*the Court did not express a *non liquet*)in any legal matter particularly given the wide range of principles which are available for application (Judges Weeramantry, Shahabuddeen and Koroma).[1050]

### 10.7. Concluding remarks

Based on the above analysis, the chapter proposes the following concluding remarks, primarily with a view to have enhanced contribution of India towards the role and functioning of the ICJ in the future.

It is observed that the Indian position and attitude towards the Court, like any other sovereign state, is guided by the considerations of the national interests. It is proposed that there is more scope for India, in line with her overall influence in international relations, to guide the development of international law by way of increased active participation in its overall functioning of the Court. One way of doing this is to submit written statements and participate in the oral proceedings of all advisory proceedings, particularly when such proceedings may have impact on the broad objectives of development of international law. It has been observed that the pro-active approach in the past has helped in achieving some of the important long-term objectives to bring the rule of law in the world. For example, the ICJ judgment in the *Right of Passage over Indian Territory* case proved helpful in decolonizing the territory and strengthening India's territorial sovereignty. India's active participation in the debates of the UN General Assembly and the advisory proceedings concerning the South-West Africa helped the entity in achieving full sovereignty and to make Namibia a sovereign and independent state a reality. Cases and opinions concerning South-West Africa basically involved the question of legal obligation of the government of South Africa to fulfil the *sacred trust of civilization.* India fully defended this cause. One can draw a conclusion that India has found that ICJ could be an effective international platform to resolve the legacy of colonization and achieve independence of erstwhile colonies.

The Indian position in the advisory proceedings concerning the broad issues of development or where interpretation of international law was concerned shows that it has high faith in the impartiality, objectivity and capability of the ICJ. Despite the post-adjudicative phase uncertainty in the compliance of the judgment of the ICJ, the Indian stand in the contentious cases does not enable to think about the futility of the judicial process.

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[1049] Yogesh K. Tyagi, "Judicial Statesmanship without Political Courage: The ICJ Advisory Opinion on Nuclear Weapons," 37 *IJIL* (1997), at p. 198.

[1050] P. S. Rao, "Advisory Opinion of ICJ on Nuclear Weapons" In 37 *IJIL* (1997), at p. 224.

India has respected the judgments of the ICJ, which reached the merit stage. The fact that Justice Dalveer Bhandari of India has been elected as a member of the Court, will have no implications in positively influencing India to accept the compulsory jurisdiction.[1051] Election of Justice Bhandari to the ICJ may perhaps lead to more publicity and hence knowledge in India on the activities of the Court. Nevertheless, India is unlikely to bring any case before the Court in the near future. India, during the negotiations of the current and future treaties, should consistently advocate attaching a jurisdictional clause to every multilateral treaty-conferring jurisdiction, at least, primarily, upon the ICJ. Furthermore, India can favourably look into the idea of national court or tribunal seeking guidance from the ICJ.[1052] Last but not the least, Judge Nagendra Singh advocated for the use of advisory opinion in case of inter-state disputes, to obtain – if not actual settlement of the dispute – at least a legal basis for such settlement. This position, which has found support among number of Indian scholars, is another meritorious proposal.

[1051] Justice Dalveer Bhandari, a former Judge of the Supreme Court of India, was elected as a member of the Court, following the vacancy created by the resignation of Judge Al-Khasawneh of Jordan. Justice Bhandari's term will be till November 2018.

[1052] The USA passed a resolution on 17 December 1982 for the possibility of an advisory opinion of the ICJ upon request by a national court or tribunal, which is duly authorized by national legislation to make such a request, regarding any question of international law of which such court or tribunal has jurisdiction.

## Annex

## Texts of the Successive Indian Declaration of Acceptance of the Compulsory jurisdiction of ICJ: An evolution

***A. Current declaration effective since 15 September 1974***

1. I have the honour to declare, on behalf of the Government of the Republic of India, that they accept, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate such acceptance, as compulsory *ipso facto* and without special agreement, and on the basis and condition of reciprocity, the jurisdiction of the International Court of Justice over all disputes other than:

1) disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement;
2) disputes with the government of any State which is or has been a Member of the Commonwealth of Nations;
3) disputes in regard to matters which are essentially within the domestic jurisdiction of the Republic of India;
4) disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which India, has been or may in future be involved;
5) disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court;
6) disputes where the jurisdiction of the Court is or may be founded on the basis of a treaty concluded under the auspices of the League of Nations, unless the Government of India specifically agree to jurisdiction in each case;
7) disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction;
8) disputes with the Government of any State with which, on the date of an application to bring a dispute before the Court, the Government of India has no diplomatic relations or which has not been recognized by the Government of India;
9) disputes with non-sovereign States or territories;
10) disputes with India concerning or relating to:
    a) the status of its territory or the modification or delimitation of its frontiers or any other matter concerning boundaries;
    b) the territorial sea, the continental shelf and the margins, the exclusive fishery zone, the exclusive economic zone, and other zones of national maritime jurisdiction including for the regulation and control of marine pollution and the conduct of scientific research by foreign vessels;
    c) the condition and status of its islands, bays and gulfs and that of the bays and gulfs that for historical reasons belong to it;
    d) the airspace superjacent to its land and maritime territory; and
    e) the determination and delimitation of its maritime boundaries.

11) disputes prior to the date of this declaration, including any dispute the foundations, reasons, facts, causes, origins, definitions, allegations or bases of which existed prior to this date, even if they are submitted or brought to the knowledge of the Court hereafter.

2. This declaration revokes and replaces the previous declaration made by the Government of India on 14 September 1959.

New Delhi, 15 September 1974 (signed by Swaran Singh, Minister for External Affairs)

***B. India's declaration of 14 September 1959***[1053]

I have the honour, by direction of the President of India, to declare on behalf of the Government of the Republic of India that they accept, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate such acceptance, as compulsory *ipso facto* and without special agreement, and on the basis and without special agreement, and on the basis and condition of reciprocity[1054], the jurisdiction of the International Court of Justice over all disputes arising after 26 January 1950 with regard to situations or facts subsequent to that date, other than:

(1) Disputes, in regard to which the Parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement;

(2) Disputes with the government of an State which, on the date of this declaration, is a member of the Commonwealth of Nations;[1055]

(3) Disputes in regard to matters which are essentially within the jurisdiction of the Republic of India;

(4) Disputes concerning any question relating to or arising out of belligerent or military occupation or the discharge of any functions pursuant to any recommendation or decision of an organ of the United Nations, in accordance with which the Government of India have accepted obligations;

(5) Disputes in respect of which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court; and

(6) Disputes with the Government of any State with which, on the date of an application to bring a dispute before the Court, the Government of India has no diplomatic relations. (New York, 14 September 1959, signed C. S. Jha)

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[1053] India's reservation is quite broad in substance. There is no doubt that, over a period of time, the ever-expanding scope of reservations is going to impair the efficacy of the compulsory jurisdiction.

[1054] Over the period of time, the principle of reciprocity has become an inherent part of the compulsory jurisdiction. As Rosenne says, one might infer that the inclusion of a specific reference to reciprocity or to the principle of reciprocity in an acceptance of the compulsory jurisdiction is not necessary. Shabtai Rosenne, *The Law and Practice of International Court (1920-1996) (*3rd ed., 1997) at 766.

[1055] India modified this reservation in 1974 which now reads *disputes with the government of any State which is or has been a Member of the Commonwealth of Nations. ICJ Yearbook 1996-1997*, p. 99.

***C. India's declaration of 7 January 1956***[1056]

I have the honour by direction of the President of India, to declare on behalf of the Government of India that, in pursuance of paragraph 2 of Article 36 of the Statute of the International Court Justice, the Government of India recognize as compulsory *ipso facto* and without special agreement, on condition of reciprocity and only till such time as notice may be given to terminate this Declaration, the jurisdiction of the International Court of Justice in all disputes arising after the 26th January 1950 with regard to situations or facts subsequent to that date concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any facts which if established would constitute a breach of an international obligation; or

(d) the nature or extent of the reparations to be made for the breach of an international obligation.

But excluding the following: -

(i) disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;

(ii) disputes with the Government of any country which on the date of this Declaration is a member of the Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree;

(iii) disputes in regard to matters which are essentially within the domestic jurisdiction of India as determined by the Government of India; and

(iv) disputes arising out of or having reference to any hostilities, war, state of war or belligerent or military occupation in which the Government of India are or have been involved (signed Arthur S. Lall, Permanent Representative of India to the United Nations)

***D. India's declaration of 28 February 1940 prior to independence***[1057]

(Signed on 28 February 1940, deposited with the Secretary-General of the League of Nations on 7 March 1940)

Reciprocity.5 Years (as from February 28th, 1940), and thereafter until notice of termination is given. For all disputes after February 5th, 1930, with regard to situations or facts subsequent to that date, other than:

Disputes in regard to which the Parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;

Disputes with the government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the Parties have agreed or shall agree;

Disputes with regard to questions which by international fall exclusively within the jurisdiction of India;

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[1056] By a letter dated 7 January 1956, addressed to the UN Secretary-General and received on 9 January 1956, the Government of India gave notice of the termination of the declaration of 28 February 1940, deposited with the Secretary-General of the League of Nations on 7 March 1940, accepting as compulsory the jurisdiction of the PCIJ which, by virtue of Article 36 (5) of the ICJ Statute, constituted an acceptance of the compulsory jurisdiction of that Court. By an instrument dated 7 January 1956, deposited with the Secretary-General on 9 January 1956, the Government of India accepted the compulsory jurisdiction of the ICJ.

[1057] This declaration replaced that of 9 September 1929, in respect of which a reservation was formulated on 27 September 1939, and notice of termination was given on 28 February 1940. See PCIJ Series E, No. 16, p. 341.

Disputes arising out of event occurring at a time when the Government of India were involved in hostilities.

The right is reserved to suspend judicial proceedings under certain conditions in the case of disputes under consideration by the Council.

# CHAPTER XI
# CONCLUSIONS

## 11.1. General

Can we conclude that the Indian state practice in international law is comparable with the practice of a dominant regional power in international law? Does the Indian contribution to the codification and progressive development of international law indicate the same conclusion? This thesis has attempted to create a framework of state practice of India on international law and examined various areas to see how the framework has evolved.

This chapter will begin by reviewing briefly some of the major themes that have surfaced in this work. Subsequently, this chapter will consider some of the questions which are emerging and will emerge in the future. The research has shown how the Indian state practice attempts to reconcile the structure of international law which is commonly characterized in terms of its opposition to the structure of the internal law of the state. Furthermore, it has shown how the Indian state practice pendulums between two frameworks: rules of international law which limit state's freedoms to act and confer powers on state to act which could help her achieve social idealism.[1058] Indian state practice aptly reflects what the PCIJ in the *Case of* the S. S. "Lotus" stated: "international law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."[1059] Furthermore, the thesis proves that India considers the function of international law in terms of 'governing relations between states', which comprise 'regulating relations between co-existing communities' and 'the achievement of common aims'.[1060]

The thesis has benefitted from relatively easy availability of judgments, reports and, documents of the Ministry of External Affairs, thanks largely to the application of information technology. However, it is suggested that it would be very useful if India, like UK, USA, Japan and Australia would place a high premium upon the dissemination of its official practice in the international community through complete and rapid dissemination of its position papers, especially the views of international law practitioners in key departments of the Government such as the Ministry of External Affairs, Prime Minister's Office, Defense Ministry, National Security Council and increasingly Industry and Commerce and Finance Ministries.[1061] This ready accessibility will tremendously help researchers and scholars in understanding and explaining India's position on international legal issues as well as manner in which India describes and justifies its positions. Since English is the preferred language of communication and large amount of documentation, explaining and justifying Indian position is in English, the linguistic preference has been found very useful in undertaking the overall research exercise.

At the beginning it is important to observe that since 1945 there has been the rapid expansion of the system of public international law which has more than one dimension. There has been an increase in the breadth

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[1058] For the debate between limiting form and conferring form of international law frameworks, see Jan Anne Vos, *The Function of Public International Law*, Asser Press (2013), 1.

[1059] *Case of the S. S. "Lotus"*, Judgment No. 9 of 7 September 1027, Series A. – No. 10, 18.

[1060] Jan Anne Vos, p. 7.

[1061] Shigeru Oda and Hisashi Owada, *The Practice of Japan in International Law, 1961-1970*, (Tokyo: University of Tokyo Press) 1982.

of subject matters addressed by international law. In this context it is imperative to see how India has contributed to the growth of a distinguishable body of law in specific areas such as human rights, refugee law, and law of the sea, international environmental law and international organisations. One of the most important themes which run through the chapters is that the state practice of India resembles the state practice of a dominant regional power on international law. Indian state practice clearly shows that it has contributed to the sheer quantity of rules, principles and concepts found within the system as an emerging and aspiring dominant regional power. India has shown a pattern of instrumentalization, withdrawal, denouncement of the Euro-centric period (more objectively, colonial times) and reshaping of international law to suit her interests. India has been showing resistance to those ideals and practices which would obstruct her pursuit of power in international relations and has been promoting and accommodating those which can be less detrimental to achieve the same. In other words, India has used international law as a source of legitimacy but has at the same time remained acutely aware of not projecting itself as a dominant power and has gradually but firmly consolidated a translation of its vision into international law.

The analysis of Indian state practice in seven areas – the law of the sea, human rights, international refugee law, international environmental law[1062] and climate change,[1063] disarmament, UN reforms, and international dispute settlement proves this central hypothesis. India has retooled its strategy to embrace necessary shifts and has consistently practiced this approach in different epochs both in the pre and post-independence era. India has thus consolidated its position as (perhaps) the most important proponent of developing countries in the field of international law.

Since the establishment of the UN, the Indian position on UN reforms has two main focuses: more representation of the developing countries in the decision making process in the multilateral institutions and a shift of agenda from political issues to the development issues or more precisely alignment of institutions of world order to developing nations' interests. The same conclusion can be drawn in the field of disarmament; on the one hand, India has promoted the ideals and policies of full, complete and non-discriminatory disarmament, and on the other hand, when her position requires her to use the same ideology for promoting fundamental national interests, India has shifted her position. India's state policy and practice to pursue a combined goal of peaceful use of nuclear energy and non-proliferation of nuclear material for nuclear weapons purposes has to be seen in this context. In fact, multilateral treaty regimes in various areas which are proven to be the vehicle for state' expanding influence has been exceedingly utilized by India. While the first two decades of its independence were marked with the nation-building and consolidation process, excluding the post-independence wars with China and Pakistan, since then India has taken a firm lead in articulating her position aligning with the needs and interests of developing countries in the area of environment and the law of the sea.

The research shows that there has been a significant increase in the number of actors and institutions which are involved in international law-making, executing and monitoring at national level. Although the increase and influence of these actors is not symmetrical or balanced in all areas which have been examined.

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[1062] David Leary and Balakrishna Pisupati, *The Future of International Environmental Law*, (United Nations University Press, 2010).

[1063] Ved P. Nanda, Climate Change and Developing Countries: the International Law Perspective", 16 *ILSA Journal of International & Comparative Law* 2, 539-556 (201); Jahnavi G. Pai, Armin Rosencranz and Dilpreet Singh, "Climate Change Adaptation, Policies, and Measures in India," 22 *The Georgetown International Environmental Law Review* 3, 575-590 (2010).

Nevertheless, non-state actors, especially civil society institutions have played and will be playing an active role in the overall Indian state practice.

How the Indian state, like any other state actor, is feeling unprecedented impact of international law on its national legal system is clearly borne out of the various case-studies. The research shows that India has actively participated in the rapid growth of the system of international law and has been placing greater emphasis on enhancing the effectiveness of existing treaty regimes. The Indian approach has been to consolidate the international law rather than to continually negotiate new treaties. This approach is clearly seen in international environmental law, especially climate change, disarmament and law of the sea. However, this cannot be uniformly stated for all regimes. For example, in the area of refugee law and human rights, the conceptual battle between the Indian way of making and implementation of laws and that of Western countries continues.[1064]

The following thematic concluding observations are drawn based on the analysis of the Indian state practice in various areas. First, the judiciary and the executive branches in India have each distinct approach to international law. This approach often overlaps but also comes into sharp conflict. Second, the post-independence practice of India unambiguously proves that India's overall approach to international law is comparable to the approach of an emerging global or regional power. Third, India, like similarly-situated nations, has been using and will engage proactive as well as reactive approach strategies to achieve desirable outcome commensurate with her national interests. Fourth, India will continue to avoid the International Court of Justice and international courts and tribunals in general as a preferred means for settlement of her international disputes. Fifth, India's achievements in the second round of UN reforms are measured outcomes of her patient and persistent diplomatic and political maneuvering and strategies. Sixth, although India has been unsuccessful in becoming a permanent member of the Security Council till now, the chances of her becoming a member are stronger than even before when the third round of reform will be launched in connection with the 75$^{th}$ anniversary of the UN. Seventh, India's policy and practical approach reflects that India will employ all means and abilities to gain and maintain hegemony in the Indian Ocean region in particular and ocean regimes in the world at large. Eighth, owing to sharp division between the two wings of the state – executive and judiciary and although reconciliation of approaches between them is taking place, India's position towards international law has been and will be less than stable and predictable. Ninth, India will continue to insist for non-discriminatory truly disarmament instruments and at the same time, India will try to keep her room of maneuvering open in the future bilateral and multilateral negotiations. Tenth, India will use all opportunities and forums' benign support which international law can provide her to promote her national interests. Eleventh, both idealism and realism approaches will continue to guide India's fundamental philosophical position on international law. The Indian state practice will alter accordingly. Finally, India aims to achieve the status and powers enjoyed by developed industrialised nations of the West as she gradually obtains economic, military, political and soft-power influence. The overall analysis shows that international law has effectively enabled India to obtain some of the results and therefore India will continue to use all potential inherent power of international law to further consolidate her position as a powerful member of the international community.

[1064] Christof Heyns and Frans Viljoen, "The Impact of the United Nations Human Rights Treaties on the Domestic Level," 23 *Human Rights Quarterly* 483-535 (2001), p. 483.

### 11.2. Distinct Approach of Judiciary and Executive to International Law

This research has brought out an amalgamation of collective and fragmented contributions of various national actors and institutions constituting the Indian state practice. The Supreme Court, both as exponent and as agent for the codification and progressive development of international law, has played an important role.[1065] As one can see, the judiciary's contribution in the field of international environmental law,[1066] human rights and refugee law is decisively more influential than of the executive; whereas in the field of law of the sea it is the executive, which has articulated the Indian position and orchestrated the same at global forums. In the areas of the UN reforms, ICJ and disarmament, the contribution of the non-state non-executive actors is almost negligible. The Indian judiciary, although conservative and cautious, has often invented various arguments in giving effect to the emerging positive international law principles at the domestic level. This contribution of the Indian judiciary leads us to believe that it is well prepared to face the complexities of an ever changing international and domestic order shaped by new and emerging international legal issues such as piracy, intellectual property and international trade.[1067]

In the law of the sea, disarmament and environment, India has visualized the common interests of developing countries and has successfully carved out an alliance system which has responded and resisted quite effectively the alliance led by the US, UK and several other leading economic powers. This functional alliance of developing countries, however, has not been successful so far in bringing desired results as far as the UN reforms are concerned. The case study of the Chemical Weapons Convention shows that despite the strong mutual suspicion between India and Pakistan, the Indian state machinery decided in favour of the reduction and complete destruction of the CW stockpile.[1068]

### 11.3. Post-Independence Practice of India: A Rising Power Approach to International Law

The Indian state practice since 1947, despite initial nation-building problems at the domestic level, shows that it has most cohesively coordinated its practice in all realms of international law. It should be noted however, that

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[1065] This research study has excluded the examination of the contribution of awards announced by arbitration and conciliation commissions of India, largely due to paucity of material and lack of readily available material.

[1066] As Dr Manmohan Singh, Prime Minister of India said, "but for the enduring wisdom of our judiciary, we would not have the bulk of what we proudly call 'environmental jurisprudence'. The nineties witnessed remarkable changes in India. Rapid growth and industrialization were underway as a result of the newly liberalized economy. At times like this, many nations might have chosen to bear silently the depletion of the nation's natural resources as the cost of doing business but we did not compromise on these concerns. Our judiciary enforced laws passed by a farsighted legislature to ensure that these concerns were neither diluted nor dismissed. Our safeguards are now far more stringent and well defined than they were two decades ago. But for these to be effective they need continuous support from a strong executive and the oversight of a wise judiciary. Valedictory Address of Prime Minister Dr. Manmohan Singh at the International Seminar on Global Environment and Disaster management. New Delhi, July 24, 2011.

[1067] Although the Supreme Court's contribution in the field of international environmental law is rich, a research study showing whether all the landmark judgments of the Court have examined all possible materials, such as treaties, the practice of Indian state, diplomatic correspondence, decision of states courts and juristic writings before stating a particular rule. It is also observed that the Supreme Court of India judgments on international environmental law rarely refer to the awards and rationale offered by international arbitral tribunals in environmental law.

[1068] This is unlike European civilization where mutual suspicion between European states was so strong and pervasive that nobody could think in terms of reductions of armaments or peaceful settlement of international disputes. G. Best, "Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After" 75 *International Affairs* 619 (1999), Anand *The Formation of International Organisations and India: a Historical Study* above at 7.

India, after 1919, began to function as a separate entity in its external relations.[1069] India's claims and complaints to reform the structures of the UN, especially, are due to the fact, that although India started functioning as a separate entity then, it was still under British control; hence, it could not succeed in having an effective voice during the formation of the UN.[1070] One of the reasons was the unrepresentative character of the Indian delegation at the formative stages of the UN where the Indian delegations were often perceived as mere spokesmen of the British Government. Had this not been the case, India could have more effectively participated and its subsequent persisting resistance until today of an unrepresentative character of the UN would have been partly mitigated. This conclusion stands true because since India effectively participated in the law of the sea, environment, climate change and CW disarmament regime negotiations, it has not raised similar level of complaints about the composition and character of multilateral institutions, such as ITLOS, IMO, ISA and OPCW, etc.

One of the important conclusions is that India has taken a proactive, although not necessarily most successful approach in the functioning of international institutions of importance, such as the Law of the Sea, UNCED, OPCW, ICJ and the UN. What also becomes clear is that India, due to its long historical past, has always felt a necessity to secure a rightful place[1071] as a nation in all international issues of concern. Efforts to secure a rightful place in this research has meant India's continuous or dynamic change in its behaviour towards international norms, its adoption of a more confrontational position in relation to those norms which it perceives as Euro-centric (although not necessarily means that these Euro-centric norms are always adverse to the overall development of India or other developing countries), adoption of tougher actions during bilateral and multilateral negotiations. India has come a long way from the Nehruvian days of less assertive and aggressive to high-profile diplomacy with more assertive and even aggressive positions. For example, India's position in the Climate Change negotiations has gone to an extent of even appearing as a villain. This thesis shows how based on its overall economic, military capacity, socio-cultural influence generated by 1.2 billion people, India is asserting to have a global leadership role in important issue areas. India has become increasingly assertive in its defence and promotion of 'core' national interests. While one could see that China has been experiencing frustration from anti-China forces which try to prevent China's rise to its rightful place, as Zhao shows, India's concerted efforts for rightful place have started in the last two decades only. The case study under analysis reinforces a conclusion that India's search for and assertion thereof towards a rightful place as a significant voice continues. The research demonstrates how various norms of international law are stacked against countries like India, be it in climate change, trade preferences or membership of multilateral institutions. Indian position has been to undo or resist these norms. It has been shown how the Climate Change and Trade Rounds impose substantial obligations on developing countries, including India, without commensurate benefits to them. The Indian position shows, for example, that trade liberalization is good for development but the multilateral trade rules are not appropriately tailored to the needs of developing countries, including India. In this respect one can argue that India's position

[1069] Ibid. at p. 9.

[1070] India was quite apprehensive about the establishment of the UN, although it was a founding member, flowing its membership from the days of the League of Nations. The reason for apprehension was grounded in a widely perceived picture that "imperialists were crying and clamouring for dominating the weaker nations for all time to come" and "measures were being adopted to suppress the voice of the enslaved nations of the world". *India and the United Nations: Report of a Study Group Set Up by the Indian Council of World Affairs*, prepared for Carnegie Endowment for International Peace (1957), Ibid. at 18.

[1071] Suisheng Zhao, "Chinese Foreign Policy as a Rising Power to find its Rightful Place" http://sam.gov.tr/wp-content/uploads/2013/06/Suisheng_Zhao.pdf accessed on 16 March 2014.

shows its continuation of a judicious and India specific path of liberalization which takes into account its economic and social constraints as well as its capacity to adapt. Furthermore, a collective analysis of India's position on environment, climate change, human rights and trade liberalization shows that India champions the cause of sustainable development which requires that full attention be given to the environmental and social impact of India's economy's market opening. India's increasing confidence[1072] to deal with the Western nations in obtaining more favourable consideration of its demands in issue areas like climate change, trade negotiation, law of the sea have become evident.

A subtle but seemingly disconnected conclusion can also be made that as far as non-environmental issues are concerned, the Indian state machinery, largely run by bureaucrats, had an effective voice in the shaping and execution of international law- as these bureaucrats seemed to have inherited one of the virtues of a colonial legacy that is to be able to assert its views at an international forum with a strong and effective voice. Whereas, in the areas of environment, climate change and refugees, the judiciary has remained closer to the concerns, needs and interests of civil society and has employed a 'genuinely indigenous' approach in resolving the issues and shaping of norms and principles.

### 11.4. Use and Effectiveness of the Proactive versus Reactive Approaches to Ensure Desired Outcomes

It is often believed and argued that India has a reactive, piecemeal and *ad hoc* approach on issues of national importance.[1073] The thesis shows that the emerging international law regime itself often requires such approach. In international law, one cannot have a result-guaranteed approach and since international law often reflects changing world relations, this is the most preferred option for the national policy-makers. This research is based on a policy-oriented approach as a neutral frame that could be used for clarifying and articulating national interests.[1074]

Except in refugee law and to a lesser extent in UN reforms, the influence and legacy of one of the most important foreign policy makers of India namely, Jawaharlal Nehru, the first Prime Minister of Independent India, is not very prominent.. However, the norms and ideologies which he pronounced continue to hold significant (if not decisive) influence on the negotiations and discussions. One can hardly find a decisive influence of any political leader of India in the making and implementation of international law in many areas, except perhaps in environmental law and civilian and military application of nuclear energy. This also leads to a conclusion that Indian diplomats and bureaucrats, the latter increasingly, in the post-1991 liberalization era, carry

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[1072] The main reason of increasing confidence is due to enhanced military power capacity, especially with the successful explosion of nuclear device in 1998, its ability to withstand Asian economic crisis in late 1990s and recent global financial crisis and a strong economic growth based on robust economic performances especially in manufacturing and service sector with information technology sector pioneering the long-term success. One should be cautious of, however, India's weak capacity in terms of world's dependence on Indian capital or other resources unlike China.

[1073] For example, Sandeep Sengupta argues that India's efforts "been reactive, ad hoc and piecemeal rather than carefully derived from a systematized intellectual process that calculates and assesses the costs and benefits of each individual decision and action against the bigger picture". Sandeep Sengupta, Climate Change and India's National Strategy, Paper presented at the International Workshop on India's National Strategy, Institute for Defense Studies and Analyses, IDSA, New Delhi 20-23 December 2010.

[1074] B. S. Murty, *Propaganda and World Public Order: The Legal Regulation of the Ideological Instrument of Coericionn* (1968); B. S. Murty, *The Interantional Law of Diplomacy: The Diplomatic Instrument and World Public Order* (1989); P. S. Rao, *The Public Order of Ocean Resources: A Critique of Contemporary Law of the Sea* (1975).

much higher influence than political leaders. There is a dearth of political leaders, who have articulated a new vision of India which is also acceptable to international law makers.[1075]

India's latest practice with regards to the functioning of and contribution of the G20 to development of international law shows that India, like other members of G20, is not in favour of having too much international law or one can say overlegalise world economic and political affairs when circumstances so require. A pure legal positivist who analyses G20 functioning will argue that the more law the better. But as the long-standing divide between pure international law and state practice is breaking down, Indian state practice, like other G20 members, shows that it is reconciling to bridge the realist-positivist divide to better understand the complex relationship between international law and international affairs. The state practice of India and other members show that these states intend to exercise freedom directed at formation of new principles of international law. Since the current framework of obligation is based on the assumption that in the absence of rules of international law, States have a freedom to act, G20 member States including India use the permissibility of the framework to create new norms and concepts.

### 11.5. India will continue to avoid the ICJ as a means of dispute settlement

India's position with regard to the ICJ, either as a party or as a member of the Statute of the Court, reinforces the conclusion that India is less and less likely to resort to the Court for any international dispute.[1076] The mandate drawn from the Indian constitution and the practice of the last 65 years confirms this conclusion. Secondly, India will contribute actively to those advisory proceedings which would protect or promote her national interests and policies in the long run. An idealist would desire that India participates actively in all advisory proceedings if she wishes to contribute to the clarification of issues of international law by the Court, such as those in which India did not submit any written or oral pleadings. Regardless of whether India has a proactive or reactive approach, it will continue to have high faith in the impartiality, objectivity and capability of the ICJ. Furthermore, an idealist would desire that India should advocate a jurisdictional clause to every multilateral treaty conferring jurisdiction, at least, primarily, upon the ICJ. Such an approach will enable more usage and utility of the Court. Despite the increased importance of international law in domestic and inter-state disputes on various issues, it is unlikely that India would incline to adopt an approach which was advocated by late Judge Nagendra Singh. He advocated making the use of the ICJ for some type of advisory opinion to obtain – if not actual settlement of the dispute – at least a legal basis for such settlement.

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[1075] One of the latest visions of Indian Foreign Policy which shapes and will shape future position of India in international law is well articulated by its former foreign secretary Ms Nirupama Rao. According to her, ", I would like to reassert that India's Foreign Policy is an amalgam of national interests, our conviction that inclusive structures of dialogue and cooperation to address the new dimensions of security threats are necessary, that the institutions of global governance including the United Nations should reflect current realities, and that the dynamism and energy of the Indian economic growth story must be shared with our region, and that to sustain our growth trajectory we need an environment that is free from transnational threats like terrorism." Address by Foreign Secretary Mrs. Nirupama Rao on 'Key Priorities for India's Foreign Policy' at the International Institute for Strategic Studies. London, 27 June 2011. Thus, one will find India's reassertive position in international relations and law forum dealing with issues like security, global governance, economic development, fight against terrorism and environment. Except security and fight against terrorism, other issues are forming part of core agenda of G20 of which India is one of the members.

[1076] Indian view may be considered almost an anathema to what Sir Hersch Lauterpacht argued in *The Function of Law in the International Community*. Sir Lauterpacht argues that, "obligatory judicial settlement should therefore be regarded as inherent in the concept of law, including public international law." Quoted in Jan Anne Vos at p. 6.

### 11.6. Patience and Persistence: Virtues of Statecraft in the UN Reforms

As far as India's future practice with regards to international institutions is concerned, it will continue to push for multilateral solutions to development related issues. Such position would directly contribute to her consolidation of leadership in international relations. The case study of environment and climate change and emerging trends in multilateral trade indicate that India will adopt a functional alliance strategy with nations such as China, Brazil, and South Africa and will try to ensure that development returns as a central item on the UN agenda. It is also in the long term of interests of India to work for a multilateral solution (instead of bilateral) to the terrorism problem. As the current environment is quite conducive to India's advantage, it is likely to use the same for institutionalizing and pushing for returns that are more favorable on these agenda items. Such an approach will serve to contribute to the ideals of international law and promotion of national interest in the most affirmative manner. India's failure to secure permanent membership in the UN Security Council, despite the strategic alliance and her increasing political, economic and military influence in world affairs, raises doubts about her ability to secure returns that are more favourable. India's failure to institute structural changes in various principal organs and international financial institutions reinforces this observation.[1077] To counter such trends, India must fully and effectively employ machinery and resources to garner the support of the international community as done by Japan for example. India should also make more concerted efforts to raise debates in intellectual circles, such as think tanks, universities and academic institutions.

### 11.7. Permanent Membership of the Security Council: Success Chances are Stronger than Ever Before

India's efforts to get a permanent membership in the Security Council and her efforts for structural changes in international financial institutions will continue. However, her efforts will need to encounter and overcome several key restraining factors. In the area of Security Council, India has to overcome the opposition of the Group of Consensus composed of Italy, Argentina, and Pakistan. In the area of environment and development, India will have strong encounters and resistance from key industrialized countries. These countries would prefer allocation of more funds towards peace and security issues while India would prefer better quality funding allocation to socio-economic development programs.[1078]

In view of the failure on a number of proposals, it can be proposed that the key to UN reform may lie less in trying to be innovative than in understanding why past initiatives have failed and how the strategies and tactics for achieving them could be improved.[1079] Independent scholars and commissions in India might wish to utilize their time more productively in thinking through how to advance existing proposals than in continuously

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[1077] As the UN gradually ceases to become an effective forum for negotiations of economic issues which are at the heart of developing nations and as the WTO, IMF and the World Bank are becoming the sole negotiating forums, Indi a and the developing nations alike need to work towards halting this shift.

[1078] It is important that the UN is reflective of contemporary global realities and is equipped to respond effectively to the needs, requirements, and concerns of the developing countries, which constitute the vast majority of its membership. The Indian demands can be seen in these perspectives.

[1079] Jean E. Krasno, *The United Nations: Confronting the Challenges of a Global Society*, Lynne Rienner Publishers, (2004); Marcus Franda, *The United Nations in the Twenty-First Century: Management and Reform Process in a Troubled Organisation*, (Rowman and Littlefield, 2006); Joachim Muller, Reforming the United Nations: The Quiet Revolution, (Leiden: Nijhoff, 2001); Paul Heinbecker and Patricia M. Goff, *Irrelevant or Indispensable? The United Nations in the Twenty-First Century*, (Wilfrid Laurier University Press, 2005).

developing new ones that have little chance of implementation.[1080] In this regard, it would be indeed useful if Indian scholars and think-tanks pursue research attempts analyzing and prescribing tools, strategies and frameworks which can contribute to the overall effectiveness of India's positions. India has served as a non-permanent member of the Security Council seven times (1950-51, 67-68, 72-73, 77-78, 84-85, 91-92 and 2011-12).[1081] Twice during the period of India's membership and chairing of the Council, India had seen important and evolving debates on Syria, Sudan, South Sudan, Somalia, Palestine and issues such as international terrorism, piracy and peacekeeping.

At the end of its non-permanent membership in 2012, India's concerns and disappointment remained at the same position as it was before in 2005, when the chances of the expansion of the Security Council were most prominently anticipated. India, together with Japan, Brazil and Germany reiterated their commitments as aspirants of new permanent members of the Council and renewal of commitment to support each other, support for the inclusion of Africa in the enlarged Council, and drafting of a concise document which would pave way for possible permanent membership of India in future.

### 11.8. Law of the Sea: Reflection of a Growing Hegemonic Power

India's major interests have been largely accommodated in the 1982 Law of the Sea Convention. It has been able to derive economic, security, strategic and economic benefits from the various provisions of the Convention. The Law of the Sea Convention is one of the most important examples of success of India's assertive and national-interests driven position and approach, which is almost unparallel in other areas. India, together with maritime nations, continues to ensure her strategies of building up self-reliance in offshore explorations, and development and exploiting fully the benefits of recovery of polymetallic nodules.

Based on the success of securing and promoting her national interests during the Law of the Sea Convention negotiations, it seems that India will adopt a strategy of keeping a low profile in those instances when her interests will be otherwise promoted by more vocal and powerful nations. India will succeed in this regard, if it will also play an appropriately active role in the implementing agencies, such as the International Maritime Organization, the International Whaling Commission, and the International Seabed Authority. Despite being a major seafaring nation and having vital interests in the law of the sea regime, it is interesting to note that India took a long time (14 years) to ratify the Convention, shortly after the supplementary agreement was concluded which made the Law of the Sea Convention more acceptable to most western countries as well.

This reflects the general position of India as far as the ratification of major multilateral instruments is concerned. This study shows that India waits for major nations to ratify the international instruments before doing the same. India is yet to put in place a more robust domestic legal and judicial framework to deal with the issues of the implementation of this Convention. In the absence of such framework, a complete state practice, including the approach of the judiciary, is yet to emerge.

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[1080] Reflecting on the nature of debates at the recently concluded 4th Biennial Conference of the Asian Society of International Law in New Delhi 14-16 November 2013, Simon Chesterman observed that, "…but participants spent as much time looking backwards as they did forwards". This is an important reminder to international law scholars and think-tanks of India to spend more time in forward looking debates and strategies than discussing the past. http://law.nus.edu.sg/about_us/news/2013/ST241113.pdf accessed on 2 December 2013.

[1081] India and Colombia have served Council seven times as a non-permament member. Only Japan, Brazil and Argentina have served more often than India and Colombia. India obtained 187 out of 192 votes during the 2010 election making it eligible for a non-permanent membership for 2011-12, perhaps an all-time record.

**11.9. India will continue to shape and implement the international law of human rights in its own way and pace**

India faces a unique dilemma as far as the shaping and implementation of human rights is concerned. The analysis of primarily judicial decisions, constitutional and statutory provisions and government reports interspersed with the reports of civil society institutions unambiguously prove the point. Despite the constitutional guarantees, enactment of laws and enforcement machineries, India has been facing hurdles to bring the benefits of the prominent political, civil, social and cultural rights to its large population. Since India has not signed and/or ratified most pertinent international conventions, it is able to practice the 'freedom at domestic level' associated with non-fulfillment of obligations which are derived from these conventions. India continues to find itself in this situation due to the negative legacies of legal imperialism or colonization and economic challenges. Undoubtedly, it has been able to defend its unique civilization-based position on human rights which in various ways differ diametrically from Euro-centric human rights regimes. In other words, the Indian position resists the rhetoric of system of international rules, principles, and concepts, as these do not wholly match reality of the Indian state.

The analysis shows how and why the philosophical differences exist and will continue to exist between India and Western nations and courts and increasingly Latin American, African and some other Asian countries. However, the post-1970 history shows that India has been increasingly sensitive to the growing demands of Euro-centric human rights system and has been able to identify ways and means to accommodate content of such human rights in its own way. As argued in Human Rights Chapter above, "the emergence of newer identities and shifting quality of these identities shaped by the very nature of politics and electoral processes in India coupled with the paucity of similar experiences in western liberal democracies, ensure that civil and democratic rights movement has to often formulate its own responses, make its own theoretical and conceptual innovations to meet such challenges."[1082] Furthermore, since the beginning of the globalization, privatization and liberalization of the Indian economy, the Indian human rights system has been tilting towards the Western system. In this regard it is important to conclude that along with the Indian judiciary, various international organizations, especially the United Nations and its Specialized Agencies, have been able to play an important role in promoting normative concerns on various rights within the Indian state.

India was one of the ardent supporters of the Universal Declaration of Human Rights. However, the Indian experience, like experiences of several countries of Asia and Africa, also shows the confusion of human rights in current international structure as to its precise nature and role in international law. India's own way of appreciating the problems and challenges of enforcement of sanctions with regard to human rights in international law faced by the Afro-Asian countries has been an instrumental source of human rights regime in these countries too. The concept and principles of ethics and morality which underpin the human rights system pronounced and enforced by European nations, after the second World-War, are markedly different from what the Indian polity has been practicing in the context of its own civilizational history. The European system, largely based on positive rights which can be found within a legal system, is perhaps unable to appreciate the

[1082] Aswini K Ray, "Human Rights Movements in India: A Historical Perspective", *Economic and Political Weekly*, 9 August 2003, pp. 3409-3415.

more weightage given by India to moral duties and rights, the deduction and inference of which depend upon the perception of the person seeking the existence of a particular right.[1083]

The human rights system of India is still greatly influenced by natural law which is founded upon the principle that certain rights exist as a result of higher law than positive or man-made law. Nevertheless, it is gradually coming to terms with the requirements of an evolving international legal system. This process of reconciliation and mutual influence is and will remain full of challenges and tension. It is interesting to observe that in justifying its stand, India does not plead the cultural differences between various human rights system in order to dilute its overall support for implementation of human rights.

Apart from this civilizational and natural law based approach, the Indian human rights system also faces the dilemma of having to work with policy-oriented human rights movements which typifies the approach of Western European countries. As shown in the human rights chapter, these human rights movements which seek to identify, characterize and order a wide variety of relevant factors in the process of human rights creation and equipment have been able to significantly influence the Indian policy-making, executive and judicial institutions.

The state practice also shows that India is and will continue to vehemently oppose the increasing extraterritoriality of human rights as pronounced by the case-law of the European Court on Human Rights, the ICCPR human rights committee and a few Western European nations. India will continue to guard and remain cautious in giving more freedom to international organizations to positively protect human rights in general. This is also evidenced by the approach taken by the Indian executive and National Human Rights Commission of India.

It has been observed that a negative report from an international community or UN body immediately attracts an opposition from India, especially in the area of civil and political rights. Although there has been a significant reduction in the rhetoric of sovereignty, it is found that India has been and will continue to use loss of sovereignty rhetoric when it will not agree with the political agenda of other states and the international community. The Indian practice shows that international human rights law and sovereignty can be juxtaposed and the implementation of effective human rights policies is possible in new and emerging states. The relationship between indigenously-perceived (ancient civilization based) human rights system of India and sovereignty is in a process of evolution and keeps striking a balance between "rights pertaining to the socio-political process" (freedom of expression, assembly, travel and religion, and the right to participate in the political process) and the basic principle of equal protection.[1084] It is important to note that the philosophical and foundational differences between India and Western nations will continue to exist in human rights and refugee law areas and there may be danger in equating old views with contemporary situations. The Indian practice proves that a state's stance following the early stages of independence and nation-building cannot be justified indefinitely. In view of post-1970 practice, it is concluded that there is a remarkable tilt in India towards Western European thinking and approach.

It has been observed that the role of Indian NGOs and civil society institutions in the influencing the content and implementation of international human rights, environment and climate change[1085] at international

[1083] M. Cranston, 'What are Human Rights?' in Laquer and Rubin, *Human Rights Reader*, 1973, pp. 17, 19.

[1084] Thomas M. Franck, *Human Rights in Third World Perspective.* Vol. II and III, (London: Oceana Publications, 1982).

[1085] As climate change issue is directly linked to energy which is directly connected to India's top priority - economic development, India's position is decided at the highest level – at the Prime Minister level, although

and national level is relatively small. However, these actors have been working to combine their role and interests with Western NGOs and MNCs to maximize their influence. The information technology revolution has greatly facilitated formation of transnational networks and alliances which have direct impact on the effectiveness of Indian NGOs and civil society institutions in impacting the policy-making and execution of the policies at national level. Although the human rights and environmental law issues are gigantic in nature in terms of scope of reach and size of population, it is surprising that there have been very few powerful NGOs in India which are able to counter the Western or industrial nations' powerful influence.

### 11.10. International Environmental Law: Tension will continue between the Executive and Judiciary

The analysis of Indian state practice and the role of the judiciary in the area of international environmental law lead us to conclude that India has departed from viewing the treaties and customs as the only sources of international law to accepting the emerging principles and norms of international law. However, at global level, it can be seen that "any consolidation and restructuring of global environmental governance that enhances regulatory control and develops across-the-board normative and prescriptive standards takes away the flexibility and safeguards available to developing countries under different environmental conventions".[1086] The Indian Courts have been proactive and have shown judicial activism. However, the Courts having realized the balance between environmental concerns and developmental needs have become more sensitive to the realistic needs of the Indian state as a whole.

The Indian judiciary has been seen and acknowledged as a pioneer and can be credited for introducing new principles such as the absolute liability principle. The Supreme Court of India has heavily relied upon international instruments and has given even legislative effect to these declarations, in the clarification and enforcement of the concept of sustainable development at national level. The Supreme Court in its judgments has discussed the evolution of the concept of sustainable development and has stated that India's international obligations demand the application of the concept in the Indian scenario. Moreover had the judiciary blatantly supported the liberalization policy of the 1990s, it would have led to economic progress at an advanced pace initially, which would have later suddenly been stalled due to exhaustion of resources essential for development. The judiciary probably realized this in the early 1990s. In most of the decisions, it can be observed that although temporary injunctions were always granted to stop any further harm to the environment, the final judgment usually gave certain regulations and guidelines, whereby the industries were permitted to continue with their activities by following the same.

The judiciary has followed a balanced approach towards environmental concerns and has given prime importance to the principle of sustainable development. Although there are several judgments which can be criticized from an academic point of view for the lack of in-depth discussion on the jurisprudence of the concept of sustainable development before applying it to the issue before the Court, it can however be noticed that the approach followed by the Supreme Court in almost all the decisions beginning from 1995 has been a strategically adopted one. The Supreme Court has kept in mind the essential fact that India then and now is a developing country which has to fulfill the needs of an ever increasing population without compromising on its

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the Ministry of Environment and Forests remains at the front interface between India and the international community.

[1086] Statement by Joint Secretary in the Ministry of External Affairs A.R. Ghanashyam during the session on Institutional Framework for Sustainable Development", 2nd Prep Com of Rio+20. New York, March 8, 2010.

GDP and overall economic progress. Moreover, even while it enables itself to stand in league with the developed nations of the world, it does so without compromising with environment for achieving the same. The environmental principles that evolved in the Stockholm and Rio declaration have been implemented in the domestic laws and only due to the vibrant role played by the judiciary. Despite the drawbacks of the judiciary, the role played by it in shaping the environmental law jurisprudence in India is worth emulating by countries in similar situations. Therefore, it can be concluded that in the field of international environmental law, India's contribution is mainly through the Indian judiciary. As observed, not only has the judiciary clarified various emerging and existing principles of environmental law but has also treaded into the territory of legislative in its judicial activism in the area of environmental law.

One could therefore see a strain in the relationship between the judiciary and the executive as far as enforcement of environmental norms are concerned. The former trying to establish high standards and the latter finding itself in a difficult situation; having to adhere to court's rulings on one hand and the need to reconcile environmental concerns with economic developmental needs on the other. This tension between two wings is likely to continue. However, it can be concluded that the Indian judiciary will be paying more attention to the executives concerns in the light of the latter's need to deliver economic governance. While the strain between two organs of the state will continue to exist at a national level, India is likely to push for softer environmental standards at international level in its negotiations with the developed world.

It is, furthermore, likely that civil society institutions which have been empowered by the public interest litigation mechanism and which have been actively using this mechanism to address environmental issues, will continue to add to the tension between the judiciary and executive. Civil society institutions in the area of environment and development need to be more sensitized to the developmental needs of the country, without, however, compromising the concerns of preservation of clean environment. Until and unless, these organs and civil society institutions work in tandem, India's contribution at the international level in development of international norms will continue to be less uniform and vulnerable to the pressure tactics of industrialized nations.

Various case studies lead us to conclude that the Indian courts have largely succeeded in opening new windows to welcome international legal norms through creative interpretation, aligning it, for example, with fundamental rights. This combination of fundamental rights and international legal norms has produced an exemplary and potent body of jurisprudence, expanding in the process the scope and application of certain norms relating to the environment.

The general approach of Indian courts to international law was crystallized in the case *Gramophone Company of India Ltd. V. Birendra Bahadur Pandey and Others*. In this case, the Court noted that, "the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves".[1087] The doctrine of incorporation also recognizes the position that the rules of international law are incorporated into national law and considered part of the national law, unless they are in conflict with an Act of Parliament. Municipal law must prevail in case of conflict. *Vellore Citizens* cases reveal that the Supreme Court of India is not yet ready to grant customary international law any primacy over municipal law in case of conflict.

[1087] 1984 AIR 667, 1984 SCR (2) 664.

In the context of the precautionary principle and polluter pays principles, as part of environmental law, the Court stated, "even otherwise, once these principles are accepted, as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost an accepted proposition of law that the rules of Customary International Law, which are not contrary to the municipal law, shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law."[1088]

In *Additional District Magistrate, Jabalpur v. Shivakant Shukla*, the Supreme Court noted after referring to several authorities that, "if there be a conflict between the municipal law on one side and the international law or the provision of any treaty obligations on the other, the courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the court should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with international law or treaty obligations."[1089]

Hegde makes an indicative suggestion that the Supreme Court of India has yet to take into account the complexity of sourcing correct and updated trends in international law on a continuing basis. He furthermore, rightly mentions that "the period taken for the formative process of international law norms through state practice is becoming increasingly shorter."[1090] This thesis agrees with the conclusion drawn by Hegde on the Supreme Court and treatment of international law, according to which there is still some hesitancy in recognizing *prima facie* the legality and applicability of customary norms of international law within domestic legal structures.

The Supreme Court of India continues to stick to the requirement of 'consistency' of customary international law with the municipal law. In *Jolly George Varghese and Another v. the Bank of Cochin*, the Court noted that from the national point of view the "national rules alone count…with regard to interpretation, however, it is a principle generally recognized in national legal system that, in the event of doubt, the national rule is to be interpreted in accordance with the State's international obligations". [1091] The 1984 decision of the Supreme Court in the *Gramophone Case* continues to be one of the authoritative restatements of its position concerning the applicability of international law within the domestic sphere. It elaborates on the theoretical and practical aspects of the operation of transformation and incorporation doctrines and other sources of international law dealing with this issue.

The environmental law jurisprudence concerning sustainable development suggests that the Supreme Court had no hesitation in holding that the concept of sustainable development had been accepted as a part of customary international law although its salient features have yet to be finalized by international law jurists. This statement made by the Supreme Court raises several key issues. First, it seems to be oblivious to the fact that the process of the formation of customary international law is usually a long and arduous one. Second, the customary norms under international law are formulated by consistent state practice rather than by the writings of the jurists, although their writings will have lot of persuasive value.

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[1088] AIR 1996 SC 2715 or 1996 5 SCC 647.

[1089] AIR 1976 SC 1207. The Supreme Court stated that in case of such a conflict the domestic law would prevail for all practical purposes. The court has also said that the effect would be not to read conflict into the interpretations of the domestic law. It would, therefore, look for a harmonious interpretation. The court, however, looks at treaties differently. It states, 'if there is any deficiency in the Constitutional system it has to be removed and the State must equip itself with the necessary power. Maganbhai Iswarbhai Patel v. Union of India and another, AIR 1969 SC 783 or (1970) 2 Supreme Court Cases (SCC) 400, quoted in Hegde at 61.

[1090] V. G. Hegde, *Indian Courts and International Law* above at 62.

[1091] AIR 1980 SC 470 or (1982) 2 SCC 360.

As the Supreme Court noted, "the precautionary principle and the polluter pays principle have been accepted as part of the law of the land. Article 21 of the Constitution of India guarantees protection of life and personal liberty…even otherwise once these principles are accepted as part of the customary international law there would be no difficulty in accepting them as part of the domestic law". However, the Court has apparently contradicted its own statement in the same judgment, by saying, "it is almost an accepted proposition of law that the rule of customary international law which is not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of law".[1092] As Hegde concludes, "this could be regarded as the final frontier for the Indian courts, and has been the consistent position of the Indian Supreme Court for the last six decades".[1093]

What also appears in the international environmental law jurisprudence is that the Court has shown some ambivalence to the emerging economy with the new economic agenda firmly in place. As the Supreme Court noted in the *N. D. Jayal and Another v. Union of India and others*, "the right to development cannot be treated as a mere right to economic betterment or cannot be limited to a misnomer for simple construction activities. The right of development encompasses much more than economic wellbeing and includes within its definition the guarantee of fundamental human rights".[1094]

The development is not related only to the growth of GNP. It is an integral part of human rights. Of course, the construction of a dam or a mega project is definitely an attempt to achieve the goal of wholesome development. Such works could very well be treated as an integral component for development. The Supreme Court in *Essar Oil Ltd v. Halar Utkarsh Samiti and Others*, outlined various principles of the Stockholm Declaration to sustain humanity and its environment. While emphasizing the need to balance economic and social needs, on the one hand, with environmental considerations, on the other hand, the Court stated, "indeed, the very existence of humanity and the rapid increase in the population together with consequential demands to sustain the population has resulted in the concreting of open lands, cutting down of forests, the filling up of lakes and pollution of water resources and the very air which we breathe. However, there need not necessarily be a deadlock between developments on the one hand and the environment on the other. The objective of all laws on environment should be to create harmony between the two since neither one can be sacrificed at the altar of the other".[1095]

### 11.11. Disarmament: India will continue to Insist for Non-Discriminatory Disarmament Instrument while remaining Ambivalent in Its Practices

India strengthened the basic premises of the CWC and contributed to the promotion of multilateral, non-discriminatory international disarmament instruments. Furthermore, in view of the threats of terrorism, it is in India's interest to promote and practice a strict regime of non-proliferation of chemical weapons at national and international levels.

Although there is scope for the promotion of chemical science and technology for peaceful purposes in the benefit of developing countries, India may not find it too beneficial to play a more active role, which is clearly evidenced by the lack of submission of clear policy papers, lack of chairing important clusters on the

[1092] Vellore Citizens, AIR 1996 SC 2720.
[1093] V. G. Hegde, *Indian Courts and International Law* above at 69.
[1094] JT 2003 Suppl 2 SC 1, 2003 (7) SCALE 54, (2004) 9 SCC 362.
[1095] AIR 2004 SC 1834.

subject, etc. Moreover, India has not been convinced that occupying leadership posts in the CWC regime would distinctly add to her promotion of overall interests in the CWC and allied regimes.

The overall support of India to the CWC regime leads to the conclusion that it will fully support any multilateral arms control and disarmament instrument which would have similar kinds of provisions. Having destroyed chemical weapons and chemical weapons production facilities, India faces several challenges to continue to contribute to the progressive development of international law in the area of CWC.

First, at the domestic front, it must keep ensuring that the civilian chemical industries continue to abide to the letter and spirit of the CWC. Production of dual-use chemicals is quite easy, hence, without losing sight of the gigantic task and complexity involved, India must keep submitting declarations to the OPCW and monitoring the civilian chemical industry together with the OPCW inspectorate. This will enable India to prevent re-emergence of chemical weapons at least on its territory, which is a very important goal of the Convention. Second, India must work in cooperation with other like-minded states to ensure that any non-OPCW or a group of states, such as the Australia Group,[1096] does not create obstacles in fully exploiting the benefits of peaceful uses of chemistry. In view of the terrorist threats of using chemical weapons, the Australia Group would obviously continue to exist and may use its informal provisions or understandings to deny scientific information and technology transfer to an unwanted country regardless of its good track records under the CWC. Should this happen, India must oppose the trend, as such trends significantly undermine the legitimacy of the CWC and the twin goal of international law of disarmament and peaceful uses of chemistry for economic and technological advancement of developing countries. Third, provisions related to international cooperation for the peaceful uses of chemistry to promote scientific and technological advancements in the CWC are of recommendatory nature and hence, India should work together with developing nations to fully exploit the benefits of these provisions. This will ensure that the law of disarmament in the area of CWC will truly prove beneficial to all States Parties and would strengthen the norm that disarmament must yield a peace dividend to the complying members. Fourth, although India has been unable to play an important role in the universality of the CWC, its relations with neighbouring Myanmar indicate that India has a potential to influence the Myanmar authorities to join the CW ban. If India succeeds, it would have contributed to all main pillars of the CWC – CW destruction, non-proliferation, international cooperation and universality. Fifth, the domestic legislation, which have several glitches and may prevent India from fulfilling all obligations with the Convention, must be corrected. This requires a coordinated approach, which involves bureaucracy, representatives of chemical industry, anti-terrorism experts, and the legal fraternity among others.

### 11.12. International law offers India benign tools to promote national interest

If the elements of protection and promotion of national interest are the most important criteria of hegemony, then Indian attitude and practice do indicate that India has tried to reconcile through state practice the hegemony and international law. The Indian practice records an interesting pattern of instrumentalisation (law of sea, CWC disarmament) and withdrawal (important reservation to ICJ compulsory jurisdiction following the *Right of*

[1096] http://www.australiagroup.net/en/cwc.html, accessed on 9 May 2010; Amy Smithson, "Separating Facts from Fiction: The Australia Group and the Chemical Weapons Convention", (The Henry L. Stimson Centre, Occassional Paper 34); Arms Control Today, *Australia Group (Export Control of Biological and Chemical Weapons)* (2005); Alexander Kelle, "The First CWC Review Conference: Taking Stock and Paving the Way Ahead", 4 UNIDIR: The CWC Review Conference (2002); Alexander Kelle, "The first CWC Review Conference: taking stock and paving the way ahead", *Disarmament Forum* 4, 3-9 (2002).

*Passage* case), coupling international law in a more hierarchical way and at times replacing with domestic legal tools that better accommodate formal hierarchies (environmental law – sustainable development, climate change). India, like several dominant Western powers, the Russian Federation, China and Japan, have used international law as an instrument and also to pursue resistance to unwanted or undesirable hegemony in international relations. There is nothing wrong in believing then, like many other powerful states that India has been able to contribute to international law, which occupies a precarious, but eventually secure position between the demands of the powerful and the ideals of justice held in international society. India's unwillingness to join the 1960 UNCLOS II indicates its apparent disregard for the inconvenient legal rules as these rules will not promote or protect her national interests, despite the fact that the vast majority of states, sea faring and non-sea faring alike, have embraced the Conventions. As India exercises significant power by not ratifying the Convention, one can observe that India is using international law as an instrument, which is shaped by the power of the most important sea-faring nations in the world.

The thesis also enables us to draw a major conclusion that India, like any other major nation, uses international law as a means of regulation as well as pacification and stabilization of its preeminence in world affairs and when faced with hurdles of equality and stability that international law erects, remains indifferent to it or withdraws from the same. The thesis has identified various elements of the dynamic interaction between international law and India's search for a rightful place in the comity of nations and removing power inequality in the international relations by receiving or resisting at global level. Like any dominant power of the previous centuries, such as Spain, UK, USA, (emerging power) India is showing an increasing pattern of similar interactions with international law.[1097] The work has proven how India has tried to contour the efforts at reshaping international law in line with her needs, interests, and concerns. India uses indeterminacy of international law as a medium of political maneuvering with other states and international actors.

India rightfully forecasted the benefits of international institutions for the solution of collaboration and coordination problems related to the CW disarmament, hence it supported the CWC. However, with regards to other areas of arms control, it has preferred alternative means to solve the problems and it achieved the desired results, with some success. Having a well-established regime of CW disarmament was necessary and useful for India, as it ensured to provide her with all incentives (political, economic and military) resulting from the effective implementation of the Convention. India, on its own, could never have succeeded in having an effective international mechanism for CW disarmament, hence, the globally agreed machinery has tremendously reduced the cost of enforcement of CWC, bringing good benefits to India.

India regards the *status quo* of the Security Council as non-beneficial to her; therefore she seeks to change the membership of the Council. Whereas the dominant powers i.e. the permanent members apparently consider *status quo* as beneficial and will accordingly ensure its stabilization in the future. In other words, the

[1097] India's rightful place in the international community also means achieving status, acceptance and respect from the international community, especially major economic and military powers and important multilateral institutions, including the UN and the World Bank group institutions, and holding high expectations from these nations and institutions to fulfil their promises to enable India to safeguard its legitimate core national interests. The analysis attempted in this book enables to conclude that India will continue to use international law norms and principles to defend its core national interests. The domestic compulsions will make the Indian government more and more conditional on its ability to defend such interests with sustained international law tools.

Indian attitude, like that of a dominant emerging power, is to revisit the structures and therefore she values stabilization through institution far less.

The success stories of India in the 1970s and early 1980s where India succeeded, with the Declaration on Friendly Relations and the NIEO, indicate that, India wanted to project her vision of the world into the future and since these are transformed into law (albeit in form of resolutions), the backward-looking character of international law makes them reference points for future policies of India. Although the resolutions are termed as soft-law instruments, nevertheless they generate considerable effectiveness in inducing compliance as hard-law and involve low-costs. On the other hand, despite India's criticisms on the legitimacy of the Security Council's representative character, it can be argued that although the Council, even with possible inclusion of India, will continue to be deficient in legitimacy. This dichotomy still would be preferred by India. By playing an active role in the development of international law, India makes an extensive use of the international legal order to stabilize and improve its position in world affairs. These uses have varied from time to time and from subject to subject.

As analyzed earlier, India was particularly active with decolonization, removal of slavery and racism till the 1960s, which allowed her to consolidate her position in these fields. The 1970s and the 1980s witnessed India's proactive and consolidated role in the areas of law of the sea, environment, and new international economic order and from the 1990s onwards, one could see India's dominating positions in subject areas concerning international trade, intellectual property rights, and financial institutions.

India's position with regards to the law of the sea confirms the particular importance of positions adopted by India to defend an advantageous position. In order to promote and maintain her dominant position, trade, economic and financial matters should remain at the heart of India's position with international law.

On the one hand, India has remained engaged with international law, but India's non-participation in the NPT and the International Criminal Court suggests that she wants to exempt herself from the obligations that other nations have incurred or wishes to remove certain relationships from the sphere of international law or is trying to push back international legal obligations in these areas.

What has been observed in the state practice of India is a pattern of emerging global power to search for a softer international law in those fields that do not have a general *status quo* orientation. Indian practice shows that it would like to loosen the constraints. Furthermore, the softer law have greater latitude in application, in that they bring their power more easily to bear, both in widening their own freedom of action and in circumscribing rules for others. Indian preference for arbitration reminds us of Britain's position of the 19$^{th}$ century when it preferred arbitration as it helped enforcing an international legal order that was beneficial to her in all regards.

This research study progressed on the assumption that idealism and search for peace and justice decisively influenced the Indian state practice on international law. However, as it proceeded, it became clear that the narrow national interests often, if not always, and the search for a rightful place in the comity of nations (including a permanent position in the Security Council) have remained a dominant guiding force in shaping and practicing international law at global and national level. The analysis shows that, India, at times, remains a reluctant nation to contribute to the global commonwealth when it would adversely affect its core interests and secondly, its international commitments appear to be conditional upon how other major powers give their input to the global issues.

The ideological underpinning which the Indian state borrowed in the time of Mahatma Gandhi and Nehru changed after the war with China, and resurrection of movements for new international economic order and later on with international environment and law of the sea agenda, have transformed the Indian state thinking and those ideals have hardly found significant mention in Indian statements and practice. As India aims to pursue the ideals of international law and achieve a fair and just world order, it will have more and more challenges to accept bigger international responsibilities and increase its profile as a nation with vision and magnanimous global outlook ready to shed away narrow core national interests. The question arises whether India would be willing to share more economic and political responsibilities at international level and meet heightened expectations from developing as well as developed countries to achieve a fair and just world order.

India realizes that if she wants to achieve the position of power in the international relations, then she must follow the policies of Western powers, albeit in a different way in keeping with its ancient tradition and wisdom. India can, illafford to lose her control from the power machinery, which can help her project herself bigger at the international level and allow her to influence the making of international law, as she wants it.

The Indian courts, especially, in view of international trade law, intellectual property rights and similar other subjects, have read the way India ought to progress. The courts have increasingly become realistic in their awakening of India's search for international influence, in these areas. This thesis demonstrates that India will increasingly assert her position in international law, making Indian courts align their views more and more with the state practice. Thus, if the state practice is strongly moving in the direction of realist and pragmatic approach, the Courts are and will continue to follow this executive mood.

This thesis has shown that India's positions and decisions have been made through the lenses of issues that have been of sole importance to India, rather just on the basis of broader developing countries economic and other concerns. India has increasingly been showing its capabilities (instead of hiding as was the case in the few decades immediately after her independence), focusing on her national strength-building and bidding its time set by Nehruvian era. In the initial two decades of her independence, India was quite vulnerable at the domestic as well as at international fronts. India adopted its position accordingly. India made adaptations and policy adjustments with the reality of the USA and USSR dominance during the Cold War era. However, beginning with the economic reforms adopted in early 1990s and the economic results thereof, the position has become highly assertive and as argued above, even aggressive.

### 11.13. India: Alternating between Idealist and Realist Postures

This thesis raised some core issues – India's overall approach to international law; Indian judiciary's stand on issues of international and national legal importance; structures of making and implementation of international law and, the future directions these will converge or diverge.

The disarmament debate strikes a balance between India's idealist posture versus utilitarian policies, in the sense that while it could proudly propagate that it has embraced the Chemical Weapons Convention and fulfilled the obligations, it was also clear that the utility of chemical weapons were outlived, thus, it was a coincidental convergence of idealism and utilitarian approach. CW disarmament was a clear case of promotion of disarmament ideas and alignment of national interests, which India has been practicing since the signing, and ratification of the Convention.

In the field of environment, as the Indian judiciary read into more and more emerging international law, however, early 1990 onwards, it has seen that it needs to balance its proactive and judicial activism approach with India's need for economic development. Hence, certain dichotomies were observed. The international environmental law and climate change chapter not only highlights India's contribution to the emerging norms as a developing country but also shows the active role of the judiciary and two significant phases and role of jurisprudence during these phases, namely, the initial phase of holding international norms high and the latter position in becoming more realist with regards to the need to balance environment and economic development of the country. It can also be concluded that the overall approach of India is flexible and can be molded in consonance with her interests and changing international relations.

The chapter on ICJ dealt with four cases in which India appeared as an applicant or respondent and analyzed how Indian position enabled the Court to clarify principles and procedures on international adjudicatory mechanism. The written statements of India in all advisory proceedings highlighted the high ideals, which India in the initial decades maintained and believed to promote them strongly.

An analysis of the Law of the Sea chapter shows that the jurisprudence that is emerging harmonizes with the Indian position in the negotiations and is solely aligned with her political, security, and economic interests.

It is vital that in view of the increasing expansion and penetration of international law into domestic national life, the Indian courts, not only at Supreme Court and High Court levels, but at local levels too, start taking cognizance of the importance of international law and come to the terms with its overreaching effects on the lives and well-being of natural and judicial persons. The reach and scope of the work of the judiciary in terms of international law and other related issues have begun to expand and will increase considerably. Therefore, preparedness is necessary.

As Hegde concludes, "for the Indian courts the correct sourcing, identification, and interpretation of the constantly emerging international legal norms remains a challenge, and this challenge, indeed, arises from the very nature and process of international lawmaking at the global level. In future, the Indian courts will have to find new approaches and an appropriate interpretative context to deal with the complexities of the relationship between international law and municipal law".[1098]

India's disappointment that its values and positions are not accepted by European nations or Euro-centric international law lead us to believe that India also wants dominant positions in international law. Secondly, in so long as the Indian state practice delivers effective results and expectations of the Indian masses, it will be unrealistic to pay full heed to what the world says. If, to meet their socio-economic-political needs, interests and concerns, European nations used international law, India can and will do the same. Thus, an affirmative assertive approach to international law is necessary for India to achieve its 2020 vision.

By promulgating the *Panchsheel* principles together with China, India intruded into the dominant fold of the First World to alter the vocabulary of modern international law. This was nothing but a state practice. India of 2014 needs similar approaches, to more robustly push the agenda, which would not only garner her interests but the interests of the entire developing world. This is possible, as India is becoming an essential ally player or power in the global policy-forums, be it L'Aquila session of 2009 of G8 to discuss the issues of

[1098] V. G. Hegde, *Indian Courts and International Law* above at p. 77.

financial crisis and international trade and security or civil nuclear deal which it signed with the USA without signing the NPT.

Prior to 1971, it was generally accepted that international law written and unwritten is applied by the Indian courts, i.e. as rules of international law, and not as rules of international law which have been transformed into Indian laws. Consequently, international law, both written and unwritten, is not Indian law, but is law obtaining and operative in India. The Indian judiciary is obliged to apply international law, both written and unwritten, not only when the litigating parties rely on it but also *ex officio*; in other words, the maxim *jus curia novit* applies with respect to international law. It is also to be concluded that primacy of international treaties, conventions, etc. over subsequent Acts passed by the legislature has neither been accepted nor rejected by the Indian Supreme Court. It has been amply shown that the Supreme Court has recognized in several cases the superiority of international agreements over legislation of lower rank.

There is some confusion, as seen in several environmental cases, regarding the Indian Supreme Court and lower courts according priority to customary international law over municipal acts. The thesis shows that the Supreme Court has attempted to remove and has clarified any conflict between international agreements and legislation. There is an apparent dilemma. In some instances, the Court has narrowed the opening up of the Indian legal order to international law as much as possible by cautious interpretations. This research clearly shows the economy of interests as far as India's overall approach to international environment law is concerned.

### 11.14. International Law to Help Achieve India – Developed Nation Status by 2020

India, in order to achieve its vision 2020, including through the use of international law platforms, needs to overcome the past ideological resistance and needs to move towards solutions and new approaches to the new problems and challenges she is facing. India should ensure that international law must correspond to her time, her interest, needs, and concerns and it must satisfy these as an inherent obligation of India to serve the citizens. Certainly, it will face resistance of the past (idealist era), contemporary demands and concerns and interests (of its citizens as well as many developing countries, pragmatic and realist orientation) and projections of the future (an assertive proactive approach).[1099] India will realize that the resolution of the contradictions, which mark this triangle, depends at every moment on the concrete balance of forces in international relations.[1100] Some of these contradictions are clearly seen in the various case studies – disarmament, environment, climate change, refugee law, law of the sea.

India is standing at a critical juncture of history and each initiative and action it will conduct for the realization of her goals will depend on her ability to link up international law with her own interest and the interests of her citizens in the area of private international law; particularly the interests, needs and concerns of her Non Resident Indians (NRIs) and People of Indian Origin (PIOs). India of the 1940s through 1960s could

[1099] It can be seen that a realistic reform which India has been trying to pursue since 1991 is full of all kind of compromises. At times these may go against the objectives and principles of past time and even militate against the underlying values of its civilizations. Some of the notable achievements analysed above show that the outcomes are often a matter of incident rather than something planned deliberately on the basis of set of criteria and commonly shared objectives. To continue to remain realist and pragmatic is the only viable option for the Indian practitioners of international law because whenever there will be a change in the world power equation or change in a particular subject regime or any component of the regime is found to be causing difficulties for the major nations (read vested interest of nation states at large), the expectations full of idealism and values may collapse.

[1100] Milan Sahovic, "Nehru's Ideas and the Future of International Law" 29 *Indian JIL* 1, 94-98 (1989) at p. 95.

think of decolonization, equitable relations among states, nuclear disarmament, but India of 2014 can hardly afford to live with the legacies of her ideological past, as this will serve hardly any purpose in the current matrix of developments of international trade, IPR, climate change, energy laws, and so forth.

India through a right mix of pragmatism and realism needs to create the political groundwork, which will sustain a momentum of development of right international law norms that protect and promote her newly found or inherent interests but which were yet to be materialized, as much as she did during the 1950s and 1960s in the decolonization era. If India together with China promulgated the *Panchsheela* principles as a characteristic of international legal obligations,[1101] India now needs a *Panchsheela* of a new kind which could assure her and many other developing countries a safe, secure and prosperous future and place all nations, small and large, in true sense, in equality among nations.

Several Judges of the Supreme Court of India have made noticeable contribution to the progressive development of international law in the areas of environment, climate change, human rights and refugee law. It can be hoped that judges can do more in other branches of law by expounding their own views on what they consider to be an appropriate principle of international law on a particular matter. As Agrawal suggested way back in 1962, "they should grab every little opportunity of expressing their views on an international law matter, rather than evade the point".[1102] Agarwal drawing from the words of Sir Elihu Lauterpacht, suggests that Indian judges ought to prefer giving full considerations to transnational questions before them. Lauterpacht believed that a "full and considered exposition of the law bearing upon a case was of particular importance in the International Court, which had a certain burden of persuasion to discharge. The detailed elaboration of the law would in turn add to the whole corpus of international law in such a way that the law thus articulated in a particular case would possess far greater importance than the resolution of the dispute itself or the determination of a single crucial point upon which the case might be said to turn."[1103]

Giving significantly higher importance to training and knowledge of international law among Indian judges, Agrawal went on to advocate constituting a special bench in the Supreme Court, which can, in interpreting and applying municipal statutes, perform an international function. Further, he argued for a provision in the constitution for the appointment of ad hoc judges of Indian jurists, well versed in international law to sit on such a bench – members of the bar, international civil servants and international law teachers. This suggestion made way back in 1962 needs a re-examination or a fresh consideration and may well be relevant beyond India as well.

This research has clearly brought out certain pat answers on India's attitude to international law by way of critically analyzing various important areas of international law and also international disputes. What we have also seen is India's relative success in viewing when the international law rules are inconsistent with her

[1101] Drawing an inspiration how Panchsheela contributed to the Declaration on the Principle of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the UN, Sahovic convincingly argues that, 'this Declaration, which was the result of the persistent struggle of the non-aligned countries…represents today the unique generally accepted text containing the interpretation of the Charter's principles as fundamental rules of the universal international law. In point of fact, the activity which had resulted in the formulation of this Declaration was inspired by the idea of codification and progressive development of legal principles of co-existence and the strengthening of their legal nature and obligatory character for all States irrespective of differences between their political and economic systems. Sahovic *supra note* at 96.

[1102] Quoted in S. K. Agrawal *Law of Nations as Interpreted and Applied by Indian Courts and Legislature* at p. 476. *Virendra Singh v. State of UP*, AIR 1954, SC 477; *State of Madras v. Rajagopalan*, AIR 1955, SC 817.

[1103] S. K. Agrawal *Law of Nations as Interpreted and Applied by Indian Courts and Legislature* above at p. 477.

interests; she has attempted to have these changed moderately through soft law (General Assembly resolutions). India of 2014 needs to work harder if she is willing to change the content of the rules of international law to the benefit of herself and many developing countries.

If India perceives the international law in certain areas as anarchic (as many of the current day problems ranging from trade, intellectual property rights to terrorism, to name just a few), she shall go back to the principles of Kautilaya pronounced in the 12th century, according to which it is required that, "the principle of individual responsibility of each sovereign within the collectivity or concern of all sovereigns in the circle of states for the maintenance of a measure of inter-state public order which is essential to diminish the consequences of anarchy; the principle of balance of power within the circle, modified by the evolution towards centralization; the principle of respect for the sovereignty of the dependent or subordinate rulers, and the rejection of *debellattio*, which follows to some extent from inter-dynastic cohesion or solidarity (as rooted in the social structure of society beyond political frontiers); the secular character of inter-state customs and usages which leads to the establishment of a multi-ideological framework, that is to say a system which is not allied exclusively to any particular ideology, creed or civilization, but constitutes a regime of coexistence; the principles relating to the treatment of foreign settlements, which later led to the regime of capitulations; the principle of negotiation to the limit before resort is made to sanctions or force for the solution of conflicts; finally, the preference given to customary law and usages over treaties, which are a limitation to sovereignty and reveal the initial reluctance of states to submit to treaty sanctions".[1104]

The Indian state practice shows that it is increasingly acting on the pragmatic insight that the binding obligation of international law can arise out of a state's perceived responsibilities as well as by its consent. India's contribution to the development of international law is based on the recognition of fundamental interests of the entire international developing world community which gives rise to necessary obligations on her part. In other words, Indian state practice will continue to prefer those rules of international law which are regarded as coterminous with the common good of developing world. This can lead to further argue that Indian state practice shows that India does not consider that rules of international law are hierarchically situated above states and operate downward in respect of them. Rather in view of the sovereignty and independence of states and the concomitant absence of authority above States, Indian state practice proves that rules of international law binding states shall continue to emanate from the free will of those States.

The indeterminacy of international law showing mismatch between reality and the image of international law as practiced by India can be summed up in the following ways.[1105] First, although international law is distinguishable from politics, it is not superior to national state and legal system. Second, the practice shows that India neither considers international law as political neutral or universal in the sense that it treats all states equally. Although achieving such a position remains an avowed vision of India. Third, although there have been no instances of Indian state practice which can be clearly identified as illegal in terms of international law, the line between strict legality and illegality is often blurred in the state practice. Fourth, although India advocates and shows respect for promotion and fostering respect for international law, her practice with regard to compliance with principles, norms and rules at times remain ambivalent when the same are not in her overall

[1104] C. H. Alexandrowicz, "Kautilyan Principles and the Law of Nations" 41 *British Yearbook of International Law*, 301-320 (1968) at p. 318.

[1105] Based on six assumptions made by Shirley Scott, See Shirley Scott, "Beyond Compliance: Reconceiving the International Law-Foreign Policy Dynamic," 19 *Australian YbIL* 35-48 (1998).

interests. Fifth, although international law is quite comprehensive, it does not have solution to all issues and problems that arise between states. This can be seen in the Indian practice too.

In terms of philosophical underpinning to international law practice of India, the research shows that Indian practice has often shun argument based on grounds such as morality, idealism or elements of natural law. Rather, the practice continues to combine elements from all three of the levels of principles, concepts and rules to construct her legal argument and use that as a medium through which to interact with other states in international affairs. In a way, it would not be misplaced to conclude that Indian practice shows that international law should be changed and brought into line with contemporary standards of morality and justice.

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# Samenvatting

## De staatspraktijk van India en de ontwikkeling van het internationale recht: Geselecteerde thema's

### Introductie

Een analyse van de staatspraktijk van India met betrekking tot huidige mondiale aangelegenheden en internationaal recht is één van de meest geëigende methoden om India's huidige en toekomstige beleid en praktische houding ten opzichte van uiteenlopende vraagstukken te evalueren en begrijpen. Deze staatspraktijk heeft een direct en indirect effect op India's aanzien als groeiende wereldwijde en regionale macht. Landen zoals de Verenigde Staten (VS), het Verenigd Koninkrijk (VK), Duitsland, Australië, Japan en Nederland leveren regelmatig rapportages om inzichten en praktijken van hun overheid op het terrein van internationaal publiekrecht te delen. Dit gebeurt aan de hand van officiële stukken en door geschriften van toonaangevende academici in internationaal publiekrecht. Dit wetenschappelijk onderzoek heeft getracht een grondige analyse te geven van het handelen van de Indiase staat via hun uitvoerende, wetgevende en rechterlijke instanties op bepaalde gebieden van internationaal recht. Het betreft het recht van de zee, vluchtelingenrecht, mensenrechten, internationaal milieurecht en klimaatverandering, ontwapening (een casestudy over massavernietigingswapens), internationaal institutioneel recht (VN-hervormingen en G-20) en vreedzame beslechting van internationale geschillen (een casestudy van het Internationaal Gerechtshof). Het onderzoek vat aan met het bestuderen van de opkomst en ontwikkeling van internationaal recht in India vóór de onafhankelijkheid, tussen 1500 tot 1945. Door de staatspraktijk voor de onafhankelijkheid te onderzoeken, probeert het proefschrift bestaande kennis over de Indiase toepassing van internationaal recht te verrijken. Het onderzoek toont aan dat India bijgedragen heeft aan het tot stand brengen van internationaal recht in lijn met India's opkomende status als wereldwijde en regionale macht. Het onderzoek beoogt lezers in staat te stellen te begrijpen hoe een land als India reageert op de enorme ontwikkelingen in het internationaal recht. Bovendien heeft de manier waarop India dit recht toepast reacties uitgelokt van andere staten. Het onderzoek heeft ons de kans gegeven in te zien hoe de rechterlijke instellingen en maatschappelijke organisaties India's praktijken hebben geaccepteerd of van de hand gewezen en hoe hun uitingen het land hebben beperkt in of juist hebben aangezet tot nader handelen. Verder heeft het onderzoek ons geholpen de instrumenten van secondaire rechtsbronnen te begrijpen, naast het harde bewijs van de staatspraktijk, bij het aangaan van internationale verplichtingen.

### India's zoektocht naar internationaal recht

Het proefschrift toont aan dat Indiase beleidsmakers, zoals in de meeste anglophone rechtstelsels, denken dat zij het recht hebben om zelf wetten te kunnen formuleren, inclusief die terzake van internationaal recht. Vooral op de gebieden die wereldwijd in opkomst zijn en die inspelen op post-onafhankelijke behoeften, waaronder sociaal-economische ontwikkeling, heeft India zich erop toegelegd te verzekeren dat andere staten geen wet- en regelgeving opleggen aan het land. Integendeel, India wil zich houden aan door haarzelf gemaakte wetten. Met andere woorden, de Indiase traditie kent een sterke weerstand tegen druk vanuit het buitenland. India heeft op enkele belangrijke gebieden, die in dit proefschrift aan de orde komen, wijzigingen en druk doorstaan en zelf ook vooruitgang geboekt. Het proefschrift toont aan dat de lange traditie van India laat zien dat zij steeds heeft gepleit voor en ingestemd heeft met de invoering van en naleving van internationale regels, met volledige

eerbiediging van het bestaan van andere beschavingen, en in de fase na de onafhankelijkheid, het bestaan van andere naties. Alhoewel toen een wereldwijde organisatie en mondiale rechtsstelsels nog niet bestonden, heeft India door de eeuwen heen goede tradities van internationale regelgeving gevestigd zonder in conflict te zijn gekomen met andere staten. Uit de historische praktijk van India komt duidelijk naar voren dat zij nooit geprobeerd heeft om de op haar rustende juridische verplichtingen op te leggen aan andere staten. Het proefschrift laat zien hoe en waarom er spanningen bestonden tussen India's vroegere en huidige praktijken, vooral sinds de jaren '70 en belangrijker nog na 1990. Het proefschrift toont aan de hand van voorbeelden aan dat India consistent is geweest in het toepassen van fundamentele internationale beginselen zonder veel inhoudelijke wijzigingen. Daarnaast is er een stilzwijgende overeenstemming tussen de uitvoerende en rechterlijke macht van India, vooral op het gebied van sociaal-economische ontwikkeling, dat internationaal recht en wereldwijde instellingen superieur zijn ten opzichte van nationale. Dit kan het land helpen op een juiste en passende wijze een mondiale positie in te nemen. Voor de sociaal-economische ontwikkelingsdoeleinden, en dan met name die op het terrein van milieu en mensenrechten, wordt internationaal recht door de Indiase rechterlijke macht gezien als een cruciale gedragscode. De Indiase staatspraktijk laat ook nog eens één van de fundamentele pijlers zien van het internationaal recht: namelijk dat internationaal recht uit voorgeschreven regels bestaat, gemaakt door en voor de staten, en waarvan de inhoud en toepassing meestal open staan voor een eerlijke discussie.

**De houding van India ten opzichte van een fundamentele definitie van internationaal recht**

Er bestaan bijna geen verhandelingen die analyseren wat India's houding is ten opzichte van een specifieke definitie van internationaal recht. India onderschrijft vooral de beginselen en normen geformuleerd door de Volkenbond (India was toen nog niet volledig onafhankelijk, kreeg wel de status als lid toegekend) en de VN en de vele honderden andere internationale organisaties waar India lid van is.

De belangrijkste reden voor de aanvaarding en naleving van internationaal recht is dat India in haar staatspraktijk haar affiniteit laat zien met een echt systeem van internationaal recht, vergelijkbaar met de nationale rechtsorde met inhoudelijke en procedurele regels. India's positie op bilateraal en multilateraal niveau benadrukt nogmaals haar onafhankelijke soevereine status en haar recht om internationaal recht zelf te interpreteren. Op het gebied van milieu, klimaatverandering, mensenrechten en vluchtelingen, beschouwt de rechterlijke macht in India beslissingen en verklaringen van mondiale instellingen vaak als bindend op nationaal niveau.

**Bijgevolg heeft de Indiase rechterlijke macht vaak geëist dat de uitvoerende en wetgevende macht zich houden aan internationale regels en opvattingen**

Voor wat de Indiase grondwet en het internationaal recht betreft, is er een eenduidig standpunt onder academici en wetenschappers dat internationaal recht niet een integraal onderdeel uitmaakt van de Indiase grondwet en dat de verplichtingen van India beperkt zijn tot het internationaal gewoonterecht en toepasselijke bindende verdragen. Alhoewel geen specifiek onderscheid wordt gemaakt tussen de politieke machten, de rechten en verplichtingen van enerzijds de federatie en anderzijds de individuele staten, zoals in het geval van de VS, bevestigen zowel de Indiase grondwet als de staatspraktijk zonder uitzondering dat de Indiase unie zich uit met

één stem op internationaal niveau. De Staten van India hebben respect getoond bij het naleven van internationaal rechtelijke normen zoals aanvaard door de Indiase unie. Er zijn geen incidenten gemeld, zoals in het geval van de VS, waarbij de unie en de individuele staten verschillende stellingen hadden of een andere toepassing praktiseerden op eenzelfde onderwerp van internationaal recht.

**Onderzoeksvragen**

Deze studie onderzoekt de bijdrage van de Indiase staatspraktijk aan de ontwikkeling van internationaal recht. Het centrale onderzoek richt zich op hoe de staatspraktijk van India bijgedragen heeft tot de consolidatie van het internationaal recht bij internationale en nationale aangelegenheden. Met een studie van de vele veranderingen in de internationale betrekkingen, de opkomst van en de focus op een wereldwijde machtsstructuur, en de impact daarvan op internationaal recht, heeft het onderzoek bewezen dat de Indiase uitoefening van internationaal recht vergelijkbaar is met de uitoefening van die van een dominante staat op het gebied van internationaal recht. Dit onderzoek heeft zowel de valkuilen als de krachten van de Indiase staat geïdentificeerd die een beslissende invloed hebben gehad op de vorming van internationaal recht.

**Onderzoek en wetenschappelijke debatten over de Indiase staatspraktijk**

De theorieën over de onafhankelijkheid en literatuur over India's positie ten opzichte van internationaal recht ontberen dikwijls objectiviteit vanwege de nadruk die gelegd wordt op de uitleg en analyse van de Indiase positie vanuit een perspectief van post-kolonialisme en theorieën van uitbuiting. Om die reden werd een analyse met een frisse blik essentieel bevonden omdat de structuren, allianties, bronnen van voor- en na de onafhankelijkheid en recente decennia enorme veranderingen hebben ondergaan op zowel nationaal als internationaal vlak. Dit onderzoek heeft getracht te laten zien of de benadering van internationaal recht van een belangrijk ontwikkelingsland nieuwe hoop biedt aan academici om te zien of de aspiraties van ontwikkelingslanden kansen bieden voor wetenschappelijke werken die nieuwe betekenis geven en meer respons krijgen van de Westerse naties. Het is zeker te hopen dat dit zo is omdat, alhoewel de structuur van de wereldmacht nog steeds onevenwichtig is, de stemmen vanuit ontwikkelingslanden in debatten over internationaal recht worden aangemoedigd en nadrukkelijk gelezen.

Het onderzoek bestudeert de directe en indirecte rol van maatschappelijke organisaties in de vorming van de positie van India ten opzichte van internationaal recht. De maatschappelijke organisaties zijn niet alleen eindgebruikers maar ook effectieve platformen om het staatsapparaat aan te moedigen om een specifieke positie in te nemen op mondiaal niveau die direct voordeel kan opleveren voor de belangen van de staat en de bevolking op lange termijn. De staatspraktijk heeft een directe invloed op de dagelijkse gang van zaken van deze instituten en individuen. Daarom heeft het onderzoek geprobeerd om de rol van de civiele samenleving in te schatten bij het beïnvloeden van de staatspraktijk. Een analyse van de staatspraktijk van India geeft ons inzicht in de werking van internationaal recht op micro niveau.

De buitenlandse politiek is één van de belangrijkste bronnen om de toepassing van internationaal recht door de staat te begrijpen. Zoals Chimni uitlegt, India "zag zichzelf nu als een opkomende macht en begon met het veranderen van haar buitenlandse politiek". Haar groeiende profiel doet India opnieuw geloven dat zij het internationaal recht en instellingen in haar voordeel kan gebruiken, echter alleen als dit uitgaat van haar eerdere buitenlandse politieke denken en strategie. In dit opzicht heeft de Indiase staatspraktijk een ingrijpende

verandering ondergaan van idealistisch (gedurende het Gandhi en Nehru tijdperk) tot een meer realistische en pragmatische aanpak sinds eind jaren ‘70 die gelijkheid onder de naties nastreeft, en vooral onder de machtigste. De staatspraktijk van India laat duidelijk zien dat zij de middelen die tot haar beschikking staan zal aanwenden om zo invloed uit te oefenen op de uitleg van bestaand en het vormen van nieuw internationaal recht teneinde de beoogde resultaten te behalen.

**Onderzoeksgebieden**

Dit proefschrift heeft getracht India’s staatspraktijk te analyseren op een aantal geselecteerde gebieden. Het heeft eerst de staatspraktijk van India geanalyseerd ten tijde van de kolonisatie, inclusief de gehele fase voor de onafhankelijkheid van 1500 - 1945. Dit heeft geholpen om de verschillen en overeenkomsten te identificeren van de Indiase staatspraktijk van de fase voor de onafhankelijkheid en die daarna. Vanaf het moment dat India onafhankelijk werd, onderzoekt het proefschrift vooral de Indiase staatspraktijk op het gebied van mensenrechten, het internationaal humanitair recht, het vluchtelingenrecht, milieurecht, klimaatverandering, ontwapening - een casestudy over chemische massavernietigingswapens, het recht van de zee, het internationaal institutioneel recht met een focus op VN-hervormingen en de G-20 en India en het internationale geschillenbeslechting met een focus op het Internationale Gerechtshof.

**De belangrijkste bevindingen**

Het proefschrift heeft laten zien hoe de staatspraktijk van India in lijn probeert te zijn met de structuur van internationaal recht, terwijl de staat normaliter kritiek heeft op de bestaande structuur van het internationaal recht. Verder toont het onderzoek aan dat de staatspraktijk van India heen en weer slingert tussen twee kaders: enerzijds de regels van het internationaal recht die de staatsvrijheid beperken en anderzijds het toegekend krijgen van staatsbevoegdheden die kunnen helpen om sociaal idealisme te realiseren. Allereerst is het van belang te constateren dat sinds 1945 er een sterke ontwikkeling is geweest van het stelsel van internationaal publiekrecht op diverse terreinen. Er is een enorme toename geweest in het aantal onderwerpen die door het internationaal recht worden bestreken. In deze context is het van belang te realiseren dat India zelf heeft bijgedragen aan de groei van een herkenbaar rechtsstelsel op bepaalde gebieden, zoals mensenrechten, vluchtelingenrecht, recht van de zee, internationaal milieurecht en internationale organisaties. Een van de belangrijkste thema's die als een rode draad door de hoofdstukken loopt is dat de staatspraktijk van India vergeleken kan worden met de staatspraktijk van een dominante regionale macht op het gebied van internationaal recht. India heeft een patroon laten zien van gebruikmaking, terugtrekking uit en afwijzing van de eurocentrische periode (oftewel, de koloniale tijden) en hervorming van internationaal recht om aan haar belangen te voldoen. India heeft ook verzet heeft aangetekend tegen de internationale idealen en praktijken die haar zouden beperken in het nastreven van macht op internationaal vlak en heeft andere, voor haar minder schadelijke praktijken bevorderd waarmee hetzelfde resultaat bereikt kan worden. Met andere woorden, het onderzoek toont aan dat India het internationaal recht heeft gebruikt als een bron van legitimiteit maar tegelijkertijd zeer alert is gebleven om zichzelf niet als dominante macht te laten overkomen. De analyse van India’s staatspraktijk op zeven onderdelen - het recht van de zee, mensenrechten, internationaal vluchtelingenrecht, internationaal milieurecht en klimaatverandering, ontwapening, VN-hervormingen, en de internationale geschillenregeling - bevestigt deze centrale hypothese.

India heeft haar strategie aangepast om de nodige veranderingen in te voeren en zij heeft deze benadering consistent toegepast in de verschillende perioden, zowel voor als na de onafhankelijkheid.

Het onderzoek laat zien dat er een behoorlijke toename is geweest in het aantal spelers en instellingen die op nationaal niveau betrokken zijn bij het vormen van internationaal recht alsmede bij de uitvoering en de controle daarvan. De toename en de invloed van deze spelers is evenwel niet symmetrisch en niet hetzelfde op alle gebieden die onderzocht zijn. Desalniettemin zullen niet-statelijke actoren, vooral maatschappelijke organisaties, een actieve rol blijven spelen in het algehele beleid van de Indiase staat. Hoe de Indiase overheid, net als elke andere staat, ongekende impact ervaart van het internationale recht op het nationale rechtssysteem komt duidelijk naar voren uit de verschillende case studies. Het onderzoek toont aan dat India actief bijgedragen heeft aan de snelle groei van het internationaal rechtssysteem waarbij veel nadruk is gelegd op het versterken van de effectiviteit van bestaande verdragsregelingen. De Indiase benadering was vooral gericht op de consolidatie van bestaand internationaal recht in plaats van steeds nieuwe verdragen te sluiten. Deze benadering is vooral goed te zien in het internationale milieurecht, en dan met name betreffende klimaatverandering, alsmede ontwapening en recht van de zee. Maar dit kan niet eenduidig over alle regimes gezegd worden. Bijvoorbeeld, op het gebied van vluchtelingenrecht en mensenrechten, duurt de conceptuele strijd tussen de Indiase visie op het recht en die van Westerse landen voort.

Hieronder volgen enkele thematische conclusies die gebaseerd zijn op de analyse van de Indiase staatspraktijk op de verschillende terreinen. Allereerst, het rechtsstelsel en de uitvoerende instanties in India hebben ieder een te onderscheiden benadering van het internationaal recht. De benaderingen overlappen veelal, maar komen soms ook in conflict met elkaar. Ten tweede, de staatspraktijk van India toont eenduidig aan dat sinds de onafhankelijkheid de algemene benadering tot internationaal recht vergelijkbaar is met die van opkomende mondiale of regionale machten. Ten derde zal India, evenals landen in een vergelijkbare positie, zich zowel proactief als ook reactief opstellen ten aanzien van strategieën om resultaten te bereiken die dienstbaar zijn aan haar nationale belangen. Ten vierde, India zal in het algemeen het Internationaal Gerechtshof en internationale hoven en tribunalen als het middel bij voorkeur om internationale geschillen op te lossen blijven vermijden. Ten vijfde, wat India bereikt heeft in de tweede ronde van de VN hervormingen zijn aantoonbare resultaten van haar geduld en aanhoudende diplomatieke en politieke strategieën. Ten zesde, alhoewel India tot dusver niet succesvol is geweest in het permanent lid worden van de Veiligheidsraad, is de kans dat zij lid wordt groter dan voorheen. Bijvoorbeeld ingeval van een derde serie hervormingen ter gelegenheid van het 75-jarig bestaan van de VN in het jaar 2020. Ten zevende, India's politieke en praktische benadering weerspiegelt dat India alle middelen en deskundigheid zal inzetten om gezag te winnen en te behouden, vooral in de regio van de Indische Oceaan maar ook in alle oceaanregimes. Als achtste punt, dankzij de scherpe scheiding tussen twee uitersten van de staat - de uitvoerende en rechterlijke macht - en ondanks pogingen tot verzoening tussen beide, zal India's positie ten opzichte van internationaal recht in de komende tijd waarschijnlijk minder stabiel en voorspelbaar zijn. Als negende punt, India zal blijven vasthouden aan haar standpunt om niet-discriminatoire en echte ontwapeningsinstrumenten in te zetten en tegelijkertijd proberen haar ruimte open te houden om te manoeuvreren in toekomstige bilaterale en multilaterale ontwapeningsonderhandelingen. Als tiende zal India alle mogelijkheden die internationaal recht te bieden heeft gebruiken om haar nationale belangen te behartigen. Op de elfde plaats zullen zowel idealistische als realistische benaderingen voortgezet worden teneinde India's fundamentele filosofische positie vorm en uitvoering te geven op het gebied van internationaal recht. De Indiase

staatspraktijk zal dienovereenkomstig wijzigen. Ten slotte zal India een status en macht willen nastreven die vergelijkbaar is met die van de ontwikkelde geïndustrialiseerde Westerse landen. Daartoe zal zij voorzichtig aan steeds meer economische, militaire, politieke en soft-power invloed verwerven en ook uitoefenen. De algemene analyse van het onderzoek toot aan dat internationaal recht India een effectieve mogelijkheid heeft gegeven om diverse resultaten te bereiken en daarom zal India alle potentiële daarmee gepaard gaande macht van internationaal recht blijven gebruiken om haar positie als een machtig lid van de internationale gemeenschap verder te versterken .

**Specifieke aanpak van internationaal recht door de rechterlijke en de uitvoerende macht**

Dit onderzoek laat een samengaan zien van collectieve en gefragmenteerde bijdragen van verschillende nationale spelers en instituten en tezamen vormen zij de staatspraktijk van India. Het hooggerechtshof, als exponent van de codificatie en progressieve ontwikkeling van internationaal recht in India, heeft een bijzonder belangrijke rol gespeeld. De bijdrage van de rechterlijke macht op het gebied van internationaal milieurecht , mensenrechten en vluchtelingenrecht heeft beslist meer invloed dan die van de uitvoerende macht. Daarentegen heeft de uitvoerende macht op het terrein van het recht van de zee de leiding in het formuleren en richting geven aan India's positie in mondiale fora. De Indiase rechterlijke macht, alhoewel van huis uit conservatief en voorzichtig, heeft vaak verschillende methoden bedacht om effect op nationaal niveau te geven aan nieuw opkomende beginselen van internationaal recht. Deze bijdrage van de Indiase rechterlijke macht wijst erop dat zij goed voorbereid is om de complexiteit aan te kunnen van een immer veranderende internationale en nationale orde die zich mede vormt in reactie op nieuwe internationale juridische kwesties zoals piraterij, intellectuele eigendomsbescherming en internationale handel.

**De onafhankelijke praktijk van India: een groeiende macht op het terrein van internationaal recht**

De Indiase positie laat bijvoorbeeld zien dat liberalisering van de handel goed kan zijn voor de ontwikkeling van het land maar ook dat de multilaterale handelsregels niet goed zijn afgestemd op de behoeften van de ontwikkelingslanden, waaronder India. De positie van India toont aan dat zij een beredeneerde en een voor India specifieke weg van liberalisering nastreeft, die rekening houdt met haar specifieke economische en sociale beperkingen als ook haar capaciteit om zich aan te passen. Verder laat de algehele analyse over de positie van India ten opzichte van milieu, klimaatverandering, mensenrechten en handelsliberalisering zien dat India pleit voor een duurzame ontwikkeling waarbij alle nodige aandacht besteed wordt aan de invloed die de omgeving en maatschappij hebben op de economische openstelling van de Indiase markt. Uit het onderzoek blijkt duidelijk het toegenomen zelfvertrouwen van India in de relatie met de Westerse landen bij onderwerpen zoals klimaatverandering, handelsbesprekingen en recht van de zee.

**Het gebruik en effectiviteit van proactieve en reactieve benaderingen om gewenst resultaten te behalen**

Er wordt dikwijls gesteld dat India een reactieve, versnipperde en ad hoc aanpak heeft in belangrijke internationale zaken. Het proefschrift laat zien dat het internationale rechtsstelsel zelf vaak een dergelijke aanpak veroorzaakt. Men kan bij internationaal recht niet een resultaat-gegarandeerde aanpak hebben en daarom is deze gefragmenteerde ad hoc-benadering maar al te vaak de voorkeursoptie van nationale beleidsmakers.

**India zal het Internationale Gerechtshof blijven vermijden als een middel om geschillen te beslechten**

India's positie met betrekking tot het Internationale Gerechtshof als partij bij een geschil en als partij bij het Statuut van het hof suggereert dat het land steeds minder geneigd zal zijn haar toevlucht tot dit Hof te nemen om een internationaal geschil te beslechten. Wel zal India actief bijdragen aan de adviesprocedures om haar nationale belangen en beleid op lange termijn te beschermen en te bevorderen.

**Geduld en vasthoudendheid bij het nastreven van VN- hervormingen**

Voor wat betreft 'het toekomstig beleid ten aanzien van internationale organisaties, zal India blijven streven naar multilaterale oplossingen voor ontwikkelingsvraagstukken. Een dergelijke positie draagt direct bij aan haar consolidatie van leiderschap in de wereld op dat belangrijke punt.

**Permanent lidmaatschap van de Veiligheidsraad: kans op succes groter dan ooit tevoren**

India zal haar inspanningen blijven voortzetten om als permanent lid tot de Veiligheidsraad toe te mogen treden èn om structurele veranderingen bij internationale financiële instellingen teweeg te brengen. Echter, haar inspanningen zullen stuiten op belangrijke beperkende factoren en zij zal deze moeten overwinnen. Op het gebied van de Veiligheidsraad, heeft India verzet overwonnen van de Consensus Groep die bestaat uit onder meer Italië, Argentinië en Pakistan. Op het gebied van milieu en ontwikkeling zal India sterke weerstand ondervinden van belangrijke geïndustrialiseerde landen. Het proefschrift pleit ervoor dat de sleutel tot VN-hervormingen niet ligt in het proberen te innoveren maar meer in het begrijpen waarom initiatieven uit het verleden mislukten en hoe de strategieën en tactieken om resultaten te behalen verbeterd kunnen worden. Onafhankelijke wetenschappers en commissies uit India zouden moeten bedenken hoe bestaande voorstellen vooruitgang zouden kunnen boeken in plaats van steeds nieuwe te ontwikkelen met weinig kans op implementatie. In dit verband zou het inderdaad nuttig zijn om Indiase wetenschappers en denktanks onderzoek te laten verrichten om instrumenten, strategieën en kaders te analyseren en aan te bevelen die kunnen bijdragen aan de algemene effectiviteit van de positie van India.

**India zal mensenrechten op haar eigen manier en in haar eigen tempo blijven doen**

Voor wat betreft de toepassing en naleving van mensenrechten staat India voor een uniek dilemma. De analyse van primaire rechterlijke beslissingen, grondwettelijke en wettelijke bepalingen en overheidsverslagen, tezamen met die van maatschappelijke organisaties, leveren een eenduidig beeld. De analyse laat zien hoe en waarom filosofische verschillen bestaan en zullen blijven bestaan tussen India en de Westerse landen en gerechtshoven. De staatspraktijk van na 1970 laat zien dat India steeds gevoeliger werd ten aanzien van de toenemende eisen van Eurocentrische stelsels over mensenrechten en dat zij in staat is geweest om op haar eigen manier invulling te geven aan dergelijke mensenrechten. India was één van de sterke voorstanders van de Universele Verklaring van de Rechten van de Mens. De ervaring van India laat zien dat, zoals ook de ervaring van meerdere landen in Azië en Afrika, er verwarring is omtrent de exacte aard en rol van de rechten van de mens binnen de huidige internationale structuur en het internationaal recht. India's eigen manier van omgang met problemen en uitdagingen bij de tenuitvoerlegging van sancties met betrekking tot mensenrechten is ook een bron van inspiratie geweest van mensenrechtenstelsels in de Afro-Aziatische landen. De ethische normen van de mensenrechten, veelal verwoord en opgelegd door de Europese naties na de Tweede Wereldoorlog, verschillen

aanzienlijk van het Indiase beleid en de toepassing in de context van haar eigen maatschappelijke geschiedenis. Het Europese systeem, grotendeels gebaseerd op positieve rechten die gevonden kunnen worden in een wettelijk systeem, waardeert misschien onvoldoende het belang dat India hecht aan morele rechten en plichten, die sterk afhangen van de perceptie van degene die het bestaan van een specifiek recht zoekt. Afgezien van deze maatschappelijke en natuurlijke benadering van het recht, ontmoet het Indiase mensenrechtenstelsel ook een dilemma omdat zij moet werken met beleidsgerichte mensenrechtengroeperingen die veelal juist de benadering van Westerse landen volgen. Het onderzoek laat zien hoe de op het Westen georiënteerde mensenrechtengroeperingen, die een groot aantal relevante factoren in het proces van de ontwikkeling willen identificeren en daarbij ook een rol zien voor respect voor mensenrechten, in staat zijn geweest een belangrijke bijdrage te leveren aan de Indiase beleidsvorming, zowel bij uitvoerende als rechterlijke instellingen.

**Internationaal milieurecht: Spanning tussen de uitvoerende en rechterlijke macht**

De analyse van de staatspraktijk van India en de rol van de rechterlijke macht op het gebied van internationaal milieurecht leidt tot de conclusie dat India niet alleen verdragen en gewoonten als bron van internationaal recht ziet maar ook beginselen van internationaal recht. De Indiase rechtbanken zijn proactief geweest en hebben bij gelegenheid rechterlijk activisme bedreven. Meerdere casestudies tonen aan dat de Indiase rechtbanken nieuwe deuren hebben geopend om internationaal juridische normen toe te laten en af te stemmen, bijvoorbeeld met grondrechten. Deze combinatie van grondrechten en internationaal juridische normen hebben een krachtige jurisprudentie gevormd, met name op het terrein van het milieu. De rechtelijke macht heeft vooral belang gehecht aan het principe van duurzame ontwikkeling. De Indiase rechtelijke macht beseft goed dat India een ontwikkelingsland is dat de behoeften van een steeds groter wordende bevolking moet vervullen zonder af te doen aan het BBP (bruto binnenlands product) en het algemene economische proces. De rol van de Indiase rechterlijke macht in het vormen van milieurechtelijke jurisprudentie vormt een voorbeeld dat gevolgd kan worden door andere landen in vergelijkbare situaties. Het is verder aannemelijk dat maatschappelijke organisaties, die het algemeen belang willen dienen en opkomen voor milieuzaken, de spanning tussen de rechterlijke en uitvoerende macht verder zullen kunnen opvoeren.

**India's pleidooi voor een niet-discriminerend ontwapeningsinstrument terwijl zij ambivalent is in haar eigen staatspraktijk**

Uit de algemene ondersteuning van India aan het verdragsregime voor chemische wapens (CWC) kan men concluderen dat het in algemene zin haar volledige ondersteuning zal geven aan elk multilateraal wapentoezicht en ontwapeningsinstrument dat gelijksoortige bepalingen heeft.

**Internationaal recht biedt India een gunstig middel om haar nationaal belangen te behartigen**

Als bescherming en bevordering van het nationaal belang de meest belangrijke leidraad voor een staat is, dan heeft de houding en praktijk van India laten zien dat zij op zich de moeite heeft gedaan haar staatspraktijk aan te passen aan de heerschappij van het internationaal recht. De staatspraktijk van India laat een interessant patroon zien van gebruik van de instrumenten van het internationaal recht (bijvoorbeeld recht van de zee, CWC ontwapening) dan wel terugtrekking (belangrijk voorbehoud bij de verplichte rechtsmacht van het Internationaal Gerechtshof volgend op de *Right of Passage case*) of zelfs afwijzing. Regelmatig wordt internationaal recht

omgezet in nationale juridische instrumenten die beter plaats bieden aan formele hiërarchieën (milieurecht - duurzame ontwikkeling, klimaatverandering). India, zoals meerdere dominante Westerselanden, de Rusland, China en Japan, gebruikt internationaal recht ook als een instrument om weerstand te bieden tegen ongewilde en ongewenste heerschappij in de internationale betrekkingen. Het onderzoek stelt ons dan ook in staat een belangrijke conclusie te trekken, nl. dat India, zoals elk ander groot land, internationaal recht gebruikt als verordening, pacificatie en stabilisatie van haar voorname rol op het wereldtoneel en dat zij bij het tegenkomen van hindernissen over gelijkheid en stabiliteit die bij internationaal recht ontstaan, onverschillig blijft of zich terugtrekt. In de staatspraktijk van India is een patroon te zien van een opkomende mondiale macht die zo nodig een zoektocht naar een versoepeld internationaal recht onderneemt op gebieden die niet de status quo al algemeen uitgangspunt hebben.

De staatspraktijk van India laat zien dat het aan minder beperkingen onderhevig zou willen zijn. Vandaar de zoektocht naar versoepelde regelgeving waardoor haar macht gemakkelijker uit te dragen is als ook naar het verruimen van haar vrijheid om acties te ondernemen. De voorkeur van India voor bemiddeling herinnert ons aan de positie van Engeland in de 19e eeuw, toen dit land dikwijls bemiddeling verkoos als het instrument bij het toepassen van de internationale rechtsorde die dit land in alle opzichten ten goede kwam.
Een van de veronderstellingen van dit onderzoek was dat idealisme en de zoektocht naar vrede en rechtvaardigheid van doorslaggevende invloed waren op de staatspraktijk van India met betrekking tot internationaal recht. Duidelijk werd echter dat het meer beperkte nationaal belang en het zoeken naar een rechtmatige plaats in de gemeenschap van landen (inclusief een permanente positie in de Veiligheidsraad) vaak, zo niet altijd, een dominante leidraad zijn gebleven bij het vormen en uitvoeren van internationaal recht op wereldwijd en nationaal niveau. De analyse laat zien dat India regelmatig terughoudend blijft bij het bijdragen aan een mondiaal gemenebest als dat haar belangen nadelig zou kunnen beïnvloeden. Voorts lijkt haar internationale betrokkenheid dikwijls ook mede afhankelijk te zijn van hoe andere grootmachten bereid zijn bij te dragen aan het oplossen van wereldproblemen.

De ideologische onderbouwing die de Indiase staat ten toon spreidde ten tijde van Mahatma Gandhi en Jawaharlal Nehru veranderde na de oorlog met China. Dergelijke groeperingen herrezen bij de campagne voor een Nieuwe Internationale Economische Orde en later met de agenda voor nieuw recht van de zee en internationaal milieurecht. Dit heeft de manier van denken in India veranderd waarbij gaandeweg diezelfde idealen in de praktijk nu bijna niet meer genoemd worden . Enerzijds probeert India nog zeker de idealen van internationaal recht als ook een eerlijke en rechtvaardige wereld orde na te streven. Anderzijds is het druk doende om grotere internationale verantwoordelijkheid op zich te nemen en zich duidelijker te profileren als een land met een visie op de wereldeconomie, klaar om zich te ontdoen van bekrompen nationale belangen. De vraag rijst daarbij of India in staat en bereid zal zijn om daadwerkelijk meer economische en politieke verantwoordelijkheid op internationaal niveau op zich te nemen en aan de hoge verwachtingen kan voldoen om een eerlijke en rechtvaardige wereldorde te bereiken.

**India: afwisselende houding tussen idealist en realist**

Gezien de toegenomen uitbreiding en penetratie van internationaal recht in het nationaal gebeuren, is het van belang dat de Indiase rechtbanken, en niet alleen op het niveau van het Hooggerechtshof en de Hoge Raad maar ook op lokaal niveau, kennis nemen van het belang van internationaal recht en het vergaande effect op het leven en welzijn van natuurlijke en rechtspersonen. De rol van de rechterlijke macht met betrekking tot internationaal recht en andere relevante kwesties is toegenomen en zal nog fors blijven toenemen. Daarom is paraatheid noodzakelijk. Er bestaat enige verwarring, zoals dat in meerdere milieuzaken het geval was, over het Indiase Hooggerechtshof en lagere rechtbanken die wel of niet voorrang geven aan internationaal gewoonterecht in plaats van aan lokale wetgeving. Het onderzoek toont aan dat het Hooggerechtshof heeft geprobeerd om conflicten daarover uit de weg te ruimen en op te helderen hoe de verhouding is tussen internationale verdragen en de nationale en lokale wetgeving. Er is een duidelijk dilemma. In enkele gevallen heeft de rechtbank het openstellen van de Indiase rechtsorde voor de toepassing van internationaal recht zoveel mogelijk beperkt door het maken van voorzichtige interpretaties.

**De rol van het internationaal recht om India te helpen de status van ontwikkeld land in 2020 te bereiken**

India moet, om de status van ontwikkeld land in 2020 te bereiken, internationale platforms gebruiken, de ideologische weerstand uit het verleden overwinnen en zich richten op oplossingen voor nieuwe problemen en uitdagingen die zij op deze weg tegenkomt. India moet zich ervoor inzetten internationaal recht dienstbaar te maken aan haar belangen, behoeften en zorgen, met daarbij de onlosmakelijke verplichting om haar burgers te dienen. India zal onder andere weerstand en uitdagingen ontmoeten op basis van het verleden (uit de idealistische tijd), moderne eisen, zorgen van haar burgers en andere ontwikkelingslanden. Daarbij is een pragmatische en realistische oriëntatie vereist, met een aktieve toekomstverkenning (een assertieve proactieve benadering). India zal zich realiseren dat de oplossing van de ogenschijnlijke tegenstrijdigheden, die deze driehoek markeren, mede afhankelijk is van de concrete machtsbalans in de internationale betrekkingen.

India bevindt zich in een kritieke fase van de geschiedenis waarbij elk initiatief en elke actie die zij onderneemt ten behoeve van de realisatie van haar doelen afhankelijk is van haar vermogen om internationaal recht te laten aansluiten op haar eigen belangen en die van haar burgers.

India moet een solide politieke basis scheppen door een juiste mix van pragmatisme en realisme, die steun geeft aan de ontwikkeling van die normen van internationaal recht die haar inherente en nieuwe belangen beschermt. Destijds kondigden India en China de *Panchsheela*-beginselen af als een raamwerk van internationale juridische verplichtingen. Nu heeft India een nieuw soort *Panchsheela* nodig dat haar, en vele andere ontwikkelingslanden, verzekert van een veilige, zekere en welvarende toekomst en van gelijkheid tussen landen, klein of groot, in de ware zin van het woord.

Als India internationaal recht op enkele terreinen ziet als anarchistisch (zoals een aantal van de hedendaagse problemen, variërend van handel, intellectuele eigendomsrechten tot terrorisme, om er een paar te noemen), zal zij zich kunnen beroepen op de principes van *Kautilaya*, uitgesproken in de 12e eeuw. Deze vereisen dat "iedere soevereiniteit individuele verantwoordelijkheid heeft binnen de collectiviteit en de zorg van alle soevereine staten in de cirkel van staten nodig is voor het onderhoud van de publieke orde van allen als maatstaf tussen staten om de consequenties van anarchie te verminderen; Het principe van de machtsbalans binnen de cirkel, aangepast door de evolutie richting centralisatie; het principe van respect voor de soevereiniteit

van de afhankelijke en ondergeschikte regels, en het weigeren van *debellatio*, die tot op zekere hoogte de samenhang tussen de dynastieën of solidariteit volgt (zoals geworteld in de sociale structuur van de maatschappij buiten de politieke grenzen); het seculiere karakter van de gewoontes en gebruiken tussen staten dat leidt tot het ontstaan van een multi-ideologisch kader, dat wil zeggen het systeem dat niet exclusief verbonden is aan een specifieke ideologie, geloof of beschaving, maar een regime gevormd door co-existentie; de principes die betrekking hebben op de behandeling van buitenlandse nederzettingen, die later geleid hebben tot het regime van capitulatie; de principes van onderhandeling die leiden tot een vreedzame oplossing in plaats van over te moeten gaan op sancties, geweldgebruik of conflicten; en uiteindelijk de voorkeur die gegeven wordt aan gewoonterecht en het gebruik van verdragen die een beperking zijn van soevereiniteit".

De Indiase staatspraktijk laat zien dat India in toenemende mate handelt op basis van het pragmatisch inzicht dat bindende verplichtingen van internationaal recht kunnen ontstaan uit zowel de door de staat geïnterpreteerde verantwoordelijkheden als ook op basis van haar instemming. India's bijdrage aan de ontwikkeling van internationaal recht is gebaseerd op de erkenning van de fundamentele belangen van de gehele internationale gemeenschap. Daarbij zal de Indiase staatspraktijk de voorkeur blijven geven aan die regels van het internationaal recht die gezien worden als belanghebbend voor het algemeen welzijn van de ontwikkelingslanden. Dit kan leiden tot de opvatting dat India de regels van het internationaal recht niet noodzakelijkwijs als hiërarchisch hoger beschouwt dan die van nationaal recht. De soevereiniteit en onafhankelijkheid van staten en tegelijkertijd de afwezigheid van centraal gezag erboven, maken dat India in haar staatspraktijk uit zal blijven gaan van de vrije wil bij het vormen en toepassen van de regels van internationaal recht die staten met elkaar moeten verbinden.

De onbepaaldheid van het internationaal recht met ook de scheve verhouding tussen de realiteit en het imago van internationaal recht zoals toegepast door India kan op de volgende manieren worden samengevat. Allereerst, ook al is internationaal recht te onderscheiden van politiek, het is niet superieur en leidend voor de nationale staat en zijn rechterlijk systeem. Ten tweede toont de staatspraktijk van India aan dat zij internationaal recht niet beschouwt als politiek neutraal noch universeel in de zin van het gelijkwaardig behandelen van alle staten. Het bereiken van een dergelijke positie is een lang gekoesterde wens van India waaraan zij toegewijd werkt. Ten derde, alhoewel er weinig of geen incidenten zijn in de Indiase staatspraktijk die duidelijk bestempeld kunnen worden als onrechtmatig op basis van het internationaal recht, is de balans tussen strikte legaliteit en illegaliteit in de praktijk vaak wazig. Als vierde alhoewel India voorstander is van respect voor internationaal recht, blijft de praktijk met betrekking tot het zich houden aan de beginselen, normen en regels dubbelzinnig als deze niet evident in haar belang zijn. Als vijfde, hoezeer internationaal recht ook behoorlijk uitgebreid is, desondanks biedt het geen oplossing voor alle kwesties en problemen die zich voordoen tussen de staten. Ook dit kan men terug vinden in de Indiase praktijk.

Met betrekking tot de filosofische onderbouwing van het internationaal recht in India laat het onderzoek zien dat de Indiase staatspraktijk vaak discussies mijdt op basis van moraliteit, idealisme of elementen van natuurrecht. Veeleer gaat het in de Indiase staatspraktijk om het combineren van elementen van de drie niveaus van beginselen, concepten en regels bij het vorm geven van haar juridisch betoog en het gebruiken als middel om te kunnen communiceren met andere staten over internationale zaken. Tegelijkertijd is het niet misplaatst is om te concluderen dat de praktijk van India haar inzet aantoont dat internationaal recht veranderd zou moeten worden in het licht van modernere maatstaven voor moraliteit en recht en de wisselwerking tussen die twee.

# CURRICULUM VITAE

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Mr Bimal N. Patel, was awarded the first Doctorate of Philosophy in International Law and Governance by the Jaipur National University, Jaipur (India) in 2011 under the guidance of Professor V. S. Mani. Mr Patel acquired LLM in International Law from Leiden University and Master of Arts in International Relations from the University of Amsterdam. He also obtained Post Master Degree Graduate Diploma in International Relations from the University of Amsterdam and Post Graduate Diploma in International Relations and Development from the Institute of Social Studies, the Hague, The Netherlands. He received Post Graduate Summer School Certificate in International Relations, Foreign Policy and Government from the University of Oslo, Norway. He completed his undergraduate studies in Agriculture Science from the Gujarat Agriculture University, Anand (Gujarat) India.

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**Selected publications**

**Disputes Settlement – International and National Courts and Tribunals**

- *The World Court Reference Guide and the Case-Law Digest 2000-2010 (Volume II)* (foreword by H. E. President Peter Tomka, ICJ), (Nijhoff: the Hague: 2014)
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