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

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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."<sup>1</sup> Mere

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<sup>1</sup> 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<sup>2</sup> and executive activities and programs as well as judicial pronouncements to obtain a comprehensive or correct treatment of the subject.<sup>3</sup>

State practice, in order to contribute to the customary rule, must be followed consistently, commonly and concordantly.<sup>4</sup> 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

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*, 7<sup>th</sup> edition, (Routledge: 1997), p. 43.

<sup>2</sup> “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.

<sup>3</sup> 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).

<sup>4</sup> 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 though 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.<sup>5</sup> There are equally good numbers of areas where a state can deny the opposability of a rule in question by consistently demonstrating its objections.<sup>6</sup>

Except few countries, such as the UK,<sup>7</sup> USA,<sup>8</sup> Australia,<sup>9</sup> Japan<sup>10</sup> and the Netherlands,<sup>11</sup> no systematic efforts are made,<sup>12</sup> 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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<sup>5</sup> *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.

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

<sup>7</sup> 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.

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

<sup>9</sup> Donald R. Rothwell, Stuart Kaye, Afshin Akhtarkhvari 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.

<sup>10</sup> 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: Giappichelli, 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).

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

<sup>12</sup> 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<sup>13</sup> recognizes the importance of international law in facilitating international relations<sup>14</sup> 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.<sup>15</sup> 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<sup>16</sup> 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.<sup>17</sup>

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*.<sup>18</sup>

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<sup>13</sup> 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.

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

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

<sup>16</sup> 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).

<sup>17</sup> 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).

<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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]”.<sup>22</sup>

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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 50<sup>th</sup> 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.

<sup>19</sup> 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).

<sup>20</sup> 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 *Politique étrangère*, 65-78 (2008); Babbage Ross, *India's Strategic Future: Regional State or Global Power?*, (Basingstoke: MacMillan, 1992).

<sup>21</sup> 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.

<sup>22</sup> *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.<sup>23</sup> On the contrary, when it has found that its interests remain substantially at odds with international institutions such as the International Criminal Court,<sup>24</sup> it has displayed vehement opposition<sup>25</sup> 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,<sup>26</sup> 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

<sup>23</sup> P. S. Rao, see above, *Some General Principles of International Law*.

<sup>24</sup> 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).

<sup>25</sup> 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).

<sup>26</sup> Wenyang 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<sup>27</sup> 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.<sup>28</sup> In fact, all principles and norms used in the Havana Declaration have found their way through in Article 51 of the Constitution.<sup>29</sup> 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<sup>30</sup> and 246<sup>31</sup> 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

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<sup>27</sup> 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*, 3<sup>rd</sup> 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.

<sup>28</sup> 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.

<sup>29</sup> <http://www.legalindia.in/the-status-of-international-law-under-the-constitution-of-india>.

<sup>30</sup> 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.”

<sup>31</sup> 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 7<sup>th</sup> Schedule.<sup>32</sup> 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 7<sup>th</sup> 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,<sup>33</sup> 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.<sup>34</sup>

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

<sup>32</sup> The Constitution distributes legislative powers between Parliament and State Legislatures as per the list of entries in the 7<sup>th</sup> Schedule.

<sup>33</sup> *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.”

<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> Nevertheless, India does not distantiate itself from the binding nature of Council decisions as per Article 25 of the Charter.

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<sup>35</sup> *In re Berubari Union*, AIR 1960 SC 845; *Gramophone Co. vs. Birendra*, AIR 1984 SC 667.

<sup>36</sup> 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 21<sup>st</sup> 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/accesion to this Treaty, there are hardly attempts made to understand India's objection to the Treaty.

<sup>37</sup> 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).

<sup>38</sup> 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).

<sup>39</sup> 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.<sup>40</sup> This study tests the hypothesis that the Indian state practice in international law resembles the state practice of a dominant state on international law,<sup>41</sup> especially since it has started acquiring political,<sup>42</sup> military and economic<sup>43</sup> influence in world affairs, from 1998 onwards.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

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

<sup>40</sup> 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.

<sup>41</sup> 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).

<sup>42</sup> 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).

<sup>43</sup> The Economic Times, *Why It Makes Sense to Have an Indian Heading the IMF*, 21 May 2011.

<sup>44</sup> 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.

<sup>45</sup> 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).

<sup>46</sup> 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,<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> The 2010 issue of the *Leiden Journal of International Law*<sup>50</sup> brings out an excellent discourse on India

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<sup>47</sup> 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*, 6<sup>th</sup> 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*.

<sup>48</sup> 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).

<sup>49</sup> *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<sup>51</sup> writes on *The formation of International Organization and India – A Historical Study*; B. S. Chimni<sup>52</sup> focuses on *International Law Scholarship in Post-colonial India: Coping with Dualism*; Hegde<sup>53</sup> writes on *Indian Courts and International Law*, whereas Prabhakar Singh<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup>

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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.

<sup>50</sup> 23 *Leiden Journal of International Law* 1, Leiden (2010).

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

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

<sup>53</sup> V. G. Hegde, "Indian Courts and International Law," 23 *Leiden JIL* 1, 52-78 (2010).

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

<sup>55</sup> 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.

<sup>56</sup> 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 34<sup>th</sup> 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.<sup>57</sup> 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?<sup>58</sup> 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.<sup>59</sup> 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).

<sup>57</sup> 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).

<sup>58</sup> 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).

<sup>59</sup> 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.<sup>60</sup> One finds sparse literature on the area of international monetary and fiscal law.<sup>61</sup> 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.<sup>62</sup> 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).

<sup>60</sup> 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).

<sup>61</sup> 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).

<sup>62</sup> 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 3<sup>rd</sup> 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<sup>63</sup> 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."<sup>64</sup> 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."<sup>65</sup>

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.<sup>66</sup> Apparently, this was not necessary as far as India's influence of UN in 1950 and early 1960s was concerned.<sup>67</sup> 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".<sup>68</sup>

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

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* 2<sup>nd</sup> edition, (New Delhi: Konark, 1995).

<sup>63</sup> 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).

<sup>64</sup> 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.

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

<sup>66</sup> *International Law: A Tool to Delegitimize 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).

<sup>67</sup> *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).

<sup>68</sup> 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.<sup>69</sup> This amendment has made the Court jurisdiction almost impossible in any future cases against India.<sup>70</sup>

The Indian policy and practical approach on Law of the Sea area has been subjected to various analyses.<sup>71</sup> 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".<sup>72</sup>

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".<sup>73</sup> In this regard, the Indian state practice has undergone a major departure from the idealist (during Gandhi and Nehru era)<sup>74</sup> 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.<sup>75</sup> However, whether international law can provide a platform to achieve some tangible results or

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<sup>69</sup> 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.

<sup>70</sup> See Chapter x below.

<sup>71</sup> 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).

<sup>72</sup> Despite the Indian effectiveness in negotiations, India took 13 years for ratification of the Convention.

<sup>73</sup> See Chimni above.

<sup>74</sup> 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).

<sup>75</sup> 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.<sup>76</sup> 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'.<sup>77</sup>

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

The thesis attempts to analyse India's state practice in selected important areas.<sup>78</sup> 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.

<sup>76</sup> Chimni in *Teaching, Research and Promotion of International Law in India* above at p. 49.

<sup>77</sup> *Ibid.*

<sup>78</sup> 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?<sup>79</sup> Whether and to what extent international law has decisively influenced domestic law-making process of India?<sup>80</sup>

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

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<sup>79</sup> 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).

<sup>80</sup> 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.<sup>81</sup> 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?<sup>82</sup> This research study addresses these questions and issues in a systematic manner.

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<sup>81</sup> 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).

<sup>82</sup> 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).

