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

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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.

[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 75th 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.

[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.

[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.

[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 19th 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.