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India's Contribution to the Advisory Jurisdiction of the ICJ

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ABSTRACT

This paper examines the contribution India has made to the advisory jurisdiction of the International Court of Justice (Court). It analysis the development of jurisdiction with the contribution of India's opinion and examines the major cases in which India was involved as a party, and determine the attitude of India towards the Court. There is a lack of literature on this topic because of the limited number of cases India has been a part of as a party. We will mainly focus on these cases which India has been part of rather than the general procedure of the ICJ and try to draw a conclusion as to the contribution India has made to the advisory jurisdiction. This paper will start with an Introduction and subsequently, discuss all the six cases under six different headings and analyze India's position in each of the cases and the impact it made on the jurisdiction of the Court. In the end, give concluding remarks to end the paper. Our research methodology is mostly based on a comparative and analytical basis. Rely on different Research papers, Reports, Letters and Provisions for the research.

Whether India's contribution can be seen as isolated thinking or influenced by other theories or world views? What is the influence made on the advisory proceeding and jurisdiction? These are some of the major questions that arise while discussing India's contribution to the advisory jurisdiction and functioning of the Court, which we will answer through this paper.

I. INTRODUCTION

India has been an active participant to request the Court to give an advisory opinion through advisory proceedings, which is evident through its participation in the general debate in the sixth committee of the General Assembly and voting records on the General Assembly resolutions. It has also regularly file written submissions in the advisory proceedings; there are a total of eight written submissions from 1948 and one oral statement in the advisory proceedings till now.² If we look at the participation, India has been the most active one in Asia, followed by China. In the world, India is at number four after the USA, UK and France

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² India gave its written advisory opinion under "Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)"(1948)

in relation to written submissions. Following are the topics on which India has filled its written statement in the advisory proceedings- "Conditions of Admission of a State to Membership in the UN, Reparations for Injuries, International Status of South-West Africa, Voting Procedures on Questions Relating to Reports and Petitions concerning the Territory of South-West Africa, Constitution of the Maritime Safety Committee, Legal Consequences for States of the Continued Presence of South Africa in Namibia, Legality of the Use by a State of Nuclear Weapons in Armed Conflict."³ These are also the topics we will look into in the paper to see the contribution India has made in the advisory jurisdiction of the Court.

India is active in filling written statements but has been the original one to request the advisory opinion of the Court in only one case of International Status of South-West Africa, 1949. It is also noteworthy that the Hyderabad and Kashmir questions were also raised in the Security Council for an advisory opinion of the Court, but no formal request came from the Security Council.

In the Nuclear weapon case, India did not take part in the oral hearing of the case, even being a firm supporter to eliminate nuclear weapons. One of the main arguments is that physical presence adds much weight to the argument and cause of banning the production of nuclear weapons, but India lost a big opportunity to represent the cause on behalf of the international community by not attending the hearing. Or it was a well-thought decision not to attend the hearing to keep a low profile. Thus, this point needs a deeper analysis of the situation.⁴ India made only one oral statement in the Namibia case but has filled many written statements. India refrains from making such oral statements to maintain a low profile, and whether this affects the Court's decision is debatable, but the physical absence of India from such cases reflects at the low profile of India in the matter, as seen in the context of a nuclear explosion of 1998. Similar to the advisory proceedings in the Construction of Wall in the Palestinian territory in 2004, which was influenced by the foreign policies, interests and relations with Israel.

India's absence in filling the oral statements certainly raises some issues but not filling written or oral statements in some of the most important advisory proceedings for the development of international law is very interesting. To date, India has participated in a total of eight advisory proceedings. But one must have expected its participation in some of the most important issues, such as. "Competence of the General Assembly for the admission of a State to the UN, Certain

³ R. S. Shiv, "The Development of India's Nuclear Weapons Policy in the Framework of the Development of the International Humanitarian Law by the International Court of Justice"(2010) *International Criminal Law and Human Rights* 155-200

⁴ V. S. Mani, "The Nuclear Weapons and the World Court" (1997) 37 *IJIL* 167

Expenses, Reservation to the Genocide Convention, Application of Article VI, Section 22 of the Convention on the Privileges and Immunities of the UN and Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights opinions, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory."⁵ These are some of the major advisory opinions that have contributed to the development and codification of international law. It has also not filed any submissions in the five advisory proceedings related to administrative law. Therefore, this shows India's intention to take active participation in the advisory opinions and proceedings of those matters that have a direct or indirect impact on India's national interest or foreign policy.

II. COURT'S ADVISORY OPINION IN THE MARITIME SAFETY COMMITTEE CASE

India has submitted a written statement in this advisory proceeding, where it stated that concerns related to the ship like- its "nationality", "protection of the ships", "standar for the largest ship owning nation".

In this matter, India gave its opinion regarding the "nationality of ships", it said that Court should apply the principles that are most prevalent and practised in the international community and apply them with reason and logic. "India supported its argument through Article 5 of the High Seas Convention of the 1958 Geneva Convention", where it says that every state has a right to give nationality to its ship, have its registration, and have a right to use a flag. It said that registration and flying a flag are essential conditions to maintain order in an open sea, and as these rules are very easy to enforce, these rules must be enforced, and if a ship does not abide by it, then it will have not protection at all.⁶ India also supported its argument through the case of *Noim Molvan v. Attorney General for Palestine*, where it held that a ship that is sailing without a flag and registration has no rights of a ship but will be treated as a vessel between two states.⁷

India's position relies on the general principle of law as it has used this principle to justify its point. Example-"a ship that is flying a flag of a certain state has a direct relationship with that state, uses the same principle as used in the case of *LOTUS* judgment, where it said that "a corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the state the flag of which it flies, for, just as in its own territory, that state exercises its authority upon it, and no other state may do so ... By virtue of the principle of the

⁵ The issue revolved around Article 17(2) of the UN Charter, but the main issue was the obligations of members.

⁶ Composition of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 253

⁷ *Ibid* 254

freedom of the seas, a ship is placed in the same position as national territory."⁸

Thus, India argued that the flag used by a ship is not connected with the ownership of the ship, as it only acts as a means to ease the trade during the voyage for the master of the ship. So India argued that the term is only used to give the idea of jurisdiction and not that of ownership of the ship.⁹ Further, ICJ gave the opinion that Maritime Safety Committee was not formed in reliance on the convention. Therefore, India helped in the Court's opinion in such a global issue.

III. COURT'S ADVISORY OPINION ON VOTING PROCEDURES

The United Nations General Assembly enacted a precise rule for voting procedures to be followed by the Assembly in making decisions on questions relating reports and petitions on October 11, 1954. India's declaration in this advisory proceeding proved its active support for the principle of absolute sovereignty. It defined the relationship between the principle of sovereignty and voting processes. In a world where national sovereignty is so highly valued, India believes that the concept of unanimity, rather than the more expedient theory of a majority decision, has natural appeal. "With the exception of the Security Council, the UN Charter does not embrace the concept of unanimity." "The consequences of the rule of unanimity in international conventions have not been positive," India claimed, adding, " In some cases, it is quite slow and proven to be difficult."¹⁰ It's worth noting that India's two arguments relied heavily on scholarly opinions rather than treaties, customary international law, or fundamental legal concepts. India's declaration in this advisory proceeding proved its active support for the principle of absolute sovereignty. It defined the relationship between the principle of sovereignty and voting processes. In a world where national sovereignty is so highly valued, India feels that the concept of unanimity, rather than the more convenient doctrine of a majority decision, has a natural place. The Court unanimously agreed that General Assembly resolutions on reports and complaints involving the Territory of South-West Africa would be recognised as an important question under the meaning of Article 18, paragraph 2 of the United Nations Charter, the correct translation of Counseling Notes dated 11 July 1950. Therefore, The Indian position was approved.

IV. COURT'S ADVISORY OPINION IN THE SOUTH WEST AFRICA CASE

This case was regarding the legal position of the territory of South-West Africa. After the First World War, the administration of this territory was handled by the "League of Nations" and

⁸ Ibid 256

⁹ Ibid 258

¹⁰ "Voting Procedures on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa" 77

placed under the "Union of South Africa". But later, the league was gone, and with it, the mandate which holds the supervision of the territory was also gone. Also, the United Nations Charter did not clear regarding the mandate of the territories that whether it will come under the same trusteeship or not. India gave a written statement for the same, asking for an advisory proceeding by the Court. India did not give any specific statement but gave a detailed analysis on the interpretation of the League's orders. It said that any reservation made during a multilateral treaty does not have any effect on the treaty unless it is made at the time when the treaty was signed or through a verbal process. It said that a reservation means refusal to an offer, and certain rights are already reserved and are not up for an offer. But for a multilateral treaty to be up for an offer, it must be made available for signature. Therefore any reservations which were made prior to this offer does not hold any validity. India argued that the Union of South Africa does not have the rights over the territory because it did not renew its reservation at the time of signing of the UN Charter and neither ratified under Article 110 of the UN charter. This argument of India is supported by the Vienna convention of treaties, which states that "cannot derive any advantage from the reservation made during the drafting of the Charter."¹¹ In the year 1960. This is also mentioned in Article 19 of the Vienna convention, "A state may when signing or approving a treaty can make a reservation." This opinion of India could be seen in the final advisory opinion of the Court. Thus, contributing to its development.

V. COURT'S ADVISORY OPINION IN THE NAMIBIA CASE

From the above discussion, we have seen that South Africa has lost its control over the territory and does not have the right to exercise any control over the territory. This was decided by the UN General assembly in 1966 that South Africa does not have any rights over Namibia. In 1969 the Security Council asked South Africa to withdraw all its control and administration from Namibia. In 1970¹², it declared that any rights exercised over Namibia by South Africa would be illegal after the mandate was declared void. India gave three principles in his oral statement. These were as follows- Rights exercised by the colonial people of the place to enjoy their freedom and independence, no territory should be captured by the use of force, threat or any form of aggression, and the need to abide by the rules of international law in good faith, are the three pillars to maintain international peace and order. India explained these principles in full detail and said that it has a universal value to improve the standard of international law and group of states. India also stated that the Court, in its opinion, should apply these principles for the betterment of international relations and promote the rule of law. Subsequently, the

¹¹ India gave its written advisory opinion under "International Status of South-West Africa" 150

¹² "Security Council Resolution" (1970) 276

Court found in its opinion that South Africa was illegally administering control over the territory of Namibia and had to stop exercising all the control immediately. It also mentioned that all the members of the UN must not recognize any action by South Africa over Namibia and recognize it as illegal¹³. This shows that India's opinion is once again crucial in the matter and used by the Court in its advisory opinion and contributed to the Court's jurisdiction.

VI. COURT'S ADVISORY OPINION ON LEGALITY OF USE OF NUCLEAR WEAPONS

A legal opinion was asked by the world health organization from the Court on the matter¹⁴. India gave a written statement on the topic at the last date of the submission in 1955. In this statement, India very strictly condemned the use of nuclear weapons and wanted to abolish it in the international community completely. India argues that the international community has accepted the use of these nuclear weapons as a crime on the grounds of human rights violation and also recognized as illegal under the violation of the UN charter act. This is also the general view of the international community and labelling it as illegal. But India does not mention anything about its possession. It asked the Court to recognize the generally accepted view of the community and declare it as illegal. India also argued on the point that the use of nuclear weapons might affect the future existence of the human species and its wellbeing and emphasized on the point of WHO, asked to give it a considerate thought as it is very important for our species existence. But this question raised by the WHO was declined by the Court, and it held that the Court is not able to give its advisory opinion on the current subject matter. Since WHO's mandate only allows it to deal with the health-related issues which the nuclear weapons poses, or any other hazardous disease which might take birth because of these weapons, or to take any preventive measures for the safety of the human species. But the question which was put forth by the Court was not related to the health issues it would have on its use but was aimed towards the legality of the effect on the use of these weapons on health and environment. The Court declined the request of the WHO on the basis of the principle of speciality. It said that the issue raised by the WHO does not come under its purview or within the scope of its activity and is not at all related to its work.¹⁵

VII. COURT'S ADVISORY OPINION ON REQUEST OF UN GENERAL ASSEMBLY ON USE OF NUCLEAR WEAPONS¹⁶

As we have seen from the above discussion that WHO claim for an advisory opinion by the

¹³ Ibid

¹⁴ "World Health Assembly Resolution" WHA 46.40 (1993)

¹⁵ I.C.J. Reports (1996) 84

¹⁶ UNGA 49/75k (1994)

Court was rejected, and further to get an opinion out of the Court on the matter UN General assembly asked for an advisory opinion on the matter that whether the use or threat to use a nuclear weapon is allowed under the international law or not? It also mentioned that it had jurisdiction over the matter to ask for an advisory opinion from the Court and the most direct law that they used was related to the use of force as mentioned in the UN charter and also law applicable in case of armed conflict with treaties related to nuclear weapons that the Court might find helpful.

In this matter, India filed a seven-page long written statement in the year 1995 and argued that the "use of force is prohibited under the Article 2(4) of the UN charter" and "this prohibition is so comprehensive and fundamental as to be regarded as a jus cogens or an obligation of an absolute character. On the basis of this principle, it is clear that any use of nuclear weapons as a measure of use of force to promote national policy objectives would be unlawful."¹⁷ India backed its argument by stating that the right to self-defence is a temporary measure to provide aid to the situation, but as soon as any other measure is available for the aid of the state, the protection or retaliation through self-defence must stop at once and immediately. India also argues that Nuclear weapons cannot be used as a first measure to attack in an armed attack as it would be against international law. This argument draws its power from the political position of India in the matter. In India's eye, no state can use nuclear weapons as a way of retaliation when the other state has not done any wrongful act of use of force or any other illegal act from the point of international law. India also states that if one state uses illegal methods or use force on other states, then in retaliation, the state has to use a proportionate amount of force, and if one state has not used nuclear weapons, then the retaliation must not be with a nuclear weapon. Further, India also took a critical stand where it was a bit hesitant to argue; it took the stance that even if one state uses force through nuclear weapons, then also the other state must not retaliate with a nuclear weapon because it is not in consonance with humanitarian grounds and violates the principle of human law. Thus, it shows that a ban on nuclear weapons is a must and cannot be negotiated because it is not dependent on the consonance of others but is necessary for all circumstances.

India argued that the use of force or threat to use force is against the principle of customary international law and peace is the main goal then all the use of force must be ban, and a complete ban on the production of nuclear weapons should be done rather than deterrence. India went out to make an extreme argument that "since the production and manufacture of

¹⁷ India gave its written advisory opinion under "Legality of the Threat or Use of Nuclear Weapons" 1

nuclear weapons can only be with the objective of their use, it must follow that if the use of such weapons itself is illegal under international law, then their production and manufacture cannot under any circumstances be considered as permitted."¹⁸ In conclusion, India meant that since the use of force is against the principle of international law and to curb the use of nuclear weapons, the final aim should be to target the complete abolishment of the manufacture and production of nuclear weapons. Also, a threat to the use of force is illegal in all circumstances and does not hold any validity in international law.

In conclusion, India did not really give a clear answer as to whether the use of nuclear weapons in an armed conflict should be illegal or, in case of survival, it would be legal. Court's advisory opinion was somewhat in consonance with India and maintained a balance in its judgment. India's take is not that surprising after looking at the nuclear test of 1998; this opinion benefits its position only. "Falk summarizes in an apt manner that ever since India exploded a nuclear device in May 1974, the Indian relationship to nuclear weaponry has been ambivalent and controversial."¹⁹ Falk takes very fittingly in the situation as India has maintained a dual stance in the matter as being a nuclear weapon owning state on the one hand to improve its geopolitical standard among other states, on the other hand, talk about the complete abolishment of production and manufacturing of nuclear weapons to give moral and ethical stance in the international community.

The ICJ gave its opinion in line with the Indian opinion that the states that have nuclear power must move forward with reasonableness and care towards the disarmament of nuclear weapons. It also stated that abolishment of nuclear weapons is the true legal path for an equitable and just international society. Court also gave a "Comprehensive Test Ban Treaty" that said an end to stop testing of these nuclear weapons is the first step towards nuclear weapons abolishment, and this is the right progressive path in the international law. India has followed the advisory opinion very strongly and demanded the disarmament of nuclear weapons from the nuclear weapons state at NAM (Non- Aligned Movement). NAM has also asked these weaponized states to assure the non-nuclear states for their safety that there will be no use or threat of use of nuclear weapons.²⁰The ICJ has given their opinion in line with the Indian viewpoint of time based nuclear weapon abolishment. "In this regard, the views expressed by some judges that accord with the Indian position must be noted: that the ICJ is not justified in expressing the

¹⁸ Ibid 6

¹⁹ Richard Falk, "Nuclear Weapons, International Law and the World Court: A Historic Encounter," 37 *IJIL* (1997) 149

²⁰Yogesh K. Tyagi, "Judicial Statesmanship without Political Courage: The ICJ Advisory Opinion on Nuclear Weapons," 37 *IJIL* (1997) 198

existence of non-liquet (the Court did not express a non-liquet) in any legal matter particularly given the wide range of principles which are available for application (Judges Weeramantry, Shahabuddeen and Koroma)."²¹

VIII. CONCLUSION

From the above discussion of the topics in relation to the contribution of India in the advisory jurisdiction of the Court. We have observed that India's stance is dependent on the national interest like any other state. It is stated that there is much possibility for India to do well for the international community and be an active member to participate in the advisory proceedings and give its valuable input to improve the functioning of the international Court of justice and improve its international relations. To do this, India can submit more of these written and oral proceedings in the advisory proceedings, especially when such matters are related to the overall development of international law, which deals with broad cases that affect the whole world. Active participation in such proceedings have resulted beneficial in the past, and this is a proven method that should be followed by India. Example- "ICJ judgment in the Right of Passage over Indian Territory case proved helpful in decolonizing the territory and strengthening India's territorial sovereignty. India's active participation in the debates of the UN General Assembly and the advisory proceedings concerning South-West Africa helped the entity in achieving full sovereignty and to make Namibia a sovereign and independent state a reality." From these, one can make an inference that India has found ICJ as an effective body that can help in the abolishment of colonization and provide freedom to its native territory civilians.

In matters that cover broad propositions and development on a global level, India has high faith and trust over the ICJ in such proceedings as it has been mostly impartial and reasoned while giving its opinion. In the past, India has abode by the judgment of the ICJ that were decided on merit. Currently, "Justice Dalveer Bhandari of India is one of the elected members" in the Court of justice and "despite that India does not have to accept the compulsory jurisdiction", neither it will influence India in any way. Having an Indian Judge may lead to publicity, but it will also keep us updated about the latest proceedings. Also, India is not planning to bring any new case in Court. India should also include a jurisdiction clause in every multilateral treaty, where the jurisdiction to the matter is with the ICJ, which would be favourable for India. India could also seek help from the ICJ, as a national or a tribunal court could seek guidance from such a knowledgeable international body²². Lastly, a lot of Indian meritorious scholars have supported

²¹ P. S. Rao, "Advisory Opinion of ICJ on Nuclear Weapons" In 37 IJIL (1997) 224

²² USA has passed a resolution in 1982, where the national and tribunal court can ask for an advisory opinion of the ICJ on the matters where these courts have jurisdiction.

the idea that India can seek legal opinions in case of inter-state dispute, like- Kashmir, if not the actual settlement but just an advisory opinion on the issue, an opinion could be very crucial in such matters as an alternative solution might come from one of the most knowledgeable international body.
