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

Patel, B.N.

CHAPTER X
INTERNATIONAL COURT OF JUSTICE AND INDIA

10.1. Introduction

This Chapter examines how India has contributed to the development of jurisprudence and to the functioning of the International Court of Justice (hereinafter referred as either ICJ or the Court). It analyses India's contribution to the advisory jurisdiction of the Court, examines the contentious cases in which India was involved as a party, and considers the general attitude of India towards the Court.[978] It also briefly describes and analyses information on the judges from India who served the ICJ as a judge or judge *ad hoc*.

Though the literature on India and the ICJ is very limited, the few contributions Indian authors have made thus far have been important; especially those of Nagendra Singh and R. P. Anand stand out.[979] What little has been produced focuses more on cases in which India was involved rather than on the general functioning of the ICJ. There are a few direct references to ICJ judgments in the domestic case law of India – and the same can be said of many other UN Member States. The lack of literature can be explained in part by the small number of cases before the ICJ in which India has been either an applicant or a respondent. That in turn can be attributed to the importance India has attached to settling international disputes through negotiation rather than litigation, which it has tended to regard as an option of last resort. This attitude can also find reflection in President Nagendra Singh's book '*The Role and Record of the International Court of Justice'*.[980] He advocates that recourse to the ICJ is and should be a normal and natural step in the face of any dispute not resolved by negotiation.[981]

Should we look at the contribution of India as an isolated product of thinking or as inspired and influenced by contemporary theories and phenomena elsewhere? What have been the exact influence and the judicial legacy? The pursuit of these issues seems an indispensable exercise when we discuss the contribution of India to the functioning of the ICJ and the jurisprudence.

10.2. India's Position on the Role and Functioning of the Court

In this section, an attempt is made to examine India's approach on the judicial settlement of international disputes, its general attitude towards the functioning of the ICJ and the Indian representation in the membership of the ICJ.

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[978] Ko Swan Sik, "The attitude of Asian states towards the International Court of Justice revisited," In Nisuke Ando, Edward McWhinney, Rudiger Wolfrum, (ed.) *Liber amicorum* judge Shigeru Oda, 165-76 (2002).

[979] R. P. Anand, *International Courts and Contemporary Conflicts*, (Popular Press, 1974); _____ The International Court of Justice and Impartiality between Nations In XII *The Indian Yearbook of International Affairs* (1963), World Rule of Law Booklet Series, No. 26; _____*Compulsory Jurisdiction of the International Court of Justice*, (Asia Publishing House, London: 1961); J. N. Singh, International Justice, (New Delhi: Harnam Publications, 1991); Ramesh Thakur, (ed.) P*ast Imperfect, Future Uncertain*, (New York: MacMillan Press Ltd., 1998); Nagendra Singh, The *Role and Record of the International Court of Justice*, (Dordrecht: Nijhoff, 1989).

[980] Judge Nagendra Singh served as Judge *ad hoc* and a member of the Court from 1973 to 1988, including as the President from 1985 to 1988.

[981] Nagendra Singh, *The Role and Record of the International Court of Justice*, (Dordrecht: Nijhoff, 1989) at p. 83.

10.2.1. Preferred Means of Dispute Settlement

It is interesting to note that the Indian Constitution makes it the duty of the government to foster respect for international law and encourage settlement of international disputes by arbitration.[982] India has taken a principled position and consistently followed the practice of resolving legal disputes or questions through negotiations instead of adjudication. It has preferred negotiation which does not involve an element of compulsion to any third party's binding judgment, as in arbitration and adjudication. In fact, the observation of Professor Wright *(*commenting on new nations of Asia and Africa) -"the Orient has preferred government by good men applying institutions of justice to the facts rather than government by law that is government by magistrates bound by rules making for certainty and predictability in decisions"- is very much applicable in the case of India.[983] The Indian attitude of preferring less adjudication is not typical of India, in fact, the Asian-African states have generally preferred negotiations assisted by conciliatory measures in their conflicts. Has there been any marked change in this basic posture of India? In the last decade, the preference for diplomatic solutions or negotiations is also imbibed in India's general lack of pro-active support for the establishment of international courts and tribunals, like the International Criminal Court (India has not signed the Rome Statute establishing the ICC).[984]

The scholastic community explains the advantages of these preferred means of India for the settlement of disputes. Anand cites an example of the Canal Water dispute of 1950 between India and Pakistan where India strongly advocated a resolution tribunal consisting of judges from the two countries and failing to find a solution for a part of the dispute, submitted to arbitration or to the ICJ. Writing in 1961, Anand argues that "rarely have such disputes, such as Kashmir, affecting such vital interests of the states, been submitted to any judicial procedure. Such matters may be decided by negotiation or conciliation or mediation, but not by a judicial tribunal. It can be confidently stated that any country in India's position would have behaved in the same way as she has done."[985] Thus, scholars also indicate the preference for other peaceful means to adjudication. In one of the earliest reports on India and the UN, report of a study group set up by the Indian Council of World Affairs, New York, 1957, the conclusion was drawn that India's policy is one of caution and of eagerness to safeguard India's sovereignty when it comes to accepting any additional legal obligations in the international field. This conclusion is largely valid even today.

10.2.2. Role of the Court in the Contemporary World

Is India pro-actively interested in the overall functioning of the Court? The following two examples are indicative of its interest. The leaders of the Indian delegations at the UN General Assembly's annual sessions

[982]Part IV, Directive principles, Article 51 of the Constitution of India.

[983]Quincy Wright, "The Influence of the New Nations of Asia and Africa upon International Law," In *Foreign Affairs Reports*, New Delhi, (March at 1958), p. 38.

[984]Since the end of the Second World War in general and the collapse of the former Soviet Bloc, there is a proliferation of intergovernmental committees and organs and courts to deal with human right violations, whether by public debate, states' reports, individual petition procedures, truth and reconciliation commission, etc. The establishment and functioning of this mosaic of machineries is largely of Western European origin in terms of philosophy establishing these mechanisms, rules of procedure, members and functionaries in these structures. This human rights ideological domination once again fails to augur consolidation of international human rights law in which large nations like India, China and several prominent developing countries can also actively participate and embrace them with some sense of acceptance. India actively follows the ICC work and gave legal opinions on request for cooperation in investigations by the ICC as well as keeps preparing briefs on the cases in the docket of the Court. MEA Annual Report 2012-13, p. 105.

[985] R. P. Anand, *Compulsory Jurisdiction of the International Court of Justice*, New Delhi: Indian School of International Studies, Jawaharlal Nehru University, (1961) at p. 256.

have made very few references in their speeches regarding the role and importance of the ICJ and those few references are related to a particular case or opinion.[986] Furthermore, India did not provide its comments on the General Assembly resolution on the review of the role of the Court. The UN Secretary-General prepared the questionnaire pursuant to Resolution 2723 (1970) of the General Assembly which among other topics contained the aspects of: (1) the role of the ICJ within the framework of the UN (2) organization of the ICJ (3) jurisdiction of the ICJ (4) procedures and methods of Work of the ICJ, and (5) future action by the General Assembly. These two sporadic examples can indicate that India is not as pro-active as one would have expected of it.[987]

10.2.3. Representation on the Bench of the Court

What is India's record as far as its representation on the Bench of the Court is concerned? The available records show that India has never made any reference regarding the composition of the ICJ Bench in its speeches at the UN General Assembly except when India advocated the case of China's representation in various organs of the UN including the ICJ.[988]

Three Indian nationals have been elected as a member of the ICJ, namely, Sir B. Rau, Dr Nagendra Singh and Justice R. S. Pathak. In addition, Justice Chagla, Nagendra Singh, Reddy and P. S. Rao have served as *ad hoc* judges in the *Right of Passage over Indian Territory*, *ICAO Appeal*, the *Aerial Incident of 10 August 1999* cases, and *Pedra Branca/Pulau Batu Puteh (Malaysia/Singapore)* respectively. It is interesting to observe that all of these Judges including the *ad hoc* judges have served the Indian government in various capacities before joining the Court.[989] Sir Benegal Rau (1952-1953) and Dr. Nagendra Singh (1972) were elected during the time when India was holding a non-permanent membership in the Security Council.[990] Dr. Pathak was elected upon the death of Judge Nagendra Singh. Although India was not a member of the Security Council during the election in 1988, following the tradition of the ICJ, a judge from the same nationality of the preceding judge who died during the service of the ICJ, was elected.[991] Justice Dalveer Bhandari, sitting Judge of the

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[986] The website of the Permanent Mission of India to the UN, New York, reproduces the text of landmark speeches by the leaders of the Indian delegation to the UN GA annual session. Reference to the ICJ is found in six speeches, namely, (8th Session 448th Plenary Meeting, 28th September,1953 ; Eleventh Session 611th Plenary Meeting, 6th December, 1956; 12th Session 703rd Plenary Meeting, 8th October, 1957; Fourteenth Session 823rd Plenary Meeting, 6th October, 1959; 26th Session 1940th Plenary Meeting, 27th September, 1971; Address by H. E. Mr I. K. Gujral, Prime Minister of the Republic of India to the 52nd Session of the UN General Assembly, 24th September 1997.

[987] Patel, Bimal N., "Recommendations on the Enhancement of Role and Effectiveness of the International Court of Justice and the State Practice: Gap between Recommendations and Practice (1971 – 2006)," 11 *Singapore YbIL* 99-122 (2007).

[988] Statement of V. K. Krishna Menon, 8th Session, 448th Plenary Meeting of the UN General Assembly, 28 September 1953.

[989] Judge Benegal Rau was the first Indian Judge to sit on the bench of the ICJ, he was the Prime Minister of Kashmir, he participated in two contentious cases and gave one dissenting opinion in the *Rights of US Nationals in Morocco* case. Judge Nagendra Singh was Secretary to the President of India prior to his election as a member of the Court. He participated in 15 contentious cases and 6 advisory opinions and appended six declarations and ten separate opinions. Judge Pathak was the Chief Justice of India prior to his election as a member of the Court. He participated in five contentious cases and one advisory opinion. He appended no opinion.

[990] Sir Benegal Rau was elected in 1951 while Judge Nagendra Singh was elected in 1972 and assumed the functions in the following years respectively. Judge Nagendra Singh served as the President of the ICJ between 1985 and 1988. Judge Dalveer Bhandari, was elected, upon the vacancy created by Judge Al-Khasawneh of Jordan resignation for a term expiring in 2018.

[991] Sir Benegal Rau was nominated as a candidate in October 1948 and December 1951. He was elected on 6 December 1951 at the triennial election along with Judges Armond-Ugon, Golunsky, Klaestad and

Supreme Court of India (as he was then) became the fourth person from India to occupy the post of Judge in the ICJ. Justice Bhandari was elected in 2012, filling the vacancy created by the resignation of Justice Al-Khaswaneh of Jordan. His term will be for the duration of 6 years till 2018.

10.2.4. Views of the Indian Academicians on the Functioning of the Court and its Members

Indian writers have held the independence, impartiality and objectivity[992] of the judges in high esteem, have never challenged it in the slightest, and have believed that the judges are custodians of international law and justice.[993] All official positions of India speak highly of the judges and the ICJ, even in the fierce arguments of the South-West Africa cases.[994] The fact that the national judges and the *ad hoc* judges usually give judgment in favour of their country or friendly countries, especially on important issues, is not a healthy trend and it certainly reflects on the degree of their objectivity.[995] The position of *ad hoc* judges is invidious as standing somewhere between independent judges and representative of the parties. They have to give a solemn declaration to act as judges, but they are probably expected by their nominating countries to defend their interests and are chosen because their past opinions indicate that they will. In this regard, it can be observed that Judge *ad hoc* Nagendra Singh rendered an individual separate opinion in the *Trial of Pakistani Prisoners of War* - interim measures of protection phase - and Judge *ad hoc* Reddy supported the Court's rejection of its jurisdiction in the *Aerial Incident 10 August of 1999* and issued an individual opinion. Judge *ad hoc* Chagla issued a dissenting opinion in the *Right of Passage over Indian Territory* case – preliminary objection and merits phases.

Hackworth. Following the death of Sir Benegal Rau, India nominated Radha Binod Pal during the supplementary election in 1954 and in triennial election in 1957, however, he was not elected. Dr. Nagendra Singh was nominated 27 October 1969 for the triennial election of judge starting office from 6 February 1970. However, he was elected on 6 February 1973, following the expiry of the term of Sir Muhammad Zafrulla Khan on 5 February 1973. Sir Zafrulla Khan was not nominated for re-election at this stage. Dr. Pathak was elected on 18 April 1989 at the supplementary election caused by the vacancy following the death of Judge Nagendra Singh. The other Asian candidates were Messrs S. Kraichitti, D. Patel and M. C. W. Pinto. His term of office expired on 5 December 1991. Justice Pathak was nominated for the second term at the triennial election but was unsuccessful. Instead, Judge Weeramantry (Sri Lanka) was elected.

[992] Mani, reflecting on the weakness in favour of one's own country, says that the fact can hardly be denied that it is very difficult for a man to resist the affiliations of the people and the country with which his interests are so much bound up. As a committee of the Permanent Court itself, consisting of Judges Loder, Moore and Anzilotti said: "…of all influences to which men are subject none is more powerful, more persuasive, or more subtle, than the tie of allegiance that binds them to the lands of their homes and kindred and to the great sources of honours and preferments for which they are so ready to spend their fortunes and to risk their lives. This fact, known to the world, the Statute frankly recognizes and deals with." P.C.I.J Series E, No. 4, p. 75.

[993] Anand succinctly justifies that the Court's criticism regarding the possible partiality and political motivation is unfounded. Although, he refrains from giving a categorical denial to the criticism, as he mentions that *although impartiality is a characteristic, which is universally prized in a judicial tribunal, it must never be forgotten that the impartiality of tribunal is always relative, never absolute.* However, in his final analysis, he shows even more optimism and holds a view that *distrust of the competence and impartiality of the International Court of Justice is* scarcely the reason why Governments do not submit their cases to the tribunal. Anand In *International Courts and Contemporary Conflicts* at 193.

[994] It should be noted that there was no judge from India on the bench whenever India presented its written statement during any of the advisory proceedings.

[995] Although ad hoc judges have normally supported the nominating state, there are few instances which deviate from this, for example, *Application for Revision and Interpretation of the Judgment* made in the *Tunisia/Libya* case and the *Great Belt* (Finland v. Denmark) case.

10.2.5. Records on the Declarations and Opinions of Indian Members

Sir Benegal Rau appended only one opinion, namely, joint dissenting opinion in the *Rights of Nationals of United States in Morocco* (France *v.* USA). Judge Nagendra Singh appended declarations in *Fisheries Jurisdiction* (United Kingdom *v.* Iceland – merits); *Fisheries Jurisdiction* (Federal Republic of Germany *v.* Iceland – merits); *Nuclear Tests* (Australia *v.* France - interim measures of protection); *Nuclear Tests* (New Zealand *v.* France - interim measures of protection) as well as to two advisory opinions *Application for Review of UNAT Judgment No. 158* and *Western Sahara*. Judge Nagendra Singh also appended an individual opinion in *Trial of Pakistani Prisoners of War* during interim measures of protection ruling (Pakistan *v.* India); *Aegean Sea Continental Shelf* during interim measures of protection ruling (Greece *v.* Turkey); *Continental Shelf* (Libya/Malta – intervention); *Military and Paramilitary Activities in and against Nicaragua* (intervention, preliminary objections and merits – Nicaragua *v.* USA); and in one advisory opinion *Application for Review of UNAT Judgment No. 273*. Judge Nagendra Singh appended a dissenting opinion in the *Appeal Relating to the Jurisdiction of the ICAO Council* (India *v.* Pakistan). Judge Pathak did not append any opinion in the two contentious cases in which he participated (*Land, Maritime and Island Frontier Dispute*, El Salvador/Honduras; and *Arbitral Award of 31 July 1989*, Guinea Bissau v. Senegal). In both the cases, he voted with the majority.

10.3. India as a Party in the Contentious Cases: A Short Description

India has appeared before the ICJ as the respondent in three cases, namely, the *Right of Passage over Indian Territory*,[996] the *Trial of Pakistani Prisoners of War*,[997] and the *Aerial Incident of 10 August 1999*.[998] In each of these, it has challenged the jurisdiction of the Court. The *Trial of Pakistani Prisoners of War* case was removed

[996] Portugal instituted proceedings against India on 22 December 1955. The case lasted for 4 years, 3 months and 21 days and the final judgment was delivered on 12 April 1960. The Portuguese possessions in India included the two enclaves of Dadra and Nagar-Aveli which, in mid-1954, passed under an autonomous local administration. Portugal claimed that it had a right to passage to those enclaves and between one enclave and the other to the extent necessary for the exercise of its sovereignty and subject to the regulation and control of India; it also claimed that, in July 1954, contrary to the practice previously followed, India had prevented it from exercising that right and that that situation should be redressed. A first judgment, delivered on 26 November 1957, related to the jurisdiction of the Court, which had been challenged by India. The Court rejected four of the preliminary objections raised by India and joined the other two to the merits. In a second Judgment, delivered on 12 April 1960, after rejecting the two remaining preliminary objections the Court gave its decision on the claims of Portugal, which India maintained were unfounded. The Court found that Portugal had in 1954 the right of passage claimed by it that such right did not extend to armed forces, armed police, arms and ammunition, and that India had not acted contrary to the obligations imposed on it by the existence of that right. Source: *the International Court of Justice* (1986), p. 92.

[997] Pakistan instituted proceedings against India concerning 195 Pakistani prisoners of war on 11 May 1973, whom, according to Pakistan, India proposed to hand over to Bangladesh, which was said to intend trying them for acts of genocide and crimes against humanity. India stated that there was no legal basis for the Court's jurisdiction in the matter and that Pakistan's application was without legal effect. The case lasted for 7 months and 4 days. The case was removed from the General List on 15 December 1973. Pakistan having also filed a request for the indication of interim measures of protection, the Court held public sittings to hear observations on this subject; India was not represented at the hearings. In July 1973, Pakistan asked the Court to postpone further consideration of its request in order to facilitate negotiations. Before any written pleadings had been filed, Pakistan informed the Court that negotiations had taken place, and requested the Court to record discontinuance of the proceedings. Accordingly, the case was removed from the list by an order of 15 December 1973. Source: *the International Court of Justice* (1986), p. 98.

[998] Pakistan instituted proceedings before the Court against India in respect of a dispute concerning the destruction on 10 August 1999 of a Pakistani aircraft. India raised preliminary objections to the jurisdiction of the Court. The Court declared, by a vote of fourteen to two, that it had no jurisdiction to adjudicate upon the dispute brought by Pakistan.

from the General List of the Court in 1973. The *Aerial Incident of 10 August 1999* case was discontinued because of the lack of jurisdiction of the ICJ. The ICJ rejected the preliminary objections of India in the *Right of Passage over Indian Territory* case and handed down its judgment on the merits. India has also brought a fourth case to the ICJ - the ICAO appeal.[999] In this case, the ICJ found that it had jurisdiction to deal with the case lodged by India. Three of the four cases were concerned with disputes between India and Pakistan; the exception was the *Right of Passage over Indian Territory* case, which was brought by Portugal.

10.3.1. Basis of jurisdiction

All four cases were brought before the ICJ through a unilateral application under Article 40 of the ICJ Statute. Portugal invoked Article 36(2)[1000] of the Statute in the *Right of Passage over Indian Territory* case, Pakistan invoked Article IX of the Genocide Convention and Article 36(1) of the Statute in the *Trial of Pakistani Prisoners of War* case, and Pakistan invoked Article 36(1)[1001] and (2) of the Statute, the General Act of 1928 and declarations of Pakistan and India accepting the jurisdiction of the ICJ in the *Aerial Incident of 10 August 1999* case. India, in its sole case as an applicant, invoked Article 84 of the Convention on International Civil Aviation of 7 December 1944, Article II of the International Air Services Transit Agreement of 7 December 1944, and Articles 36 and 37 of the Statute.

10.4. The Position of India on the Legal Rules and Principles in the Contentious Cases

How have the cases concerning India contributed to the clarification of legal principles and rules and the emergence of new ones, and how have they affected practices followed by the ICJ and the member States of the UN. The following section examines the position of India concerning the elements of political motives in the contentious cases; its standpoint on reciprocity, mutuality and equality before the Court; its emphasis on the *prima facie* jurisdiction and consent for the purposes of interim measures of protection and its views on the compulsory jurisdiction of the Court.

10.4.1. Political Motives

India has been quite sensitive to the political use of any legal instrument in the proceedings of the Court. It has vehemently objected, whenever the opposing party had relied on political connections of the legal disputes. For

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[999] The case lasted for nearly eleven months and 12 days (from 30 August 1971 to 18 August 1972). In February 1971, following an incident involving the diversion to Pakistan of an Indian aircraft, India suspended over flights of its territory by Pakistan civil aircraft. Pakistan took the view that this action was in breach of the 1944 Convention on International Civil Aviation and the International Air Services Transit Agreement and complained to the Council of the International Civil Aviation Organization. India raised preliminary objections to the jurisdiction of the Council, but these were rejected and India appealed to the Court. During the ensuring written and oral proceedings before the Court, Pakistan contended, *inter alia*, that the Court was not competent to hear the appeal. In its judgment of 18 august 1972, the Court found that it was competent to hear the appeal and that the Council had jurisdiction to deal with Pakistan's case. Source: *the International Court of Justice* (1986) at 98.

[1000] Art. 36(2) ICJ Statue reads: The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.

[1001] According to article 36(1), the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

example, India made it clear that the *Trial of Pakistani Prisoners of War* case could have been instituted against another state, namely, Bangladesh, which was not yet a Member State of the UN. Since India had nothing to do with the crimes or trials that were at the centre of the case, "it could not be made a party to the application and request for interim measures just in order to enable the respondent to seek extraneous political advantages."[1002] It also alleged that Pakistan had had political motives in bringing the case and had thus "shown utter disregard for the object and purpose of the Genocide Convention.[1003]

10.4.2. Principles of Reciprocity and Equality

The contribution of India has enabled a clarification of the legal principle of reciprocity, mutuality and equality through its pleadings in the *Right of Passage over Indian Territory* case. India argued that the Portuguese application had been filed before the lapse of brief period. In the normal course of events, the UN Secretary-General would have, in compliance with Article 36 (4), transmitted copies of the Portuguese declaration to the other parties of the Statute. By doing this, Portugal violated equality, mutuality, and reciprocity to which India was entitled under the optional clause and the express condition of reciprocity contained in its own declaration of 1940; and consequently, the conditions did not exist to entitle Portugal to file the application. This argument led the Court to clarify and reinforce its jurisprudence of Article 36 (4) of the Statute which has two parts; the deposition of the declaration, a mandatory requirement; and transmission of the declaration to the States, an administrative/procedural obligation of the UN Secretary-General. In other words, the Indian argument necessitated that the Court clarified an important point of law - namely, whether the lapse of time is necessary between depositing the declaration with the UN Secretary-General under Article 36(4) of the Statute and filing of an application against some state. The ruling of the Court reaffirmed that "as soon as a State Party to the Statute deposits a declaration with the UN Secretary-General, it may invoke the compulsory jurisdiction against any other State party to the Statute, and every other State is likewise bound by its acceptance of the jurisdiction. It is immaterial whether those other states know that the declaration has been deposited."[1004] The ICJ clarified that there is no additional requirement that the information transmitted by the UN Secretary-General must reach the parties to the Statue or that some period must elapse subsequent to the deposit of declaration before it can become effective. Although the Indian argument of an entitlement to expect a reasonable degree of certainty with regard to the obligations imposed on them by the declarations of other states was put aside by the Court, this clarification of the Court had useful effects as far as similar situations were concerned.[1005] Furthermore, several Member States following the judgment of the Court in this matter modified the content of their declaration accepting the compulsory jurisdiction of the Court.[1006] This case also gave an important challenge to determine the relevant time period at which to ascertain the legal rights and obligations in question. The general

[1002] Pleadings, Oral Arguments and Documents, *Trial of Pakistani Prisoners of War*, p. 152.
[1003] *Ibid.*
[1004] Case concerning *Right of Passage over Indian Territory* (Preliminary Objections), Judgment of November 26th, 1957: I.C.J. Reports 1957, p. 145-147.
[1005] This position also played an important role in Maritime Boundary Dispute between Cameroon and Nigeria. *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 13.
[1006] Pleadings, Oral Arguments and Documents, *Right of Passage over Indian Territory*, p. 111.

rule the Court considered in such circumstances is, in a dispute, the claim or situation in question shall be examined according to the conditions and rules in existence at the time it was made and not at a later date.[1007]

10.4.2.1 Reciprocity

India has consistently mentioned in its declaration, accepting compulsory jurisdiction, that it has accepted the jurisdiction only on condition of reciprocity. This shows India's general attitude towards international law wherein it believes that rules of law ought to reciprocally bind the parties. India, invoking this clause in the *Right of Passage over Indian Territory* case, argued that Portugal violated India's reciprocal right by filing an application against it on 22 December 1955, before India knew, or had any means of knowing, the terms of the conditions of the Portuguese Declaration. Furthermore, Portugal violated India's reciprocal right, with respect to the third condition in the Portuguese Declaration which reserved to itself the right to exclude from the scope of Portugal's acceptance of compulsory jurisdiction, any given category or categories of dispute, at any time by mere notification to the UN Secretary-General. From the view of India, the instantaneous filing of the application was inconsistent with India's right to reciprocity and was wholly incompatible both with the terms of the optional clause and with the express conditions of India's own declaration.

The above position of India has helped to understand that the relation created between states by adherence to the clause is a consensual relation involving reciprocal rights and obligations. Therefore, in its view, it was "essential for the operation of this consensual relation that the contractual nexus between any two states should become effective only in law when the action of the UN Secretary-General under Article 36(4) of the Statute has had its appropriate effects with respect to other states which have previously adhered to the optional clause."[1008] This principle is of particular importance with respect to a state against which the state making the declaration already, intends to file an application. Although India offered a set of lengthy arguments on this principle, they were far from convincing to the Court, as it is clear from the Court's rejection of India's arguments.

10.4.2.2. Equality

India has shown determination to uphold the principle of equality of states, in fact, even in law, before the ICJ. Thus, India holds that a correct procedure should be followed to ensure equality of all states before the ICJ. In the *Right of Passage over Indian Territory* case, its arguments showed that the principle, that states have a right to be in a position of complete equality before the Court with regard to access to the Court and Court jurisdiction, is fundamental. In the words of India's counsel, "the principle of equality finds particular expression in Article 35 (2) of the Statute, which expressly provides that the conditions laid down by the Security Council under which states, not parties to the Statute, may have access to the ICJ, shall in no case place the parties in a position of inequality before the ICJ."[1009] It also finds particular expression in Article 36 (2) of the Statute, which provides equality in relation only to that state accepting the same obligation. In India's view, the purpose of transmission by the UN Secretary-General of declarations under the optional clause to the Court and all Member States is to protect the interests of all other parties to the Statute and with this end in view to ensure that all states that have accepted the optional clause have equal knowledge of the scope both of their obligations and rights

[1007] See ICJ Reports 1957, pp. 6, 37.
[1008] Case concerning *Right of Passage over Indian Territory* (Preliminary Objections), Judgment of November 26th, 1957: I.C.J. Reports 1957, p. 141-5.
[1009] Pleadings, Oral Arguments and Documents, *Right of Passage over Indian Territory*, pp. 210-213.

under the optional clause. Thus, India considered the lack of sufficient elapse of time period between depositing the declaration and the filing of the case in the Court as a manifest infringement of the principle of equality.

10.4.3. Necessity for Jurisdiction and Consent of State for the Judgment on Interim Measures

As far as the issue of interim measures is concerned, the Indian position shows that the question of interim measures of protection does not arise in the face of the patent and manifest lack of jurisdiction, and more so where the Court is not properly seized of the matter.[1010] This was apparent in the Indian argument in the *Trial of Pakistani Prisoners of War* case. India argued that "there is an inextricable link between an application and a request for interim measures which can only follow the application. The request cannot go beyond the scope of the application. The request must be founded on the application and the application alone, and the state making an application is not entitled to urge any point, particularly regarding jurisdiction, beyond what is contained in its application."[1011] To prove its point further, it relied upon case law of the ICJ in the *Fisheries Jurisdiction* case, where it was argued that "when the absolute absence of jurisdiction is so patent and manifest at the threshold of the institution of proceedings, the question of summoning the parties for a hearing to determine its jurisdiction does not arise…the only proper action for the ICJ to take…is to remove the application from the list by an administrative order."[1012]

10.4.4. Consent of State

India declined to give consent to the ICJ in the *Trial of Pakistani Prisoners of War* case. India had made a reservation under Article IX of the 1948 Genocide Convention, according to which India declared that, for the submission of any dispute in terms of this Article to the jurisdiction of the ICJ, the consent of all the parties to the dispute is required in each case.[1013] India, accordingly, presuming that the application and request of Pakistan which were submitted to India sought the consent of India, regretted that it could not give consent and informed the Court that it could not be in proper seizing of the case[1014] and proceed with it. It was also of the opinion that there was no legal basis whatsoever for the jurisdiction of the Court. It provides that any dispute relating to the interpretation or application of the treaty in question may be referred to the Court; however, the consent of the respondent is required to perfect the jurisdiction of the Court in any concrete case.

India submitted a written statement elaborating its position declining the consent through its letter dated 28 May 1973. It detailed its reasoning for refusing the consent to the jurisdiction of the Court by clarifying that its views did not constitute preliminary objections within the meaning of Article 67 of the Rules of the Court, despite Pakistan's assertion to the contrary. It made clear that its views are those of a sovereign state that refuses to give its consent to frivolous and vexatious proceedings instituted against it for interim measures for an ulterior

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[1010] Pleadings, Oral Arguments and Documents, *Trial of Pakistani Prisoners of War*, p. 131.
[1011] *Ibid.*, p. 140.
[1012] Fisheries Jurisdiction (Federal Republic of Germany *v.* Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972, p.33.
[1013] Pleadings, Oral Arguments and Documents, *Trial of Pakistani Prisoners of War*, p.132.
[1014] The case-law suggests that the Court in interpreting the relevant texts has reached the conclusion that it allows a unilateral seisin. Once the court has been validly seized, both parties are bound by the procedural consequences which the statute and the rules make applicable to the method of seisin employed. Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995, p. 23.

purpose and to seek extraneous political advantages against the object and purpose of the Genocide Convention[1015] and the Statute and Rules of the Court.

10.4.5. Compulsory Jurisdiction of the ICJ

India has accepted the compulsory jurisdiction of the Court in 1940 (prior to independence) and in 1956 (after independence) and has made eleven separate reservations in its current declaration which has been in effect since 1974. Each of the revisions to the original declaration shows the new ways and ingenious reservations of India to avoid the Court as far as possible in a concrete case. Which are the factors and how has the Indian position on compulsory jurisdiction evolved over time? An evolution of India's acceptance of compulsory jurisdiction dating back from the Permanent Court of International Justice is annexed at the end of this chapter.

The first significant revision of the declaration by India was made in the wake of the ICJ judgment in the *Right of Passage over Indian Territory* case. As mentioned above, India was unaware of the deposit of the declaration of Portugal and immediate filing of the case in the Court which had long-term implications for the equilibrium of the compulsory jurisdiction. Not only India, but several other states also made significant changes in their declaration subsequent to this judgment.[1016] Bulgaria, Cyprus, Hungary, Israel, Malta, Mauritius, New Zealand, Philippines, Poland, Somalia, Spain and the United Kingdom introduced changes to their reservations to the compulsory jurisdiction, subsequent to this judgment. India made a change on 14 September 1959 according to which disputes in respect of which any other party to a dispute has accepted the compulsory jurisdiction of the Court exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court.

There is one particular aspect of India's reservation, namely, its reservation for the Commonwealth countries. A close reading of India's 1959 and 1974 Commonwealth reservations gives the impression that the reservation is made against a particular state – *ratione personae*, properly so described.[1017] There may be an argument about whether this reservation may somehow defeat the purposes which it hoped to achieve by means of the purposes of Article 36 (2) and (6) of the Statute.

British India accepted the compulsory jurisdiction of the Permanent Court of International Justice on 19 September 1929 with a number of reservations. The declaration was revised on 28 February 1940 and continued to be in force after the formation of the ICJ under Article 36 (5) of the Statute. It was the *Right of Passage over Indian Territory* case which awakened the Indian government to make an appropriate change to the declaration.

[1015] Pleadings, Oral Arguments and Documents, *Trial of Pakistani Prisoners of War*, p. 124.

[1016] As Rosenne says, "Since that decision (Right of Passage over Indian Territory), several states previously bound by compulsory jurisdiction have made new declarations containing stipulations designed to counteract the two novel features of the declaration of Portugal and of the decision upholding it in the Right of Passage over Indian Territory case – the unexpected and unknown deposit of a declaration very shortly after a state became a party to the Statute and the equally sudden introduction of proceedings by that state before the respondent could have known that the declaration had been deposited". Shabtai Rosenne, *The Law and Practice of the International Court*, 3rd ed. (Leiden: Nijhoff, 1997), at p. 799.

[1017] India modified its reservation in 1959 reading *disputes with the government of any state which, on the date of this declaration, is a member of the Commonwealth of Nations.* This reservation omitted *all of which disputes shall be settled in such manner as the parties have agreed or shall agree* which were contained in previous declarations. In 1974, India modified again the reservation reading *disputes with the government of any state which is or has been a member of the Commonwealth of Nations.* Dissenting opinion of Judge Al-Khasawneh, Aerial Incident, paragraph 9 In the Case Concerning the *Aerial Incident of 10 August 1999* (Pakistan *v.* India), Judgment, I. C. J. Reports 2000, p. 50.

India withdrew the previous declaration and a new declaration under Article 36 (2) on 9 January 1956 was submitted which was terminable immediately without any notice, and contained, apart from other reservations, the most sweeping reservation on the American lines (the Connally reservation - under this reservation, the USA has excluded disputes with regard to matters which are essentially within the domestic jurisdiction of the USA as determined by it). India excluded disputes with regard to matters which are essentially within the domestic jurisdiction of India as determined by India. Such a reservation leaves very little scope for a case to be brought before the Court without the will of the country making it and is in fact against the very spirit of the compulsory jurisdiction of the Court. Realizing this fact, it seems, India in its 14 September 1959 declaration withdrew the most objectionable part of this reservation by which it was India and not the Court which had the authority to decide whether a matter was within the domestic jurisdiction of India or not. The new declaration, which has again been made terminable on notice provided that it applies only to disputes arising after 26 January 1950 with regard to situations or facts subsequent to that date.

In the *Right of Passage over Indian Territory* case, the declaration of Portugal had a reservation according to which it had the right to exclude from the scope of its declaration, at any time during its validity, any given category or categories of disputes, by notifying the UN Secretary-General and with effect from the moment of such notification. India maintained that this condition gave Portugal the right, by making a notification at any time to that effect, to withdraw a dispute from the jurisdiction of the Court, which had been submitted to it prior to such notification. It argued that the notification had retroactive effect and asserted it to be incompatible with the principle and notion of compulsory jurisdiction as established in Article 36 of the Statute. The Court rejected India's argument and its rejection enabled it to draw a conclusion that when an application has been regularly filed in a particular case while the declarations of both states were current, the subsequent lapse of one of the declarations, whether by the expiry of a fixed period or by denunciation under the terms of the declaration does not deprive the Court of jurisdiction over the case. On the other hand, the prior lapse of a declaration by however brief a period, suffices to prevent the establishment of the Court's jurisdiction by means of an application based upon the expired declaration. This is an important clarification which this case brought to bear in the subsequent cases.

Several Indian scholars have shown hesitation towards the advocacy of the acceptance of unqualified compulsory jurisdiction. For example, Anand says the maxim *calculate the limits of the possible* should be observed. He is cautious in showing optimism that the acceptance of the jurisdiction of the Court in essentially legal disputes is the first step towards the establishment of the rule of law in international society. Anand outlines the factors which keep Member States away from accepting the unqualified compulsory jurisdiction. Some of the most important are: the absence of any machinery for the execution of the Court's judgments, the fact that not all conflicts of interests are capable of being terminated by judicial techniques within the existing legal framework, the alleged insufficiency and the uncertainty of the rules of international law to deal with all situations arising between the states and the lack of confidence in the impartiality of its judgments.[1018] He

[1018] The Court suffered from a perception of lack of confidence in early 1970s, however, since then, the use of the Court in resolving disputes has steadily been increasing. Dugard John, "1966 and all that. The South West Africa Judgment Revisited in the East Timor Case" In 8 African Journal of International and Comparative Law 3, 549-563 (1996); Anthnoy Gaglione, *Anti-Colonoliasm and the South West Africa case: a study in Majoritarianism at the United Nations*; Lejeune, Anthony, *The Case of South West Africa* (1971); W. G. Friedman, *"The Jurisprudential Implications of the South West Africa case",* 6 *Columbia Journal of Transnational Law*, 1-16 (1967).

predicted optimism in the late 1950s that the ICJ will gain the confidence of the legal community and play an ever more useful role when world tension eases to some extent and states are more willing to entrust the solution to their differences to impartial judgment.[1019] Although the ICJ has gained significant confidence and prominence, particularly since the 1990s, and more and more states are bringing their disputes to the Court, it would be difficult to imagine whether this trend will have positive spill over effect on India's reservations to the compulsory jurisdiction.

There is no doubt that the practice of attaching more and more reservations and exclusions has reduced the usefulness of the optional clause system and of the Court itself.

10.5. Preference for Diplomatic Negotiations

As mentioned above in the introduction, India has consistently and strongly advocated its preference for the method of negotiation in all types of disputes. This position has been reinforced in its pleadings at the Court in all four cases involving India.

For example, one of its objections to the Court in the *Right of Passage over Indian Territory* case was that Portugal filed its application when the diplomatic negotiations had not yet reached the point at which they could no longer be profitably pursued. India contended that it is a rule of customary international law that the filing of a unilateral application must be preceded by a full trial of diplomatic negotiations. It held that "[T]he reason why customary law requires a state to undertake negotiations and continue them until they can no longer profitably be pursued is that states which accept the system of compulsory jurisdiction of the Court do not wish to be brought before the Court without first having made every reasonable effort to obtain a settlement through the diplomatic resources available to them, or to be obliged to appear before the Court in cases except those in which settlement by negotiation is not possible. It is for this reason that many treaties of compulsory jurisdiction and arbitration contain an express condition that there should be previous negotiations."[1020] The ruling of the ICJ on this point of India in the *Right of Passage over Indian Territory* case shows that it is not essential to have diplomatic means fully exhausted and that only the failure in reaching diplomatic settlement will enable any institution of the proceedings in the Court.[1021]

This preference for diplomatic negotiations and the predictable attitude of India during the *Trial of Pakistani Prisoners of War* case helped Pakistan to remain engaged in the diplomatic dialogue. Hoping that diplomatic negotiations would result in the resolution of the dispute, Pakistan requested the Court to discontinue the proceedings in this case. In the *ICAO Appeal* case, India, having been left with no alternative by the deliberations of the ICAO Council, took recourse to the Court. This move also furnished an interlude which ultimately helped to resolve the dispute to the satisfaction of both parties.

[1019] R. P. Anand, *International Courts and Contemporary Conflicts*, (Popular Press, 1974).

[1020] Pleadings, Oral Arguments and Documents, *Right of Passage over Indian Territory*, at p. 117.

[1021] India raised the objection that, "unless negotiations had taken place which had resulted in a definition of the dispute between the Parties as a legal dispute, there was no dispute, in the sense of Article 36(2) of the Statute, the existence of which had been established in the Application and with respect to which the Court could exercise jurisdiction." After analyzing the content of both, India and Portugal on this matter, ICJ held that, "the legal issue was sufficiently disclosed in the diplomatic exchanges, and considers that the Government of Portugal has complied with the conditions of the Court's Jurisdiction as laid down in Article 36(2) of the Statute. Accordingly, the Court must dismiss the Third Preliminary Objection. Case concerning right of passage over Indian territory (Preliminary Objections), Judgment of November 26th, 1957: I. C. J. Reports 1957, p. 125 at p. 148.

10.6. ICJ Advisory Proceedings

India has been active in promoting recourse to the Court, especially through the advisory proceedings, as can be seen through its participation in the general debates in the Sixth Committee of the General Assembly and voting records on the General Assembly resolutions requesting the Court to deliver advisory opinions. It has also been active in filing written submissions in the advisory proceedings with its written statements in eight advisory proceedings, starting from 1948,[1022] and presented oral statement in one advisory proceeding. If participation is measured in terms of written and oral statements, India has been the most active state in Asia followed by China which has submitted written statements in seven proceedings and none in oral hearings. India ranks fourth, after the USA, UK and France, in terms of submission of written submissions in the advisory proceedings. It should be noted that India has never challenged the Court's jurisdiction to entertain the request of the requesting organ in any of the advisory proceedings. India filed its written statements in the advisory proceedings concerning the *Conditions of Admission of a State to Membership in the UN*, *Reparations for Injuries*, *International Status of South-West Africa*, *Voting Procedures on Questions Relating to Reports and Petitions concerning the Territory of South-West Africa*, *Constitution of the Maritime Safety Committee, Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,*[1023]*Legality of the Threat or Use of Nuclear Weapons.* It presented an oral statement in the advisory opinion concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia.*

While India has been active in filing written statements, it has been an original proponent of only one resolution which requested the advisory opinion, namely *International Status of South-West Africa*. The other original proponents were Denmark, Norway, Syria and Thailand of Resolution 338 (IV) of 6 December 1949. In the advisory proceedings concerning *Voting Procedure on Questions relating to Reports and Petitions concerning the territory of South-West Africa*, India, along with Mexico, Norway, Syria and the US, submitted the formal proposal (Resolution 904 (IX) of 23 November 1954). It should be noted that the Hyderabad question (1949) and the question of Kashmir (1949) were mooted in the Security Council for the advisory opinions of the Court, but no formal request emanated from the Security Council.

In the *Nuclear Weapons* advisory opinion, India did not participate in the oral hearings despite its staunch support and advocacy for the elimination of nuclear weapons. As Mani argues, "[I]ts physical presence before the Court might have given an added weight to the cause of nuclear disarmament. By not participating at the hearings, India lost an opportunity to formally address the international community on such an important aspect of its foreign policy. Or, was the decision on non-participation deliberate, reflecting a desire to assume a low profile on the issue?"[1024] Mani's observation needs some analysis. As mentioned above, India made oral statement only in one advisory proceeding, namely, the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* where it strongly condemned the illegal presence of South Africa in Namibia. In those advisory proceedings where India filed written statements and refrained from making oral statements, the opinions rendered by the Court were more or less reflective of the Indian position. Although whether the physical presence of India would have decisive effects on the Court's consideration of the matter is a

[1022] India submitted its written observation in the advisory opinion concerning *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* through a letter dated 28 January 1948.

[1023] R. S. Shiv, "The Development of India's Nuclear Weapons Policy in the Framework of the Development of the International Humanitarian Law by the International Court of Justice", in M. K. Sinha (ed.) *International Criminal Law and Human Rights*, 155-200 (New Delhi: Manak Publications, 2010).

[1024] V. S. Mani, "The Nuclear Weapons and the World Court", 37 *IJIL* (1997), p. 167.

subject of separate scrutiny, one thing is clear, that the physical absence definitely reflects India's low profile in the subject, particularly, seen in the context of the subsequent nuclear explosion in 1998. In the same way, India's lack of written or oral submission in the *Wall* advisory proceedings in 2004 also leads to believe that the Indian decision was influenced by foreign policy interests, namely, the growing relations with Israel.

In view of the conspicuous absence in filing oral statements, it becomes interesting to see why India did not file written or oral submissions in some of the important landmark advisory proceedings which concerned the broad objectives of development of international law. India participated in eight advisory proceedings, but one would have firmly expected its active participation in the *Competence of the General Assembly for the Admission of a State to the UN, Certain Expenses,*[1025]*Reservation to the Genocide Convention, Application of Article VI, Section 22 of the Convention on the Privileges and Immunities of the UN and Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights opinions, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion).* These advisory opinions have significantly contributed to the codification and progressive development of international law in the matters dealt with by the opinions. The advisory opinions concerning *Western Sahara*, *WHO-Egypt Agreement*, *Interpretation of Peace Treaties*, *Application of Article VI, Section 22 of the Convention on the Privileges and Immunities of the UN*, *Applicability of the Obligation to Arbitrate under section 21 of the UN HQ Agreement of 25 June 1947* could be considered as having no significant foreign policy interest. In the *Admissibility of hearing* advisory proceedings, India did not consider it necessary to submit any written statement, in view of the fact that its views in the matter were already indicated in the relevant records of the tenth Session of the General Assembly. India did not file any submissions in the five advisory proceedings that dealt with the administrative law matters either.[1026] Thus, the brief examination of records shows that India actively participates in the Court's advisory proceedings when the outcome of the opinion or proceedings themselves may have potential impacts on India's national interests, in particular, the foreign policy.

As far as the use of substantive laws in the written submissions of states is concerned, India has shown heavy reliance on the general principles of international law. This is partially led by India's firm belief that the general principles of law are principles expressing legal ideas common to the legal systems of civilized states which the Court is authorized to apply in Article 38 of the Statute.

10.6.1. India's Position on the Legal Rules and Principles in the Advisory Proceedings

What contribution has India made towards the substantive law and procedures dealing with the advisory opinion rendered by the Court? Has India's position contributed to the clarification of legal principles and rules involved in the advisory opinion? The following section analyses India's position in each of the advisory proceedings where she has filed a written statement.

[1025] It is known that although the issue involved the interpretation of Article 17(2) of the UN Charter, the obligations of the members was the real matter of dispute.

[1026] *Effect of Awards of Compensation made by the UNAT*; *Judgments of Administrative Tribunal of ILO upon Complaints Made against UNESCO*; *Application for Review of UNAT Judgment No. 158*; *Application for Review of UNAT Judgment No. 273* and *Application for Review of UNAT Judgment No. 333*.

In the advisory opinion concerning,the *Reparation for Injuries*,[1027] India submitted that" if it is established that the United Nations, as an Organization, is competent legally to bring an international claim against the responsible State for reparation of damage caused to the victim, the Government of India considers that the only way to deal satisfactorily with the rights of the State of which the victim is a national and of the United Nations of which he was agent is to make the State as well as the United Nations parties to the proceedings in order that the rights of both may be worked out in the same proceedings."[1028]

In the advisory proceedings of the *Admission of a State to UN Membership*,[1029] India suggested that it adheres to the view that the Members of the United Nations are entitled to take into consideration only those points which are specified in Article 4 of the Charter and it is wrong to import extraneous considerations into this matter. Consequently, India forwarded that the ICJ should negatively answer the question contained in the resolution.[1030]

10.6.1.1. Advisory opinion - *IMO Safety Committee*[1031]

In this advisory proceeding, India submitted a lengthy written statement covering among other things the legal points concerning the nationality of the ship, protection of ships, the standards to be applied to ascertain the "largest ship-owning nations", the term "ship-owning nations", ownership by nationals as a criterion and the object behind the provision on the functions of the Maritime Safety Committee.

[1027] The question referred by the General Assembly Resolution of 3 December 1948 to the Court: (1)In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him? (2) In the event of an affirmative reply on point 1(b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national? This is one of the most quoted advisory opinions of the ICJ and is considered to be one of the most important judicial pronouncements. If statistics are any significant indication of the most-quoted advisory opinion of the Court in its case law then, the Court up to 31 December 2000, has quoted directly or indirectly this advisory opinion six times in the advisory opinion and three times in its contentious cases. One would agree that this advisory opinion in several respects has significantly aided the international organizations law. Bimal N. Patel, *The World Court Reference Guide*, (the Hague: Kluwer Law International, 2002).

[1028] Letter from the Deputy Secretary to the Government of India to the Registrar of the International Court of Justice dated 28 December 1948.

[1029] UN General Assembly Resolution 296(IV) of 22 November 1949: Can the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend? The decision to submit the question to the Court grew out of the debates in the General Assembly concerning the refusal of the (then) Soviet Union to support in the Security Council the admission of certain States. As Oliver Lissitzyn concludes, "nothing was gained by the submission of this question to the Court. There is no indication that the opinion gave any substantial political or moral advantage to the Western nations over the Soviet bloc." Oliver James Lissitzyn, *The International Court of Justice: Its Role in the Maintenance of International Peace and Security*, p. 91-92 (New York: Carnegie Endowment for International Peace: 1951). It is important to note that India voted against the draft resolution seeking the advisory opinion of the ICJ.

[1030] Letter from the Joint Secretary to the Government of India, Ministry of External Affairs and Commonwealth Relations, to the Registrar of the Court of 28 January 1948.

[1031] Resolution of the Assembly of Inter-Governmental Maritime Consultative Organization of 19 January 1959: Is the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on 15 January 1959, constituted in accordance with the Convention for the Establishment of the Organization?

Regarding the nationality of the ships, India suggested that the ICJ should base its opinion in the light of international practice and through the reasoned application of the generally accepted principles of international law. It cited Article 5 of the High Seas Convention of the 1958 Geneva Convention, as one such principle which reads that each state is free to fix conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. India argued that the registration of ships and the need to fly the flag of the country where the ship is registered are considered essential for the maintenance of order on the open sea, since it is easy to enforce the rule that a vessel not sailing under the maritime flag of a State enjoys no protection whatsoever.[1032]

On the question of protection of vessels, India relied on the case-law of *Noim Molvan v. Attorney-General for Palestine* in which it was established that a vessel not sailing under the flag of any State has no right to protection just as a vessel sailing under the flags of two different States is deprived of any protection whatsoever.[1033] India contended that Article 6 of the Geneva Convention on the High Seas of 1958 rule has now become part of the treaty law.

One can also say that the Indian position is based on general principles of law as it substantially used these principles to justify its position. For example, in establishing the relationship between a ship and the state whose flag it flies, it used a principle propounded by the majority in the *Lotus* judgment, according to which "a corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the state the flag of which it flies, for, just as in its own territory, that state exercises its authority upon it, and no other state may do so … By virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory."[1034]

India argued that it is the law of the flag unconnected with the ownership of the vessel, which provides the necessary authority to the master of a ship to deal with the cargo during the voyage and the manner in which he should execute it. India argued, "[T]he term has been used to convey the idea of jurisdiction and authority over the ship and not that of ownership of the ship in its literal sense."[1035] To ascertain the nationality of the ship, one has to look to the flag and the registry of the ship. Another major argument India forwarded was that the intention for the inclusion of Article 28(a) of the Convention seems to be to restrict membership of the Maritime Safety Committee to nations having the powers to enforce rules and regulations for maritime safety; this certainly could be done only under the law of the flag of state and under no other way. India took strong exception and considered that the test of ownership which could change at will of shareholders at a moment's notice is totally unsuited with reference to the question of formulation and enforcement of maritime safety rules.[1036] India considered that the economic success of ship-owning and ship-operating business depends upon a reasonably reliable forecast of the laws and regulations which will apply to the ship. The law as to the nationality of the ship must be definitely known in advance. India argued that the election which took place on 15 January 1959 to elect the members of the IMCO Maritime Safety Committee was not in accordance with the Convention and Liberia and Panama should have been elected. Belgium, France, Switzerland, Italy, Denmark, UK, Norway and the Netherlands stated that the Council was duly elected, whereas India, Liberia, Panama and the USA

[1032] Pleadings, Oral Arguments and Documents, *Composition of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, p. 253.
[1033] *Ibid*., at 254.
[1034] *Ibid.*, at 256.
[1035] *Ibid.*, at 258.
[1036] *Ibid.*, p. 259.

refused to agree with them. Ultimately, the ICJ ruled by nine votes to five that the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on 15 January 1959, was not constituted in accordance with the Convention for the Establishment of the Organization.

10.6.1.2. Advisory opinion - *Voting Procedures*[1037]

The UN General Assembly, on 11 October 1954, adopted a special Rule for voting procedure to be followed by the Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South West Africa. According to this Rule, such decisions were to be regarded as important questions within the meaning of Article 18(2) of the UN Charter and would therefore require a two-thirds majority of Members of the UN present and voting. The Indian statement in this advisory proceeding displayed its active advocacy for holding up the principle of absolute sovereignty. It articulated the relationship between the principle of sovereignty and voting methods. According to India, a world where national sovereignty is so widely stressed, the principle of unanimity as opposed to the more convenient doctrine of a majority decision has a natural appeal. India argued that "[T]he UN Charter has not accepted the principle of unanimity except in the Security Council and believed that the results of the rule of unanimity in international conferences have not been reassuring. It has proved to be highly dilatory in some cases and intolerably obstructive in others."[1038] It is interesting to note that these two arguments of India were substantially based on the researchers' opinion than on treaty or customary international law or the general principles of law. The Court unanimously confirmed that the decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations, the correct interpretation of the Advisory Opinion of 11 July 1950. Thus, the Indian position was vindicated.

10.6.1.3. Advisory opinion - *International Status of South-West Africa*[1039]

This Advisory Opinion was concerned with the determination of the legal status of the Territory, the administration of which had been placed by the League of Nations after the First World War under the mandate of the Union of South Africa. The League of Nations had disappeared, and with it the machinery for the supervision of the mandates. Moreover, the UN Charter did not provide that the former mandated Territories should automatically come under the trusteeship. In its written statement for this advisory proceeding, India did not make any particular pronouncement but its submission attempted to provide a detailed interpretation of the resolution of the League mandate. It submitted that a reservation made during the discussions of a multilateral treaty does not affect the operation of the treaty unless reservation has also been made at the time of the signature of the treaty and duly attached to the signature and recorded in a process-verbal or unless reservation is

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[1037] UN General Assembly Resolution 904 (IX) of 23 November 1954 : Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950: "Decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations'?" that the said rule is the correct interpretation of the Advisory Opinion of July 11th, 1950.

[1038] Pleadings, Oral Arguments and Documents, *Voting Procedures on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, p. 77.

[1039] UN General Assembly Resolution of 6 December 1949: What is the international status of the Territory of South-West Africa and what the international obligations of the Union of South Africa arising therefrom.

attached to the ratification. A reservation is the refusal of an offer. But an offer is not made in the case of a multilateral treaty until the treaty is offered for signature. Therefore, a reservation made preceding to the making of an offer cannot have any legal effect. It argued that the Union of South Africa having not renewed its reservation at the time of signing of the UN Charter or of its ratification under Article 110 of the Charter (which, at any rate, does not provide for a limited ratification), "cannot derive any advantage from the reservation made during the drafting of the Charter."[1040] The subsequent codification by the Vienna Convention on the Law of Treaties lends support to this position of India which was pronounced back in the 1960s. Furthermore, the Vienna Convention on the Law of Treaties has formulated the principle on this aspect in Article 19 which provides that a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation. The position of India was well reflected in the final opinion of the Court.

10.6.1.4. Advisory Opinion - Namibia[1041]

The UN General Assembly decided on 27 October 1966 that the mandate for South West Africa was terminated and that South Africa had no other right to administer the Territory. The Security Council in 1969 called upon South Africa to withdraw its administration from the Territory, and on 30 January 1970, it declared, the continued presence of South African authorities there was illegal and all acts taken by the South African Government on behalf of or concerning Namibia after the termination of the mandate were illegal and invalid. India advocated three basic principles in its oral statement. In the viewpoint of India, the inalienable right of the colonial people to self-determination and independence, the non-acquisition of territory by threat or use of force or any other form of aggression, the non-recognition of the fruits of aggression or illegal occupation of territory, and the duty to fulfil international obligations in good faith, are the foundations of international legal order. India explained that these principles have universal value and are therefore in the interest of the international community of states as a whole. India emphasized that the Court should recognize and apply these principles in its opinion so that the principles strengthen and promote the rule of law in international relations. The Court found that the continued presence of South Africa was illegal and it was under an obligation to withdraw its administration immediately. It also found that State Members of the UN were under an obligation to recognise the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain any acts implying recognition of the administration.[1042]

10.6.1.5. Advisory Opinion -World Health Organization's Request on the Question of *Use of Nuclear Weapons in Armed Conflicts*[1043]

India submitted its one and half page statement on the last date of filing of the statement, i.e. 20 July 1995. In its statement, India strongly advocated the elimination of nuclear weapons and outlawing of the use of these

[1040] Written statement of India in the advisory proceedings concerning the *International Status of South-West Africa*, p. 150.

[1041] What are the legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)? Security Council Resolution 276 (1970) of 29 July 1970.

[1042] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p.16 at p. 58, paragraph 133.

[1043] World Health Assembly Resolution WHA 46.40 of 14 May 1993: In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?

weapons as a first step. India argued that based on the understanding that the international community has agreed that the use of nuclear weapons constitutes a crime against humanity and violation of the Charter, it has already been generally accepted as illegal. It also considered that the use of nuclear weapons is a violation of international humanitarian law, however, the Indian statement did not mention anything on the possession of nuclear weapons. It invited the Court to confirm the generally accepted view among nations that the use of nuclear weapons is illegal. In this proceeding, India, arguing the importance of the question on the future well-being of the international community, advocated that the Court should give its considerate opinion on the question posed by the WHO, which the Court ultimately declined. It found that it was not able to give the advisory opinion. In this opinion, the Court found that, according to its Constitution the WHO was authorised to deal with the health effects of the use of nuclear weapons, of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in. But the question put to the Court did not relate to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons in view of their health and environmental effects. The Court applied the principle of speciality and found that the request for advisory opinion submitted by the WHO did not relate to a question arising "within the scope of [the] activities of the WHO."[1044]

10.6.1.6. Advisory Opinion -UN General Assembly Request on the Question of the *Use or* Threat of Use of Nuclear Weapons[1045]

The UN General Assembly asked an advisory opinion: Is the threat or use of nuclear weapons in any circumstances permitted under international law? It concluded that it had jurisdiction to render an opinion on the question put to it and that there was no compelling reason to exercise its discretion not to render an opinion. It also found that the most directly relevant applicable law was that relating to the use of force, as enshrined in the UN Charter, and the law applicable in armed conflict, together with any specific treaties on nuclear weapons that the Court might find relevant. India submitted a seven-page statement on the last date of filing of the written statement, i.e. 20 July 1995. India argued that "the use of force is prohibited by Article 2(4) of the UN Charter and the prohibition is so comprehensive and fundamental as to be regarded as a *jus cogens* or an obligation of an absolute character. On the basis of this principle it is clear that any use of nuclear weapons as a measure of use of force to promote national policy objectives would be unlawful."[1046] The qualification that the use of force to promote national policy objectives is prohibited lends support to the argument that in case of a survival crisis, a state may resort to the use of force including nuclear weapons. Is it possible that the lack of argument of a categorical denial to use nuclear weapons in any circumstances enabled the ICJ to find support of its argument in the Indian position?

India reinforced its position in this advisory proceeding that the right of self-defence is to be regarded as a provisional measure or a remedy and hence as soon as other means or measures become available, the resort to self-defence through use of force has to cease. It advocated that the use of nuclear weapons in any armed conflict as a first attack would be unlawful under international law. This legal argument derives support from India's

[1044] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996, p. 66 at p. 84 (32).

[1045] UN General Assembly Resolution 49/75K of 15 December 1994: Is the threat or use of nuclear weapons in any circumstances permitted under international law?

[1046] Written statement of India in the advisory proceedings concerning the *Legality of the Threat or Use of Nuclear Weapons,* p. 1.

political position on this issue. In its view, nuclear weapons could not be used by way of reprisal against another state if that state did not commit any wrongful act of *delict* involving use of force. Second, when a state commits such a wrongful act or *delict*, the use of force by way of reprisal would have to be proportionate and as such if the wrongful act did not involve the use of nuclear weapons, the reprisal could also not involve the use of nuclear weapons. Even where a wrongful act involves use of a nuclear weapon the reprisal action cannot involve use of a nuclear weapon without violating certain fundamental principles of humanitarian law. In this sense, prohibition of the use of a nuclear weapon in an armed conflict is an absolute one, compliance with which is not dependent on corresponding compliance by others but is a requisite in all circumstances. But India was a little hesitant when it argued that the use of nuclear weapons by way of reprisal or retaliation a*ppears* to be unlawful. One can note a lack of categorical denial of the use of nuclear weapons in this position of India.

It emphasized that the use of nuclear weapons in an armed conflict is unlawful being contrary to the conventional as well as customary international law. In its view, if peace is the ultimate objective there can be no doubt that disarmament must be given priority and has to take precedence over deterrence. India went to the extent of arguing that "since the production and manufacture of nuclear weapons can only be with the objective of their use, it must follow that if the use of such weapons itself is illegal under international law, then their production and manufacture cannot under any circumstances be considered as permitted."[1047] In a nutshell, in the viewpoint of India, the use of nuclear weapons which is otherwise contrary to international law could only be effectively prevented by eliminating completely their production, manufacture and by ensuring the dismantling of existing nuclear weapons. India submitted that the threat or use of nuclear weapons, in any circumstance, whether as a means or method of warfare or otherwise, is illegal or unlawful under international law.

All in all, the Indian argument neither fully justified that use of nuclear weapons in armed conflict would be illegal or that use of nuclear weapons in a survival case is legal. It can be observed that the ICJ's opinion in some respects was in balance with Indian arguments. In view of the subsequent nuclear testing in 1998, the Indian position, retrospectively viewed, is not surprising. In this respect, Falk summarizes in an apt manner that "ever since India exploded a nuclear device in May 1974, the Indian relationship to nuclear weaponry has been ambivalent and controversial."[1048] His analysis is quite correct because India has maintained a dual posture of staking its claims as a threshold nuclear weapons state, by claiming it's upgrading of geopolitical status that follows there from, on the one hand and strong advocacy for complete nuclear disarmament as a moral and political imperative for all countries on the other. The Indian government, regardless of its political leadership, has for several decades sustained this dual posture: a virtual member of the exclusive club of nuclear weapons states and a leading critic of *nuclearism (italics added)* and advocate of comprehensive denuclearization.

The decision of the ICJ gives strong support on the basis of international law to the abiding Indian view that nuclear weapons states are under an obligation to move prudently, but insistently, toward the implementation of nuclear disarmament. The ICJ opinion apparently has not any discernible impact on the policy of India with respect to the role assigned to nuclear weapons and the duty to seek nuclear disarmament through self-restraint. The opinion underlined an offer to India of an important instrument with which to support its

[1047] Written statement of India in the advisory proceedings concerning the *Legality of the Threat or Use of Nuclear Weapons*, p. 6.

[1048] Richard Falk, "Nuclear Weapons, International Law and the World Court: A Historic Encounter," 37 *IJIL* (1997) at p. 149.

central contention that nuclear armament abolition is the proper legal path for international society. It also offered support to advocates of the Comprehensive Test Ban Treaty, who contend that the end of testing is a step on the path to nuclear disarmament and this path now enjoys a prescriptive status in international law.

India following the advisory opinion strongly advocated for the phased program for the complete elimination of nuclear weapons at the Non-Aligned Movement (NAM). The NAM also urged nuclear weapons states to commence negotiations on a legally binding international instrument to provide unconditional assurances to all non-nuclear weapons states against the use or threat of nuclear weapons.[1049] The Indian position was vindicated in a number of respects. First, the ICJ accepted that it should comply with the request for an advisory opinion from the General Assembly despite strong arguments against from nuclear weapons states. The final opinion of the ICJ seemed to endorse the strongly held Indian view which insists upon a time-bound program for nuclear disarmament. The Court in this opinion seemed to recognize a state of legal vacuum or *non liquet* governing the status of nuclear deterrence in international law. In this regard, the views expressed by some judges that accord with the Indian position must be noted: that the ICJ is not justified in expressing the existence of *non liquet (*the Court did not express a *non liquet*)in any legal matter particularly given the wide range of principles which are available for application (Judges Weeramantry, Shahabuddeen and Koroma).[1050]

10.7. Concluding remarks

Based on the above analysis, the chapter proposes the following concluding remarks, primarily with a view to have enhanced contribution of India towards the role and functioning of the ICJ in the future.

It is observed that the Indian position and attitude towards the Court, like any other sovereign state, is guided by the considerations of the national interests. It is proposed that there is more scope for India, in line with her overall influence in international relations, to guide the development of international law by way of increased active participation in its overall functioning of the Court. One way of doing this is to submit written statements and participate in the oral proceedings of all advisory proceedings, particularly when such proceedings may have impact on the broad objectives of development of international law. It has been observed that the pro-active approach in the past has helped in achieving some of the important long-term objectives to bring the rule of law in the world. For example, the ICJ judgment in the *Right of Passage over Indian Territory* case proved helpful in decolonizing the territory and strengthening India's territorial sovereignty. India's active participation in the debates of the UN General Assembly and the advisory proceedings concerning the South-West Africa helped the entity in achieving full sovereignty and to make Namibia a sovereign and independent state a reality. Cases and opinions concerning South-West Africa basically involved the question of legal obligation of the government of South Africa to fulfil the *sacred trust of civilization.* India fully defended this cause. One can draw a conclusion that India has found that ICJ could be an effective international platform to resolve the legacy of colonization and achieve independence of erstwhile colonies.

The Indian position in the advisory proceedings concerning the broad issues of development or where interpretation of international law was concerned shows that it has high faith in the impartiality, objectivity and capability of the ICJ. Despite the post-adjudicative phase uncertainty in the compliance of the judgment of the ICJ, the Indian stand in the contentious cases does not enable to think about the futility of the judicial process.

[1049] Yogesh K. Tyagi, "Judicial Statesmanship without Political Courage: The ICJ Advisory Opinion on Nuclear Weapons," 37 *IJIL* (1997), at p. 198.

[1050] P. S. Rao, "Advisory Opinion of ICJ on Nuclear Weapons" In 37 *IJIL* (1997), at p. 224.

India has respected the judgments of the ICJ, which reached the merit stage. The fact that Justice Dalveer Bhandari of India has been elected as a member of the Court, will have no implications in positively influencing India to accept the compulsory jurisdiction.[1051] Election of Justice Bhandari to the ICJ may perhaps lead to more publicity and hence knowledge in India on the activities of the Court. Nevertheless, India is unlikely to bring any case before the Court in the near future. India, during the negotiations of the current and future treaties, should consistently advocate attaching a jurisdictional clause to every multilateral treaty-conferring jurisdiction, at least, primarily, upon the ICJ. Furthermore, India can favourably look into the idea of national court or tribunal seeking guidance from the ICJ.[1052] Last but not the least, Judge Nagendra Singh advocated for the use of advisory opinion in case of inter-state disputes, to obtain – if not actual settlement of the dispute – at least a legal basis for such settlement. This position, which has found support among number of Indian scholars, is another meritorious proposal.

[1051] Justice Dalveer Bhandari, a former Judge of the Supreme Court of India, was elected as a member of the Court, following the vacancy created by the resignation of Judge Al-Khasawneh of Jordan. Justice Bhandari's term will be till November 2018.

[1052] The USA passed a resolution on 17 December 1982 for the possibility of an advisory opinion of the ICJ upon request by a national court or tribunal, which is duly authorized by national legislation to make such a request, regarding any question of international law of which such court or tribunal has jurisdiction.

Annex

Texts of the Successive Indian Declaration of Acceptance of the Compulsory jurisdiction of ICJ: An evolution

A. Current declaration effective since 15 September 1974

1. I have the honour to declare, on behalf of the Government of the Republic of India, that they accept, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate such acceptance, as compulsory *ipso facto* and without special agreement, and on the basis and condition of reciprocity, the jurisdiction of the International Court of Justice over all disputes other than:

1) disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement;
2) disputes with the government of any State which is or has been a Member of the Commonwealth of Nations;
3) disputes in regard to matters which are essentially within the domestic jurisdiction of the Republic of India;
4) disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which India, has been or may in future be involved;
5) disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court;
6) disputes where the jurisdiction of the Court is or may be founded on the basis of a treaty concluded under the auspices of the League of Nations, unless the Government of India specifically agree to jurisdiction in each case;
7) disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction;
8) disputes with the Government of any State with which, on the date of an application to bring a dispute before the Court, the Government of India has no diplomatic relations or which has not been recognized by the Government of India;
9) disputes with non-sovereign States or territories;
10) disputes with India concerning or relating to:
    a) the status of its territory or the modification or delimitation of its frontiers or any other matter concerning boundaries;
    b) the territorial sea, the continental shelf and the margins, the exclusive fishery zone, the exclusive economic zone, and other zones of national maritime jurisdiction including for the regulation and control of marine pollution and the conduct of scientific research by foreign vessels;
    c) the condition and status of its islands, bays and gulfs and that of the bays and gulfs that for historical reasons belong to it;
    d) the airspace superjacent to its land and maritime territory; and
    e) the determination and delimitation of its maritime boundaries.

11) disputes prior to the date of this declaration, including any dispute the foundations, reasons, facts, causes, origins, definitions, allegations or bases of which existed prior to this date, even if they are submitted or brought to the knowledge of the Court hereafter.

2. This declaration revokes and replaces the previous declaration made by the Government of India on 14 September 1959.

New Delhi, 15 September 1974 (signed by Swaran Singh, Minister for External Affairs)

B. India's declaration of 14 September 1959[1053]

I have the honour, by direction of the President of India, to declare on behalf of the Government of the Republic of India that they accept, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate such acceptance, as compulsory *ipso facto* and without special agreement, and on the basis and without special agreement, and on the basis and condition of reciprocity[1054], the jurisdiction of the International Court of Justice over all disputes arising after 26 January 1950 with regard to situations or facts subsequent to that date, other than:

(1) Disputes, in regard to which the Parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement;

(2) Disputes with the government of an State which, on the date of this declaration, is a member of the Commonwealth of Nations;[1055]

(3) Disputes in regard to matters which are essentially within the jurisdiction of the Republic of India;

(4) Disputes concerning any question relating to or arising out of belligerent or military occupation or the discharge of any functions pursuant to any recommendation or decision of an organ of the United Nations, in accordance with which the Government of India have accepted obligations;

(5) Disputes in respect of which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court; and

(6) Disputes with the Government of any State with which, on the date of an application to bring a dispute before the Court, the Government of India has no diplomatic relations. (New York, 14 September 1959, signed C. S. Jha)

[1053] India's reservation is quite broad in substance. There is no doubt that, over a period of time, the ever-expanding scope of reservations is going to impair the efficacy of the compulsory jurisdiction.

[1054] Over the period of time, the principle of reciprocity has become an inherent part of the compulsory jurisdiction. As Rosenne says, one might infer that the inclusion of a specific reference to reciprocity or to the principle of reciprocity in an acceptance of the compulsory jurisdiction is not necessary. Shabtai Rosenne, *The Law and Practice of International Court (1920-1996) (*3rd ed., 1997) at 766.

[1055] India modified this reservation in 1974 which now reads *disputes with the government of any State which is or has been a Member of the Commonwealth of Nations. ICJ Yearbook 1996-1997*, p. 99.

C. India's declaration of 7 January 1956[1056]

I have the honour by direction of the President of India, to declare on behalf of the Government of India that, in pursuance of paragraph 2 of Article 36 of the Statute of the International Court Justice, the Government of India recognize as compulsory *ipso facto* and without special agreement, on condition of reciprocity and only till such time as notice may be given to terminate this Declaration, the jurisdiction of the International Court of Justice in all disputes arising after the 26th January 1950 with regard to situations or facts subsequent to that date concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any facts which if established would constitute a breach of an international obligation; or

(d) the nature or extent of the reparations to be made for the breach of an international obligation.

But excluding the following: -

(i) disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;

(ii) disputes with the Government of any country which on the date of this Declaration is a member of the Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree;

(iii) disputes in regard to matters which are essentially within the domestic jurisdiction of India as determined by the Government of India; and

(iv) disputes arising out of or having reference to any hostilities, war, state of war or belligerent or military occupation in which the Government of India are or have been involved (signed Arthur S. Lall, Permanent Representative of India to the United Nations)

D. India's declaration of 28 February 1940 prior to independence[1057]

(Signed on 28 February 1940, deposited with the Secretary-General of the League of Nations on 7 March 1940)

Reciprocity.5 Years (as from February 28th, 1940), and thereafter until notice of termination is given. For all disputes after February 5th, 1930, with regard to situations or facts subsequent to that date, other than:

Disputes in regard to which the Parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;

Disputes with the government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the Parties have agreed or shall agree;

Disputes with regard to questions which by international fall exclusively within the jurisdiction of India;

[1056] By a letter dated 7 January 1956, addressed to the UN Secretary-General and received on 9 January 1956, the Government of India gave notice of the termination of the declaration of 28 February 1940, deposited with the Secretary-General of the League of Nations on 7 March 1940, accepting as compulsory the jurisdiction of the PCIJ which, by virtue of Article 36 (5) of the ICJ Statute, constituted an acceptance of the compulsory jurisdiction of that Court. By an instrument dated 7 January 1956, deposited with the Secretary-General on 9 January 1956, the Government of India accepted the compulsory jurisdiction of the ICJ.

[1057] This declaration replaced that of 9 September 1929, in respect of which a reservation was formulated on 27 September 1939, and notice of termination was given on 28 February 1940. See PCIJ Series E, No. 16, p. 341.

Disputes arising out of event occurring at a time when the Government of India were involved in hostilities.

The right is reserved to suspend judicial proceedings under certain conditions in the case of disputes under consideration by the Council.