

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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Case Study On Kulbhushan Jadhav

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ABSTRACT

The case of Kulbhushan Jadhav started in March 2016 when Jadhav, an Indian citizen, was arrested and detained in Pakistan. He was found guilty of terrorism by a military court in Pakistan and given the death penalty. In the midst of Jadhav's arrest, incarceration, and military trial, India had asked for consular access. With the idea and evolution of compulsory jurisdiction as a whole, the writers of this paper seek to answer the ingenious techniques Pakistan used to avoid the court's obligatory jurisdiction. The writers have relied on the ICJ ruling and the reasoning behind it to understand how the court arrived at its decision. Having learned that a former naval officer in the Indian armed services, an Indian citizen, has been found guilty of espionage and condemned to death by a military tribunal in Pakistan. On May 8th, 2017, the Indian government petitioned the International Court of Justice (ICJ) to rule in opposition to Pakistan for allegedly destroying the Vienna convention on consular rights. This is the fourth time that both countries have brought a case against each other to ICJ. In this study we will analyze the Kulbhushan Jadhav case in-depth.

KEYWORDS: Pakistan, ICJ, Article 36, Kulbhushan Jadhav, human rights etc.

CHAPTER1: INTRODUCTION

The case of Kulbhushan Jadhav started in March 2016 when Jadhav, an Indian citizen, was arrested and detained in Pakistan. He was found guilty of terrorism by a military court in Pakistan and given the death penalty. In the midst of Jadhav's arrest, incarceration, and military trial, India had asked for consular access. Although Pakistan had permitted Jadhav's mother and wife to see him, they had denied it. When consular access is denied, the sole recourse for an Indian person abroad is the Vienna Convention on Consular Relations of 1963. The VCCR and its supplementary protocol include India and Pakistan as signatory countries. India first went to the ICJ for help on May 8 of this year. As a temporary fix, the ICJ ordered Pakistan to stop Mr. Jadhav's execution awaiting the outcome of the case. This was accepted by India. At long last, on July 17th, the ICJ issued a ruling on the core issues at stake.¹

According to Article I of the VCCR optional protocol, the ICJ ruled that it may hear the case. Where the VCCR is relevant, the protocol requires the parties to the treaty to resolve their disputes via mandatory arbitration. As one would expect, Pakistan raised an objection to the ICJ's consideration of India's plea, but the court ultimately ruled against Pakistan. When the court finally got to the meat of the case, things got interesting.

A treaty, the VCCR is legally binding. Vienna Convention on the Law of Treaties establishes the standards for interpreting treaties. Even though Pakistan has signed the VCLT, they have yet to ratify it. Therefore, the ICJ opted to read the VCCR "in accordance with the established standards of treaty interpretation." Pakistan claimed that Article 36 of the VCCR, which requires consular access, should be waived in cases involving espionage. The judge did not buy that defence. The Agreement on Consular Access between Pakistan and India of 2008 does not envisage any restrictions on the rights granted for in Article 36 of the VCCR.²

The violation of VCCR by Pakistan was then brought up by the ICJ. Under Article 36, paragraph 1, Pakistan was required to advise Jadhav of his rights (b). India was kept in the dark by Pakistan on Jadhav's detention. The court ordered that Jadhav be allowed to meet with Indian consular authorities so that India might get legal counsel for him. The ICJ ruled that Jadhav should be granted a "effective review and reconsideration" of his conviction and

¹ "Rao, P. S. (2016). *The Jadhav case (2017): India and Pakistan before the International Court of Justice. Indian Journal of International Law*"

² "International Court of Justice, Optional Clause."

sentence by a civilian court. The ICJ has left it up to Pakistan to decide how to remedy the situation, in keeping with the concept of sovereignty. According to the ICJ, "effective review and reconsideration of conviction and sentencing of Mr. Jadhav" requires that the stay of execution be maintained. Importantly, the ICJ took notice of the *Rashid v. Pakistan* case, a finding from the Peshawar High Court, reiterating its "legal duty affirmatively to intervene with rulings of military tribunals" for insufficient evidence and "malice of fact and law." This puts the ultimate decision on Jadhav's fate in the hands of the Supreme Court of Pakistan.

Facts that were previously unknown were revealed in the Jadhav case. The circumstances surrounding Jadhav's capture are a point of contention between India and Pakistan. While India believes that Jadhav was abducted in Iran, Pakistan says he was detained in Balochistan after illegally crossing into Pakistan from Iran. The role of optics in the case was also highlighted. Harish Salve, a normally pricey counsel, charged a pitiful one rupee for a national cause. The media went crazy trying to figure out who had won as Somali judge and court president Abdulqawi Yusuf announced the result. The outcome of the war is conditional on the specific battles that are fought. The life of human is at stake in the Jadhav case, and international arbitration is being used to resolve the disagreement.³

MATERIAL FACTS

Kulbushan Jadhav was captured by Pakistan on March 3, 2016, and, he was accused of being a spy by Pakistani military on March 24, 2016 and law enforcement for having infiltrated into Pakistan from Iran. Jadhav was apprehended in Balochistan, in the country's south. meantime, Pakistan issued a video of Jadhav seemed to admit to the charges against him.

To no avail, Pakistan's foreign affairs minister wrote the Indian high commission in Islamabad a "Letter of Assistance for Criminal Investigation against Indian National Kulbhushan Sudhair Jadhav" on January 23. Since Jadhav is a former naval officer who was kidnapped in Iran by the Pakistani government, India declared on March 29th, 2016 that he is innocent of all allegations. Kulbushan Jadhav was denied consular access in Islamabad despite a request from the Indian government. In a single year, Pakistan refused 16 demands from New Delhi. On April 10, 2017, a Pakistani military court found Kulbhushan Jadhav guilty of "Espionage and Terrorism" and condemned him to death.

³ *"International Organizations and International Dispute Settlement: Trends and Prospects"*

After a Pakistani military court handed down a death sentence against Jadhav on April 14, the Indian government requested consular access for him and an official copy of such charge sheet and verdict. On May 8, 2017, India filed an appeal with the International Court of Justice in The Hague, Netherlands, against the judgement of Pakistan's Military Court, which condemned Kulbhushan Jadhav to death. India cited Pakistan's failure to cooperate and harden its stance on the matter. The following day the ICJ issued a stay of execution for Jadhav.

Following intensive negotiations between New Delhi and Islamabad, on November 10th, 2017, Pakistan agreed to permit Mr. Jadhav's wife to visit on "humanitarian grounds," and the country also extended an invitation to Mr. Jadhav's mother. Pakistan also provided India with guarantees of both the safety and freedom of movement of the visitors. Kulbhushan "Sudhir Jadhav" was a 50-year-old former Indian Navy officer who was given the death penalty by the Pakistan Military Court. For "Espionage and Terrorism," the allegations that led to Jadhav's death sentence.⁴

The problem is not the objections taken up by the Pakistani government in an attempt to avoid jurisdiction, but rather by both parties to the case. It's no secret that tensions between the two countries have always been high; in fact, both have included reservations about exercising jurisdiction in their declarations subscribing to compulsory jurisdiction, which will only serve to further muddy the waters when it comes to resolving any disputes that arise. Despite this, the court has consistently adopted a broad interpretation of its authority, and without backing from the Security Council, its rulings have little effect either the parties are unwilling to recognize its authority or because the remedy it awards is unclear.

Rule of Law was never meant to ensure the impartiality of the law. Predicting the ultimate authority of law is its principal function. When espoused by many jurists, the concept of compulsory jurisdiction served the objective of rule of law. Given the political divisions and lack of consistency in recognising what the law is, do you really think that great powers like the United States and the Soviet Union would accept this idea in its unrestrained form? As a result, the international court's authority was weakened and a toothless tiger was constructed due to debate and the urgent need for a legislation that would really make the court function.⁵

⁴ "On the ICJ and its compulsory jurisdiction. (2017, May 19)"

⁵ "Jadhav Case (India v. Pakistan), Judgment, 17 July 2019. (n.d.)"

ARGUMENTS- INDIAN REPUBLIC

Legal proceedings were initiated against Pakistan "under Article 36, paragraph 1 of the Statute of the ICJ, and Article 1 of the Optional Protocol towards the Vienna Convention on Consular Relations Regarding the compulsory settlement of Disputes (Optional Protocol) accusing violations of the VCCR by Pakistan," on behalf of the Indian Republic, represented by Mr. Harish Salve, Senior Advocate. The Indian government's lawyers maintained that Kulbushan Jadhav was entitled to consular access under Article 36(1) of the Vienna Convention on Consular Relations since a military court in Pakistan had handed down a death sentence against him (VCCR). There has been a blatant breach of Article 36(1) of the VCCR since Pakistan has declined this request more than sixteen times.

The attorneys also argue that the provisions of the VCCR will take precedence over any bilateral contract among Pakistan and India because Article 73(2) states that "nothing in the present Convention shall preclude States from reaching the conclusion treaty obligations confirming or supplementing or extending or exacerbating the provisions thereof." According to the Vienna Convention on the Law of Treaties and fundamental principles of treaty law, such as Article 41(1), the duties "under the VCCR may be strengthened or clarified by bilateral treaties, but they can't be weakened or undermined. Further, the ICJ's Article 36(2) reservations are not a precondition for using its power under Article 36(1) of the ICJ Statute; hence, VCCR is the proper authority to be referred to in consular access situations.⁶

VIOLATION OF ARTICLE 36 OF THE VCCR

The Republic of India's lawyers have argued that consular access protects the constitutional right of anybody jailed in a foreign state to maintain contact with citizens of his own country in order to ensure a fair trial. The lawyers argued further that the consular official should be permitted to contact and visit any citizen jailed in a foreign nation or territory.

In light of the importance of having access to consular services in ensuring a fair trial in line with international law and international humanitarian law, it is clear that this fundamental right cannot be denied under any circumstances. Pakistan violated the Vienna Convention on the Law of Treaties (VCCR), the International Covenant on Civil and Political Rights (ICCPR), and the statute of the International Court of Justice (ICJ) in three main ways: (a) by failing to provide

⁶ "On the ICJ and its compulsory jurisdiction"

India with sufficient information about the detention of Mr. Jadhav, and that too without delay; (b) by failing to inform the detainee about his lawful right and remedy; and (c) by failing to allow India and its consular officers the imprescriptible right.⁷

ABUSE OF RIGHTS

The attorneys argue that the Islamic Republic of Pakistan's blanket denial of all legally protected rights constitutes prima facie proof of a severe violation of those protections. However, denying someone their right to a free as well as fair trial is a serious mistake that goes against the principles of the International Covenant on Civil and Political Rights (ICCPR), making consular access one of the most important preconditions for a fair trial. Since a fact is only addressed if it's in dispute, and Pakistan has always noted Kulbushan Jadhav as an Indian national, their justification that they're only guilty of not providing India with consular access if the other country accepts and provides evidence that the detainee in inquiry is their national is completely without merit.

Remedies

In the closing section of their comments, India's Counsels laid out precisely what they want to gain from this ICJ decision. The following are the remedies that India has requested from the Islamic Republic of Pakistan, as presented by the attorneys:

- Considering the ICJ's prescribed ratio, we thus order the immediate suspension of the death penalty.
- Since Pakistan had not allowed India consular access to Jadhav, India said that the judgment by the Pakistani military court constituted "brazen violation" of the Vienna Convention on Consular Relations (VCCR) and the International Covenant on Civil and Political Rights (ICCPR).
- To secure Kulbushan Jadhav's freedom, Pakistan must reverse the ruling of its Military Court.
- More specifically, the court should rule that the military court's sentencing decision was illegal under the Vienna Convention on the Control of Extraordinary Measures, the

⁷ "Vienna Convention on Consular Relations, 1963"

International Covenant on Civil and Political Rights, and international law, and that Kulbushan Jadhav should be deported back to India as a result.⁸

ARGUMENTS -REPUBLIC OF PAKISTAN

Pakistan's legal representative, Mr. Khawar Qureshi, Legal Counsel & Advocate, said that India made three major errors in its response to Pakistan's charges. Pakistan said that India committed violations of due process, violations of rights, and illegal acts because it refused to acknowledge a simple fact: the VCCR lacks the jurisdiction and application to hear espionage and terrorist matters owing to the nature and severity of these offenses. Both India and Pakistan are allowed to make their own decisions about the merits of any instances involving "arrest, custody, or punishment issued on political or security grounds," as stated in a bilateral agreement signed in 2008. Moreover, the VCCR is null and void as of 2008 due to the existence of the pre-existing bilateral agreement.⁹

Article 36(2) reservations are practically as admissible and accepted as Article 36(1) reservations under the ICJ law. Therefore, if a legally binding treaty or agreement exists, it is automatically recognized and ratified by the parties. Given the presence of the 2008 bilateral agreement between the parties, India cannot assert the jurisdiction of Article 36 of the VCCR in the current issue.

ABUSE OF PROCESS

The Islamic Republic of Pakistan's legal representatives argued that India's violations of its procedural rights amounted to an abuse of power. First, it went against procedure by asking the ICJ to intervene with procedural procedures to halt Kulbushan Jadhav's execution. Pakistan's constitution guarantees every citizen the right to file a mercy appeal after 150 days of receiving a death sentence; India, however, cast doubt on this provision in Mr. Jadhav's case. So, by going to the ICJ while the proper remedy existed to halt Jadhav's execution, India undercut what Pakistan terms "very material facts" and breached the process.

India also violated the VCCR's optional protocol by not allowing Pakistan to use alternative dispute resolution processes, as is specified in Articles 2 and 3. Both parties must provide two months' notice to the other that a disagreement has arisen and that it must be resolved, not via

⁸*"Ranganathan, S. (2018, March 5). Jadhav Case (India v. Pakistan): Order on Provisional Measures"*

⁹ *"Latest developments: Jadhav (India v. Pakistan): International Court of Justice. (n.d.)."*

the ICJ but through an appropriate tribunal or forum. Both of these actions make it quite evident that India has broken the rules, and none of them can legally bring Pakistan within the jurisdiction of the International Court of Justice.¹⁰

ABUSE OF RIGHTS

In the next part of their arguments, Pakistan's attorneys argued that India should be held liable for abuse of rights for failing to corroborate in further inquests into the case of Kulbushan Jadhav because, among other things, India flatly refused to do is provide clarity on the nationality of Jadhav by arranging for an actual Indian passport to be issued in his name, despite the fact that it was under a clear obligation to do so. Pakistan has asked India's assistance in conducting criminal investigations into Mr. Jadhav's actions, but India has taken a frigid approach.

There is sufficient evidence that India has helped Jadhav carry out several espionage and terrorist acts. Given that India issued Kulbushan Jadhav a "false cover name authentic passport," it has broken anti-terrorism laws, and Pakistan's lawyers have said they will ask the International Court of Justice to enforce a resolution from the United Nations Security Council against the country over the incident.¹¹

India is accountable of its unlawful conduct

The Islamic Republic of Pakistan's Counsels respectfully submit that India's claim/application is inadmissible since it is based solely on India's alleged illegal behavior. Since a corollary, the Counsels ask that India's position be rejected by the ICJ, as the country is not entitled to a clean slate in judicial proceedings. The fact that India has not come to court with clean hands is evidenced by its failure to respond to Pakistan's request for assistance in investigating the criminal matter of Kulbushan Jadhav, its assistance to Jadhav by providing him with a fake forged passport to carry out activities including espionage and terrorism against Pakistan, and its disregard of the 2008 bilateral agreement between the parties.

Therefore, on representative of the Islamic Republic of Pakistan, we would like to submit before the hon'ble ICJ that, since India has not assisted Pakistan in investigating Jadhav's matter, and since India's failure to establish Jadhav's national identity is evidence that they are

¹⁰ "Latest developments: Jadhav (India v. Pakistan): International Court of Justice. (n.d.)"

¹¹ "Jadhav Case (India v. Pakistan), Judgment"

denying him to be a Indian, the demand for trying to seek Consular access stands dismissed.¹²

CONCRETE JUDGMENT

The ICJ's ruling was approved by a 15:1 margin. The breach of article 36 of the VCCR is the primary focus of the majority's ruling. The court has noted that the two nations are at odds over the 'consular aid' provided during Kulbhushan Jadhav's arrest, custody, prosecution, and punishment. Both nations have signed on to the "Optional Protocol to the Vienna Convention on Consular Relations regarding the Compulsory Settlement of Disputes" with no reservations or declarations of their own, in addition to VCCR membership. According to the court, the case's jurisdiction stems from Article 1 of the "Optional Protocol," which is not in conflict with any other international agreements. As the State of India has asserted, it has jurisdiction over the alleged VCCR infringement under Article 1 of the Optional Protocol.¹³

India's application was deemed valid, and the "three objections" filed by the State of Pakistan were overruled, which had focused on the alleged misuse of authority, violations of human rights, and other illegal activities on the part of India. Furthermore, the court ruled that Pakistan had violated Article 36 of the VCCR by failing to carry out its commitments. Pakistan violated Kulbhushan Jadhav's rights under Article 36(1)(b) by keeping India in the dark about his arrest and incarceration and by refusing to allow him access to Indian consular officials. Pakistan had committed to all of these terms as part of the VCCR agreement, without any qualifications or disclosures. As a result, the court rules that Pakistan has broken international norms.

Regarding India's request for "restitution in integrum," the Court reminds us that "it is not to be inferred that partial or entire annulment of conviction or sentence offers the required and exclusive remedy" in circumstances of breaches of Article 36 of the Vienna Convention. The Court agrees with India that its arguments do not hold water.¹⁴

RATIO DECIDENDI

Considering the evidence and the applicable precedents, it follows that Article 36 of the VCCR, when read in the "context and in light of the object and purpose of the Convention," did not exclude from its scope "certain categories of persons, such as those suspected of espionage,"

¹² "Iqbal, K. (2019). ICJ's Interesting Verdict on Commander Kulbhushan Jadhav. *Defence Journal*, 23(1), 60."

¹³ "Rao, P. S. (2016). *The Jadhav case (2017): India and Pakistan before the International Court of Justice*. *Indian Journal of International Law*"

¹⁴ "Rao, P. S. (2016). *The Jadhav case (2017): India and Pakistan before the International Court of Justice*. *Indian Journal of International Law*"

the Court ruled in response to Pakistan's argument that the ICJ lacks jurisdiction to hear cases where the detainees in question are guilty of offenses related to espionage and terrorism. When a receiving state claims that a foreign person in its custody is participating in espionage, the Court finds that "it would run opposite to the object of that clause if the rights it protects could be ignored."

The ICJ emphasized that the 2008 Agreement could not be interpreted as prohibiting consular access since it stated that "each party may review a matter on its merits" in cases of "arrest, custody, or punishment issued on political or security grounds." "if the Parties had meant to limit in any manner the rights granted by Article 36, one would anticipate such an aim [would have been] plainly represented in the [2008 Agreement], which was not the case," it writes. The ICJ clarified that Pakistan's duties under Article 36 of the VCCR remain in effect notwithstanding the 2008 Agreement, which may only "confirm, augment, extend or amplify" the VCCR.¹⁵

The Court concludes that the conviction and sentencing of Mr. Jadhav do not constitute a breach of the Vienna Convention, which was the basis for India's claim. As the Court stated in the Avena case, "the case before it concerns Article 36 of the Vienna Convention rather than the correctness as such of any conviction or sentencing," and "it is not the convictions and sentences of the Mexican nationals that are to be considered as a violation of international law, but solely" certain breaches of international commitments on consular access which preceded them.

The Court reiterates that it is not Mr. Jadhav's conviction and sentence that are to be set aside, despite India's claims that it is entitled to restitution integrum and its requests to have the military court's decision annulled and for Pakistan to be enjoined from giving effect to the sentence or conviction and to have Pakistan take the steps to annul the decision of the military court, to release Mr. Jadhav, and to facilitate his safe passage to India. The Court further emphasizes that in circumstances involving breaches of Article 36 of the VCCR, because of the sufficiency of this observation, the Court accepted the dispute under the Vienna Convention and issued an order for further factual and legal clarifications, finding that the alleged acts of terrorism or espionage do not exceed the limits of the Court's jurisdiction underneath the Convention. It was noted that neither the ICJ statute nor the Vienna Convention permitted the

¹⁵ "Singh, P. (2019). *Kulbhushan Jadhav: A rather curious case*"

jurisdiction of the Court to be circumscribed by a bilateral agreement. "Vienna Convention, "[i]t is not to be expected... that partial or entire annulment of conviction or punishment offers the required and exclusive remedy." The Court agrees with India that its arguments do not hold water. The Court has said that information showing Pakistan's failure to provide consular access or communication would be used as a basis for removing unnecessary jurisdiction.¹⁶

The International Court of Justice (ICJ) ruled that Pakistan had a duty to promptly notify India and provide it consular access; Pakistan's claim that India's reluctance to recognize the prisoner as a citizen rendered the request for consular access moot was rejected as baseless. The fact that Kulbhushan was often referred to as a "Indian spy" by Pakistan is indicative of their knowledge of this reality. Not convinced by this, the ICJ found Pakistan guilty of breaching the VCCR by barring consular access and also of not adopting the requirements of the optional protocol of 1969.

LEGAL ANALYSIS

This case has been used as a model for how to push the boundaries of international law when interpreting legal instruments. However, the pursuit of justice has been slow, which has slowed the development of the legal system. One may compare a grasp of the Vienna Convention to the fundamental element of jurisdiction that underpins every case on its own merits. The Court also noted that there was a fundamental issue over the consular aid that would be provided to Mr. Jadhav in the event of his arrest, incarceration, and trial.

Jurisdiction

The Court has said that information showing Pakistan's failure to provide consular access or communication would be used as a basis for removing unnecessary jurisdiction. After making this remark, the Court accepted the dispute under the Vienna Convention¹¹ and ruled that the claimed acts of terrorism or espionage do not beyond the limitations of the Court's jurisdiction under the Convention, requiring additional legal and factual evidence. explanations. As was pointed out, the ICJ's jurisdiction cannot be limited by a bilateral agreement because of the terms of the ICJ statute and the Vienna Convention.¹⁷

¹⁶ "International Court of Justice, Optional Clause"

¹⁷ "Jadhav Case (India v. Pakistan), Judgment"

Protection of Rights

India has contended that the rights relevant to interim measures are the fundamental principles of consular protection¹⁴, which may be invoked by any State Party under the Convention in the event that one of its nationals is arrested or imprisoned. The Court said that it is not necessary to make a final determination as to the existence of the rights, which India desires to see safeguarded, at the temporary measures stage. It need simply assess whether these rights have any basis in reality. Pakistan decided to allow Mr. Jadhav's family contact him since the case served as an example for the protection of human rights. If the Parties' rights are at stake, it is necessary to establish irreparable harm that might be caused by the order of interim measures. That's reminiscent of Pakistan's treatment of Mr. Jadhav, who was given the death sentence without a fair trial, in violation of natural justice standards that resulted in irreparable damage. Finally, the LaGrand case demonstrates the importance of timing in a request for interim measures.¹⁸

¹⁸ "Dubey, A. (2017). *The Jadhav Case Before the International Court of Justice*. *Indian Journal of International Law*"

CHAPTER 2: REVIEW OF LITERATURE

The two most typical origin points for locating the Court are laid forth in Article 36 of the Court's Statute. The ICJ's authority is defined by the terms of the provisions. Second, in circumstances where States have made unilateral declarations accepting the ICJ's jurisdiction for specific kinds of disagreements that may evolve with other States, Article 36 (2) of the ICJ Statute grants authority to the ICJ. To support its claim, India cites Article 36 (1), which states that the ICJ has jurisdiction over any dispute arising out of or in connection with the interpretation or application of the VCCR, since both Pakistan and India are signatories to the Optional Protocol to the VCCR. If India can show that the disagreement concerns "the interpretation or application" of the VCCR, as stated in the Optional Clause of the Optional Protocol, then the ICJ has jurisdiction to rule on the case.¹⁹

Pakistan, on the other hand, has cited not just India's objections about the ICJ's jurisdiction, but also its own qualms about the court's jurisdiction in matters of national security. Pakistan argued that the court lacked authority to hear the Jadhav case since it involved questions of national security. This objection was submitted by India and Pakistan due to their concerns with Article 36 (2) of the ICJ Statute. However, the court found that these challenges did not pertain to Article 36 (1), which permits a State to rely on the mandatory element of a treaty to determine the ICJ's jurisdiction.²⁰

Using a prior judgment in which it was determined that once it is founded which court jurisdiction under Article 36(1), the formalities adopted by the states becomes immaterial, the ICJ ruled that Pakistan's claims were inadmissible. While resuming its prior precedent on procedural steps, the court warned that any reservation in the states' declarations might thwart the court's authority as specifically established by the optional protocol. By failing to investigate additional VCCRs, the Pakistani government may have been making a tactical mistake in its attempt to avoid the court's jurisdiction under Article 36. (2). The majority of nations agreed with the proposal made by the 1920 advisory Jurists Committee when they were tasked with writing a resolution for the ICJ to get all signatory parties to accede to the concept of obligatory jurisdiction of the ICJ.²¹

¹⁹ "Shah, S. (2017). *Journalism, Nationalism, and Multiperspectivity: A Critical Discourse Analysis of Media Coverage of Kulbhushan Jadhav Case in Pakistani and Indian Media*. *Pakistan Journal of Peace and Conflict Studies*"

²⁰ "Iqbal, K. (2017). *Kulbhushan Jadhav Case: Prospective Doklam for Modi!*. *Defence Journal*, 21(3), 10-12"

²¹ "Kattan, V. (2020). *Jadhav Case (India v. Pakistan)*. *American Journal of International Law*, 114(2), 281-287."

Nonetheless, the Soviet Union and the United States remained steadfast in their opposition to automatic obligatory jurisdiction, and the idea was eventually abandoned once again. The United States Senate's compliance with 20th-century isolationist practice protected the country from being bound by the ICJ's resolution's mandatory jurisdiction. However, in 1946, Senator Thomas, Representative Morse, and Representative Herter advocated requesting President Truman to accept the court's mandatory jurisdiction over the four categories of problems set out in the Act. In spite of the Senate's objections, he went ahead and did it. The ICJ's legislation makes it optional for individual governments to accept the court's obligatory jurisdiction, putting the court at the mercy of the states that choose whether or not to recognize it.²²

²² "Iqbal, K. (2017). *Kulbhushan Jadhav Case: Prospective Doklam for Modi*. *Defence Journal*, 21(3), 10-12"

CHAPTER 3: METHODOLOGY

OBJECTIVES OF THE STUDY

- To analyse the Kulbhushan Jadav case.
- To know the judgements related to this case.

METHODOLOGY

Content analysis process was taking into consideration for getting the evaluation of information about various aspects of internet of things. So many literatures such as research papers, PDFs, research articles, journal articles were cited for getting detailed information about internet of things. After the citation of research papers, relevant information was taken out and irrelevant data was deleted so that the results of analysis will be correctly done with all the valuable information already in existence regarding the topic. After the extraction of information, accuracy has been tested and then after with the help of research cited this paper has been finalized.

CHAPTER 4: CASE LAW

BACKGROUND OF THE CASE

The ICJ has ruled that Mr. Jadhav has been in Pakistani custody since March 3, 2016, while the circumstances surrounding his arrest remain unclear. Following his retirement from the Indian Navy, Mr. Jadhav moved to Iran, where he lived and conducted business, until being kidnapped, as per Indian claims. However, Pakistan was relieved that Mr. Jadhav had been captured in Balochistan, on the border with Iran, for unlawfully entering Pakistan using an Indian passport in the name of "Hussein Mubarak Patel." After this, Mr. Jadhav was detained in Pakistan on espionage and terrorist allegations leveled against him by India, charges that India has strongly denied. Pakistan asserts that Mr. Jadhav's trial before a Field General Court Martial commenced on September 21, 2016. Because of his violation of the Official Secrets Act of 1923 and Section 59 of the Pakistan Army Act of 1952, he was legally unable to speak publicly about the matter. The trial of Mr. Jadhav lasted less than seven months, and on April 10th, 2017, the Field General Court Martial handed down a death sentence.²³

The problem is not the objections taken up by the Pakistani government in an attempt to avoid jurisdiction, but rather by both parties to the case. It's no secret that tensions between the two countries have always been high; in fact, both have included reservations about exercising jurisdiction in their declarations subscribing to compulsory jurisdiction, which will only serve to further muddy the waters when it comes to resolving any disputes that arise. Despite this, the court has consistently adopted a broad interpretation of its authority, and without backing from the Security Council, its rulings have little effect either the parties are unwilling to recognize its authority or because the remedy it awards is unclear.

Rule of Law was never meant to ensure the impartiality of the law. Predicting the ultimate authority of law is its principal function. When espoused by many jurists, the concept of compulsory jurisdiction served the objective of rule of law. Given the political divisions and lack of consistency in recognising what the law is, do you really think that great powers like the United States and the Soviet Union would accept this idea in its unrestrained form? As a result, the international court's authority was weakened and a toothless tiger was constructed

²³ "Iqbal, K. (2017). *Kulbhushan Jadhav Case: Prospective Doklam for Modil. Defence Journal*, 21(3), 10-12."

due to debate and the urgent need for a legislation that would really make the court function.²⁴

Most of the nations agreed with the proposal made by the 1920 advisory Jurists Committee when they were tasked with writing a resolution for the ICJ to get all signatory states to consent to the idea of obligatory jurisdiction of the ICJ.

Even then, countries like the United States and the Soviet Union were adamantly opposed to the idea of automatic obligatory jurisdiction, and so it was abandoned once again. The United States Senate avoided signing on to the ICJ's resolution's mandatory jurisdiction clause because of the 20th century isolationist culture that was then in effect there. However, in 1946, Senator Thomas, Representative Morse, and Representative Herter advocated requesting President Truman to accept the court's mandatory jurisdiction over the four categories of problems set out in the Act. Nonetheless, he did so with certain caveats attached from the Senate. It is up to individual nations to subscribe to the ICJ's obligatory jurisdiction, under the rules of the ICJ's statute; this leaves the court at the mercy of the states, who may accept or reject the claim at their discretion.

When compared to the PCIJ legislation, the new law's concept of compulsory jurisdiction is narrower. If we examine the prior legislation, we see that much discretion was purposefully given to each state, making it as easy as possible for them to exercise compulsory jurisdiction on the basis of the provision. The original idea was that if a critical mass of nations were persuaded to issue declarations, the rest of the states would eventually come around to the idea of obligatory jurisdiction. Each of the four predicate conditions for the exercise of compulsory jurisdiction in a legal dispute was included in the prior legislation. Accepted and ratified by Iran, the country served as an exception to the declaration's four sections in 1930 by limiting its scope to disagreements over the interpretation of conventions and treaties.

Consular access to Jadhav

Following the meeting, the official spokesman for India's Ministry of External Affairs released a public statement alleging that Mr. Jadhav had been subjected to "severe pressure" to repeat a fake story in support of Pakistan's implausible assertions. Official MEA spokespeople made a statement on July 16, 2020, criticizing Pakistan for blocking Mr. Jadhav's unfettered and unrestricted consular access. According to the spokesman, India has asked Pakistan more than

²⁴"Iqbal, K. (2017). *Kulbhushan Jadhav Case: Prospective Doklam for Modi!*. *Defence Journal*, 21(3), 10-12."

twelve times in the last year to provide consular access to Mr. Jadhav, who has been detained in Pakistani custody since 2016.²⁵

Following the ICJ's recommendations, Mr. Jadhav was to be provided with all of the avenues and support necessary to have his conviction and sentence reassessed. Within 60 days of the ordinance's enactment, a petition for review and reconsideration of a military tribunal conviction may be filed with the Islamabad High Court. This was made possible by the ICJ Reconsideration and Review Ordinance, 2020, issued by the Pakistani government in May of that year. Mr. Jadhav, a duly authorized representative, or a member of the Indian High Commission in Islamabad might all submit a plea with the relevant authorities under this Ordinance. Mr. Jadhav was allegedly encouraged by Pakistani officials to submit a plea for reconsideration of his sentence and conviction, but he declined and instead insisted on following through on his pending mercy appeal. While Pakistan may have a point, India perceived their assertion as a form of bullying.

According to Article 60 of the ICJ Statute, the ICJ's decisions are final and cannot be challenged in higher courts. In addition, Article 94(1) of the Charter of the UN specifies that every UN member agrees to follow the ruling of the ICJ in any matter in which it is a party. As members of the UN and litigants in the case, India and Pakistan are bound by the ICJ's ruling. Pakistan has repeatedly disregarded the ICJ's ruling by not granting Mr. Jadhav full, unfettered, and unconditional consular access.

If Indian authorities were granted unrestricted consular access, they would be able to speak with Jadhav in a safe space where they wouldn't have to worry about him feeling threatened or retaliated against. Despite the accord and the ICJ's directives, the consular access offered in both instances was empty and unconvincing. The Indian government may have to go back to the ICJ if Pakistan doesn't really start executing the July 2019 ruling, according to lawyer Shri Harish Salve, who also sided with India in the Jadhav case. However, the Security Council of the United Nations is the ideal place to start.²⁶

According to Article 94(2) of the United Nations Charter, the other party to a case may appeal to the Security Council if one party fails to adhere to its responsibilities under a judgment issued by the ICJ. If necessary, the Security Council may then issue a recommendation or make a

²⁵ "Singh, P. (2019). *Kulbhushan Jadhav: A rather curious case.*"

²⁶ "Rao, P. S. (2016). *The Jadhav case (2017): India and Pakistan before the International Court of Justice. Indian Journal of International Law, 56(3)*"

decision upon steps that must be taken to give effect to the judgment. The Security Council has been given the discretionary authority to make recommendations or take the necessary steps to implement ICJ rulings according to Article 94(2).

Counsel for the Republic of India argued that Pakistan's military court had issued a death sentence against Kulbushan Jadhav, making consular access to Jadhav a fundamental human right protected by Article 36(1) of the VCCR, and that Pakistan's repeated refusals to grant India consular access to Jadhav constitute a flagrant violation of this provision of the treaty.

Due to the seriousness and horror of espionage and terrorist acts, the VCCR cannot apply or have the necessary authority to rule on such instances. In 2008, India and Pakistan signed a bilateral agreement in which it was stated clearly that in situations of "arrest, custody, or punishment issued on political or security grounds," each country is free to make its own decision on the merits of the case. With the 2008 bilateral agreement already in place, its terms take precedence over those of the VCCR.

Article 36(2) reservations are practically as admissible and accepted as Article 36(1) reservations under the ICJ law. Therefore, if a legally binding treaty or agreement already exists, it is automatically recognized as such by all parties involved. Given the presence of the 2008 bilateral agreement between the parties, India cannot assert the jurisdiction of Article 36 of the VCCR in the current issue.

MERITS

A legitimate 2008 bilateral agreement between the parties established that the VCCR would be applicable in addition to domestic law. The Court's determination that Pakistan was responsible for violating VCCR and ICCPR regulations was based on this fact alone. Given its inclusion in Article I of the Options Protocol, the ICJ does have jurisdiction over matters relevant to the Options Protocol, as the Court has argued. Accordingly, Pakistan's argument that India's lack of cooperation in their criminal investigations against Kulbhushan Jadhav is evidence that India denied Pakistan's claims that Jadhav is an Indian citizen and, thus, that Pakistan has no legal claim to consular access to him, is without merit, as the Court correctly inferred that only a fact that is in dispute is to be addressed.

It was appropriate for the Court to reject India's stance on restitution in integrum, since it is contrary to the norms of international law and the Official Secrets Act of Pakistan, which

permits prisoners to apply for a re-evaluation petition. Moreover, undermining Pakistan's constitutional machinery by issuing a directive for the deportation of Kulbhushan Jadhav back to India would be a violation of the concept of justice since a law or decision is only given force if it is endorsed by the Constitution.

DEMERITS

While the Hon'ble Court's analysis of the VCCR's applicability was correct, There is a danger to the country's sovereignty, political infrastructure, or social order, but the Court did not perform the required investigation to determine why stakeholders should be permitted to resolve the issues on their own merit under the 2008 bilateral agreement. The researcher has no argument with the VCCR's legality or its extraterritorial applicability; rather, she is upset that the court did not give a straightforward harmonic reading to the articles of the bilateral agreement in order to grasp the core of the same.

CHAPTER 5: CONCLUSION

When it comes to this specific case, the researcher wholeheartedly agrees with the logic and decision reached by the Honourable ICJ. The researcher also provides a few arguments against accepting the court's position. This section will provide a streamlined presentation of opposing viewpoints and research results. Kulbhushan Jadhav, an Indian citizen, was arrested and imprisoned in Pakistan in March 2016. After hearing evidence of his espionage and terrorist activities, a military court in Pakistan handed down a death sentence. During Jadhav's arrest, incarceration, and military trial, India had demanded consular access. While Pakistan denied it, they did let Jadhav's mother and wife to see him. After being denied consular access, India's sole recourse for protecting a person abroad is the VCCR of 1963. The VCCR and its supplementary protocol include India and Pakistan as signatory countries. On May 8 of this year, India decided to approach the ICJ for help. With a temporary measure reading, "Pakistan will take all steps at its disposal to ensure that Mr. Jadhav is not executed awaiting the ultimate determination in these proceedings," the ICJ complied with India's request. The ICJ issued its ruling on the merits of the case on July 17. The ICJ ruled that it could hear the case because of Article I of the VCCR optional protocol. In cases where the VCCR applies, the protocol requires the parties to the treaty to resolve their differences via mandatory arbitration. Naturally, Pakistan raised an objection to the ICJ's ability to hear India's case, but it was overruled. Finally, the judge addressed the meat of the case. An international agreement, the VCCR is legally binding. The Vienna Convention on the Law of Treaties establishes the standards for interpreting treaties. Pakistan has signed the VCLT but has yet to ratify it, and India is not a party to it. Therefore, the ICJ opted to read the VCCR "in accordance with the established standards of treaty interpretation." According to Pakistan, Article 36 of the VCCR does not require consular access in cases involving espionage. However, the judge found otherwise. No limitations on the rights presented by Article 36 of the VCCR are foreseen under the Agreement on Consular Access between India and Pakistan of 2008. The ICJ then brought up Pakistan's violation of the VCCR on the Control of nuclear weapons. In violation of Paragraph 1 of Article 36, Pakistan had neglected to tell Jadhav of his rights. When Jadhav was arrested and taken into custody, Pakistan did not notify India. The court ordered that Jadhav be made available to Indian consular authorities so that he might be represented by Indian lawyers. The International Court of Justice ruled that a "proper remedy" for Jadhav would be for the military court to "effectively examine and reassess" his conviction and sentence. The ICJ has left it up to Pakistan to decide how to remedy the situation, in keeping with the concept of

sovereignty. The ICJ ruled that Mr. Jadhav's conviction and punishment must be effectively reviewed and reconsidered, hence a stay of execution is necessary. The ICJ took notice of the Rashid v. Pakistan case, a verdict from the Peshawar High Court, asserting its "legal duty affirmatively to intervene with rulings of military tribunals" for insufficient evidence and "malice of fact and law." This puts the ultimate decision on Jadhav's fate in the hands of the Supreme Court of Pakistan. Uncertain details about the Jadhav case have surfaced. The circumstances surrounding Jadhav's capture are a point of contention between India and Pakistan. While India believes that Jadhav was abducted in Iran, Pakistan says he was detained in Balochistan after illegally crossing into Pakistan from Iran. The role of optics in the case was also highlighted. Harish Salve, a normally pricey lawyer, took just one rupee to represent a national cause. With the Somalian judge and court president Abdulqawi Yusuf's announcement of the judgement, the media erupted into a frenzy attempting to ascertain which side had won. The outcome of the war is conditional on the specific battles that are fought. Case in point: the Jadhav issue, which was arbitrated internationally since it involved a person's physical safety.

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