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Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

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ANALYSIS OF INDIA V. PAKISTAN (JADHAV CASE): INTERNATIONAL LEGAL IMPLICATIONS AND DIPLOMATIC TENSION

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INTERNATIONAL COURT OF JUSTICE JADHAV CASE (INDIA v. PAKISTAN) JUDGMENT OF 17 JULY 2019

Hon'ble Judges: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judge ad hoc Jillani; Deputy-Registrar Fomété.

Official Citation: Jadhav (India v. Pakistan), Judgment, I.C.J. Reports 2019, p. 418

In the Jadhav case, between the Republic of India, represented by:

Mr. Deepak Mittal, Joint Secretary, Ministry of External Affairs, as Agent;

Mr. Vishnu Dutt Sharma, Additional Secretary, Ministry of External Affairs, as Co-Agent;

Mr. Harish Salve, Senior Advocate, as Senior Counsel;

H.E. **Mr. Venu Rajamony**, Ambassador of the Republic of India to the Kingdom of the Netherlands;

Mr. Luther M. Rangreji, Counsellor, Embassy of India in the Kingdom of the Netherlands, as Adviser;

Ms. Chetna N. Rai, Advocate, **Ms. Arundhati Dattaraya Kelkar**, Advocate, as Junior Counsel;

Mr. S. Senthil Kumar, Legal Officer, Ministry of External Affairs, **Mr. Sandeep Kumar**, Deputy Secretary, Ministry of External Affairs, as Advisers.

And

the Islamic Republic of Pakistan, represented by:

Mr. Anwar Mansoor Khan, Attorney General for the Islamic Republic of Pakistan, as Agent;

Mr. Mohammad Faisal, Director General (South Asia and South Asian Association for Regional Cooperation), Ministry of Foreign Affairs, as Co-Agent;

H.E. Mr. Shujat Ali Rathore, Ambassador of the Islamic Republic of Pakistan to the Kingdom of the Netherlands;

Ms. Fareha Bugti, Director, Ministry of Foreign Affairs;

Mr. Junaid Sadiq, First Secretary, Embassy of Pakistan in the Kingdom of the Netherlands;

Mr. Kamran Dhangal, Deputy Director, Ministry of Foreign Affairs;

Mr. Ahmad Irfan Aslam, Head of the International Dispute Unit, Office of the Attorney General;

Mr. Mian Shaoor Ahmad, Consultant, Office of the Attorney General;

Mr. Tahmasp Razvi, Office of the Attorney General;

Mr. Khurram Shahzad Mughal, Assistant Consultant, Ministry of Law and Justice;

Mr. Khawar Qureshi, QC, member of the Bar of England and Wales, as Legal Counsel and Advocate;

Ms. Catriona Nicol, Associate, McNair Chambers, as Junior Counsel;

Mr. Joseph Dyke, Associate, McNair Chambers, as Legal Assistant;

Brigadier (retired) Anthony Paphiti, Colonel (retired) Charles Garraway, CBE, as Legal Experts.

FACTS OF THE CASE

Kulbushan Jadhav, a 50 years old retired Indian Navy Officer was imprisoned by Pakistan on March 3, 2016, and on March 24, 2016, the country's military establishments and law enforcement organisations accused Jadhav of being a spy on the basis that he crossed into Pakistan from Iran and

was apprehended in Balochistan, which is in southern Pakistan. In the meantime, Pakistan also published a video in which Jadhav was seen confessing the accusations made against him.

On January 23, 2017, Pakistan's external affairs minister sent a "Letter of Assistance for Criminal Investigation against Indian National Kulbhushan Sudhair Jadhav" to the Indian High Commission in Islamabad, but no reply was received. On March 29, 2016, India asserted that all accusations made against Jadhav were completely baseless because he is a retired naval officer who was kidnapped illegally from Iran by Pakistani authorities. Additionally, Kulbushan Jadhav's request for consular access from Islamabad by the Indian government was turned down. In the course of a year, Pakistan denied as many as 16 requests from New Delhi. Kulbushan Jadhav was given the death penalty by the Pakistani Military Court on April 10, 2017, for "espionage and terrorism."

On April 14, 2017, the Indian government requested a legitimate copy of the charge sheet and death sentence issued by the Pakistani military court, as well as consular access for Jadhav. On May 8, 2017, India petitioned the International Court of Justice in The Hague, Netherlands, to review Pakistan's military court decision to sentence Kulbushan Jadhav to death. This was done out of resentment over Pakistan's stance and lack of cooperation in granting Mr. Jadhav consular access. In a dispute over alleged violations of the Vienna Convention on Consular Relations of 24 April 1963, India applied to start legal proceedings against Pakistan. India complained that Pakistan had not promptly notified it of the arrest and detention of one of its citizens. Furthermore, it claimed that Mr. Jadhav had not been made aware of his rights under Article 36 of the Vienna Convention on Consular Relations and that India's consular officers had been denied access to him while he was being held, detained, and imprisoned. As a result, they were unable to speak with him, arrange for his legal representation, or even have a conversation with him. A Request for the Indication of Provisional Measures was also submitted by India on the same day, asking the ICJ to order Pakistan to "take all necessary steps to ensure that Mr. Kulbhushan Sudhir Jadhav is not executed" and to "ensure that no action is taken that might prejudice the rights of the Republic of India or Mr. Kulbhushan Sudhir Jadhav concerning any decision the Court may render on the merits of the case." By an Order dated May 18, 2017, the Court instructed Pakistan to "take all measures at its disposal" to prevent Mr. Jadhav from being executed before the case had concluded. Pakistan was also required to report to the Court on all actions taken in response to that Order. It also determined that it would maintain control over the matters that made up the Order until the Court made its final ruling.

ISSUES RAISED

- ✚ Whether the sentence imposed by the Military Court in Pakistan is illegal?
- ✚ By not denying Consular access to Kulbushan Jadhav, Pakistan has violated the standards laid down by the Vienna Convention on Consular Relations (VCCR) and the International Covenant on Civil & Political Rights (ICCPR).
- ✚ Whether the ICJ have the jurisdiction to hear an application in the current case and rule on it?
- ✚ Whether the Court order for provisional measures if they determine that there was an irreparable prejudice to the rights of the Parties?
- ✚ Whether acts of terrorism or espionage would make the Vienna Convention on Consular Relations implicitly non-applicable?
- ✚ Whether Pakistan's request that India assist in the Jadhav case investigation, which will serve as a prerequisite for granting India consular access under Article 36, acceptable or is the obligation under Article 36 unconditional?
- ✚ Is the Vienna Convention on Consular Relations superseded by the bilateral agreement signed between India and Pakistan in 2008?

ARGUMENTS ON BEHALF OF THE REPUBLIC OF INDIA

The Republic of India's legal representative, Mr. Harish Salve, Senior Advocate, filed a lawsuit against Pakistan under Article 36, paragraph 1 of the International Court of Justice's Statute and Article 1 of the Vienna Convention on Consular Relations Optional Protocol, alleging violations of the VCCR on Pakistan's part. India denied the charges, claiming that Mr. Jadhav was apprehended by Pakistani agents in the Iranian port of Chabahar, where he was conducting business.

Kulbushan Jadhav was given a death sentence by a military court in Pakistan. As a result, the request to grant Jadhav consular access is a matter of right under Article 36(1) of the VCCR. It was argued that VCCR is the proper authority to be referred to in matters of consular access because the reservations stated in Article 36(2) of the ICJ Statute are independent of and not merely a prerequisite to using the authority under Article 36(1) of the ICJ Statute. The counsels contended that the

provisions of the VCCR that have already been established cannot be overridden by any bilateral agreement between India and Pakistan, by Article 73(2) of the VCCR.

It was argued that Pakistan violated the ICJ statute, the VCCR, and the ICCPR covenants and committed a grave error in its application to the court by (a) failing to promptly inform India of Mr. Jadhav's detention, (b) failing to inform the detainee of his legal rights and remedies, and (c) denying India and its consular officers the unrestricted right of consular access. It was further argued that Jadhav's confession, which was broadcast on Pakistani television, was extracted through coercion and should not be considered as evidence.

Pakistan's justification that granting consular access is contingent upon the other nation accepting and supplying evidence that the detainee in question is their national is baseless because a fact in question is only addressed if it's in dispute, and in the current instance, Pakistan has always mentioned Kulbushan Jadhav as an Indian national. Therefore, according to the justification provided by Pakistan, they are also at fault for denying India consular access even though the issue of nationality was prima facie, unambiguous.

The remedies sought by India included the suspension of Jadhav's death sentence, the declaration that Pakistan had violated the VCCR and ICCPR, and the overturning of Jadhav's conviction. India also sought the release of Jadhav and his repatriation to India.

ARGUMENTS ON BEHALF OF THE ISLAMIC **REPUBLIC OF PAKISTAN**

Mr. Khawar Qureshi appeared on behalf of the Islamic Republic of Pakistan and claimed that India had abused the process, violated the rights, and engaged in unlawful conduct because they refused to accept the fact that the VCCR lacks the applicability and jurisdiction to hear cases of espionage and terrorism, the bilateral agreement between India and Pakistan signed in 2008 supersedes the VCCR's applicability, and the cases under Article 36(1) of the statute, reservations made under Article 36(2) of the ICJ statute are almost equally admissible and acceptable. Therefore, if a treaty or agreement exists that has legal force, it ipso facto becomes a valid treaty or agreement that the parties abide by.

The counsels for the Islamic Republic of Pakistan claimed that India had violated some procedural rules and abused its power by asking the ICJ to use procedural measures to stop Kulbushan Jadhav's execution and by denying Pakistan the option to use other dispute resolution mechanisms, India violated the provisions of Articles 2 and 3 of the Optional Protocol to the VCCR. Therefore, India has abused the process and cannot subject Pakistan to the jurisdiction of the ICJ.

It was argued that India should be held accountable for violating rights for not corroborating the investigations in the Kulbushan Jadhav case. India blatantly refused to establish Jadhav's nationality, despite having a clear obligation to do so. Furthermore, India's extremely cold response to assist Pakistan in conducting additional investigations.

The counsels for the Islamic Republic of Pakistan claimed that India was guilty of its unlawful conduct. It was argued that India has not come to the Court with clean hands, failed to respond to Pakistan's request for assistance to conduct further investigation into the criminal matter of Kulbushan Jadhav and assisted Jadhav by giving him a fake, forged passport to engage in espionage and terrorism against Pakistan, thus disregarding the 2008 bilateral agreement between the parties. Therefore, the demand for seeking Consular access is dismissed as establishing valid nationality is a prerequisite for the right to seek Consular access.

JUDGMENT

On July 17, 2019, the International Court of Justice (ICJ) issued its ruling on India's petition concerning the case of Shri Kulbushan Jadhav, with a 15:1 majority. Both India and Pakistan are members of the Vienna Convention on Consular Relations (VCCR) and have also ratified the "Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes" without any reservations or declarations. The court observed that the case's jurisdiction stems from Article 1 of the "Optional Protocol" and does not violate any other international treaties except VCCR. As claimed by the State of India regarding the violation of VCCR, it therefore has legal jurisdiction under Article 1 of the Optional Protocol.

The State of India's application was admissible while the three objections raised by the State of Pakistan regarding the State of India's abuse of power, abuse of rights, and unlawful conduct were

dismissed. The court further determined that Pakistan had violated the agreement and been in default of its obligations under Article 36 of the VCCR. Kulbhushan Jadhav's rights under Article 36(1)(b) were not made known to him by the State of Pakistan, which also prevented him from seeing Indian consular officers by failing to inform India of Jadhav's arrest and detention. The 22-day delay in informing India of Jadhav's arrest was regarded as "undue delay," given that his Indian nationality was established by Pakistan early on. Despite India's repeated requests for consular access, Pakistan wrongly refused it and even made it conditional on India's cooperation in Jadhav's investigation. Such a requirement is not only acceptable legally, but it also seems to be intended to pressure India into indirectly accepting Jadhav's "guilt" by cooperating with Pakistan's investigation. All of these were included in the VCCR agreement, to which Pakistan had consented without making any declarations or reservations. As a result, the court determined that Pakistan had violated international laws.

Pakistan contested the relevance of the VCCR to this matter, claiming that it does not apply to alleged cases of espionage and terrorism. Moreover, Pakistan argued that a 2008 bilateral agreement between the two countries altered the application of the VCCR to politically and security-sensitive cases. The ICJ rejected these because no such exception or modification is envisaged under the VCCR. It further emphasised that recognising espionage or terrorism as an exception will make it convenient for countries to forego their obligations under the VCCR in controversial cases. Regarding India's demand for "restitution in integrum," the court stated that the annulment of Jadhav's conviction or sentence does not necessarily provide the necessary and sole remedy in cases of VCCR violations. Therefore, the court could not uphold India's submissions. Overall, the case highlights the importance of consular access and the role of the ICJ in resolving international legal disputes.

ANALYSIS

The Kulbhushan Jadhav, one of the landmark cases has highlighted the importance of consular access in international law and the role of the ICJ in resolving disputes related to consular access. The case also raises broader questions about the treatment of foreign nationals in detention and the rights of states to exercise jurisdiction over foreign nationals accused of crimes within their territory. The ICJ's judgment in the case is significant as it reinforces the importance of consular access and sets a precedent for future cases involving violations of the VCCR.

Despite Pakistan's objections, the ICJ determined that it had jurisdiction over the case, as the alleged violations of the Vienna Convention on Consular Relations fell within its jurisdiction. The Court clarified that its jurisdiction could not be limited by bilateral agreements. India's claim for consular access and protection of its national rights was plausible, and Pakistan was found to have violated Jadhav's rights under Article 36 of the Vienna Convention. The Court also highlighted the importance of establishing a causal link between provisional measures and the parties' rights, as well as the urgency of such measures. India argued that all states can claim consular protection under the Vienna Convention when their nationals are detained or imprisoned. The ICJ noted that it only needs to determine whether these rights are plausible at the provisional measures stage, not definitively establish their existence. The Jadhav case became an example of human rights preservation, prompting Pakistan to allow Jadhav's family to meet him. The ICJ stressed the need to demonstrate a causal link between the order of provisional measures and the parties' rights to prove irreparable prejudice, similar to Pakistan's violation of natural justice by sentencing Jadhav to death without a hearing. The case has been a notable example of pushing the boundaries of legal interpretation of international agreements. Overall, the case underlined the importance of the International Court of Justice to prevent the violations of laws. The verdict of the case was a big win for India I applaud the decision of the court that helped the good to win over evil.

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