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Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



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Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



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.

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CROSSROADS OF CONTENTION: INDIA AND PAKISTAN AT THE INTERNATIONAL COURT OF JUSTICE

AUTHORED BY - UTKARSH PANDEY¹ & MANSI²

1. INTRODUCTION

“Two basic pillars are necessary for the establishment of public order: the existence of a proper law and the machinery for enforcing it, including the sanctions behind the law. In the Inter-State sphere, no order can be maintained if there is no existence of a well-defined and well-codified International Law and an effective agency to enforce it.”³

The atmosphere created by the Hague Conferences of 1897 and 1907 fueled the need to establish a world court for the international community. While neither permanent nor a judge, the creation of the Permanent Court of Arbitration marked a significant move forward in international law and the consolidation of an international legal system. However, by the end of the First World War, no lasting concrete steps were taken. The League of Nations Covenant required the drafting of proposals for the establishment of a world court, and the Permanent Court of International Justice (PCIJ) was established in 1920. It boosted attempts to establish universal arbitral bodies. The Permanent Court was designed to work in combination with arbitration to establish a fairly comprehensive mechanism for the international community. It was conceived as a means of preventing outbreaks of violence by making conflict resolution mechanisms readily accessible within the context of a legal and organizational system.⁴

After WWII, the PCIJ was replaced by the International Court of Justice, which is listed as the UN's "principal judicial organ" in Article 92 of the Charter. In reality, it is a hybrid of the Permanent Court and the International Court of Justice, with almost identical statutes and jurisdiction and a continuous line of proceedings, with no distinction made between those determined by the PCIJ and the ICJ. Following the collapse of the League of Nations, participants at the Dumbarton Oaks Meeting, which established the United Nations, wished to establish a

¹ Research Scholar, University of Lucknow

² Judicial Magistrate First Class, Rajmahal, Sahibgunj, Jharkhand Judicial Services

³ Nagendra Singh, "International Court of Justice – Watchman of the World Peace and Order" (18 October 1970) 87

⁴ Rosenne's Law and Practice, Vol. I, Chapter 1, para. I.4.

direct judicial connection between the League of Nations and the new UN.

HISTORY:

Since the ICJ is the successor to the PCIJ, the PCIJ's Statute served as the current Court's legislative foundation. The question then becomes how the whole tribunal may be modified while maintaining the same Statute and the same State statements that the Court's jurisdiction will remain intact. Considering the high productivity of the PCIJ's cases during its years of operation, it was determined that it would be unfair for the Court to bear the brunt of the League of Nations' shortcomings. As a result, it was much easier to make a formal name change and leave the new Court as the UN's principal judicial entity, while retaining a degree of consistency in the work that the PCIJ had done since 1922 (the year the PCIJ made its first decision.⁵)

FUNCTIONS OF ICJ:

It is not necessary to go to the International Court of Justice. Both parties freely agree to the jurisdiction of the case. As a result, any contesting party that files an application with the ICJ agrees that it is prepared to obey the Court's decision on the issue at hand.⁶

However, if one of the parties refuses to accept a decision, the ICJ will not be able to enforce it against that country. Judicial execution would be contrary not only to the principle of state sovereignty, but also to past practice, which has shown that disputes between nations can only be resolved by negotiation rather than coercion.

The ICJ's trials are divided into two phases: a "written phase," in which the parties file and exchange pleadings, and a "oral phase," in which the parties' representatives and lawyers testify before the Court in public hearings.⁷ The Court's hearings are conducted in English and French, with both written and oral submissions in one of the two languages being translated into the other.⁸ The Court deliberates in camera after the oral process of the proceedings. It then announces its decision in a public meeting. There is no right of appeal against the ruling. If one of the parties fails to comply with the ICJ's resolution, the order entitles the matter to be brought

⁵ *Designation of Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, Advisory Opinion (31st of July 1922) PCIJ.

⁶ Article 94 (1) of the UN Charter.

⁷ Article 43 of the Statute of the International Court of Justice.

⁸ Article 39 of the Statute of the International Court of Justice.

before the United Nations Security Council. The ICJ acts as a plenary body, but the parties may request that smaller specialized chambers be formed.

Hypothesis

In the clash between the principles of natural justice and international politics it is the latter which takes precedence over the former.

Research Questions

1. Has ICJ been biased in cases between India and Pakistan due to the international reputation held by Pakistan? / Preconceived notion and bias against Pakistan in the eyes of ICJ valid?
2. Does jurisdiction of ICJ exist after a country has explicitly denied jurisdiction?
3. Powers of ICJ in cases of non-observance of its judgement.?
4. Can ICJ have jurisdiction on a particular matter when countries have already signed a bilateral treaty to govern the event/situation?

Research Methodology

The paper adopts a combination of analytical and descriptive approach wherein the research has been done primarily through case laws, books and journals.

Mode of Citation

In this research a uniform style of citation has been followed.

Limitation

The research is limited through secondary materials along with the analysis of the case laws.

Chapterization

In the first chapter a basic introduction to the topic has been given. The several insights that the researcher is going to have upon the topic has been discussed.

In the second chapter the structure of court in detail as well as the role and function of each and every agent.

In the third chapter several cases of ICJ in which India was a necessary party taken up.

2. STRUCTURE AND COMPOSITION OF THE COURT

As Leo Gross argues:

*Confidence in the Court, its impartiality and objectivity has been widely identified as a crucial factor in the role which it might play in the changing pattern of international relations.*⁹

There has been considerable care taken to ensure that as many nationalities and legal structures as possible are included.

- JUDGES: Originally, the PCIJ consisted of eleven Judges and four Deputy-Judges; however, the post of Deputy-Judge was abolished in 1936, and the Court's membership was reduced to fifteen.

The International Court of Justice (ICJ) is made up of fifteen judges who are selected, regardless of nationality, from among individuals of high moral character who have the credentials required in their respective countries for election to the highest judicial offices, or who are jurisconsults with recognized experience in international law.¹⁰

The process for appointing judges incorporates legal and political aspects while attempting to limit the control of nation states as much as possible. The judges of the Court are chosen from a list of eligible persons drawn up by the PCA's national groups, or by newly selected national groups in the case of UN members who are not represented in the PCA, by the General Assembly and Security Council (voting separately).¹¹ This clause was added to limit political influence in the appointment of judges. The elections are held every three years, with five judges being elected each time. The aspect of continuity among the Court is preserved in this way.

In reality, there is strong cooperation between the Assembly and the Security Council in the election of judges, and political considerations do obtrude, especially in light of Article 9 of the ICJ Law, which states that electors should bear in mind not only that the individuals to be elected

⁹ Leo Gross, 'The International Court of justice: Consideration of Requirements for Enhancing its Role in the International Legal Order', AJIL, Vol.65(1971) p.281.

¹⁰ Article 2, Statute of the ICJ

¹¹ Articles 4 and 5 of the ICJ statute. In practice, governments exercise a major influence upon the nomination process of the national groups. Merrills, International Dispute Settlement, p. 134

individually possess the qualifications needed, but also that the body as a whole should possess the qualifications required.

This mechanism has been criticized for being politicized, but given the conditions, it's difficult to see how it could be avoided entirely. Individual judges' decisions can be critical, particularly in delicate situations.

Members of the Court are chosen for a nine-year term and are eligible for re-election.¹² When on official duties, they possess diplomatic immunity and immunities,¹³ and a judge cannot be disqualified until the other judges of the Court agree that he or she has failed to meet the necessary requirements.¹⁴ This includes the ban of members conducting certain legislative or managerial roles or working in any other occupation. In no situation does a member act as an agent, advocate, or lawyer, and no member may engage in the decision of a case in which he has previously acted as an agent or advocate for one of the parties.

If the parties to a lawsuit do not have a judge with their nationality seated on the case, Article 31 of the ICJ constitution gives them the option of naming ad hoc judges. This procedure therefore aims to maintain perfect balance in the court such that parties who want to take their case to the tribunal can be assured of its fairness and impartiality. Ad hoc judges serve for a limited time, as opposed to the 15 permanent judges appointed by the General Assembly and Security Council. Ad hoc judges, on the other hand, have also voted against the Establishment that had selected them. - In the Nicaragua vs. Colombia situation, Jean-Pierre Cot.¹⁵ In another case, a respondent to a complaint can have an official language that is not one of the Court's official languages.¹⁶ In such cases, the States can choose an ad hoc judge of a different nationality with the assurance that the judge's mother tongue is one of the Court's official languages, as in Nicaragua¹⁷ and Bahrain.¹⁸

¹² Article 13 of the ICJ Statute.

¹³ Article 19 of the ICJ Statute.

¹⁴ Article 18 of the ICJ Statute.

¹⁵ Territorial and Maritime Dispute (Nicaragua vs. Colombia), Judgement, 19th November 2012. Available at <https://www.icj-cij.org/en/case/124> accessed on 25/03/2021 at 02:04 PM.

¹⁶ Article 39 of the Statute: The official languages of the ICJ are English and French.

¹⁷ Nicaragua chose Mr. Gilbert Guillaume – France; Dispute regarding Navigational and Related Rights (Costa Rica vs. Nicaragua), Judgment, I.C.J. Reports 2009, p. 213 <https://www.icj-cij.org/en/case/133> accessed on 25/03/2021 at 02:04 PM.

¹⁸ Bahrain chose Mr. Yves Fortier; Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgement, I.C.J. Reports 2001, p. 46 <https://www.icj-cij.org/en/case/87> accessed on 25/03/2021 at 02:04 PM.

An person with a recognized trajectory in International Law or international law professors from reputable universities must be selected as an ad hoc judge.¹⁹ Ad hoc judges must meet the same standards as permanent judges of the Court, according to the Court's Legislation.²⁰

- **PRESIDENT AND VICE-PRESIDENT:** The Court's President and Vice-President are chosen for a three-year term and may be re-elected.²¹ The President is chosen in a secret ballot election.

The President is in charge of receiving communications from judges when they consider that he ought not to sit on a special case. Additionally, if the President considers that a judge should not sit on a case, he must communicate that consideration to the judge. If they disagree, the Court shall decide.²²

“The president shall preside at all sessions of the Court, and he shall direct the operation and supervise the administration of the Court,” according to Article 12 of the Rules of Court.

- **REGISTRAR:** As “an separate and autonomous register is a necessary prerequisite for an independent judiciary,” the Registrar is the chief administrative officer of a court or tribunal.

The Court elects the Registrar²³ for a seven-year term, and he or she may be re-elected. The Registrar's responsibilities are specified in Article 26 of the ICJ Rules.

JURISDICTION OF INTERNATIONAL COURT OF JUSTICE:

Over the independent states, there is no single political power. As a result, without the permission of the sovereign nations, no International Tribunal can exercise authority over them. The parties' permission is required for the ICJ to exercise jurisdiction. Many ICJ decisions support the idea of the ICJ's authority being founded on consent. The International Court of Justice (ICJ) ruled in the Corfu Channel case²⁴ that the parties' agreement confers authority over the court.

¹⁹ Professors Pellet, Crawford, Kohen, Brownlie and Abi-Saab.

²⁰ Articles 4 and 5 of the Statute of the ICJ

²¹ Article 21 of the Statute of ICJ

²² Article 24 of the Statute of ICJ

²³ Article 21 of the Statute of ICJ

²⁴ United Kingdom vs Albania, 1948 available at <https://www.icj-cij.org/en/case/1> accessed on 25/03/2021 at 02:04 PM.

The rigidity of the concept of consensual foundation of authority has been quite mitigated by court pronouncements pertaining to the way under which the consent through is conveyed. It has been apparent from the experience of both the old and modern courts that it makes no difference if or when permission is granted. Consent does not have to be conveyed in a precise manner, and it does not have to be granted until the proceedings are begun.²⁵ As a result, it is clear that the parties' consent will not be articulated and may be decided by their actions. Such actions may be inferred by the respondent State's written pleadings or whether the respondent State has argued the merits of the case without contesting the ICJ's jurisdiction.

Doctrine of "*Forum Prorogatum*": Prorogated jurisdiction is a Roman law entity that allows jurisdiction to be bestowed over an existing tribunal that is not otherwise qualified by the litigants during the trials. The theory of forum prorogatum is the product of pronouncements from both the PCIJ and the ICJ in international law. Acceptance to a unilateral order to appear before the judge confers authority over the court, according to the theory.

DISPUTE RESOLUTION OF INDIA AT ICJ:

The International Court of Justice's law controls its activities. While all UN members are potentially party to the statute²⁶, the ICJ does not have authority over lawsuits involving them. And with the parties' approval does the ICJ gain authority.

India has declared the areas of which it recognises the ICJ's jurisdiction. India repealed and restored its previous declaration from September 1959 in September 1974.

Among the matters over which India does not accept ICJ jurisdiction are:

- Disputes with the government of any State which is or has been a Member of the Commonwealth of Nations, and
- Disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defense.
- The declaration, which includes other exceptions as well, has been ratified by Parliament.

²⁵ Ibid.

²⁶ Article 93(1) of the UN Charter

3. INDIAN CASES AT THE ICJ

There are six incidents when Indian cases were put before the ICJ. Four of the cases put before the ICJ were regarding issues with Pakistan.

- **Case About Right of Passage over Indian Territory²⁷ (Portugal Vs India, 1955):** Portugal had filed a lawsuit against India in 1954, alleging that it had been denied access to the Portugese territories of Dadra and Nagar Haveli. In 1960, the International Court of Justice ruled in India's favour, noting that India's denial of passage was protected by its authority to govern and control Portugal's right of passage.
- **Appeal Regarding the Jurisdiction of ICAO Council²⁸ (India Vs Pakistan, 1971):** In 1971, India challenged the International Civil Aviation Organization's (ICAO) authority to rule on Pakistan's appeal that India not deny it flight and landing privileges. After the January 1971 hijacking of an Indian Airlines flight to Lahore and the hijackers' gutting of the plane, India revoked Pakistan's overflight rights. The International Court of Justice ruled against India stating that ICAO had jurisdiction in this case.
- **Case Concerning the Trial of Pakistani Prisoners of War²⁹ (Pakistan Vs India, 1973):** Pakistan lodged a lawsuit in 1973 to prohibit the repatriation to Bangladesh of 195 Pakistani citizens detained in Indian detention during the 1971 war to face genocide charges, but the case was dismissed the following year. Pakistan, as a Commonwealth member, can no longer take India to the International Court of Justice after 1974.
- **Aerial Incident of 1999³⁰ (Pakistan Vs India, 1999):** Pakistan lodged a lawsuit with the International Court of Justice (ICJ) in 1999 over a controversy over India's 1999 demolition of a Pakistani aircraft. Pakistan argued that the International Court of Justice (ICJ) has authority over the case. India, on the other hand, challenged the International Court of Justice's jurisdiction in the matter, arguing that Pakistan's appeal to the ICJ did not apply to any treaty or agreement in effect between the two countries. Pakistan's argument that the Shimla Accord requires disputes between the two countries to be

²⁷ Available at - <https://www.icj-cij.org/en/case/32> accessed on 25/03/2021 at 02:04 PM.

²⁸ Available at -<https://www.icj-cij.org/en/case/54> accessed on 25/03/2021 at 02:04 PM.

²⁹ Available at -<https://www.icj-cij.org/en/case/60> accessed on 25/03/2021 at 02:04 PM.

³⁰ <https://www.icj-cij.org/en/case/119> accessed on 25/03/2021 at 02:04 PM.

referred to the ICJ was dismissed by the court in 2000. The ICJ decided that it lacked authority to hear Pakistan's application. Around the same time, the court encouraged both sides to use diplomatic means to overcome their differences.

- **Kulbhusan Jadhav Case³¹ (India vs. Pakistan)**: Kulbhusan Sudhir Jadhav, born 16 April 1970³² is an Indian national arrested over charges of terrorism and spying for India's intelligence agency, the Research and Analysis Wing (RAW).³³

According to Pakistan, they arrested Kulbhusan Jadhav from Mashkel area in the province of Balochistan, Pakistan on 3rd March, 2016.³⁴ It was alleged that Kulbhusan was involved in espionage and sabotage activities against Pakistan.

He was detained on March 3, 2016, during a counter-intelligence operation in Balochistan, according to the Pakistani government. He was a former commander in the Indian Navy who was engaged in terrorist activities within Pakistan, according to the Pakistani government. The Indian government acknowledged Jadhav as a former naval officer but denied any links to him, claiming that he retired early and was kidnapped in Iran, where he was doing business after leaving the Indian Navy.

Kulbhusan Jadhav was charged with espionage and found guilty by a court under Section 3 of the Official Secrets Act of 1923 and Section 59 of the Pakistan Army Act of 1952. After a three-and-a-half-month hearing, Jadhav was sentenced to death in a Field General Court Martial on April 10, 2017.

The situation escalated into a major flashpoint in India-Pakistan relations. India had requested consular access to Mr. Jadhav on several occasions, as well as a verified copy of the charge sheet and the verdict. Pakistan has turned down India's offer a total of 13 times. India went to the International Court of Justice (ICJ) for help.

³¹ <https://www.icj-cij.org/en/case/168> accessed on 25/03/2021 at 02:04 PM.

³² Kulbhusan Yadav, alias (alleged- Hussain Mubarak Patel), "What the ICJ had to say in the Kulbhusan Yadav Case", The Wire on 18 July 2019 available at <https://thewire.in/law/full-text-kulbhusan-jadhav-icj-judgment> accessed on 25/03/2021 at 02:04 PM.

³³ Salman Masood (29 March 2016) "Pakistan releases Video of Indian Officer, saying that he's a spy". The New York Times on 30 March 2016, available at <https://www.nytimes.com/2016/03/30/world/asia/pakistan-releases-video-of-indian-officer-saying-hes-a-spy.html> accessed on 25/03/2021 at 02:04 PM.

³⁴ "Pakistan claims arrest of 'RAW Agent' in Balochistan. What happens next" The Wire on 27 March 2016 available <https://thewire.in/diplomacy/pakistan-claims-arrest-of-raw-agent-in-balochistan-what-happens-next> at accessed on 25/03/2021 at 02:04 PM.

India requested for four temporary reliefs from the ICJ³⁵, which were:

- a) The death penalty levied on Kulbhushan should be suspended.;
- b) Restitution in interregnum (restoring to prior condition) by declaring that Pakistan has:
 - i. Violated Article 36(1)(b)³⁶ of the Vienna Convention on Consular Relations, 1963 by denying it access to Kulbhushan.
 - ii. Defied elementary human rights under Article 14 of the International Covenant on Civil and Political Rights, 1966.³⁷

³⁵ Press Release, International Court of Justice on 9 May 2017 available at <https://www.icj-cij.org/files/case-related/168/19420.pdf> accessed on 25/03/2021 at 02:04 PM.

³⁶ Article 36 (1) (b): “With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a)...

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;”

³⁷ Article 14 of the ICCPR reads: “All persons shall be equal before the courts and tribunals:

1. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

- c) Limiting Pakistan's right to carry out the death sentence;
- d) If Pakistan is unable to revoke the conviction decision against Kulbhusan, the ICJ should consider Pakistan's decision to be in breach of international law.

The International Court of Justice (ICJ) in The Hague unanimously acknowledged India's appeal against Kulbhusan Jadhav's death penalty imposed by Pakistan. The tribunal, headed by Judge Ronny Abraham, asked Pakistan not to execute Kulbhusan Jadhav until the International Court of Justice issued a final ruling in the case.³⁸ There were several issues before the ICJ:

1. *Whether ICJ has jurisdiction to decide the case?*
2. *Are the rights alleged by India plausible?*
3. *Is there a link between the rights claimed and provisional measures requested?*
4. *Is there a risk of irreparable prejudice and urgency?*

- The ICJ started its analysis of the case's first issue by deciding if it had authority to hear it. According to the Court, India claimed jurisdiction under Article 1 of the Vienna Convention's Optional Protocol, which states that the Court has jurisdiction over "disputes arising out of the reading or implementation of the Vienna Convention."

According to the Court, both India and Pakistan disagree on the issue of India's consular assistance to Kulbhusan Jadhav under the Vienna Convention. The activities claimed by India-failure Pakistan's to include the necessary consular notices in regard to Jadhav's arrest and detention tend to fall within the framework of the Vienna Convention, according to the Court.

According to the Court, this was enough to show that it had prima facie authority under Article 1 of the Optional Protocol. The presence of a bilateral agreement between the parties in 2008³⁹ would not affect the ICJ's conclusion on jurisdiction.

- In relation to the second question in the case, the Court noted that Article 36 (paragraph 1) of the Vienna Convention acknowledges rights to consular notification and communication between a State (India) and its citizens, as well as the responsibilities of

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

³⁸ Press Release, International Court of Justice, available at

<https://www.thehindu.com/news/international/article18484722.ece/BINARY/ICJ%20verdict%20staying%20Kulbhusan%20Jadhav%20execution> accessed on 25/03/2021 at 02:04 PM.

³⁹ "India, Pakistan ink deal on consular access for prisoners" India Today on 21 May 2008, available at <https://www.indiatoday.in/latest-headlines/story/india-pakistan-ink-deal-on-consular-access-for-prisoners-25525-2008-05-21> accessed on 25/03/2021 at 02:04 PM.

the detaining State (Pakistan) to notify the individual concerned of his rights without delay. India has stated that this clause has been breached.

According to the ICJ, India's claimed rights seem to be possible.

- On the third question, the ICJ stated that the requested steps are intended to protect the rights set out in Article 36, paragraph 1 of the Vienna Convention. The Court noted that the rights asserted by India and the provisional steps sought have a relation.
- In reference to the fourth question, the Court said that the simple fact that Kulbhushan Jadhav is on trial for murder and may be executed is sufficient to prove that there is a possibility of irreparable damage to India's interests. Pakistan has stated that the execution of Kulbhushan Jadhav would most likely not take place before August 2017, according to the ICJ. This ensures that an execution may happen at any time before the Court renders its final judgement in the case. Pakistan has not issued any guarantee that Kulbhushan Jadhav will not be executed until the Court makes its final verdict, according to the ICJ. As a result, the Court stated that it is confident that the current case is urgent.

The Court ordered Pakistan to take all available steps to prevent Kulbhushan Jadhav from being executed pending the outcome of the case, and Pakistan to notify the Court of all actions taken to carry out the direction.⁴⁰

In terms of defensive logic, Pakistan's situation had a variety of alternatives. The following points may be used as defensive lines:

1. Pakistan should have targeted the case's jurisdictional dimension on a technical level. The ICJ's authority jurisprudence is far from simple. It's a risky job to use Article 36(1) of the ICJ Statute to attach Article I of the OP-VCCR. Since Article 36(1) of the ICJ Statute refers to compromissory jurisdiction, while Article I of the OP-VCCR refers to compulsory jurisdiction, the ICJ will have to investigate the grounds of the essence of the jurisdiction it will assume.⁴¹

The apparent conflict between the forms of authority would undoubtedly aid Pakistan in demonstrating the ICJ's jurisdictional shortcomings.

⁴⁰ Press release, International Court of Justice on 18 May 2017, available at <https://www.icj-cij.org/files/case-related/168/19440.pdf> accessed on 25/03/2021 at 02:04 PM.

⁴¹ Article 1 of OP-VCCR reads: "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol"

2. In their essay “ICJ's Restricted Authority” two foreign lawyers from Pakistan, Sikandar Ahmed Shah and Abid Rizvi, have discussed the line of claims. Their arguments are that:
 - a. The ICJ's jurisdiction is limited because it can only look at the interpretation or application of the VCCR;
 - b. Because Pakistan is a dualist state that requires international legal obligations to be legislated nationally before they can be considered binding, the VCCR was not legislated nationally in the Diplomatic and Consular Privileges Act, 1972, and hence it cannot be interpreted.
 - c. Given the extraordinary situations that exist between India and Pakistan, the relevant international law is International Humanitarian Law. The rule of military war can be extended under these situations and in light of the Additional Protocol I to the Geneva Conventions, 1977 (AP-I). Article 46 of the AP-I deals with spies who are not afforded the same immunity as soldiers or prisoners of war. He is only qualified to the basic rights set out in Article 75 of the AP-I. Widening the AP-I to this situation would invariably mean acknowledging the continuation of an international military war between India and Pakistan; this stance must be taken with caution, since it could have unintended legal implications for the two countries' Kashmir dispute.
 - d. The scholars cite the *Medellin vs. Texas* dispute, which was settled by the United States Supreme Court in 2008. The case concerned the permeability of international law into national law in the absence of relevant national laws. The case was similar to the *Kulbhushan* case, in which consular entry was refused to a rapist who had gang raped two girls in Texas among others. It should be recalled that the *Medellin* decision was based on the *Avena* case, which was settled in 2004 and in which the US denied consular entry to 54 Mexican nationals. The International Court of Justice had ruled in Mexico's favour, but the US Supreme Court refused to follow the ICJ's decision.

3. Article 30 of the ICJ Statute states that the ICJ will establish guidelines for carrying out its functions. As a result, in 1978, it drafted the Rules of Court. Since there is no statutory framework for a stay in the legal system under which the ICJ operates, India has applied for a “provisional measure” order against Pakistan under Rule 74(4). Since Rule 74 (4) of the ICJ Law is not a result of the treaty-making process, Pakistan will dispute the Rule's

very foundation in its pleadings. Even if it were not, the Rule's language is soft. "Pending the Court's meeting, the President should call upon the parties to proceed in such a manner that any order the Court may make on the proposal for provisional steps will have the necessary effects," it says.

4. India has stated that it plans to challenge the military court's conviction and death sentence; however, the ICJ is unlikely to consider this argument. Pakistan's best bet is to contend that it followed its own laws and that the case was handled by a judge with authority over those offences. The death penalty and military courts are also part of Pakistan's criminal justice system, and is based on the UN Charter's "principle of sovereign freedom" (Article 2(1)).⁴²
5. The Agreement on Consular Access (ACA) among Pakistan and India, which was concluded on May 21, 2008, may be taken into account into Pakistan's technical security qua jurisdiction. The ACA stipulated that "in case of conviction, imprisonment, or punishment rendered on political or security grounds, each party may examine the case on its merits," according to clause (vi). The language of ACA clause (vi) is broad, which may encourage Pakistan to claim that the impact of Article 1 of the OP-VCCR has been superseded by the ACA, as echoed in the Joint Statement of May 21, 2008. (after the Foreign Minister level review of the Fourth Round of Composite Dialogue between India and Pakistan).

In any case where India was a party before the ICJ, the court tested its jurisdiction and ultimately determined the case. In the case of Kulbhushan Jadhav, the ICJ issued temporary relief/provisional steps, i.e. a stay of execution of Kulbhushan Jadhav, after being prima facie satisfied about the validity of India's case and the availability of its authority over the conflict, by invoking the clauses of the aforementioned articles. Both India and Pakistan are signatories to the Vienna Convention on Consular Relations of 1963, which provides for consular assistance to their citizens awaiting prosecution in other countries and confers unequivocally and compulsorily jurisdiction in the International Court of Justice. Furthermore, the well-known international law doctrine of "pacta sunt servanda" demands that negotiations entered into in good faith be carried out in good faith, with any infringement constituting a violation of international law. When viewed against this perspective, it is clear that consular access to India was refused, despite the

⁴² Article 2(1) reads: "The Organization is based on the principle of the sovereign equality of all its Members."

fact that it is well recognised that Pakistani military tribunals are opaque, work in breach of national and international fair trial requirements, and refuse to offer fairness, evidence, and even adequate redress to those facing charges.

The case of Kulbhushan Jadhav was a starting point for the International Court of Justice (ICJ) to dispel the myth that international law is the last bastion of jurisprudence.

The International Court of Justice (ICJ) released its final judgement on the Kulbhushan Jadhav case involving India and Pakistan on July 17, 2019. The court found that Pakistan had violated its obligations under the 1963 VCCR with a 15-1 majority decision in India's favour.⁴³ However, since the International Court of Justice will only offer partial relief, Kulbhushan Jadhav's arrest and pending death penalty remain unclear at best.⁴⁴

After being refused entry for the previous 13 times, Pakistan eventually allowed Indian diplomats and family members (mother and wife) to meet with Jadhav on September 2, 2019, after which consular access was rejected once more. Even during this meeting, it was alleged that Jadhav was being pressured to repeat a false Pakistani story.⁴⁵

4. CONCLUSION

The International Court of Justice, which is based in the Netherlands, is the UN's primary judicial body. It is independent of both the UN legislative branch (the Security Council and the General Assembly) and the executive branch (the UN Secretary-General) (the Secretariat). The Court contributes to the implementation of international law by making rulings on disputes between states and issuing advisory opinions to support other UN bodies.

The International Court of Justice has no way of applying its decisions, which still have little legal jurisdiction. If a country doesn't even want an unfavorable decision, it will refuse to allow

⁴³ International Court of Justice, available at <https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf> accessed on 25/03/2021 at 02:04 PM.

⁴⁴ "The Kulbhushan Jadhav Verdict: A certain win, with uncertain outcomes" Observer Research Foundation on 19 July 2019 available at <https://www.orfonline.org/expert-speak/the-kulbhushan-jadhav-verdict-a-certain-win-with-uncertain-outcomes-53188/> accessed on 25/03/2021 at 02:04 PM.

⁴⁵ "Kulbhushan Jadhav was under pressure to parrot false Pakistani narrative : India after consular meet" India Today on 3 September 2019 available at <https://www.indiatoday.in/india/story/kulbhushan-jadhav-was-under-pressure-to-parrot-false-pakistani-narrative-india-after-consular-meet-1594608-2019-09-02> accessed on 25/03/2021 at 02:04 PM.

the appeal to be considered and resolved by the Judge.

This is a major deviation from domestic courts' binding nature. The long-term stability of the Universal Court of Justice is predicated on its constitutional validity. If it constantly released unpopular decisions against influential states, and those states rejected the rulings, any kind of foreign diplomatic recognition would be jeopardized. Overall, the world court would be unable to take up politically contentious cases of relevance because it is acting in a diplomatic setting.

Nonetheless, it offers a new platform for hope in the settlement of world crises, one that is aligned with the United Nations' mandate.

In a recent press publication, the United Nations stated that in the past, various countries used to show some level of respect for the International Court of Justice's decisions and directives. Nobody needs to be bound by the words of others in today's world. The United States has failed to attempt to regulate the amount of waste it produces in the atmosphere and refuses to acknowledge that this is the world's second-most polluting region. India and Pakistan are at war, and so there is no way to avert possible violence after the Indian Parliament's revocation of Article 370 of the Indian Constitution. As a result, although the ICJ was once the legal authority in the field of international law, its ability to apply its own decision is steadily dwindling in this intolerant world.

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