

# TREACHERY OF A SPY: ANALYSIS OF KULBHUSHAN JADHAV CASE

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## Abstract:

The Jadhav Case noticed few arrays of international law that could navigate global relations and applicability of law on unprecedented levels, which include the jurisdictional issues, preservation of human rights, provisional measures that are critical and high-priority, thus challenging the judicial system at the global level. Besides contributing to new facets of international litigation, this case also witnessed turns towards adjudication between never ending disputes regarding India and Pakistan. As per the *jus cogens* norm that prevails in international law, India progressively filed an application to institute proceedings and maintain international relations, rather than a violent method of resolution of disputes by use of force. Remarkably, this case did not merely focus on international consular relations, but also decided on other paramount issues such as international treaty obligations over bilateral agreements, interpretation of norms in a state of conflict of laws etc., and hence, makes the verdict a landmark judgement.

**Keywords:** Jurisdiction, Provisional Measures, Consular Rights

## Introduction:

Martin Luther King Jr. rightly states, “*Injustice anywhere is a threat to justice everywhere*”. Throughout the evolution of law, there has always been an unsettling debate between law and morality between which justice is torn apart. The same debate also presents itself in international law where States reach out to reconcile differences and maintain inter-relational cooperation. The pursuit of one man’s freedom fighter could be another’s terrorist. This perception was recently observed in the case of *India v. Pakistan*<sup>1</sup> (Jadhav case).

## Facts:

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<sup>1</sup> Jadhav Case, *India v Pakistan*, Provisional Measures, ICGJ 515 (ICJ 2017), [2017] ICJ GL No 168.

An unfortunate series of events resulted in India instituting legal proceedings in the International Court of Justice (ICJ) against Pakistan on numerous legal issues relating to Pakistan sentencing death penalty upon an Indian national- Kulbhushan Jadhav. The procedural history began with the jurisdiction being sought as under Article 40, ¶ 1, of the ICJ Statute<sup>2</sup> and Article 38 of the Rules of the ICJ, read along with Article 1 of the Optional Protocol.<sup>3</sup> While Pakistan claimed that the arrest was based on espionage and sabotage activities conducted by Mr. Jadhav, India claimed that he was wrongfully sentenced without providing consular access and a fair trial after being abducted from Iran, where he was engaged in business following retirement from the Indian Navy.

### Questions Presented before the ICJ:

- i. Whether the Court has jurisdiction to entertain an application seeking provisional measures?
- ii. Whether the Court can order for provisional measures in the finding that there was an irreparable prejudice to rights of the Parties?
- iii. Whether the Vienna Convention on Consular Relations were implicitly inapplicable in cases of terrorism or espionage?
- iv. Whether the rights contained in Convention could be limited by a subsequent bilateral agreement?

### Arguments advanced by the Parties:

India's application sought the Court to declare that the sentence imposed was violative of Article 36 of the [Vienna Convention on Consular Relations](#) (VCCR)<sup>4</sup>, and of the 'elementary human rights of the accused' mandated under Article 14 of the 1966 International Covenant on Civil and Political Rights (ICCPR). The arguments posed by India were tangent towards *prima facie* jurisdiction i.e., by praying the Court to accept the jurisdiction upon the grounds clarified and not by definitive manner of merits of the case.<sup>5</sup> The relief sought also included-

- i) Immediate suspension of the sentence of death awarded by the Military Court

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<sup>2</sup> Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 UNTS 933.

<sup>3</sup> Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 596 UNTS 487.

<sup>4</sup> Vienna Convention on Consular Relations, Apr. 18, 1961, 500 UNTS 95.

<sup>5</sup> ¶ 15, Jadhav Case (*India v. Pakistan*), Order on Provisional Measures (May 18, 2017), available at <http://www.icj-cij.org/files/case-related/168/168-20170518-ORD-01-00-EN.pdf>.

- ii) Restraining Pakistan from giving effect to the sentence awarded directing it to annul the decision of death penalty.
- iii) In case of non-annulment of the decision, to declare that the sentence would be violative of International law and treaty obligations, thus ordering for release.

Pakistan primarily argued that Art. 36(1) of Vienna Convention is inapplicable to persons suspected of espionage or terrorism which leaves no room for interpretation of the provisional measures.<sup>6</sup> It also stated that it had conditioned consular assistance and the rights invoked by India were not plausible because of non- application of Vienna Convention due to the existence of the 2008 Agreement.<sup>7</sup> Further, Pakistan did not challenge the argument that it had failed to provide consular access.<sup>8</sup>

### **Legal Analysis:**

This case has stood as an exemplary instance of exploration of new horizons for legal interpretation of International documents. However, the expedition of justice has been time-consuming which in itself, is a deterrent to growth of realm of law. On an analysis of the case, one could equate the understanding of the Vienna Convention with the primordial aspect of jurisdiction that forms the base of every legal case. Further on referral to consular assistance to be given to Mr. Jadhav, the Court observed that there was an essential dispute concerning the consular assistance with respect to arrest, detention and trial of Mr. Jadhav.<sup>9</sup>

*Jurisdiction:* The Court stated that the evidence of no communication or consular access provision by Pakistan would form a ground for extracting necessary jurisdiction.<sup>10</sup> On satisfying the requirement of jurisdiction with such observation, the Court mandated clarifications on questions of law and fact, thereby admitting the dispute under the Vienna Convention<sup>11</sup> and held that the alleged acts of terrorism or espionage cannot exclude the scope of jurisdiction of the Court under the Convention.<sup>12</sup> An important observation made was that a

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<sup>6</sup> *Id.*, ¶ 24.

<sup>7</sup> *Id.*, ¶ 41.

<sup>8</sup> *Id.*, ¶ 44.

<sup>9</sup> *Id.*, ¶ 29.

<sup>10</sup> *Id.*, ¶ 30.

<sup>11</sup> Pratap, Ravindra, Provisional Measures and the Jadhav Case (December 21, 2017). Groningen Journal of International Law, Vol. 5, No. 2, 2017, 300.

<sup>12</sup> *Supra* note 6, ¶ 32.

bilateral agreement cannot possibly limit jurisdiction of the Court under the ICJ statute or under Vienna Convention.<sup>13</sup>

*Protection of Rights:* As asserted by India, the rights pertinent to provisional measures are that of basic principles of consular protection<sup>14</sup> and such rights can be claimed by all States under the Convention when a national is detained or imprisoned.<sup>15</sup> The Court observed that at the provisional measures stage, it is not required to determine definitively whether the rights, which India wishes to see protected, exist. It only needs to decide whether these rights are plausible.<sup>16</sup> Further, this case stood as an example for preservation of human rights<sup>17</sup> after which Pakistan agreed to let the family of Mr. Jadhav meet him.

The causal link between order of provisional measures and the rights of Parties involved must be proved to show irreparable prejudice that could affect the case.<sup>18</sup> This could be a parallel with the way Pakistan treated Mr. Jadhav by sentencing him to death penalty without providing him an opportunity to be heard, therefore, violating principles of natural justice and causing irreparable prejudice. Lastly, the matter of urgency in provisional measures as seen in the *LaGrand* case, notes that time is essential in an application seeking provisional measures.<sup>19</sup>

### **Conclusion:**

This pending case between India and Pakistan has been fundamental in progression of international jurisprudence and development of contemporary mechanism of resolution of disputes between the Parties. The Court in this case has acted as a mere adjudicator rather than a 'Court of criminal appeal'.<sup>20</sup> Provisional measures being one among the most general principles of international law<sup>21</sup>, has become a predominant feature that has binding effect as laid down in multiple international precedents.<sup>22</sup> Provisions regarding humanitarian law in

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<sup>13</sup> *Supra* note 9, 302.

<sup>14</sup> *Supra* note 6, ¶ 38 quoting *LaGrand*, ICJ Reports 2001, 492, ¶ 74

<sup>15</sup> *Id.*, ¶ 39.

<sup>16</sup> *Id.*, ¶ 42.

<sup>17</sup> *Id.*, ¶ 39.

<sup>18</sup> International Court of Justice, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v Russian Federation*) Provisional Measures, I.C.J. Reports 2008, Order of 15 October 2008, 353, ¶ 118.

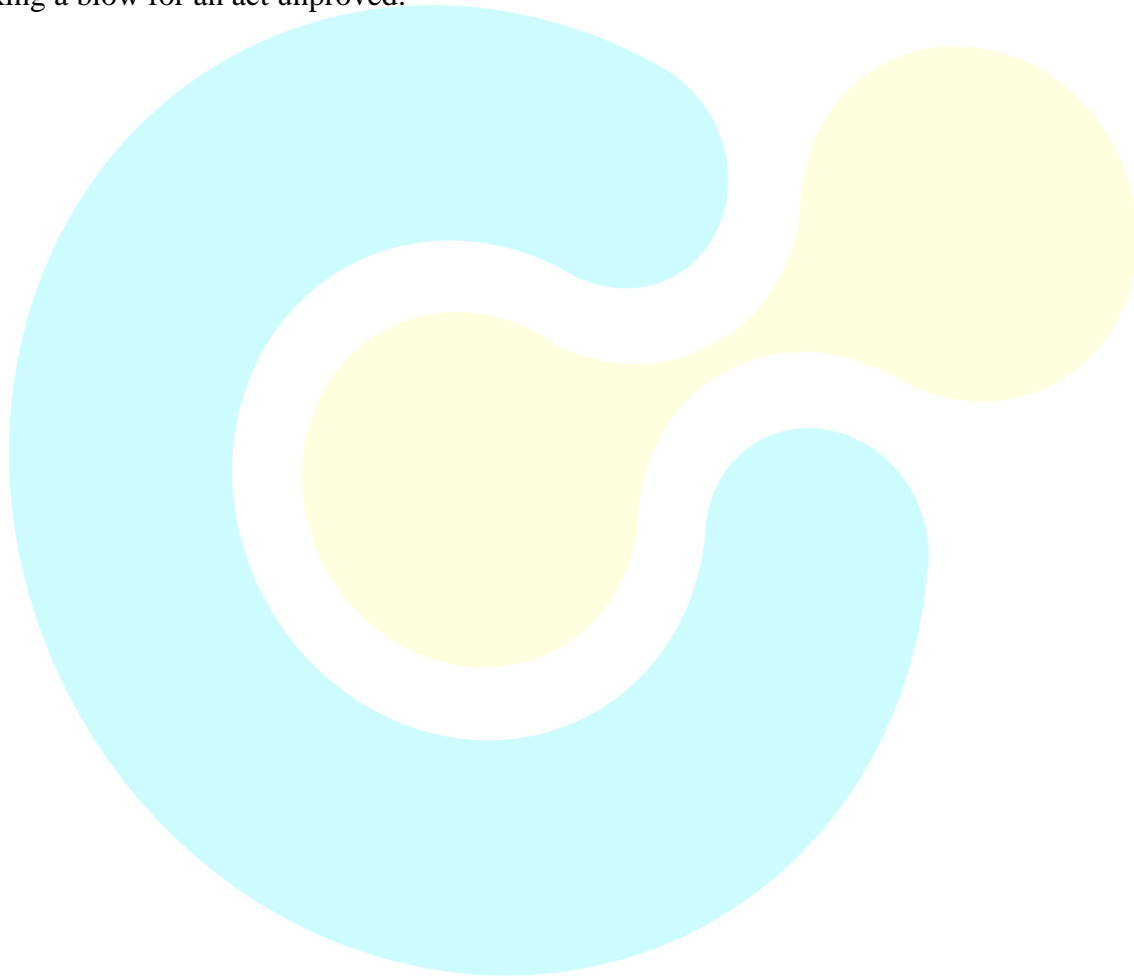
<sup>19</sup> ICJ, *LaGrand (Germany v United States of America)* Provisional Measures, ICJ Reports 1999 (I), Order of 3 March 1999, 9, ¶ 19

<sup>20</sup> *Supra* note 6, at ¶ 56.

<sup>21</sup> *Aegean Sea Continental Shelf (Greece v Turkey)*, [1978] ICJ Rep 3, 15-16.

<sup>22</sup> *LaGrand (Germany v United States of America)* (Judgment) ICJ Reports 2001, 506, ¶ 109.

public international law has been given weightage in all past incidents over issues between States which is followed in the current case also, thereby expanding the ambit of *jus cogens* norm of protection of human rights. Currently, post events of passage of second order by the ICJ, were the request of time by India for submission of a reply to the memorandum of Pakistan and request of a rejoinder by Pakistan.<sup>23</sup> The ongoing status of the case is that the execution order is stayed while Pakistan has time till 17<sup>th</sup> July 2018 to submit a rejoinder to the ICJ. It is hoped to give freedom to the man accused of treacherous activities on a rival land, without taking a blow for an act unproved.



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<sup>23</sup> Jadhav Case (*India v. Pakistan*), Order on Time limits (January 17, 2018), available at <http://www.icj-cij.org/files/case-related/168/168-20180117-ORD-01-00-EN.pdf>.