

THE RELEVANCE OF I.C.J. IN THE BACKDROP OF KULBHUSHAN JADHAV CASE

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INTRODUCTION

Kulbhushan Sudhir Jadhav was a former Indian naval officer. He was caught by Pakistani security agencies and imprisoned there. He was mainly charged for an offence of espionage and other charges like facilitating terrorism etc. His trial was held in a Pakistani Military Court where he was accorded death sentence in the month of April, 2018. His trial was conducted ex-parte as Jadhav was not provided any opportunity to put up any defence in his favour. He was presented as an alleged Indian spy and a confession was extracted in custody before a magistrate. The most remarkable thing in this series of events was that Jadhav was not accorded any consular access during this period. Though Indian Government made sixteen requests to Pakistan Government in this regard, yet all such requests fell on deaf ears of Pakistani authorities; Ultimately, seeing the danger of Kulbhushan Jadhav's imminent execution, the Indian Government decided to knock the doors of the International Court of Justice on the ground that Pakistan has violated the provisions of Article 36 of the Vienna Convention on Consular Relations, 1963. The ICJ responded to India's request and after hearing both sides granted a reprieve to India, and the Jadhav both. The case was fixed for final hearing which has just concluded in The Hague, where the ICJ is situated. This paper examines in depth about the India's stance in ICJ and the relevance of ICJ in such cases in the light of some previous cases decided by the Court.

WHY INDIA OPTED FOR ICJ

Since its establishment by the Charter of the United Nations, this is first time after 1971 that India has turned to the ICJ in a dispute with Pakistan. In 1971, India had withdrawn Pakistan's

overflight rights after the hijacking of an Indian Airlines flight to Lahore in January. Pakistan, then, moved to the International Court of Justice, citing the jurisdiction of the International Civil Aviation Organisation, claimed that India could not deny it the overflight as well as landing rights. The ruling of the ICJ went in favour of Pakistan.¹

Before Jadhav's case, India has taken Pakistan to the ICJ only once while Pakistan has done it twice. Pakistan, in 1973, for the first time, knocked the door of ICJ. It was a matter of repatriation of 195 of its nationals to Bangla Desh from Indian custody after the 1971 war. However, Pakistan withdrew the case after a year. Meanwhile, a new country, Bangla Desh, was created in the wake of 1971 India- Pakistan war.²

Once again in the year 1999, after its military plane was shot down in Indian air space over the Rann of Kutch, Pakistan took India to ICJ. India contested the case on the plea of jurisdiction and the ICJ ruled in India's favour.³

During these years, India has not resorted to settling of disputes to the ICJ. In September 1974, India had elaborated on the matters over which it would accept the ICJ jurisdiction. By doing this, India replaced a similar declaration made in 1959.⁴

"Among the matters over which India does not accept the ICJ jurisdiction are: Disputes with the government of any State which is or has been a member of the Commonwealth of Nations."⁵

Commonwealth is a group of 53 countries comprising mostly former British Colonies. Since Pakistan is a member of the Commonwealth, moving to ICJ for any bilateral dispute would amount to bringing the dispute before a multilateral forum, which is against India's stance.

However, Kulbushan Jadhav's case called for immediate intervention because it was a matter of life and death for an Indian national who was handed over death sentence unilaterally by a Pakistan's Military Court.

India has reason to believe that ICJ can look into Jadhav's case. This is primarily because of the fact that both the countries are signatory to the Optional Protocol of the Vienna Convention

¹ Jayanth Jacob, Why India went to ICJ after 46 yrs, Hindustan Times, dt. May 11, 2017.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

on Consular Relations (VCCR). As per this Protocol, any dispute arising out of the interpretation or application of VCCR shall lie within the jurisdiction of the ICJ.

INDIA'S CASE BEFORE THE ICJ

On 25 March 2016, India was informed that an Indian national, Kulbhushan Sudhir Jadhav, was allegedly arrested on March 3, 2016. Without losing further time, on the same day India sought consular access to the said individual at the earliest. The same request was repeated on 30 March 2016, and thirteen more reminders were sent by India on 6 May 2016, 10 June 2016, 11 July 2016, 26 July 2016, 22 August 2016, 3 November 2016, 19 December 2016, 3 February 2017, 3 March 2017, 31 March 2017, 10 April 2017, 14 April 2017 and 19 April 2017. All these requests evoked no response from Pakistan.⁶

Almost a year after India's first request for consular access, India received a request from Pakistan for assistance in investigation in respect of an FIR No.6 of 2016. Later on, Pakistan formally communicated to India on 21 March 2017 that consular access by a State to Kulbhushan Jadhav "shall be considered in the light of Indian side's response to Pakistan's request for assistance in investigation processes and early dispensation of justice". This was in total contrast against Pakistan's obligation under the Vienna Convention under which no limitation, on right of consular access by a State to its national and also the right of the Indian national to freely communicate with Indian authorities under Article 36 of the Convention, has been laid down.⁷ India received the similar letter from Pakistan Ministry of Foreign Affairs. India responded to this on the same day i.e. 10 April, 2017, itself pointing out that this offer was being iterated after the death sentence had been confirmed by the Military Court of Pakistan. India stated that his offer "underline the farcical nature of the proceedings and the so-called trial by Pakistan military court martial." India pointed out that despite its repeated requests consular access had not been allowed.⁸

⁶ Case Concerning the Vienna Convention on Consular Relations, (India Vs. Pakistan), presented by Dr. Deepak Mittal, Joint Secretary, Ministry of External Affairs, Government of India, The Hague, 8 May 2017, available at <https://www.icj-cij.org/files/case-related/104/10618.pdf>, accessed on 21.2.2019.

⁶ Ibid.

⁷ Ibid.

Pakistan, a party to the Vienna Convention, was under an international legal obligation to India, to comply with the rights of consular access under sub-paragraphs (a) and (c) of paragraph 1 of Article 36. Pakistan was also under an obligation to allow Indian national to seek consular access within the framework of international law.

The trial of Kulbhushan Jadhav was concluded on 21 March 2017. Pakistan proposed to consider the request for consular access after the trial was concluded, on the condition that India first accede to its request for assistance in investigation.

The mother of Kulbhushan Jadhav filed an appeal under Section 133 (B) and a petition to the Federal Government of Pakistan under Section 131 of the Pakistan Army Act 1952. The Appeal and the petition were handed over to the Pakistan Government by the Indian High Commission in Islamabad on April 26, 2017. From the press reports it appears that a court of Appeal was constituted.⁹ What happened towards the disposal of Appeal is not within public domain.

Before the ICJ, India also stressed upon the legal aspects of the case and also highlighted the authority of the court. India's stand on these points can be summarized as follows:

1. The Court (ICJ) is vested with "power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party "pending a final Judgment in the case, as per Article 41 (1) of the Statute of the Court. Even Orders of provisional measures in compliance of Article 41 establish binding obligations.¹⁰ The Court has indicated provisional measures to prevent executions in application based on the violation of Article 36 of the Vienna Convention on Consular Relations in three reported cases.
2. In the case concerning the Vienna Convention on Consular Relations (Paraguay Vs. United States of America), Provisional Measures, Order of 9 April 1998, ICJ Reports 1998, p. 248, the Court indicated provisional measures to prevent the execution of the Paraguayan national Angel Francisco Breard pending final judgment. The Court afforded similar relief in LaGrand (Germany Vs. United States of America), Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, p.9 to prevent the execution of the German national Walter La Grand. In Avena and Other American Nationals (Mexico Vs. United States of America), Provisional Measures, Order of 5 February 2003, ICJ

⁹ Ibid.

¹⁰ La Grand (Germany Vs. United State of America), Judgment, ICJ Reports 2001, p. 466, para. 109, Ibid.

Report 2003, p.77, the Court directed the United States of America to take all measures necessary to ensure that three Mexican nationals were not executed pending final judgment.¹¹

3. The sanctity of human life has been well recognized by the International Law. Pakistan is a party to the International Covenant on Civil and Political Rights [ICCPR] which establishes that every human being has the inherent right to life and which shall be protected by law. Article 14 of the ICCPR clearly states that every person is entitled to a fair and public trial by an impartial tribunal. The fairness of the trial substantially depends upon the available means to an accused to defend himself effectively. In the case where a person is arrested in a foreign country, the right to consular access, and to seek the assistance of his home country in his defence, are the basic tenets of fair trial in foreign state.¹²

INDIA'S CONTENTIONS BEFORE THE ICJ IN THE REGULAR TRIAL

In the regular trial before the ICJ which started on 19th February this year, India's stand on various issues of the case is as under:

(1) On violations of Vienna Convention¹³

- Article 36 of the Vienna Convention says that a country must be informed of arrest of its citizens by another country. But Pakistan did not inform India of Jadhav's arrest.
- Pakistan was bound to give consular access. Even Jadhav was not informed of his right of consular access.
- India had sent at least 13 reminders asking for consular access. All were repeatedly ignored by Pakistan.
- Article 36 does not give any exception to charges of espionage.
- India has always given consular access to Pakistan whenever its citizens were caught by India on charges of terrorism. Pakistan did not reciprocate in Jadhav's case.

¹¹ Ibid

¹² Ibid.

¹³ Live Law News Network, dt. 19Feb 2019.

- Article 36 is a powerful tool which ensures the facility of consular access to foreign nationals who have been put on trial in a foreign court. This has been egregiously violated by Pakistan.

Article 36

Communication and contact with nationals of the sending State

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:

- (a) consular officers shall be free to communicate with nationals of the sending state and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending state;
- (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;
- (c) Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
- (d) The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

2. On lack of material against Jadhav¹⁴

- There are no credible charges against Jadhav. Pakistan's version is stronger on rhetoric and weaker on facts.
- Jadhav's confession was obtained before the registrations of FIR.
- Pakistan has not yet disclosed the judgment convicting Jadhav. They are embarrassed to disclose it.

3. On illegality of military court's trial against Jadhav.¹⁵

- Pakistan uses military courts to try civilians. Their Constitution has been amended to permit this. This is against basic canon of due process that military courts should be used only to try military personnel.
- Jadhav's trial by military court hopelessly fails to satisfy even minimum standards of due process and should be declared "unlawful".
- A foreign detainee has right to life, right to fair trial and an impartial Judiciary. Pakistan's military courts have put 161 civilians to death over last two years through opaque process.

In the last, India's contention is that since the case involves the interpretation and application of a multilateral international treaty- Vienna Convention on Consular Relations - ICJ can exercise jurisdiction, regardless of Pakistan's Consent.

CASES BEFORE THE ICJ

1. Breard Case (Paraguay Vs. United States)¹⁶

This was the first case brought before ICJ filed by Paraguay in 1998 against U.S. In this case, Paraguayan national, Breard, was convicted of murder in Virginia and faced imminent execution in Virginia. Paraguay sought redress on the ground that no consular access was provided to its national. The U.S. countered this argument by saying that a receiving State that fails to comply the provisions of Article 36 of the Vienna Convention regarding consular

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ ICJ Rep 1998, 248 : 37 ILM 810 (1998).

access, is not required to reverse a consequent criminal conviction. The ICJ, in an interim order, stayed the execution proceedings pending the final judgment. The case was taken to the U.S. Supreme Court where the US took the stand that the interim order of the ICJ was not binding. The Supreme Court refused to stay the execution and it was carried out. Despite this, the case was continued before the ICJ and Paraguay filed the memorial. However, Paraguay withdraw the case before the U.S. could reply. Thus, no final judgment resulted from the ICJ in this case.

2. LaGrand Case¹⁷

Walter LaGrand, a German national, was charged and tried for a criminal offence committed by him in the mid-1980s. He was later on executed by Cyanide gas in a correctional facility in Arizona, U.S. on March 3, 1999. The ICJ, at the request of Federal Republic of Germany, indicated provisional measures to halt the execution of LaGrand. But the execution took place after the four hours of the ICJ verdict at its scheduled times. A week ago, his half-brother Karl Heinz LaGrand, also a German Citizen, was executed by lethal injection, for his involvement in the same felonies. Taking into cognizance of the fact that in U.S. 17 foreign nationals were executed since 1976 and over 110 were on death row at that time, these executions were not unusual. U.S. persistently ignored the requests of Germany of according the right to information on consular assistance under Article 36 of the Vienna Convention on Consular Relations. The executions took place despite Germany's claims that the U.S. had breached the International Law. In the latter case of Walter LaGrand, execution was carried out overlooking the fact, that the ICJ had granted provisional measures of staying the execution pending the hearing of the case on merits.

In the final hearing, ICJ had to decide upon multiple issues. On the one hand, there were claims of Germany that the U.S. had breached its obligation in respect of both Germany and LaGrand brothers under Article 36 of the Convention. ICJ had also to look into the far-reaching questions pertaining to the intersection of the individual rights vis-a-vis the State Parties. Last but not the least, ICJ was required to put a stamp of his authority and show to the world that it was not a "Paper Tiger" as it was generally ascribed to its image.

In its historic verdict of far-reaching consequence, the ICJ decided that provisional measures ordered by ICJ are binding on litigants. It was further decided that the Convention on Consular

¹⁷ LaGrand (Germany Vs. United States of America), ICJ Rep 2001, 466: 40 ILM 1069 (2001).

Relations confers rights not only on State Parties but also on their nationals. In its final conclusion, the ICJ effectively concluded that these rights are not bare rights to consular communication, notification and access but serve broader purposes and ends, such as allowing a detained person's state of nationality to provide through legal assistance in domestic criminal proceedings. Article 36 rights, to this extent, can lend practical effect to fundamental human rights related to fair criminal trial processes.

Here, it is to be noted that State of Arizona did not notify LaGrands of their rights under the Vienna Convention. Even the U.S. authorities did not provide any information to LaGrands regarding provisions of the Convention related to Consular Communication. It was also undisputed that this claim was not raised in the State Trial Proceedings of LaGrands. The claim was thus defaulted on procedural ground. US Supreme Court denied certiorary in a subsequent petition. ICJ had ordered in its provisional order to stay the execution of Walter LaGrand and also ordered to communicate this to the Governor of Arizona. On the basis of this Order of the ICJ, Germany approached the US Supreme Court for granting stay on the execution of Walter LaGrand less than two hours before he was scheduled to die. The Supreme Court rejected the claim of LaGrand on the ground of being procedurally defaulted because it was not raised before State Trial Criminal Proceedings.

3. Avena Case¹⁸

In this case, Mexico brought a suit on behalf of certain Mexican nationals arrested in various States of the U.S. This case was lodged focusing those arrest nationals who were sentenced to death and were to be executed. The claim of Mexico was based on the fact that 51 of its nationals had not been informed about consular access upon arrest, but were nonetheless convicted and sentenced to death. Mexico asked for doing away with the death sentence of such convicted nationals.

Before the ICJ, Mexico claimed that the US was subject to the compulsory jurisdiction of ICJ because both States were parties to the Vienna Convention as well as Optional Protocol to the Vienna Convention on Consular Relations regarding the compulsory settlement of disputes.

Avena case differed from prior two cases of the same nature, viz. U.S. Vs. Paraguay and U.S. Vs. Germany, in the sense that in this case a large number of foreign nationals were involved.

¹⁸ Avena and Other Mexico Nationals (Mexico Vs. United States), 110. ICJ Rep 2004, 12.

ICJ, like other previous cases, stayed the executions pending the final judgment in an interim Order. The US complied with the interim order.

On 9 January 2003, Mexico instituted proceedings against the U.S. in a dispute concerning the breaches of Vienna Convention on Consular Relations, 1963. On 31 March 2004, ICJ delivered final judgment on merits of the dispute and held that:

- "1. By not informing, without delay upon their detention, the 51 Mexican nationals of their consular rights under Article 36 (1) (b) of the Convention;
2. By not notifying the appropriate Mexican consular post without delay of the 49 Mexican nationals and thereby depriving Mexico of the right to render assistance to detained Mexican nationals, the U.S. breached its obligations under Article 36 (1) (b);
3. In relation to 49 Mexican nationals, USA deprived Mexico of the right to communicate with and have access to these nationals and to visit them in detention and thereby breached obligations under Article 36 (1) (a) and Article 36 (1) (c) of the Convention;
4. In relation to 34 Mexican nationals, the U.S. deprived Mexico of the right to arrange for legal representation of those nationals, and thereby breached obligations under Article 36 (1) (c) of the Convention;
5. By not permitting review and reconsideration of the conviction and sentences of three Mexican nationals, namely Mr. Cesar Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera, the U.S. breached the obligations under Article 36 (2) of the convention; appropriate reparation in this case consists in the obligation of the US to provide, by means of its choosing, review and reconsideration of the convictions and sentences."¹⁹

The Court also held that in case the Mexican nationals are sentenced to severe penalties ignoring their rights under Article 36 (1) (b) of the Convention, the US shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence.

¹⁹ cited in Gurdip Singh, *International Law*, Third Edition, 2015, Eastern Book Company, Lucknow, p. 176.

CONCLUSION

The International Court of Justice is a principal judicial organ of the United Nations and it functions in accordance with its statute which forms an integral part of the Charter of the United Nations. Since no international tribunal can exercise jurisdiction over the sovereign states without their consent, the jurisdiction of the ICJ is based upon the consent of the parties. As far as jurisdiction of the ICJ is concerned, there are two types of jurisdiction, namely, voluntary jurisdiction and compulsory jurisdiction. Voluntary jurisdiction of ICJ extends to cases which the parties refer to it and cases brought before the court by one of the parties and the other party, expressly or impliedly, accepts the jurisdiction of the court. Article 36, para 1, refers to voluntary jurisdiction while compulsory jurisdiction is contained in the remaining two parts of Article 36, para 1, namely, "Matters specially provided for in the Charter of the United Nations" and "Treaties and Conventions in force." These refer to the obligatory jurisdiction of the Court. Since its inception the preliminary issue of ICJ's jurisdiction has been raised by the contending parties but ultimately the State parties had to accept the jurisdiction of the World Court.

In the matter of implementation of Vienna Convention on Consular Relations, 1963, especially regarding the provisions contained in its Article 36 relating to consular access to foreign nationals, the intervention of the ICJ has, by and large, yielded the desired results. Despite the fact that the ICJ is not armed with any robust enforcement powers, the implementation of the ICJ judgments and its interim orders have successfully saved the day for many aggrieved states and its nationals.

According to Article 94 of the UN Charter, each member undertakes to comply with the decision of the Court in any case to which it is a party. The judgments are final and without appeal. If a state fails to agree then the other party can take the case to the Security Council. Though there remains a possibility that any one of the five permanent members can veto against any further action, yet these are exceptions not the rule.

In case of Kulbhushan Jadhav, ICJ's intervention has successfully thwarted Pakistan's endeavour to execute him. That way he was saved from the gallows, though temporarily till the final judgment of the Court. In the present circumstances, ICJ is the only forum to resolve ticklish issues of international law arising between the states. Despite a few exceptions where the judgments of the Court were not implemented or either of the parties refused to comply with its Orders, the sanctity and adherence to the ICJ verdicts have saved the humanity form

escalation of certain war at numerous occasions. By all accounts, this is the only forum to get instance justice in the form of interim orders of the Court. That is why despite its shortcomings, ICJ is still relevant as a judicial tribunal for adjudication of inter-nation disputes. India's reliance on this forum in the Jadhav case is a testimony to the efficacy of ICJ in the present turbulent times. At least, a life has been saved by the Court in whose case death was a certainty. That is why ICJ has survived a long period since its inception in 1945.

