

JADHAV CASE: WHETHER THE RIGHT TO CONSULAR ACCESS UNDER THE VIENNA CONVENTION ON CONSULAR RELATIONS IS AVAILABLE IN TERRORISM AND ESPIONAGE CASES?

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ABSTRACT

The ongoing Jadhav case has a lot of significance not only in deciding India's position in getting its naval officer back, but also in terms of setting up a precedent in the international sphere for the protection of human rights and deciding some still disputed concepts of International Law mainly Customary International Law and International Conventions. The Vienna Convention on Consular Relations is one of the most observed treaty which has both India and Pakistan as its signatories. Article 36 of the Vienna Convention on Consular Relations governs the communications between the consul and the nationals of his country. It requires that the receiving state should inform the detainee or arrested foreign national of his right to contact his national consul. It will be the first time that the ICJ will decide on whether offences such as espionage and terrorism exclude accused persons and States from the protections of the VCCR, which is the main question in this case.

This paper thus analyses the law on consular access and the status of spies in International Law considering the Jadhav Case proceedings. The paper while taking into account the contentions of both the countries attempts to examine whether Customary Law provided for an exception to Consular Access in the cases of espionage and terrorism and whether bilateral agreements can override obligations under VCCR.

FACTUAL BACKGROUND - WHAT LED TO THE DISPUTE?

The Jadhav case revolves around the two differing facts presented by Indian and Pakistan on their parts. Pakistan claims that it has arrested Kulbhushan Jadhav from Mashkel area in the province of Baluchistan on March 3, 2016. While citing grounds of national security to support it claims, Pakistan alleges Jadhav of committing espionage and terrorism. According to Pakistan Jadhav was a RAW agent working in Baluchistan, on “India’s official policy of terror.” After being arrested, Pakistan aired a confessional statement made by Jadhav and was put to a trial before a military court where he was declared as a spy, who was in a breach of Section 3 of the Official Secrets Act, 1923 read with Section 59 of the Pakistan Army Act, 1952.

India on the other hand maintains that the facts presented by Pakistan are flawed. Claiming Jadhav as its national, India alleges him to be a former naval officer who was carrying on his business in Iran where he was abducted and brought to Pakistan to be charged under fabricated charges of espionage and terrorism. India had constantly demanded consular access to Jadhav since the day it got to know about his arrest. Pakistan however, without providing any such access tried him before a military court, which breaches the norms of International Law as claimed by India.

Article 36 of the Vienna Convention on Consular Relations governs the communications between the consul and the nationals of his country. It requires that the receiving state should inform the detainee or arrested foreign national of his right to contact his national consul.ⁱ Pakistan’s act of directly sending Jadhav to a military court for trial, puts India in a position to contend the violations of the Vienna Convention on Consular Relations of the VCLT of which both the countries are signatories. India has claimed that denial of consular access to Jadhav breaches Pakistan’s obligations under Article 36(1) of the VCCR. This provision, among other things, provides that when a national of a foreign country is arrested or detained, the detainee must be advised of the right to have the detainee’s consulate notified and that the detainee has the right to regular consultation with consular officials during detention and trial.ⁱⁱ

Establishing the jurisdiction of the ICJ to hear this matter arising from a treaty under the Optional Protocol of the VCCR, India seeks relief for *restitution in integrum* (restoration of original condition) by requesting the suspension of the death sentence awarded by the Pakistan military court and to also declare the decision of conviction by Pakistan to be violative of

International Law on account of defying article 36 (1) of VCCRⁱⁱⁱ and Article 14 of the International Covenant on Civil and Political Rights, 1966 (ICCPR)^{iv}

Pakistan in response to India's claims, holds that the right to Consular Access under the VCCR is not provided in specific cases like those of espionage and terrorism which threatens the national security of a country. Moreover, the bilateral agreement entered by the two countries in 2008 overrides the obligations under the VCCR, hence there has been no violation of International law on its part. espionage is a well-accepted exception in customary law for the right of consular access. The Vienna Convention on Consular Relations has not codified or crystallised the entire customary law on the subject and Customary international law provided for an exception to consular access in the case of an individual reasonable suspected for espionage which thus remained unaffected by the VCCR. ^v

ISSUES UNDER CONSIDERATION

The two issues which arise for consideration by the ICJ with regards to International Law are that, whether Customary International Law provided for an exception to Consular Access in the cases of espionage and terrorism and whether bilateral agreements can override obligations under VCCR. The paper mainly focuses on the first issue and to answer that, it is important to first understand what amounts to Customary International Law and how Customary International Law and treaties work together to develop general international law.

RELATIONSHIP BETWEEN TREATIES AND CUSTOMS

Treaties and customs are effective sources of International Law as they are binding and substantive rules according to Article 38(1) of the International Court of Justice.^{vi} Treaties and customs are thus an essential components of international law because of the respect that states give them hoping to get back in return from other states. Treaties are codified instruments which gain legitimacy through signatures and ratification by the states, customs on the other hand emerges when a clear and continuous habit of doing certain actions grow up under the aegis of the conviction that those actions are right.^{vii} These actions when clubbed together give rise to generally accepted practises of nation states which thus forms customary international

law. Customary international law is further composed of two components, the objective element is the state practices and the subjective element being the feeling on the part of the states that acting as they do, they are fulfilling their legal obligation called the opinion juris. Thus, when a general usage or state practice is connected with opinion juris, international customary law exists. As held by ICJ in the North sea continental shelf case, “ *For a state practice to constitute opinion juris, not only must the acts concerned amount to a settled practice, but they must also be such, or be carried in such a way, as to be the evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.*”^{viii}

Thus, there exists a mutual relationship between treaties and customs in the sense they that reciprocate each other to enhance their legitimacy and when used in combination they form the primary foundation of basic International Law. Customs are often codified into treaties to enhance their legitimacy. During the codification process of treaties related customs often develop.^{ix} Treaties are thus not only a direct source of law but alternatively a reflection of customary law. They are different forms of one essential element i.e. agreement of subjects of international law which do not oppose each other but interact and supplement each other. However, in situation where customary international law is comprised of rules identical to those of treaty law, there would be no reason for the court to hold that the latter supervenes the former, so that customary law has no further existence of its own.^x

LITERATURE REVIEW

The chief contention of Pakistan that customary law provided for an exception to the VCCR give rise a conflict between the two main components of international law, treaties and Customary law. In order to dwell on this, it is important to know the general view of customary international law on espionage. Espionage and gathering intelligence methods and techniques may violate certain treaties concerning Human Rights, such as right to privacy and principles set by international law on non-interference on internal affairs of another state, but report between espionage and international law is not defined yet and international law is tolerant toward the process of spying on foreign countries, especially in peacetime.^{xi}

Oppenheim, *all States constantly or occasionally send spies abroad, and although it is neither morally nor politically and legally considered wrong to send spies, such agents have, of course,*

no recognized position whatever according to International Law, since they are not agents of States for their international relations.

Demarest says that, *'although espionage is "an unfriendly act," it does not violate international law.*^{xii} While arguing that peacetime espionage is not illegal, he argues that captured spies, even when convicted, should not receive the death penalty for peacetime espionage and war, it seems, should lead to ultimate punishments.^{xiii}

Roger Scott asserts that *"espionage is not prohibited by international law as a fundamentally wrongful activity, "it does not violate a principle of jus cogens."* Scott ties it to the "right of anticipatory or preemptory" self-defence under the UN Charter and international law and further opines that, *"the surreptitious collection of intelligence in the territory of other nations that present clear, articulable threats based on their past behaviour, capabilities, and expressions of intent, may be justified as a practice essential to the right of self-defence."*

DISCUSSION

The discussion of spy treatment during wartime by international law suggests an implied legitimacy to the practice; however, it is still not explicitly declared legal and the application to peacetime espionage is essentially negligible due to the supremacy of state sovereignty. Conclusions about the legality of peacetime espionage, therefore, are difficult to draw from established international law directly, especially since peacetime espionage has a wide range of forms and aims by different states.^{xiv} Covert operations with an intent to violate the principles of sovereignty and non-intervention have been however discouraged by the ICJ in the case of *Nicaragua v. US*^{xv} by declaring US guilty of using force with charges constituting both direct and indirect action to undermine the Nicaraguan government through deploying American agents, financing Nicaraguan insurgents, and mining waters within Nicaragua's territorial sea.^{xvi}

The judgment in *Nicaragua* was based on the earlier decision given by the ICJ in *Corfu Chanel case*^{xvii} where two British destroyers struck mines in Albanian waters and suffered damage, including serious loss of life. By upholding the principle of non-intervention ICJ regarded, *"the alleged right of intervention as the manifestation of a policy of force, such as has, in the past,*

given right to the most serious abuses and as such cannot, whatever be the present defects in international organization, find a place in international law.”^{xviii}

It is thus established that, although Customary International Law is vague on espionage, the principle of non-intervention and state-sovereignty have always been upheld by the ICJ. This renders ICJ in a disputed area to decide the question of Customary law as an exception to VCCR in the Jadhav case. However, even if Pakistan happens to establish a Customary Law with regard to the exclusion of espionage under VCCR, the ICJ should follow its precedent given in the *SS. Wimbledon Case* in which it was held that, “*treaties and customs are mutually reinforcing, these do not oppose each other, but interact and supplement each other, However, a treaty is superior to a custom, when there is an apparent conflict between the two.*”^{xix}

Furthermore, ICJ should focus on the wording of the treaty along with its purpose by considering Article 31 of the VCLT 1969, which provides for a general rule of interpretation. Article 31(1) provides for the interpretation of the treaty in good faith by giving it ordinary meaning in light of its object and purpose. Since, the object of treaty is to assure consular communication and assistance to such nationals, who may not fully understand the host country’s legal regime or even speak its language, the provisions of the treaty are general in nature and applies to all class and categories of persons and it can on no general ground be argued that, espionage will constitute an exception to such a protection. Article 31(2) provides that the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.^{xx} The preamble to the Convention states that customary international law continues to apply to matters not addressed in the Convention.^{xxi} The law on consular relations as written by John Quigley in his book *Consular Relations*, is found in Customary International Law, based on a practice extending back to a number of centuries. Largely, that customary law has been codified in a multilateral treaty that enjoys wide adherence and is known as the Vienna Convention on Consular Relations (1963).^{xxii} Hence, as VCLT itself is a codification of various customary norms and practices, applying customary international law as an alternate to it seems redundant.

CONCLUSION

In light of the above aspects and giving the VCCR a ‘collective’ reading, it is evident that there can be no exception to the norms established by the said treaty.^{xxiii} Moreover, such an exception to exclude specific categories will undermine the whole purpose of the treaty and allow the states to decide themselves to categorize offences for which consular access should be given. Application of Customary International Law evidenced by state practice and opinion juris should be made where the VCCR is silent to support the terms and purpose of the treaty, i.e. to provide consular access to all ‘foreign nationals’, and not to act as an exception against it.

Moreover, Pakistan’s claim that the bilateral agreement of 2008 overrides the provisions of the VCCR has no standing since India has clarified that, this agreement has not been registered with the UN, it cannot be put into consideration before the ICJ which happens to be its judicial branch. Furthermore, as VCCR is a multilateral treaty, the bilateral agreement cannot dilute it, but can only enhance or strengthen it to give a clear meaning to its provisions.^{xxiv}

All these arguments clearly put a win-win situation for India by pursuing ICJ to hold that denying Jadhav consular access, Pakistan breached its obligations under the VCCR. The ICJ having its sole discretion to decide on this question of whether Pakistan has defied its obligations under the VCCR, or has it followed the rules of customary international law, or whether any customary law even existed in this regard, on 17th July 2019 has finally decided to deny the execution of death penalty by Pakistan Military Court. The Court with a ratio of 15:1 has allowed consular access to Jadhav and has held to review the case again. This decision will be binding on both the countries directly and on other countries indirectly in terms of its persuasive value. Since it is the first time ICJ has decided a question on the subject matter of espionage under VCCR it is important for the Court to decide the case on its merits to establish a good precedent on a topic, which has not been decided before.

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ⁱⁱ Reema Omer, Do Alleged "Terrorists" and Spies Have the Right to Consular Access Under the VCCR? *Opinio Juris* (2019), <http://opiniojuris.org/2019/02/22/do-alleged-terrorists-and-spies-have-the-right-to-consular-access-under-the-vccr/>.

ⁱⁱⁱ Article 36(1), VCCR, 1963- “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; ...

^{iv} Article 14 of the ICCPR- "All persons shall be equal before the courts and tribunals..."

^v Snippets from the electronic presentation made by the Counsel for Pakistan, Khawar Qureshi, India v. Pakistan.

^{vi} Article 38(1), Statute of the International Court of Justice." International Court of Justice. International Court of Justice.

^{vii} Malcolm N. Shaw, International Law, Ch. 3, (69-123) (6th Edn.).

^{viii} *North Sea Continental Shelf Cases*, ICJ Rep.3, (1969).

^{ix} Sukran Delan, Nicole Bailey, How Customary International Law and Treaties Work Together to Develop General International Law, University of Maltra Press, January 6, 2015.

^x *Military and Paramilitary Activities in and Against Nicaragua*, *Nicaragua v. US*, ICJ Rep 14, (1986).

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^{xiii} *Id.*

^{xiv} *Id.*

^{xv} *Supra* note 11.

^{xvi} Veronika Prochko, The International Legal View of Espionage E- International Relations Student Publishers (2018), <https://www.e-ir.info/2018/03/30/the-international-legal-view-of-espionage/>.

^{xvii} *Corfu Channel Case, Albania v. UK*, ICJ Rep 4, [1949].

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^{xxii} John Quigley, Consular Relations - International Law - Oxford Bibliographies (2019), <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0014.xml>.

^{xxiii} *Supra* note 20.

^{xxiv} *Id.*