

Analysis Of India-Pakistan Conflictual Relations In The Context Of Kulboshan Jadhav Case: International Law Perspective

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ABSTARACT

This study explores the tension between India and Pakistan, focusing on the international law ramifications of the Kulbushan Jadhav case. The conflict between India and Pakistan is not a new phenomenon, however, the case of Kulboshan Jadhav is unique on the grounds that it contains various jurisdictional issues and that various principles of customary international law are discussed in this case. Tensions between India and Pakistan have sharply increased as a result of the case involving Indian navy officer Jadhav, who is accused of terrorism and espionage in Pakistan. The case's complex effects on bilateral ties, international laws, and human rights are all thoroughly examined in this paper. Examining diplomatic alternatives in light of the Jadhav case, it examines past wars and territorial disputes. To get understanding of state conduct in accordance with international legal norms, the intricate problems of state sovereignty, denial of consular access, and human rights breaches are examined. The paper assesses Jadhav's denial of consular access, which violates the Vienna Convention, critically and considers the implications for diplomatic ties and state commitments. The trial of Jadhav is examined closely for issues of due process and transparency, as well as for compliance with international human rights standards and the principles of law. Additionally, the study looks at how the Jadhav case could influence future international law espionage case management guidelines and further the establishment of legal norms. The study concludes with an acknowledgement of the dynamic within both national and global courts and the expanding importance of international law in defining bilateral relations. It also offers important research topics, surveys pertinent literature, and analyzes prior ICJ rulings on consular relations.

KEY WORDS: Terrorism, Espionage, International Law, International Court of Justice, Pakistan and India.

INTRODUCTION:

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The partition of the Indian subcontinent caused a difficult beginning for the diplomatic ties between Pakistan and India. Millions of Muslims, Hindus, and Sikhs who crossed the new boundaries to live in either India or Pakistan were killed, which was the direct cause of strife. The religious conflicts that existed throughout the two nations' period of independence served as fuel for their continuous conflict (Malik, 2019).

In their relationship, India and Pakistan have always had unsolved issues. Crisis after crisis and violence have plagued the country since the 1947 split. The war has a substantial impact on all areas of their relationships, both at the state and social levels, notwithstanding sporadic efforts at peace (Paul, 2005). In addition to their disagreements in global fora, India and Pakistan also have problems with nuclear deterrent. For instance, Pakistan accused India of breaking international accords when it filed a complaint regarding India with the International Court of Justice in 1971. Regarding the intended transfer of Pakistani POWs to Bangladesh for prosecution on allegations of atrocities and crimes against humanity, Pakistan filed a lawsuit against India in 1973. Pakistan had asked India to appear in court, but the International Court of Justice (ICJ) declared that this was inappropriate. The finding in the Kulboshan case by the International Court of Justice (ICJ) left open a number of issues, including whether the Vienna Convention on Consular Relations applies to espionage and terrorist cases and whether the ICJ has the authority to overturn domestic court rulings in a state (Jaspal, 2014).

The recent detention of Indian Naval Officer Kulboshan Jadhav in Pakistan on charges of terrorism and espionage in Balochistan will be the subject of this study project. The Military Court sentenced him to death. During the case's hearing, the International Court of Justice granted an interim decision directing Pakistan to provide the Indian citizen consular access. In addition, until the ICJ rendered a final decision, Pakistan was mandated by the ICJ to modify its domestic legislation to let Kulboshan to challenge the death sentence.

PAST CONFLICTS AND LITIGATION BETWEEN INDIA AND PAKISTAN

The root cause of instability and hostility in South Asia lies in the unresolved nature of the Kashmir dispute between India and Pakistan. It has resulted in two major wars and several near misses in the past. Since the early 1990s, a “proxy war” has developed between India and Pakistan over Kashmir. The start of the proxy war brought bilateral relations between the two states to their lowest point and directly contributed to the open nuclearization of South Asia in 1998. It has further undermined prospects for regional integration and raised fears of a deadly India-Pakistan nuclear exchange in the future. The solution to the Kashmir conflict has therefore never been more urgent than it is today (Satish, 2011).

India-Pakistan Water disputes are deepening. For almost sixty years the Indus Waters Treaty survived diplomatic tensions but recent upstream water infrastructure projects have rekindled conflicts. Water issues in the Indus Basin are mainly regulated through the Indus Waters Treaty. It was signed in 1960, and mediated by the World Bank to avoid water conflict between India and Pakistan. The treaty defined the principles for interstate water sharing from the Indus. It has generally been considered a success, surviving multiple interstate tensions. The UN, the World Bank as well as other Asian countries have some power to force compliance with the treaty. Under the IWT, control over the three eastern tributaries of the Indus River. Although its framework regulating water distribution between the two states was generally accepted by both parties, the treaty came under increasing tension as the conflict in the disputed territory of Jammu and Kashmir deepened. The allocation of control over the tributaries of the Indus is still contested, and certain ambiguities have allowed India to build infrastructure

legally, which Pakistan claims undermines its water security and the treaty itself. This ambiguity has led to polarised interpretations on both sides. (Jasparro, 2006)

In February 1971, following an incident involving the diversion to Pakistan of an Indian aircraft, India suspended overflights of its territory by Pakistan civil aircraft. Pakistan took the view that this action was in breach of the 1944 Convention on International Civil Aviation and the International Air Services Transit Agreement and complained to the Council of the International Civil Aviation Organization. India raised preliminary objections to the jurisdiction of the Council, but these were rejected and India appealed to the Court. During the written and oral proceedings, Pakistan contended, inter alia, that the Court was not competent to hear the appeal. In its judgment of 18 August 1972, the Court found that it was competent to hear the appeal of India. It further decided that the ICAO Council have jurisdiction to deal with both the Application and the Complaint of which it had been filed by Pakistan is accordingly dismissed. (Evans, 1973)

In May 1973, Pakistan instituted proceedings against India concerning 195 Pakistani prisoners of war whom, according to Pakistan, India proposed to hand over to Bangladesh, which was said to intend trying them for acts of genocide and crimes against humanity. India stated that there was no legal basis for the Court's jurisdiction in the matter and that Pakistan's Application was without legal effect. Pakistan having also filed a Request for the indication of provisional measures, the Court held public sittings to hear observations on this subject; India was not represented at the hearings. In July 1973, Pakistan asked the Court to postpone further consideration of its Request in order to facilitate the negotiations which were due to begin. Before any written pleadings had been filed, Pakistan informed the Court that negotiations had taken place, and requested the Court to record discontinuance of the proceedings. Accordingly, the case was removed from the List by an Order of 15 December 1973. (Patel, 2000)

On September 1999 Pakistan filed an application in ICJ requesting the court to declare India for the shooting down of an unarmed aircraft of Pakistan Navy by the Indian Air Force. Pakistan also maintained that helicopters violated its territorial integrity by visiting the crash site in Pakistan as an attempt to collect the debris immediately after the incident. In Pakistan opinion, it was a clear violation of its sovereignty, breach of obligations to refrain from use of force under the UN Charter, Customary International Law and other treaties especially 1991 Bilateral Agreement on Prevention of Air Space Violations. Pakistan demanded for Compensation. As bases of jurisdiction Pakistan invoke Article 37 of ICJ statute, Article 17 of the 1928 General Act for Pacific Settlement of International Disputes. The ICJ in its decision hold that it lack jurisdiction over the matter. (Bekker, 2017)

BACKGROUND OF KULBHUSHAN JADHAV CASE

On March 3, 2016, Kulbhushan Jadhav, a former Indian Navy officer and citizen was allegedly detained in the Pakistani region of Balochistan on charges of espionage and terrorism. He was charged with acting as an agent of India in Pakistan, which he had entered unlawfully. The fact that he had an Indian passport under the name "Hussein Mubarak Patel," which the Indian government disputes, further complicated matters (Reports, 2022).

In a video that the Pakistani government unveiled, Jadhav admitted to being involved in terrorism and espionage inside Pakistan, purportedly at the request of India's Research and Analysis Wing (RAW), the country's intelligence agency. While recognizing Jadhav as an Indian citizen, the Indian government asked for consular access on the same day. Further India, disregarded Pakistan's allegations that Jadhav was involved in espionage and terrorism. On September 21, 2016, Jadhav's trial got underway before a Pakistani Military Court, where Indian officials were invited to help with the evidence collection. India then asked to see Jadhav

consular rights but their request was turned down. The Pakistani Military Court condemned Jadhav to death after the trial and his confession. The Indian government aggrieved and disappointed with the ruling of the military court, filed complaint against Pakistan under the Vienna Convention on Consular Relations 1963 read with its Optional Protocol in the International Court of Justice claiming that Pakistan had violated the Vienna Convention on Consular Relations 1963. In their petition, India prayed for suspension of the verdict as well as release of Jadhav from Pakistan Custody.

SIGNIFICANCE OF THE RESEARCH STUDY:

Examining the conflictual ties between India and Pakistan in the background of the Kulbhushan Jadhav case, from an international law perspective, is essential given the case's consequences for bilateral relations, human rights and international law. The case highlights the intricacies of the bonds between the two adjacent nations and throws light on a number of legal, political and diplomatic concerns. The following are some salient considerations about the importance of the research study:

1. **Bilateral Relations:** India and Pakistan's relationship has been strained by past wars and geographical issues, such as the Kulbhushan Jadhav case. Tensions have increased as a result of the case, affecting the stability and security of the whole area. Examining the case's legal ramifications may provide information on how to settle the conflict and improve diplomatic ties.
2. **Implications for International Law:** State sovereignty, consular access, due process, and human rights are among the complex issues raised by this case in terms of international law. Understanding how states function within certain legal norms is improved by looking at these features within the context of international law.
3. **Consular Access and Diplomatic Relations:** One of the main issues in the Jadhav case is Pakistan's denial of consular access, which is against the Vienna Convention on Consular Relations. An essential component of the case is examining the importance of consular access as the cornerstone of diplomatic relations and its consequences for governments' duties under international law.
4. **Human Rights and the Rule of Law:** Jadhav's prosecution and conviction have been criticized for their violations of due process and transparency, which raises human rights issues. A human rights viewpoint analysis is useful in assessing how well the case complies with international human rights principles and the rule of law.
5. **Legal Precedents and International Precedence:** Under international law, the Jadhav case may establish a norm for resolving situations pertaining to espionage, consular access, and bilateral conflicts in the future. Legal professionals, scholars, and politicians must comprehend how this case advances the creation of international legal norms and principles.

RESEARCH QUESTIONS

1. How the decision of International Court of Justice in Jadhav case affects India-Pakistan relations?
2. What are the Legal issues involved in Kulboshan Jadhav Case?
3. What rights are available to Kulboshan Jadhav under Vienna Convention on Consular Relations 1963 and International Covenant on Civil and Political rights?
4. Whether International Court of Justice can overrule the decision of Domestic Court while exercising its Jurisdiction?

LITERATURE REVIEW

E. R. Akhmedova (2021): In this research, Akhmedova discusses the International Court of Justice's handling of international conflicts between states, namely the maritime dispute between Greece and Turkey. Determining the Aegean continental shelf has been the primary point of contention between these two countries for the last fifty years. The research investigates whether Turkey's sovereignty over its continental shelf and territorial sea may be compromised by Greece's plan to bring the Aegean Sea issue before the International Court of Justice, therefore endangering the security of Turkey's mainland by Greek military actions.

Janis, M. W. (1992): Janis talks on how governments reexamined their options for peacefully resolving international disputes after the Hague Peace Conferences, which preceded World War I, and the dispute settlement mechanism's failure. To advance the rule of law across the world, efforts were made to create an international court after World War II.

Peter J. Spiro (2012): In "Sovereignism's Twilight," Spiro examines the value of a state's sovereignty in relation to the obligatory jurisdiction of international organizations for peacefully settling global disputes. In analyzing the current status of international relations law and academics, the research highlights the emergence of sovereignism.

Dilip Sinha (2017): The International Court of Justice was established as a result of global efforts for peaceful conflict settlement, as discussed in Sinha's thesis. It covers the events leading up to the League of Nations Covenant and the Convention for the Pacific Settlement of International Disputes of 1899.

Kashif Javed (2019): In this article, Javed criticizes the standard procedure for granting consular access to a terror suspect. He talks about the Vienna Convention on Consular Relations, which gives anyone suspected of terrorist activity the right to a consular notification. The Jadhav case, in which consular requests for information were turned down, is the main subject of the article.

John B. Quigley (2013): In his discussion of the Vienna Convention on Consular Relations, Quigley emphasizes the importance of this enduring multinational agreement. In order to guarantee state compliance, the treaty sought to regulate consular contacts and provide mandated dispute settlement.

Vahid Bazzar (2021): Bazzar talks on consular access in terrorist and espionage cases. Pakistan contests the applicability of Article 36 of the Convention on Consular Relations, claiming that customary international law allows exceptions to consular access restrictions in such circumstances.

DENGLIE & Rehna Gul (2020): This research examines Kulbhushan Jadhav's case from an international legal standpoint. It gives historical background by following the problems that India and Pakistan have faced since gaining their independence in 1947 and highlighting the struggles and conflicts that have strained their relationship.

Abhishek Trivedi (2020): The Vienna Convention on Consular Relations' rules governing consular relations are examined by Trivedi. Facilitating consular tasks and promoting goodwill among nations are the convention's primary objectives. It talks about an arrested person's right to speak with a consular representative from their state of residence.

Surabhi Ranganathan (2018): Ranganathan provides a preliminary note to the Jadhav case at the International Court of Justice. The note discourses the Court's procedure for allowing provisional relief in death penalty cases, addressing the definition of urgency and its implications.

Ryan Shaffer (2019): Shaffer addresses the issue of espionage as a source of conflict between Pakistan and India. Both nations accuse one another of using covert intelligence operations and fueling terrorism, domestic revolutions, and instability.

Paraveen Swami (2018): Swami discloses India's clandestine action plan, in place since 2013, against Pakistan with the goal of penalizing terrorists and cutting off their financial supporters. Under the direction of National Security Adviser Ajit Doval, the initiative has had a major impact on organizations such as Lashkar-e-Taiba and Jaish-e-Mohammed.

Sebastian Bates (2020): Bates talks about the Jadhav case, in which Pakistan executed an Indian national who had been detained, convicted of terrorism and espionage, and sentenced to death. Interpreting Vienna Convention on Consular Relations Article 36 involves the International Court of Justice.

ANALYSIS OF PAST CASES DECIDED BY INTERNATIONAL COURT OF JUSTICE ON ACCOUNT OF CONSULAR RELATIONS

(a) Vienna Convention on Consular Relations (Paraguay v united states of America)

The Republic of Paraguay took a legal action against the United States of America in 1998, alleging that the Vienna Convention on Consular Relations of 1963 had been violated. Paraguay claimed that in 1992, a citizen of Paraguay had been taken into custody by the Commonwealth of Virginia authorities, charged with culpable murder, found guilty, and given the death penalty. The crux of the matter was that, in Paraguay's opinion, the United States had neglected to provide the notice required in Article 36, paragraph 1(b) of the Convention. This notice contained the detainee's right to get in touch with the appropriate diplomatic office in their home country and seek notification of their arrest and detention. Paraguay said that the U.S. authorities also failed to notify consular officials in Paraguay, so that the Paraguayan government was the only one to learn about the matter on its own in 1996. In its lawsuit, Paraguay claimed that the United States had breached its international legal duties and asked the court to rule that it was entitled to "restitution in kind." The court said in an order that the convicted Paraguayan citizen would not be subject to the procedural default doctrine and that the death penalty would not be carried out until the court reached a conclusion. The dispute was eventually resolved, however, since Paraguay subsequently withdrew or stopped their application.

(b) Case Concerning the Vienna Convention on Consular Relations (Federal Republic of Germany v. United States)

Germany contended in this case that two German nationals, Karl and Walter LaGrand, had been arrested and executed by the state of Arizona in 1982 without receiving the consular aid to which they were due under Article 36, paragraph 1 (B) of the Convention. Prior to a hearing on its case, Germany requested preliminary remedy from the court as per article 75 of the procedural rules of the court. The court ordered USA to use all available means to prevent Walter LaGrand from being put to death and to report back to the court on that decision. Still, he was executed at the appointed hour.

(c) Avena and Other Mexican Nationals (Mexico v. United States of America)

A lawsuit was filed by Mexico against the United States of America, its neighbor, for violating the Vienna Convention on Consular Relations. Mexico alleged that the United States had violated this treaty by killing 54 Mexican nationals and arresting, detaining, prosecuting, and sending others to death row. In reaction, considering the offense that the US had done,

Mexico asked that the US stop the violation and make the required steps to safeguard rights as stipulated under article 36. In addition, Mexico requested interim steps to protect its people's human rights after the case's verdict. Nonetheless, the government ought to forbid the setting of an execution date or the execution of any person who may or may not be a citizen of Mexico. Though the US acknowledged that in certain cases, Mexican nationals had been tried and found guilty without being aware of their rights, it was still required to permit a review of the case and take the conviction and sentence into consideration in cases where the rights guaranteed in the aforementioned Convention had been violated. Over the past two years, such circumstances had been reviewed and reevaluated. Furthermore, the USA emphasized that if the court decided to halt the execution of Mexican people, it would establish a blanket prohibition on the death penalty for all Mexican nationals, violating American sovereignty, and convert this court into a single criminal appeals court. Additionally, it was mentioned that in spite of this, it also recalled that the US had already breached paragraphs 1 and 2 of Article 36, without a review or reconsideration, with reference to the decisions of February 5, 2003, regarding the temporary measures taken against the Mexican citizens. As a result, the Court believed that the USA needed to decide on a legitimate remedy that could be evaluated in accordance with the legal standards set out in the ruling.

(d) Medellin Case in United States of America

The U.S. Supreme Court decided in this case that even though a treaty is an international agreement, it cannot be enforced domestically unless it has been enacted by an act of congress or expressly states that it would take effect immediately upon ratification. In a similar vein, the Court decided that without express permission from Congress or the US constitution, the president is not permitted to carry out the rulings of the International Court of Justice. Two girls, ages 14 and 16, Jennifer Ertman and Elizabeth Pea, were sexually assaulted for an hour on June 24, 1993. To keep the girls from identifying their attackers, José Ernesto Medellin and other gang members—all Mexican citizens—were executed after having their corpses disfigured. One of the girls was strangled by Medellin using their own shoelaces. Finally, Medellin was put to death in 2008 after the US Supreme Court denied his last-minute pleas.

REVIEW OF THE JADHAV CASE AND ITS IMPACT ON INDIA PAKISTAN RELATIONS

Tensions amongst India and Pakistan was high as a result of the Kulbhushan Jadhav issue. In 2016 the arrest of Indian national Kulbhushan Jadhav by Pakistani authorities took place. Jadhav was given the death penalty by a Pakistani military court after he was charged with spying and terrorism. India, on the other hand, insisted Jadhav was innocent and that he had been kidnapped from Iran. An already tense relationship between India and Pakistan was further strained when the case turned into a significant point of controversy. India repeatedly requested consular access to Jadhav, but Pakistan first refused. Consequently, India brought the matter before the International Court of Justice (ICJ), which in May 2017 mandated that Pakistan have a fair trial and stayed Jadhav's execution. The two countries' bilateral ties took a further hit as a result of the ICJ's intervention. India said that by denying Jadhav consular access, Pakistan was infringing on the Vienna Convention on Consular Relations. Pakistan, however, countered that since Jadhav was allegedly involved in terrorist operations, he did not need consular help. The Indian Supreme Court found in July 2019 that Pakistan had infringed upon Jadhav's rights according to the Vienna Convention, ruling in favor of India. Pakistan was given the mandate by the international court to carry out an "effective review and reconsideration" of Jadhav's conviction and punishment. Pakistan and India, however, cannot agree on how the ruling should be carried out.

A LOOK AT HOW DOMESTIC COURT RULINGS AFFECT INTERNATIONAL COURT ENFORCED:

G. Fitzmaurice was interested in examining the effect of domestic court decisions on case law from the International Court of Justice. Even while local courts follow various legal systems than the ICJ, he discovered that there is a rising expectation that they would take international law into account. This is partially because topics that were formerly covered only by local law are now covered by international law. An important shift from the past is that courts all over the world are beginning to communicate and collaborate more. This is a result of the growing significance of international law and the need for courts to be able to communicate with one another in order to interpret and apply it. It's similar to trying to find out how to navigate a new game with your buddies. Until you comprehend the rules, you converse and exchange opinions with one another.

Courts are using international law in this way. Some believe that this is beneficial since it will result in a more equitable society. Some fear it will give judges an excessive amount of authority. This essay will examine all sides of the argument in an effort to determine whether or not this shift is beneficial. The importance of international law is causing a change in the interaction between normal courts and international courts. Conventional courts had little influence on international law in the past since their rulings were regarded as factual only. It was also difficult for normal court verdicts to have an impact on international cases because of the differences in the workings of regular and international courts. However, normal courts are becoming increasingly engaged in defining and applying international law as it gains significance. This raises the question of how much domestic courts can pick up from foreign courts and vice versa. It also raises questions about the ICJ's actual authority.

CONCLUSION

The international law doctrine of consular relations was articulated from customary international law by international jurists to afford a lawful means by which states could respond to their obligations and violations pertaining to consular access. This paper critically analysed the theoretical value of law of consular relations as embodied in the Vienna Convention on Consular Relations specifically in light of the recent case before the International Court of Justice involving the detention incommunicado of Indian national, Kulbhushan Jadhav, at the behest of Pakistani authorities. It identifies several key shortcomings that problematize the implementation of the doctrine of consular relations. It subsequently examines the precedents before the ICJ invoking the application of the VCCR to preserve its nationals' due process rights as well as the drafting history of the convention. It uses the same to also analyse the arguments presented by the parties and the decision thereof. It is concluded that the law on consular relations as codified in the VCCR is insufficient and extremely ambiguous in its application, leaving states unwilling to fulfil their obligations under the VCCR as also witnessed in the Kulbhushan Jadhav case. There is a need to remedy this either by further codifying its loose ends or clarifying the meaning of the law. Even though the ICJ had an opportunity to tie these ends in the Kulbhushan Jadhav case, it did not conclusively ascertain the failings of this doctrine and its effect in the international legal community.

The primary center of judicial collaboration and discussion is no more the ICJ. Rather, international courts, regional integration, investment law, and human rights law are assuming a central role. For comprehensive evidence, the ICJ is not the ideal source. It mostly resolves customary international issues that refuse to be heard by national courts. The cooperation of nations is a pre-requisite for the ICJ's authority. Assigning more weight to the opinions of one nation than to facts defies convention. There may be complexities in the interactions between

national and foreign courts. There is not a one strategy that works for all situations; instead, it depends on the legal system and the problems at hand. Individual rights, the possibility that people would file lawsuits in their own nations, and the International Court of Justice's restrictions on considering domestic cases have all eroded the conventional wisdom.

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