



## RE-DEFINING INTERNATIONAL LAW AND RELATIONS: KULBHUSHAN JADHAV CASE.

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### Abstract

India v. Pakistan (2019) was one of the most talked about legal disputes between nations, hanging in between was the life of Kulbhushan Jadhav. International Court of Justice pronounced its judgement in favor of India with a 15:1 majority ruling. Despite some misconception this case was not one regarding legitimacy of the claims that Jadhav was spy, rather the main issue revolved around the fact that India was denied consular access to Kulbhushan Jadhav despite multiple requests. This is one case where Pakistan took the defense of customary international law. The said case outlined the jurisdiction of Vienna Convention on Consular Relations (VCCR) and the bilateral agreement between India and Pakistan of 2008. This research article will show a detailed analysis of the said case and how the ratio how this case affects the international theatre. This case becomes worth studying because it not only deals with consular access but issues relating to interpretation of norms and obligation of nation states to treaties and agreements. Hence, this paper will rely on secondary data from other articles, books, jurists and the official documents of the ministries of both nations and the international court of justice as well as other case laws on similar lines and the authors own analysis to provide the reader with an extensive understanding of consular access and jurisdiction of treaties and agreements through the help of Kulbhushan Jadhav Case.

### Introduction

Two major aspects to talk about in this case are that of consular access and jurisdiction.

Consular access as we all know it in general parlance is the grant of legal protection and consultation, to an accused foreigner, by his/her respective consulate/high commission. It is something that is

generally allowed by the nation to a foreigner however the same was denied by Pakistan herein. So, the question pertained whether such a refusal was even valid in the first place.

To better understand what consular access entails we can take up an illustration:

*Let's say that there are two countries A and B, Person 1 from country B is visiting country A where he has now been accused of a crime. Here he gets a right to consular access meaning that he can now Person 1 can contact the Consulate of Country B in Country A and ask for representation and related help so that their home country can interfere on their citizen's behalf.*

The law regulating Consular Relations is the Vienna Convention on Consular Relations, 1963. According to the Article 2 of the same statute establishment of consular relations is also implied as soon as diplomatic relations are established between the two nations, however severance of diplomatic relations does not necessarily ipso facto mean severance of consular relations<sup>1</sup>.

Vienna Convention on Consular Relations codifies a well-known centuries long practice of where citizens from foreign country, if accused of a crime, were allowed to be represented by the representatives of their home country. The practice could've gone without the need of it being codified as an International Custom, however that would have left a lot of grey area where states could have crept through a gap or a loophole to avoid providing consular access. It is important to note that the convention itself realises that it is a centuries long practice that is not immune to customary practices. Historically speaking this convention was brought into existence in 1963, a time when cold war was at its peak and the age of espionage was rampant too so no major power had much objection due to their own self-interest to secure their own agents and plug any possible leaks in their security by ensuring that their citizens were represented elsewhere by their own people.

Coming over to the second major aspect of jurisdiction in this case, it might seem settled as to who has the right to prosecute over the crimes committed in one's territory and who can be prosecuted, however there

<sup>1</sup> Article 2, *Vienna Convention on Consular Relations* 1963, Done at Vienna on 24 April 1963. Entered into

force on 19 March 1967. United Nations, Treaty Series, vol. 596, p. 261



are mainly 5 principles which provide different interpretations and basis to this matter of International Criminal Jurisdiction.

**Territorial Jurisdiction** happens to be one of the major principles recognised throughout also because it is very simple in its application. Jurisdiction would belong to the one whose territory it is where the act was committed<sup>2</sup>. This is codified in multiple municipal laws including the Indian Penal Code which allows the authorities to arrest and prosecute a foreign citizen given that the alleged crime occurred within the bounds of India. Obviously the same is subject to multilateral and bi-lateral agreements between nation states.

**Nationality Principle**<sup>3</sup> is, as the name suggests, based on the nationality of the citizens. For the sake of an analogy, a citizen can be considered an extended vassal of their state and hence by that logic the home country would obviously have the right to exercise jurisdiction over their own nationals. This is the logic countries use when asking for extradition of their citizens. However, to maintain cordial diplomatic relations countries do not often ask for extradition or invoke this principle while saving it for only necessary times.

**Passive Personality Principle** suggests that a nation will have the right to prosecute a foreign national abroad if an act or omission done by that person affects the nation prosecuting or a citizen of that nation, the principle for the same had been laid down in the cutting case where a Mexican national sued an American national in Mexico for an act done in Texas, USA<sup>4</sup>.

**The Protective principle** of jurisdiction allows states to prosecute foreign nationals for crimes that the nation deems vital for state security. This principle was what was relied on by Israel while prosecuting Nazi war criminals after the World War 2 ended. A perfect example would be of the Eichmann Trial<sup>5</sup>.

**Universality principle of jurisdiction**, perhaps one of the most controversial principles is that of universal

jurisdiction. It allows states to prosecute anyone and anywhere if they are accused of violating the Geneva convention or of crimes against humanity or War crimes<sup>6</sup>.

India v. Pakistan revolves around these two major issues; however, we should not forget the history that flows between these two nations. Since the partition in 1947, both, India and Pakistan have been at each other's throats for territorial gains and due to past animosity between both the leaderships. It has almost become a trend for any incoming government to maintain a better standard than the other and to always have an upper hand. These intentions have led to malign tactics being used more often than not. Amidst these tensions this case has erupted that too not of any normal crime but espionage by a retired Indian Navy Officer. Hence, it is advised that when reading about such subjects, readers should keep the background geo-politics in mind because International Law is not immune to such politics, it never has been and probably never be.

#### Facts of the Case

Kulbhushan Sudhir Jadhav is a retired Indian Naval Officer whose arrest by Pakistani Authorities is surrounded by a lot of speculation and dispute. There are two different versions of the same story and even though they do not differ a lot factually, the point at which they do differ makes a lot of difference to both the case and International Relations between these two nations.

- India: The Republic of India contended that the retired naval officer was living peacefully and conducting his business in Iran. It was from there that he was kidnapped and brought into Pakistan by force against his will.
- Pakistan: Pakistan had argued that Jadhav was allegedly conducting espionage acting on behalf of the Indian Government and the Research and Analysis Wing (Intelligence wing of India). Pakistan argued that it was during this that they arrested Jadhav near Baluchistan which was bordering Iran. They also argued that at the time of arrest, Jadhav was carrying an Indian Passport

<sup>2</sup> Al-Skeini v. Secretary of State for Defence (2007) UKHL 26, para. 109.

<sup>3</sup> Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41 (1992).

<sup>4</sup> See, *The Cutting Case*, [Mexico v. USA], 1887.

<sup>5</sup> *Attorney-General of Israel v. Eichmann*, 36 ILR 18,54-7,304

<sup>6</sup> The resolution adopted by the Institut de Droit International on 26 August 2005



bearing the name “Hussein Mubarak Patel.” This claim was outrightly denied by India.

Kulbhushan Jadhav was arrested on 3rd March, 2016 and was subsequently accused of espionage by the Pakistani authorities. The same was backed by a video, shared by the Pakistani authorities, which showed Jadhav confessing to the allegation of espionage<sup>7</sup>. The Pakistani high commission raised these concerns with the Indian authorities on 25th March, 2016. Subsequently, the Indian high commission in Islamabad raised requests for consular access which was ignored by the Pakistani Authorities.

Fast forward to 10th April, 2017 a Pakistani Army court sentenced Jadhav to Death after finding him guilty of espionage and sabotage against the federation of Pakistan. Without fail these allegations were denied by India. On April 20 of the same year, India requested details of the court proceedings, upon whose failure on May 8 India filed a case against Pakistan Military Court’s order in the International Court of Justice. Subsequently on May 9, ICJ stayed the order of Death Penalty given to Jadhav.

While the written rounds were going on in the ICJ, Pakistan had claimed multiple things including the claim that Jadhav had filed for a mercy petition and that India had offered terrorists a swap exchange deal for Jadhav which was categorically denied by the Republic of India.

### Issues in Question

1. Jurisdiction: India had approached ICJ for violation of consular rights as well as breach of human rights of Kulbhushan Jadhav and repatriation of Mr. Jadhav. Pakistan argued that according to Article 36 of ICJ statute, ICJ had no jurisdiction to rule over this matter.
2. VCCR: ICJ also dealt with the second major issue being of consular access and whether Pakistan violated such rights of Mr. Jadhav and whether such rights existed in the first place.
3. Espionage as an exception: ICJ dealt with the issue whether “espionage” acted as an exception to the rule of providing consular access, which was argued by Pakistan.
4. Clean hands: Whether the defence of “clean hands” principle in the current case is valid or not?

5. Repatriation: ICJ had previously never ordered a nation to hand over a person to another country, herein India raised a question asking the International Court of Justice to order Pakistan to hand over Kulbhushan Jadhav to India as they argued that the detention was illegal.

### Analysis of the case from an objective standpoint

As far as jurisdiction is concerned the jurisdiction of International Court of Justice is laid down in Article 36 of the statute of ICJ and it reads as below:

“2. The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.”<sup>8</sup>

This is what is called as the Compulsory jurisdiction of the International Court of Justice. On a closer reading we come to the conclusion that Interpretation of a treaty and questions of International Law are

<sup>7</sup> Deeksha Kathayat, JADHAV CASE (INDIA V. PAKISTAN), Supremo Amicus Vol.13.

<sup>8</sup> <https://www.icj-cij.org/basis-of-jurisdiction>



under the purview of the ICJ. Now an argument to be made is that Vienna Convention on Consular relations is just that, a convention and not a treaty.

The basic understanding is that treaties are legally binding on the nations that are party to it and have ratified the said treaty. However, a convention might not necessarily have a legally binding nature<sup>9</sup>. Even the basic google definitions also define the terms on a separate footing. While Treaty is defined as something binding once ratified, Convention is defined as an agreement usually less formal than a proper treaty.

However, it seems that the position itself is not clear within United Nations itself as UNEP defines the two terms separately but United Nations Human Rights Commission defines them as one, stating that “legally, there is no difference between a treaty, a convention or a covenant. All are international legal instruments which, in international law, legally bind those States that choose to accept the obligations contained in them by becoming a party in accordance with the final clauses of these instruments<sup>10</sup>.”

Even so it seems clear that ICJ can still hear the matter under Article 36(2)(c) of the ICJ statute as once established VCCR confers an international obligation on states, breach of which can be interpreted as giving jurisdiction to ICJ.

Another way and probably the simplest and most effective one which was applied by the ICJ was that of the Optional Protocol of the VCCR. Article 1 of the said Optional Protocol states that:

*“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.”<sup>11</sup>*

Vienna Convention on Consular access itself provides an option to the parties to refer the case to International Court of Justice. In addition to this through prior case laws too it was established that Article 36 of the statute itself confers jurisdiction on ICJ<sup>12</sup> using the same logic as this article has used before.

At this time, we should deal with the issue of the “Clean Hands” principle. The principle does not directly affect the jurisdiction of the case, however if proved the whole maintainability of the case gets shaken. Clean Hands principle is based out of old roman law and states that a state cannot put forward a case where their own wrongful doing had some hand in the cause of action, the principle in itself acts as an estoppel on that nation from seeking a remedy where they themselves had a hand in the wrong<sup>13</sup>.

Federation of Pakistan had claimed that Republic of India had on multiple occasions denied their request to provide necessary documentation and proof that Mr. Kulbhushan Sudhir Jadhav was an Indian National. In doing so, according to Pakistan, India intentionally let go of any chance to claim Mr. Jadhav as their national hence to go latter and claim for consular access was an abuse of process on behalf of the Republic of India and the same should not be granted. That stance, if what is alleged is true, stands firm as then the principle of estoppel should apply to stop India from claiming Mr. Kulbhushan Jadhav as their own citizen, even though it could later be questioned on the question of human right of Mr. Kulbhushan Jadhav himself. As even though India can be stopped from claiming him as their citizen but Mr. Kulbhushan Jadhav could possibly still have the option to request for consular access on the basis of his own human rights.

In the present case to refute the claims by Pakistan, India argued that they never backed down from the fact that Mr. Jadhav was an Indian Citizen and they provided Pakistan with whatever support they needed.

<sup>9</sup> <https://ozone.unep.org/>

<sup>10</sup> <https://www.ohchr.org/en/treaty-bodies/glossary-technical-terms-related-treaty-bodies>

<sup>11</sup> Optional Protocol concerning the Compulsory Settlement of Disputes 1963

<sup>12</sup> LaGrand

(Germany v.

United States of

America), 2001.

<sup>13</sup> Amerasinghe, Chittharanjan F., 'The 'Clean Hands' Doctrine', *Diplomatic Protection*, Oxford Monographs in International Law (Oxford, 2008; online edn, Oxford Academic, 1 Jan.

2009), <https://doi.org/10.1093/acprof:oso/9780199212385.003.0013>, accessed 4 Apr. 2024.



Even if that wasn't the case, Pakistan had more than enough reason to believe that Mr. Jadhav was an Indian citizen as according to them Mr. Jadhav was caught with an Indian Passport and from the very beginning, they had been portraying him as the "Indian Spy".

Now the question arises whether consular access exists as a right of an individual detained in another nation and if it does whether "espionage" would be an exception to the same. Consular access has been well established as a right since 1963 when Vienna Convention on Consular Access came into force. Two major cases to look on the same matter in question would be the LaGrand case and the Avena Case both involving denial of Consular Access by the United States of America.

In 1982 two German nationals were detained by the state of Arizona and were subsequently convicted with a death sentence, despite the fact they were German Nationals they were not informed of their rights of consular access. Those two German nationals were ultimately executed. The Arizona governor had made claims that regardless of any pressure or diplomatic effort they would still have been executed, however those claims held no value. International Court of Justice had come to a conclusion that consular access is not only a rule of the international law for those who are party to Vienna Convention on Consular Access but it also exists as an individual right in the international sphere<sup>14</sup>.

The Avena case revolves around a similar factual scenario a little while after the judgement of LaGrand. Avena Case involved The United States and Mexico, Mexico contended that their citizens were denied consular access in the USA similar to the LaGrand case, here court had also looked into what should be the time within which an accused should be apprised of his rights and similar to LaGrand, International Court of Justice again held that consular access also exists as an individual right. Court here discussed how at the earliest possible the person should be informed of his rights and that the consulate should be made aware<sup>15</sup>.

In the present case the problem arises because Pakistan had accused Kulbhushan Jadhav of

"espionage". Such situation had never been tackled before not in LaGrand, where they were charged with armed bank robbery and murder, and neither in Avena Case. It is understandable to think that "espionage" would be an exception as it pertains to state security and even in the international sphere state security takes precedence. However, we ought to understand through the LaGrand judgement that consular access does not only exist as an international state right but also as an individual right. Hence, denying consular access would be equal to denying an individual his individual right. Moving on, since it is a criminal case the presumption of innocence should apply meaning that Pakistan could not be sure that Mr. Jadhav in all surety did conduct espionage and hence, he should have been granted consular access.

As far as the question of Repatriation is concerned, in the author's opinion it could be considered a psychological tactic rather than an actual prayer. India was well aware that ICJ has never ordered a deportation or repatriation of a person from where he is being held to his place of origin and yet they demanded the same from the International Court of Justice. It could be due to one of two reasons: 1) India believed that they actually had a strong enough case to demand repatriation and bring Jadhav back home which would have eventually won the political party in power huge brownie points with the public as well as establishing a precedent in ICJ history. 2) That India believed that they had to go overboard with their demands so that the prayers that they actually want to be met were met with by the ICJ without the judgement looking too one sided in the international sphere which would grant India the right to make Pakistan look bad if they did not themselves return Mr. Jadhav if the ICJ upheld right to consular access.

The reason the author says that repatriation is something the court would never grant and it is something that India themselves knew is because it is clearly not in the ICJ's jurisdiction to do so according to Article 36 of the Statute of International Court of Justice<sup>16</sup>. Adding to that fact that in the past ICJ has never made such a ruling so it was unlikely that they would deviate from that practice.

<sup>14</sup> *Supra* note 12.

<sup>15</sup> *Avena and other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12.

<sup>16</sup> *Supra* note 8.



### Ratio and the factual scenario afterward

The ICJ decided in favor of India that Pakistan had denied consular access to Mr. Jadhav where they were ought to. Their objection that India did not come with clean hands and that India did not provide clear clarification to Pakistan that Mr. Jadhav was their citizen was denied as Pakistan had been labelling him an Indian national from the get-go. The jurisdiction of ICJ in this matter was also upheld through the virtue of Optional Protocol of the Vienna Convention on Consular Access looking back at the case of LaGrand (Germany v. USA) where the same logic was used.

As anticipated the prayer for repatriation for Mr. Jadhav was denied by the International Court of Justice considering how it felt outside their power for the reasons previously mentioned in this paper<sup>17</sup>.

As of 2024 Kulbhushan Jadhav is still in custody in Pakistan and yet not returned to India. The news about his trial and the whole hiatus had taken the world by storm back in 2019, however, right now the public interest seems low. The political interest into a topic as we have observed is directly proportional to the public interest so the author does not expect any recent developments in the coming times.

A situation had arisen in the winters of 2023 where the Pakistan supreme court ordered that no civilian could be tried by a military court in Pakistan and hence all such trials were null and void<sup>18</sup>. However, the said order quickly prompted the Pakistan Foreign Ministry to comment on the Kulbhushan Jadhav situation that even though his case was tried by a Military Court he is not exactly a civilian as he was a former Indian Navy Official. After that we have not had any recent developments.

In respect to repatriation, we will have to see how International Court of Justice rules in the coming times with respect to the Rohingyas, International Court of Justice has already accepted Gambia's case against Myanmar for atrocities against Rohingyas if International Court of Justice finds Myanmar guilty we will have to see if they re-state their citizenship and how will their repatriation turn out.

<sup>17</sup> *Supra* pp. 8.

### Conclusions

India v. Pakistan not only tumbles on Consular access and jurisdiction in regards to VCCA matters but also on the fact that the relations between these two countries have been weak to put it lightly and as has been the norm International Law has been always affected by the Politics that surround the countries and the power dynamics. If it was any other nation other than India it is quite possible that Pakistan would have allowed consular access. However, they did not which lead us to this case.

This case solidifies the situation where Vienna Convention on Consular Access matters are triable by the international court of justice only when the Optional Protocol is invoked by either party. This purely solidifies the position of consular access in International Law which before VCCA was only just considered a customary practice.

Another major development was the position in relation to a person accused of "espionage". Since it was a question which was not answered in any of the previous cases in relation to consular access, this case offered a kind of stability to the position.

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<sup>18</sup> See, Short order in the case of *Jawad S. Khawaja and others versus the Federation of Pakistan and others* on 23<sup>rd</sup> October, 2023.