

International Court of Justice and its Role in India – Pakistan Relation

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Abstract

International Court of Justice (ICJ) is judicial body to resolve disputes at International level. After the establishment it is playing crucial role in resolving International disputes. With respect to India and Pakistan relation it has played crucial role time to time. India was party in six matters before the ICJ. In ICJ four out of the six cases were against Pakistan. Recently 11-judge bench of the International Court of Justice (ICJ) at The Hague unanimously agreed to accept India's plea against Pakistan's death sentence to Kulbhushan Jadhav.

In the above context present paper offers brief outline of the ICJ, its constitution, function and role in India- Pakistan relation. The case of Kulbhushan Jadhav is specially discussed.

Key Words: ICJ, UN, Dispute, jurisdiction, RAW, Treaty etc.

International Court of Justice

International Court of Justice (ICJ) is the principal judicial body of the United Nations (UN) to resolve disputes at International level, though its origin predates the League of Nations. It was established in June 1945 by the Charter of the United Nations and began work in April 1946. It is the only organ, of the six organs of the United Nations not located in the New York, United States of America. The seat of the Court is at the Peace Palace in The Hague, Netherland. The role of the Court is to settle legal disputes submitted to it by States and to give advisory opinions on the legal questions referred to it by authorised organs of the United Nations and specialised agencies in accordance with international law.

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Chapter XIV of the Charter of the United Nations deals with International Court of Justice under Articles 92 to 96. The Court is composed of 15 judges¹, who are elected for the terms of office of nine years² by the United Nations General Assembly (GA) and the Security Council (SC). All the 15 Judges of the ICJ are elected for a nine year term, and one third of the membership is newly elected at three year intervals. They are permitted for re-election. The judges do not represent the governments of their home countries, and act entirely as independent authorities. To be eligible, they must be sufficiently qualified to hold the highest judicial office in their home country or must be a recognised authority on public international law³. The ICJ reaches decisions by majority vote, the President of the Court having the casting vote in the event of a tie⁴.

Functions of ICJ: Recourse to the ICJ is optional. Both parties subject themselves voluntarily to its jurisdiction. Thus any contesting party that files an application to the ICJ acknowledges its readiness to comply with the Court's decision on the matter under dispute.⁵ On the other hand, if one of the parties subsequently refuses to accept a decision, the ICJ cannot enforce it against that country's will. Judicial execution would run counter not only to the concept of the sovereignty of the states, but also to the experience which has thought that conflicts between nations cannot be resolved by force, but only by establishing consensus.

The proceedings before the ICJ break down into a "written phase" during which the parties submit and exchange the pleadings and an "oral phase" during which the agents and counsel of the parties appear before the Court in public hearings⁶. The proceedings of the Court take place in *English* and *French*, and all the written and oral submissions in one of those languages are invariably translated into other⁷. After the oral phase of the proceedings, the Court deliberates in camera. Its decision is then announced at a public session. The decision is final, and has no right to appeal. In case of one of the parties fails to comply with the decision of ICJ, the order is entitled to the matter to the Security Council of the United Nations. The ICJ performs its duty as a plenary body, but may also form smaller specialized chambers if the parties so wish.

¹ Article 3 (1) of the Statute of the International Court of Justice.

² Article 13 (1) of the Statute of the International Court of Justice.

³ Article 2 of the Statute of the International Court of Justice.

⁴ Article 55 (2) of the Statute of the International Court of Justice.

⁵ Article 94 (1) of the UN Charter.

⁶ Article 43 of the Statute of the International Court of Justice.

⁷ Article 39 of the Statute of the International Court of Justice.

Dispute Resolution of India at ICJ:

The statute of the ICJ regulates the functioning of the Court. All members of the UN are automatic parties to the statute⁸, but this does not automatically give ICJ jurisdiction over disputes involving them. The ICJ gets jurisdiction only on the basis of consent of both parties.

India declared the matters over which it accepts the jurisdiction of the ICJ, in September 1974, which has revoked and replaced the previous declaration made in September 1959. Among the matters over which India does not accept ICJ jurisdiction are:

- disputes with the government of any State which is or has been a Member of the Commonwealth of Nations, and
- disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence....
- The declaration, which includes other exceptions as well, has been ratified by Parliament.

Indian Cases in the ICJ:

There are *six* incidents when Indian cases were put before the ICJ. Though it has been a party in many cases, there are *four* of them with Pakistan, at the ICJ.

- **Case About Right of Passage over Indian Territory (Portugal Vs India, 1955):** In 1954, Portugal had filed a case against India over denial of passage to what were then the Portugese territories of Dadra and Nagar Haveli. ICJ decided in India's favour in 1960, saying India's refusal of passage was covered by its power of regulation and control of the right of passage of Portugal.
- **Appeal Regarding the Jurisdiction of ICAO (India Vs Pakistan, 1971):** In 1971, India filed a case against the jurisdiction of International Civil Aviation Organisation (ICAO) to decide on Pakistan's demand that India could not deny it over flight and landing rights. India had withdrawn Pakistan's over flight rights after the January 1971 hijacking of an Indian Airlines flight to Lahore, and the gutting of the aircraft by

⁸ Article 93 (1) of the UN Charter.

the hijackers. The ICJ ruled against India, saying that ICAO had jurisdiction in this case.

- **Case Concerning the Trial of Pakistani Prisoners of War (Pakistan Vs India, 1973):** In 1973, Pakistan filed a case to stop the repatriation to Bangladesh of 195 Pakistani nationals in Indian custody after the 1971 War, to face trial on charges of genocide, but withdrew the case the next year. After 1974, Pakistan, a Commonwealth nation, can no longer take India to the ICJ.
- **Aerial Incident of 1999 (Pakistan Vs India, 1999):** In 1999, Pakistan filed a case at the ICJ regarding a dispute relating to the destruction of a Pakistani aircraft by India in 1999. Pakistan contended that the ICJ had jurisdiction in this issue. India on the other hand contested the jurisdiction of ICJ in the issue saying that Pakistan's application to the ICJ did not refer to any treaty or convention in force between the two countries. In 2000, the court rejected Pakistan's contention that the Simla Accord provides for disputes between the two countries to be submitted to the ICJ. ICJ concluded that it had no jurisdiction to entertain the application filed by Pakistan. At the same time, the court requested both the countries to settle their disputes by peaceful means.
- **Case About the Obligation of Negotiations About Cessation of Nuclear Arms Race (Marshall Islands Vs India, 2014):** The Republic of the Marshall Islands had instituted proceedings at the ICJ in 2014 against all nuclear weapon states, including India, contending breach of customary law obligations on nuclear disarmament (from Article VI of the NPT). India contended that the ICJ had no jurisdiction in this case. In 2016 in its decision (by 9 votes to seven), the court ruled that it does not have any jurisdiction on the issue in the absence of a dispute between the two countries. The court further ruled that it cannot proceed to the merits of the case because of the lack of jurisdiction.

Kulbhushan Jadhav Case:

Fact of the Case: Kulbhushan Sudhir Jadhav born 16 April 1970⁹ is an Indian national arrested in Balochistan, Pakistan, over charges of terrorism and spying for India's intelligence agency, the Research and Analysis Wing (RAW).¹⁰

The Pakistani government states that he is a serving commander in the Indian Navy who was involved in subversive activities inside Pakistan, and was arrested on 3 March 2016 during a counter-intelligence operation in Balochistan.¹¹ The Indian government recognises Jadhav as a former naval officer, but denies any links with him and maintains he took premature retirement and was possibly abducted from Iran.¹²

Jadhav was sentenced to death in a Field General Court Martial on April 10, 2017 after three-and-a-half months of trial. He has been accused of espionage and working for the India's external intelligence agency, Research and Analysis Wing (R&AW).¹³ He was arrested from Balochistan on 3rd March 2016. The issue has snowballed into a flash point for India-Pakistan relations. India has been repeatedly requesting consular access to Mr. Jadhav while also demanding a certified copy of the charge sheet as well as the judgment. Pakistan has so far denied India's request 13 times, Mr. Gautam Bambawale, Indian High Commissioner in Islamabad told reporters in the Pakistan capital. In the wake of this, India has cancelled maritime talks with Pakistan that was scheduled for April 17. It is likely that more steps could follow based on Pakistan's response to India's latest request for consular access for Mr. Jadhav, according to *The Hindu's* Special Correspondent¹⁴.

Verdict of the International Court of Justice in Kulbhushan Jadhav case¹⁵

The 11-judge bench of the International Court of Justice (ICJ) at The Hague unanimously agreed to accept India's plea against Pakistan's death sentence to Kulbhushan Jadhav.

⁹ Kulbhushan Yadav, alias (alleged; Hussain Mubarak Patel), "Pakistan Claims Arrest of 'RAW Agent' in Balochistan. What Happens Next" *The Wire*. on 27 March 2016.

¹⁰ Salman Masood (29 March 2016). "Pakistan Releases Video of Indian Officer, Saying He is a Spy". *The New York Times*. on 30 March 2016.

¹¹ "Pakistan sentences Indian spy Kulbhushan Yadav to death". *The Express Tribune*. 10 April 2017.

¹² "Rijju Slams Pakistan for Releasing Doctored Video on Arrested Man". *The New Indian Express*. Press Trust of India. 30 March 2016.

¹³ <http://www.thehindu.com/news/national/kulbhushan-jadhav-the-story-so-far/article18075599.ece>.

¹⁴ *ibid*.

¹⁵ <http://indiatoday.intoday.in/story/kulbhushan-jadhav-case-international-court-of-justice-order-explained/1/957109.html>.

The bench led by Judge Ronny Abraham asked Pakistan not to execute Kulbhushan Jadhav till the final verdict in the case is not pronounced by the International Court of Justice. There were several questions before the ICJ:

1. **Whether ICJ have jurisdiction to decide the case?**
2. **Is the rights alleged by India are plausible?**
3. **Is there a link between the rights claimed and provisional measures requested?**
4. **Is there a risk of irreparable prejudice and urgency?**

- On *first* question of the case the ICJ began by considering if it has jurisdiction to hear the case. The Court said that India sought its jurisdiction under *Article 1* of the *Optional Protocol of the Vienna Convention* under which the Court has jurisdiction in “disputes arising out of the interpretation or application of the Vienna Convention”. The Court said that both parties, India and Pakistan, have differed on the question of India’s consular assistance to Kulbhushan Jadhav under the Vienna Convention. The Court noted that the acts alleged by India--Pakistan's failure to provide the requisite consular notifications with regard to arrest and detention of Jadhav--appear to be falling within the scope of the Vienna Convention.

The Court said this was sufficient to establish that it has prima facie jurisdiction under Article 1 of the Optional Protocol. The ICJ also observed that the existence of a 2008 bilateral agreement between the parties does not change its conclusion on jurisdiction.

- With response to *second* issue of the case the Court observed that rights to consular notification and access between a State (India) and its nationals, as well as the obligations of the detaining State (Pakistan) to inform the person concerned without delay of his rights are recognised in Article 36 (paragraph 1) of the Vienna Convention. India has alleged violations under this provision.

The ICJ said that it appears that the rights alleged by India are plausible.

- On the *third* issue the ICJ said that the measures requested are aimed at ensuring that the rights contained in Article 36, paragraph 1, of the Vienna Convention are preserved.

The Court observed that a link exists between the rights claimed by India and the provisional measures being sought.

- The Court in response to *fourth* question said that the mere fact that Kulbhushan Jadhav is under a death sentence and might therefore be executed is sufficient to demonstrate the existence of a risk of irreparable prejudice to the rights claimed by India. The ICJ then observed that Pakistan has indicated that any execution of Kulbhushan Jadhav would probably not take place before August 2017. This means, the Court said, that there is a risk that an execution could take place any moment thereafter, before the Court has given its final decision in the case. The ICJ noted that Pakistan has not given any assurance that Kulbhushan Jadhav will not be executed before the Court has rendered its final decision. Under such circumstances, the Court said that it is satisfied that there is urgency in the present case.

The Court asked Pakistan to take measures at its disposal to ensure Kulbhushan Jadhav is not executed pending the final decision in the case, and that it will inform the Court of all the measures it has taken to implement the order.

Impact of the Judgement:

How strong can be the International Court of Justice in giving relief to Kulbhushan Jadhav and his family? This vexed question of fact and law has engaged the attention of many students of law and legal practitioners and now it is increasingly felt in India that the effectiveness of ICJ is highly critical for global peace and progress in the 21 Century.

Under the United Nations regime, the ICJ i.e. ‘world court’ is the “Principal Judicial Organ” charged with *two* primary functions, namely,

- to assist in the resolution of disputes between states and
- to provide advisory opinion to specified international organizations.

Established under the UN Charter, the court is governed by the Charter, the statute of the ICJ and the Rules of procedure adopted by the Judges and amended from time to time, as well as the Practice Directions adopted in October, 2001.

All members of the United Nations are automatically parties to the court's statute¹⁶. Non-UN members can also become parties to the courts statutes¹⁷. Once a state is a party to the court's statute it is entitled to participate in cases before the court. *Article 38* of the ICJ statute, provides that, while deciding cases the court needs to apply *international conventions, international Custom , the general principles of law recognized by civilized nations* and also refers to *academic writings i.e the teachings of most highly qualified publicists of the various nations and previous judicial decisions*, which though not binding, have great persuasive value.

On 14.04.1978 the ICJ, to streamline its functioning and having regard to chapter XIV of the charter of the united nations, and further having regard to the statute of the court annexed to the said charter and exercising powers in terms of *Article 30* of the said statute has framed exhaustive Rules of Court (1978) laying down the procedure to invoke the jurisdiction of the ICJ. Subsection 1 of Section D of these Rules deal with interim protection proceedings. **Article 73** and **74** of the 1978 Rules of Court provide as under:

Article 73

1. A written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made.
2. The request shall specify the reasons therefore, the possible consequences if it is not granted, and the measures requested. A certified copy shall forthwith be transmitted by the Registrar to the other party.

Article 74

1. A request for the indication of provisional measures shall have priority over all other cases.
2. The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.
3. The Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. The Court shall received and

¹⁶ *Article 93* of the UN Charter.

¹⁷ *Article 93(2)* of the UN Charter.

take into account any observations that may be presented to it before the closure of the oral proceedings.

4. Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects.”

Conclusion: Thus in all the matters in which India was a party before the ICJ, the court has examined its jurisdiction and decided the matter effectively. The ICJ, in the matter of *Kulbhushan Jadhav* being prima facie satisfied about the merits of India’s case and the availability of its jurisdiction over the dispute has granted interim relief/provisional measures i.e. stay of execution of Kulbhushan Jadhav by invoking the provisions of the aforesaid articles. It is a matter of record that both India and Pakistan are signatories to the *Vienna Convention on Consular Relations 1963* providing for consular assistance to their nationals who are facing trial in other countries and unequivocally and compulsorily conferring jurisdiction in the ICJ. Additionally, the doctrine of “*pacta sunt servanda*” which is a well recognized doctrine in international law requires that treaties entered into in good faith have to be carried out in good faith and any breach thereof amounts to violation of international law. Examined from this back drop there is no manner of doubt that consular access to India has been denied even though it is well known that military tribunals in Pakistan are opaque and operate in violation of national and international fair trial standards and fail to provide justice, truth and even proper remedies to under trials.

In the present case the court has jurisdiction as per *Article 36* of the ICJ statute which has been recognized as compulsory *ipso facto* and without special agreement. In almost identical fact situation i.e. in the *Lagrand case* and in the case of *Avena* and other Mexican Nationals the ICJ has exercised its jurisdiction, stayed the execution and directed review and retrial. The case of *Kulbhushan Jadhav* is a test case for the *ICJ* to dispel the impression that international law is the vanishing point of jurisprudence.

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