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INDIA-PAKISTAN LOCK HORNS OVER ICJ JURISDICTION

By- Dr. S. Krishnan

Dr. S. Krishnan¹ | On May 8, 2017, India submitted an application to the International Court of Justice against Pakistan's arrest of the Indian spy, Kulbhushan Jadhav. The ICJ President, Judge Ronny Abraham, wrote to the Government of Pakistan on May 9, 2017, to not undertake any action on the Jadhav case until the ICJ has had a chance to examine India's petition against Pakistan.²

However, it is vital to understand that Pakistan is in *not obliged* to accept ICJ jurisdiction in this matter. Furthermore, accepting to engage India in the ICJ would be grievously detrimental to Pakistan's national interest.

India was perhaps emboldened when the ICJ granted similar provisional measures in three cases involving questions of consular access: Breard³, LaGrand⁴ and Avena.⁵ All three cases involved persons on death row in different states within the United States. Paraguay, Germany, and Mexico, respectively, had claimed a violation of the Vienna Convention on Consular Relations (VCCR), in denial of consular access to these individuals, much like India's present dispute with Pakistan.

The more contentious issue is whether India would be able to approach the U.N. Security Council to enforce the ICJ's provisional measure, in the event there is concrete evidence that Pakistan plans to execute Jadhav in blatant disregard of the Court's order. The issue of whether the Security Council possesses the authority to enforce the ICJ's provisional measures has been subject to much discussion

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²Mitra, Devirupa, "At India's Urging, ICJ Requests Pakistan to Hold Back Execution of Kulbhushan Jadhav", *The Wire*, 10th May, 2017; "International Court of Justice stays execution of Kulbhushan Jadhav by Pakistan", *Hindustan Times*, 10 May, 2017.

³Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J., 248, 41 (Apr. 9, 1998).

⁴LaGrand (Ger. v. U.S.), Provisional Measures, 1999, I.C.J. 9, 29, (3rd Mar. 1999).

⁵Avena and Other Mexican Nationals (Mex. v. U.S.), Provisional Measures, 2003, I.C.J., 77, 59, (5th Feb, 2003).

among scholars, with most arguing the Security Council has no power to enforce Article 41 orders.⁶ Article 94(2) of the U.N. Charter provides: [I]f any party to a case [before the Court] fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.⁷

CHANGED GAME

There is no doubt that Prime Minister Narendra Modi's decision that India approaches the ICJ, essentially to ensure consular access, rescind the death sentence and for Pakistan to embrace judicial fairness to Kulbhushan Jadhav, has potentially very significant political and diplomatic dimensions for Indo-Pakistan

relations.⁸ It marks a departure from the old cautious policy of not approaching the Court itself and denying the Court any space in India-Pakistan matters if Pakistan did so.

Obviously, the government's legal luminaries and the redoubtable Harish Salve, who is appearing on India's behalf in this matter, seem confident that the present case involving the Vienna Convention on Consular Relations will not adversely impact India's general position that the ICJ has no jurisdiction in India-Pakistan matters.⁹

The ICJ's jurisdiction question had last come up when Pakistan had taken India to Court on the Indian Air Force's downing of its naval Atlantique aircraft on 10 August 1999. The 'downing' had resulted in the death of 16 Pakistani defence personnel.

The aircraft was shot down in Indian airspace after it had disregarded warnings. Pakistan claimed that Indian aircraft had shot it in the Pakistani airspace and the action was illegal and

⁶Oellers-Frahm, Karin, Commentary To Article 41, In The Statute Of The International Court Of Justice: A Commentary, 923–66 (Zimmerman, Andreas, *The Statute of the International Court of Justice: A Commentary*, Oxford Commentaries on International Law, 2d Ed. 2012); Tanzi, Attila, "Problems Of Enforcement Of Decisions Of The International Court Of Justice And The Law Of The United Nations", *European Journal of International Law*, 6, (1995); 539, 569–70.

⁷U.N. Charter, Art. 94, Issue. 2.

⁸Chaudhury, Dipanjan Roy, "ICJ stays Kulbhushan Jadhav's execution in Pakistan, supports India's case", *Economic Times*, 13th July, 2018.

⁹Katju, Vivek, "Stalling of Kulbhushan Jadhav's death & the role of ICJ: What does this mean for Indo-Pak relations", *CatchNews*, 17th May, 2017.



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unjustified and demanded the Court order India to pay compensation. India asserted to the ICJ that it had no jurisdiction to adjudicate the matter.

In the summary of its judgment of 21 June 2000, the Court quoted the following three points which contained the substance of Indian objections:

- i. That Pakistan's Application did not refer to any treaty or convention in force between India and Pakistan which confers jurisdiction upon the Court under Article 36(1).
- ii. That Pakistan's Application fails to take into consideration the reservations to the Declaration of India dated 15 September 1974 filed under Article 36(2) of its Statute. In particular, Pakistan, being a Commonwealth country, is not entitled to invoke the jurisdiction of the Court as sub-paragraph 2 of paragraph 1 of that Declaration excludes all disputes involving India from the jurisdiction of this Court in respect of any State which *'is or has been a Member of the Commonwealth of Nations'*.

- iii. The Government of India also submits that sub-paragraph 7 of paragraph 1 of its Declaration of 15 September, 1974 bars Pakistan from invoking the jurisdiction of this Court against India concerning any dispute arising from the interpretation or application of a multilateral treaty, unless at the same time all the parties to such a treaty are also joined as parties to the case before the Court.

The reference to the UN Charter, which is a multilateral treaty, in the Application of Pakistan as a basis for its claim would clearly fall within the ambit of this reservation. India further asserts that it has not provided any consent or concluded any special agreement with Pakistan which waives this requirement."

WHAT IS THE ICJ AND WHAT CAN IT ACTUALLY DO?

India's application to the ICJ has no locus standi and Pakistan risks calamitous consequences on its national security if it entertains India by consenting to participate in any ICJ proceedings regarding Kulbhushan Jadhav's arrest and prosecution. We have endeavored to highlight few principles concerning ICJ's jurisdiction and



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role in international and bilateral affairs between the two countries.

ICJ is by no means an international regulatory authority rather, its role so far has been that of an official mediator to which states turn to when they need to resolve disputes. All member states of the UN can approach the ICJ. However, all of them have explicitly attached conditions on the extent of ICJ's jurisdiction concerning their respective national interests.

India put forth a declaration in 1974 outlining the conditions where it would not accept ICJ jurisdiction. Below are two points which are relevant in India's current application to the ICJ.

They included the following:

- Disputes with government of any state which is or was part of the Commonwealth;
- Disputes related or connected to facts, hostilities and armed conflicts.

These conditions clearly state that in the case of any disputes with Commonwealth countries India reserves the right to not participate in any ICJ proceedings. It quoted this declaration to get itself out of the 1999 plane dispute that Pakistan had taken to the ICJ.

Similarly, Pakistan also has a declaration in place regarding the jurisdiction of the ICJ in which it is stated that Pakistan is not bound to participate in any proceeding which involves "matters related to the national security of the Islamic Republic of Pakistan." It also declares that the Government of Pakistan specifically agrees to the jurisdiction.

Furthermore, Pakistan has a bilateral agreement with the Indians – the 2008 bilateral agreement on Consular Access – signed between the two countries that allows for both sides to make an exception to the granting of access when issues of "national security" were involved. Hence, it is clear that Pakistan is in no way obliged to appear before the ICJ in this particular case. It should simply state as Indians have before that it does not accept the ICJ's jurisdiction on this case.

India claims that Pakistan is violating the Vienna Convention on Consular Relations (VCCR). India and Pakistan are both signatories to the Vienna Protocol on Consular Relations, 1963, which mandates that consular officials of any country "shall have the right to visit a national of their sending State who is in prison, custody or detention, to converse and



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correspond with him and to arrange for his legal representation”, however conditions highlighted by both Pakistan and India exempt them from any ICJ proceeding related to issues of multilateral treaties in which both parties are not consenting.

PAST MEDIATIONS OF ICJ BETWEEN INDIA AND PAKISTAN

India and Pakistan have always used legal caveats to prevent one another from using the mechanism of the International Court of Justice to act against them — on the ground that ICJ does not have jurisdiction on matters involving the two Commonwealth countries.

The Hague has taken up three cases involving India and Pakistan where the latter had initiated 2 of them,

In 1971, India filed a case and challenged the jurisdiction of the International Civilian Aviation Authority (ICAO) to decide over India’s legality of banning overflight and landing rights to Pakistan. India had banned Pakistan’s overflight after a flight of the Indian Airlines was hijacked in January 1971. India did this when West Pakistan was facing a civilian disturbance in East Pakistan and the blockage of

airspace created a huge obstacle for West Pakistanis to go into East Pakistan. *The ICJ gave the verdict in favor of the ICAO and against India.*

In 1973, Pakistan filed a case to stop the repatriation to Bangladesh of 195 Pakistani nationals in Indian custody. From the outset, India refused to recognize the court’s jurisdiction on the basis that it was not a consenting party to the case and following negotiations between Pakistan and India which had resulted in an agreement signed at New Delhi on 28 August 1973. *Pakistan requested ICJ to record its discontinuance in the case as it would facilitate further negotiations.*

Pakistan relied on Article 17 of the General Act for Pacific Settlement of International Disputes, signed in Geneva on September 26, 1928, on the declarations of acceptance of the compulsory jurisdiction of the court made by the parties and on para 1 of Article 36 of the court’s statute. But India reiterated its stand outlined by the declaration of 1974. New Delhi made it clear that India does not accept the ICJ’s jurisdiction over “disputes with the government of any state which is or has been a member of the Commonwealth of Nations”. Finally, in June



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2000, the ICJ said India's declaration contained, inter alia, a reservation according to which "disputes with the government of any state which is or has been a member of the Commonwealth of nations" are excluded from the court's jurisdiction.

The last time both countries battled in the Hague was in 1999, when Pakistan filed a case after India shot down a Breguet Atlantique patrol plane of the Pakistan Navy in the Rann of Kutch, in Pakistani airspace. *India succeeded in blocking the case by broaching upon the fact that ICJ had no jurisdiction in matters between two Commonwealth countries.* In a preliminary letter to the ICJ, India clearly stated its objections to Court's jurisdiction by citing its Declaration of 15 September, 1974, which states that Pakistan cannot invoke the jurisdiction of the ICJ on any issue that arises from the interpretation of a multilateral treaty if India was not joined with Pakistan as party to the case presented before the court.

Therefore, it is evident that consenting to participate in any proceedings regarding Kulbhushan Jadhav would be tantamount to handing over matters of national interests to a foreign body. Pakistan government is well

within its rights to declare this a non-ICJ jurisdiction matter. Taking any other stance would only be in India's favour.

Similarly, India could not sue Pakistan over the murder and mutilation of Captain Saurabh Kalia and five other soldiers during the Kargil War in 1999.

This time, India has taken Pakistan by surprise. It has knocked at the doors of the ICJ at The Hague to pressurise Pakistan from carrying out its military court's verdict handed to Kulbhushan Jadhav, a former Indian naval officer, held for spying.

This was after Islamabad refused consular access to him. India believes the ICJ can look into Jadhav's case as both the countries are signatories to the optional protocol of the Vienna Convention on Consular Relations (VCCR), which deals with facilities that are to be provided to anyone held in a foreign country.

The protocol says any dispute arising out of the interpretation or application of VCCR shall lie within the jurisdiction of the ICJ.



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KULBHUSHAN JADHAV CASE: THE TEST OF BILATERALISM

Pakistan argued in the Kulbhushan case that the alleged activities of commander Jadhav are well dealt with under Article VI, “in case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits”, of the Agreement on Consular Access (“2008 Agreement”) signed on May 21, 2008 by and between India and Pakistan.¹⁰

Pakistan also argued that the jurisdiction under the Vienna Convention on Consular Relations 1963 (Vienna Convention) is limited, and indeed it is further limited and qualified or supplemented by the 2008 agreement.¹¹

India acknowledges that the parties have signed the 2008 Agreement, but it maintains that this instrument does not restrict the parties’ rights and obligations under Article 36, paragraph 1, of the Vienna Convention.¹² In respect to the 2008

Agreement, the Court concluded that it does not need to decide at this stage of the proceedings whether Article 73 of the Vienna Convention would permit a bilateral agreement to limit the rights contained in Article 36 of the Vienna Convention. It is sufficient at this point to note that the provisions of the 2008 Agreement do not impose expressly such a limitation.¹³

Article 73 (2) of the Vienna Convention says that “Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.” This means the 2008 agreement can only confirm, supplement, extend or expand the Vienna convention but cannot limit it. On the other hand, the Shimla agreement and the Lahore declaration, prima facie, preclude any bilateral issue between India and Pakistan, including Jammu and Kashmir, to be decided

¹⁰Shah, Syed Ali, “RAW officer’s arrested in Balochistan”, *Dawn*, 25th March, 2016.

¹¹Case Concerning the Vienna Convention on Consular Relations (India v. Pakistan), Order of the ICJ, 18 May 2017. Available at <http://www.icj-cij.org/files/casereLATED/168/168-20170518-ORD-01-00-EN.pdf>.

¹²Article VI states: “in case of arrest, detention or sentence made on political or security grounds, each side

may examine the case on its merits”. Available at <https://www.icj-cij.org/files/case-related/168/168-20170518-ORD-01-00-EN.pdf>.

¹³Carter, L. E., “Compliance with ICJ Provisional Measures and the Meaning of Review and Reconsideration under the Vienna Convention on Consular Relations: Avena and Other Mexican Nationals (Mex. v. U.S.)”, *Michigan Journal of International Law*, 25, (2003-2004); 129.

outside bilateral understandings or at the multinational forum.¹⁴

Once the question of jurisdiction is settled, the next issue is the admissibility of India's application before the ICJ. In this case, India has made claims against Pakistan, for violations of its own direct rights as well as indirect injuries through the violation of Jadhav's rights under the VCCR. Regarding the violations of India's own rights, there would clearly be no issue of admissibility. However, as to the alleged violations of Jadhav's rights under the VCCR, India would have an indirect right of standing (i.e. through exercising diplomatic protection).¹⁵ International law requires that two conditions be satisfied before a State can exercise diplomatic protection over an individual's rights. First, the individual must be a "national" of that State.¹⁶ Second, all local remedies must have been

exhausted in the other State's courts against whom the violations are being claimed.¹⁷

It appears Pakistan knew of Jadhav's status as a foreign national at the time of his arrest. Relying on Avena, India could argue the twenty-two-day delay violated Pakistan's obligation under Article 36(1)(b) of the VCCR. However, there is some indication in the travaux préparatoires of the VCCR that member States shared the opinion that some delay in informing the consular post was permissible, in instances where there are national security concerns.¹⁸ In fact, this seems to be one of the reasons for not adopting the English proposal of a forty-eight-hour time limit to inform the consular post of an arrest.¹⁹ Considering Pakistan consistently maintains the security risks associated with Jadhav's case, it may be possible for Pakistan to contend the delay of about twenty-two days was justified under the VCCR.

With respect to Article 36(1)(a) and (c) the violations seem more evident. Pakistan has denied the Indian consular post communication

¹⁴Sharma, D., "India v. Pakistan - Round Four", *JURIST - Professional Commentary*, 10th July, 2017. Available at <http://jurist.org/professional/2017/07/dhruv-sharma-indiapakistan.php>.

¹⁵Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007, I.C.J., 582, (May 24, 2007); 63–65.

¹⁶The test of "nationality" test required for exercising diplomatic protection was elaborated in detail in the Nottebohm decision of the ICJ. Nottebohm (Liech. v. Guat.), Judgment, 1955, I.C.J., 4, (6 Apr., 1955).

¹⁷Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Note 14.

¹⁸See U.N. Conference on Consular Relations, Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees 338, U.N. Doc. A/CONF.25/6 (I) (15th Mar., 1963)

¹⁹Ibid.



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and the right to arrange for Jadhav's legal representation. In fact, India claims that Jadhav continues to be held incommunicado. Interestingly, Pakistan does not refute India's contention on facts—it does not claim to have informed Jadhav of his rights under the VCCR or to have provided the Indian consular staff access to Jadhav. Pakistan's position is that the issue of consular access to Jadhav remains under evaluation. While Pakistan vehemently denies India's allegation that Jadhav's consular access is conditioned upon India's assistance in the investigation against him, Pakistan has significantly emphasized India's non-cooperation in the investigation in its oral arguments. Pakistan's argument then, begs the question of whether under the VCCR, consular access can be denied if the State of the foreign national refuses to cooperate in the receiving State's investigation against him.

Last but not least, it is as if India has opened Pandora's Box to Pakistan by making the Jadhav issue multilateral, Pakistan is sure not to hesitate to take India to the ICJ not only on the Kashmir issue but on many matters such as

Kishan-Ganga power project under the Indus Water Treaty 1960.²⁰

WHAT'S NEXT?

The ball is now in Pakistan's court. How will it react? Will it contest the ICJ jurisdiction so that its record, in this case, does not come up for international legal scrutiny?

One important aspect may be that the functioning of its military courts may become a subject of the ICJ comments. It may wish to avoid a probe in this matter. As India's approach is based on Article 36 (1) of the Court's jurisdiction will it take a long-term view to explore subsequently how to use this Article in its own interest now that India has invoked it in an Indian-Pakistan matter? The Pakistani position will become known fairly soon.

The last word, however, is that the Manmohan Singh government had shed inhibitions to allow the dispute resolution mechanism of the Indus Waters Treaty to be put into motion.

²⁰Trivedi, A., "ICJ Jurisdiction on Bilateral Issues Possibilities Regarding Jammu and Kashmir Dispute", *JURIST - Student Commentary*, 19th July, 2017. Available at <http://jurist.org/dataline/2017/02/abhishek-trivedi-icj-pandora.php>.



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In doing so it had gone against India's basic impulse that outsiders should have no role in any aspect on India's bilateral ties with Pakistan. Earlier, India had been prepared to stop IWT projects rather than risk going for international arbitration under the treaty. That move did not really harm India for it was limited applicability.

Now the stakes are higher but in Modi, India has a Prime Minister who is not diffident in looking at new approaches even if they have elements of risk.

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