

## A CRITICAL ANALYSIS OF THE ROLE OF INTERNATIONAL COURT OF JUSTICE IN KULBUSHAN JADHAV CASE

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### INTRODUCTION

The International Court of Justice was constituted by the the United Nations charter in 1945 and then it commenced working from April 1946. The credit of settling international disputes through judicial decisions goes to the Permanent Court of International Justice which was established under the League of Nations. The Permanent Court of Justice was based upon the Statute which was called, The Statute of Permanent Court of International Justice. (1) As provided under Article 36 of the Statute, the International Court of Justice was competent authority to decide following cases - (1) which were entrusted by State Parties, and all matters or issues which are specifically provided for in the Charter of the United Nations or in treaties and convention in force; (2) States are also empowered to confer the jurisdiction by the way of a treaty or convention, and (3) Moreover the State Parties to the Statute at any time, without special agreement, confer compulsory jurisdiction. The Court is entitled to present its advisory opinion on the urge made by the League Council and Assembly. Thus, the idea of advisor opinions, designed to aid international Organizations on questions of International law was conceived and provided for in the same Article. The Permanent Court contributed much for the development of International Law. For example, in S.S. Wimbledon case, the Court developed the rule relating to strict interpretation of International instruments and their validity. In **Tunis and Morocco Nationality Decrees (2)**, the CPU dwelt upon the change in the meaning and scope of domestic jurisdiction, in **Danzing Official Railway case (3)**, the Court developed the law relating to rights of people as provided under the various International Agreements and again in **Eastern Greenland case (4)**, the International Court of Justice developed the law relating to occupation. Thus, "From its

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[1]S.K.KAPOOR, INTERNATIONAL LAW & HUMAN RIGHTS, PG -577 (DR.NAGENDRA SINGH, TWENTHETH EDITION, 2016

[2]P.C.I.J(1923), series B.40.4

[3]P.C.I.J.(1928)Series B.No.15

[4]P.C.I.J (1933).Series A/B.53

experimental beginning ,it established the point that the Permanent judicial organ is necessary even without going so far as to be accompanied by any true compulsory jurisdiction".

### **INTERNATIONAL COURT OF JUSTICE ORDERED MYANMAR TO END GENOCIDE CAMPAIGN AGAINST ROHINGYA MUSLIMS**

The panel of 17 judges of the International Court of Justice has ruled that Myanmar should adopted certain emergency measures which are required to be implemented in order to end the ongoing genocide campaign against Rohingyas Muslim .

Moreover ,Judge Abdulqawi Ahmed Yusuf reiterated that the International Court of Justice found the Rohingya are suffering are in serious risk of genocide ,violating their human rights.

The Judges of Court asked the Government of Myanmar to ensure that its military not to commit any further acts of genocide, and take steps in order to reduce killings and serious harm to the Rohingya .In fact Myanmar was ordered to protect any evidence of offences against Rohigyas that as the court may use those evidence later on during the hearings as well as to report to International court of Justice on all steps to be followed which was ordered to take within four months, and then report and present in every six months as the case moves through the UN's highest court.

The International Court of Justice stated that order passed by the Court to be followed by Myanmar was binding upon it as well as that creates international legal obligations on Myanmar.

Human rights activists welcomed the unanimous decision.

Param-Preet Singh,who is an associate international justice director of New York-based Human Rights Watch stated that the order made by International Court of Justice to Myanmar regarding taking measures in order to to reduce the instances of genocide and crimes of the Rohingya is a landmark step initiated so to prevent any further atrocities against one of the world's most persecuted people and the governments concerned and United Nations Organs should take

steps to weigh in to ensure that the order is enforced as the genocide case moves forward. Nicholas Bequelin, Amnesty International's South Asia regional director, said: "Today's decision sends a message to Myanmar's senior officials: the world will not tolerate their atrocities, and will not blindly accept their empty rhetoric on the reality in Rakhine State today.(5)

**DUE TO INCREASING CORONA VIRUS CASES PLEA HAS BEEN MADE TO SUPREME COURT OF INDIA TO GIVE DIRECTION TO APPROACH INTERNATIONAL COURT OF JUSTICE TO GIVE DIRECTION FOR COMPENSATION FROM CHINA**

Recently a plea has been filed by KK Ramesh

in the Supreme Court so that, the Apex Court of India give direction and order to Central Government to move to the International Court of Justice (ICJ) for filing a suit against China on the ground that alleging China is responsible for the pandemic as Corona viruses were deliberately created by the mischievous acts of China and to ask for compensation of the amount of USD 600 billion from China due to the drastic losses.

Moreover, it was alleged that the dangerous viruses originated from China's Wuhan Institute of Virology and claimed that they were having strong evidence regarding that fact that coronavirus or Covid-19, that its origin is from China, which has "destroyed" the Indian economy and large number of people all over the world. Moreover, it was stated that the spread of coronavirus took place in India, other countries and continents but not in other cities of China despite originating in nearby Wuhan. The plea was made before the Apex Court that as the people cannot move the matter to the ICJ, the Centre should be directed by the Supreme Court to file a case there in this regard.

The International Court of Justice is the prominent judicial organ of the United Nations, which is located at the Peace Palace in The Hague, Netherlands. Despite that the remaining six prominent organs of the United Nations, is situated in New York, USA. It settles legal disputes between States and gives advisory opinions in accordance with international law, on legal questions referred to it by authorized United Nations organs and specialized agencies.

It has 193 state parties and current President is Ronny Abraham.(6)

Background

As provided under Article 33 of the United Nations Charter states the list of the negotiation, enquiry, mediation etc. ,Various procedures formed for the purpose of pacific settlement of disputes between States. Certain methods for settling the disputes includes the services of third parties.Even the method of , mediation and arbitration preceded the judicial settlement. The method of mediation,was well known and applied during ancient times in India as well as in the Islamic world, whilst huge number of examples relating to latter was there in ancient Greece, in China, among the Arabian tribes, in maritime customary law in medieval Europe, and in Papal practice.

The modern history of international arbitration:

The first phase is generally recognized as dating back from the so-called Jay Treaty of 1794 between the United States of America and Great Britain.The Alabama Claims there was arbitration in between the United Kingdom and the United States in 1872 and considered as initiation of second, even more decisive, phase.Another conference held on 1899 in The Hague Peace Conference ,which convened on the initiative of the Russian Czar Nicholas II, recognized as the the commencement of a third phase in the modern history of international arbitration.With regard to arbitration, the 1899 Convention established provides provisions regarding the formation of permanent machinery, called the Permanent Court of Arbitration,which was established in 1900 and began operating in 1902. Besides that several plans and proposals were submitted from 1911 and 1919, even by both by national and international bodies and by governments, for the composition of an international judicial tribunal, which culminated in the creation of the Permanent Court of International Justice (PCIJ) as an integral part of the new international system set up after the end of the First World War.In 1943, the States like China, the USSR, the United Kingdom and the United States issued a joint declaration regarding their concern for the requirement“of establishing at the earliest practicable date a general international organization,which should be based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security. Besides that the San Francisco Conference while keeping the recommendations made by the Committee ,keeping in thought had decided against compulsory jurisdiction and supported for the establishment of an entirely new court, which would be a pivotal body organ of the United Nations, on the same footing as the General Assembly, the

Security Council, the Economic and Social Council, the Trusteeship Council and the Secretariat. For the last time then the PCIJ met in October 1945 and transferred authority and powers to the new International Court of Justice, which, like its predecessor, was to have its seat at the Peace Palace. In April 1946, the Permanent Court of International Justice came to end officially, and the International Court of Justice, meeting for the first time, elected as its President Judge José Gustavo Guerrero (El Salvador), who was the last President of the Permanent Court of International Justice.(7)

### **COMPOSITION OF INTERNATIONAL COURT OF JUSTICE**

As per the provisions under Article 7 of the United Nations Charter, the International Court of Justice is considered as the prominent organ of the United Nations which is based on a Statute. The members of the United Nations are ipso facto the members of the Statute of the International Court of Justice. Moreover based on the recommendation of the Security Council and as per the conditions of the General Assembly, new States can be added as the member of the United Nations. There are 15 Judges who are elected by the General Assembly and the Security Council for the International Court of Justice, with certain period of 9 years and can be again elected after the end of the term. The one third part of the Court members are elected every three years with the purpose of the continuation of the functions of International Court of Justice. Moreover the Registry, and its administrative organ used to help the Court in performing its function of deciding the disputes between parties. The official languages are- English and French. However, distribution has been made of the 15 judges of the Court which includes - Three from Africa, Two from Latin America and Caribbean, Three from Asia, Five from Western Europe and other states and Two from Eastern Europe. The International Court of Justice is not constituted by the representatives of governments. Perhaps the members of the Court are considered as the independent judges and they at first take oath in open court that they will execute their powers and duties impartially and conscientiously. In fact in order to provide guarantee his independence, no Courts member can be dismissed until and unless, in the view of rest of the Members, he/she no longer fulfils the required conditions. (8)

[5]Ibid

[6]<https://www.google.com/amp/s/www.newindianexpress.com/nation/2020/may/08/covid-19-plea-filed-in-sc-seeks-direction-to-centre-to-approach-icj-for-compensation-from-china-2140791.amp>

[7]<https://www.google.com/amp/s/www.newindianexpress.com/nation/2020/may/08/covid-19-plea-filed-in-sc-seeks-direction-to-centre-to-approach-icj-for-compensation-from-china-2140791.amp>

[8]Supra Note1 PG -578

### **INDIAN JUDGE ELECTED TO INTERNATIONAL COURT OF JUSTICE**

Justice Dalveer Bhandari ,the Senior Judge of the Supreme Court was elected to International Court of Justice(ICJ) ,who received 122 votes in the local organ of United Nations ,that is General Assembly,13 out of 15 votes in UN Security Council and then he served for the period of 2012 - 2018.Various law relative and applied by the ICJ -As per Article 38 of the Statute of International Court of Justice,the Court is empowered to decide the matter of issue submitted as the International Law and can also use the sources of International Law -

- (a) International Conventions
- (b) International Customs
- (c) General Principles of Law which are recognised by the civilised states.
- (d) The decisions of Judiciary,other work of jurists etc.(9'

### **BINDING FORCE OF THE DECISIONS TAKEN BY THE INTERNATIONAL COURT OF JUSTICE**

As per Article 59 of the Statute of the International Court of Justice,it states that the decisions taken by the International Court of Justice is only binding upon the party to the dispute and not upon the States or the Court itself.But the earlier decision taken by the Court influence the future decision that may be taken by the Court.(10)

### **KULBUSHAN JADHAV CASE**

Pakistan has refused to access any more consuler against India to former Navy commander Kulbhushan Jadhav who has been awarded with punishment of death penalty by the Pakistan military court by stating that confession was made by him that he was desperately involved in the offence of "espionage and terrorism.Later on after the first consular access on September 2, India reiterated that Jadhav must be under extreme pressure to give a false narrative.

#### **Facts**

The former Indian Navy Officer Kulbhushan Jadhav, allegation was made against him as he was abducted by Pakistani intelligence from Iran on March, 2016.. Moreover the Pakistan made allegation against him by calling and considered him "an Indian Spy" who is doing illegal works against Pakistan and was fomenting trouble in Balochistan.But Indian Government refused to accept such claims made by Pakistan against Jadhav ,being arrested on those certain grounds in

Balochistan. India later on tried for the consular access to Jadhav. In April, 2017 A Pakistani army court punished him to death. Then India seeking justice reached to the International Court of Justice against the decision of Pakistan's Army Court. The International Court of Justice later on stayed the execution order of Jadhav in May, 2017.

However .in June, 2017 Jadhav has filed a petition seeking mercy from Death execution against the alleged conviction before Pakistan army. It was claimed by Pakistan that he has accepted and confessed that he was indulged in terror activities in Balochistan against the country Pakistan. Further December, 2017 Pakistan allows Jadhav's wife as well as his mother to meet him and then he spoke to his family members by using an intercom as a glass screen which separated the family members and Jadhav. India has then rejected Islamabad's claims regarding the matter that they have provided the consular access to Jadhav, and argued against such claim that permitting an Indian official to be present at the meeting doesn't implies as consular access. Then further ,International Court of Justice commenced the public hearing in relation to Jadhav case in February, 2019. July, 2019, ICJ decision was granted by the Court on Kulbhushan Jadhav matter and hence ordered Pakistan to provide the consular access to him. The directive of the ICJ called for a review by Pakistan. In September 2, 2019 Pakistan grants the first consular access Kulbhushan Jadhav. India says Kulbhushan Jadhav is under extreme pressure and is parroting Pakistan's false charges.

### **Arguments by India at ICJ**

**Following are the arguments made by India -**

- 1) That after delay of almost 3 weeks of the arrest process of Jadhav ,the notification was given to Indian based Consuler at Islamabad.
- 2) That he was refused to provide any facility and and further the communication between Kulbhusan Jadhav and the Consuler officials and even he was not informed about his rights which he was entitled and can claim as per the Convention.(11)

### **Decision of ICJ**

The International Court of Justice held that the acts of Pakistan were in violation of the provisions of international law and norms of consular access and then the Court stayed the order of death sentence. The International Court of Justice gave direction to Pakistan for granting

of the consular access to Mr. Jadhav. Pakistan made a review petition of the direction given by the ICJ, but the Court denied the plea of to set him free. The court stated that the conviction and punishment awarded by the Pakistan Court to Mr. Jadhav are not a violation or contravention to the provisions of Article 36 of the Vienna Convention. The Court expressed its view by stating that the withdrawal of conviction or sentence of Jadhav does not provide the essential remedy while in the matter of violations of provisions under Article 36 of the Vienna Convention and then the Appeals and review petitions on the decision of ICJ are not allowed.

### **Pakistan's conditions for granting consular access**

After the granting of verdict by the International Court of Justice, confirmation was given Pakistan, that it would abide by the direction of the International Court. But certain conditions were imposed by Pakistan, as they wanted one of their officers from Pakistan should present in the meeting as well as installation of CCTV cameras during the meeting. Later on India stated that that Pakistan must provide consular access to Jadhav in such a matter and in an environment there shouldn't be existence of fear of intimidation and reprisal in the mind of Jadhav. Moreover India had demanded the requirement of urgent as well as effective and unhindered consular access should be provided to Jadhav from Pakistan and argued that as per Article 36 Paragraph 1(a) of the Vienna Convention it states that consular officers shall be free to contact /communicate with person of the sending State and to have access to them. The citizens of the State who are sending is entitled and shall have the freedom to communication with and access to consular officers of the sending State. Later on on 2nd September, 2019 Pakistan agreed to allow the first consular access to Kulbhushan Jadhav who is an Indian death-row convict. Then an Indian diplomat met Kulbhushan Jadhav relating the case at a sub-jail for an hour. And hence the entire proceeding of their communication was also recorded by the officials in Pakistan. Pakistan stated that the meeting was recorded in order to maintain transparency. Indian Government stated that Kulbhushan Jadhav was in severe extreme pressure during the whole period to parrot a false Pakistani narrative in his case.(12)

[9]Id PG - 579

[10]<https://news.un.org/en/tags/international-court-justice>

[11]<https://news.un.org/en/tags/international-court-justice>

[12]Ibid



### **Why India wants independent consular access for Jadhav?**

As Jadhav was awarded with a capital punishment which was given in a secret trial, hence in order to collect, any further information from Jadhav which would advise and suggestion to Jadhav with respect to the case, can prove that the trial which took place in Pakistan Court was completely a sham, moreover the Consular access to Jadhav, can also dismiss the case against Jadhav in Pakistan. India can collect more information regarding the Jadhav's genuine version of events which leads to his arrest. (13)

### **International norms regarding this case**

#### **Vienna Convention**

The Vienna Convention on Diplomatic Relations was established in 1961 defines the framework regarding various acts of diplomatic relations between several countries. A distinct Convention was signed in 1963 by Consular Relations. This treaty was developed ad per the provisions of the United Nations. They are applicable to the diplomats of several states under the military departments, in both the cases applied to the military and civilian, who are in the country under the authority and control of the Chief of Mission.

Several important articles as provided under Vienna Convention are -

- 1) Article 27-As provided under Article 27 of the Convention, it states that every host country must allow and support the protect free communication between the diplomats of the mission and national countries from where he belongs.
- 2) Article 36- As provided under Article 36 of the Convention, it states that Foreign nationals who are arrested or detained should be informed or let him know regarding his various right to have their embassy or consulate notified of that arrest. (14)

#### **India-Pakistan bilateral agreement, 2008**

The instant notification in regard to any arrest/detention/imprisonment of the individuals of any other country shall be given to the concerned respective High Commission. The concerned country is empowered to determine or observe the case on its merits. During the case, where the arrest, detention, or sentence made on the ground of political or security issues, the Government is under responsibility to provide the consular access to all nationals of the foreign nations during the matter of arrest or in case of detention or imprisonment within the time period of

three months of the date of arrest or detention or sentence. Essentially, the agreement does not provide the same opportunity and avail of facilities to the spies which are given almost the same types of privileges that signatories to the Vienna Convention like the states of India and Pakistan should provide to the citizens of opposite countries in their jail. But that point is not there in India's case. Moreover the International Court of Justice reiterated that no bilateral treaty can prevail over Vienna Conventions on consular access.(15)

### **International Covenant on Civil and Political Rights (ICCPR)**

The United Nations International Covenant of Civil and Political Rights (ICCPR) has been formed in order to ensure the protection of civil and political rights of the people. On 19th December, 1966 the

United Nations' General Assembly has adopted the Convention and at last it came into force on March 23, 1976. The treaty established grants recognition of equality before the courts and tribunals & Right to a fair trial. As per Article 41 of the ICCPR it provides that a State Party who states and confirms that another State Party is not performing its obligations to implement the provisions under ICCPR, may submit that issue in written form to the Committee for consideration.

### **Previous ICJ cases & the problem of implementation**

As provided under Article 94 of the United Nations Charter, it reiterated that all the members of the United Nations are bound to follow the directions or decisions of the International Court of Justice during the cases in which they are parties to the dispute. While in the instant case both countries that are India and Pakistan have signed and ratified this. Moreover, there is also an 'Optional Protocol' relating to the Vienna Convention on Consular Relations for the purpose of the compulsory settlement of disputes between nations. Even Both the countries India and Pakistan are parties to this protocol and have signed that. In the case of Kulbhusan Jadhav, the verdict of the Court is final and in the contentious cases are final and without appeal, but the decisions can't be enforced by the International Court of Justice.

The conclusion came out of the case and remedies in the Jadhav case are in relation to Article 36 of VCCR are along the same lines of the **LaGrand case (Germany v. United States)** and the **Avena case (Mexico v. United States)**.

In both the verdicts, the ICJ found that the US was in breach of its obligations under Article 36 VCCR, and directed it to give “effective review and reconsideration” to sentences and convictions of foreign nationals. Unfortunately, the implementation of the ICJ decisions on ground was extremely poor and left much to be desired.

Apart from the directive that Pakistan should ensure a fair trial, there is little control that India can exercise over the judicial procedure it will choose to adopt.(16)

## CONCLUSION

International Court of Justice plays a vital role while settling various issues between several nations.

[13]Ibid

[14]Ibid

[15]Ibid

[16]Ibid