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INTERNATIONAL COURT OF JUSTICE

AGENDA / FOCUS

The Kulbhushan Jadhav Case (India v. Pakistan): determination of state responsibility for violations of the Vienna Convention on Consular Relations and non-compliance with orders of the ICJ.

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THE KURUKSHETRA OF DIPLOMACY

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STUDY GUIDE

Committee: International Court of Justice

Agenda: The Kulbushan Jadhav Case (India vs Pakistan): Determination of state responsibility for violations of the Vienna Convention on Consular Relations and Non-Compliance with orders of the ICJ.



FACTS

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The Mystery of Kulbhushan Jadhav

The story begins in March 2016, when security forces in Pakistan announced a major counter-intelligence breakthrough: they had arrested a man named Kulbhushan Jadhav in the volatile province of Balochistan. According to Pakistan, Jadhav was not just an ordinary traveler but a highly placed, active-duty commander in the Indian Navy operating as a spy for India's intelligence agency, R&AW, to orchestrate sabotage and terrorism.

However, across the border, New Delhi told a completely different story. India fiercely maintained that Jadhav was a retired naval officer who had long left the military to run a peaceful, legitimate cargo business in the Iranian port city of Chabahar. India alleged that Jadhav had actually been ambushed and abducted from Iran by a militant group, who then smuggled him across the border and sold or handed him over to Pakistani authorities to frame him.

The plot thickened rapidly behind closed doors. Pakistan released a video containing Jadhav's purported confession whereby he admitted to espionage, which India dismissed as a statement coerced under severe torture. Instead of a civilian trial, Jadhav was rushed before a secret Pakistani military court. In April 2017, the court delivered its verdict: Jadhav was convicted of terrorism and sentenced to death by hanging.

Throughout his entire captivity, Pakistan completely cut Jadhav off from the outside world. India sent sixteen consecutive, urgent diplomatic requests to see him, but Pakistan rejected every single one, refusing to grant "consular access." With Jadhav's life hanging in the balance and a complete breakdown in communication between the two nuclear-armed neighbors, India took a massive gamble. In May 2017, they bypassed bilateral talks entirely. India rushed to the

International Court of Justice (ICJ) in The Hague, accusing Pakistan of violating the fundamental laws of global diplomacy.

CONSULAR ACCESS

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What was once meant for traders evolved to be a legal necessity for all citizens on foreign soil.

The roots of consuls as an institution go back to the city-states of ancient Greece. In foreign lands, officials called “*prostates*” acted as intermediaries between Greek colonists and local governments. As an effective political institution, the consular office emerged only with the dawning of the commercial age during the early Middle Ages.

In the commercial towns of Italy, Spain, and France the merchants used to elect one or more of their fellow merchants as arbitrators in commercial disputes, and these were called *juges consuls* [judge consuls] or *consuls marchands* [merchant consuls]. When, between and after the Crusades, Italian, Spanish, and French merchants established themselves in Near Eastern countries, they brought the institution of consuls with them, merchants from the same nation electing their own consul. The competence of these consuls became gradually enlarged through treaties, called “capitulations,” between the home states of the merchants and the mohammedan monarchs in whose territories they had settled. The competence of consuls came to comprise all civil and criminal jurisdiction over, and protection of, the privileges, life, and property of their countrymen.

Such a broad role for consuls - allowing them to exempt their co-nationals from local jurisdiction - had waned by the early twentieth century. The functions of consuls became limited to assisting co-nationals in more defined ways. A set of rules came into being in the international community for the consular institution as part of a body of law referred to as “customary” law.

In modern times, consular relations came to be regulated as well by treaties between states. By 1900, approximately 200 treaties contained provisions on consular relations, and by the 1930s the number reached 900.³ These were bilateral agreements, that is, treaties between pairs of states. These bilateral treaties addressed a variety of issues in the relations between the two states. One or two provisions addressed consular relations. Provisions relating to consuls in bilateral treaties were typically brief so that customary rules continued as the major body of relevant rules. As time passed, some pairs of states began to conclude entire treaties devoted to consular matters.

Immunities are an important aspect of the consular institution. In order to prevent the receiving state from interfering with their work, consuls enjoy certain privileges. The confidentiality of their files and documents must be respected by the authorities of the receiving state. Consuls may not be compelled to testify in a receiving-state court about matters relating to their official functions. Consuls may not be sued, or prosecuted criminally, for acts relating to their official functions. Consuls are exempt from paying taxes in the receiving state.

Types -

There are two types of consuls who function on behalf of sending states - career consul and honorary consul.

A **“career consul”** is an official of the sending state, typically a member of its foreign service. This type of consul is dispatched by the sending state to a consulate in a particular foreign state. Consuls may serve in a particular receiving state for a period of years and then may be re-assigned elsewhere. A career consul works out of an office referred to in treaties as a “consular post,” or more popularly a “consulate.” In capital cities, consulates are usually housed in the building complex of the sending state’s embassy. They are referred to as the consular section of the embassy. In cities other than the capital city, consulates are self-standing. A building may be purchased or leased by a sending state as its consulate, or space may be rented in an office building. In larger consulates, one

finds not a single consul but an entire staff of consuls distinguished by various ranks. The head of a consulate may be called the “consul general.”

Many states engage a local resident, particularly in outlying areas of a receiving state, to perform consular work on a part-time basis. Such a person, called an **“honorary consul”**, may even be a national of the receiving state. An honorary consul may have some connection in her or his background to the sending state. Honorary consuls typically practice a profession of their own and work out of the office they use in that profession. Some sending states never engage honorary consuls, but those that do find it a convenient way to provide at least a minimal level of assistance to their nationals in localities in which it does not make financial sense to establish a consulate staffed by career consuls.

The function of protection –

Consuls perform a variety of functions for sending-state nationals who encounter difficulties in the receiving state. If a sending-state national dies while in the receiving state, a consul may facilitate arrangements for repatriation for burial. If a national dies abroad with property in the receiving state, the consul may assist in settling the estate. Consuls inquire about sending-state nationals who go missing or are victims of crime, particularly if the sending state is concerned that the receiving state is not doing all that it should in the case. If persons suspected of crime are to be extradited – either from the sending state to the receiving state or vice versa – the consul may facilitate that process. The assistance that consuls provide to nationals who find themselves in situations of difficulty is referred to as “protection” activity. A member of a consulate responsible for assisting nationals may be called the consulate’s “protection officer.”

BIRTH OF THE VIENNA CONVENTION

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By the mid-twentieth century, the patchwork of bilateral treaties on consular matters had come to be regarded as inadequate. While consular matters were the subject of rules of customary law, those rules, being unwritten, were often unclear. Protection of foreign nationals, and the activity of consuls in general, would presumably be better served if uniform rules were devised, and if those rules could be reduced to writing. In that way, receiving states could more efficiently comply with their obligations to sending states. The matter was eventually taken up by the United Nations.

In 1949, the United Nations designated the subject of consular relations as an area ripe for a multilateral treaty. UN Secretary-General Trygve Lie explained that *“in view of the continual expansion of international trade, the legal position and functions of consuls should be regulated on as universal a basis as possible.”* The idea was to devise a single treaty that would provide uniform regulation for consular work throughout the world.

The task of drafting a treaty was given to the International Law Commission (ILC), a treaty-drafting agency operating under the General Assembly of the United Nations. The ILC began examining the issue in 1955. In 1961, it submitted to the General Assembly a set of Draft Articles on Consular Relations. The General Assembly called a conference to finalize the text of a multilateral treaty based on the Commission's draft. The United Nations Conference on Consular Relations met in Vienna from March 4 until April 22, 1963, attended by most UN member states. On April 24, 1963, the Conference adopted a text, which it called the Vienna Convention on Consular Relations (VCCR), naming the Convention, as is often done, for the city where its drafters met.



ICJ held its inaugural session on 18 April 1946 at the Peace Palace in The Hague, Netherlands.

International Court of Justice

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States as the primary parties: Following the aftermath of the Second World War, the International Court of Justice was established as the successor to the Permanent Court of International Justice, as the principal judicial organ of the United Nations Organisation. The Court was a creation of the ICJ Statute, whereby it has been endowed with jurisdiction over contentious disputes arising out of interactions between states. In addition, the Court may also render non-binding

advisory opinions upon requests from UN Organs and Specialized Agencies.

Interventions by third parties:

Notwithstanding the preoccupation of the ICJ, and by extension, of international law in general, with state consent as being the basis of all obligations, there are certain avenues, albeit underutilized ones, which may allow non-state actors to intervene in ICJ proceedings. Whether the avenues are viable or not, are a matter of impending adjudication. In a legal proceeding as dynamic and crucial as the Jadhav case, it is imperative for the delegate to think beyond India and Pakistan. One must tread beyond the subcontinent, and consider - exhaustively - all the kinds of entities which may possibly seek to successfully intervene.

1. International Organisations -

In contentious cases, the ICJ Registrar issues notifications to inform states and international organizations of the case, giving the opportunity to furnish information to the Court via written and oral statements. The Court's notifications to state and NSAs were based under four main provisions: Articles 34(2)-(3), 50, 62 and 63 ICJ Statute, and Article 43(2) ICJ Rules.

According to Article 34(2) ICJ Statute, the Court '*may request of public international organizations information relevant to cases before it*' and/ or shall receive such information from such organization '*on their own initiative*'. The ICJ Rules (as amended in 2005) define a 'public international organization' as 'an international organization of states'.

Article 34(3) ICJ Statute provides an avenue for public international organizations to be notified by the Registrar and eventually present written observations in the framework of intervention proceedings based on Article 63(2) ICJ Statute.

Article 43(2) ICJ Rules (as amended in 2005) allows the organizations so notified to submit observations on the

particular provisions of the convention the construction of which is in question. The idea behind the new Article 43 is to consider that both states and international organizations may hold a comparable interest in taking part in the proceedings in which the construction of a convention is discussed before the Court. The procedure to be followed in this case is provided for in Article 69(3) ICJ Rules.

2. **Non-state entities before ICJ proceedings** - Other non-state entities, such as nongovernmental organizations (NGOs) and individuals, may seek to submit information to the Court on the basis of Article 50 ICJ Statute. According to this provision, the Court may invite individuals, bodies, bureaus, commissions or other organizations to carry out an enquiry or to give an expert opinion. Article 50 is supplemented by Article 67 ICJ Rules, which allows individuals or intergovernmental organizations (IGOs) to be heard in their limited capacity as experts.
 3. **Interests of third states** - The particular interests of third States in an ongoing dispute before the Court may be pursued via intervention proceedings under Art. 62 or Art. 63. According to Art. 62 of the Statute, a third State may request to intervene whenever it has an interest of a legal nature which may be affected by the decision in the case, whereas the right of a third State to intervene on a question of interpretation of a treaty of which it is party is recognized by Article 63 of the Statute.
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In other words, the Indian Constitution...provides for maximum flexibility. Article 33 starts from a position of full availability and applicability of fundamental rights, and then allows Parliament to mould or sculpt the position by the restriction or abrogation (a word that, at least in our constitutional history, has rather dark, unpleasant and even sinister connotations)

- Supreme Court of Pakistan in *Jawwad S. Khawaja v. Federation of Pakistan* 2023 SCLR 31 (Petitions challenging trials of Civilians under the Army Act, 1952.) - overruled in 2025.

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The Indian Connection

Sir Benegal Narsing Rao was the first Indian who had served as a Judge of the International Court of Justice. Best known for serving as the Constitutional Advisor to the Constituent Assembly of India, during the course of which he penned down the first draft of the Indian Constitution. Interestingly, and on a different note, Sir B.N. Rao had served as a Judge of the Calcutta High Court in the late 1930s.

Sovereignty - an impediment or an enabler ?

The Jadhav dispute was not India's first case before the ICJ. Neither was it the first contentious dispute between Pakistan and India which found its way to the ICJ.

Most importantly, however, the Jadhav dispute was in no sense the first time that the World Court was faced with interpreting the applicability of Article 36 of the Vienna Convention on Consular Relations. On the eve of Kulbhushan Yadav's alleged abduction and/or arrest, there already existed multiple precedents of the ICJ regarding the enforcement of Article 36 of the Vienna Convention on Consular Relations. Although the Court was proactive in previous decisions, the enforcement of the orders within the domestic legal systems became a challenge. Non-compliance was made the norm. The following two realities emerged from the previous ICJ decisions and the domestic decisions across countries -

1. That compliance to ICJ has not been secured by-default. The obligation to comply has, time and again, across jurisdictions, been made incumbent upon the stipulations of the domestic legal frameworks.
2. That the substantial right to notification of arrest and consular access has been established, crystallized, and reiterated by the ICJ.

Landmark Decisions at the International Court of Justice The ICJ first dealt with Article 36 during the 1979 Iran Hostage Crisis. The United States sued Iran after militants seized the U.S. Embassy in Tehran. The ICJ ruled that Iran directly violated Article 36 by failing to protect U.S. diplomatic staff and cutting off their communication. The court ordered Iran to immediately release the hostages and pay reparations, setting an early precedent that VCCR protections must be upheld even during intense geopolitical crises. Two decades later, the ICJ faced a series of cases where the United States was the defendant. In the **Breard case (1998)**, Paraguay sued the U.S. because a

Paraguayan citizen was sentenced to death without being told he could contact his consulate. The ICJ issued an emergency order to stop the execution while it reviewed the case, but U.S. authorities ignored the order and executed Breard anyway, arguing that local state laws took priority over international orders. Shortly after, Germany brought the **LaGrand case (2001)** against the U.S. after two German citizens were sentenced to death without consular notification. The ICJ ruled that failing to inform foreign detainees of their rights violates international law. Crucially, the court stated that Article 36 does create individual rights for the arrested person, and that domestic courts must find a way to review and reconsider convictions when these rights are violated. The definitive ICJ ruling came in the **Avena case (2004)**, where Mexico sued the U.S. on behalf of over fifty Mexican nationals on death row. The ICJ reaffirmed that local police have an absolute duty to provide consular information the moment they realize a detainee is a foreign national. It ruled that while countries can use their own legal procedures, those local rules cannot be used to completely block a foreign national from challenging a conviction based on a VCCR violation.

Domestic Courts: Reluctance and Rejection

Despite the ICJ's clear rulings, many domestic courts have resisted changing their laws. In the U.S. Supreme Court case **Medellín v. Texas (2008)**, the court ruled that ICJ decisions are not automatically binding inside the United States unless Congress passes a specific law to enforce them. The U.S. court used a legal concept called "procedural default," which means that if a defendant forgets to bring up their consular rights during their initial trial, they lose the right to bring it up later, even if the ICJ ordered a review. Frustrated by these constraints, the U.S. eventually withdrew from the VCCR's Optional Protocol, meaning it no longer recognizes the ICJ's mandatory jurisdiction over these specific disputes. Australia and the United Kingdom have followed a very similar path of resistance. In the Australian case **La Bara (2008)**, an Indonesian citizen argued his detention broke VCCR rules. The Australian court rejected this, declaring that unless the national parliament explicitly writes a

treaty into domestic law, the treaty cannot be enforced by local judges. Similarly, English courts in cases like *Abbasi* have stated that the VCCR operates strictly as a contract between governments and does not give everyday citizens individual legal rights that can be used in a UK courtroom. Canada has taken a slightly mixed but ultimately restrictive approach. In cases like **R. v. Partak** and **R. v. Van Bergen**, Canadian courts acknowledged that police are supposed to give consular notifications. However, they concluded that a failure to do so does not automatically ruin a trial. Unless a foreign citizen can prove that the lack of consular help caused them severe, unfair prejudice during their arrest, Canadian courts treat the mistake as a minor oversight rather than a constitutional crisis. China's approach leans heavily on state sovereignty and government discretion. While Chinese regulations state that foreign detainees should be handled in accordance with the VCCR, actual compliance has been inconsistent. For example, in the high-profile case of Huseyin Celil, a Canadian citizen detained in China, authorities blocked Canadian diplomats from visiting him for months. China argues that local administrative rules take precedence and has never subjected itself to an ICJ ruling regarding Article 36.

Germany: The Exception to the Rule

Germany stands out as the primary example of a nation willing to harmonize its domestic courts with international tribunals. In 2006, the German Federal Constitutional Court reviewed a case involving a Turkish citizen who had not received consular notice. The court ruled that Germany has a clear constitutional duty to follow the treaty interpretations laid out by competent international courts like the ICJ. The German legal system treats the VCCR as directly enforceable federal law. German courts believe that keeping their legal system isolated does not truly protect national sovereignty and that respecting global rules prevents international backlash. Because of its integration into the European Union, Germany's legal culture is much more comfortable deferring to supranational court judgments than its global peers.

State consent as the hallmark of international law - States remain reluctant to comply with the decisions rendered by the ICJ. This has been the state of affairs, despite the fact that the body of law enforced by the ICJ is supposedly a body of law which has been accepted, endorsed, ratified, and followed habitually by the state-parties. International law, by its very nature, is not meant to be an imposition of the collective will of nations. The implementation and enforcement of the international treaties and/or conventions, often having much global appeal and clothed in cosmopolitan packaging, are subjected to something called “*reservations*” made by the individual states. The effect of expressing reservations is rather simple: when the conventions/treaties are enforced, they would apply only to the extent agreed upon and consented to by the states. All provisions of the supposedly global document will not apply. Thus, there is conditional, partial acceptance of the terms, conditions, obligations, and liabilities set out in the treaty.

Substantial questions for determination - The fact that consular access for a detainee and the right of notification of arrest are rights in international law have been well-settled by the ICJ by now. Although domestic jurisdictions have refused to give effect to the ICJ orders, the normative right does exist in theory. However, the *Jadhav* dispute is unique and dynamic in comparison to the previous disputes on Article 36 of the VCCR. The *Jadhav* dispute is different in facts too. Afterall, this is a dispute involving not just any ordinary person accused of a crime. But rather, it is the **military trial** of a **purported spy**. These two factors - a military trial and espionage accusations - open the floodgates of legal questions which were never part of any previous ICJ case on VCCR. The question that falls for determination is thus: do Article 36 VCCR stipulations even apply to *prima facie* cases of espionage? Or did the treaty intend to exempt espionage cases by carving out them from its scope and purview? The commentary and preparatory stage of the treaty remains important. If one peruses the same, it emerges that there is no straight-forward answer. The question was left unaddressed, unanswered—raised but not settled. The Court in this case needs to do the unfinished task.

Of utmost importance, however, remains the concept of **customary international law**. In the many sources of international law, this is the most dynamic, unique, and unconventional. It is state practice coupled with the intention to make such practice legally binding. If a customary exemption of espionage cases from consular access and notification is proven to have persisted, then the same would prevail over the treaty obligations—for the VCCR preamble explicitly states that *"rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention."*

Customary international law is vital in the *Jadhav* case because it represents the real-world conflict between **national security** and **treaty rules**. It allows delegates to debate whether centuries of unwritten state secrecy regarding spies can override a modern, written promise to protect human rights.

Pakistani Military Law regime – The possibility of review and reconsideration of cases within the framework of Pakistani military court regime is to be explored. The same involves scrutiny into legal decisions from Pakistan which shed light upon the military courts and their compliance with rule of law, civil liberties, et cetera.



Above: West German Chancellor Willy Brandt (left) walking alongside his trusted personal aide Gunter (right). In 1956, Gunter fled East Germany with his family. He joined the West German Social Democratic Party. Over the course of the next 1.5 decades, he climbed up the political ladder. In 1970, he secured a job within the West German Federal Chancellery. In 1972, he was promoted to personal assistant to Chancellor Willy Brandt. Then, in 1974, the shocking discovery shattered the West German nation: the Chancellor's aide was, all the while, an East German spy. The government had to resign. Gunter was sentenced to treason. Interestingly, both East and West Germany had ratified the VCCR. This begs the question: What happened of consular access?

Incidents of high-profile espionage such as the above have produced an interesting body of legal literature. To access the same, however, is difficult and, at times, not possible for a layperson or amateur researcher. By supplementing one's research with unconventional cases, one can certainly stand out in the committee.

Bibliography

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2. Denza E. The Law of Consular Access: A Documentary Guide by John Quigley, William J Aceves and S Adele Shank [Routledge Research in International Law 2009, vii+303 pp, ISBN 978-0-415-48327-1 (hbk) £80.00]. International and Comparative Law Quarterly. 2010;59(4):1173-1175. doi:10.1017/S0020589310000527

Further readings . . .

Please find attached the Google Drive link below, containing the materials cited in the bibliography along with other materials.

Google Drive Link: [Materials for ICJ, Legatio'26](#)

The attached materials are not exhaustive. This guide and materials referred to herein are only to provide a reference point. Delegates are expected to tread beyond what has been furnished here.

Happy researching!
