



THE POLITICAL TENSION SUBVERTING RULE OF INTERNATIONAL LAW: ANALYZING *KULBHUSHANJADHAV'S* CASE

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*"...the International Court rose to the occasion and did what it could in such short notice. We have saved a person from the gallows. This will prove to be a very important case for the jurisprudence of human rights."*¹

Justice Dalveer Bhandari

The quote underlines the opinion of International Court of Justice, Judge Dalveer Bhandari on Kulbhushan Jadhav's case after granting interim order of stay on execution. The dramatic secret incidents and unexpected political events that took place during Kulbhushan's case go beyond the fictitious story like Agents of Innocence. The case is not first of its sort; there is a long history of accusations and convictions (with/without evidence) of Indian nationals by Pakistan on the charge of spying and espionage. From Kashmir Singh to well known Sarbjit Singh and present Kulbhushan Jadhav, there are numerous incidents of such deliberate allegations backed with political propaganda.

The case stands one more example in the course of tense bilateral Indo-Pak relations. India's resort to international law process and Pakistan's propaganda of holding an Indian as spy or terrorist and thereby spreading enmity can be observed from unpredictable and opaque events taking place in Kulbhushan's case. Secret trial and conviction of Kulbhushan amounted to gross violation of International Law provisions.²

In response to Pakistan's arbitrary conviction the Indian government responded heavily warning not to execute Kulbhushan as it will be held 'pre-mediated murder' devoid of rule of law and natural justice. The Indian national Kulbhushan is retired Naval officer thus, now he is an ordinary civilian. Trying a civilian in Martial Courts raises substantive questions on 'intention' and 'procedural validity' of the entire trial conducted by Pakistan. If one Dissects and understands the problem thoroughly, analyses its myriad angles the solution lies within the problem. With this approach, to resolve such complex and sensitive politico-legal issue, India approached the World Court challenging the trial conducted and conviction of Kulbhushan. Pakistan questioned the jurisdiction of ICJ by taking the defence of bilateral agreement concluded in 2008. ICJ recognised the merits of the case and having jurisdiction³ under Optional Protocol to Vienna Convention concerning Compulsory Settlement of Disputes as well as jurisdiction to try contentious cases between states. India invoked jurisdiction under Article 36(1) of Convention.

India internationalised the issue by its actions; the boycott of SAARC summit hosted by Islamabad, postponing maritime talk, approaching International Court of Justice and

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¹Ritu Sarin, "Flew from all over, saved man from gallows: Justice Bhandari" *The Indian Express*, May 19, 2017.

²Vienna Convention on Consular Relations, 1963.

³See, art. 93 of the UN Charter; art. 36 (1) of Vienna Convention on Consular Relations; art. 73 and art. 74 of Rules of Court Procedures ICJ, 1978; art. I of Optional Protocol to Vienna Convention.

diplomatically isolating Pakistan on the point of its linkages to terrorism. The experts of international relations-diplomacy have opined that India need not undertake hastily any negotiations unless availing other lawful recourses. Thus, decision of Indian government resorting to procedure of ICJ proved favourable till date. Still the recourse of approaching UN General Assembly to create International pressure on Pakistan is open for India.

The case of Kulbhushan is not only unique for India but it is unique for International Law as well, reason being that this case questions the effective implementation and binding nature of International Law. Nevertheless jurisdiction of ICJ and its interim order to stay execution of Kulbhushan till the final judgment stands high on the foundation of judicial precedents⁴ and provisions of International Law.

The prospective consequences of this case are: it will highlight declining democracy in Pakistan, opaqueness of legal procedures conducted by Martial Court of Pakistan in absence of strong evidence, violation of International Law and human rights and lack of shared trust between two countries. There are still many unanswered questions like, why Pakistan is not revealing evidences to substantiate and prove its allegations? Whether mere facts (corroborated), narration of story and doubtful confession be held valid to award highest punishment-capital sentence? Whether trying civilian in secret trial by martial court is in line with due process? What should be the underlying principle of criminal law dealing with spying and espionage? What are the far reaching consequences of this case on bilateral relations? How India is going to frame its prospective legal policy on such matters? Whether International Law will be efficacious to resolve case on merit and implement its decision?

The author appeals to the Pakistani scholars and leaders to mind that conviction without conclusive proof and on the basis of mere doubtful/forced confession will undermine rule of law. Moreover, arbitrary execution of Kulbhushan will mark the collapse of justice oriented democracy in Pakistan. Also, they should understand basic difference between spying as a 'peace time' and terrorism as 'a war time' crime. Even if Pakistan considers Kulbhushan a spy, the treatment given to him like terrorist amounts to gross subversion of established international norms and violation of Kulbhushan's human rights. Pakistan must defer from such deliberate unlawful moves and considering that it stands among top countries⁵ in execution across the world, it must note that, "The death penalty, in and of itself, now likely constitutes a legally prohibited cruel and unusual punishment".⁶

Moreover, it is an opportunity for the World Court to ensure effective implementation of International Law and uphold sacred human rights and state's legal rights. Tracing the Kashmir Singh case of 1970s, the Indian accused of spying who was pardoned and released after long battle of 35 years; the author is hopeful that sooner or later, Kulbhushan may be released provided the due process is followed by both the sides. No doubt, the crucial debates triggered by this case will pave way for upcoming legal policies on alike sensitive issues.

⁴*James v. Trinidad and Tobago*, 2000; *LaGrand Case (Germany v. United States of America)*, ICJ, 2001; *Mexico v. United States* (ICJ), 2004.

⁵Amnesty International Report on Execution of Death Penalty, 2015.

⁶*Glossip et. al. v. Gross et al.*, Breyer J., 576 U. S. (2015).