

**NMMUN 2022**

**ICJ- BACKGROUND GUIDE**



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# *Letter from the Presidents*

Greetings Delegates,

Welcome to the New Millennium Model United Nations! We are the Presidents for the International Court of Justice, Akshat Pradeep Kumar & Hetvi Anand Shah. We hope we will deliver to you an interesting and fulfilling experience through our simulation of the ICJ- an experience you'll never forget...for the good, hopefully, not the worse :)

The ICJ simulations in MUNs are unique- they are usually the most valuable councils when it comes to learning how to construct an argument and defend it diplomatically. While other forms of debate may seem derivative, the ICJ asks delegates to think critically through its allocations. The advocates must work as a team to put forward an ironed-out argument with no loopholes- a gargantuan task, while the judges must consider all arguments and deliver a verdict on the issue, keeping in mind the mandate of the ICJ.

The ICJ is widely considered the apex court internationally- beyond just civil and criminal cases, the ICJ is expected to serve as a mediator between countries as a whole. It asks a lot of delegates and expects only the best arguments to be put forward and deliberated. This is why we've picked you, delegates, and we look forward to your remarkable and creative ways to approach this demanding case.

Delegates, we have carefully compiled this study guide with the valuable contribution and efforts of your chairs, and they've tried to cover every part of the agenda briefly. But this study guide is just an overview of the agenda. We hope you'll do research besides this study guide and try to find every aspect of the agenda and help your allocations serve their fullest potential to the committee.

Wishing you the very best,

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## ***Disclaimer***

For the purposes of NMMUN, all evidence presented must have been discovered and discussed prior to 17th July 2019. The ICJ also requires every state to submit a declaration detailing the jurisdiction of the rulings of the ICJ in their countries. Under these declarations, neither Pakistan nor India would be able to bring a case such as Jadhav's (innocence or validity of the case) to the Court. Due to the nature of the case, however, the court will rule and act through provisional measures- to prevent any immediate threat and damage to the parties. Therefore, keeping in mind the urgency of this matter, and for the educational purposes of this simulation of the ICJ, we will be considering the verdicts of the ICJ on both:

1. The validity of India's plea, and the nature of this case at the ICJ (The legality of the capture and sentencing of Khulbushan Sudhir Jadhav)
2. The innocence of Jadhav and to ensure him a free and fair trial

## ***Introduction of ICJ***

The main court of the United Nations is the International Court of Justice (ICJ) (UN). The United Nations Charter established it in June 1945, and it officially got going in April 1946. The Peace Palace in The Hague serves as the Court's location (Netherlands). It is the only one of the UN's six main bodies that is not located in New York (United States of America). The Court's duties include providing advisory opinions on legal issues that have been brought to it by recognized United Nations institutions and specialized agencies as well as resolving legal disputes that States have presented to it in conformity with international law. 15 judges make up the court, and they are chosen to serve nine-year terms.

## ***History of ICJ***

The development of techniques for the peaceful resolution of international disputes, which have their roots in classical times, culminated in the founding of the Court.

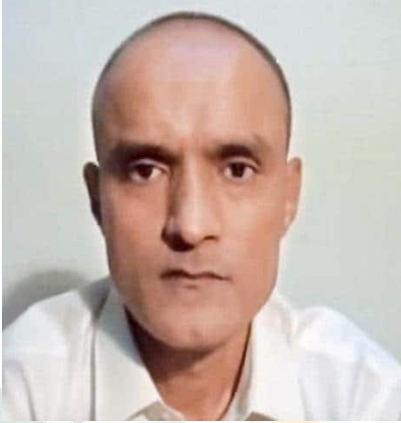
Negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, and good offices are all means for the peaceful resolution of conflicts between States that are listed in Article 33 of the United Nations Charter. Some of these techniques call for the assistance of outside parties. For instance, mediation gives the parties to a disagreement the opportunity to resolve it on their own through the help of a neutral third party

## ***Mandate of the ICJ***

The ICJ strives for a just society governed by the rule of law where all people can equally enjoy their human rights. Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.



## ***Who was Khulbushan Sudhir Jhadav?***



Jadhav was born to a Marathi family in Sangli, Maharashtra, on 16 April 1970 to Sudhir and Avanti Jadhav. His father is a retired Mumbai Police officer. Jadhav is married and has two children. His family resides in Powai, Mumbai.

Kulbhushan Jadhav is an Indian national who is on the death row in Pakistan.

The Indian Government states that Khulbushan Sudhir Jadhav is a free Indian citizen who served in the naval army but retired prematurely.

The Pakistani Government states that Khulbushan Sudhir Jadhav is a serving officer in the Indian Navy who was involved in subversive activities in Pakistan, and was arrested on March 3rd, 2016, during a counter intelligence program in Balochistan.

A video, allegedly stated as a 'confession video' by Pakistan, consisted of Jadhav himself claiming that he is a current serving officer and was in Pakistan to indulge in subversive activities on behalf of India. This video became the basis and reason for arrest by Pakistan. Although arrested on 3rd March, 2017, the Indian government was informed about his arrest after 22 full days. The Indian side argues that Pakistan breached the Vienna Convention on Consular Relations by denying them consular access in Pakistan during the course of his arrest. They also state that Jadhav was denied his rights of being informed of the arrest as he was 'abducted' and hence Pakistan violated Jadhav's rights as well. While Pakistan claims the opposite. They state that the arrest is justified as Jadhav was 'involved in subversive activities and terrorism' in Pakistan on behalf of India.

The execution was stayed by Pakistan after India filed an appeal against the judgment at the International Court of Justice (ICJ) on May 18, 2017.

## ***Pakistani Argument***

Pakistan claimed that Jadhav unlawfully entered Pakistani territory in Balochistan, close to the Iranian-Pakistani border, and was engaging in espionage and terrorist activities on behalf of India.

Pakistan said Jadhav had a passport carrying the name "Hussein Mubarak Patel" issued by India, however India refuted this assertion.

Pakistan also published a video in which Jadhav appeared to admit to taking part in terrorist and espionage activities in Pakistan at the direction of India's foreign intelligence service, "Research and Analysis Wing," in support of its claims (known as RAW).

While Pakistan claims it was eager to grant India consular access, India claims it submitted numerous applications to grant Khulbhushan Jadhav access, all of which were rejected. Many said that this instance was unique and distinct from other cases when asked why access was refused. Because the case involved a terrorist rather than a regular arrest, specific considerations had to be addressed. One of the main causes of the conflict between India and Pakistan became this problem.

Pakistanis tried Jadhav in a military court behind closed doors instead of a civil court which furthermore instigated Indians to provide a free and fair trial for Jadhav. It is claimed that they held it in a military court due to lack of credible evidence.

Besides Pakistan claims that nothing that they did breached the Vienna Convention.

On the matter of not providing consular access, Pakistan claims that they did provide conditional consular access on the acceptance of the fact that Khulbhushan Jadhav was a spy sent by India, but this was unacceptable for India.

On 2 January 2017, the Adviser to the Prime Minister of Pakistan on Foreign Affairs sent a letter to the Secretary-General of the United Nations informing him of Mr. Jadhav's arrest and confession, which, in his view, confirmed India's involvement in activities aimed at "destabilizing Pakistan".

India has not provided the Court with Jadhav's "actual passport in his real name", Pakistan appears to suggest that India has failed to prove Mr. Jadhav's nationality.

This argument is relevant to the claims based on Article 36 of the Vienna Convention in relation to Mr. Jadhav, and therefore, must be addressed at this stage.

Pakistan claimed that they had already informed the International Court of Justice that they would not take any matter of national security to an international forum.

Pakistan stated that it didn't make sense why India, which was so keen on getting consular access, waited for a whole year before approaching the court when it was Pakistan itself who approached the Indian embassy informing them of Khulbhushan Sudhir Jadhav and his passport in Pakistan. The Indian embassy claimed that they had no idea of the person as such. But it was then when Pakistan had a press conference with the ambassador and a few others at Islamabad, that India finally started requesting for consular access.

Pakistan also claimed that although India stated that Sudhir Jadhav was abducted from the border of Iran, no alleged reports prove or support the same.

As previously mentioned, Pakistan's second and third reasons in support of its second objection to the application's admission are based on a number of claimed violations of India's commitments under Security Council resolution 1373.

Pakistan refers to India's failure to respond to Pakistan's request for mutual legal assistance with its criminal investigations into Mr. Jadhav's espionage and terrorism activities, as well as the issuance of what Pakistan describes as a "false cover name authentic passport".



The Court observes that Pakistan seems to argue that India cannot request consular assistance with respect to Mr. Jadhav, while at the same time it has violated other obligations under international law as a result of the above-mentioned acts.

Pakistan has not explicitly articulated the connection between allegations and the rights invoked by India on the merits.

Pakistan claims that India has refused to help with the inquiry into Mr. Jadhav's actions, that it gave him a "fake cover identity authentic passport," and, more broadly, that it is to blame for Mr. Jadhav's espionage and terrorist activities in Pakistan.

### ***What arguments does Pakistan have to dismiss the case?***

Following the bilateral treaty of 2008 that India and Pakistan both agreed on, it clearly states provisions under which consular access can be provided to the citizens of either countries if they are taken into custody. India states that it made at least 16 applications to provide consular access to Khulbhushan Jadhav and all of them were denied while Pakistan states that it was willing to give consular access to India. To questions raised on why the access was denied, many stated that this case was a different circumstance unlike regular cases. The case was no an ordinary arrest case but it was regarding a terrorist and hence special considerations had to be made. This issue became one of the most important bases of the conflict between India and Pakistan.

Pakistan argued that India was claiming rights for Jadhav under the VCCR while, at the same time, providing him with false travel documents to engage in international terrorism in Pakistan. Pakistan claimed that India had abused its rights by disobeying UN Security Council Resolution 1373 (2001), which was adopted in accordance with Chapter VII of the United Nations Charter and required states to provide one another with the maximum amount of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts.

## ***Indian Argument***

Jadhav, a retired Navy officer, was purportedly arrested on March 3, 2016, and India was notified on March 25. In April 2017, he was sentenced to die on espionage and terrorist charge. According to the Pakistani government, Jadhav was arrested on March 3, 2016 in Balochistan, Mashkel, near the Chaman border area. He was arrested during a counterintelligence operation conducted by security forces. India denied the allegations and said he was abducted from Iran.

Jadhav's conviction was confirmed by the General. The Field General Court Marshalls (FGCM) convicted him of "all charges," according to the military's media arm, Inter Service Public Relations (ISPR).

The ISPR statement also said the defendant was provided with legal counsel in accordance with court proceedings. However, no specific allegations were made public.

Lawyers familiar with the Army Law process said the defendants had very limited right of appeal. They said defendants cannot challenge the charges and that only jurisdiction exists. Appeals are also heard by military officials, but at a higher rank. However, the army chief, General Bajwa, has already upheld the verdict, so there is little chance of Mr Jadhav receiving a bailout.

Following Mr Jadhav's arrest, Pakistan launched a heavy diplomatic effort to prepare a document for the United Nations alleging that India was trying to instigate riots in Balochistan. Pakistan has previously accused India of inciting unrest in Balochistan and Karachi, but this is the first time it has claimed the arrest of a RAW officer. India disputed Pakistan's assertion that it had detained a serving navy officer in Balochistan for "subversive actions".

Mr. Yadav entered Pakistan illegally via the border with Iran, according to Pakistani intelligence sources. While official sources stated they had no information on why he would have crossed

from Iran, they did say he was thought to be privately engaged with a construction project tied to Iran's Chabahar port. The arrest was reported on the same day that Iranian President Rouhani arrived in Pakistan on a bilateral visit.

"The abovementioned individual has had no contact with the Government since his early retirement from the Indian Navy," the MEA stated, adding that India has now requested consular access to him. The administration also refuted Pakistan's accusation that the former officer was spying, claiming "India has no intention of intervening in the internal affairs of any nation and feels that a stable and peaceful Pakistan is in the best interests of everyone in the region."

According to papers given by Pakistani military intelligence sources, the imprisoned individual identified himself as Kulbhushan Yadav, a former naval captain who, Pakistan believes, was transferred to Iran on assignment to the government's Research and Analysis Wing. A passport (No. L9630722) allegedly belonging to the arrested individual listed his assumed identity as 'Hussein Mubarak Patel,' born in Sangli, Maharashtra, and residing in Powai, as well as a valid Iranian visa in his name.

Former Pakistani Army Secretary Raheel Sharif also met with Iranian President Hassan Rouhani during a visit to Pakistan last year and expressed concern that RAW was using Iranian soil to cause unrest in Baltistan. , asked the Iranian soil president to urge India to stop this activity. Tehran agreed to allay Pakistani concerns.

India first appealed to the International Court of Justice (ICJ) on 8 May 2017, alleging that Pakistan had committed a "flag violation" of the provisions of the 1963 Vienna Convention on Consular Relations. India claimed that it was only informed that Mr. Jadhav had been in custody since his arrest and that Pakistan had not been informed of his rights. India also claimed to have learned of Jadhav's death sentence from a press release.

India called for a postponement of the execution, citing the extreme seriousness and imminent threat of the Pakistani authorities to execute an Indian citizen. This brings us to today, 8th May, 2017, India approaches the International Court of Justice at The Hague against Pakistan military courts decision.

Since then, other notable news involves a confession video made by Jadhav. A forensic study of the footage by India's security services suggests that the 'spy tape' has been substantially manipulated, with audio spliced in numerous spots. The study suggests that Kulbhushan's facial expressions do not always match what is being spoken in the voice over.

According to India, the conviction was based on a coerced confession. The Indian government has questioned Pakistani military tribunals, citing international bodies such as the European Parliament and the International Justice Commission, alleging that due process has not been followed. India argued that the Vienna Convention granting consular access cannot be selectively granted and that the International Court of Justice should declare it a "human right". India mainly argued that:

**1. The judgment violates international law and the terms of the Vienna Convention.**

**India has the right to restitution (restore to its original state).**

- a. The Indian argument claims that sections 14(1) of ICCPR, Article 36 (1) [a,b] Vienna Convention on Consular Rights have been violated by Pakistan.
- b. The previous precedent had been set on this very matter by ICJ in the LaGrand case (Germany v USA.), 2001 that rights under the Vienna Convention cannot be denied at the cost of domestic legal procedures of a particular nation.
- c. The case brought before the ICJ by India concerns an alleged infringement of the Vienna Convention on Consular Relations of 1963. (VCCR). The VCCR provides States with some reciprocal rights and duties in terms of consular relations. A consul is a member of a state's diplomatic mission in another state. In addition to



developing economic and commercial links between the two nations, consular officers seek to safeguard their country's interests in the host country, particularly with regard to their nationals who are present there. Article 36(1) of the VCCR provides consular personnel the "right to visit a citizen of the sending State who is in jail, custody, or detention, chat and write with him, and arrange for his release."

- d. This is the condition that India claims Pakistan violated by denying consular personnel access to Kulbushan Jadhav. This means that the ICJ case isn't about Jadhav's innocence or guilt; the ICJ has indicated that it isn't a Criminal Appellate Court (Paraguay v USA), but rather about whether India has a right under the VCCR and if Pakistan violated it. It is vital to note that the ICJ cannot, under any circumstances, order Jadhav's release, regardless of what India may have requested in its application to initiate proceedings before the Court.

## **2. The International Court of Justice should reverse court-martial decisions and prevent Pakistan from enforcing its sentences or convictions.**

- a. It is unknown if his case was free and fair, there was a 22-day delay between his arrest and the communication of the same to the Indian consulate, and the consulate was not given access to Jadhav; the doctrine of due process violated.

## **3. Indo-Pak Composite Dialogue in 2008**

- a. The situation is far from easy, as various complicating issues emerge. The most notable is that, as part of the Indo-Pak Composite Dialogue in 2008, both nations signed a Bilateral Agreement on Consular Access. The agreement aims to "advance the purpose of humane treatment of nationals of either country..." and includes tangible methods for India and Pakistan to notify each other when its people are arrested and give consular access within three months. Over the last decade, both countries have depended on the 2008 Agreement to exchange lists of people detained or imprisoned in each other's country



- b. Over the last decade, both countries have depended on the 2008 Agreement to exchange lists of people detained or imprisoned in each other's country. It is especially important in the situation of fishermen who accidentally invade each other's territorial seas. In reality, an India-Pakistan Joint Judicial Committee on Detainees, created in January 2008, has employed the processes outlined in the 2008 Agreement on many occasions to secure the exchange of prisoners, consular access, and humane treatment. The Agreement has also been reaffirmed several times through joint comments issued by authorities from both nations. On September 8, 2012, the Indian Minister of External Affairs, Mr. S.M. Krishna, and Pakistan's Foreign Minister, Hina Rabbani Khar, issued a joint statement.
- c. However, it should be noted that this agreement is not registered with the United Nations. According to Article 102 of the UN Charter, "no party to any such treaty or international agreement that has not been registered... may invoke that treaty or agreement before any institution of the United Nations." The International Court of Justice (ICJ) is a United Nations agency.

### ***What does India demand of Pakistan through this case?***

#### **1. Temporary measures**

India has demanded urgent temporary remedies to halt Jadhav's execution till the issue is resolved by the Court. It will have to prove the case's urgency for this. In the Avena Case, Mexico sought temporary restraining orders to prevent the execution of 54 Mexican nationals on death row in the United States. The International Court of Justice only granted interim measures to three of these defendants since their execution was set within six months. Because the internal processes in the Jadhav case have not yet concluded, India may find it difficult to establish genuine urgency in the matter.

- 2. Final Decision- India has sought four types of remedies from the Court in its plea to start proceedings.

- a. First, the accused's sentence should be suspended immediately.
- b. Second, a statement that the military court's sentence violates international law and the provisions of the VCCR.
- c. Third, prevent Pakistan from carrying out the punishment and order it to reverse its judgment.
- d. Fourth, if Pakistan is unable to vacate the decision, the Court will deem the judgment to be in breach of international law and order Jadhav's release.

## ***Questions to Consider and to Guide your Research***

1. How did the Indian consulate respond so quickly to the arrest after public notification? Is it possible they had some degree of information prior to public notification?
2. If the passport is found to be somehow genuine, how can the Indian government justify its actions?
3. Why is India distancing itself from the Indo-Pak Composite Dialogue in 2008? If this agreement is registered over the duration of the case, then India will not have any way of maintaining or arguing for consular access. Does this imply that Jadhav is a known spy, allied with the government?
4. A video confession released by the Pakistani government involves Jadhav stating that he is part of RAW. How can India counteract this in a meaningful way?
5. If Pakistan has a real confession from an Indian agent, why has only a substantially modified version of the film been released rather than the original tape? Is an attempt being made to portray Yadav as saying something he never said?
6. What proof does Pakistan have that ensures us that the confession video was not forced but was of Jadhav's own will?
7. Why was India denied the right to provide consular access in Pakistan even though it meant violating the 36th article of the VCCR?
8. What explains the fact that India was informed about the arrest after 22 full days?

9. India states that Jadhav worked in Iran, which means one of two things- Either they entered Iran and captured him or they captured him in Pakistan. What locational proof does Pakistan have that states their basis of arrest was correct?

## ***Sample Moderated Caucus Topics***

1. Does Pakistan have the jurisdiction to bypass VCCR?
2. Is Pakistan's choice to settle the case in its military court justified?
3. On what grounds does Pakistan claim that Sudhir Jadhav is a terrorist indulging in subversive activities?

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