
INTERNATIONAL COURT OF JUSTICE AS VIABLE RECOURSE TO THE SIR CREEK DISPUTE BETWEEN INDIA AND PAKISTAN

Nysha Nathan, School of Law, Christ (Deemed to be) University

ABSTRACT

The Sir Creek dispute between India and Pakistan, initially a territorial dispute, has evolved into a complex problem encompassing maritime boundaries, historical claims, and humanitarian concerns. This paper advocates for the International Court of Justice (ICJ) as a viable means of resolving this protracted dispute. It highlights the historical roots of the conflict, the limitations of previous negotiations, and the humanitarian issues faced by civilian fishermen belonging to both nations. Drawing from international

Background

Sir Creek is a 96-kilometre-long tidal estuary flowing into the Arabian Sea that separates the Sindh province of Pakistan from the state of Gujarat in India. Originally known as Ban Ganga, it was renamed after a representative of the British Raj.¹ The bone of contention between India and Pakistan lies in interpreting the maritime boundary line separating the two nations.

Nestled in the marshlands of the Rann of Kutch in Gujarat, the creek is considered to be among the largest fishing grounds in Asia.² The area is of immense strategic and economic importance owing to the untapped potential of petroleum, minerals, oil, gas, and plant life, all pending exploration due to a dispute over its boundaries. Acquiring ownership over the creek would grant a nation control over the Territorial Sea, Exclusive Economic Zone, and Continental Shelf necessary to access these valuable resources. Furthermore, this region holds immense ecological significance, as noted by the late Indian ornithologist Salim Ali in 1973.³

The enduring dispute over the creek predates the independence and subsequent partition of India and Pakistan. Pursuant to letter no. 5543 dated September 20, 1913, from the Government of Bombay to the then British Government of India, the compromise of 1914 titled Resolution 1192 was brokered by the Government of Bombay. What was an interstate subject under British rule, became an international boundary issue between India and Pakistan⁴. An arbitration resulted in the construction of 140 pillars between 1923-24. A dissonance arose with respect to paragraphs 9 and 10 of letter no. 5543 incorporated into the text of the 1914 Resolution and the annexed map - Pakistan argued that the interstate boundary between Kutch and Sind lies on the eastern bank of

¹ Maninder Dabas, *Everything You Need To Know About The Dispute Over Sir Creek Between India And Pakistan*, INDIA TIMES (August 16, 2016, 5:06 PM), <https://www.indiatimes.com/news/everything-you-need-to-know-about-the-dispute-over-sir-creek-between-india-and-pakistan-260071.html>.

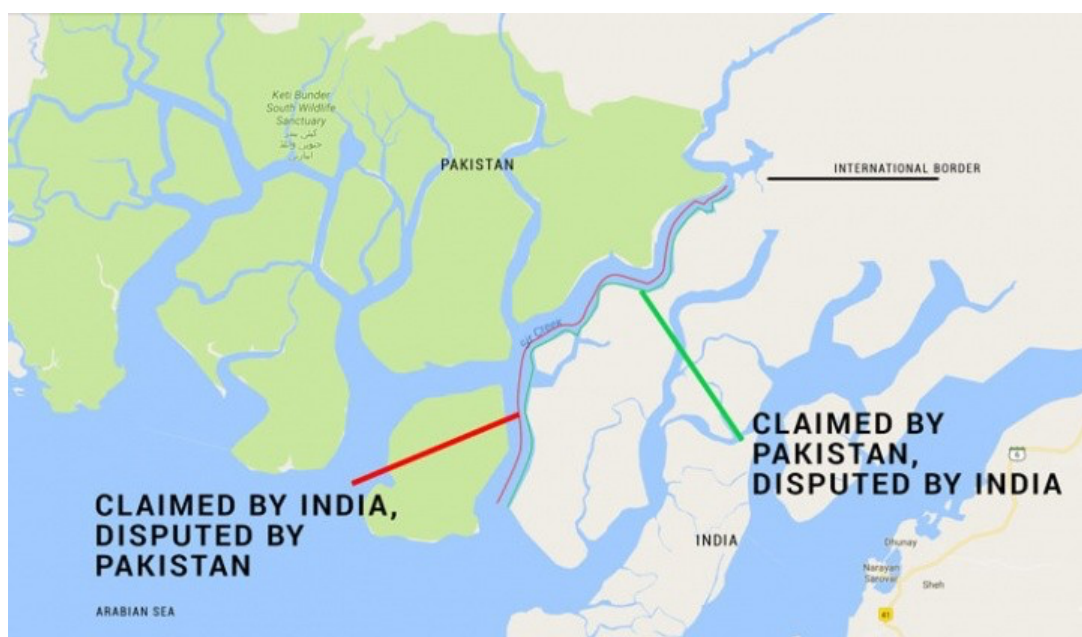
² K. R. Menon, *Maritime Confidence Building in South Asia*, Maritime Confidence Building in Regions of Tension, Stimson Center (Report) 75, 78-79 (1996).

³ Lavkumar Khacher, *The Birds of Gujarat: A Salim Ali Centenary Year Overview*, 93 *Journal of the Bombay Natural History Society* 331, 335-336 (1996).

⁴ Raghavendra Mishra, *The 'Sir Creek' Dispute: Contours, Implications and the Way Ahead*, *Strategic Analysis*, 184, 185-185 (2015).

Sir Creek, as depicted in the map, while India placed emphasis on paragraphs 9 and 10 of the text to assert that the thalweg (the centre) of Sir Creek is the actual boundary in the river.⁵

Further countering Pakistan’s claim that the boundary was permanently fixed by the 1914 Resolution, India argued that the green line mentioned in the 1914 Resolution Map was only meant for symbolic representation and the geographic changes have shifted the boundary westward. Finally, India cites Pakistan’s official note of May 19, 1958, wherein Pakistan conceded that the 1914 Resolution Map was intended to be no more than an annexure to the 1914 Resolution.⁶



Source: India Times, 2016.⁷

It has also been opined that Pakistan’s reliance on the map appended to the 1914 resolution is tenuous considering the ruling of the International Court of Justice (ICJ) in the year 2007 in the case involving Nicaragua and Honduras where the ICJ re-emphasised its earlier stand by stating that ‘maps can still have no greater legal value than that of corroborative evidence endorsing a

⁵ Sikander Ahmed Shah, *River Boundary Delimitation and the Resolution of the Sir Creek Dispute between Pakistan and India*, 34 Vermont Law Review 357, 359-360 (2009).

⁶ Raghavendra Mishra, *supra* note 4 at 2.

⁷ Maninder Dabas, *supra* note 1 at 2.

conclusion⁸. Arguably, Sir Creek does not meet the navigability criteria imperative for the application of the thalweg principle, as was asserted by Pakistan. The text of the Resolution nonetheless seems to define a mid-channel demarcation.

The dispute resurfaced in 1947 and negotiations continued until 1965. The Indo-Pakistani Western Boundary Case Tribunal in 1968 awarded Pakistan 10% of its claim to the Rann of Kutch while India was awarded 90% of the disputed Kutch. It is imperative to note that the award only partly provided resolution as neither nation contested certain portions of the boundary before the tribunal, namely the westernmost part of the boundary of the Rann of Kutch, which commenced from a point called “Western Terminus” to the head of Sir Creek further to the west as well as the demarcation of the boundary between the top of Sir Creek to its mouth at the Arabian Sea in the southwest⁹. This avoidance is deemed to have birthed the dispute as it stands - Pakistan claims that the Sind–Kutch boundary on the eastern bank of Sir Creek was delimited on the basis of the compromise of 1914 to which India argued that the thalweg or the centre was the proper boundary of Sir Creek.

While Pakistan has on myriad occasions expressed its willingness and proclivity towards third-party processes to resolve the dispute, India has declined the same citing the Shimla Agreement and the emphasis that it places on bilateral settlement¹⁰. Speaking on behalf of the Indian delegation, the Joint Secretary, handling Iran, Pakistan, and Afghanistan relations in the Foreign Office, Vivek Katju said, “There is no place at all for any third-party intervention in the Indo-Pakistani matters following the Simla accord.”¹¹ India’s reluctance toward third-party resolution and/or internationalising the conflict has also been deduced to be due to the Indian government having to overcome a no-confidence motion in Parliament after being criticised domestically for having agreed to an unwarranted dispute resolution mechanism that resulted in what was perceived as an acceptance of an unfavourable outcome.¹²

⁸ Raghavendra Mishra, *supra* note 4 at 2.

⁹ Sikander Ahmed Shah, *supra* note 5 at 3.

¹⁰ Raghavendra Mishra, *supra* note 4 at 2.

¹¹ ‘India-Pakistan Talks: Sir Creek’, Hindu, 7 November 1998.

¹² Mukund G. Untawale, *The Kutch-Sind Dispute: A Case Study in International Arbitration*, 23 INT’L & COMP. L.Q. 818, 824 (1974).

Additionally considering the fact that India has been awarded 90% of its claim to the Rann of Kutch, it has been asserted that India might be unwilling to re-negotiate so as to avoid endangering its advantageous position.¹³

Ongoing dissimilarities in viewpoints have failed to dissuade India and Pakistan from persevering in their endeavours to amicably resolve the dispute through a series of dialogues, however sporadically. Commencing in 1969, these bilateral discussions have seen the two nations engage in a dozen negotiations, yet the parties have not managed to arrive at a definitive resolution or mutual accord on the matter. This protracted issue once led to a resurgence of military tensions in 1999, triggered by a Pakistan Navy Maritime Patrol aircraft being shot down by an Indian MiG-21 fighter aircraft. Nevertheless, the escalation of hostilities was ultimately constrained through high-level diplomatic talks. Subsequently, the negotiations persisted in 2012, but the prevailing atmosphere was far from conducive to achieving a mutually acceptable settlement.¹⁴

While the Sir Creek dispute may ostensibly appear to be a mere disagreement over territory, it is a multifaceted dispute encompassing dimensions such as resources, socio-economic factors, and security,¹⁵ which collectively intensifies the gravity of the issue. It is imperative to underscore that the nations could acquire the resources present in the creek to enhance their respective national energy reserves. Furthermore, the lack of clarity regarding the maritime boundary line inflicts undue hardship on innocent fishermen who inadvertently cross into waters claimed by the opposing territory. This unintentional transgression results in violations of territorial sovereignty, leading to frequent arrests and the confiscation of boats and equipment by both the Pakistan Maritime Agency and the Indian Border Security Forces.

The injustice faced by thousands of civilian fishermen is exacerbated by the distressing conditions they are held captive in - they often find themselves incarcerated in dismal living conditions, enduring torture and even custodial killings; all while being denied consular assistance.

¹³ Sikander Ahmed Shah, *Sir Creek and its Legal and Political Significance and Resolution*, 1(1) *Polaris Journal of Maritime Research* 79, 87 (2019).

¹⁴ Cmde SL Deshmukh NM (Retd) and Dr R Srinivasan, *Maritime Boundaries and Sir Creek Dispute: Re-Appraising India's Options*, 2 *Electronic Journal of Social and Strategic Studies* 23, 34-35 (2021).

¹⁵ Raghavendra Mishra, *supra* note 4 at 2.

These individuals become victims of blatant violations of *jus cogens* norms, and their suffering is prolonged as they languish in detention for extended periods. Occasionally, a few prisoners are fortunate enough to secure their release and are exchanged between the two states after enduring protracted periods of confinement. However, these purported acts of goodwill are merely transactional in nature and lack genuine intentions of cooperation. Further regrettably, the boats and equipment belonging to the fishermen are seldom returned, exacerbating the socio-economic hardships faced by the fishermen and their families.¹⁶

The security aspect of this disputed territory demands close scrutiny, particularly in the light of occurrences in areas like the 'Harami Nala' and 'Bondho Dhoro,' renowned for their notoriety in terms of harbouring illicit activities such as infiltration, smuggling, human trafficking, and even potential terrorist activities.¹⁷ Thus, while the central focus of the dispute revolves around establishing a maritime boundary, the glaring and pervasive issues at play as aforementioned in these regions cannot be relegated to a secondary or subordinate status.

Introduction

The demarcation of a maritime boundary between Kutch and Sindh, or the lack thereof, has led to a certain dangerous ambiguity resulting in security concerns due to skirmishes in the said region, as well as grave violations of international human rights law due to the deplorable treatment of civilian fishermen. While the disputing nations agree to resolve the dispute, they have not in the past seven decades since their independence agreed on a method of resolution.

In this note, this author seeks to present the International Court of Justice as a viable forum for recourse to the Sir Creek dispute between India and Pakistan. The doctrinal method of legal research adopted called for an analysis of qualitative sources - primary sources such as judicial

¹⁶ Sikander Ahmed Shah, *supra* note 5 at 3; Press Trust of India, *Fisherman's Wife Raises Question Over Husband's Death in a Pakistani Jail*, NDTV (August 31, 2014, 10:42 PM), <https://www.ndtv.com/india-news/fishermans-wife-raises-question-over-husbands-death-in-a-pakistani-jail-657011>.

¹⁷ *What Is Harami Nala? A Border Region Between India And Pakistan*, THE FREE PRESS JOURNAL (August 12, 2023, 9:18 PM), <https://www.freepressjournal.in/india/what-is-harami-nala-a-border-region-between-india-and-pakistan>; Sujan R. Chinoy, *Spotlighting another border point, the 'rogue channel'*, THE HINDU, https://epaper.thehindu.com/ccidist-ws/th/th_delhi/issues/51645/OPS/GS4BOADC5.1+G0BBOB7FS.1.html.

decisions of tribunals constituted to adjudicate upon the matter as well as precedent of the ICJ where similar matters have in the past been adjudicated are consulted and discussed to further this author's assertion. India and Pakistan have on earlier occasions referred matters to the ICJ, thus in a way setting a precedent for themselves in seeking the aid of the World Court. Relevant facets of applicable customary international law and the United Nations Convention on the Law of the Sea (hereinafter referred to as 'UNCLOS') that may aid in resolving the dispute are discussed to further assert that the ICJ is the apt judicial authority to implement the same. The secondary sources consulted include scholarly work, particularly with respect to applicable international law as well as to explore various other suggestions made for the resolution of the dispute. A textual analysis of the said sources culminates in the conclusion that given the gravity and multifaceted nature of the dispute, the ICJ can be considered to be a desirable forum for resolution. This author shares the opinion that the Sir Creek dispute is a rather low-hanging fruit in the large gamut of India-Pakistan disputes. Its resolution, especially one that is definitive and enduring, can ameliorate and accelerate the resolution of larger, more intractable disputes such as that of the fabled valley of contention - Kashmir.¹⁸

Maritime Boundary Disputes - Customary International Law and the ICJ's Jurisprudence

The Sir Creek dispute, like several others¹⁹, is a river boundary dispute inextricably linked with the dispute relating to maritime boundary delimitation. Borrowing insights from the prevailing discourse and the multitude of scholars who advocate a similar viewpoint,²⁰ it is apparent that international law is unequivocally pertinent to the Sir Creek dispute and has the potential to significantly contribute to its eventual resolution. The purpose of this author's exposition herein is to succinctly encapsulate the propositions and elucidations put forth by the esteemed scholar Professor Sikander Ahmed Shah, who is renowned for his notable contributions in this domain.

¹⁸ Sikander Ahmed Shah, *supra* note 5 at 3.

¹⁹ Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.) 2007 I.C.J. 120; Arbitration, (Guy. v. Surin.), Hague Ct. Rep. 97 (Perm. Ct. Arb. 2007); Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.), 2002 I.C.J. 303.

²⁰ Raghavendra Mishra, *supra* note 4 at 2; Sikander Ahmed Shah, *supra* note 5 at 3; Cmde SL Deshmukh NM (Retd), et al., *supra* note 14 at 5.

Prof. Sikander Ahmed Shah places emphasis on the legal principles of *uti possidetis juris*, the *thalweg*, and the *medium filus aquae* doctrines for the delimitation of river boundaries.²¹ He discusses these principles in light of the phenomena of accretion and avulsion and their impact on river boundaries, all the while placing emphasis on the authority of a binding treaty between the concerned nations and, in fact, prefacing the discussion with the maxim of *lex specialis derogate generali*.

The term "medium filus aquae" is a Latin phrase that means the "middle thread of the water." In the context of international law and boundary delimitation, it refers to the principle that, in the absence of a specific agreement between nations, the midpoint or median line of a river is recognized as the international boundary, especially for non-navigable rivers. "Thalweg" refers to the channel used for navigation in international law. Thalweg demarcates navigable boundary rivers and is referred to as the "fairway," "midway," "main channel," or "middle of the stream."²²

Prof. Shah posits that there exist two distinct methodologies for the determination of boundaries, namely, the Thalweg principle and the median line approach, and the selection between these methods is contingent upon the river's primary functions, with a profound emphasis on achieving equity and parity among the riparian states involved. The Thalweg principle, as a boundary-determination approach, chiefly safeguards the navigational freedom of the riparian states and is discerned by identifying the most suitable channel for navigation. The decision on whether to employ the thalweg or median line delimitation hinges upon the dominant role of the river. The Thalweg method is generally favoured when navigation stands as the primary purpose, whereas the median line approach is more apt when the river serves alternative functions, such as fishing, or when it lacks navigability. In cases involving non-navigable rivers, it is commonplace to acknowledge the median line as the international boundary in the absence of a specific agreement between the nations in question. This practice is rooted in the "medium filus aquae" rule, grounded in both common and Roman law traditions.²³

²¹ Sikander Ahmed Shah, *supra* note 13 at 5.

²² Stephen Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford: Oxford University Press 2016).

²³ Sikander Ahmed Shah, *supra* note 5 at 3.

Prof. Shah extensively delves into the pertinent subject of the applicability of international law within the context of the Sir Creek dispute, a dispute that has witnessed the apprehending of fishermen hailing from both India and Pakistan, minor confrontations, and even full-scale conflicts erupting in the region. It is worth noting that the issue concerning the plight of the fishermen assumes a more prominent role in the subsequent sections of this paper. In an insightful analysis tracing back to the historical underpinnings of Resolution 1192, Prof. Shah undertakes a comprehensive evaluation of India and Pakistan's historical claims to Sir Creek. This assessment is conducted through the lens of the *uti possidetis juris* principle.

To enhance clarity, the principle of *uti possidetis* delineates the prioritisation of legal title over effective possession as the foundation of sovereignty.²⁴ This principle holds universal significance and is acknowledged in international agreements of a global nature. Colonial effectivities, on the other hand, pertains to the actions of administrative authorities serving as evidence for the practical exercise of territorial jurisdiction within a region during the colonial era.²⁵

Professor Shah's conclusions are unequivocal: Pakistan can assert its historical entitlement to the entirety of Sir Creek, rooted in the annals of history. This assertion is grounded in the presence of a green line that prominently features on the 1914 Resolution Map, a line that had received official endorsement from the Government of Bombay and the subsequent approval of the Government of India during the years 1913-1914.

In contradistinction, he opines that India's argument advocating for the thalweg or median line as the rightful delineation of Sir Creek's boundaries may be considered less robust. However, this assessment does not leave India without a compelling legal foundation. India can present a formidable argument that the boundary in question was inherently designed to accommodate fluctuations brought about by accretion. This argument aligns with the tenets of Resolution 1192 and corresponds with the original intent of the contracting state parties at the time of entering

²⁴ Frontier Dispute, *Burkina Faso v Mali*, Merits, Judgment, [1986] ICJ Rep 554, ICGJ 116 (ICJ 1987), 22nd December 1986, United Nations [UN]; International Court of Justice [ICJ].

²⁵ Malcom Shaw, *Maritime Delimitation: Principles of Maritime Delimitation*, Lecture Series: Boundary Delimitation, The Sir Robert Jennings Professor of International Law University of Leicester, 2015, https://legal.un.org/avl/lis/Shaw_BD.html.

into the agreement. In simpler terms, India can assert that the Sir Creek's river boundary, inherited by both nations through the principles of *uti possidetis* and colonial effectivités, was structured in a manner that allowed for adaptations necessitated by the process of accretion.²⁶

Prof. Shah deftly manoeuvres through the intricacies and inherent ambiguities associated with the prevailing geographical landscape of Sir Creek. His astute analysis centres around the potential assertions that can be advanced by both India and Pakistan, taking into account the principles of customary international law, established state practices, and the precedents set forth by the International Court of Justice (ICJ) in its interpretations of these norms. This insightful examination underscores the striking resemblance between the Sir Creek dispute and other contentious matters that have been previously presented before the ICJ. It underscores the justifiability of the ICJ's jurisdiction in addressing this matter, provided that both nations exhibit a requisite level of political commitment to elevate and ultimately amicably resolve the persisting dispute.²⁷

On December 13, 1999, the ICJ decided the Case Concerning Kasikili–Sedudu Island (Botswana v. Namibia)²⁸ wherein the confusion over the title to the island in the Chobe River stemmed from the definition of the phrase “main channel” agreed upon in the Anglo–German Treaty was resolved by the court in its ruling in favour of Botswana. Similar river boundary disputes have been resolved by the court in Frontier Dispute (Benin v. Niger)²⁹ wherein the Chamber upheld the principle of *uti possidetis juris*. The ICJ's jurisprudence extends to maritime boundary disputes such as Cameroon v. Niger³⁰ which determined that the Anglo–German agreement of 1913 effectively determined the river boundary and the Thalweg principle was applied. Fundamentally, when scrutinising the case studies of Guyana and Suriname³¹, as well as Benin and Niger, it becomes conspicuously clear that the determinations made in both instances were firmly grounded in well-established principles of customary international law.

²⁶ *Ibid.*

²⁷ *Id.*

²⁸ Kasikili/Sedudu Island, *Botswana v Namibia, Judgment*, Merits, [1999] ICJ Rep 1045, ICGJ 57 (ICJ 1999), 13th December 1999, International Court of Justice [ICJ].

²⁹ Frontier Dispute, *Benin v Niger, Judgment*, Merits, ICJ GL No 125, [2005] ICJ Rep 90, ICGJ 16 (ICJ 2005), 12th July 2005, International Court of Justice [ICJ].

³⁰ Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I. C. J. Reports p. 275, 1998.

³¹ Guyana v Suriname, Award, ICGJ 370 (PCA 2007), Permanent Court of Arbitration [PCA], 17th September 2007.

These principles notably encompassed the application of the thalweg principle and the jurisprudential rulings of the ICJ Chamber, while being firmly rooted in an exhaustive examination of historical records. In a parallel vein, the Sir Creek dispute presents a comparable scenario, as analogous records, comprising historical maps, charts, and correspondences, are readily available for examination. Notably, a comprehensive land and hydrographic survey were undertaken in 2007, and both sides have exchanged pertinent charts. In summary, it can be contended that the requisite elements for a favourable resolution are already in place concerning the Sir Creek dispute.³²

Both India and Pakistan are parties to the United Nations Convention on the Law of the Sea (UNCLOS) of 1982. Notably, India has demonstrated a proactive approach in addressing its maritime boundary concerns, notably with Sri Lanka and Bangladesh, by employing reconciliation and arbitration methods that align harmoniously with the fundamental principles enshrined within the UNCLOS. Applying a similar array of Confidence Building Measures (CBM) and by engaging in constructive dialogues between India and Pakistan, it becomes evident that there exists a viable pathway for the amelioration of the Sir Creek dispute.³³

Delivering Justice to the Civilian Fishermen

Sir Creek consistently garners international attention, primarily due to the recurring arrests of innocent fishermen. These fishermen often find themselves detained and their boats and belongings confiscated by both the Pakistan Maritime Agency and the Indian Border Security Forces, ostensibly for trespassing into the other's territory.³⁴ The inherent injustice in these situations stems from the dire circumstances of these impoverished fishermen, who possess no reasonable means to ascertain that they have strayed into foreign waters. This is especially problematic given that these arrests transpire in the vicinity of Sir Creek, an area bereft of any clearly defined territorial or maritime boundary demarcation.³⁵ Tragically, some of these detained

³² Aulia Humaira Jundi, *Sir Creek Issue between Pakistan and India*, International Islamic University Islamabad (2018), https://www.researchgate.net/publication/322251639_Sir_Creek_Issue_Between_Pakistan_And_India.

³³ Cmde SL Deshmukh NM (Retd), et al., *supra* note 14 at 5.

³⁴ *KARACHI: Permanent Solution to Fishermen's Detention Issue Stressed*, DAWN NEWS (October 21, 2008) <https://www.dawn.com/news/326245/karachi-permanent-solution-to-fishermen-s-detention-issue-stressed>.

³⁵ *Id.*

individuals have inexplicably disappeared while in custody, and there are grave suspicions of their falling victim to custodial killings.³⁶ Thousands of others find themselves either currently incarcerated or languishing in deplorable conditions within Indian and Pakistani penitentiaries.³⁷ Furthermore, it is disconcerting to note that on several occasions, both nations have neglected to report such civilian arrests, flagrantly violating established norms of international law.³⁸ Adding to the distress, the families of these apprehended fishermen often receive belated news of their detainment, sometimes months after the fact. This information typically reaches them through former prisoners who have served their sentences and been released, or through visits by members of the Joint Judicial Commission for Prisoners, who are mandated to make such visits once every six months.³⁹

The multitude of civilians apprehended, a number reaching into the thousands, endure the gross deprivation of their fundamental human rights. Regrettably, they are recurrently subjected to acts of torture, which unequivocally contravene the recognized principles of *jus cogens*, representing the highest level of international law.⁴⁰ Furthermore, these individuals are systematically denied their rightful access to consular assistance, a vital safeguard established by the Vienna Convention on Consular Relations of 1963.⁴¹ This international convention expressly dictates that foreign nationals who find themselves arrested or detained must be granted the privilege of reaching out to their respective country's consulate for support. However, it is a lamentable fact that both India and Pakistan routinely either permit this crucial access only after significant delays or, in some instances, neglect to extend this courtesy at all, particularly when the detainees are citizens of the other nation.⁴²

³⁶ Valinder Walia & Neeraj Bagga, *India, Pakistan Free 583 Prisoners*, TRIBUNE, (September 13, 2005) <http://www.tribuneindia.com/2005/20050913/main3.htm>.

³⁷ Zainab Iqbal, *Tit for Tat*, NEWSLINE (April, 2008), <https://newslinemagazine.com/magazine/tit-for-tat/>.

³⁸ *Id.*

³⁹ Beena Sarwar, *As Another Fisherman Dies Across the Border, India and Pakistan Need to Work on Their Priorities*, THE WIRE (July 20, 2017) <https://thewire.in/diplomacy/india-pakistan-border-fisherman-death>.

⁴⁰ M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 67–68 (1996).

⁴¹ *Supra* note 37.

⁴² *Supra* note 39.

The ICJ as viable recourse

The most evident and preferable approach to resolving the dispute, which is bilateral resolution, has, thus far, been disappointingly ineffective in producing any substantial breakthrough. The lingering uncertainty surrounding the boundary that continues to persist is the albatross around the necks of innocent and impoverished civilian fishermen hailing from the disputing states. Professor Sikander Ahmed Shah argues in favour of pursuing political avenues for resolution, acknowledging that such methods could potentially endow both nations with enhanced bargaining power, particularly given the prospect of mutual exploitation of the adjacent maritime areas for commercial purposes.⁴³

While a peaceful bilateral negotiation process would be the optimal scenario, this author posits that pursuing a legal route for resolution offers the potential for a structured, equitable, and enduring solution, making it a more desirable option.

Numerous iterations of discussions and dialogues have taken place in an attempt to address this protracted dispute, yet they have regrettably failed to yield any substantial or concrete results. Both nations have, at intermittent intervals, engaged in the occasional release of detained fishermen, ostensibly as gestures of goodwill.⁴⁴ However, it is apparent that these actions lack the bona fide desire to reach a meaningful compromise.

Moreover, placing excessive reliance on bilateral treaties is not necessarily the most judicious course of action. Such treaties may exhibit inherent vagueness right from their inception⁴⁵ or they might become incomplete or ambiguous by virtue of their failure to fully consider, or inadequately address, contingencies such as the potential alterations in the course of a river.⁴⁶

⁴³ Sikander Ahmed Shah, *supra* note 13 at 5.

⁴⁴ Press Trust of India, *20 Indian Fishermen Jailed In Pakistan Released After Five Years*, NDTV (June 19, 2022, 2:56 PM), <https://www.ndtv.com/india-news/20-indian-fishermen-jailed-in-pakistan-released-after-five-years-3080828>; Press Trust of India, *Pakistan Releases 26 Indian Fishermen From Jail As Goodwill Gesture*, NDTV (August 13, 2018, 12:17 AM), <https://www.ndtv.com/india-news/pakistan-releases-26-indian-fishermen-from-jail-as-goodwill-gesture-1899383>; *India releases 32 Pakistani fishermen*, THE TIMES OF INDIA (May 28, 2014, 7:34 PM), <https://timesofindia.indiatimes.com/india/India-releases-32-Pakistani-fishermen/articleshow/35683840.cms>.

⁴⁵ Victor Prescott & Gillian D. Triggs, *International Frontiers and Boundaries: Law, Politics and Geography* 217 (2008).

⁴⁶ *Id.*

The existence of ambiguity within certain treaties can often be traced back to the complex legacies of colonial history, governance, and the dynamics of power that have prevailed in the past.⁴⁷

Similar to the rulings of the ICJ mentioned above, Resolution 1192 and all the subsequent developments can be better examined by the ICJ, a forum capable of applying international law and resolving disputes of a similar nature.

According to the assertions put forth by SL Deshmukh, it is posited that the Sir Creek conundrum can potentially be subjected to a recent precedent set by the International Court of Justice (ICJ) in 2005. This landmark case pertains to the maritime dispute between Benin and Niger, wherein the ICJ Chamber rendered a clear and unequivocal determination concerning the boundary of the Niger River. This determination was meticulously grounded in the application of the 'Thalweg Principle,' a concept that centres on ascertaining the river's status as it existed at the time of the respective countries' independence in 1960.⁴⁸

In light of this, it is recommended that Pakistan and India should collaborate in order to establish the precise geographical position of Sir Creek as it stood in the year 1947. Subsequently, the matter can be diligently resolved by utilising the aforementioned ICJ decision as a guiding precedent, thereby affording a more structured and well-founded approach to the dispute.⁴⁹

International law is unfortunately perceived to be a vanishing point of jurisprudence. It might be contended that the body of international law, often referred to as "soft law," lacks the robust enforcement mechanisms characteristic of domestic legal systems. Nevertheless, it is imperative to recognize that international law represents a reservoir of potential solutions for a multitude of disputes that have arisen throughout centuries of international interactions and conflicts, each possessing unique characteristics and nuances.

⁴⁷ A. O. Cukwurah, *The Settlement of Boundary Disputes in International Law* 46 (Manchester University Press 1967).

⁴⁸ Cmde SL Deshmukh NM (Retd), et al., *supra* note 14 at 5.

⁴⁹ Raghavendra Mishra, *supra* note 4 at 2.

The principles of international law that pertain to these intricate issues have been succinctly touched upon within this exposition, while comprehensive examinations have been undertaken by esteemed scholars. Echoing the sentiments articulated by Professor Sikander Ahmed Shah, this author concurs that it is the actual application of international legal principles to the complex and specific circumstances surrounding the delimitation of river boundaries that constitutes the impediment to the resolution of such disputes. This challenge arises not from any inherent obscurity within the corpus of international law that pertains to river boundaries.

It is put forth that a viable means to ensure the diligent application of international law is to submit the dispute in question before the International Court of Justice (ICJ), a step that can potentially usher in a more structured and effective approach to resolving these intricate matters.

In conclusion, considering the profound seriousness of the issue at hand and the human rights violations it engenders, it becomes imperative that the International Court of Justice (ICJ) takes cognizance of this situation and dispenses justice in the form of prompt consular assistance to the civilian fishermen who endure ongoing injustices due to the murky delineation of river boundaries, which is a consequence of the nations' inadequate commitment to reaching a resolution.

It is noteworthy that the tenets of the Vienna Convention on Consular Relations find direct and unequivocal relevance in this context.⁵⁰ Paradoxically, it is worth highlighting that the matter of consular assistance concerning the arrest, detention, trial, and sentencing of Mr. Jadhav became a subject of contention in a case brought before the ICJ by India against Pakistan in the instance of *Jadhav (India v. Pakistan)*⁵¹. These provisions must be interpreted in conjunction with The International Covenant on Civil and Political Rights (ICCPR)⁵² and other pertinent facets of international law to safeguard the rights and well-being of the apprehended fishermen.

⁵⁰ Article 5, United Nations, *Vienna Convention on Consular Relations*, 24 April 1963; Article 36, United Nations, *Vienna Convention on Consular Relations*, 24 April 1963.

⁵¹ *Jadhav Case, India v Pakistan*, Merits, [2019] ICJ GL No 168, ICGJ 538 (ICJ 2019), 17th July 2019, United Nations [UN]; International Court of Justice [ICJ].

⁵² Article 14, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

CONCLUSION

Thus far, the Sir Creek dispute has predominantly been characterised and approached as a maritime disagreement. However, considering the profound importance of this region and the escalating apprehensions regarding the detrimental impacts of climate change on this crucial ecosystem, there is a compelling case for transforming this issue into a platform for collaborative environmental diplomacy and preservation.

By recontextualizing the Sir Creek dispute as an environmental concern, it becomes possible to mitigate the contentious aspects related to territorial demarcation. This strategic shift offers the opportunity to tap into a spectrum of international mechanisms readily available via comprehensive environmental treaties. These instruments are already in place and can be harnessed to ensure that the shared, transboundary nature of ecosystems like Sir Creek is duly respected by states in conflict. Such cooperation could lead to the implementation of joint conservation programs that safeguard this vital ecosystem.

In essence, the Sir Creek dispute should not be narrowly categorised as a mere maritime boundary dispute. Instead, it is prudent to recognize the region's significance and acknowledge the mounting anxieties surrounding the effects of climate change on this critical ecosystem. This reimagining of the issue as an environmental challenge offers a potential avenue to ease the complications associated with boundary delineation, fostering greater cooperation among involved states.⁵³

On May 21, 1997, the United Nations General Assembly endorsed the United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, commonly referred to as the Water Convention. This significant international accord officially became effective on August 17, 2014. The Water Convention stands as a noteworthy exemplar among the limited body of multilateral treaties focused on the intricacies of water resource management in international rivers that traverse national boundaries.

⁵³ Saleem H. Ali, *Use Environmental Diplomacy to Resolve the Sir Creek Dispute*, Stimson (December 18, 2017), <https://www.stimson.org/2017/use-environmental-diplomacy-resolve-sir-creek-dispute/>.

Crucially, the Water Convention addresses fundamental aspects such as the equitable apportionment of water resources, the responsible use of freshwater, and the safeguarding and coordinated management of ecological elements within these shared watercourses. The potential application of this convention to the Sir Creek dispute holds the promise of fortifying collaborative efforts between the nations involved, thereby generating a ripple effect that may positively impact other seemingly intractable disputes in the region and beyond.⁵⁴

In conclusion, it is evident that, with a concerted and robust commitment from the nations directly involved, the Sir Creek dispute can and should be elevated to the International Court of Justice (ICJ) to secure a resolution that is not only satisfactory but enduring. Such a favourable and constructive outcome remains a distinct possibility, primarily because the ICJ has a track record of effectively and judiciously adjudicating disputes of a similar nature between sovereign states by applying international legal principles.

Hence, it is strongly advisable that India heeds Pakistan's request to internationalise this dispute and submits it to a neutral third party, which, as contended herein, would be the ICJ. It is imperative to recognize that the implications of this issue extend beyond a mere territorial struggle, delving into the lesser-known realm of *jus cogens* violations inflicted upon civilian fishermen. The profound gravity and magnitude of this matter undeniably warrant seeking redress through the ICJ.

⁵⁴ Sikander Ahmed Shah, *supra* note 5 at 3.