



INDIAN COUNCIL OF WORLD AFFAIRS

VIEWPOINT

The Verdict of ICJ on the Kulbhushan Jadhav Case

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The final verdict about the petition submitted by India on the case of Shri Kulbhushan Jadhav was awarded by the International Court of Justice (ICJ) on July 17, 2019. The verdict is a 42-page document. Both the Indian and the Pakistani media declared the verdict as a national victory. Pakistani media asserted that ICJ have rejected India's claim for Jadhav's acquittal and release.¹ The paper tries to identify, the appeal made by India and analyses the final verdict of ICJ.

On May 8, 2017, India petitioned in the ICJ that Pakistan had arrested Kulbhushan Jadhav- an Indian national, hastily carried out a trial and awarded him a death sentence without giving him any consular access, violating Article 36 (1) of the 1963 Vienna Convention.² India requested ICJ to put a stay on the execution, while it looked into the wrongful detention.³ India submitted a request and a memorial to ICJ in May and September 2017, respectively.

Analysts have stated that this case was 'sui generis'.⁴ This case was the first of its kind, where an appeal was made by India of the violation of both the Vienna Convention on Consular Relations along with the laws that protect International Human Rights. The ICJ dealt with the violation of the Vienna Convention on Consular Relations, but did not dwell on the violation of the International Human Rights.

¹ "ICJ rejects Indian plea for Jadhav's acquittal, release", *Dawn*, July 18, 2019, <https://www.dawn.com/news/1494738/icj-rejects-indian-plea-for-jadhavs-acquittal-release> as accessed on July 23, 2019

² The Vienna Convention on Consular Relations of 1963 is an international treaty that defines a framework for consular relations between independent states.

³ Application Instituting Proceedings filed in the Registry of the Court on 8 May 2017 Jadhav Case, International Court of Justice, May 8, 2017, <https://www.icj-cij.org/files/case-related/168/168-20170508-APP-01-00-EN.pdf> as accessed on July 19, 2019

⁴ 'Sui Generis' means unique

Pakistan has always looked for a ‘silver bullet’ to build a narrative on terrorism and espionage being sponsored by India in Pakistan. That is the reason why it was important for Pakistan to fabricate a case with the arrest of Kulbhushan Jadhav.

On 13 December 2017, Pakistan submitted a counter-memorial highlighting three basic objections to the Indian application and reasoned why it ought to be rejected. In the first objection, Pakistan stated that the fact that India brought the case of Jadhav to the ICJ was an abuse of the Court’s process. It was so because although India’s application sought the Court for a judgment or order for a specific purpose, but in reality was pursuing some different purpose which takes the application outside the scope of the provision on which it was purportedly based’.⁵

Secondly, Pakistan argued that the ICJ should dismiss India’s application on the ground of abuse of rights. It stated that India failed to prove Jadhav’s Indian nationality and was ineligible to submit an application. Pakistan also claimed that India breached its international obligations under the United Nations Security Council Resolution 1373 of 2001, and India had authorised Jadhav to carry out espionage and terrorist activities.⁶

Thirdly, Pakistan argued that India’s application was on the basis of India’s alleged unlawful conduct, relying on the doctrine of “clean hands” and the principles of “*ex turpi causa non oritur actio*” and “*ex injuria jus non oritur*”, and hence the case must be dismissed.⁷

In its final verdict on July 17, 2019, the ICJ stated that it had full jurisdiction over cases falling under ‘Article 1 of Optional Protocol to Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes’.

Rejecting the first objection made by Pakistan, the Court stated that it did not find that India has abused its procedural rights.

Dealing with the second objection made by Pakistan, the Court concluded that India did not abuse its rights while making the application. It made clear that there was ‘no room for doubt’ and that Jadhav was an Indian national. The court also rejected the other objections raised in the second objection by Pakistan on account of holding no “merit”.

⁵ Counter Memorial of the Islamic Republic of Pakistan, International Court of Justice, December 13, 2017, <https://www.icj-cij.org/files/case-related/168/168-20171213-WRI-01-00-EN.pdf> as accessed on July 19, 2019

⁶ The United Nations Security Council Resolution 1373 of 2001 states that UN member states were encouraged to share their intelligence on terrorist groups in order to assist in combating international terrorism. The resolution also calls on all states to adjust their national laws so that they can ratify all of the existing international conventions on terrorism. States “should also ensure that terrorist acts are established as serious criminal offences in domestic laws and regulations and that the seriousness of such acts is duly reflected in sentences served”, https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf as accessed on July 22, 2019

⁷ “*Ex turpi causa non oritur actio*” means of an illegal cause there can be no lawsuit and “*ex injuria jus non oritur*” means law (or right) does not arise from injustice

Dealing with the third objection from the Pakistani side, the Court stated that it did not find any unlawful conduct of India and rejected Pakistan's "clean hands" doctrine. Pakistan could not provide any explanation of how India's unlawful conduct (i.e. alleged action of espionage) prevented Pakistan from providing Jadhav's consular access. The court thus did not uphold Pakistan's objection based on the principle of "*ex turpi causa non oritur actio*". The Court further stated that similarly the principle of "*ex injuria jus non oritur*" which stands for the proposition that unlawful conduct cannot modify the law applicable in the relations between the parties is inappropriate to the circumstances of the case.

It stated that India's appeal was admissible as the case fell under ICJ's purview. The Court stated that there was no reference of any alleged exception in cases of espionage in the Vienna Convention as Pakistan claimed.⁸ The Court outrightly rejected Pakistan's contentions based on human rights. It categorically stated that Pakistan failed to abide by the Vienna Convention on the following grounds:

- Jadhav was not informed of his rights after he was arrested.
- Pakistan failed to inform India, without delay, of the arrest and detention of Jadhav.
- Pakistan also failed to inform India's consular post of arrest and detention of Jadhav, where Pakistan made the notification three weeks after the arrest was made.
- Pakistan failed to provide consular access to Jadhav

As remedies, the Court gave the verdict that Pakistan is under international obligation "to cease internationally wrongful acts of a continuing character". Jadhav should be informed of his rights and that Indian consular officers must be given access to Jadhav, and let him to arrange for his legal representation.

Pakistan will review and reconsider the conviction and sentence of Jadhav and if necessary, will enact appropriate legislation so that such review can be done in a free and fair manner. Till the time Pakistan takes such steps and the uncertainty remains in this case, the ICJ placed a stay on the execution till then.

The Ministry of External Affairs in India upheld the ICJ judgement and heralded it. Pakistan reacted by stating that the ICJ did not accept India's demand for Jadhav's release and instead had upheld faith in Pakistan's judicial system.

It should be noted here that the case in the ICJ on Shri Jadhav was not regarding getting him released and being handed over to India. India claimed that Pakistan violated the Vienna Convention by detaining an Indian national, not informing India on time and carrying out a sentence without Jadhav without him being given any legal representation, these contentions were agreed by the ICJ. The Court further stated that Pakistan must review and reconsider the

⁸ Examples of *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004 (I), p. 48, para. 83; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 232, para. 153 were cited in the verdict.

conviction and sentence of Jadhav, where the latter would be represented by a legal representative of his choice.

The Minister of External Affairs, Shri S. Jaishanker, while addressing the Parliament on July 18, 2019, stated that “Kulbhushan Jadhav is innocent of the charges leveled against him. No forced confession, that too without legal representation and due process, will change this fact. We once again call upon Pakistan to release and repatriate him forthwith”⁹

On 18th July 2019, Shri Jadhav was informed of its rights. However, Pakistan had called for the presence of a Pakistani official during Jadhav’s interaction with the Indian embassy representative, which India did not agree to. India in response has demanded ‘unimpeded access’ during the times Jadhav would require consular access.

Thus it can be concluded that despite the claims of victory on the ICJ verdict by the Pakistani and Indian media, Jadhav’s trial is a long way to go. The saving grace which emerged from the ICJ verdict is the stay on the execution, as he gets the opportunity of having a legal proceeding, in a free, fair and transparent manner along with consular access. The ongoing diplomatic impasse that has been brought in by Pakistan, in which they have downgraded diplomatic relations with India by sending back the Indian High Commissioner Shri Ajay Bisaria, further complicates the situation. The vindictive stand taken by Pakistan and the negative narrative being built by Pakistan post India’s abrogation of Article 370 will most likely lengthen Shri Jadhav’s incarceration longer. Till diplomatic relations are normalised, Shri Jadhav will most likely neither get consular access, nor will his sentence will be most likely reviewed.

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Disclaimer: The views expressed are that of the Researcher and not of the Council.

⁹ “External Affairs Minister’s statement in the Parliament regarding Kulbhushan Jadhav”, Ministry of External Affairs, Government of India, July 18, 2019, <https://www.mea.gov.in/Speeches-Statements.htm?dtl/31621/External+Affairs+Ministers+statement+in+the+Parliament+regarding+Kulbhushan+Jadhav> as accessed on July 22, 2019