



Case of Kulbhushan Jadhav

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The International Court of Justice (ICJ) will be holding next week its second public hearing on the death sentence that has been awarded to Mr. Kulbhushan Jadhav, an Indian accused by a Pakistani military court of espionage. This will have all the drama of an Indo-Pak contestation in a European capital. That India took Pakistan to the ICJ – a departure from its policy so far of not invoking multilateral or third parties in dealings with Pakistan – adds an extra pungency to these legal proceedings. India has from the start contested the espionage claim. Both India and Pakistan have already also submitted their arguments and counter arguments to the ICJ. The Indian government had first approached the ICJ in May 2017, on the grounds that non-provision of consular access to Mr. Jadhav, was in violation of the Vienna Convention on Consular Relations. After India and Pakistan presented their arguments, on 17 May, 2017, the ICJ delivered an order directing Pakistan not to proceed with the execution during pendency and final verdict from the ICJ hearings.

The Legal Dimension

The Indian legal team had stated that Pakistan had violated Article 36 of the Vienna Convention¹ by not allowing consular access to Mr. Jadhav. The ICJ noted that the court had prima facie jurisdiction under Article 1 of the Optional Protocol to the Vienna Convention², and asked Pakistan to take ‘all measures at its disposal’ to ensure that Mr. Jadhav is not executed till ICJ does not reach its final verdict. The Court also directed Pakistan government to inform the Court of all the measures taken to implement the order.³

The ICJ in its initial declaration had noted that India had sent thirteen *Note Verbales* to Pakistan seeking consular access to Mr. Jadhav. Pakistan government did not communicate to India either informing about the charges against Mr. Jadhav, or giving details of the proceedings against him. It further stated that India and Pakistan had signed the India-Pakistan Agreement on

Consular Access in 2008, which ‘amplifies, confirms and extends the Parties’ reciprocal obligations relating to consular assistance, for which the Vienna Convention is a framework’. The ICJ concluded that the Agreement does not exclude the Court’s jurisdiction in Mr. Jadhav’s case.⁴

In its order of 13 June 2017, the ICJ had asked the Indian government to submit its written pleadings on 13 September 2017 and a counter Memorial was submitted by Pakistan government on 13 December 2017.⁵ Thereafter, on 3 October 2018, ICJ finalised the dates to hold public hearings of Mr. Jadhav’s case. The first round of oral argument will take place on 18-19 February, 2019, where both parties will present their arguments. The second round of oral argument will take place on 20-21 February, 2019, where both parties will deliver their second round of arguments.⁶ The Court will have to decide if further hearings and deliberations are required or it can reach a verdict on the basis of the arguments of the parties.

The Political Context

The case against Mr. Jadhav has to be contextualized in terms of events in late 2015 and 2016. In December 2015, Prime Minister Narendra Modi visited Lahore. This important initiative was followed by a terrorist attack in an Indian Army base at Pathankot on 2 January 2016. The Pakistan based terrorist group Jaish-e-Mohammad was identified to be behind the attack. India provided evidence of the involvement of terrorist groups from Pakistan in attacks in India and also allowed a Pakistan investigating team on 31 March, 2016 to visit the Army base in Pathankot. While some superficial steps were taken by Pakistan – shutting down some madrassahs in Punjab and the JeM chief, Maulana Masood Azhar being taken into protective custody – but these were short lived. The Pakistan government has not made any move to arrest any of the conspirators and planners of the attack. A return visit by an Indian investigative team to Pakistan also did not materialize.

It was at this stage that Pakistan released the news of the arrest of an Indian spy on 3 March, 2016. Initially, it was reported that he was arrested in Iran and brought back to Pakistan.⁷ Later, that testimony changed to Mr. Jadhav being arrested in Balochistan, after he entered Pakistan using a fake passport issued by the Indian government. Most of the Pakistani media had Mr. Jadhav’s face as their headlines for days, and the Pakistani army started telecasting morphed confession videos of Mr. Jadhav.⁸

Pakistan alleged that Mr. Jadhav was an Indian Naval officer and a RAW agent, who carried out subversive activities in Baluchistan, which he has supposedly confessed to. This narrative received a great deal of amplification in Pakistan partly because it provides a fillip to the Pakistani belief of Indian involvement in terrorist activities in Baluchistan. In no small part this narrative is important in Pakistan as it establishes in mindsets there a moral equivalence between India and Pakistan on the question of support to terrorism and terrorist groups. India acknowledged that Jadhav was a retired naval officer, and as a civilian, worked as a businessman (scrap dealer) in Chabahar, Iran. In April 2017, a Pakistan military tribunal awarded the death sentence to Mr. Jadhav, on charges of espionage. Mr. Jadhav has sent an appeal to the Pakistan

Chief of Army Staff, who is yet to take any decision in this regard. In this context, the ICJ hearings are important.

Though, Pakistan has not given consular access to India, it allowed Mr. Jadhav's mother and wife to visit Islamabad to visit him on 25 December 2017.

The forthcoming proceedings may well focus on finer points of law and in particular whether the judgment by a military court, where there was a clear violation of the Vienna Convention on Consular Relations, is legally sound. Yet outside of the legalities the court room drama will also be of high political voltage given the extent of media attention and public involvement in both countries with this case.

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

Endnotes:

¹ Article 36 deals with communication and contact with nationals of the sending states, where in 36-1(b) deals with the right of foreign nationals in case of arrest, detention, trial, in prison etc. being provided with consular access.

² Article 1 states that disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

³ Jadhav Case (India vs. Pakistan), *International Court of Justice*, 18 May 2017, <https://www.icj-cij.org/files/case-related/168/19440.pdf>

⁴ Jadhav Case (India vs. Pakistan), No. 2017/22, *International Court of Justice*, 18 May 2017, <https://www.icj-cij.org/files/case-related/168/19440.pdf>

⁵ Jadhav Case, No. 168, *International Court of Justice*, 13 June 2017, <https://www.icj-cij.org/files/case-related/168/168-20170613-ORD-01-00-EN.pdf>

⁶ Jadhav Case, No. 2018/51, *International Court of Justice*, 3 October 2018, <https://www.icj-cij.org/files/case-related/168/168-20181003-PRE-01-00-EN.pdf>

⁷ "Big blow for Pakistan: Ex-ISI official admits Kulbhushan Jadhav was captured from Iran", *India Today*, May 24, 2017, <https://www.msn.com/en-in/news/newsindia/big-blow-for-pakistan-ex-isi-official-admits-kulbhushan-jadhav-was-captured-from-iran/ar-BBBt9Fr>

⁸ "Pakistan's 'spy' video raises questions, Jadhav's India trail offers clues", *Indian Express*, February 12, 2019, <https://indianexpress.com/article/india/india-news-india/pakistans-spy-video-raw-kulbhushan-yadav-confession-india-mea/>