



INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands

Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928

Website: www.icj-cij.org Twitter Account: @CIJ_ICJ YouTube Channel: [CIJ ICJ](#)

LinkedIn page: [International Court of Justice \(ICJ\)](#)

Press Release

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Jadhav case (India v. Pakistan)

The Court finds that the Islamic Republic of Pakistan, in the matter of the detention and trial of an Indian national, Mr. Kulbhushan Sudhir Jadhav, has acted in breach of the obligations incumbent on it under Article 36 of the Vienna Convention on Consular Relations

THE HAGUE, 17 July 2019. The International Court of Justice (ICJ), the principal judicial organ of the United Nations, today rendered its Judgment in the Jadhav case (India v. Pakistan). In its Judgment, which is final, binding and without appeal, the Court,

(1) finds, unanimously, that it has jurisdiction, on the basis of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations of 24 April 1963, to entertain the Application filed by the Republic of India on 8 May 2017;

(2) rejects, by fifteen votes to one, the objections by the Islamic Republic of Pakistan to the admissibility of the Application of the Republic of India and finds that the Application of the Republic of India is admissible;

(3) finds, by fifteen votes to one, that, by not informing Mr. Kulbhushan Sudhir Jadhav without delay of his rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, the Islamic Republic of Pakistan breached the obligations incumbent upon it under that provision;

(4) finds, by fifteen votes to one, that, by not notifying the appropriate consular post of the Republic of India in the Islamic Republic of Pakistan without delay of the detention of Mr. Kulbhushan Sudhir Jadhav and thereby depriving the Republic of India of the right to render the assistance provided for by the Vienna Convention to the individual concerned, the Islamic Republic of Pakistan breached the obligations incumbent upon it under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations;

(5) finds, by fifteen votes to one, that the Islamic Republic of Pakistan deprived the Republic of India of the right to communicate with and have access to Mr. Kulbhushan Sudhir Jadhav, to visit him in detention and to arrange for his legal representation, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 (a) and (c), of the Vienna Convention on Consular Relations;

(6) finds, by fifteen votes to one, that the Islamic Republic of Pakistan is under an obligation to inform Mr. Kulbhushan Sudhir Jadhav without further delay of his rights and to provide Indian consular officers access to him in accordance with Article 36 of the Vienna Convention on Consular Relations;

(7) finds, by fifteen votes to one, that the appropriate reparation in this case consists in the obligation of the Islamic Republic of Pakistan to provide, by the means of its own choosing, effective review and reconsideration of the conviction and sentence of Mr. Kulbhushan Sudhir Jadhav, so as to ensure that full weight is given to the effect of the violation of the rights set forth in Article 36 of the Convention, taking account of paragraphs 139, 145 and 146 of this Judgment;

(8) declares, by fifteen votes to one, that a continued stay of execution constitutes an indispensable condition for the effective review and reconsideration of the conviction and sentence of Mr. Kulbhushan Sudhir Jadhav.

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These proceedings were instituted on 8 May 2017 by the filing in the Registry of an Application by the Republic of India against the Islamic Republic of Pakistan, alleging violations of the Vienna Convention on Consular Relations of 24 April 1963 (hereinafter the “Vienna Convention”), with regard to the detention, since March 2016, and trial of an Indian national, Mr. Kulbhushan Sudhir Jadhav, who was accused of performing acts of espionage and terrorism on behalf of India, and sentenced to death by a military court in Pakistan in April 2017. In particular, India contends that Pakistan acted in breach of its obligations under Article 36 of the Vienna Convention (i) by not informing India, without delay, of the detention of Mr. Jadhav; (ii) by not informing Mr. Jadhav of his rights under Article 36; and (iii) by denying consular officers of India access to Mr. Jadhav.

Reasoning of the Court

I. JURISDICTION

The Court, having noted that India and Pakistan are parties to the Vienna Convention and the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (hereinafter the “Optional Protocol”), finds that it has jurisdiction under Article I of the latter instrument to entertain India’s claims based on alleged violations of the Vienna Convention.

II. ADMISSIBILITY

Pakistan has raised three objections to the admissibility of India’s Application. These objections are based on India’s alleged abuse of process, abuse of rights and unlawful conduct.

A. First objection: abuse of process

In support of its first objection, Pakistan contends, first, that India abused its procedural rights when requesting the Court to indicate provisional measures in this case, and secondly, that before instituting the current proceedings, India failed to give consideration to other dispute

settlement mechanisms envisaged in Articles II and III of the Optional Protocol. The Court considers that neither argument can be upheld and rejects Pakistan's first objection to the admissibility of India's Application.

B. Second objection: abuse of rights

Pakistan based its second objection on three main arguments. First, it refers to India's refusal to "provide evidence" of Mr. Jadhav's Indian nationality. Secondly, Pakistan mentions India's failure to engage with its request for assistance in relation to the criminal investigations into Mr. Jadhav's activities. Thirdly, Pakistan alleges that India authorized Mr. Jadhav to cross the Indian border with a "false cover name authentic passport" in order to conduct espionage and terrorist activities.

In response to Pakistan's first argument, the Court observes that the evidence before it shows that both Parties have considered Mr. Jadhav to be an Indian national. With regard to the second and third arguments, based on various alleged breaches of India's obligations under Security Council resolution 1373 (2001), the Court is of the view that such allegations are properly a matter for the merits and therefore cannot be invoked as a ground of inadmissibility.

For these reasons, the Court finds that Pakistan's second objection to the admissibility of India's Application must be rejected. The second and third arguments advanced by Pakistan are addressed by the Court when dealing with the merits.

C. Third objection: India's alleged unlawful conduct

In its third objection, Pakistan asks the Court to dismiss the Application on the basis of India's alleged unlawful conduct, relying on the "clean hands" doctrine and the principles of "ex turpi causa non oritur actio" and "ex injuria jus non oritur". The Court considers that none of the arguments put forward can be upheld and rejects Pakistan's third objection to the admissibility of India's Application.

III. APPLICABILITY OF ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

The Court notes that Pakistan advances several contentions concerning the applicability of certain provisions of the Vienna Convention to the case of Mr. Jadhav. First, Pakistan argues that Article 36 of the Vienna Convention does not apply in "prima facie cases of espionage". Secondly, it contends that customary international law governs cases of espionage in consular relations and allows States to make exceptions to the provisions on consular access contained in Article 36 of the Vienna Convention. Thirdly, Pakistan maintains that it is the 2008 Agreement on Consular Access between India and Pakistan (hereinafter the "2008 Agreement"), rather than Article 36 of the Vienna Convention, which regulates consular access in the present case.

With regard to Pakistan's first argument, the Court concludes that Article 36 does not exclude from its scope certain categories of persons, such as those suspected of espionage.

With regard to Pakistan's second argument, the Court considers that Article 36 of the Vienna Convention, and not customary international law, governs the matter at hand in the relations between the Parties.

With regard to Pakistan's third argument, the Court does not find that any provisions in the 2008 Agreement evince an intention on behalf of the Parties to restrict the rights guaranteed by Article 36 of the Vienna Convention. Moreover, the Court is of the view that this Agreement is a subsequent agreement, within the meaning of Article 73, paragraph 2, of the Vienna Convention, intended to "confirm, supplement, extend or amplify" that instrument, and therefore does not displace the obligations under Article 36.

None of the arguments raised by Pakistan concerning the applicability of Article 36 of the Vienna Convention to the case of Mr. Jadhav having been upheld, the Court thus concludes that the Convention is applicable in the present case, regardless of the allegations that Mr. Jadhav was engaged in espionage activities.

IV. ALLEGED VIOLATIONS OF ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

The Court observes that Pakistan has not contested India's contention that Mr. Jadhav was not informed of his rights under Article 36, paragraph 1 (b), of the Convention. It notes that Pakistan consistently maintained that the Convention does not apply to an individual suspected of espionage. The Court infers from this position that Pakistan did not inform Mr. Jadhav of his rights under Article 36, paragraph 1 (b), of the Vienna Convention, and thus concludes that Pakistan breached its obligation under that provision.

Turning to India's submission regarding the alleged failure of Pakistan to inform India, without delay, of the arrest and detention of Mr. Jadhav, the Court recalls that, under Article 36, paragraph 1 (b), of the Vienna Convention, if a national of the sending State is arrested or detained, and "if he so requests", the competent authorities of the receiving State must, "without delay", inform the consular post of the sending State. The Court notes that there is an inherent connection between the obligation of the receiving State to inform a detained person of his rights and his ability to request that the consular post of the sending State be informed of his detention. If a detained person is not informed of his rights, he may not be aware of his entitlement to request that the sending State's consular post be informed of his arrest. According to the Court, the phrase "if he so requests" must be read in conjunction with that obligation of the receiving State. Having already found that Pakistan failed to inform Mr. Jadhav of his rights, the Court is consequently of the view that Pakistan was under an obligation to inform India's consular post of the arrest and detention of Mr. Jadhav. As to whether and when the notification was made, the Court notes that Pakistan did notify India on 25 March 2016 of the arrest and detention of Mr. Jadhav. The Court considers that the fact that the notification was made some three weeks after the arrest constitutes a breach of the obligation to inform "without delay", as required by Article 36, paragraph 1 (b), of the Vienna Convention.

The Court then addresses India's submission concerning the alleged failure of Pakistan to provide consular access to Mr. Jadhav as required under Article 36, paragraph 1 (a), of the Vienna Convention. In the present case, it is undisputed that Pakistan has not granted any Indian consular officer access to Mr. Jadhav. Any alleged failure by India to co-operate in the investigation process in Pakistan does not relieve Pakistan of its obligation to grant consular access. Article 36, paragraph 1 (c), provides that consular officers have the right to arrange legal representation for a detained national of the sending State. This right remains in place regardless of whether Mr. Jadhav opted to be represented by a defending officer qualified for legal representation, as alleged by Pakistan. The Court therefore concludes that Pakistan has breached the obligations incumbent on it under Article 36, paragraph 1 (a) and (c), of the Vienna Convention.

V. ABUSE OF RIGHTS

In light of the foregoing, the Court addresses the question whether India's alleged violations of international law invoked by Pakistan in support of its contentions based on abuse of rights may constitute a defence on the merits. In essence, Pakistan argues that India cannot request consular assistance with respect to Mr. Jadhav, while at the same time it has failed to comply with other obligations under international law. In the Court's view, there is no basis under the Vienna Convention for a State to condition the fulfilment of its obligations under Article 36 on the other State's compliance with other international law obligations. Pakistan's arguments relating to abuse of rights by India must therefore be rejected.

VI. REMEDIES

The Court has found that Pakistan acted in breach of its obligations under Article 36 of the Vienna Convention: first, by not informing Mr. Jadhav of his rights; secondly, by not informing India, without delay, of the arrest and detention of Mr. Jadhav; and thirdly, by denying access to Mr. Jadhav by consular officers of India, contrary to their right, *inter alia*, to arrange for his legal representation.

In the Court's view, the first and third breaches by Pakistan, as just set out, constitute internationally wrongful acts of a continuing character. Accordingly, Pakistan is under an obligation to cease those acts and to comply fully with its obligations under Article 36 of the Vienna Convention. Consequently, Pakistan must inform Mr. Jadhav without further delay of his rights under Article 36, paragraph 1 (b), and allow Indian consular officers to have access to him and to arrange for his legal representation, as provided by Article 36, paragraph 1 (a) and (c).

The Court considers the appropriate remedy in this case to be effective review and reconsideration of the conviction and sentence of Mr. Jadhav. In order to be effective, this process must ensure that full weight is given to the effect of the violation of the rights set forth in Article 36, paragraph 1, of the Convention and guarantee that the violation and the possible prejudice caused by the violation are fully examined.

The Court takes full cognizance of the representations made by Pakistan. During the oral proceedings, the Agent of Pakistan declared that the Constitution of Pakistan guarantees, as a fundamental right, the right to a fair trial; that the right to a fair trial is "absolute" and "cannot be taken away"; and that all trials are conducted accordingly and, if not, "the process of judicial review is always available". The Court considers that the violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention, and its implications for the principles of a fair trial, should be fully examined and properly addressed during the review and reconsideration process.

The Court notes that the obligation to provide effective review and reconsideration can be carried out in various ways. The choice of means is left to Pakistan. Nevertheless, freedom in the choice of means is not without qualification. The obligation to provide effective review and reconsideration is an obligation of result which must be performed unconditionally. Consequently, Pakistan shall take all measures to provide for effective review and reconsideration, including, if necessary, by enacting appropriate legislation.

The Court finally considers that a continued stay of execution constitutes an indispensable condition for the effective review and reconsideration of the conviction and sentence of Mr. Jadhav.

Composition of the Court

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Caçado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judge ad hoc Jillani; Deputy-Registrar Fomété.

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Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judges SEBUTINDE, ROBINSON and IWASAWA append declarations to the Judgment of the Court; Judge ad hoc JILLANI appends a dissenting opinion to the Judgment of the Court.

A summary of the Judgment appears in the document entitled “Summary 2019/4”, to which summaries of the opinions and declarations are annexed. This press release, the summary and the full text of the Judgment are available on the Court’s website (www.icj-cij.org), under the heading “Cases”.

Note: The Court’s press releases are prepared by its Registry for information purposes only and do not constitute official documents.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It was established by the United Nations Charter in June 1945 and began its activities in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York. The Court has a twofold role: first, to settle, in accordance with international law, legal disputes submitted to it by States (its judgments have binding force and are without appeal for the parties concerned); and, second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system. The Court is composed of 15 judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. Independent of the United Nations Secretariat, it is assisted by a Registry, its own international secretariat, whose activities are both judicial and diplomatic, as well as administrative. The official languages of the Court are French and English. Also known as the “World Court”, it is the only court of a universal character with general jurisdiction.

The ICJ, a court open only to States for contentious proceedings, and to certain organs and institutions of the United Nations system for advisory proceedings, should not be confused with the other — mostly criminal — judicial institutions based in The Hague and adjacent areas, such as the International Criminal Court (ICC, the only permanent international criminal court, which was established by treaty and does not belong to the United Nations system), the Special Tribunal for Lebanon (STL, an international judicial body with an independent legal personality, established by the United Nations Security Council upon the request of the Lebanese Government and composed

of Lebanese and international judges), the International Residual Mechanism for Criminal Tribunals (IRMCT, mandated to take over residual functions from the International Criminal Tribunal for the former Yugoslavia and from the International Criminal Tribunal for Rwanda), the Kosovo Specialist Chambers and Specialist Prosecutor's Office (an ad hoc judicial institution which has its seat in The Hague), or the Permanent Court of Arbitration (PCA, an independent institution which assists in the establishment of arbitral tribunals and facilitates their work, in accordance with the Hague Convention of 1899).

Information Department:

Mr. Andrey Poskakukhin, First Secretary of the Court, Head of Department (+31 (0)70 302 2336)

Ms Joanne Moore, Information Officer (+31 (0)70 302 2337)

Mr. Avo Sevag Garabet, Associate Information Officer (+31 (0)70 302 2394)

Ms Genoveva Madurga, Administrative Assistant (+31 (0)70 302 2396)