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Case Summary: Jadhav (India v. Pakistan)

The nation is well-acquainted with a face often printed on posters that seek ‘Justice for Kulbhushan Jadhav’. India says that Mr. Jadhav, a retired navy officer, was a businessman working in Iran. Pakistan’s version of the facts is that he was performing acts of espionage and terrorism against Pakistan and illegally entered Pakistan from the border with Iran near Balochistan.¹ While India says that he was ‘kidnapped’, Pakistan says that he was ‘arrested’.

Factual Background

What is not disputed is that he was in Pakistan’s custody since 3rd March 2016.² His nationality was also never in question. Therefore, India had a right to ‘consular access’ to Mr. Jadhav as both India and Pakistan are state parties to Vienna Convention on Consular Relations 1963 (“*Convention*”). ‘Consular access’ would mean that Indian consular officers would “have the right to visit” Mr. Jadhav “who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.”³

India had been seeking consular access from Pakistan since 25th March 2016, to which Pakistan replied that it would consider India’s request only if India assists in investigation against Mr. Jadhav.⁴ In response, India said that it can’t provide such assistance unless and until it is able to “verify the facts and understand the circumstances of his presence in Pakistan”, for which it would require

¹ Jadhav (India v. Pak.), Judgement, ¶ 21 (July 17, 2019), <https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf>.

² See *id.*

³ Vienna Convention on Consular Relations art. 36, ¶ 1(c), Apr. 24, 1963, 596 U.N.T.S 261.

⁴ Jadhav (India v. Pak.), Judgement, ¶ 23-28 (July 17, 2019), <https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf>.

consular access to Mr. Jadhav.⁵ This meant that the diplomatic confrontation was running in circles. Time was running out for Mr. Jadhav as his trial was coming to an end and soon thereafter, on 10th April 2017, he was sentenced to death.⁶

After diplomatic endeavours with Pakistan proved to be futile, India moved to the International Court of Justice (“*Court*”) by filing an application alleging violations of the Convention by Pakistan. India submitted to the jurisdiction of the Court under Article I of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes 1963 (“*Protocol*”). Article I of the Protocol allows for “[d]isputes arising out of the interpretation or application of the Convention” to be submitted for adjudication to the Court.⁷

Pakistan’s Objections to Admissibility of India’s Application

Pakistan objected to the admissibility of India’s application on the following three grounds:

1. India abused Court’s procedure by not drawing the Court’s attention to the existence of a constitutional right to lodge a clemency petition and by failing to consider other dispute settlement mechanisms envisaged in Articles II and III of the Protocol.⁸
2. India abused its rights when it refused to provide Mr. Jadhav’s “actual passport in his real name” to prove his Indian nationality; failed to assist the criminal investigations into Mr. Jadhav’s activities; and authorized Mr. Jadhav to cross the Indian border with a “false cover name authentic passport” to conduct espionage and terrorist activities.⁹
3. India itself committed illegal acts by not helping Pakistan investigate against Mr. Jadhav; by providing him with a “false cover name authentic passport”; and by being responsible for Mr. Jadhav’s espionage and terrorism activities. India did not approach the Court with ‘clean hands’ and therefore has no right to pursue any legal remedy.¹⁰

⁵ Jadhav (India v. Pak.), Judgement, ¶ 28 (July 17, 2019), <https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf>.

⁶ See *id.* ¶ 29.

⁷ Optional Protocol concerning the Compulsory Settlement of Disputes art. I, Apr. 24, 1963, 596 U.N.T.S. 487.

⁸ Jadhav (India v. Pak.), Judgement, ¶ 40-42 (July 17, 2019), <https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf>.

⁹ *Id.* ¶ 52.

¹⁰ *Id.* ¶ 59.

Substantive Issues

In addition to preliminary objections, Pakistan also contended that the Convention would not be applicable because of the following three reasons:

P.1 Mr. Jadhav's case is a prima facie case of espionage and therefore exempted under Article 36.

P.2 Customary international law allows States to make exceptions to the Convention because it is the customary international law which governs cases of espionage in consular relations.

P.3 The 2008 Agreement on Consular Access between India and Pakistan ("**Agreement**") regulates consular access in the present case.

On the other hand, India maintained its stand that the Convention would be applicable and further contended breach of Article 36 of the Convention by Pakistan when it:

In.1 Did not inform India, without delay, of the detention of Mr. Jadhav.

In.2 Did not inform Mr. Jadhav of his rights under Article 36.

In.3 Denied consular officers of India access to Mr. Jadhav.

The Court's Decision

Pakistan's Objections

Dismissing Pakistan's first objection, the Court held that "there was considerable uncertainty as to when a decision on any appeal or petition could be rendered and, if the sentence is maintained, as to when Mr. Jadhav could be executed".¹¹ Moreover, exhausting remedies under Article II or Article III of the Protocol are not conditions precedent for India to move under Article I of the Protocol.¹²

As far as Pakistan's second objection is concerned, the Court considered it as an allegation by Pakistan that India failed to prove Mr. Jadhav's nationality and dismissed such an allegation on the

¹¹ Jadhav (India v. Pak.), Judgement, ¶ 44 (July 17, 2019), <https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf>.

¹² See *id.* ¶ 45; see also United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. Rep. 23, (Dec. 24).

basis of evidence before it.¹³ It further held that fulfilment of obligations under international law is not a condition precedent for the machinery under Article 36 to come into effect.¹⁴ Therefore, alleged violations of rights under international law by India cannot be a ground for objection to admissibility of the application.

The Court dismissed Pakistan's third objection very easily by referring to its earlier decision wherein it was held that an objection based on 'clean hands' doctrine would not be sufficient per se to dismiss an application at the admissibility stage.¹⁵

Substantive Issues

Regarding Pakistan's first issue P.1, the Court referred to the Convention's objectives, its *travaux préparatoires*, along with the ordinary meaning of Article 36, and found that it does not exclude from its scope those persons who are suspected of espionage.¹⁶ While dismissing the second issue P.2, the Court held that Article 36, and not customary international law, governed the matter at hand and that Article 36 of the Convention makes no exception with regard to cases of espionage.¹⁷ While addressing the third issue P.3, the Court interpreted the Agreement as not denying consular access in the instant case and that it was only intended to "confirm, supplement, extend or amplify" the Vienna Convention.¹⁸

Coming to India's allegations against Pakistan, it is interesting to note that Pakistan did not challenge India's allegation In.1 and constantly maintained that the Convention did not apply to Mr. Jadhav. This strongly hinted that "Pakistan breached its obligation to inform Mr. Jadhav of his rights under" Article 36.¹⁹ To address India's allegation In.2, the Court noted that Mr. Jadhav was in Pakistan's custody since 3rd March 2016 but India was informed of his "arrest" only after 22 days he was "arrested", i.e. on 25th March 2016.²⁰ This period of 22 days was held to be a "delay" and

¹³ See Jadhav (India v. Pak.), Judgement, ¶ 55-56 (July 17, 2019), <https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf>.

¹⁴ See *id.* ¶ 123.

¹⁵ See *id.* ¶ 61; see also Certain Iranian Assets (Iran v. U.S.), Judgement, (Feb. 13, 2019), <https://www.icj-cij.org/files/case-related/164/164-20190213-JUD-01-00-EN.pdf>.

¹⁶ See Jadhav (India v. Pak.), Judgement, ¶ 75, 86 (July 17, 2019), <https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf>.

¹⁷ See *id.* ¶ 89.

¹⁸ *Id.* ¶ 94, 97.

¹⁹ *Id.* ¶ 102.

²⁰ *Id.* ¶ 104.

consequently a violation of the Convention.²¹ Lastly, it was not difficult for the Court to accept India's allegation In.3 as it was undisputed that "consular access" was denied to Mr. Jadhav by Pakistan.²²

Concluding Remarks

The Court by a majority of 15:1 decided in favour of India by accepting all of its submissions and dismissing those made by Pakistan. A careful perusal of Pakistan's contentions reveals that it never submitted that its conduct was lawful under the Convention, but strongly argued against the applicability of the Convention. This approach was an artful attempt to circumvent the Convention, which shows that Pakistan implicitly acknowledged violation of the Convention.

The judgement is well celebrated in India, but not quite understood. As far as "consular access" to Mr. Jadhav is concerned, the judgement holds that the trial which imposed death sentence on Mr. Jadhav was illegal because no "consular access" was available to him. However, it should not be understood to mean that his death sentence has been waived.

When it comes to the 'justice' that the posters seek, the Court remains indifferent. Laymen equate this win as a way to bring Mr. Jadhav back home, which is not the case. The ultimate consequence of the judgement is that it leaves upon Pakistan "by means of its own choosing" to ensure that an "effective review and reconsideration of the conviction and sentence of Mr. Jadhav" is conducted, and "if necessary, by enacting appropriate legislation".²³ Pakistan must provide "consular access", but it does not necessarily have to try Mr. Jadhav in a civil court, and it is still possible that another military trial is conducted which yields the same result. In conclusion, the win does not give 'Justice to Kulbhushan Jadhav', which the posters seek, but it might be the first step to achieve the same.

²¹ Jadhav (India v. Pak.), Judgement, ¶ 113 (July 17, 2019), <https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf>.

²² See *id.* ¶ 117.

²³ See *id.* ¶ 146-147.