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The Case of Kulbhushan Sudhir Jadhav: Legal, Political and Diplomatic Implications

On 3 March 2016, Kulbhushan Sudhir Jadhav, an Indian national, was arrested in Pakistan over charges of terrorism and spying for India's intelligence agency. However, India has denied such allegations and maintained that it has no official links with him. On 10 April 2017, he was sentenced to death by a Field General Court Martial in Pakistan. Following an approach by India, the International Court of Justice (ICJ) stayed the hanging of Jadhav on 18 May 2017. It increasingly appears that Jadhav's fate depends more on the status of India-Pakistan relationship than the final verdict of the ICJ.

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Examining the India-Pakistan relationship, Stanley Wolpert wrote, "India and Pakistan were born [in 1947] to conflict."² Although the two countries have taken steps, ranging from wars (1947, 1965, 1971 and 1999) to dialogues (1963, 1972, 1999, 2001 and 2007), to address their conflicts, the history of their bilateral engagements nearly confirms the observation. The recent case of Kulbhushan Sudhir Jadhav brings some of these implicit and underlying issues to the

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² Wolpert, Stanley (2011) *India and Pakistan: Continued Conflict or Cooperation*. California: California University Press.

forefront of contemporary discourse about some general questions that underpin India-Pakistan relations.

Both sides are currently embroiled in an acrimonious exchange over the detention of Jadhav by Pakistan. He was arrested in Balochistan on 3 March 2016 over, as Pakistan argues, charges of terrorism and spying for India. The Indian government has stated that Jadhav has no links with it and that he was running a business at Chabahar (Iran) after his “premature retirement”³ from the Indian navy.⁴ The Indian government also maintains that “Jadhav was doing business in Iran and was kidnapped and taken to Pakistan.”⁵ However, the Pakistani establishment has viewed him as a spy from India’s external intelligence agency – the Research and Analysis Wing – who was directing subversive activities in Karachi and Balochistan.⁶ To support its stand, the Pakistan army released a video tape showing Jadhav making ‘confessions’ about his activities in Pakistan. However, India questioned the authenticity of the tape, claiming that it was doctored. Later, after a ‘trial’, Pakistan’s Field General Court Martial sentenced Jadhav to death on 10 April 2017. Reacting to the sentence, India’s Ministry of External Affairs summoned the Pakistani High Commissioner in India, Abdul Basit, and issued a démarche indicating that Jadhav’s execution would be viewed by India as a “premeditated murder”.⁷ India also warned about the dire consequences for bilateral relations if Pakistan were to proceed with Jadhav’s death sentence.⁸

In an attempt to save Jadhav’s life, India took the matter to the International Court of Justice (ICJ) in May 2017. In its petition before the ICJ, India charged Pakistan with the violation of the Vienna Convention on Consular Relations, under which Pakistan was obliged to allow India consular access to Jadhav. India also invoked the International Covenant on Civil

³ ‘Who is Kulbhushan Jadhav?’ *The Hindu* (10 April 2017). Retrieved from <http://www.thehindu.com/news/national/who-is-kulbhushan-jadhav-the-hindu-explains/article17907888.ece>. Accessed on 22 May 2017.

⁴ Ibid.

⁵ <http://www.mea.gov.in/Speeches-Statements.htm?dtl/28373/External+Affairs+Ministers+Statement+in+Rajya+Sabha+on+case+of+Shri+Kulbhushan+Jadhav+Indian+Citizen+awarded+death+sentence+by+a+Pakistani+military+court+April+11+2017>

⁶ ‘Who is Kulbhushan Jadhav?’ *The Dawn* (18 May 2017) Retrieved from <https://www.dawn.com/news/1326117>. Accessed on 22 May 2017.

⁷ ‘Kulbhushan Jadhav: If hanged, will be treated as premeditated murder, India tells Pakistan’ (11 April 2017), *The Indian Express*. Retrieved from <http://indianexpress.com/article/india/kulbhushan-jadhav-trial-farcical-high-commission-not-even-informed-india-to-pakistan-4607558/>. Accessed on 22 May 2017.

⁸ ‘Kulbhushan Jadhav death sentence: Pak should keep in mind the consequences, says Sushma Swaraj’ *Indian Express* Retrieved from <http://indianexpress.com/article/india/kulbhushan-jadhav-death-sentence-sushma-swaraj-warns-pakistan-of-consequences-on-bilateral-ties/> Accessed on 29 May 2017.

and Political Rights, under which nobody can be arbitrarily deprived of his or her life.⁹ After hearing the pleas made by both India and Pakistan, the ICJ, in its first part of judgement on 18 May 2017, granted a stay on the execution of Jadhav till the final verdict. Interpreting contrarily, India viewed the judgement as a moral victory in the case while, Khawar Qureshi, who represented Pakistan in the court, said that it was “just a procedural order”.¹⁰

Legal Angle

Although it deals with protection of civilians during war, Article 30 of the Geneva Convention states, “A spy taken in the act shall not be punished without previous trial.”¹¹ On the subject of trial, Article 3 of the Convention prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹² The prohibition mentioned under Article 3 is, moreover, reaffirmed by Article 5 and Articles 64 and 76 of the Convention.¹³

On provisions under the Vienna Convention, Sana Das writes, “Under the 1963 Vienna Convention, to which both India and Pakistan acceded, access to consular services is guaranteed to ensure that the general welfare and rights of foreign national prisoners are safeguarded.”¹⁴ She adds, “In 2008, the two countries signed a consular agreement to provide each other with lists of prisoners who could be exchanged at least twice a year. Consular visits are made by officials of the High Commission of a country to ascertain that citizens arrested abroad obtain fair trial rights, have legal and medical assistance, and are treated humanely while incarcerated in a foreign country’s prison. These services must be quick, consistent,

⁹ Varadarajan, Siddharth (22 May 2017) ‘Why International Law Matters, from Kulbhushan Jadhav to Kashmiri ‘Human Shield’ *The Wire* Retrieved from <https://thewire.in/137742/icj-india-kulbhushan-jadhav-human-shield-kashmir/> Accessed on 23 May 2017.

¹⁰ ‘Kulbhushan Jadhav’s Case: India wrongly claiming victory, claims Pakistan’s lawyer Khawar Qureshi’, *Indian Express*. Retrieved from <http://indianexpress.com/article/world/india-wrongly-claiming-victory-in-jadhavs-case-qaureshi-4666783/>. Accessed on 22 May 2017.

¹¹ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Commentary of 1958 retrieved from <https://ihl-databases.icrc.org/ihl/com/380-600177?opendocument>. Accessed on 22 May 2017.

¹² Ibid.

¹³ Ibid.

¹⁴ Das, Sana (8 May 2013) ‘Proxy Wars in Prison Cells of India and Pakistan’. Retrieved from <http://www.tehelka.com/2013/05/proxy-wars-in-prison-cells/>. Accessed on 22 May 2017.

regular and routine but are usually denied and obstructed by wilful red-tapism, political vendetta and excuses that find no legal or human ground.”¹⁵

Given the state of political relationship between India and Pakistan, most of such prisoners in each other’s jails are often denied legal and physical protections. They are treated as enemies on mission and, in many cases, nationalist sentiments are woven around their cases. There are many such examples. Indian national, Sarabjit Singh, was murdered in a Pakistani jail in May 2013, as a result of a brutal attack by Pakistani inmates in the jail. Later, this was given a nationalist colour by the Pakistani establishment, terming the attack “a sign of ‘nationalist’ retaliation by his co-prisoners who became angry because of the execution of Kasab and Afzal Guru by India.”¹⁶ In a ‘retaliatory’ act, a Pakistani prisoner in a Jammu jail, Sanaullah Haq, was attacked and killed by Indian inmates. Earlier in 2008, Khalid Mahmood, a Pakistani national arrested in India in 2005 for overstaying, died in mysterious circumstances in Bhondsi jail in Gurgaon, near New Delhi.¹⁷

In the case of Jadhav, even if the ICJ in its final judgment, disallows his execution, the choice to abide by the judicial decision lies with the Pakistani establishment. In an almost similar case in 2003, when Mexico approached the ICJ on behalf of 54 of its citizens awaiting execution in the United States (US), all of whom had been denied consular access after their arrest, the ICJ issued provisional measures, on behalf of the three prisoners at immediate risk, ordering the US “to take all measures necessary to ensure that Mr Caesar Roberto Fierro Reyna, Mr Roberto Moreno Ramos and Mr Osvaldo Torres Aguilera are not executed pending final judgment”.¹⁸ In this popularly known Avena Case, the ICJ, in its concluding judgement, stated that, the US, as Praveen Swami writes, “had to grant consular access – but its own judicial system would decide whether or not, the denial of access had a material bearing on the sentencing or not.”¹⁹

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Swami, Praveen (19 May 2017) ‘Tussle between army, govt will shape how the Hague verdict plays out in Pakistan’, *Indian Express*. Retrieved from <http://indianexpress.com/article/explained/kulbhushan-jadhav-hearing-tussle-between-army-govt-will-shape-how-the-hague-verdict-plays-out-in-pakistan-4662831/>. Accessed on 29 May 2017.

¹⁹ Ibid. For details see <http://www.icj-cij.org/docket/files/128/8188.pdf>.

Writ of the ICJ

The verdicts of the ICJ and international tribunals carry a legacy of being non-binding. In the past, many countries have ignored the ICJ's judgements, a recent case being China's non-acceptance of the international tribunal's ruling on the South China Sea disputes.²⁰

Moreover, on 29 March 2017, Pakistan's Permanent Representative to the United Nations (UN), Maleeha Lodhi, submitted a declaration to the office of the UN regarding the new position adopted by her country towards the ICJ. It states, "The Declaration revokes and substitutes the previous Declaration made on 12 September 1960."²¹ Under the new Declaration, Pakistan, while recognising the ICJ's jurisdiction, clarified, "Provided this Declaration shall not apply to:²²

- a. disputes the resolution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future;
- b. disputes relating to questions which fall essentially within the domestic jurisdiction of the Islamic Republic of Pakistan;
- c. disputes relating to or connected with any aspect of hostilities, armed conflicts, individual or collective self-defence or the discharge of any functions pursuant to any decision or recommendation of international bodies, the deployment of armed forces abroad, as well as action relating and ancillary thereto in which Pakistan is, has been or may in future be involved;

²⁰ <https://www.theguardian.com/world/2016/jul/13/china-damns-international-court-after-south-china-sea-slap-down>

²¹ 'March 2017 declaration limits ICJ jurisdiction in case of Pakistan' (21 May 2017) *The News*. Retrieved from <https://www.thenews.com.pk/print/205755-March-2017-Declaration-limits-ICJ-jurisdiction-in-case-of-Pakistan>. Accessed on 22 May 2017.

²² Charter of the United Nations and the Statute of the International Court of Justice, United Nations Treaty Collections, Retrieved from https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&lang=en. Accessed on 22 May 2017. Also See 'March 2017 declaration limits ICJ jurisdiction in case of Pakistan' (21 May 2017) *The News*. Retrieved from <https://www.thenews.com.pk/print/205755-March-2017-Declaration-limits-ICJ-jurisdiction-in-case-of-Pakistan>. Accessed on 22 May 2017.

- d. disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute as deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court;
- e. all matters related to the national security of the Islamic Republic of Pakistan;
- f. disputes arising under a multilateral treaty or any other international obligation that the Islamic Republic of Pakistan has specifically undertaken unless: i) all the parties to the treaty affected by the decision are also parties to the case before the Court, or ii) the Government of the Islamic Republic of Pakistan specifically agrees to jurisdiction, and iii) the Government of Islamic Republic of Pakistan is also a Party to the treaty;
- g. any dispute about the delimitation of maritime zones, including the territorial sea, the exclusive economic zone, the continental shelf, the exclusive fishery zone and other zones of national maritime jurisdiction of the exploitation of any disputed area adjacent to any such maritime zone;
- h. disputes with the Islamic Republic of Pakistan pertaining to the determination of its territory or the modification or delimitation of its frontiers or boundaries; or
- i. All disputes prior to this Declaration although they are filed before this Court hereafter (The) Government of the Islamic Republic of Pakistan reserves the right at any time, by means of a written notification addressed to the Secretary General of the UN, and with effect from the moment of such notification, either to amend or terminate this Declaration.”

Pakistan submitted this declaration one day before the Submission of the International Commission of the Jurists on the Periodic Review of Human Rights situation in Pakistan in the UN Human Rights Council. In its submission on 30 March 2017, the Commission of Jurists raised concerns about the following issues:²³

- a. Trials of civilians by military tribunals;
- b. Enforced disappearances;
- c. Torture and other ill-treatment;
- d. Blasphemy laws; and
- e. International human rights instruments.

The review is likely to come up during the 28th session of the UN Human Rights Council on Universal Periodic Review from 6 to 17 November 2017.²⁴

Conclusion

The future course this case might take will depend on a number of underlying factors, some of which are slowly unfolding. A key factor ultimately will be the state of political relationship between India and Pakistan. Based on evidence of past attitudes of India and Pakistan towards each other's prisoners, Jadhav's future remains uncertain. One has to simply wait and see how the two countries will pursue this case to its final conclusion.

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²³ Retrieved from <https://www.icj.org/wp-content/uploads/2017/04/Pakistan-ICJ-UPR-Advocacy-non-legal-submissions-2017-ENG.pdf>. Accessed on 22 May 2017. Also See <https://www.frontlinedefenders.org/en/state-ment-report/upr-submission-pakistan-2017>

²⁴ Ibid.