

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**

[ISSN 2581-5369]

Volume 5 | Issue 1

2022

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Kulbhushan Jadhav Petition: 'A Resounding Victory for India'

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ABSTRACT

Kulbhushan Sudhir Jadhav is an Indian national born in Sangli, Maharashtra on 16 April 1970. He is an Ex-naval officer who served India from 1987 to 2001. He served Indian Navy as a commander. He was sentenced to death by a Field General Court Martial in Pakistan on 10 April 2017 because Pakistan Government claimed that he was spying for India's intelligence agency entering their territory by having fake identity credentials. Indian Government filed a writ petition in the International Court of Justice to prove the innocence of Kulbhushan Jadhav and claimed that Pakistan has violated Article 32 of the Vienna Convention even after being a signatory to this convention. Article 32 of the Vienna convention is the basis of this case. Applicability and alleged violation of Article 32 of the Vienna convention is the prudent part of the argumentation. The jurisdiction of the International Court of Justice to entertain the matter is also challenged by Pakistan. But as per Article 1 of an optional protocol to the Vienna convention court has jurisdiction over the interpretation and application of the Vienna convention on counselor relations concerning the compulsory settlement of the disputes. The research article will put light on the deep analysis of the Kulbhushan Jadhav case and the moral and legal duties of the government of Pakistan and India towards this case. In the hindsight, the first part of the paper discusses the history of the case. The second part discusses the detailed facts of the case. The third part elucidates the International Court of Justice involvement in the case, violation of Article 32 of the Vienna Convention, and statutes apply to this particular situation. And fourth part throws light on the conclusion.

I. OBJECTIVE

The objective of this research is to safeguard civilians of a state from the enemy country from inflicting great misery on them to retaliate as the same happened in the Kulbhushan Jadhav case. Secondly, these civilians are oppressed, tortured and the opposing state robs them of basic human rights such as the right to representation and right to a fair trial, this research aimed at barring any state from violating of basic human rights of any detainee. This research aims a

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thorough analysis of the Kulbhushan Jadhav case to get a deep insight into violations of the International laws and abuse of rights of Jadhav by Pakistan and raise voices against such violations to bring justice for all those civilians who are innocent but do not get a chance to prove their innocence. Thirdly, to halt the states to violate rules of the conventions to which they are signatory and International laws just to comply with the domestic laws or overpowering domestic laws over international laws by any state. And to get a deep insight into the role of international courts and tribunals in resolving the issues related to violation of international laws and maintaining peace between two countries.

(A) Methodology

The methodology used in research is the Archival study. The research is based on secondary data and is very descriptive. It focuses on the 'what' of the research subject rather than the 'why' of the research subject.

II. HISTORY OF THE CASE

Kulbhushan Jadhav was taken into custody by Pakistan Government on 3 March 2016. As per Pakistan, Jadhav was arrested by Pakistan in Balochistan near the region of the Chaman border. Pakistan contended that he entered Pakistan through the border of Iran with a fake passport bearing the name of "Hussain Mubarak Patel". He was taken into custody during the counterintelligence raid conducted by securing forces. Pakistan identified Jadhav as a spy working for India as a member of the research and analysis wing and revealing its confidential information to India. Pakistan claimed that he was an officer in the Indian navy and supporting India's external intelligence. Pakistan started the interrogation of Jadhav. On 8 April 2016, Pakistan police authorities registered a "First Information Report" to pursue the process of investigation. On 21 September 2016, the trial was started before the Field General Court Martial. On 10 April 2017, Kulbhushan Jadhav was sentenced to death. Pakistan retreated that Jadhav was provided with the duration of three weeks to defend him and he was provided with a specialized advocate to represent his interest. Secondly, the Oath is administered to every witness in front of Jadhav and he was also allowed to interrogate the witnesses. The whole proceedings were held in the presence of an officer of Pakistan's Judge Advocate General Branch. Pakistan's Ministry of Foreign Affairs sent a letter to the high commission of India to seek assistance for the criminal investigation against Jadhav but was not supported by India. Later, Jadhav's mother appealed for the remedy of the death sentence of Jadhav given by the court-martial of Pakistan.

According to India, Pakistan's allegations of Jadhav for alleged involvement in espionage and

terrorism activities are meaningless. India claimed that Jadhav was abducted from Iran and an armed group of Pakistan forcefully took him inside the territory of Pakistan with the help of proxy group Jaish al Adl, this group is against Iran. He was residing in Iran for business motives after he retired from the Indian Navy. It was all done to portray India as a terrorist country. India requested for the counselor access to Jadhav in more than ten Notes Verbales to ensure a fair trial for him. Letter demanding the support of procuring evidence against Indian national, Kulbushan Jadhav was considered baseless from the legal perspective. India came to know about the death sentence of Jadhav from the reported press statement of Pakistan. Later, Pakistan retaliate by replying to a request for counselor access to Jadhav 'which is indispensable to know to get a deep insight into the case' would be considered in terms of a request for criminal investigation assistance. When Pakistan close all its doors to initiate a fair trial of Jadhav then India decided to refer the matter to the International Court of Justice.

III. FACTS OF THE CASE

Kulbhushan Jadhav was allegedly arrested by Pakistan on 3 March 2016. On 25 March 2016 India came to know about the detention of Jadhav by Pakistan Military when the Foreign Secretary of Pakistan evoke the matter before Indian High Commission in Islamabad. India requested Pakistan for consular access on that day only. But after not receiving any reply from Pakistan for five days, India sent a reminder on 30 March 2016 to consider the matter at the earliest. Again, after waiting for the response of Pakistan in this matter. India sent thirteen more reminders on 6 May 2016, 10 June 2016, 11 July 2016, 26 July 2016, 22 August 2016, 3 November 2016, 19 December 2016, 3 February 2017, 3 March 2017, 31 March 2017, 10 April 2017, 14 April 2017 and 19 April 2017. All these reminders were ignored by Pakistan. It's been a year but India's request fell on deaf year.

On 23 January 2017, Pakistan asked India for assistance in the investigation procedure of Jadhav which was described as "FIR No. 6 of 2016". 'FIR is identified as First Information Report being registered by Police when it comes to knowing about the commission of a crime as per the Code of Criminal Procedure of Pakistan'. FIR was registered against Kulbhushan Jadhav as an Indian national on 8 April 2016. There was clarity about the nationality of Jadhav as mentioned in FIR but still, he was deprived of Consular access. On 3 February 2017, India protested through demarche for repeated ignorance of their request for consular access even after the affirmation of Jadhav as an Indian national by Pakistan. On 3 March 2017, India reminded about their several requests and its demarche for the same issue and again requested consular access for Jadhav. Pakistan provided India with Note Verbale dated 21 March 2017,

stating that "the case of consular access to the Indian National ... shall be considered in the light of Indian side's response to Pakistan's request for assistance in the investigation process and early dispensation of justice". On 31 March 2017, India responded to Note Verbale of Pakistan exclaiming that "consular access to Mr. Jadhav would be an essential prerequisite to verify the facts and understand the circumstances of his presence in Pakistan".

On 10 April 2017, India was informed through a press release issued by Inter-Service Public Relations that Jadhav is declared a spy and awarded a death sentence by Field General Court Martial under Pakistan Army Act. On 10 April 2017, Pakistan handed over another Note Verbale from the Ministry of Foreign Affairs, Islamabad conveying that "consular access shall be considered in the light of India's response to Pakistan's request for assistance in the investigation process. After declaring the death sentence of Jadhav providing India with Note Verbale does not make any sense, this contention is raised by India.

On 14 April 2017, a press statement by an advisor to the Prime Minister of Pakistan on issues related to foreign affairs has released a statement about the

- "confessional video statement" which was recorded on 25 March 2016 immediately after his detention but registered on 8 April 2016.
- Confessional statement of Jadhav before magistrate during his interrogation on May 2016, and in July 2016.
- The Trial was over by the court-martial in four proceedings.
- The accused was allowed to cross-question the witness and "a law qualified officer was provided to defend him throughout the court proceeding".

On 17 April 2017 authorized Spokesperson contended that 'Indian national is not entitled to consular access' therefore was not provided with it. On 19 April 2017, India gave Note Verbale to Pakistan and ask for copies of the charge sheet and procedure of trial of Jadhav's trial. On 25 April 2017, the parents of Jadhav applied for Pakistani visas to seek legal remedies to safeguard Jadhav from the death sentence. But they received no response from Pakistan in this regard. The family of Jadhav filed an appeal in Pakistan under sections 133 B and 131 of the Pakistan Army Act 1952. Along with the petition India again requested consular access. But the charge sheet of the petition, proceedings, defense lawyer, and any other information on this petition was not given by Pakistan. On 27 April 2017, the External Affairs Minister of India sent a letter to the advisor of the Pakistan Prime Minister on Foreign Affairs requesting again for the charge sheet, Proceedings of trial, shreds of evidence, and judgment of petition filed by the family of Kulbhushan Sudhir Jadhav. Even after requesting twice no response was received

from Pakistan. So, Pakistan left India with no choice to protect Jadhav and to stop further violation of International laws by Pakistan, India presented this matter to the appropriate court i.e. International Court of Justice on 8 May 2017.

IV. ROLE OF VIENNA CONVENTION

India and Pakistan both are signatories to the Vienna convention. India filed the case in the International Court of Justice for the violation of Article 36 of the Vienna Convention by Pakistan as it denied consular access to Jadhav to secure justice for him. Pakistan also raised a question on the jurisdiction of the International Court of Justice. In this context, the court stated 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". Every person should be treated equally by the courts and tribunals. And if a person has criminal charges against him then it becomes necessary to dispense him with fair proceedings conducted by a competent, independent, and impartial court. But this did not happen in the case of Kulbhushan Jadhav which compelled India to approach the International Court of Justice. Pakistan has raised three objections against India in regards to this case:

1. Abuse of Process: Pakistan argued before the court that the court's procedures have been abused by India. Firstly, it alleged that after the declaration of Jadhav's death sentence constitution of Pakistan provide the accused with the president's clemency procedure within 150 days of passing the verdict. India should wait for the clemency procedure instead of directly approaching the International Court of Justice to indicate the provisional measures in this case. Secondly, Pakistan argued that as per the Vienna convention India should consider other dispute settlement mechanisms before instituting proceedings in the International Court of Justice. The court contended that having faith in Pakistan's clemency procedure is strenuous for India and if in clemency procedure his sentence is maintained then it would be very tough for India to secure justice for Kulbhushan Jadhav. Court also concluded that there is no mandatory provision in the Vienna convention that fettered India from directly filing the petition before the International Court of Justice and for approaching the conciliation commission would require the mutual consent of both the states that there exists a dispute which again a strenuous task for India. Hence, the court opined that Pakistan's first objection against India must not be taken into the consideration.

2. Abuse of Rights: Pakistan objected that India has various rights under International law and it abused them. Pakistan claimed that India denied providing any evidence which could justify Jadhav's nationality as Indian, refused to dispense Pakistan with any sort of assistance in the criminal investigation procedure of Jadhav, and alleged that India permitted Jadhav to enter the territory of Pakistan with a fake identity and passport for the main motive of carrying espionage and terrorist activities.

The Court concluded that when both the countries agreed that Jadhav is an Indian national then there arises no question of requesting proof of Jadhav nationality. In regards to the other two objections, Pakistan claimed that India has violated the security council resolution and cannot request consular access for Jadhav as it violated many international laws in this particular case. The court explained that there is no relationship described by Pakistan between the objections raised and the laws violated by India on merits in the view of the court. Therefore, the court rejected the objection of Pakistan in regards to nationality and the court contended that the remaining two objections would be taken into consideration only when dealing with merit.

3. India alleged unlawful conduct: Pakistan requested the court to dismiss the petition filed by India as it involved in the unlawful conduct of not assisting Pakistan in the criminal investigation of Jadhav and issued "False cover name authentic cover name" to Kulbhushan Jadhav. Pakistan requested the court to opt for the 'doctrine of clean hands' and 'Ex turpi causa' in this case as referred to in the 'Islamic Republic of Iran v. the United States of America'. The court opined that how violation of international law by India can escape Pakistan in fulfilling its obligation towards Vienna Convention by not availing Jadhav with consular access to represent his point of view in this particular matter. Finally, the court also denied to uphold the third objection of Pakistan.

V. VERDICT

India claimed that Pakistan acted in a violative manner concerning Article 36 of the Vienna convention. The court also in its judgment considers that Pakistan acted in breach of an obligation under Article 36 of the Vienna convention by not making Jadhav aware of his rights, delaying in informing India about the Jadhav in their custody, and barring Jadhav to receive any consular access or to avail him of legal representation from India. Even after the verdict of the Field Court Martial of Pakistan, Jadhav filed a mercy petition which was not taken into the consideration by President of Pakistan and not presented before the court as there is no record of clemency procedure of Jadhav with Pakistan to present before the court. India argued that the death sentence of Jadhav declared by Pakistan's military court is violative of International

laws and provisions of the Vienna Convention. But here the court contended that 'its jurisdiction is limited to the interpretation and application of Vienna convention and does not extend to any other rules of International Law. India requests the court to annul the death sentence of Kulbhushan Jadhav. The court denied quashing the death sentence completely but declared that India is entitled to "restitutio in integrum" to avoid further violation of any right of Jadhav and India as well. On 17 July 2019, unanimously by fifteen votes to one, the International Court of Justice ordered Pakistan the review and reconsideration of the death sentence by referring to the case of Avena and Other Mexican Nationals (Mexico vs united states of America), Judgement, I.C.J Reports 2004. Court exclaimed that the 'Islamic Republic of Pakistan has to inform Jadhav about his rights without any further delay and to avail him of consular access of India to represent his interest before the courts of Pakistan for effective justice by the Vienna Convention on consular relations and to safeguard his right to a fair trial which is absolute'.

VI. CONCLUSION

Kulbhushan Sudhir Jadhav's incarceration by Pakistan is a complicated issue for India because Jadhav was taken into custody by Pakistan and it claimed that 'he is a spy' which can prove to be detrimental to India's reputation and this issue can negatively affect the relations of India with the rest of the world. So, it became necessary for India to bring this issue to any International Court or Tribunal also this issue is related to the violation of Article 36 of the Vienna Convention and no domestic court is in the position to entertain this matter. Secondly, every nation has to protect its nationals from the untold misery inflicted by other states if somehow they fall into the vicious circle of criminal charges imposed by the other state who has taken the national in its custody. Pakistan was repeatedly making efforts to tarnish the image of India to destabilize it by sending a letter to the security council and releasing videos of Jadhav in which he is accepting all the claims made by Pakistan. It tried to use that video as a proof in the International Court of Justice but the court refused to accept any such videos as it might possible that it is recorded through coercion or torture. Pakistan alleged India as a terrorist country and defamed India continuously by objecting that India is involved in unlawful activities such as issuing fake passports to Jadhav and stealing confidential information from Pakistan. The court dismissed all the three objections raised by Pakistan against India.

Now the question arises that whether International Humanitarian Law is applicable under this case and why the matter was presented before the International Court of Justice instead of taking the matter directly to other criminal tribunals and courts like International Criminal

Court and United Nations Security Council. Although India is a signatory to the Geneva Convention, 1949 which regulates the treatment of civilians who are taking no direct part in hostilities and also prohibits targeting of civilians as per common Article 3 of the Geneva Convention. But in this case, firstly there is was no war-like situation during the detention of Jadhav and secondly, this convention is applicable related to Non-International war conflicts. The matter was not presented before any International Criminal Courts and Tribunal because simply violating of rights of an individual and international laws does not evoke any criminal liability against any state.

The verdict of the International Court of Justice in regards to the Kulbhusan Jadhav petition is a resounding victory for the Rule of Law and India. Advocate Harish Salve was representing India in this case exclaimed that “this judgment has restored our faith in the rule of law, in the International Court of Justice and in the system which we as mankind put together to protect the citizens of the world.” Court supported the arguments of India which depicts the violation of Article 36 of the Vienna Convention to which Pakistan is a signatory and dispense India with the “restitutio in integrum”. Pakistan has passed a bill (Review and Reconsideration bill,2020) for the implementation of the International Court of Justice Judgement without any undue delay which also makes this petition a great success for India.

VII. RECOMMENDATION

- If Pakistan does not comply with the judgment of the International Court of Justice in the matter of effective review and reconsideration of Jadhav's death sentence properly then India can directly appeal to the United Nations Security Council. Because as per Article 27(2) of the UN Charter, non-compliance with the verdict of the International Court of Justice is a procedural matter of the security-council and permanent members of the council cannot exercise their veto power. So, there are more chances of adequate justice.
- India can suspend diplomatic relations with Pakistan, raise its voice against unlawful practices of Pakistan by appealing to the public for moral and emotional support at the international level and use sanctions for retaliation.
- India can ask Indian Diplomats in Pakistan to keep a check on every activity of Pakistan in regards to the treatment and trial of Jadhav.

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