

India v. Pakistan (Jadhav case)

Questions and Answers

February 2019

All that you need to know about India v. Pakistan (Jadhav case)

As oral hearings are due to commence on 18 February in *India v. Pakistan* (Jadhav case) before the International Court of Justice (ICJ), the International Commission of Jurists has published the following Questions and Answers to clarify the key issues and relevant laws raised in the case.

1. What are India's allegations against Pakistan?

India has alleged "egregious violations of the Vienna Convention on Consular Relations (VCCR)" by Pakistan in connection with the detention, trial and conviction of Indian national Kulbhushan Sudhir Jadhav.

Pakistani authorities reportedly arrested Kulbhushan Jadhav on 3 March 2016. The circumstances of his arrest remain in dispute between the Parties.

India was informed of the arrest on 25 March 2016. On 10 April 2017, Pakistan's military announced Kulbhushan Jadhav had been convicted and sentenced to death by a military court for "espionage and sabotage activities against Pakistan."¹

India's requests for consular access, made at least sixteen times starting from 25 March 2016, were either denied by Pakistan or made conditional upon India's assistance in the investigation against Jadhav.

India alleges that denial of consular access breaches Pakistan's obligations under Article 36(1) of the VCCR.²

2. What is Pakistan's response?

According to Pakistan, Kulbhushan Jadhav was involved in espionage and terrorism-related activities, particularly in the province of Balochistan.

Responding to India's allegations, Pakistan argued: (1) The VCCR is not applicable to spies or terrorism due to the inherent nature of the offences of espionage and terrorism; (2) a bilateral agreement on consular access, signed by India and Pakistan in 2008, overrides the obligations under the VCCR; and (3) reservations made under Article 36(2) of the ICJ Statute are also applicable to cases under Article 36(1) of the ICJ Statute.

3. What are the applicable laws in this case?

India and Pakistan are parties to the Vienna Convention on Consular Relations and the Optional Protocol to the VCCR.

Article 36(1) of the VCCR, among other things, provides that when a national of a foreign country is arrested or detained, the detainee must be advised of the right to have the detainee's consulate notified and that the detainee has the right to regular consultation with consular officials during detention and any trial.

¹ ISPR press statement, 10 April 2017.

² <http://www.icj-cij.org/files/case-related/168/19424.pdf>

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The Optional Protocol to the VCCR gives the International Court of Justice (ICJ) jurisdiction to try disputes that arise from the treaty.

This basis of ICJ's jurisdiction under the VCCR is distinct and separate from the generic basis for jurisdiction provided for under Article 36(2) of the ICJ Statute. India and Pakistan have both submitted a number of reservations to the generic basis, which does not evidently affect the jurisdiction of the ICJ to settle disputes under Article 36(1) of the ICJ Statute, though that is a question the ICJ may clarify in these proceedings.

4. What does the 2008 bilateral agreement between India and Pakistan say?

The bilateral agreement, concluded in May 2008, states that the objective of the agreement is to further "the humane treatment of nationals of either country arrested, detained or imprisoned". It lists a number of measures of cooperation, including: immediate notification of arrest or detention to their respective High Commissions; maintenance of a comprehensive list of people arrested or detained; and provision of consular access within three months of arrest or detention.

The agreement also states that in cases of "arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits."³

The agreement does not make any reference to the VCCR.

5. Can bilateral agreements override obligations under the Vienna Convention on Consular Relations?

Article 73(2) of the VCCR provides that "[n]othing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof."

The VCCR is a multilateral treaty, to which the vast majority of States are party (179 at present). The obligations under the VCCR may be enhanced or clarified by bilateral treaties, but cannot be diluted or undermined, as affirmed by authoritative interpretation of the VCCR and general principles of treaty law, including Article 41(1) of the Vienna Convention on the Law of Treaties.

6. Does the Vienna Convention on Consular Relations apply to alleged spies or people accused of terrorism-related offences?

The VCCR does not make any exception for people suspected of committing espionage or terrorism-related offences and the ICJ has in the

³ A copy of the bilateral agreement is available with the International Commission of Jurists.

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past also not interpreted the treaty to exclude offences such as espionage or terrorism.

Making the rights pertaining to consular access under the VCCR contingent upon the offence foreign nationals are charged with would undermine the purpose of the treaty. It would allow States to deny consular access to foreign nationals merely through a particular and unilateral characterization of their acts. Indeed, it is precisely for charges of the most serious nature that consular access will be most compelling, both for the State and the individual seeking such access. Since the right to consular access is applicable from the time of arrest or detention, denial of consular access based on charges would also fly in the face of the principle of presumption of innocence.

7. What are provisional measures? What does the ICJ's order on provisional orders say?

Pursuant to Article 41 of its Statute, the ICJ may issue orders for "provisional measures". The object of provisional measures is to preserve the *status quo* concerning the rights and interests of the parties pending the judgment of the Court.

Measures taken under Article 41 of the ICJ Statute are "provisional" in that they are indicated pending the final decision of the Court and that they cease to apply once the judgment of the Court is rendered.

On 18 May 2017, the ICJ issued an order for provisional measures in response to India's request, and directed Pakistan to "take all measures at its disposal" to ensure Jadhav is not executed pending the final decision of the Court.⁴

8. What are the next steps in the case? How long does it take for cases before the ICJ to conclude?

The ICJ is scheduled to hold public oral hearings in the case from 18 to 21 February 2019.⁵ After the oral proceedings, the Court will likely deliberate *in camera* and sometime thereafter deliver its judgment at a public sitting. The judgment is final, binding on the parties to a case and without appeal.

If the parties have no objection, their written pleadings are made public when oral proceedings commence.

There is no way to accurately predict when the case will be decided after the conclusion of oral hearings. Judgments in previous cases involving similar disputes have been delivered even up to a year or longer after oral hearings conclude.

⁴ <http://www.icj-cij.org/files/case-related/168/168-20170518-ORD-01-00-EN.pdf>

⁵ <https://www.icj-cij.org/files/case-related/168/168-20181003-PRE-01-00-EN.pdf>

9. What relief has India sought from the ICJ? What relief measures can the ICJ order?

India has requested a number of measures of relief from the ICJ, including: Suspension of Kulbhushan Jadhav's death sentence; a directive to Pakistan to annul the death sentence; a declaration that Kulbhushan Jadhav's military trial was in violation of the VCCR and international human rights law, including the right to fair trial under Article 14 of the ICCPR; a directive restraining Pakistan from giving effect to the death sentence; and a directive to Pakistan to release Kulbhushan Jadhav.

The ICJ, pursuant to its jurisdictional competencies, can only decide whether Pakistan breached its obligations under Article 36 of the VCCR and order related relief. This may include, for example, directions to Pakistan to "review or reconsider" Jadhav's conviction and sentence and to guarantee that similar breaches will not occur in future. In these particular proceedings, the ICJ would not have jurisdiction to make a declaration as to whether Jadhav's trial was in violation of the ICCPR. It is also unlikely that the Court would decide it could order Jadhav's release or rule on the lawfulness of military trials or the death penalty in Pakistan.

10. Will the ICJ consider the lawfulness of the death penalty in Pakistan?

No, the case at issue is limited to consular access under the VCCR. Nonetheless, the case engages critical fair trial concerns, and, according to many experts and advocates, underscores one of inherent problems of the death penalty i.e. that fair trial violations that lead to the execution of a person are inherently irreparable.

The International Commission of Jurists considers the death penalty a violation of the right to life and cruel, inhuman or degrading punishment and notes that a large majority of States, in repeated UN resolutions, have called on retentionist states to declare a moratorium on the practice with a view to abolition.

11. What is the relationship between consular access and the right to a fair trial under international standards?

Under international standards, foreign nationals who are detained or arrested must also be promptly informed of their right to communicate with their embassy or consular post.

The International Court of Justice has in other cases clarified that authorities have a duty to inform a foreign national of this right as soon as they realize a person is a foreign national or once there are grounds to think that the person is probably a foreign national.⁶

⁶ See, for example, International Court of Justice, *Avena and Other Mexican Nationals*, (*Mexico v United States of America*), 2004.

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The Inter-American Court of Human Rights has said the right to consular access “must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial.”⁷

12. Under what provisions of the law was Kulbhusan Jadhav tried in Pakistan? Are proceedings of Pakistan’s military courts compatible with international standards?

According to military sources, Kulbhusan Jadhav was tried under the Official Secrets Act, 1923, for “espionage and sabotage activities against Pakistan”. Evidence against Kulbhusan Jadhav includes a “confession” that was later made public and broadcast on Pakistani media.⁸

Pakistan’s Army Act, 1952, allows military courts to hear cases that arise out of the Official Secrets Act. Contrary to media reports, Kulbhusan Jadhav has not been tried pursuant to constitutional amendments that give military courts additional powers to try people accused of belonging to proscribed organizations that are associated with terrorism-related offences.

Pakistani military courts are not independent and the proceedings before them fall far short of national and international fair trial standards. Judges of military courts are part of the executive branch of the State and continue to be subjected to military command; the right to appeal to civilian courts is not available; the right to a public hearing is not guaranteed; and a duly reasoned, written judgment, including the essential findings, evidence and legal reasoning, is denied.⁹

13. Are judgments of the ICJ binding?

Yes, ICJ’s judgments, where the Court is exercising contentious jurisdiction, are binding on the States that are party to the case, in respect of the particular case being decided.¹⁰ (The ICJ may also render advisory opinions under Article 96 of the UN Charter, but that is not relevant to the case of *India v. Pakistan*.)

Article 94(1) of the UN Charter states “[e]ach member of the United Nations undertakes to comply with the decisions of the International Court in any case to which it is a party.”

Article 94(2) provides “[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”

⁷ Inter-American Court of Human Rights, advisory opinion OC-16/99 of October 1, 1999 requested by the United Mexican States, “The right to information on consular assistance in the framework of the guarantees of the due process of law”, para 122.

⁸ ISPR press statement, 10 April 2017.

⁹ See, for example, *International Commission of Jurists*, “Military injustice in Pakistan”, January 2019, accessed at: <https://www.icj.org/military-justice-system-a-glaring-surrender-of-human-rights/>

¹⁰ Article 59, ICJ Statute.