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Issue Brief

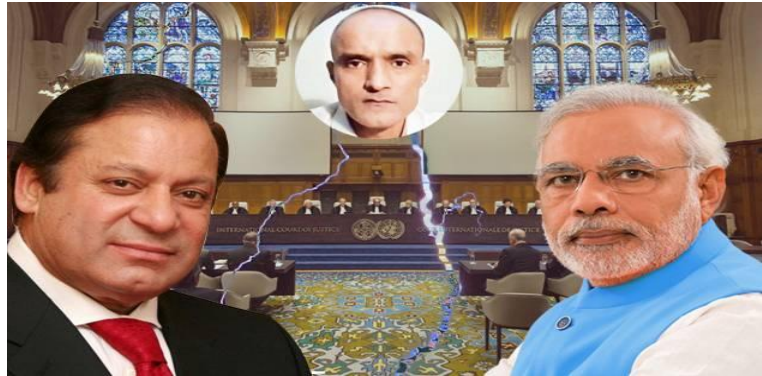
ICJ Verdict on Jadhav Case: The Battle is not Over Yet

May 22, 2017

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The International Court of Justice (ICJ) on May 18 'stayed' the execution of Kulbushan Jadhav till its final verdict. The decision was made after India moved ICJ against Jadhav's conviction in Pakistan. Indians



have called the ICJ decision as a major victory for India. However, they seem to have ignored many facts which still are in favor of Pakistan.

Kulbushan Jadhav, an active Indian naval officer and an active Research and Analysis Wing (RAW) agent, was arrested in March 2016 and was awarded death sentence on April 10, 2017 under the Field General Court Martial (FGCM) in Pakistan.¹ The sentence evoked a sharp reaction in India which warned Pakistan of consequences and damage to bilateral ties if the "pre-meditated murder" was carried out.

India hastily took the case to ICJ on May 8.² At ICJ, India had two major arguments: One, it sought ICJ intervention to ensure that Jadhav is not executed while referring to 'the extreme gravity and immediacy of the threat; and second accused Pakistan of 'egregious violations of the Vienna Convention on Consular Relations'.³

Although the Court's verdict has come in favor of India at the moment, however, it will not yield substantial results. Pakistan still has not lost the case and there are many reasons for this.

To begin with jurisdiction of ICJ, a question rises whether the ICJ has the authority or some legal basis to hear and decide this case? The ICJ's jurisdiction applicability can be challenged on a number of counts.

Firstly, in terms of Article 93 of the UN Charter "all members of UN are ipso facto parties of the ICJ".⁴ Also, under Article 36 (2) of the ICJ, states may submit a declaration and voluntarily accept the ICJ

¹ Pakistan sentences Indian spy Kulbushan Jadhav to death, *DAWN*, April 11, 2017.

² India moves International Court of Justice against Jadhav's conviction, *DAWN*, May 11, 2017.

³ International Court of Justice, Press Release, No 201/16, May 9, 2017. www.icj-cij.org/docket/files/168/19420.pdf

⁴ UN Charter, Article 93, <http://www.un.org/en/sections/un-charter/chapter-xiv/index.html>

jurisdictions and allow the Court to settle their dispute. However, in declaration, states may limit the grounds on which a case is brought against it.⁵ India, in its declaration with ICJ signed in 1974 has limited the grounds that other countries could take it to the ICJ and preclude international intervention under Article 36 (1). Pakistan has also revised its commitment to the ICJ and has withdrawn all domestic and national security related issues from the jurisdiction of the Court on March 29, 2017.

With its revised declaration, Pakistan is now on equal footing with the Indian declaration. Indians themselves have acknowledged the declaration made by Pakistan's ambassador to the United Nations Maleeha Lodhi to ICJ. The declaration stated that the issues related to its domestic sphere and national security issues would no longer be part of the ICJ jurisdiction.⁶ Thus, under these declarations, neither Pakistan nor India would be able to bring a case such as Jadhav's to the Court.

Furthermore, the case India presented before the ICJ is about alleged violation of the Vienna Convention on Consular Relation (VCCR), 1963. The VCCR 1963 grants certain rights and obligations regarding consular relations. India referred to Article 36 clause (a & b) of VCCR and stated that Pakistan has violated the Convention by denying access to Jadhav. This Article of VCCR grants the Consular⁷ officials the "right to visit national of the sending State who is in prison, custody or detention, to correspond with him and arrange legal representation."⁸ However, the Court in its decision has not indicated towards such measures. Also, the VCCR does not provide any grounds for the termination of a decision of a domestic court. Therefore, Jadhav's trial or his sentence cannot be reversed by the Court.

The Courts Jurisdiction of the case can be challenged on many other grounds. Foremost among them is the 2008 Bilateral Agreement between Pakistan and India on Consular Access. The agreement aims at "furthering the objective of humane treatment of nationals of either country...".⁹ Both the countries had exchanged the lists of nationals detained or imprisoned in the past and re-affirmed the agreement on multiple occasions.¹⁰ Under this agreement, both India and Pakistan agreed that "in case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its

⁵ Statute of International Court of Justice, Article 36, legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf

⁶ Indian media says taking Jadhav case to ICJ might not be fruitful, *Pakistan Today*, May 12, 2017.

⁷ A consular is generally a part of the diplomatic mission of a State in another State. In addition to promoting economic and commercial relations between the two countries, consular officials also look to protect their State's interests in the host State, especially in relation to their citizens present in the host State.

⁸ Vienna Convention on Consular Relations, 1963, Article 36, www.fuech.eu/pdf/viennaconvention.pdf

⁹ "Pakistan at the ICJ", *The Express Tribune*, May 17, 2017.

¹⁰ Joint Statement issued by India and Pakistan at Islamabad, *The Hindu*, September 8, 2012.

merits”.¹¹ This provided an option for both the countries to deny consular access where national security compulsions require. However, India is trying to distant itself from this agreement. India contends that agreement is not registered with the UN and contradicts the VCCR, saying consular access under the VCCR is absolute and cannot be limited under any circumstances. This raises the question of why then did India enter into this agreement with Pakistan and has been supporting it?

The other significant aspect which Pakistan can challenge is that how a serving Indian naval official was engaged in systematic espionage on the behalf of his government in Pakistan. Such arguments would make more sense at ICJ during the course of legal arguments in weeks to come.

ICJ’s decision cannot change the basic facts of the case that Jadhav is a ‘spy terrorist’. India’s desperation to find a way to get consular access and meet Jadhav is a proof of the high value of his role as an agent of India.

Thus, the legal battle is far from over. Pakistan has a strong case to plead at the end of the day when each and every legal aspect of the case would be deliberated upon in regular hearings. It is not a just confessional statement of Jadhav which supports Pakistan’s case, but his dual passports to say the least. ICJ’s future decision will not change the fundamental reality that India has been actively involved in promoting terrorism in Pakistan.

Moreover, India’s move to the ICJ is advantageous for Pakistan as it provided the chance to open up all cases between India and Pakistan to multilateral jurisdiction. Thus weakening India’s stance that all issues with Pakistan would be resolved bilaterally. With India acceptance to ICJ’s jurisdiction over bilateral issues, Pakistan could well demand that ICJ arbitrate on human rights violations in Indian Occupied Kashmir, water issue and Indian aggression along Line of Control and Working Boundary.

¹¹ ICJ case: Media ‘experts’ should stop misleading the public, *Daily Times*, May 19, 2017.