



ICJ DISMISSES INDIA’S CLAIM FOR "AT LEAST" ACQUITTAL, RELEASE AND RETURN OF COMMANDER JADHAV (INDIA V PAKISTAN)

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Introduction

In an unprecedented situation, it appears that the decision of the ICJ has been leaked publicly on Twitter (https://mobile.twitter.com/reema_omer/status/1151469535201042434), shortly prior to 3PM (Hague time). Based upon the information now in the public domain (which we will confirm once judgment is handed down), it appears that the ICJ has rejected India’s claim for “at least” the acquittal, release and return of Commander Jadhav to India.

The ICJ has, consistent with its previous case law, accepted (as argued by Pakistan) that effective review of Jadhav’s conviction and sentence by the Pakistan Military Court for espionage on 10th April 2017 is provided for under the law of Pakistan. As would be expected, the Court has ordered that no execution be carried out pending the review of the domestic courts of Pakistan.

India had argued that no remedy less than the acquittal, release and return to India of Commander Jadhav would be effective and had attacked the soundness of the Pakistani legal system. The ICJ’s decision amounts to a rejection of India’s attack in this regard.

The full judgment will be available on the ICJ’s website at <https://www.icj-cij.org/en/case/168>.

Pakistan’s Counsel at the ICJ was Khawar Qureshi QC, supported by Catriona Nicol and Joseph Dyke.

Background

The Jadhav Case was brought by India against Pakistan under the Vienna Convention on Consular Relations 1963 (Article 36(1)(b)). India alleged that Pakistan had committed a breach of the VCCR 1963

by failing to grant immediate consular access in respect of Commander Jadhav on 25th March 2016, and alleging that the Military Court procedure which led to his conviction and sentence for espionage on 10th April 2017 was flagrantly unfair.

On 18th May 2017, the ICJ ordered provisional measures to preserve the *status quo* without any finding on the merits.

Following the filing of written pleadings and evidence on the merits of the case by both India and Pakistan, a hearing was held before the ICJ from 18th-21st February 2019. Pakistan's legal submissions were presented by English Barrister Khawar Qureshi QC, while India's legal submissions were presented by Indian Counsel Harish Salve SA.

India argued that Commander Kulbhushan Jadhav is an innocent businessman who was kidnapped from Iran, brought to Pakistan, and tortured to confess that he was a Commander in the Indian Navy working with India's Research & Analysis Wing ("RAW" – India's primary foreign intelligence agency). India argued that it was entitled to obtain consular access to Commander Jadhav as soon as his detention was made public by Pakistan on 25th March 2016. India argued that the trial and conviction of Commander Jadhav for espionage and terrorism offences by a Military Court on 10th April 2017 was "a farce". India contended that the denial of consular access requires the ICJ to "at least" order the acquittal, release and return to India of Commander Jadhav.

Pakistan rejected all of India's assertions. Pakistan pointed to evidence obtained from Commander Jadhav after his arrest and during the criminal process leading to his conviction as amply demonstrating his activities in fomenting terrorism and engaging in espionage within Pakistan. Pakistan maintained that it would be incompatible with international law for someone sent as a spy/terrorist by a State to be afforded access to officials of that State, as India asserted.

Pakistan also pointed to an express Agreement on Consular Access dated 21st May 2008 between India and Pakistan, which allows each State to consider a request for consular access "on its merits" in a case involving national security. Furthermore, Pakistan pointed to the uncontradicted evidence that Commander Jadhav was provided with an authentic Indian passport in a 'cover' Muslim name of 'Hussein Mubarak Patel' by the Indian authorities, as a clear and obvious link between his conduct and the Government of India. Such conduct being a blatant violation of international law should bar any claim for relief from a court. India refused to reply on this issue and (unconvincingly) described it as "mischievous propaganda". The passport had been examined by a former UK Chief Immigration Officer who had trained the Indian authorities. The passport had been used at least 17 times to enter and exit India.

In addition, Pakistan pointed to the fact that, in all of the ICJ's previous decisions concerning Article 36 of the Vienna Convention on Consular Relations 1963 (which involved death sentences imposed by the USA), the Court made it clear that it was not a court of criminal appeal and the presence of "effective" "review and reconsideration" by domestic courts was an appropriate remedy, even if a breach of the right to consular access had been established. The High Court and Supreme Court of Pakistan provide such review, as confirmed by leading UK-based military law experts.