



INTERNATIONAL COURT OF JUSTICE

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Jadhav Case (India v. Pakistan)

Provisional Measures

The Court indicates to the Islamic Republic of Pakistan that it must take “all measures at its disposal” to prevent the execution of an Indian national. Mr. Kulbhushan Sudhir Jadhav, pending final judgment of the Court

THE HAGUE, 18 May 2017. The International Court of Justice (ICJ), principal judicial organ of the United Nations, today indicated to the Islamic Republic of Pakistan that it must “take all measures at its disposal” to ensure that Mr. Kulbhushan Sudhir Jadhav, of Indian nationality, is not executed pending a final judgment of the Court in the Jadhav Case (India v. Pakistan).

In its Order indicating provisional measures, which was adopted unanimously, the Court also stated that the Government of Pakistan shall inform it of all measures taken in implementation of that Order. It further decided to remain seized of the matters which form the subject of the Order until it has rendered its final judgment.

History of the proceedings

India filed its Request for the indication of provisional measures on 8 May 2017, the same day that it initiated proceedings against Pakistan in a dispute concerning alleged violations of Article 36 of the Vienna Convention on Consular Relations of 24 April 1963 with respect to an Indian national, Mr. Jadhav, sentenced to death in Pakistan.

Reasoning of the Court

The Court begins by considering whether it has jurisdiction *prima facie* to hear the case. It recalls that India seeks to ground its jurisdiction in Article I of the Optional Protocol to the Vienna Convention, which provides that the Court has jurisdiction over “[d]isputes arising out of the interpretation or application of the [Vienna] Convention”. In this regard, the Court notes that the Parties do indeed appear to have differed, and still differ today, on the question of India’s consular assistance to Mr. Jadhav under the Vienna Convention. It further notes that the acts alleged by India, i.e., the alleged failure by Pakistan to provide the requisite consular notifications with regard to the arrest and detention of Mr. Jadhav, as well as the alleged failure to allow communication and provide access to him, appear to be capable of falling within the scope of the Convention. In the view of the Court, this is sufficient to establish that it has *prima facie* jurisdiction under Article I of

the Optional Protocol. The Court further observes that the existence of a 2008 bilateral Agreement between the Parties on consular relations does not change its conclusion on jurisdiction.

The Court then turns to the question whether the rights alleged by India are at least plausible. It observes that the rights to consular notification and access between a State and its nationals, as well as the obligations of the detaining State to inform the person concerned without delay of his rights with regard to consular assistance and to allow their exercise, are recognized in Article 36, paragraph 1, of the Vienna Convention, and that India has alleged violations of this provision. In the view of the Court, therefore, it appears that the rights alleged by India are plausible.

The Court then focuses on the issue of the link between the rights claimed and the provisional measures requested. It considers that the measures requested are aimed at ensuring that the rights contained in Article 36, paragraph 1, of the Vienna Convention, are preserved. Therefore, a link exists between the rights claimed by India and the provisional measures being sought.

The Court then examines whether there is a risk of irreparable prejudice and urgency. It considers that the mere fact that Mr. Jadhav is under a death sentence and might therefore be executed is sufficient to demonstrate the existence of a risk of irreparable prejudice to the rights claimed by India. The Court further observes that Pakistan has indicated that any execution of Mr. Jadhav would probably not take place before the month of August 2017. This means that there is a risk that an execution could take place at any moment thereafter, before the Court has given its final decision in the case. The Court also notes that Pakistan has given no assurance that Mr. Jadhav will not be executed before the Court has rendered its final decision. In those circumstances, the Court is satisfied that there is urgency in the present case.

The Court concludes by indicating the following measures:

Pakistan shall take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order.

The Court also decides that, until it has given its final decision, it shall remain seized of the matters which form the subject-matter of this Order.

Composition of the Court

The Court was composed as follows: President Abraham; Judges Owada, Cançado Trindade, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian; Registrar Couvreur.

Judge Cançado Trindade appends a separate opinion to the Order of the Court; Judge Bhandari appends a declaration to the Order of the Court.

Note: The Court's press releases do not constitute official documents.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It was established by the United Nations Charter in June 1945 and began its activities in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York. The Court has a

twofold role: first, to settle, in accordance with international law, legal disputes submitted to it by States (its judgments have binding force and are without appeal for the parties concerned); and, second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system. The Court is composed of 15 judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. Independent of the United Nations Secretariat, it is assisted by a Registry, its own international secretariat, whose activities are both judicial and diplomatic, as well as administrative. The official languages of the Court are French and English. Also known as the “World Court”, it is the only court of a universal character with general jurisdiction.

The ICJ, a court open only to States for contentious proceedings, and to certain organs and institutions of the United Nations system for advisory proceedings, should not be confused with the other — mostly criminal — judicial institutions based in The Hague and adjacent areas, such as the International Criminal Tribunal for the former Yugoslavia (ICTY, an *ad hoc* court created by the Security Council), the International Criminal Court (ICC, the first permanent international criminal court, established by treaty, which does not belong to the United Nations system), the Special Tribunal for Lebanon (STL, an international judicial body with an independent legal personality, established by the United Nations Security Council upon the request of the Lebanese Government and composed of Lebanese and international judges), or the Permanent Court of Arbitration (PCA, an independent institution which assists in the establishment of arbitral tribunals and facilitates their work, in accordance with the Hague Convention of 1899).

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Concurring Opinion of Judge Cançado Trindade

1. In his Concurring Opinion, composed of seven parts, Judge Cançado Trindade begins by pointing out that, having concurred with his vote to the adoption of the present Order indicating Provisional Measures of Protection, there are certain aspects pertaining to the matter dealt with therein to which he attaches great importance. He feels thus obliged to append his Concurring Opinion thereto, so as to leave on the records the foundations of his own personal position thereon. He purports to address the selected points bringing them into the realm of juridical epistemology.

2. The points he proceeds to examine (part I) are: (a) rights of States and of individuals as subjects of international law; (b) presence of rights of States and of individuals together; (c) the right to information on consular assistance in the framework of the guarantees of the due process of law; (d) the fundamental (rather than “plausible”) human right to be protected: provisional measures as jurisdictional guarantees of a preventive character; (e) the autonomous legal regime of provisional measures of protection; and (f) the humanization of international law as manifested in the domain of consular law.

3. The present Jadhav case concerns alleged violations of the 1963 Vienna Convention on Consular Relations with regard to the detention and trial of an Indian national (Mr. K.S. Jadhav), sentenced to death (on 10.04.2017) by a Court Martial in Pakistan. Keeping in mind the distinct lines of arguments advanced by the two contending parties (India and Pakistan) before the ICJ, he observes at first that the present case “brings to the fore rights of States and of individuals emanating directly from international law” under Article 36(1) of the 1963 Vienna Convention, as related to the U.N. Covenant on Civil and Political Rights (paras. 5-6).

4. Judge Cançado Trindade stresses that, in “contemporary international law, rights of States and of individuals are indeed to be considered altogether, they cannot be dissociated from each other” (para. 7). He recalls that, before the turn of the century, the Inter-American Court of Human Rights [IACtHR] delivered its pioneering Advisory Opinion n° 16 on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (of 01.10.1999), advancing the proper hermeneutics of Article 36 (1) (b) of the 1963 Vienna Convention, reflecting the impact thereon of the corpus juris of the International Law of Human Rights (ILHR).

5. On that occasion, - he further recalls, -he appended a Concurring Opinion appended to that Advisory Opinion n° 16, wherein he examined that impact, putting an end to the “old monopoly of the State of the condition of being subject of rights”, and demystifying the constraints of an outdated voluntarist positivism (para. 8). He then warned that those constraints “had wrongly been indifferent to other areas of human knowledge, as well as to the existential time of human beings”, with its “obsession with the autonomy of the ‘will’ of the States”, and he added:

“It so happens that the very emergence and consolidation of the corpus juris of the ILHR are due to the reaction of the universal juridical conscience to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law came to the encounter of human beings, the ultimate titulaires of their inherent rights protected by its norms (...).

In the framework of this new corpus juris, one cannot remain indifferent to the contribution of other areas of human knowledge, nor to the existential time of human

beings. (...) [T]he right to information on consular assistance (...), “cannot nowadays be appreciated in the framework of exclusively inter-State relations, as contemporary legal science has come to admit that the contents and effectiveness of juridical norms accompany the evolution of time, not being independent of this latter” (...).

Thus, (...) Article 36 (1) (b) of the aforementioned 1963 Vienna Convention, in spite of having preceded in time the provisions of the two U.N. Covenants on Human Rights (of 1966), could no longer be dissociated from the international norms of protection of human rights concerning the guarantees of the due process of law and their evolutive interpretation” (paras. 9-11).

6. Judge Cançado Trindade holds (part III) that “States and individuals are subjects of contemporary international law; the crystallization of the subjective individual right to information on consular assistance bears witness of such evolution” (para. 12). The ICJ itself took into account the ILHR in the case of Hostages in Tehran (Provisional Measures, Order of 15.12.1979) (paras. 12-13), and, much later, the “presence of rights of States and of individuals together” was acknowledged in express terms by ICJ in the case of Avena and Other Mexican Nationals (Judgment of 31.03.2004 para. 40), where it stated that “violations of the rights of the individual under Article 36 [of the 1963 Vienna Convention] may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual” (para. 14).

7. The present Jadhav case affords, in his view, yet another occasion to keep in mind the formation of an opinio juris communis to this effect (para. 16), corresponding to a new ethos of our times (para. 18). It has thus become indispensable to link, for the purpose of protection, — he ponders, — “the right to information on consular assistance with the guarantees of the due process of law” set forth in the instruments of the ILHR, bearing witness of the process of humanization of international law, as manifested in particular also in the domain of consular law nowadays (part IV).

8. Provisional measures of protection — he proceeds — have become true jurisdictional guarantees of a preventive character (paras. 7 and 22), safeguarding, to begin with, the fundamental and non-derogable (rather than “plausible”) right to life (in addition to the right to liberty and security of person, and the right to a fair trial) (part V). Judge Cançado Trindade draws attention to the importance of compliance with provisional measures of protection, as illustrated by the IACtHR’s Orders in the case (of so-called “mandatory” death penalty) of James and Others versus Trinidad and Tobago (1998-2000), where the condemned individuals were not executed and the condemnatory sentences of the national tribunals were commuted (paras. 20-21).

9. Judge Cançado Trindade next considers the “autonomous legal regime of provisional measures of protection (part VI), in its component elements, namely: “the rights to be protected, the obligations proper to provisional measures of protection; the prompt determination of responsibility (in case of non-compliance), with its legal consequences; the presence of the victim (or potential victim, already at this stage), and the duty of reparations for damages” (para. 24). He proceeds that, even though the proceedings in contentious case before the ICJ keep on being strictly inter-State ones (by “attachment to an outdated dogma of the past”), this in no way impedes that the beneficiaries of protection in given circumstances are the human beings themselves, individually or in groups, - as he pointed out also in his Dissenting Opinion in the case concerning Questions Relating to the Obligation to Prosecute or to Extradite (Order of 28.05.2009), and in his Separate Opinion in the case of Application of the International Convention for the Suppression of

the Financing of Terrorism [ICSFT] and of the International Convention on the Elimination of All Forms of Racial Discrimination [CERD] (Order of 19.04.2017) (para. 25).

10. Judge Cançado Trindade comes to the last part of his Concurring Opinion addressing the ongoing historical process of the humanization of international law (part VII), manifesting itself, as in the present Jadhav case, in particular also in the domain of consular law. He recalls that, already in his earlier Concurring Opinion in the IACtHR's Advisory Opinion n° 18 on the Juridical Condition and Rights of Undocumented Migrants (of 17.09.2003), he examined this process singling out the relevance, in its evolution, of fundamental principles, laying on the foundations themselves of the law of nations (le droit des gens, as foreseen by the “founding fathers” of the discipline), as well as of the emergence of jus cogens and the corresponding obligations erga omnes of protection, in their horizontal and vertical dimensions (para. 28). Those principles, - he added therein,

“form the substratum of the legal order itself, revealing the right to the Law (droit au Droit), of which are titulaires all human beings, irrespective of their statute of citizenship or any other circumstance (...). Without such principles, - which are truly prima principia, - wherefrom norms and rules emanate and wherein they find their meaning, the ‘legal order’ simply is not accomplished, and ceases to exist as such” (para. 29).

11. In his view, the “great legacy of the juridical thinking of the second half of the XXth century (...) has been, by means of the emergence and evolution of the ILHR, the rescue of the human being as subject” of the law of nations, endowed with international legal personality and capacity (para. 30). This was due — he proceeds — to “the awakening of the universal juridical conscience”, — the “recta ratio inherent to humanity, — as the ultimate material source of the law of nations, standing well above the ‘will’ of individual States” (para. 30). And Judge Cançado Trindade concludes:

“That outlook has decisively contributed to the formation, inter alia and in particular, of an opinio juris communis as to the right of individuals, under Article 36 (1) (b) of the 1963 Vienna Convention, reflecting the ongoing process of humanization of international law, encompassing relevant aspects of consular relations. Always faithful to this humanist universal outlook, I deem it fit to advance it, once again, in the present Concurring Opinion in the Order that the ICJ has just adopted today, 15.05.2017, in the Jadhav Case.

The ICJ has, after all, shown awareness that the provisional measures of protection rightly indicated by it in the present Order (resolatory point I of the dispositif) are aimed at preserving the rights of both the State and the individual concerned (...) under Article 36 (1) the 1963 Vienna Convention. The jurisprudential construction to this effect, thus, to my satisfaction, keeps on moving forward. Contemporary international tribunals have a key role to play in their common mission of realization of justice” (paras. 32-33).

Declaration of Judge Bhandari

Judge Bhandari agrees with the decision of the Court to indicate provisional measures. However, he wishes to place on record his views concerning the requirements for indicating provisional measures in more detail. This case gives rise to questions pertaining to the basic violation of human rights through the denial of consular access during the pendency of court proceedings in Pakistan, which culminated with Mr. Kulbhushan Sudhir Jadhav's death sentence.

In his declaration, Judge Bhandari starts by outlining the facts pertaining to India's Application instituting proceedings as well as to India's Request for provisional measures. Subsequently, Judge Bhandari discusses the four requirements for the indication of provisional measures: (i) prima facie jurisdiction; (ii) plausibility; (iii) real and imminent risk of irreparable prejudice; and (iv) the link between the rights claimed on the merits and the provisional measures requested. Each requirement is examined in turn.

Concerning the facts of the case, Judge Bhandari underscores the uncertainty surrounding the circumstances in which Mr. Jadhav was arrested. He makes clear that the Parties do not agree as to where Mr. Jadhav was arrested, whether within or outside Pakistan. Judge Bhandari stresses the diplomatic intercourse between the Parties relating to India's consular rights with respect to Mr. Jadhav. Despite thirteen Notes Verbales sent by India to Pakistan, Pakistan has not communicated to India either the charges against Mr. Jadhav, or the documents of the proceedings against him. He also outlines the court proceedings in order for Mr. Jadhav to obtain a revision of his death sentence or to be granted clemency. It is currently not clear whether any of these domestic remedies have been triggered by Mr. Jadhav himself, while it is known that his mother has filed, in an act of desperation, both for appeal under Section 133 (B) of the Pakistan Army Act 1952, and for clemency under Section 131 of the 1952 Act. Moreover, Judge Bhandari emphasizes that Pakistan's denial of consular access has determined a situation in which India has no direct knowledge of the charges against Mr. Jadhav, as well as of the proceedings against him in the Pakistani military court.

Before addressing the requirements for indicating provisional measures, Judge Bhandari analyses the role of the 2008 India-Pakistan Agreement on Consular Access. He agrees with the Court that there is nothing which prima facie suggests that the Parties, by concluding the 2008 Agreement, have limited or set aside their reciprocal obligations under the Vienna Convention on Consular Relations. On the contrary, the 2008 Agreement amplifies, confirms and extends the Parties' reciprocal obligations relating to consular assistance, for which the Vienna Convention is a framework. Therefore, the 2008 Agreement does not exclude the Court's jurisdiction in the present case. Moreover, Judge Bhandari stresses that India did not rely on the 2008 Agreement, but only claimed the violation of the Vienna Convention. Specifically, India did not rely on the 2008 Agreement because: (i) Article 102, paragraph 2, of the United Nations Charter precludes the invocation before United Nations organs of treaties not registered with the United Nations, such as the 2008 Agreement; (ii) Article 73 of the Vienna Convention does not preclude the conclusion of treaties confirming, supplementing, amplifying or extending the provisions of the Vienna Convention itself; and (iii) Article 73 of the Vienna Convention does not allow the dilution of its provisions by means of the conclusion of subsequent consular treaties.

On prima facie jurisdiction, Judge Bhandari recalls that India based the Court's jurisdiction on Article 36, paragraph 1, of the Statute, read in conjunction with Article I of the Optional Protocol to the Vienna Convention. Neither India nor Pakistan made any reservation to that Optional Protocol. He draws a parallel with LaGrand, in which the Court found to have prima facie jurisdiction based on the same legal provisions, to which both Germany and the United States of America had not made any reservations. Judge Bhandari states that the Court was right in following the previous jurisprudence in Equatorial Guinea v. France, in which it was held that, in order to find it has prima facie jurisdiction, the Court must satisfy itself that there prima facie exists a dispute between the Parties and that such a dispute prima facie falls within the scope of the treaty invoked. According to Judge Bhandari, the prima facie existence of a dispute is confirmed by the exchange between the Parties of Notes Verbales on the subject of consular access to Mr. Jadhav. Moreover, such a dispute falls within the scope of the Vienna Convention ratione materiae since the facts alleged by India all pertain to its consular rights guaranteed under the Vienna Convention, yet allegedly denied by Pakistan.

With reference to plausibility, Judge Bhandari recalls the Court's test as recently restated in Ukraine v. Russia. According to Judge Bhandari, the rights claimed by India on the merits are plausible because they concern consular access to a person who is indisputably an Indian national, who has been arrested, tried and convicted in a foreign country. Therefore, it is plausible that India holds the rights it is claiming in the circumstances of the case, namely with respect to Mr. Jadhav. He recalls that the International Law Commission's commentary to the Draft Articles that became the Vienna Convention clearly stated that the right to consular assistance as provided for in Article 36, paragraph 1, of the Vienna Convention applies also in cases where a national court decision has become final. In the present case, it is possible that appeals against Mr. Jadhav's death sentence are still ongoing, and therefore rights to consular access plausibly apply.

Concerning real and imminent risk of irreparable prejudice, Judge Bhandari analysed the similarities between the present case and the previous death penalty cases: Breard, LaGrand and Avena. In all such cases, which involved facts comparable to the facts of Mr. Jadhav's case, the Court found that the execution of the foreign national would have irreparably prejudiced the rights of consular access claimed by the sending State on the merits. Moreover, Judge Bhandari clarified that it does not matter, for making a finding of urgency, how long a period of time is likely to elapse before Mr. Jadhav is executed. So long as there is a real risk that Mr. Jadhav would be executed before the final disposal of the case by the Court, there is urgency in the circumstances.

On the link between the provisional measures requested and the rights claimed on the merits, Judge Bhandari again highlighted the continuity between the previous death penalty cases and the present case. In all such cases, the Court always indicated that the respondent State should not execute the person whose consular rights were at stake in the proceedings before the Court, and that the respondent State should inform the Court as to the measures taken in the implementation of the order. Therefore, Judge Bhandari agreed that the same provisional measures should be indicated in the present case.

Judge Bhandari concludes that a clear case has been made out for the indication of provisional measures under Article 41 of the Statute. Consequently, during the pendency of the proceedings before the Court, Mr. Kulbhushan Sudhir Jadhav shall not be executed. In addition to issues of consular relations, this is a case in which it regrettably appears, on a preliminary examination of the facts, that the basic human rights of Mr. Jadhav have been violated by not allowing India to have consular access to him after his arrest and during the pendency of the criminal proceedings against him in Pakistan.
