

**MUNLAWS 20**

**STUDY**

**GUIDE**

**INTERNATIONAL COURT OF JUSTICE**

Written by Gal Veber

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Faculty of Law, University of Ljubljana

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# Introduction to the Study Guide

The International Court of Justice (hereinafter the ICJ) is the primary judicial body of the United Nations. Established in 1946 and seated in The Peace Palace in the Hague, it began its work in April 1946. (ICJ, 2020)

The primary objective of the ICJ is settlement of the disputes, submitted by the members of the United Nations, in accordance with international law. This judicial body also gives advisory opinions on legal questions that are referred to it by appropriate bodies of the United Nations. (ICJ, 2020)

The court is originally composed of 15 judges that serve for terms of nine years. They are elected by the United Nations General Assembly and by the Security Council. The official languages are English and French. (ICJ, 2020) Each party of the conflict will be represented by 2 advocates.

As the MUNLawS 2020 Conference will be held online, the sessions of the ICJ committee will be no exception to this rule. All the simulated judicial procedures will be executed differently as in previous years, which poses a special challenge to all the team members. It will be our primary objective to make it as realistic and 'normal' as possible.

The purpose of this study guide is to provide a brief context of the issue at hand. The delegates should therefore focus their research beyond this document. It is also important to note that the document is based on a fiction that the judgement in the specific case has not been delivered yet. Delegates must therefore completely disregard the existence of the actual decision in their final documents. Delegates are kindly referred to a special document, called 'Court Committees Manual' which is published on MUNLawS website to and provides further ICJ-specific information.

### I. Factual Framework of the Jadhav Case

On 3 March 2016, Kulbhushan Sudhir Jadhav, an Indian national, had been arrested in the province of Balochistan by Pakistani authorities due to alleged espionage. The parties of the dispute disagree on the circumstances of the apprehension. They are to be specifically established by the advocates in the simulated proceedings. India claims that Jadhav retired from the Indian Navy and moved to Iran to pursue business opportunities. India also claims that Jadhav has been kidnapped from Iran and transferred to Pakistan afterwards. As Pakistan accused him of acts of espionage and terrorism, he was arrested near the Pakistan-Iran border after allegedly crossing the border line illegally. Pakistan states that Mr Jadhav possessed an Indian passport on the name of »Hussein Mubarak Patel« during the arrest. Those allegations were rejected by India.

On March 25, 2016 Pakistan released a video, which includes a confession of espionage and terrorism on behalf of India by Mr Jadhav, after raising the issue with Indian High Commissioner in Islamabad. Pakistan notified the P5 (permanent 5) members of the United Nations Security Council of the matter. Also on March 25, 2016 India demanded consular access to the detainee after having sent a Note Verbale to Pakistani authorities. By 9 October 2017, more than 10 similar Notes Verbales demanding consular access and identifying Mr Jadhav as Indian national had been sent to Pakistan.

First Information Report (an official document recording alleged criminal offence) has been registered on 8 April 2016, enabling initiation of an investigation by the authorities. This official document stated that Mr Jadhav is accused of Terrorism and Espionage and under interrogation by Pakistani military. On 22 July 2016 an alleged confessional statement has been made before a magistrate in Pakistan.

On 21 September 2016 a trial began before a 'Field General Court Martial.' Mr Jadhav was allegedly tried under Section 59 of the Pakistan Army Act of 1952 and Section 3 of the Official Secrets Act of 1923. Certain information about the trial were made public by several press releases on April 10 and 14, 2017. A period of 3 weeks were given to Mr Jadhav to prepare for trial and a special officer qualified in law was appointed to him. Witness statements were recorded under oath and in his presence.

On 2 January 2017, a letter to the Secretary General of the United Nations was sent by an advisor to the Pakistani prime minister, pointing out India's alleged clandestine activities, oriented towards destabilization of Pakistan. The advisor also mentioned the arrest and confession of Mr Jadhav in the same letter.

On 23 January 2017, Pakistan sent a request for India's judicial cooperation in the Jadhav case, aimed especially towards obtaining evidence. In a letter containing the request, Pakistan pointed out the Security Council Resolution 1371 (2001) 'concerning measures to prevent and suppress threats to international peace and security caused by terrorist acts.' Pakistan claims that that it received no response whatsoever from the Indian side, despite numerous reminders made prior to the proceedings before the (Pakistani) Court. India on the other hand denies any legal value of the proposed cooperation and states that the case is not supported by credible evidence. On 21 March 2017, Pakistani Ministry of Foreign Affairs sent a Note Verbale to Indian High Commission in Islamabad, implicating that it would enable consular access should the Indian side be willing to cooperate in the evidence-gathering and investigation process as already proposed on 23 January 2017. India replied 10 days later, stating that enabling consular access would be a necessary prerequisite for determination of Mr Jadhav's presence in Pakistan and verification of the presented facts.

On 10 April 2017, Pakistan announced that Mr Jadhav was sentenced to death and a press statement followed on 14 April 2017 by the Prime Minister's Advisor on Foreign Affairs. The Advisor also mentioned several alternative possibilities that could follow the judgement: an appeal before a Military Appellate Court (the deadline for an appeal was 40 days) or a mercy petition before the Chief of Army within 60 days of the decision by the Appellate

Court. A possibility of submitting a similar petition to the President of Pakistan was also mentioned should the decision of the Chief of Army would be negative.

On 26 April 2017, an appeal was forwarded by High Commission of India on behalf of Mr Jadhav's mother. The Commission specifically stated that an appeal had to be based on public information as Pakistan repeatedly kept denying access to the official file. On 22 June 2017, Pakistan announced that a mercy petition had been made by Mr Jadhav to the Chief of Army after the Military Appellate Court rejected the appeal referring to the confessional statement.

On 10 November 2017, Pakistan allowed Mr Jadhav's wife to visit him based on humanitarian grounds. The possibility of a visit was also extended to Mr Jadhav's Mother. Pakistan assured that their passage to the premises, where the visit would be held, would be free and safe and that a diplomatic representative of India would be allowed to be present. The visit happened on 25 December 2017.

The latest report on Mr Jadhav's status is dated 9 July 2020. The news article states that Mr Jadhav remains in custody of Pakistani army, waiting his execution. (Source: <https://www.ndtv.com/india-news/kulbhushan-jadhav-coerced-says-centre-after-pakistan-claims-he-wants-mercy-plea-2259441>; accessed on 15.10.2020)

*The factual background is slightly modified and adapted version of the factual background provided in the ICJ Judgement in the Jadhav case (dated 17 July 2019). Delegates must disregard the fact that the judgement has already been delivered. (Source: Judgement Jadhav (India v. Pakistan), ICJ, para. 20-32; available at: <https://www.icj-cij.org/public/files/case-related/168/168-20190717-JUD-01-00-EN.pdf>; accessed on 15.10.2020)*

## II. Timeline of Events

The Timeline of Events is adapted from the article *Kulbushan Jadhav case: A timeline* (16 July 2019, *The Hindu*, available at: <https://www.thehindu.com/news/national/kulbushan-jadhav-case-a-timeline/article28492569.ece>; accessed on 15.10.2020 )

<b>March 3, 2016</b>	Kulbushan Jadhav is arrested.
<b>March 25, 2016</b>	First reports of ‘arrested Indian spy’ emerge. <ul style="list-style-type: none"><li>- India denies, says that there is no proof of spying activity by a retired Navy officer.</li><li>- New Delhi seeks consular access to Jadhav; 16 more Indian requests denied during the year.</li></ul>
<b>March 26, 2016</b>	India denies existence of any proof that Jadhav was arrested in Balochistan (implies kidnapping).
<b>March 29, 2016</b>	India demands consular access. Over the year, 16 more attempts had been made – they were all rejected by Pakistan.
<b>April 8, 2016</b>	First Information Report; charged with terrorism and espionage.
<b>April 15, 2016</b>	Pakistan briefs representatives of Arab and ASEAN countries plus the P5 members of the UN Security Council about the arrest and India’s clandestine activities in Pakistan.
<b>April 10, 2017</b>	Jadhav sentenced to death by Pakistani Army Court. India warns of “premeditated murder.”
<b>April 11, 2017</b>	Indian External Affairs Minister pledges his country’s full engagement to help the “innocent kidnapped Indian.”
<b>April 14, 2017</b>	India demands a certified copy of charge sheet and the judgement in the death sentence. Demands consular access.
<b>April 27, 2017</b>	India requests a Pakistani visa for Jadhav’s family in order to organize a visit to the convict.
<b>May 8, 2017</b>	India approaches the International Court of Justice in the Hague.

<b>May 18, 2017</b>	Provisional measure: ICJ halts Jadhav's execution, declares the matter sub judice until final decision.
<b>June 22, 2017</b>	Jadhav files mercy petition before Chief of Army Staff.
<b>July 2, 2017</b>	Another consular access request denied by Pakistan.
<b>September 13, 2017</b>	India submits the case to the ICJ in the Hague. Pakistan responds on December 13, 2017.
<b>November 10, 2017</b>	Pakistan offers Jadhav wife's visit on humanitarian grounds. India demands safe passage on November 23, 2017.
<b>December 8, 2017</b>	Pakistan allows wife's visit, extends permission to Jadhav's mother.
<b>December 20, 2017</b>	Pakistan issues visas to wife and mother.
<b>December 25, 2017</b>	Meeting takes place, viewed as humanitarian gesture by Pakistan.

*Judgement by the ICJ was delivered on July 17, 2019. Delegates must disregard this circumstance. Consular access was granted after the ICJ judgement. Timeline only includes data important for delivering the judgement in simulated proceedings on MUNLawS.*

### III. Claims of the Parties

#### Reliefs demanded by India in the Application

(1) A relief by way of immediate suspension of the sentence of death awarded to the accused.

(2) A relief by way of restitution in integrum by declaring that the sentence of the military court arrived at, in brazen defiance of the Vienna Convention rights under Article 36, particularly Article 36, paragraph 1 (b), and in defiance of elementary human rights of an accused which are also to be given effect as mandated under Article 14 of the 1966 International Covenant on Civil and Political Rights, is violative of international law and the provisions of the Vienna Convention; and

(3) Restraining Pakistan from giving effect to the sentence awarded by the military court and directing it to take steps to annul the decision of the military court as may be available to it under the law in Pakistan.

(4) If Pakistan is unable to annul the decision, then this Court to declare the decision illegal being violative of international law and treaty rights and restrain Pakistan from acting in violation of the Vienna Convention and international law by giving effect to the sentence or the conviction in any manner, and directing it to release the convicted Indian national forthwith.

Source: Application instituting proceedings of 8 May 2017; available at: <https://www.icj-cij.org/public/files/case-related/168/168-20170508-APP-01-00-EN.pdf> (accessed on 15.10.2020)

#### Submissions of India in the Memorial:

“For these reasons, the submissions of the Government of India, respectfully request this Court to adjudge and declare that Pakistan acted in egregious breach of Article 36 of the Vienna Convention on Consular Relations, in:

(i) Failing to inform India, without delay, of the arrest and/or detention of Jadhav,

(ii) Failing to inform Jadhav of his rights under Article 36 of the Vienna Convention on Consular Relations,

(iii) Declining access to Jadhav by consular officers of India, contrary to their right to visit Jadhav, while under custody, detention or in prison, and to converse and correspond with him, or to arrange for his legal representation.

And that pursuant to the foregoing,

(i) Declare that the sentence of the military court arrived at, in brazen defiance of the Vienna Convention rights under Article 36, particularly Article 36, paragraph 1 (b), and in defiance of elementary human rights of Jadhav, which are also to be given effect as mandated under Article 14 of the 1966 International Covenant on Civil and Political Rights, is violative of international law and the provisions of the Vienna Convention;

(ii) Declare that India is entitled to *restitutio in integrum*;

(iii) Restrain Pakistan from giving effect to the sentence or conviction in any manner, and direct it to release the Indian National, Jadhav, forthwith, and to direct Pakistan to facilitate his safe passage to India;

(iv) In the alternative, and if this Court were to find that Jadhav is not to be released, then restrain Pakistan from giving effect to the sentence awarded by the military court, and direct it to take steps to annul the decision of the military court, as may be available to it under the laws in force in Pakistan, and direct a trial under the ordinary law before civilian courts, after excluding his confession that was recorded without affording consular access, in strict conformity with the provisions of the ICCPR, with full consular access and with a right to India to arrange for his legal representation.”

Source: Memorial of the Republic of India of 13 September 2017; available at:

<https://www.icj-cij.org/public/files/case-related/168/168-20170913-WRI-01-00-EN.pdf>

(accessed on 15.10.2020)

#### **Submissions of Pakistan in the Counter-Memorial:**

“For the reasons set out in this Counter-Memorial, Pakistan requests the Court to adjudge and declare that the claims of India, as advanced through its Application and its Memorial, are rejected.”

Source: Counter-Memorial of the Islamic Republic of Pakistan of 13 December 2017;

available at: <https://www.icj-cij.org/public/files/case-related/168/168-20171213-WRI-01-00-EN.pdf> (accessed on 15.10.2020)

#### **Submissions of Pakistan in the Rejoinder:**

“For the reasons set out in this Rejoinder, as well as those set out in the Counter-Memorial, Pakistan requests the Court to adjudge and declare that the claims of India, as advanced through its Application, its Memorial and its Reply, are rejected.”

Source: Rejoinder of the Islamic Republic of Pakistan of 17 July 2018; available at:

<https://www.icj-cij.org/public/files/case-related/168/168-20180717-WRI-01-00-EN.pdf>

(accessed on 15.10.2020)

## IV. Legal Framework

### Capital Punishment in International Law

Although the right to life is one of most notable human rights, stated in Article III of the Universal Declaration on Human rights, it is not an absolute right under any universal treaty. The application of capital punishment is limited to the most serious crimes with several restrictions, such as age of the offender, possibility of pardon or a lesser sentence, possible violation of offender's rights, offender's pregnancy or the fact that when committed, crime was not punishable by capital punishment. Criteria for the application derives from Article VI of the International Covenant on Civil and Political Rights.

### Capital Punishment in International Convention on Civil and Political Rights (1966)

Article 6 of the International Convention on Civil and Political Rights (ICCPR), which is attached below, shows the extent of international regulation of capital punishment. Both India and Pakistan are states parties to the Convention.

#### **Article 6 of ICCPR**

(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

(2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

(3) When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

(4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

(5) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

(6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Source: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed on 15.10.2020)

### **Vienna Convention on Consular Relations**

Adopted on 18 April 1963, Vienna Convention on Consular Relations (VCCR) codifies the rules of diplomatic protection. In its Article 36, communication and contact with nationals of the sending State is addressed. More specifically, Article 36 (1) (a) mandates that consular officers shall be free to communicate with nationals of the sending state and to have access to them, whereas nationals shall have the same freedom of communication with and access to consular officers. In addition, Article 36 (1) (b) provides the right to the arrested national that if he so requests, the authorities of the of the receiving state shall without delay inform the consular post of the sending state of any arrest or detention. (Shaw, 2017). As established in the Avena case (Mexico v. USA) and LaGrand case (Germany v. USA), article 36 (1) creates individual rights for the persons concerned which could be invoked by the state, which, by virtue of the Optional Protocol on Compulsory Settlement of Disputes attached to the Convention, may be brought before the Court. (Shaw, 2017). Furthermore, violations of individual rights under this provision may also violate the rights of the state itself, while such violations could also constitute the violations of the individual. (The Avena (Mexico v. USA case), 2004).

As all treaties of international law, VCCR must be performed in good faith under the rule of *pacta sunt servanda*, which is one of the oldest and most paramount principles of international law.

## V. Further Guidelines

As mentioned above, this study guide only provides most essential information, that do not suffice for simulated proceedings in the ICJ. Delegates are highly encouraged to familiarize themselves with the Jadhav case documentation, which may be found here: <https://www.icj-cij.org/en/case/168>. Facts stated in this document have mostly been established in the real proceedings at the ICJ. The facts established in simulated proceedings may sometimes slightly differ from the facts at the original proceedings.

Delegates are also expected to show knowledge of the relevant institutes and conventions of international public law. It is recommended to find that knowledge in either of the following monographies:

- Shaw, Malcom N.: International Law, 8<sup>th</sup> Edition. Cambridge University Press. June 2018.
- Crawford, James: Brownlie's Principles of Public International Law. Oxford University Press. July 2019.

All legal committee-specific information can be found in the document called 'Court Committees Manual', published on the official MUNLawS webpage, under Documents section.

## VI. Bibliography

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