



Hague Case Law: Latest Developments

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International Court of Justice

(1) *Jadhav case (India v. Pakistan)*

On 17 July 2019, the International Court of Justice (ICJ) rendered its Judgment in the *Jadhav case (India v. Pakistan)*. The Court found that the Islamic Republic of Pakistan, in the matter of the detention and trial of an Indian national, Mr. Kulbhushan Sudhir Jadhav, had acted in breach of the obligations incumbent upon it under Article 36 of the Vienna Convention on Consular Relations of 24 April 1963 (hereinafter the ‘Vienna Convention’).

On 8 May 2017 India instituted proceedings against Pakistan alleging violations of the Vienna Convention, with regard to the detention, since March 2016, and the trial of an Indian national, Mr. Jadhav, who was accused of performing acts of espionage and terrorism on behalf of India, and sentenced to death by a military court in Pakistan in April 2017. In particular, India contended that Pakistan had acted in breach of its obligations under Article 36 of the Vienna Convention (i) by not informing Mr. Jadhav of his rights under Article 36; (ii) by not informing India, without delay, of the detention of Mr. Jadhav; and (iii) by denying consular officials of India access to Mr. Jadhav.

The Court established that it has jurisdiction on the basis of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes and that the application of the Republic of India is admissible. Further, the Court concluded that the Convention is applicable in the present case, regardless of the allegations that Mr. Jadhav was engaged in espionage activities.

The Court observed that Pakistan has not contested India’s contention that Mr. Jadhav was not informed of his rights and noted that Pakistan consistently maintained that the Convention does not apply to an individual suspected of espionage. The Court inferred from this position that Pakistan did not inform Mr.

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Jadhav of his rights under Article 36, paragraph 1 (b), of the Vienna Convention, and thus concluded that Pakistan had breached its obligation under that provision.

As regards India's submission regarding the alleged failure of Pakistan to inform India, without delay, of the arrest and detention of Mr. Jadhav, the Court recalled Article 36, paragraph 1 (b) and noted that there is an inherent connection between the obligation of the receiving State to inform a detained person of his rights and his ability to request that the consular post of the sending State be informed of his detention. If a detained person is not informed of his rights, he may not be aware of his entitlement to request that the sending State's consular post be informed of his arrest. According to the Court, the phrase 'if he so requests' must be read in conjunction with that obligation of the receiving State.

Having already found that Pakistan had failed to inform Mr. Jadhav of his rights, the Court was consequently of the view that Pakistan was under an obligation to inform India's consular post of the arrest and detention of Mr. Jadhav. As to whether and when the notification was made, the Court considered that the fact that the notification was made some 3 weeks after the arrest constitutes a breach of the obligation to inform 'without delay', as required by Article 36, paragraph 1 (b), of the Vienna Convention.

The Court then addressed India's submission concerning the alleged failure of Pakistan to provide consular access to Mr. Jadhav. Article 36, paragraph 1 (c) of the Vienna Convention, provides that consular officials have the right to arrange legal representation for a detained national of the sending State. In the present case, it is undisputed that Pakistan had not granted any Indian consular official access to Mr. Jadhav. In light of the foregoing, the Court also addressed, and rejected, Pakistan's argument that India could not request consular assistance with respect to Mr. Jadhav, while at the same time it had failed to comply with other obligations under international law. In the Court's view, there is no basis under the Vienna Convention for a State to condition the fulfilment of its obligations under Article 36 on the other State's compliance with other international law obligations.

Thus, the Court found that Pakistan had acted in breach of its obligations under Article 36 of the Vienna Convention: first, by not informing Mr. Jadhav of his rights; secondly, by not informing India, without delay, of the arrest and detention of Mr. Jadhav; and thirdly, by denying access to Mr. Jadhav by consular officials of India, contrary to their right, *inter alia*, to arrange for his legal representation.

Subsequently, the Court concluded that Pakistan was under an obligation to inform Mr. Jadhav, without further delay, of his rights and to provide Indian consular officials access to him in accordance with Article 36 of the Vienna Convention. Moreover, the Court found that the appropriate reparation in this case consists of the obligation of Pakistan to provide, by the means of its own choosing, an effective review and reconsideration of the conviction and sentence of Mr. Jadhav, so as to ensure that full weight is given to the effect of the violation of the rights set forth in Article 36 of the Convention and to guarantee that the violation and the possible prejudice caused by the violation are fully examined. The Court considered that a continued stay of execution constitutes an indispensable condition for the effective review and reconsideration of the conviction and sentence of Mr. Jadhav.

International Criminal Court

(1) *Lubanga Case*

On 18 July 2019, the Appeals Chamber of the International Criminal Court (ICC) delivered its judgment on two appeals filed by Mr. Lubanga and the V01 group of victims against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', which was issued on 15 December 2017. It confirmed for the most part the impugned decision.

On 14 March 2012, Trial Chamber I decided unanimously that Thomas Lubanga Dyilo was guilty, as a co-perpetrator, of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities from 1 September 2002 to 13 August 2003. On 10 July 2012, Trial Chamber I sentenced Thomas Lubanga Dyilo to a total of 14 years of imprisonment. On 1 December 2014, the Appeals Chamber confirmed, by majority, the verdict declaring Mr. Lubanga guilty and the decision sentencing him to 14 years of imprisonment.

As regards the reparations, on 7 August 2012, Trial Chamber I issued a decision on the principles and process to be applied for reparations to victims in the case. On 3 March 2015, the Appeals Chamber amended the Trial Chamber's order for reparations and instructed the Trust Fund for Victims to present a draft implementation plan for collective reparations to Trial Chamber II. On 21 October 2016, Trial Chamber II approved and ordered to start the implementation of a plan submitted by the Fund for Victims for symbolic collective reparations for the victims in relation to the *Lubanga* case. On 15 December 2017, Trial Chamber II set the amount of Thomas Lubanga Dyilo's liability for collective reparations at USD 10,000,000 in respect of 425 victims it found eligible for reparations and 'any other victims who may be identified'. The decision completes the Order for Reparations of 3 March 2015 in the case. On 15 January 2018, the V01 group of victims and Mr. Lubanga filed notices of appeal against that decision.

The Appeals Chamber however confirmed the Trial Chamber's decision subject to the following amendment: the victims whom the Trial Chamber found ineligible to receive reparations, and who consider that their failure to sufficiently substantiate their allegations, including by supporting documentation, resulted from insufficient notice of the requirements for eligibility, may seek a new assessment of their eligibility by the Trust Fund for Victims, together with other victims who may come forward in the course of the implementation stage and as envisaged by the Trial Chamber. Any recommendations as to eligibility made by the Trust Fund for Victims shall be subject to the approval of the Trial Chamber.

(2) *The Prosecutor v. Bosco Ntaganda*

On 8 July 2019, Trial Chamber VI of the ICC found Mr Bosco Ntaganda guilty, beyond reasonable doubt, of 18 counts of war crimes and crimes against humanity, committed in Ituri, Democratic Republic of the Congo (DRC), in 2002–2003.

An investigation into the situation in the DRC was opened in June 2004, following the self-referral by the DRC. An arrest warrant was issued for Mr. Bosco Ntaganda on 22 August 2006, followed by a second arrest warrant on 13 July 2012. After having voluntarily surrendered to the Court on 22 March 2013 he was transferred to the Court. On 2 September 2015, the trial proceedings commenced.

Over the course of 248 days of hearings, the Chamber heard 102 witnesses, called by the Prosecution, the Defence, and on behalf of the victims, and 1791 items were admitted into evidence. A total of 2129 victims were authorized to participate in this trial and in addition to several victims testifying as witnesses before the Chamber, five further victims presented their views and concerns in person. The Chamber issued 347 written decisions and 257 oral decisions during the trial phase. While the evidence did not sustain all incidents indicated by the Prosecutor, it did demonstrate that in relation to each of the 18 counts at least part of the charges were proven beyond any reasonable doubt.

Trial Chamber VI found that the conduct of the *Union des Patriotes Congolais* (UPC) and its military wing, the *Forces Patriotiques pour la Libération du Congo* (FPLC), against the civilian population was the intended outcome of a preconceived strategy to target the civilian population, and the crimes committed took place pursuant to a policy of the UPC/FPLC. Mr. Ntaganda fulfilled a very important military function in the UPC/FPLC.

The Chamber found Mr. Ntaganda guilty of crimes against humanity (murder and attempted murder, rape, sexual slavery, persecution, forcible transfer and deportation) and war crimes (murder and attempted murder, intentionally directing attacks against civilians, rape, sexual slavery, ordering the displacement of the civilian population, conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities, intentionally directing attacks against protected objects, and destroying the adversary's property).

As a result of the Chamber's judgment, Mr. Ntaganda shall remain in detention until such time as the Chamber has determined his sentence and rendered a sentencing judgment pursuant to Article 76 of the Statute.

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