The Right to Consular Access: Kulbhushan Jadhav Issue

What is the issue?

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- Kulbhushan Jadhav, an Indian national and a retired Indian Navy officer was convicted of conducting **‘subversive activities’** for the Indian government in Pakistan and has been sentenced to death by a Pakistani military court on April 10, 2017.
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- Pakistani authorities had reportedly arrested Jadhav in what they termed as a counter intelligence operation in Balochistan on 3 March, 2016. He has remained in Pakistan's custody ever since.
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Background:

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- While the Pakistani side has repeatedly alleged that Jadhav is a **Research and Analysis Wing "spy"** in Pakistan's restive Balochistan province, India had categorically denied Islamabad's charges.
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- Though India has conceded right from the start that Jadhav was indeed an Indian national and a retired naval officer, the Indian side claims that Jadhav ran a **legitimate business from Iran,** and might have inadvertently crossed over to Paksitan.
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- Another curious aspect of the case has been an alleged confessional video by Jadhav, widely circulated in the Pakistani media, wherein he had confessed to his sabotage activities and detailed his networks with Indian spy agency RAW.
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- However, India has rejected the validity of the video and claimed that it was tutored or recorded under immense mental and physical pressure.
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- Pakistan Army chief had said, "His goal was to disrupt development of the

CPEC, with Gwadar port as a special target."
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- The Indian government has, although categorically denied these allegations, it has said it was not in a position to clarify the circumstances in which Jadhav reached Pakistan as despite repeated attempts **Pakistan had denied India consular access**.
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- India had also requested for Jadhav's extradition but in March 2017, Pakistan told it won't extradite Jadhav.
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How International Law Can Help India?

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- At present, the government appears committed to pursuing the matter bilaterally through diplomatic representations and negotiations.
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- Given the current ebb in relations, however, such bilateral efforts may be ill-conceived and ineffectual in securing access to Jadhav.
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- Mindful of this, India would be well-served in promptly initiating legal proceedings against Pakistan before the **International Court of Justice (ICJ) for the violation of international law providing for consular access**.
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- **The right to consular access:** Encompassing the right of sending-state consuls to visit, converse with and arrange legal representation for nationals of the home-state in custody of the receiving-state, is provided for under **article 36(1)(c) of the Vienna Convention on Consular Relations, 1963 (VCCR),** to which both India and Pakistan are parties.
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- Under the VCCR, the receiving state (Pakistan in this case) is obligated to facilitate this protection work by:\n
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    - promptly informing the competent consulate when one of their nationals is arrested or detained;
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    - inform the detained foreign national of his right to consular access with his home state; and
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    - facilitate the protection work performed by the competent consuls in the

form of visits, communications and legal arrangements made for the detainee.
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- Pakistan’s conduct in Jadhav’s case, wherein it failed to inform Indian authorities of his detention and refused to provide consular access to Indian authorities despite multiple requests, is in **contravention to the obligations** it has undertaken under the VCCR and international law.
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- Pakistan’s breach of international law and Jadhav’s death sentence may be effectively challenged by recourse to the ICJ.
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- Such recourse, is almost providentially open in Jadhav’s case by virtue of both **India and Pakistan being parties to the Optional Protocol to the Vienna Convention on Consular Relations** concerning the Compulsory Settlement of Disputes, 1963.
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- The Optional Protocol, to which India and Pakistan acceded, provides that disputes arising out of the interpretation or application of the VCCR shall lie within the compulsory jurisdiction of the ICJ, and may accordingly be brought before the court by any party to a dispute.
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- An Indian recourse to the ICJ may produce a result like, the ICJ ordering the Pakistan to review and reconsider Jadhav’s trial, in which he may be afforded adequate legal representation arranged by the Indian government.
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- This would satisfactorily protect India’s and Jadhav’s interests in the present dispute.
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What is the way forward?

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- The ICJ, under the provisions of its statute, has ordered binding provisional measures against the execution of death sentences during the pendency of consular access disputes before it.
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- Such provisional measures were first ordered in the **Lagrand case** where Germany filed a request for provisional measures before the ICJ against the scheduled execution of German national Walter Lagrand.
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- The ICJ, issued binding provisional measures directing the US to ensure that Lagrand was **not executed pending the final decision of the court.**
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- Accordingly, India’s recourse to the ICJ under **article 1 of the Optional Protocol,** and a subsequent request for provisional measures under **article 41 of the ICJ Statute** would be the most efficacious way of ensuring that Jadhav’s death sentence is not carried out before the resolution of the alleged improprieties and illegalities surrounding this case.
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Source: First Post & The Wire

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