

**ORDER SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

Misc. Petition No. 01 of 2020

Secretary, Ministry of Law and Justice  
Vs  
Federation of Pakistan, etc.

<b>S. No. of order/ proceedings</b>	<b>Date of order/ proceedings</b>	<b>Order with signature of Judge and that of parties or counsel where necessary.</b>
-------------------------------------	-----------------------------------	--------------------------------------------------------------------------------------

- 01) 03-08-2020. Mr Khalid Javed Khan, Attorney General for Pakistan.  
Syed Muhammad Tayyab, Deputy Attorney General.  
Mr Muhammad Arshad Kayani, Deputy Attorney General.  
Mr Hassnain Haider Awan, Assistant Attorney General.  
Mr Ahmad Irfan, Consultant to Attorney General for Pakistan.

ATHAR MINALLAH, CJ.- Through this petition, the State of Pakistan has sought the review and reconsideration of the conviction and sentence of Commander Kulbhushan Sudhir Jadhav, [*hereinafter referred to as "Commander Jadhav"*], handed down by the Field General Court Martial on conclusion of the trial conducted under the Pakistan Army Act 1952, read with the Official Secrets Act 1923. Mr Jadhav was arrested and tried on charges of being involved in espionage and terrorism activities. He was sentenced to death. The appeal preferred against the conviction and sentence was dismissed by the Military Appellate Court.

2. The learned Attorney General gave us a detailed background of the case and the events which led

to the filing of this petition. The Government of the Republic of India [*hereinafter referred to as the "Government of India"*] instituted proceedings before the International Court of Justice [*hereinafter referred to as the "International Court"*]. The International Court stayed the execution of the sentence and, on conclusion of the proceedings, pronounced judgment, dated July 17 2019. In response to our query regarding the object and purpose of the promulgation of the International Court of Justice (Review and Re-consideration) Ordinance, 2020 [*hereinafter referred to as the "Ordinance of 2020"*], the learned Attorney General of Pakistan has explained that it was to give effect to the judgment of the International Court and, in this regard, he drew our attention to the relevant paragraphs, which are reproduced as follows:

*"137. With regard to India's contention that it is entitled to restitutio in integrum and its request to annul the decision of the military court and to restrain Pakistan from giving effect to the sentence or conviction, and its further request to direct Pakistan to take steps to annul the decision of the military court, to release Mr. Jadhav and to facilitate his safe passage to India, the Court reiterates that it is not the conviction and sentence of Mr. Jadhav which are to be regarded as a violation of Article 36 of the Vienna Convention. The Court also recalls that "[i]t is not to be presumed . . . that partial or total annulment of conviction or sentence provides the necessary and sole remedy" in cases of violations of Article 36 of*

*the Vienna Convention (ibid., p. 60, para. 123). Thus, the Court finds that these submissions made by India cannot be upheld.*

*138. The Court reaffirms that "it is a principle of international law . . . that any breach of an engagement involves an obligation to make reparation" and that "reparation must, as far as possible, wipe out all the consequences of the illegal act" (Factory at Chorzów (Claim for Indemnity), Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, pp. 29, 47). The Court considers the appropriate remedy in this case to be effective review and reconsideration of the conviction and sentence of Mr. Jadhav. This is consistent with the approach that the Court has taken in cases of violations of Article 36 of the Convention (LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 514, para. 125; Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), pp. 65-66, paras. 138-140 and p. 73, para. 153). It is also in line with what the Applicant asks the Court to adjudge and declare in the present case. In the Court's view, India ultimately requests effective remedies for the breaches of the Convention by Pakistan. The Court notes that Pakistan acknowledges that the appropriate remedy in the present case would be effective review and reconsideration of the conviction and sentence.*

*139. The Court considers that a special emphasis must be placed on the need for the review and reconsideration to be effective. The review and reconsideration of the conviction and sentence of Mr. Jadhav, in order to be*

*effective, must ensure that full weight is given to the effect of the violation of the rights set forth in Article 36, paragraph 1, of the Convention and guarantee that the violation and the possible prejudice caused by the violation are fully examined. It presupposes the existence of a procedure which is suitable for this purpose. The Court observes that it is normally the judicial process which is suited to the task of review and reconsideration (see Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), pp. 65-66, paras. 138-140).*

*140. In the present case, the death sentence imposed on Mr. Jadhav by the Field General Court Martial of Pakistan was confirmed by the Chief of Army Staff on 10 April 2017. The evidence suggests that Mr. Jadhav appealed to the Military Appellate Court under Section 133 (B) of the Pakistan Army Act of 1952, but that the appeal was rejected. With regard to the petition procedure, the evidence suggests that Mr. Jadhav has made a mercy petition to the Chief of Army Staff, and that the mother of Mr. Jadhav has sought to file a petition with the Federal Government of Pakistan under Section 131 and an appeal under Section 133 (B) of the Act. There is no evidence before the Court to indicate the outcome of those petitions or that appeal.*

*141. The Court notes that, according to Pakistan, the High Courts of Pakistan can exercise review jurisdiction. The Court observes, however, that Article 199, paragraph 3, of the Constitution of Pakistan has been interpreted by the Supreme Court of Pakistan*

*as limiting the availability of such review for a person who is subject to any law relating to the Armed Forces of Pakistan, including the Pakistan Army Act of 1952. The Supreme Court has stated that the High Courts and the Supreme Court may exercise judicial review over a decision of the Field General Court Martial on "the grounds of coram non iudice, without jurisdiction or suffering from mala fides, including malice in law only" (Said Zaman Khan et al. v. Federation of Pakistan, Supreme Court of Pakistan, Civil Petition No. 842 of 2016, 29 August 2016, para. 73). Article 8, paragraph 1, of the Constitution provides that any law which is inconsistent with fundamental rights guaranteed under the Constitution is void, but this provision does not apply to the Pakistan Army Act of 1952 by virtue of a constitutional amendment (ibid., para. 125). Thus, it is not clear whether judicial review of a decision of a military court is available on the ground that there has been a violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention.*

*145. In this regard, the Court takes full cognizance of the representations made by Pakistan. During the oral proceedings, the Agent of Pakistan declared that the Constitution of Pakistan guarantees, as a fundamental right, the right to a fair trial; that the right to a fair trial is "absolute" and "cannot be taken away"; and that all trials are conducted accordingly and, if not, "the process of judicial review is always available". Counsel for Pakistan assured the Court that the High Courts of Pakistan exercise "effective review jurisdiction", giving as an example the decision*

*of the Peshawar High Court in 2018 (see paragraph 142 above). The Court points out that respect for the principles of a fair trial is of cardinal importance in any review and reconsideration, and that, in the circumstances of the present case, it is essential for the review and reconsideration of the conviction and sentence of Mr. Jadhav to be effective. The Court considers that the violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention, and its implications for the principles of a fair trial, should be fully examined and properly addressed during the review and reconsideration process. In particular, any potential prejudice and the implications for the evidence and the right of defence of the accused should receive close scrutiny during the review and reconsideration.”*

3. With the able assistance of the learned Attorney General we have carefully gone through the provisions of the Ordinance of 2020. It appears to us that by giving a statutory right to a foreign national, in this case Commander Jadhav, to seek the review and reconsideration of the conviction and sentence handed down by a Military Court, the concerns recorded by the International Court in relation to the limited scope of judicial review under Article 199 of the Constitution of the Islamic Republic of Pakistan have been attended to. The wide scope of the right of review and reconsideration and its effectiveness as a statutory remedy in the context of the judgment of the International Court appears to be

obvious from the expressions used in section 3 of the Ordinance of 2020.

4. We have been informed that, in compliance with the judgment of the International Court, Commander Jadhav was duly briefed and made aware of his rights described under Article 36 of the Vienna Convention on Consular Relations [*hereinafter referred to as the "Convention"*]. Moreover, it has been stated that consular officers' access was provided twice in accordance with the Convention and an offer has been communicated to the Government of India for a third access. A meeting was also arranged between Commander Jadhav and his family members.

5. The learned Attorney General has stated that Commander Jadhav and the Government of India were informed regarding the promulgation of the Ordinance of 2020 but they have not shown willingness to avail the statutory remedy, which has been specifically made available to fulfill the requirements set forth by the International Court in its judgment. The learned Attorney General has stated that the Government of India had informed that it had engaged a counsel but the latter was not given a power of attorney so that necessary documents could be handed over to him. It has been averred that, since the time prescribed for availing the statutory remedy was expiring, therefore, this petition was filed in order to give effect to the judgment of the

International Court. He has asserted that the Government of India was requested to avail the statutory remedy but the latter has not demonstrated a bonafide serious intent in this regard.

6. It is noted that, due to the exceptional circumstances prevailing on account of the COVID-19 pandemic, this Court, vide office order, dated 24-03-2020, had suspended the requirement of availing remedies within the prescribed limitation period and the aforementioned notification continues to be effective. We feel that in order to ensure the effectiveness of the review and reconsideration of the conviction and sentence of Commander Jadhav, a reasonable opportunity ought to be extended to the latter and the Government of India to arrange legal representation and to file a petition. We, therefore, at this stage restrain ourselves from appointing a counsel on behalf of Commander Jadhav and advise the Government of Pakistan to extend an opportunity to Commander Jadhav and the Government of India for arranging legal representation in terms of Article 32(1)(c) of the Convention and in accordance with the applicable laws. We note that the International Court has granted a continued stay of execution as "an indispensable condition for the effective review and reconsideration of the conviction and sentence of Mr Jadhav".

7. We, therefore, observe and direct as follows.-



- (i) The Government of Pakistan shall once again inform Commander Jadhav regarding his rights under Article 36 of the Convention and the judgment of the International Court will also be brought to his attention. He shall be specifically informed regarding his right to avail the statutory remedy provided under the Ordinance of 2020 and to authorize the Government of India to arrange legal representation on his behalf.
  
- (ii) The Government of Pakistan shall communicate this order to the Government of India. Subject to the applicable laws, the latter shall be at liberty to make appropriate arrangements on behalf of Commander Jadhav in the context of the Convention, read with the statutory right made available under the Ordinance of 2020, so as to give effect to the judgment of the International Court.
  
- (iii) In the meanwhile, we expect that the right to a fair trial of Commander Jadhav will be respected and utmost care will be exercised while making statements, verbal or in writing, reporting by print and electronic media or otherwise commenting

on or relating to the proceedings before this Court, so as to ensure that the principles highlighted by the august Supreme Court in the case titled "Suo Motu Case No. 28 of 2018" [PLD 2019 S.C. 01] and in this Court's judgment titled "The State v. Dr Firdous Ashiq Awan" [PLD 2020 Islamabad 109], are not breached.

(iv) We feel that it would be appropriate if a larger Bench is constituted to hear this matter in view of the importance of the questions raised for our consideration.

(v) The Registrar of this Court is directed to fix the proceedings at 02:00 p.m. on 03.09.2020, before a Larger Bench.

8. We appoint Mr Abid Hassan Manto, Mr Hamid Khan, Senior Advocates of the Supreme Court and former Presidents of the Supreme Court Bar Association and Mr Makhdoom Ali Khan, Senior Advocate Supreme Court and former Attorney General of Pakistan as *amici curiae* for our legal assistance in general and, in particular, to ensure that the judgment of the International Court is effectively implemented.

(CHIEF JUSTICE)

(MIANGUL HASSAN AURANGZEB)  
JUDGE