



CAPTAIN SAURABH KALIA THE FORGOTTEN MARTYR

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Abstract: The dispute resolution among Commonwealth countries mainly India and Pakistan has been unexpectedly developing. Even when there are numerous units specifically treaties between the states that tries to position quit, all hopes have a tendency to be in useless. Capt. Saurabh Kalia's case, concerning the torture of an Indian army Captain and five soldiers by the Pakistan armed forces has been a highly controversial topic. It certainly has given rise to an interesting question of Humanitarian law: Whether such matter can be taken to the ICJ or not ? The question seems to have paramount significance under the international law. The paper sets out the facts of the incident about the torture of POWs and examines whether the submission made by the Government of India in the Supreme Court is standing in law or not. It analyses the jurisdiction of the ICJ to keep the case, in the mild of the prison impediments being provided through the reservation made by means of India in the announcement accepting the obligatory jurisdiction and what are the issues that India is going through to method ICJ. The paper additionally units out the statistics that why India cannot approach to the ICC?

Index Terms – Indian Army, Humanitarian law, ICJ, POWs, ICC.

I. INTRODUCTION

Captain Saurabh Kalia was only 22 years old when he was captured by the Pakistani Army in May 1999 that marked the start of the Kargil War. After almost as many years as he lived, Captain Kalia is yet to receive justice and his helpless father continues to fight a lonely battle with little or no support. Captain Kalia along with five soldier were one of the first ones to take on the Pakistani Army intruders. The 6 soldiers were captured alive once they ran out of ammunition after a prolonged gun battle that ran into several hours along the Line of Control (LoC) in Kargil's Kaksar area.

After 22 days in captivity, the bodies of the young army officer and five sepoy - **Arjun Ram, Bhanwar Lal Bagaria, Bhika Ram, Moola Ram and Naresh Singh** - were returned to the Indian side and that started the ordeal of their families. Late. Saurabh Kalia's father has fought a relentless battle for 20 years with no sign of hope yet.

The Kalia family got the body of their son who was about to celebrate his birthday on 29th June, 1999 in a mutilated state, stories of which are still etched in the minds of millions of Indians who were left shocked at the high level of torture these men had to face for 22 days.

In gross violation of the Geneva Convention the Pakistani Army subjected Captain Kalia and his soldiers were in captivity from 15 May 1999 – 7 June 1999 and were subjected to torture. They said the torture was evident from injuries to their bodies when they were handed over by the Pakistani Army on 9 June 1999.¹ Post-mortem examinations performed through India mentioned that the prisoners had cigarette burns, ear-drums with hot rods, many damaged tooth and bones, fractured skulls, eyes that were punctured before being eliminated, cut lips, chipped noses, amputated limbs and genitalia². According to the examinations, these injuries preceded the captives being shot dead in the head.³

His father approached Army Forces Tribunal, New Delhi with the petition to the Union of India approach the ICJ. The judgment was declined due to the lack of jurisdiction⁴. In 2012, Even there were further consistent touch with the Ministry of External Affairs which had no positive information to their satisfaction. He continues to make efforts and pursue the central government to move the International Court of Justice (ICJ) to pull up Pakistan, even after 20 years. He says he will continue the fight till the last day of his life.

II. CASE BEFORE HON'BLE THE SUPREME COURT OF INDIA

It was in 2013, the Government of India (GOI) took a stand that it had no objective to go to ICJ to pursue the matter against Pakistan. With a political turnover, the new government has agreed to change its affidavit in the Supreme Court and proceed with a case to International Court of Justice (ICJ).⁵

It was said in the affidavit that India cannot invoke the compulsory jurisdiction clause for filing a case against Pakistan as it is a member of the Commonwealth and the issue of prisoners of war is linked to armed conflict/hostilities. The ICJ in Aerial Incidents Case⁶ had upheld India's argument that in view of India's commonwealth reservation, Pakistan being a Commonwealth country cannot bring in an action against India in ICJ. So, the subject matter is not amenable to the Mandamus jurisdiction of the Supreme Court, the issue involved is not of law but of foreign policy.

The Government expressed the scenario in a different aspect claiming it to be fight non feasible⁷. Recently in a serious turnover of events, Ms. Sushma Swaraj, (The Minister of External Affairs) said that they will be changing the affidavit so filed in the Supreme Court. The Government is going to take the matter to ICJ with the permission of the Court.⁸

¹ <https://www.thehindu.com/todays-paper/tp-national/Saurabh-Kaliarsquos-parents-waging-a-lone-battle-to-highlight-war-crimes/article16549134.ece> [last visited on July 3, 2020]

² <https://www.news18.com/news/india/pakistani-army-punctured-eyes-cut-off-genital-and-limbs-of-captain-saurabh-kalia-and-his-soldiers-after-capturing-them-999802.html#:~:text=tortured%20and%20killed,-In%20gross%20violation%20of%20the%20Geneva%20Convention%20the%20Pakistani%20Army,were%20burned%20with%20cigarettes%20butts>. [last visited on July 4, 2020]

³ Captain Saurabh Kalia's Case (Dr. N.K. Kalia V. Union of India) W. P. (Civil) No. 528 of 2012, Supreme Court of India.

⁴ N.K. Kalia V. Union of India & Ors., Armed Forces Tribunal, Principal Bench at New Delhi, O.A. No. 154/2010.

⁵ Counter Affidavit on Behalf of the Respondents, Union of India in Civil Original Jurisdiction in Writ Petition (Civil) No. 528 of 2012, Dr. N.K. Kalia V. Union Of India & Ors.

⁶ *Aerial Incident Case (Pakistan V. India)*, 21st June 2000, Judgment, Jurisdiction, [2000] ICJ Rep 12.

⁷ ASIAN NEWS INTERNATIONAL, 'Modi govt shuts doors on Kargil martyr Captain Saurabh Kalia, Congress slams stand', *The Times of India*, *The Times of India* (1st June 2015), <http://timesofindia.indiatimes.com/india/Modi-govt-shuts-doors-on-Kargil-martyr-Captain-Saurabh-Kalia-Congress-slams-stand/articleshow/47497943.cms> [last visited on July 7, 2020 at 08:21 PM]

⁸ SPECIAL CORRESPONDENT 'Will take Capt. Kalia's case to ICJ if SC allows', *The Hindu* (2nd June 2015), online: [The Hindu](http://www.thehindu.com) <

III. WHETHER PAKISTAN IS RESPONSIBLE FOR THE VIOLATION OF THE INHUMAN TREATMENT TO THE PRINCIPLES OF INTERNATIONAL LAW

Every Human being has the inherent to life and this right shall be protected by Law. No one can be arbitrarily deprived of his life. No one has the right to take anything that does not belong to him/her and they did not only take the life of our soldiers but also committed something that was inhuman mutilation.

Human rights are based totally upon the moral concepts or norms that describe positive standards of human conduct and are frequently blanketed as criminal rights in municipal and worldwide regulation.

3.1. INTERNATIONAL HUMANITARIAN LAW & POWs

The rules for protecting prisoners of war (POWs) are specific and were first detailed in the 1929 Geneva Convention. They were provided in the third 1949 Geneva Convention, following the lessons of World War II, as well as in Additional Protocol I of 1977.

The status of POWs only applies in international armed conflict. POWs are the members of the armed forces of one of the parties to a conflict who fall into the hands of the adverse party. The IIIrd Geneva Convention, 1949 also classifies other categories of persons who have the right to POW status or may be treated as POWs. **Their detention is not a form of punishment, but only aims to prevent or avoid further participation in the conflict.** They must be released and repatriated. The detaining power may prosecute them for possible war crimes, but not for acts of violence under IHL⁹. POWs must be treated humanely in all situations. **They should be protected against any act of violence, as well as against intimidation, insults, and public curiosity.** IHL also talks about the minimum conditions of detention covering such issues as accommodation, food, clothing, hygiene and medical care.¹⁰ The Act expressly prohibits violence and torture on the person of the POWs¹¹, and also prohibits any attack on their dignity. This Convention attempts to define the term “POWs” in such wide ambit so as to include every possible combatant, militia members, volunteer corps, etc. who might be engaged in the battle, to accord protection under this law.¹²

In the context of the present case, this provision fixes responsibility on the Government of Pakistan for the torture and subsequent death of Capt. Saurabh Kalia and the other Soldiers. The provisions of the Convention have been gravely violated by the acts of Pakistan in torturing and murdering the Indian soldiers who were legally entitled to the protection under the POW status.

<http://www.thehindu.com/todays-paper/tp-national/will-take-capt-kalias-case-to-icj-if-sc-allows/article7272565.ece> > [last visited on July 4, 2020 at 09:21 PM]

⁹ PRISONERS OF WAR AND DETAINEES PROTECTED UNDER INTERNATIONAL HUMANITARIAN LAW – ICRC.

<https://www.icrc.org/en/doc/war-and-law/protected-persons/prisoners-war/overview-detainees-protected-persons.htm> [last visited on June 4, 2020]

¹⁰ Art. 12, “Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.”

¹¹ Art 3, “...the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture...”

¹² Art.3, “Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy....”

Pakistan had brutally treated the Indian Prisoner of Wars, violating international norms of Human Rights. There was evidence of gruesome torture on the soldiers including mutilation, permanently disabling or removing an organ and endangering mental and physical health. As it is mentioned in the Geneva convention III that Medical and scientific experiments are prohibited. Prisoners should to be treated alike regardless of race, nationality, religious beliefs or political opinions¹³.

3.2. CONVENTION AGAINST TORTURE

The Convention against Torture was adopted by resolution 39/46 of 10 December 1984 at the thirty-ninth session of the United Nations General Assembly¹⁴. Pursuant to Article 25 of the Convention, it was opened for signature by all States. At the end of June 2010, it had 146 States Parties¹⁵.

The object and purpose of the Convention against Torture are clearly established in its preamble that: It was adopted to “*make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment*”¹⁶. In the above-mentioned resolution 39/46, the General Assembly also expressed itself desirous “of achieving a more effective implementation of the existing prohibition under international and national law of the practicing of torture and other cruel, inhuman or degrading treatment or punishment”.

3.3. GENOCIDE CONVENTION

Article II of the Convention identifies two categories of acts, the commission of any one of which will amount to genocide¹⁷, where accompanied by the requisite mental element. As indicated above, there is a close relationship between the physical element and the mental element. The widespread or systematic occurrence of the proscribed acts, committed against persons belonging to a protected group, may well give rise to a legitimate inference of the proscribed intent.

3.3.1. ‘KILLING MEMBERS OF THE GROUP’

The first act listed in Article II is “**killing members of the group**”. This formulation was agreed by the Sixth Committee without a great deal of discussion and without a vote. In *Akayesu* the Trial Chamber of the ICTR identified the two material elements of the required physical element: the victim must be dead, and the death must have resulted from an unlawful act or omission of the accused or a subordinate¹⁸.

It is apparent from the Convention that the term “killing” means intentional killing¹⁹. Subsequent developments, particularly in the context of the ICC Statute, indicate that the term “members of the group” means “one or more members of the group”²⁰.

In the present case there were intentional killings of Capt. Saurabh, along with his five soldiers²¹.

3.3.2. ‘CAUSING SERIOUS BODILY OR MENTAL HARM TO MEMBERS OF THE GROUP’

¹³ Article 16 GC III

¹⁴ General Assembly, resolution 39/46, 10 Dec. 1984.

¹⁵ See Multilateral Treaties deposited with the Secretary-General, online at <http://treaties.un.org/>, ch. IV, 9.

¹⁶ Sixth preambular paragraph of the Convention. See also M. Nowak and E. Mc Arthur, *The United Nations Convention against Torture, A Commentary*, Oxford University Press, 2008, p. 8

¹⁷ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) 2007 I.C.J. 191.

¹⁸ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 588.

¹⁹ UN Doc. A/C.6/SR.81. See also Robinson, *Genocide Convention*, p. 63.

²⁰ See “Discussion Paper Proposed by the Co-ordinator, Article 6: The Crime of Genocide,” UN Doc. PCNICC/1999/WGEC/RT.1.

²¹ Moot Proposition, para 15

The second proscribed act consists of “causing serious bodily or mental harm to members of the group”. Debate amongst the drafters of the Convention focused on the concept of “mental harm”. Where a particular proscribed act has been committed in the context of a genocidal assault or campaign, there is no need to show that the act itself has contributed to the destruction of the group in whole or in part. It is only necessary to show that one or more victims actually suffered physical or mental harm. If the act is perpetrated with the requisite element of intent (*mens rea*) then the crime has been committed²².

In the present case there were intentional killings of Capt. Saurabh, along with his five soldiers. There was evidence of gruesome torture on the soldiers including mutilation, permanently disabling or removing an organ and endangering mental and physical health.

IV. JURISDICTION REGARDING THIS MATTER BEFORE ICJ

India and Pakistan, as members of the United Nations, are bound by Articles 92 and 93 of the UN Charter. Article 92 provides that, "*The International Court of Justice shall be the principal judicial organ of the United Nations*" and hence necessarily open to all its members, on the basis of the principle of sovereign equality and on an equal footing. Article 93 of the UN Charter provides that "*All members of the United Nations are ipso-facto parties to the Statute of the International Court of Justice*". This implies that all members are entitled to rely on the provisions for Jurisdiction and other matters set out in the Statute on a non-discriminatory and equal basis. This concept is further reinforced by Article 35 paragraph 1 of the Statute of the Court which provides "*The Court shall be 'to the States parties to the present Statute'*". India can submit that the ICJ maintains its compulsory jurisdiction²³. Government of India, in its counter affidavit, has stated several legal barricades that stand in the way of approaching the ICJ regarding the given matter.²⁴ As for the provision under special agreement, a Country cannot be compelled to submit to a dispute filed by another Country; the reference to ICJ has to be consensual. In this respect, it has been stated that it is highly dubious that Pakistan will consent to the same. The Compromisory clause provision also does not apply here as the Geneva Conventions do not carry a clause to the effect that a party may refer any dispute or disagreement over the same to the International Court of Justice. The Compulsory jurisdiction of the ICJ is provided under Art. 36 (2) of ICJ²⁵, and each country has accepted the same in its own Declarations along with any specific reservations. Pakistan has accepted the compulsory jurisdiction on the condition of reciprocity²⁶. On the other hand, India has accepted the compulsory jurisdiction subject to several reservations of its own²⁷, three of which limit our right to approach the ICJ in the current case, namely the

²² Schabas, *Genocide*, pp. 164-5

²³ Nottebohm case (Liechtenstein v. Guatemala) [1955]

²⁴ Counter Affidavit on behalf of the Respondents in the Supreme Court of India under Writ Petition (Civil) No. 528 of 2012, in the matter of *Dr. N.K. Kalita V. Union Of India & Ors.*

²⁵ Charter Of The United Nations And Statute Of The International Court Of Justice, Declarations Recognizing the Jurisdiction of the Court as Compulsory, Pakistan, Article 36, paragraph 2, 13th September 1960:

“...Provided, that the declaration shall not apply to:

- a) Disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or
- b) Disputes relating to questions which by international law fall exclusively within the domestic jurisdiction of Pakistan;
- c) Disputes arising under a multilateral treaty unless:
 - i) all parties to the treaty affected by the decision are also parties to the case before the Court, or
 - ii) the Government of Pakistan specially agree to jurisdiction; and provided further, that this Declaration shall remain in force till such time as notice may be given to terminate it.

²⁶ *Ibid.*

²⁷ Charter Of The United Nations And Statute Of The International Court Of Justice, Declarations Recognizing the Jurisdiction of the

Commonwealth Reservation²⁸, the Multilateral Treaty Reservation²⁹, and that on matters of Hostilities and Armed Conflicts³⁰. The same has led the ICJ to reject jurisdiction in earlier cases when Pakistan approached the ICJ, as in the *Aerial incident case*³¹, stating that the reservation made by India prohibits it Pakistan by claiming that the ICJ did not have any jurisdiction over the matter (India submitted a list to the ICJ which prohibits it from trying any matter involving Pakistan or the Commonwealth). Therefore, Pakistan's attempt to seek reparation for the shooting down of its aircraft by India was nipped in the bud at the jurisdictional stage of the matter.³² The affidavit details these points to state that the jurisdiction of ICJ cannot be invoked here against Pakistan³³.

A positive interpretation of the provisions lead to the conclusion that the basic underlying object is the settlement of disputes, and the respect for UN Charter is also expressed. The agreement for bilateral settlement does not expressly prohibit the parties from approaching the appropriate forum for remedy when the other party is not complying with the attempts for bilateral settlements. As evident from the description of the incident and the subsequent requests by India for to punish, the need for interference by the ICJ to secure justice to the valiant soldiers and their families becomes necessary.³⁴

Therefore, it is unlikely that India would repeal its reservation made under Art.36(2) of ICJ because the dispute might internationalize the Kashmir situation.

Why it is not possible to refer the case to the International Criminal Court?

It is not possible to refer the case to the International Criminal Court because the Rome Statute of the ICC entered into force on 1st July 2002. Article 11 (1) of the Statute provides: “*The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.*” The late. Kalia’s case belongs to 1999. At any rate both India and Pakistan are not parties to the Statute.

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Court as Compulsory, India, Article 36, paragraph 2 of the, 18th September 1974.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Aerial Incident of 10 August 1999 (Pakistan v. India).

³² WHY INDIA WILL NOT PURSUE THE SAURABH KALIA CASE IN INTERNATIONAL COURT

https://www.huffingtonpost.in/abhishek-mishra/martyrdom-of-saurabh-kali_b_7644656.html [last visited on June 20,2020]

³³ THE EFFECTIVENESS OF DISPUTE SETTLEMENT TREATIES BETWEEN COMMONWEALTH COUNTRIES- INDIA AND PAKISTAN IN THE CONTEMPORARY SCENARIO: A STUDY AND INSIGHT FROM CAPTAIN SAURABH KALIA’S CASE https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3377593 [last visited on June 20,2020]

³⁴ *Ibid.*

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