

POLICY BRIEF, OCTOBER 2023

The Killing of Hardeep Singh Nijjar: An International Law Perspective

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Abstract

The international law options available to Canada are limited. That means the situation will have to be resolved through political means. The international community is weighing in on the issue. However, each state's involvement will be colored by their own relationship with India and Canada and the stance that the countries have taken on targeted killings in the past. The resolution of these allegations, one way or another, will have significant implications for the international community and the principles of sovereignty and human rights that underpin it.

Key Words: Canada, India, Sovereignty, Extra-judicial Killing

I. The Dispute

On 18 September 2023, Canadian Prime Minister, Justin Trudeau made an explosive statement before the Canadian Parliament that Ottawa was pursuing “credible allegations” from Canadian intelligence against New Delhi for playing a role in the assassination of a prominent Sikh Canadian leader, Hardeep Singh Nijjar, on Canadian soil in June of the same year. Nijjar was shot and killed by two gunmen wearing dark clothes with hoods outside a Sikh temple in a Vancouver suburb on 18 June 2023. Following Trudeau’s statement, Canada expelled an Indian diplomat from the country.

After rejecting the allegations in a statement by the Ministry of External Affairs of India, the Indian government urged Trudeau to take actions against, what it termed, “anti-India elements” operating from inside Canada and followed this up by ordering a senior Canadian diplomat to leave the country.

II. Background to the Dispute

Canada is home to the world’s largest Sikh population outside India, who number nearly 770,000 people, or 2.1% of the country’s population.

Tensions among Indian and Canadian officials first simmered in 2015, when Trudeau came into power and appointed four Sikh ministers to his then 30-member cabinet. In the past, Indian diplomats have also raised issues over Sikh Canadians who express support for the Khalistan movement, which calls for a separatist Sikh homeland in India. One Hindu temple in Canada was vandalized last year with graffiti that read “death to India” in Urdu and “Khalistan,” and Sikh Canadians have organized local referendums over Sikh independence from India.

In 2018, Trudeau assured India that Canada would not support anyone trying to revive a separatist movement in India but he has repeatedly said he respects the right to free speech and assembly of protesters to demonstrate.

Hardeep Singh Nijjar was a Canadian Sikh separatist leader involved with the Khalistan movement. Settled in the province of British Columbia, he also made a name for himself as a vocal advocate for the creation of Khalistan - a separate homeland for Sikhs.

He had been labeled as a terrorist by India, accused of, among other activities, being the “mastermind” behind the Khalistan Tiger Force (KTF), a banned militant group in India. However, to his supporters, Mr Nijjar was a peaceful advocate for Sikh independence in British Columbia and a man who cared deeply about his community.

III. Applicable International Law

The discussion that now ensues is that if India did in fact carry out an extra judicial killing on Canadian soil, what options does international law provide the latter?

Attribution

First and foremost, in order to claim any international law violation, the Canadian government must first attribute the wrongful act to the Indian state. In other words, the killing of Nijjar by some private persons must be connected with an act or an omission by the state. The standard of proving this is quite high since a “complete dependence” and control of the private actor by the state needs to be proved. Canada cannot link the Indian government to Nijjar’s assassination unless it provides concrete evidence that the killing was carried by Indian state organs.

The rules of attribution under international law are reflected in the International Law Commission’s Articles on State Responsibility (“ILC Articles”). The relevant provisions of the ILC Draft Articles have been recognised as the most authoritative statement of law, a codification of customary international law or the “general legal principles”.

Attribution under Article 5 of the ILC requires two cumulative conditions: (1) an entity must be empowered with governmental authority and (2) there must be an act performed through the exercise of governmental authority. Seeing that no strict definition exists for “governmental authority”, international courts and tribunals adopted a flexible approach.

In this case, India can argue that the killers were not Indian officials. According to the ILC, even though conduct of private persons or entities is generally not attributable to the State, a State may, through specific directions or by exercising control over a group, “in effect assume responsibility for their conduct.” For such situations, Article 8 of the ILC Draft Articles covers two scenarios: (i) where the person or entity “is in fact acting on the instructions” of the State; or (ii) where it is acting “under the direction or control of the State.”

Thus, for Canada the first order of business will be to clearly establish attribution under international law principles.

Admissibility of Evidence

Related to this question, but conceptually distinct from it, is the issue of the evidence supporting an attribution claim. The issue of evidence obtained from intelligence sources is its legality. The question that remains is whether evidence obtained through questionable means, such as intelligence, is admissible. This is particularly relevant to the current dispute since it is speculated that Canada is relying on evidence obtained through intelligence gathering and sharing.

The issue is that the Canadian government has not disclosed the evidence it relies on or its sources. In the context of an accusation of this type, must the Canadian government provide the Indian government confidentially, or the world publicly, with at least some of the evidence supporting its conclusion? The usual position on the evidence point is generally that a state is not legally obliged to disclose evidence that can undermine its sources and methods of intelligence-gathering, but that failing to do so, at least to some extent, will undermine its case in a court of law.

An issue arises when a party to a dispute puts forth a document obtained in violation of the opponent's sovereignty or any internationally recognized human right. International courts, however, seem strikingly lenient towards evidence obtained by breaching the very law the proceedings seek to enforce. With only a few exceptions in international criminal law, statutes and rules of international courts and tribunals predominantly remain silent on the admissibility of unlawfully acquired evidence. This means that in all probability, the admissibility of Canada's evidence will not be an issue.

IV. International Law Options Available to Canada

In the event that Canada is able to attribute the actions of India to the murder of Nijjar, the following international law instruments become relevant:

UN Charter

Article 2(4) of the United Nations Charter prohibits states from interfering with force in the territorial integrity or political independence of other states.

Given that Nijjar was a Canadian citizen, any action— directly or indirectly in his killing— would violate Canada's sovereignty, and territorial and political integrity. It is a well-established customary international law principle that one country cannot intervene in domestic matters or target individuals of another country.

Hence, the involvement of Indian State actors in killing Canadian citizens on Canadian soil would be an egregious violation of the principle of sovereignty. This act, if proven, would also be considered a use of force or the threat of use of force against the territorial integrity or political independence of any State, which is expressly prohibited under the United Nations Charter (Article 2(4)).

Any such act could meet the 'armed attack' threshold and warrant Canada to take any measures under the 'Right to Individual or Collective Self-Defence', under

Article 51 of the UN Charter. Considering Canada is also a member of the North Atlantic Treaty Organisation (NATO), it could theoretically lead to an armed offensive against the Indian State, though the possibility of this happening is negligible.

International Covenant on Civil and Political Rights

If Canada's allegations are true, it could be argued that India breached Nijjar's right to life under Article 6 of the International Covenant on Civil and Political Rights, to which both India and Canada are signatories. While international law outlines "the responsibility of states to other states", an international human rights system "entails responsibilities to individuals".

However, India is not a signatory to the First Optional Protocol to the Covenant, which enables an individual complaint mechanism for violations of the provisions of the Covenant before the United Nations Human Rights Commission.

Extradition

Canadian state authorities could pursue criminal responsibility under its domestic criminal law for the suspects that were directly involved in the killing of Nijjar. However, such an action would require Canada to request the Indian government to extradite those individuals identified as responsible for killing Nijjar to Canada, for a domestic criminal trial.

In India, the Extradition Act, 1962 regulates the surrender of a person to another country or the request for the arrest of a person in a foreign land. The act specifies that any conduct of a person in India or in a foreign state that is mentioned in the list of extradition offense and is punishable with minimum one year of imprisonment qualifies for an extradition request.

Even though Canada and India signed an extradition treaty in 1987, only an estimated six fugitives, sought by India, have been returned to the country from 2002

to 2020. Since Canada has turned down many Indian requests to extradite certain individuals to the Indian government it is highly likely that India will do the same in this case.

International Court of Justice

Even if a violation of the UN Charter is proved, recourse to the International Court of Justice will likely not be possible. If Canada receives no cooperation from India, and if it feels it has credible evidence against the Indian government, it could take the matter to the International Court of Justice. However, the ICJ's jurisdiction is consent-based and there is a high probability that India will not agree to the court's jurisdiction.

V. Canada's Position

The current dispute between Canada and India can be viewed from two lenses. The first is that of sovereignty and the second is through the human rights framework. To understand the way forward, it is important to understand the stance that Canada is taking on the issue.

The nature of the breach of international law that the Canadian government alleges is important. To understand this, we must turn to the exact language used by the Prime Minister of Canada. The important parts of Mr. Trudeau's statement quotes:

"Canada is a rule-of-law country. The protection of our citizens and the defence of our sovereignty are fundamental. Our top priorities have therefore been that our law enforcement and security agencies ensure the continued safety of all Canadians, and that all steps be taken to hold perpetrators of this murder to account.

Any involvement of a foreign government in the killing of a Canadian citizen on Canadian soil is an unacceptable violation of our sovereignty. It is contrary to

the fundamental rules by which free, open and democratic societies conduct themselves.

As one would expect, we have been working closely and coordinating with our allies on this very serious matter. In the strongest possible terms I continue to urge the Government of India to co-operate with Canada to get to the bottom of this matter. I also expect it to reiterate that its position on extrajudicial operations in another country is clearly and unequivocally in line with international law.”

What is interesting here is not so much what Mr. Trudeau said, but what he did not say. Twice he uses the term ‘sovereignty’, and the second time he does so he accuses India of breaching Canada’s sovereignty. In doing so, he uses an interesting formulation- ‘any involvement of a foreign government’. That is, he appears to be saying that even Indian complicity in the assassination (rather than its authorship), would suffice to violate Canada’s sovereignty.

At the same time, Mr. Trudeau’s statement does not refer to the international human rights framework that is at play in this situation. The basic problem with this focus on sovereignty is that it entirely negates the relevance of the individual. Imagine if Canada had consented to the Indian operation, suddenly there would be no violation of Canada’s rights in international law. The core violation, that of the individual’s right to life, would go entirely unaddressed.

So why are human rights missing here? It can be reasonably speculated that this is because of Canada’s long history of denying that human rights law, including the International Covenant on Civil and Political Rights (to which both Canada and India are parties), applies extraterritorially, except perhaps in the narrowest of circumstances. In other words, by accusing India of violating Nijjar’s human rights, Canada would inevitably be affecting its own position on when the right to life, and other human rights, apply abroad.

VI. India's Possible Defense

The protection of the 'Right to Individual Self-Defence,' however, may also be available to India. While this defense is usually applicable in times of active war or as a retaliatory measure against an 'armed attack', some States have also used the principle of preemptive self-defense.

Usually, such targeted killings are 'permitted' during established armed conflicts between two or more nations. Apart from the accusations, there is no active armed conflict between India and Canada in the present case.

The concept of 'preemptive self-defense', though not recognised formally through conventions or treaties, has gained increasing popularity in recent years. Under this defense, the threshold of acting in such self-defense is that such a threat should be 'imminent'. India can claim the defense that harboring separatist entities and terrorists in Canada' directly infringes on the territorial and political integrity of India and would be a ground for justifying its intervention, if proven.

Similar incidents involving targeted killings of foreign nationals on foreign soil have very little justification in international law and are frowned upon. However, such threats of imminent danger and the need to act preemptively have been invoked by the US in justifying the killing of Osama Bin Laden (on Pakistani soil) and Gen. Qassem Soleimani (on Iraqi soil).

Usually, such targeted killings are 'permitted' during established armed conflicts between two or more nations. Apart from the accusations, there is no active armed conflict between India and Canada in the present case. In the absence of an armed conflict between the two nations, the permitted targeted killing is an onerous burden to discharge.

VII. The Way Forward

From the discussion above, it is clear that the international law options available to Canada are limited. That means the issue will have to be resolved through political

means. The international community is weighing in on the issue. However, each state's involvement will be colored by their own relationship with India and Canada and the stance that the countries have taken on targeted killings in the past. The resolution of these allegations, one way or another, will have significant implications for the international community and the principles of sovereignty and human rights that underpin it.

Regardless of the outcome, there is value in Canada pursuing the case in an international forum, such as the ICJ, since that would set a legal precedent. Canada would do itself a favor by taking a very strong stance here to prevent such conduct in the future by any other state.