

## MAPPING THE JADHAV DISPUTE AT THE WORLD COURT: EVALUATING INDIA AND PAKISTAN'S ARGUMENTS

SAGNIK DAS & AARUSHI NARGAS\*

### TABLE OF CONTENTS

INTRODUCTION .....	36
I. THE PROVISIONAL MEASURES ORDER .....	38
<i>A. Significance of the Order</i> .....	38
<i>B. The Issue of Compliance with the Provisional Measures</i> .....	41
II. JURISDICTION OF THE COURT .....	44
<i>A. Jurisdiction under Article 36(1) of the Court's Statute</i> .....	44
<i>B. Adjudicating Claims under other Treaties</i> .....	46
III. THE ISSUE OF ADMISSIBILITY .....	48
IV. VIOLATIONS OF THE VIENNA CONVENTION ON CONSULAR RELATIONS .....	53
<i>A. Denial of Consular Access</i> .....	53
<i>B. Applicability of Article 36 to Persons Suspected of Conducting Espionage or Terrorism</i> .....	58
<i>C. The Relationship Between Article 36 and Article 55 of the VCCR</i> .....	61
<i>D. Article 36 of the VCCR: A Fundamental Human Right?</i> .....	62
V. 2008 BILATERAL AGREEMENT ON CONSULAR ACCESS .....	63
<i>A. Registration of the Agreement</i> .....	64

---

\* Sagnik Das is a Law Clerk to Honorable Mr. Justice S. Ravindra Bhat, Delhi High Court, India. He graduated from National Law University, Jodhpur, India in 2016.

Aarushi Nargas is a fifth year student pursuing B.B.A. LL.B (Hons.) at National Law University, Jodhpur, India.

## 36 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48

<i>B. Subsequent Agreements under Article 73 of the VCCR</i> .....	65
<i>C. Provisions of the 2008 Agreement</i> .....	66
VI. VIOLATIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.....	68
<i>A. Legality of Detention</i> .....	69
<i>B. Right to a Fair Trial</i> .....	72
<i>C. Right to Appeal</i> .....	76
VII. THE ISSUE OF REMEDIES .....	78
CONCLUSION .....	84

## INTRODUCTION

On May 8, 2017, the Government of India instituted proceedings in the International Court of Justice (“ICJ” or the “Court”) against the Islamic Republic of Pakistan alleging violations of the Vienna Convention on Consular Relations (“VCCR”) in relation to Mr. Kulbhushan Sudhir Jadhav, an Indian national, who was sentenced to death by a Pakistani military court. This proceeding marks the fourth time that the two States have been on opposite sides at the ICJ, and this dispute has garnered considerable media attention in both States.<sup>1</sup>

India’s case is that Jadhav was a retired naval officer who was kidnapped from Iran, brought to Pakistan, and tried on concocted charges of conducting espionage and terrorist activities on Pakistani

---

1. The other three cases were: Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), Judgment, 1972 I.C.J. 46 (Aug. 18) [hereinafter ICAO Council-Judgment]; Trial of Pakistani Prisoners of War (Pak. v. India), 1973 I.C.J. 347 (Dec. 15); Aerial Incident of 10 August 1999 (Pak. v. India), Jurisdiction of the Court, Judgment, 2000 I.C.J. 12 (Feb. 14). For instances of media coverage of the dispute in both countries, see, Jayanth Jacob, *Kulbhushan Jadhav’s Case in ICJ Today: How, What and Why of the India-Pakistan Tussle*, HINDUSTAN TIMES (May 15, 2017), <http://www.hindustantimes.com/india-news/kulbhushan-jadhav-s-case-in-icj-today-how-what-and-why-of-the-latest-india-pak-flashpoint/story-0eKAIegrH9uT8IBaldjRnL.html>; Taimur Malik, “Pakistan Didn’t Fail”: 5 Things You Should Know About ICJ’s Decision on Jadhav, DAW (May 19, 2017), <https://www.dawn.com/news/1334111/pakistan-didnt-fail-5-things-you-should-know-about-icjs-decision-on-jadhav>.

## 2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 37

soil.<sup>2</sup> Conversely, Pakistan's version of the dispute is that Jadhav was a spy sent by India to conduct subversive activities on Pakistani territory, and after his arrest, he voluntarily confessed to his involvement in espionage and terrorism in Pakistan.<sup>3</sup> While differences persist in the circumstances surrounding Jadhav's arrest between the two States, India's application to the ICJ alleged Pakistan violated the VCCR. Specifically, India alleged Pakistan denied Jadhav access to the Indian consular post, and correspondingly, denied Indian authorities any communication or contact with Jadhav from the time of his arrest through the course of the trial. In response to India's application to grant provisional measures, the ICJ issued an order on May 18, 2017, asking Pakistan to ensure that Jadhav is not executed before the final decision of the Court. In a subsequent order dated June 13, 2017, the Court fixed the time limits for the filing of written pleadings by both States.<sup>4</sup>

This dispute raises interesting questions of international law, *inter alia*, relating to interpretation of the VCCR, the right to a fair trial under the 1966 International Covenant on Civil and Political Rights ("ICCPR"), the remedies the Court can grant, and procedural issues relating to the Court's jurisdiction and admissibility of claims. In this Article, the authors attempt to address some of the principle legal issues raised by the dispute. Since the final written submissions of the two parties have not been filed at the time of writing this Article, the authors have largely relied upon the oral submissions made by the parties at the provisional measures hearing before the Court in order to ascertain their legal positions.

Using the existing legal framework and the Court's precedents, the authors examine the tenability of the submissions and how likely they are to find favor with the Court. Part I of this Article deals with the

---

2. Jadhav Case (India v. Pak.), 2017 I.C.J. 168, Verbatim Record, ¶ 94 (May 15, 2017, 10 a.m.), <http://www.icj-cij.org/files/case-related/168/168-20170515-ORA-01-00-BI.pdf> [hereinafter Oral Submissions-India].

3. Jadhav Case (India v. Pak.), 2017 I.C.J. 168, Verbatim Record, ¶ 8 (May 15, 2017, 3 p.m.), <http://www.icj-cij.org/files/case-related/168/168-20170515-ORA-02-00-BI.pdf> [hereinafter Oral Submissions-Pakistan].

4. India must file its memorial by September 13, 2017, and Pakistan must file its counter memorial by December 13, 2017. See Jadhav Case (India v. Pak.), Order, 2017 I.C.J. 168 (June 13), <http://www.icj-cij.org/files/case-related/168/168-20170613-ORD-01-00-EN.pdf>.

## 38 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48

provisional measures passed by the Court, their relationship to the merits of the dispute, and issues regarding enforcing compliance with this order of the Court. Part II deals with the Court's jurisdiction in this dispute, and specifically addresses Pakistan's preliminary objections. Part III deals with the issue of admissibility of India's claims before the Court, in light of the necessity for the exhaustion of local remedies in the courts of Pakistan prior to the application for diplomatic protection in the Court. Part IV addresses India's claims on the merits with respect to violations of VCCR and possible justifications Pakistan may advance. Part V examines the relevance of a bilateral agreement, concerning consular access, which the two States entered into in 2008. Part VI addresses India's claims under the ICCPR regarding Jadhav's detention and trial. Part VII touches upon the question of the remedies that the ICJ would likely grant even if it finds in favor of India's submissions on merits.

## I. THE PROVISIONAL MEASURES ORDER

*A. Significance of the Order*

Article 41 of the ICJ Statute gives the Court the power to grant provisional measures in order to preserve the rights of either (or both<sup>5</sup>) parties to the dispute, pending its final decision. This provision is substantively the same as Article 41 of the Statute of the Permanent Court of International Justice ("PCIJ"), the ICJ's predecessor.<sup>6</sup> The question of whether provisional measures ordered by the Court were binding was one that scholars had debated for a long time;<sup>7</sup> however,

---

5. See *Frontier Dispute (Burk. Faso/Mali)*, Provisional Measures, 1986 I.C.J. 3 (Jan. 10).

6. The only two differences are minor: the word "reserve" has been replaced by the word "preserve" in relation to the respective rights of either party, and the word "Council" in paragraph 2 of Article 41 has been replaced by "Security Council".

7. See JERZY SZTUCKI, *INTERIM MEASURES IN THE HAGUE COURT: AN ATTEMPT AT SCRUTINY* 280-93 (1983); Peter A. Bernhardt, *The Provisional Measures Procedure of the International Court of Justice through U.S. Staff in Tehran: Fiat Iustitia, Pereat Curia?*, 20(3) VA. J. INT'L L. 557 (1980). For a comprehensive review of academic opinion on this issue, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Serb. & Montenegro)*, Provisional Measures, 1993 I.C.J. 325, 370 (Sept. 13) (separate opinion by Weeramantry, J.).

2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 39

the issue was put to rest by the ICJ in its decision in *LaGrand*.<sup>8</sup> The Court held that the “object and purpose of the Statute, as well as the terms of Article 41 when read in their context,”<sup>9</sup> made it clear that orders granting provisional measures were binding.

On May 8, 2017, in Jadhav’s case, India submitted its request to the Court for indication of provisional measures, which sought an order enjoining Pakistan from executing Jadhav pending the Court’s final decision. India was perhaps emboldened when the ICJ granted similar provisional measures in three cases involving questions of consular access: *Breard*,<sup>10</sup> *LaGrand*<sup>11</sup> and *Avena*.<sup>12</sup> All three cases involved persons on death row in different states within the United States. Paraguay, Germany, and Mexico, respectively, had claimed a violation of the VCCR, in denial of consular access to these individuals, much like India’s present dispute with Pakistan.

The ICJ conducted oral hearings on May 15, 2017, on the question of provisional measures, at which both India and Pakistan made submissions. On May 18, 2017, the ICJ issued an order that accepted India’s request and granted provisional measures. The order required Pakistan to “take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order.”<sup>13</sup> The order on provisional measures would not come as a surprise to many; given the similarities with *Breard*, *LaGrand*, and *Avena*, and the Court’s strong reluctance in departing from its previous jurisprudence.<sup>14</sup> In fact, the provisional measures granted by the Court

---

8. *LaGrand* (Ger. v. U.S.), Judgment, 2001 I.C.J. 466 (June 27) [hereinafter *LaGrand-Judgment*].

9. *Id.* at 8 ¶ 102.

10. Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J. 248, ¶ 41 (Apr. 9) [hereinafter *Breard*].

11. *LaGrand* (Ger. v. U.S.), Provisional Measures, 1999 I.C.J. 9, ¶ 29 (Mar. 3) [hereinafter *LaGrand-Provisional Measures*].

12. *Avena and Other Mexican Nationals* (Mex. v. U.S.), Provisional Measures, 2003 I.C.J. 77, ¶ 59 (Feb. 5) [hereinafter *Avena-Provisional Measures*].

13. *Jadhav Case* (India v. Pak.), Provisional Measures, ¶ 60 (May 18, 2017), <http://www.icj-cij.org/files/case-related/168/168-20170518-ORD-01-00-EN.pdf> [hereinafter *Jadhav-Provisional Measures*].

14. The Court’s reluctance is best described in its decision on Preliminary Objections in the Land and Maritime Boundary case, where the Court noted, “It is true that, in accordance with Article 59, the Court’s judgments bind only the parties

## 40 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48

are the same as those granted in *Breard*, *LaGrand*, and *Avena*.<sup>15</sup> The Court used the conventional three-pronged rule, used in previous decisions under Article 41, in deciding whether provisional measures were appropriate. The rule requires the ICJ to find (1) the existence of *prima facie* jurisdiction, (2) a link between the rights being protected and the measures requested, and (3) a risk of irreparable prejudice and urgency.<sup>16</sup> Applying these criteria, the Court found that the requirements for granting provisional measures were met in this case.

However, provisional measure orders are not a reliable indicator as to the way the Court may decide the dispute's merits. As the terms of Article 41 suggest, such actions are *provisional* and do not have any bearing on the decision on the merits of the case.<sup>17</sup> Further, the Court's decision to grant provisional measures is also not an affirmation of the Court's jurisdiction over the merits of the dispute. In *Icelandic Fisheries*,<sup>18</sup> the Court noted, at the stage of Article 41, the applicant need only prove the possibility of a *prima facie* existence of jurisdiction.<sup>19</sup> More than once, the Court has declined jurisdiction on the merits after having ordered provisional measures.<sup>20</sup>

---

to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases." Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, 1998 I.C.J. 275, ¶ 28 (June 11).

15. See *Breard*, *supra* note 10, at ¶ 41; *LaGrand-Provisional Measures*, *supra* note 11, ¶ 29; *Avena-Provisional Measures*, *supra* note 12, at ¶ 59.

16. See *Passage through the Great Belt (Fin. v. Den.)*, Provisional Measures, 1991 I.C.J. 12, ¶¶ 14, 21–23 (July 29).

17. In provisional measure decisions, the Court, almost always, reaffirms the *provisional* character of its order and clarifies that it does not have any bearing on the question of merits. See, e.g., *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Provisional Measures Order, 2006 I.C.J. 113, ¶ 85 (July 13). "Whereas the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves; and whereas it leaves unaffected the right of Argentina and of Uruguay to submit arguments in respect of those questions." *Id.*

18. See *Fisheries Jurisdiction (U.K. v. Ice.)*, Interim Protection Order, 1972 I.C.J. Rep. 12 (Aug. 17).

19. *Id.* ¶ 15.

20. See *Anglo-Iranian Oil Co. (U.K. v. Iran)*, Judgment, 1952 I.C.J. Rep. 93, 115 (July 22) [hereinafter *Anglo-Iranian Oil Co.*]; see also *Application of the*

2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 41

The delayed denial of jurisdiction gives rise to a strange situation and raises the larger question regarding the legitimacy of the Court's power to grant provisional measures in the first place. If the Court ultimately reaches the conclusion that it lacks jurisdiction over the merits, ostensibly the Respondent is bound by the provisional measures ordered by the Court, without actually having consented to the Court's jurisdiction. While undoubtedly, this would involve an incursion on the State's sovereignty.<sup>21</sup> Nonetheless, given the ICJ's dispute resolution function and the *interim* character of such measures, proponents of Article 41 measures argue it is a necessary power for the Court to ensure that its decisions on merits are not rendered meaningless by the acts of either party to the dispute.

With regard to the Court's provisional measure in the Jadhav case, the Court clarified in the final paragraph of its decision that the present decision does not in any way prejudice the question of jurisdiction, admissibility, or the merits themselves.<sup>22</sup> Moreover, the Court stated both parties remain at liberty to advance arguments on all those issues.<sup>23</sup> Considering this obvious caveat, it is clear that the May 18, 2017, provisional measures order can in no way be taken as an indication of which way the Court may ultimately decide on the merits.

### *B. The Issue of Compliance with the Provisional Measures*

If media opinion is to be believed, the Pakistani Government appears to have indicated that it will not comply with the provisional measures order.<sup>24</sup> In the aftermath of the ICJ's verdict, Pakistan's official statement was that it does not accept the ICJ's jurisdiction in matters related to national security; it is not clear what the importance

---

International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, 2011 I.C.J. 70, ¶ 187 (Apr. 1).

21. See U.N. Charter art. 2; S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

22. Jadhav-Provisional Measures, *supra* note 13, ¶ 60.

23. *Id.*

24. See, e.g., Mohan Katarki, *Kulbhushan Jadhav Verdict: UN Security Council May Not Push Pakistan to Comply with ICJ's Order*, HINDUSTAN TIMES (May 19, 2017), <http://www.hindustantimes.com/analysis/kulbhushan-jadhav-verdict-un-security-council-may-not-push-pakistan-to-comply-with-icj-s-order/story-SLpgIMxWHjvL1L3Hke03AM.html>.

## 42 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48

of this statement is, but would ostensibly mean that Pakistan does not consider itself bound by the provisional measures order.<sup>25</sup> If Pakistan does disregard the ICJ's order, the issue would be what India's remedies are against Pakistan's non-compliance. However, since Article 41 measures are binding in nature, if Pakistan does not comply with the ICJ's order, the violation itself would be a separate ground for India to establish the international wrongfulness of Pakistan's actions, in its arguments in the merits phase.<sup>26</sup>

The more contentious issue is whether India would be able to approach the U.N. Security Council to enforce the ICJ's provisional measure, in the event there is concrete evidence that Pakistan plans to execute Jadhav in blatant disregard of the Court's order. The issue of whether the Security Council possesses the authority to enforce the ICJ's provisional measures has been subject to much discussion among scholars, with most arguing the Security Council has no power to enforce Article 41 orders.<sup>27</sup> Article 94(2) of the U.N. Charter provides:

[I]f any party to a case [before the Court] fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment<sup>28</sup>

The question then becomes, whether an order granting provisional measures under Article 41 is a "judgment" within the meaning of Article 94(2) of the U.N. Charter. Article 94(1) of the U.N. Charter rather unhelpfully uses the term "decision,"<sup>29</sup> and so does Article 59 of

---

25. *Pakistan Govt Rejects ICJ's Verdict on Jadhav as India Celebrates*, THE QUINT (May 18, 2017), <https://www.thequint.com/politics/2017/05/18/pakistan-government-rejects-icj-verdict-on-kulbhushan-jadhav-execution>.

26. LaGrand-Judgment, *supra* note 8, ¶¶ 115–16.

27. See, e.g., Karin Oellers-Frahm, *Commentary to Article 41*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 923–66 (Andreas Zimmerman et. al., eds., 2d ed. 2012) [hereinafter Oellers-Frahm]. For a contrary view, see Attila Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 EUR. J. INT'L L. 539, 569–70 (1995).

28. U.N. Charter art. 94 ¶ 2.

29. *Id.* art. 94 ¶ 1.



2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 43

the Court's Statute, which explains that the Court's "decision" is binding only between the parties.<sup>30</sup>

On the other hand, Article 94(2) uses the term "judgment." One commentator parsed the ambiguity by concluding that depending on which Article is used, a provisional measures order has a different effect. Specifically, for the purpose of U.N. Charter Article 94(1) and Article 59 of the Court's Statute, provisional measures are in fact "orders," and essentially "decisions" of the Court, but are not "judgments" for the purpose of Article 94(2) of the Charter—which alone may be the subject of recourse to the U.N. Security Council.<sup>31</sup> The PCIJ took a similar view when commenting on the South-Eastern Greenland case.<sup>32</sup> In the South-Eastern Greenland case, the PCIJ noted the provisional measures were in the form of an order because such "measures of protection [were] essentially provisional in character, whereas 'judgments' were final decisions."<sup>33</sup> Thus, there seems to be a distinction between the ICJ's orders of provisional measures and judgments, with only the latter affording States the right of recourse to the Security Council under the U.N. Charter.

There is only one example where a State approached the U.N. Security Council in response to a violation of a provisional measures ordered by the ICJ. In *Anglo Iranian Oil Company*,<sup>34</sup> the United Kingdom approached the Security Council complaining of the Iranian Government's failure to comply with the ICJ's provisional measures.<sup>35</sup> During the Security Council's deliberations on this matter, States held divergent views. Most States expressed discomfort at the possibility that ICJ provisional measures would have binding force, and that the Security Council could enforce such orders.<sup>36</sup> Since Iran had

---

30. Statute of the International Court of Justice art. 59, 33 U.N.T.S. 993 (1945) [hereinafter ICJ-Statute].

31. Oellers-Frahm, *supra* note 27, at 1071.

32. Permanent Court of International Justice, Ninth Annual Report, 171 (ser. A) No. 9 (June 15, 1933), [http://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_E/English/E\\_09\\_en.pdf](http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_E/English/E_09_en.pdf).

33. *Id.*

34. *See* Anglo-Iranian Oil Co., *supra* note 22.

35. *See* Sztucki, *supra* note 7, at 297; S.C.O.R., 6th year, Suppl. for Oct.-Dec. 1951, pp. 1-2.

36. *See, e.g.*, the remarks of the representative of Ecuador. U.N. S.C.O.R. 6th year, 562 mtg. at 8, U.N. Doc. S/PV.562 (Oct. 17, 1951).

challenged the Court's jurisdiction, the Security Council ultimately adopted the French proposal to postpone consideration of the matter until the ICJ had ruled on its own jurisdiction.<sup>37</sup> Eventually, the ICJ found that it lacked jurisdiction on the merits, so the Security Council never resumed its deliberations on the matter and did not express a conclusive view as to whether Article 41 orders could be enforced by the Council. Nonetheless, the Security Council has frequently adopted resolutions urging States to comply with provisional measures ordered by the ICJ.<sup>38</sup> However, these resolutions must be contrasted with the Security Council's "enforcement" function under Article 94(2) of the U.N. Charter. Therefore, it seems to be clear that India will not be able to approach the Security Council even if it becomes clear that Pakistan will violate the ICJ's provisional measures order. At best, the Security Council can pass a resolution *urging* compliance on the part of Pakistan, but seemingly, can do no more.

## II. JURISDICTION OF THE COURT

### A. *Jurisdiction under Article 36(1) of the Court's Statute*

The two most commonly used bases for establishing the ICJ's jurisdiction are provided in the Court's Statute Article 36. First, Article 36(1) provides the ICJ with jurisdiction over all matters that the State Parties specifically agree to as well as disputes regarding treaties whose compulsory clauses provide for the ICJ's jurisdiction.<sup>39</sup> Second, Article 36(2) grants jurisdiction in cases where States have made unilateral declarations recognizing the ICJ's jurisdiction over certain categories of disputes that may arise with other States.<sup>40</sup> Here, India relies on Article 36(1) because both India and Pakistan are parties to the VCCR's Optional Protocol, which provides all disputes relating to the VCCR's interpretation or application "shall lie within the compulsory

---

37. U.N. S.C.O.R., 6th year, 565th mtg. at 12, U.N. Doc. S/PV.565 (Oct. 19, 1951).

38. *See, e.g.*, S.C. Res. 461, pmb. ¶ 2 (Dec. 31, 1979); S.C. Res. 81, pmb. ¶ 2 (Apr. 16, 1993).

39. ICJ-Statute, *supra* note 38, art. 36(1).

40. *Id.* art. 36(2).

2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 45

jurisdiction of the ICJ.”<sup>41</sup> The Optional Protocol’s compulsory clause designates the ICJ as the forum for resolving such disputes; therefore, so long as India can establish that the present dispute relates to the VCCR’s “interpretation or application,” the ICJ will have jurisdiction over the matter.<sup>42</sup>

In its oral arguments, Pakistan raised preliminary objections to the Court’s jurisdiction. Pakistan relied on both India’s reservations to the ICJ’s jurisdiction (i.e. excluding the Court’s jurisdiction in case of disputes with Commonwealth States and the multilateral treaties reservation) as well as its own reservation concerning the ICJ’s jurisdiction in matters involving national security. Pakistan emphasized that because the *Jadhav* case raises questions of Pakistan’s national security, the Court’s jurisdiction was necessarily excluded. However, this argument is flawed, because both India and Pakistan’s reservations are in relation to the Court’s Statute Article 36(2) or compulsory jurisdiction. These reservations are irrelevant for the purposes of Article 36(1), under which a State can rely on a treaty’s compulsory clause for the basis of the ICJ’s jurisdiction (i.e., the VCCR in the present case).<sup>43</sup>

This assertion is bolstered by the ICJ’s conclusion in *ICAO Council*, where the Court held that once it found that it had jurisdiction under Article 36(1), the reservations to jurisdiction under Article 36(2) became irrelevant.<sup>44</sup> In its provisional measures order, the Court clearly states, “[A]ny reservations contained in the declarations made by the Parties under Article 36, paragraph 2, of the Statute cannot impede the Court’s jurisdiction specially provided for in the Optional Protocol.”<sup>45</sup> While it is true that any finding of jurisdiction in the provisional measures order is necessarily *prima facie*, it seems quite clear that the law on this is settled—parties cannot invoke reservations to jurisdiction under Article 36(2), where compulsory clauses of treaties are concerned. Therefore, for Pakistan to reassert this claim at the merits stage would be a strategic error.

---

41. Optional Protocol Concerning the Compulsory Settlement of Disputes art. I, 596 U.N.T.S. 487 (Mar. 19, 1967).

42. *Id.*

43. ICAO Council-Judgment, *supra* note 1, ¶ 25.

44. *Id.*

45. *Jadhav-Provisional Measures*, *supra* note 13, ¶ 26.

Under VCCR Optional Protocol Article I, the next aspect that the Court must consider while evaluating whether it has jurisdiction is to determine whether there is a “dispute” between the parties that arises out of the VCCR’s “interpretation or application.” As early as 1924, the PCIJ laid out the definition of a “dispute,” which has since been consistently cited in subsequent decisions, as “a disagreement on a point of law or fact, a conflict of legal views or of interests between two [parties].”<sup>46</sup> Similarly, the ICJ has held that a dispute would be a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.<sup>47</sup>

In its oral submissions, India contended that Pakistan’s denial of Jadhav’s consular access amounts to egregious violations of Article 36 of the VCCR.<sup>48</sup> In response, Pakistan posits that Article 36 of the VCCR does not apply in cases of persons guilty (or suspected) of conducting espionage or spying activities.<sup>49</sup> Moreover, Pakistan argued Article 55 of the VCCR would also apply, and in cases of interference in the internal affairs of the receiving State, consular access under Article 36 could be denied.<sup>50</sup> The two States’ divergent arguments clearly indicate the existence of a dispute or a disagreement relating to the VCCR’s interpretation, application, and performance of obligations under that treaty. Accordingly, based on the existence of a dispute, the ICJ would have jurisdiction to adjudicate these claims under Optional Protocol Article I.

### *B. Adjudicating Claims under other Treaties*

Assuming a dispute exists to which both India and Pakistan are State Parties, the ICJ has jurisdiction over the dispute by virtue of the

---

46. *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30).

47. *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 1950 I.C.J. 65, 74 (Mar. 30); *see also* *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, Judgment, 2011 I.C.J. 70, ¶¶ 26–38 (Apr. 1) (determining a “dispute” is any factual or legal contention between two or more States).

48. Oral Submissions-India, *supra* note 2, at 36, ¶ 70.

49. Oral Submissions-Pakistan, *supra* note 3, at 20.

50. *Id.*

2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 47

VCCR's Optional Protocol. However, one must examine whether the Court in such a case would be restricted to adjudicating claims *only* under the VCCR (given that its jurisdiction is borne out of the VCCR and not under Article 36(2) of the Court's Statute) or if its authority would extend to deciding obligations under other treaties or under customary international law. This would become particularly important in this case considering India's oral arguments relied on specific provisions of the ICCPR,<sup>51</sup> while Pakistan has advanced arguments based on a 2008 bilateral agreement governing consular access between India and Pakistan.<sup>52</sup> Currently, there is nothing in the VCCR or the Optional Protocol that provides any guidance on the issue as to whether the ICJ can look at other relevant rules of international law while adjudicating a dispute under the VCCR.

Some multilateral treaties expressly recognize the competence of the forum adjudicating disputes under those agreements to consider other relevant rules of international law while reaching its decision. For instance, Article 293 of the United Nations Convention on the Law of the Sea provides: "A court or tribunal having jurisdiction under this section shall apply this Convention *and other rules of international law not incompatible with this Convention.*"<sup>53</sup> Since an analogous provision is absent in the VCCR, the question would then be whether the Court, in this case, can consider India's claims under the ICCPR and Pakistan's under the 2008 bilateral agreement. The instinctive answer to this query is negative because the ICJ is rather circumspect about its jurisdiction (especially *ratione materiae*) and provides great deference to notions of State sovereignty and consent. Thus, the ICJ would be mindful that its jurisdiction is borne out of a specific treaty and does not reach beyond the terms of the treaty itself. Interestingly, however, the ICJ seems to have taken the opposite approach.

For example, in *Oil Platforms*, while reaffirming its jurisdiction is conveyed by the 1955 Treaty between the parties, the ICJ nonetheless decided that it extends to determining the lawfulness of the conduct of the parties with reference to the U.N. Charter and customary

---

51. Oral Submissions-India, *supra* note 2, at 39, ¶ 86.

52. Oral Submissions-Pakistan, *supra* note 3, at 22.

53. United Nations Convention on the Law of the Sea art. 293, Dec. 10, 1982, 1833 U.N.T.S. 397 (emphasis added).

## 48 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48

international law.<sup>54</sup> Similar conclusions were reached by the Court in *Pulp Mills*<sup>55</sup> and *Bosnian Genocide*.<sup>56</sup> In both cases, despite recognizing that the ICJ's jurisdiction derived from a specific treaty, the Court reaffirmed its ability to refer to other relevant rules of international law while judging the parties' conduct. Such an approach by the Court is justified given Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT"),<sup>57</sup> which mandates that interpretation of a treaty must take into account all relevant rules of international law applicable in the relations between the parties.<sup>58</sup> Following that line of reasoning, the Court in *Jadhav*, while interpreting the VCCR's provisions, would have the ability and obligation to take into account other relevant rules of international law applicable between the parties.<sup>59</sup>

## III. THE ISSUE OF ADMISSIBILITY

Once the question of jurisdiction is settled, the next issue is the admissibility of India's application before the ICJ. In this case, India has made claims against Pakistan, for violations of its own direct rights as well as indirect injuries through the violation of Jadhav's rights under the VCCR.<sup>60</sup> Regarding the violations of India's own rights, there would clearly be no issue of admissibility. However, as to the alleged

---

54. *Oil Platforms (Islamic Rep. Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 42 (Nov. 6) [hereinafter *Oil Platforms*].

55. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, ¶¶ 204–05 (Apr. 20).

56. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Serb. and Montenegro)*, Judgment, 2007 I.C.J. 43, ¶ 149 (Feb. 26).

57. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.

58. This was in fact, the reasoning adopted by the Court in the *Oil Platforms* case. See *Oil Platforms*, *supra* note 54, ¶ 41.

59. Both India and Pakistan are parties to the International Covenant on Civil and Political Rights ("ICCPR") as well as the 2008 bilateral agreement. With respect to the 2008 bilateral agreement, both parties differ as to whether the treaty has any legal significance before the Court. Thus, the 2008 bilateral agreement as well as the ICCPR do constitute "relevant rules of international law applicable in the relations between the parties." See *supra* text accompanying note 54.

60. Oral Submissions-India, *supra* note 2, at ¶ 70.

2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 49

violations of Jadhav's rights under the VCCR, India would have an indirect right of standing (i.e. through exercising diplomatic protection).<sup>61</sup> International law requires that two conditions be satisfied before a State can exercise diplomatic protection over an individual's rights. First, the individual must be a "national" of that State.<sup>62</sup> Second, all local remedies must have been exhausted in the other State's courts against whom the violations are being claimed.<sup>63</sup>

Therefore, India must first prove that Jadhav is an Indian "national." During the provisional measures hearing, neither the Applicant nor Respondent argued this question extensively. India relied on a letter received from Pakistan for assistance in the investigation, in which Pakistan stated that a First Information Report had been registered against "an Indian national." India's stance, therefore, was Jadhav's nationality had never been in question.<sup>64</sup> In response, Pakistan argued Jadhav's nationality "has not actually been established by the Indian authorities."<sup>65</sup> Because the countries presented conflicting accounts, the ICJ must first decide whether Jadhav is actually an Indian national before affording diplomatic protection. Proving Jadhav's nationality should not be burdensome for India, considering that Pakistan itself had contacted India for assistance in investigation of Jadhav's case.<sup>66</sup> In fact, it would be difficult for Pakistan to explain why it would request India to assist in the investigation, unless it was clear that Jadhav was an Indian national.

The issue of exhaustion of local remedies, however, would require more effort. Usually, when bringing claims on behalf of a national, a State is required to exhaust local remedies in the domestic courts of the other State. Here, India would need to exhaust all local remedies in

---

61. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. 582, ¶¶ 63–65 (May 24) [hereinafter Diallo-Preliminary Objections].

62. The test of "nationality" test required for exercising diplomatic protection was elaborated in detail in the *Nottebohm* decision of the ICJ. *Nottebohm* (Liech. v. Guat.), Judgment, 1955 I.C.J. 4 (Apr. 6).

63. On the exhaustion of local remedies rule, see, Diallo-Preliminary Objections, *supra* note 61, ¶¶ 42–44.

64. Oral Submissions-India, *supra* note 2, ¶ 69.

65. Oral Submissions-Pakistan, *supra* note 3, at 13.

66. This is clear from Pakistan's own oral submissions. See Oral Submissions-Pakistan, *supra* note 3, ¶ 11.

## 50 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48]

Pakistan's courts before bringing the alleged violations of Jadhav's rights to an international forum. However, in addition to the violations of Jadhav's rights under the VCCR, India has claimed violations of its own direct rights as a nation. In such a situation, where a State claims both a violation of its own direct rights and those of its national, the local remedies rule does not apply.<sup>67</sup> In *Avena*, the ICJ was faced with violations similar to India's allegations and found that Article 36 of the VCCR created an interdependent regime of both the State and individual's rights.<sup>68</sup> The ICJ held that in such a situation of interdependent rights, Mexico's claims with respect to its nationals would not invoke the local remedies rule.<sup>69</sup> Therefore, India need not show that local remedies in Pakistan have been exhausted.

The Court in *LaGrand* also held the exhaustion of local remedies would not be mandatory if the Respondent State itself has failed to inform the person concerned of his available remedies in accordance with the State's obligations under international law.<sup>70</sup> Thus, if India can establish that Pakistan has failed to inform Jadhav of the remedies available to him under domestic law (an obligation that could derive from either the VCCR or ICCPR), then there would be no need to exhaust local remedies.

The situation would be somewhat different if the ICJ were to adjudicate India's contentions based on a violation of the ICCPR with respect to Jadhav's detention and trial. In that case, India would be espousing rights solely belonging to Jadhav and not to the State itself.<sup>71</sup> For contending such violations, the Court should require India to demonstrate that local remedies have been exhausted in Pakistani courts. Additionally, the question of burden of proof becomes relevant:

---

67. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. Rep. 12, ¶ 40 (Mar. 31) [hereinafter *Avena-Judgment*].

68. *Id.*

69. *Id.*

70. *LaGrand-Judgment*, *supra* note 8, ¶ 60.

71. Being a human rights treaty, the ICCPR does not confer a direct right of standing on India. India would have an indirect right of standing, based on a violation of its national's rights. Therefore, India would have to exercise its right of diplomatic protection over Jadhav for bringing claims under the ICCPR before the Court. On the question of standing of a State for claiming human rights violations of its nationals see, *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶¶ 33–35 (Feb. 5).



## 2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 51

is it India's burden to show that all effective local remedies have been exhausted or is it Pakistan's to prove that there is some remedy that India and Jadhav failed to exhaust? Confronting this issue in *Elettronica Sicula S.p.A.*, the ICJ noted that, "it was for Italy to show, as a matter of fact, the existence of a remedy which was open to the United States stockholders and which they failed to employ."<sup>72</sup> Thus, the ICJ will put the burden of proof on the party that raises the contention local remedies have not been exhausted; here, that would be Pakistan.

In its oral submissions, India has contended that there exists no "effective" remedy available to Jadhav that is yet to be exhausted.<sup>73</sup> Relying on information available in the public domain, India argues that Jadhav's appeal would be heard by a military tribunal presided over by a two-star general, whereas his death sentence stood confirmed already by the Chief of Pakistan's army staff, a four-star general.<sup>74</sup> India asserts the mechanism of appeal available to Jadhav is ineffective since there is no realistic possibility of his conviction being overturned in appellate proceedings.<sup>75</sup> India relied on public reports in the media to contend that Jadhav would not even have access to legal representation of his own choice.<sup>76</sup> India further argued the availability of clemency as a right to Jadhav, would also be equally ineffective as a remedial measure.<sup>77</sup> These arguments considered cumulatively convey India's opinion that all available and effective local remedies have been exhausted and no limitation remains as to the admissibility of its claims.

The rule requiring exhaustion of local remedies does have exceptions that are found in Article 15 of the ILC's Draft Articles on

---

72. *Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.)*, Judgment, 1989 I.C.J. 15, ¶ 62 (July 20).

73. Oral Submissions-India, *supra* note 2, ¶¶ 27, 93.

74. *Id.* ¶ 93.

75. *Id.*

76. India contended that according to reports in the Pakistani media, the "Lahore High Court Bar Association had threatened to cancel the membership of any lawyer pursuing Jadhav's appeal against his conviction." *See* Oral Submissions-India, *supra* note 2, ¶ 93.

77. *Id.* ¶ 28.

## 52 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48]

Diplomatic Protection.<sup>78</sup> One of the exceptions is when there are no “reasonably available local remedies to provide effective redress or the local remedies provide no reasonable possibility of such redress.”<sup>79</sup> In its commentary to Article 15, the ILC explains that the efficacy of local remedies is a question that “must be determined in the context of the local law and the prevailing circumstances” in that country.<sup>80</sup> Therefore, whether the appellate mechanism in Pakistan’s military court would, in fact, be an *effective* remedy that must be exhausted, would be a question India (and Pakistan) would have to answer by referencing the domestic law and the current circumstances in Pakistan.

However, the issue of exhausting clemency proceedings is clearer. In its commentary to Article 14 of the Draft Articles on Diplomatic Protection, the ILC explains the injured alien is not required to exhaust remedies that involve approaching the executive for relief in the exercise of its discretionary powers.<sup>81</sup> Thus, local remedies do not include remedies of “grace”<sup>82</sup> or those whose “purpose is to obtain a favour and not to vindicate a right.”<sup>83</sup> The ILC puts requests for clemency in this category of remedies that need not be exhausted before bringing an international claim.

---

78. Draft Articles on Diplomatic Prot. with Comm’n, Int’l Law Comm’n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, art. 15 (2006) [hereinafter ILC Draft Articles].

79. *Id.*

80. *Id.* art. 15(a).

81. For a definition of “local remedies,” see *id.* art 14., cmt. 5.

82. The ILC’s Commentary to Article 14 of the Draft Articles on Diplomatic Protection cites the *Finnish Shipowners Arbitration* for this proposition. See Claim of Finnish Shipowners (Fin. v. Gr. Brit.), 3 R.I.A.A. 1479, 1492 (Perm. Ct. Arb. 1934).

83. The ILC’s Commentary to Article 14 of the Draft Articles on Diplomatic Protection cites De Becker to support this proposition. De Becker v. Belg., App. No. 214/56, 1962 Y.B. Eur. Conv. H.R. 214, 238 (Eur. Ct. H.R.).

#### IV. VIOLATIONS OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

##### *A. Denial of Consular Access*

In its oral submissions, India has primarily argued a violation of Article 36 of the VCCR.<sup>84</sup> Article 36 deals with communication with the nationals of the sending State, in the receiving State.<sup>85</sup> Article 36(1)(a) contains the general rule that consular officers shall be free to communicate with and have access to nationals of the sending State.<sup>86</sup> Correspondingly, nationals of the sending State have the same freedom of communication with respect to the sending State's consular staff.<sup>87</sup> Article 36(1)(b) ratifies a detainee's right to communicate with his consular post in the event of arrest or detention by the authorities in the receiving State.<sup>88</sup> In such a situation, if the national requests, the receiving State's authorities shall, without delay, inform the consular post of the sending State of the person's arrest or detention.<sup>89</sup> The receiving State's authorities are also obliged to expeditiously inform the person of his rights under this provision.<sup>90</sup> Likewise, Article 36(1)(c) ratifies the rights of the consular staff in relation to a national who is detained or arrested.<sup>91</sup> These rights include the right to visit, converse, correspond as well as arrange for legal representation for such national.<sup>92</sup> Article 36(2) provides that the rights mentioned in Article 36(1)(c) must be exercised in conformity with the laws and regulations of the receiving State, subject to the caveat that such laws must necessarily enable full effect to be given to the rights under Article 36.<sup>93</sup>

Article 36 of the VCCR was interpreted by the ICJ in *LaGrand*, where the Court held this provision establishes an "interrelated regime

---

84. Oral Submissions-India, *supra* note 2, at ¶¶ 1, 5, 15.

85. Vienna Convention on Consular Relations art. 36, Mar. 19, 1967, 596 U.N.T.S. 261 [hereinafter VCCR].

86. *Id.* art. 36(1)(a).

87. *Id.*

88. *Id.* art. 36(1)(b).

89. *See id.*

90. *Id.*

91. *Id.* art. 36(1)(c).

92. *Id.*

93. *Id.* art. 36(2).

## 54 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48]

designed to facilitate the implementation of the system of consular protection.”<sup>94</sup> The Court also noted that Article 36 created legally enforceable rights for the sending State as well as its nationals.<sup>95</sup> In fact, in both *LaGrand*<sup>96</sup> and *Avena*,<sup>97</sup> the United States failed to inform detained foreign nationals of their rights under Article 36(1)(b) and denied them the opportunity of having their consular posts notified. The Court held in both cases, the United States’ actions, in effect, also violated obligations, under Article 36(1)(a) and (c), that it owed to the sending State (that is Germany and Mexico, respectively).<sup>98</sup> In both cases, the Court found that given the interrelated regime of Article 36, once the receiving State failed to inform the detainee of his right to notify his consular post “without delay,” this would, in most cases, amount to a violation of the sending State’s right to have access to the individual, communicate with him, and arrange for his legal representation.<sup>99</sup>

The facts in *Jadhav* stand on a slightly different footing. In *LaGrand* and *Avena*, the individuals concerned were not informed of their rights in time, and as a result, the national States were not aware of the individuals’ arrests. However, because *Jadhav* continues to be held *incommunicado*, there is no way to ascertain whether he was informed of his rights under Article 36(1)(b) “without delay,”<sup>100</sup> if *Jadhav* requested to have his consular post notified of his arrest, or if he attempted to address any communication to his consular post.<sup>101</sup> If *Jadhav* did request to notify his consular post, Pakistan was obligated

---

94. *LaGrand*-Judgment, *supra* note 8, ¶ 74.

95. *See id.* ¶ 77.

96. *Id.* ¶ 73.

97. *Avena*-Judgment, *supra* note 63, ¶¶ 102–03.

98. *Id.*; *LaGrand*-Judgment, *supra* note 8, ¶ 73.

99. In *Avena*, the Court noted one of the Mexican nationals declined to have his consular post notified even after being informed of his rights under Article 36(1)(b) of the VCCR. In that person’s case, the Court noted that there would be no violation of either Article 36 (1)(a) or Article 36 (1)(c). *See Avena*-Judgment, *supra* note 67, ¶ 101.

100. Oral Submissions-Pakistan, *supra* note 3, ¶ 3.

101. *Id.* Pakistan in its oral submissions did not deny that *Jadhav* was being kept *incommunicado*. *Id.* In most situations it would be unlikely for an individual who has been told of his rights to have his consular post informed to decline exercising those rights. However, see footnote 91 for the exception discussed in *Avena*.

## 2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 55

to inform the Indian consular post “without delay” of his arrest. Jadhav was allegedly arrested on March 3, 2016, and India claims to have received information about the arrest on March 25, 2016.<sup>102</sup> If both dates are correct, twenty-two days passed from the time Jadhav was arrested to when India received information about the arrest.

Naturally, the actual meaning of the term “without delay” must be scrutinized. The Court confronted the interpretation of the term “without delay” in *Avena*. Considering the framework of the VCCR’s terms, and the VCCR’s object and purpose, the Court rejected Mexico’s submission that the term “without delay” was to be understood as “immediately upon arrest and before interrogation.”<sup>103</sup> The Court held that the term “without delay” did not necessarily mean that upon arrest an individual must be immediately informed of his rights under Article 36(1)(b).<sup>104</sup> However, the Court noted that the term implied a duty upon the authorities of the receiving State to inform the arrested individual of his rights under the VCCR, as soon as it was realized or there were grounds to believe that the individual was a foreign national.<sup>105</sup>

Here, it appears Pakistan knew of Jadhav’s status as a foreign national at the time of his arrest.<sup>106</sup> Relying on *Avena*, India could argue the twenty-two-day delay violated Pakistan’s obligation under Article 36(1)(b) of the VCCR. However, there is some indication in the *travaux préparatoires* of the VCCR that member States shared the opinion that some delay in informing the consular post was permissible, in instances where there are national security concerns.<sup>107</sup> In fact, this seems to be one of the reasons for not adopting the English proposal of a forty-eight-hour time limit to inform the consular post of an arrest.<sup>108</sup> Considering Pakistan consistently maintains the security risks associated with Jadhav’s case,<sup>109</sup> it may be possible for Pakistan to

102. Oral Submissions-India, *supra* note 2, ¶ 68.

103. *Avena*-Judgment, *supra* note 67, ¶ 85.

104. *Id.* ¶ 87.

105. *Id.* ¶ 88.

106. See Oral Submissions-Pakistan, *supra* note 3, ¶¶ 8–9.

107. See U.N. Conference on Consular Relations, *Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees* 338, U.N. Doc. A/CONF.25/6 (Vol. I) (Mar. 15, 1963) [hereinafter VCCR-Travaux].

108. *Id.*

109. See Oral Submissions-Pakistan, *supra* note 3, 18–20.

contend the delay of about twenty-two days was justified under the VCCR.

With respect to Article 36(1)(a) and (c) the violations seem more evident. Pakistan has denied the Indian consular post communication and the right to arrange for Jadhav's legal representation.<sup>110</sup> In fact, India claims that Jadhav continues to be held *incommunicado*.<sup>111</sup> Interestingly, Pakistan does not refute India's contention on facts—it does not claim to have informed Jadhav of his rights under the VCCR or to have provided the Indian consular staff access to Jadhav. Pakistan's position is that the issue of consular access to Jadhav remains under evaluation.<sup>112</sup> While Pakistan vehemently denies India's allegation that Jadhav's consular access is *conditioned* upon India's assistance in the investigation against him,<sup>113</sup> Pakistan has significantly emphasized India's non-cooperation in the investigation in its oral arguments.<sup>114</sup> Pakistan's argument then, begs the question of whether under the VCCR, consular access can be denied if the State of the foreign national refuses to cooperate in the receiving State's investigation against him.

The text of Article 36 (or indeed any other Article of the VCCR) does not seem to indicate the existence of any such exception. Turning to the *travaux* in the hopes of finding a basis for such an exception proves to be problematic. From the moment of its conception, Article 36 was one of the most controversial provisions, with States taking diametrically opposite views on its scope and content.<sup>115</sup> In fact, the Soviet representative suggested that the unlikelihood of finding a satisfactory middle ground for the content of Article 36 warranted dropping such a provision altogether.<sup>116</sup> However, the Indian delegate insisted that a Convention on consular relations could not be concluded

---

110. Oral Submissions-India, *supra* note 2, ¶ 81.

111. *Id.* ¶ 91.

112. Oral Submissions-Pakistan, *supra* note 3, 23.

113. *Id.* at 14.

114. *Id.*

115. See generally VCCR-Travaux, *supra* note 107. (Consideration of the draft articles on consular relations adopted by the International Law Commission at its Thirteenth Session, A/CONF.25/6, Article 36).

116. *Id.* at 81.

2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 57

without the inclusion of a provision as important as one governing the issue of consular access.<sup>117</sup>

After lengthy debate, the Conference eventually accepted the text of Article 36. While States did adopt divergent views on the text of Article 36, there was an overwhelming consensus about the importance of consular access for nationals of the sending State detained or imprisoned in the receiving State, during the drafting of the VCCR.<sup>118</sup> There is no evidence or indication that States believed that consular access could be restricted if the sending State did not cooperate in investigations with the receiving State.<sup>119</sup> In fact, there is evidence to the contrary. In an earlier draft, Article 36 (1)(a) provided that consular officials would, “in appropriate cases,” have access to their nationals.<sup>120</sup> However, States decided to drop this term in the final draft in order to reaffirm the importance of unrestricted two-way communication between the consular staff of the sending State and its nationals.<sup>121</sup> Therefore, it is highly likely that Pakistan’s denial of consular access—whether or not contingent on India’s assistance in the investigation—is a violation of Article 36 of the VCCR.

In its oral submissions, Pakistan raised two defenses to its denial of consular access. First, Article 36 of the VCCR was not intended to apply to persons conducting espionage activities.<sup>122</sup> Second, in accordance with Article 55 of the VCCR, consular access need not be

---

117. *Id.*

118. *See VCCR-Travaux, supra* note 107, at 37–40. While Article 36 was heavily debated at the Conference, the debate was largely focused on the modalities and feasibility of compliance with the provisions of that Article. In fact, many States were of the view that while the rights under Article 36 were indisputably necessary, it would create practical problems in many countries that had a large population of foreign nationals or where distances were great or in federal States.

119. *See VCCR-Travaux, supra* note 107, at 338. Even in cases of arrests made on security reasons, the debate was focused on the time-period within which consular access must be granted, and there seems to be no situation where States envisaged that consular access could be absolutely restricted.

120. U.N. Conference on Consular Relations, *Summary Records of Plenary Meetings and of Meetings of the First and Second Committees* 24, U.N. Doc. A/CONF.25/16/Add.1 (Vol. II) (Apr. 1963).

121. VCCR-Travaux, *supra* note 107, at 333.

122. *See Oral Submissions-Pakistan, supra* note 3, at 20.

58 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48

provided in such cases.<sup>123</sup> The following sections will examine whether these defenses would be tenable before the Court.

*B. Applicability of Article 36 to Persons Suspected of Conducting Espionage or Terrorism*

Pakistan argues that the VCCR was adopted to develop friendly relations between States and, therefore, protection to a person (such as Jadhav) who has allegedly committed acts of espionage and terrorism cannot be the intention of the Convention.<sup>124</sup> However, this argument is misplaced considering the drafting history and the subsequent practice of States in relation to consular access. Further, the text of Article 36 does not indicate any exception on the grounds of national security (espionage or terrorism). In fact, the protection under this Article extends to a national detained *in any other manner*.<sup>125</sup>

A plain reading of Article 36 of the VCCR in conjunction with Article 31 of the VCLT, indicates that the protections include security and preventive measures or even *incommunicado* detention on the grounds of threat to national security.<sup>126</sup> Additionally, this interpretation of Article 36 is supported by the VCCR's drafting history. The VCCR was adopted in 1963, during the Cold War era, at a time when alleged State-directed espionage was commonplace.<sup>127</sup> Despite this Cold War climate, no State called for the restriction of consular access to individuals detained on the grounds of national security while drafting Article 36. Moreover, no State subsequently submitted any reservation or any interpretative declaration to this Article at the time of signing the Convention, which would indicate the belief that Article 36 protections should be proscribed in cases of persons accused of conducting espionage or terrorism.<sup>128</sup> Additionally,

---

123. *Id.* at 20–21.

124. *See id.*

125. VCCR, *supra* note 85, art. 36(1)(b).

126. Mark Warren, *Rendered Meaningless? Security Detentions and the Erosion of Consular Access Rights*, 38 S. ILL. U. L.J. 31 (2014).

127. LUKE T. LEE & JOHN QUIGLEY, *CONSULAR LAW AND PRACTICE* 49 (3d ed., 2008); John Quigley, *Vienna Convention on Consular Relations: In Retrospect and Into the Future*, 38 S. ILL. U. L.J. 2 (2014).

128. *See* Vienna Convention on Consular Relations, Declarations & Reservations, (Apr. 24, 1963),



## 2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 59

during the drafting stage, States also raised concerns over the undue delay in granting consular access in cases of *incommunicado* detentions,<sup>129</sup> clearly intending Article 36 to have a wide scope guaranteeing this right to all detainees.

In addition to the *travaux préparatoires*, it was common State practice to grant consular access to persons suspected (or convicted) of espionage, both before and after the VCCR's adoption.<sup>130</sup> For example, in 1956, prior to the adoption of the VCCR, Egypt allowed Britain consular access to Mr. James Swinburn and three other British nationals who were accused of espionage.<sup>131</sup> Similarly, in 2009, Iran detained three American citizens, Fattal, Shourd, and Bauer on charges of espionage and illegal entry into Iran.<sup>132</sup> Despite these charges, they were granted consular access.<sup>133</sup> Conversely, in 2011, Eritrea denied consular access to four British nationals accused of terrorism, sabotage, and espionage.<sup>134</sup> This denial of consular access was met with severe opposition from the United Kingdom.<sup>135</sup> Ultimately, the United Kingdom relied on Article 36 of the VCCR and managed to secure the release of the detainees through diplomatic intervention.<sup>136</sup> Additionally, the Working Group on Arbitrary Detention, a body established by the Commission of Human Rights to investigate

---

<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20III/III-6.en.pdf>.

129. See *Summary Records of the 534th Meeting*, [1960] 1 Y.B. Int'l L. Comm'n 42, 46, U.N. Doc. A/CN.4/SER.A/1960.

130. BISWANATH SEN, *A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE* 323 (1965).

131. *Id.*

132. Cindy Buys, *Reflections on the 50th Anniversary of the Vienna Convention on Consular Relations*, 38 S. ILL. U. L.J. 57, 63 (2014).

133. *Amnesty International Again Demands that Iran Release Americans Jailed for Two Years Case of Two American Hikers Due to be Heard Again on Sunday*, AMNESTY INT'L (July 29, 2011), <https://www.amnestyusa.org/press-releases/amnesty-international-again-demands-that-iran-release-americans-jailed-for-two-years-case-of-two-american-hikers-due-to-be-heard-again-on-sunday/>.

134. Warren, *supra* note 126, at 31; For background on the issue see, Aaron Masho, *Eritrea Accuses Britons of Espionage, Terrorism*, THOMSON REUTERS (June 9, 2011), <http://www.reuters.com/article/uk-eritrea-britain-detention-idUSLNE75803L20110609>.

135. *Id.*

136. *Id.*; see also Warren, *supra* note 126, at 31.

arbitrary detentions, found Venezuela to be in violation of its obligation under the VCCR when it denied consular access to Colombian nationals detained on charges of espionage.<sup>137</sup>

It is instructive to consider the ICJ's ruling in the *Tehran Hostages Case* on this count.<sup>138</sup> In that case, the Court examined Iran's violations of the VCCR in failing to attempt to prevent militants from detaining American officials in Tehran's United States embassy and consulates in Tabriz and Shiraz.<sup>139</sup> Although Iran did not appear before the Court, it sent a letter to the Court, alleging that the United States had been conducting espionage activities and illegally interfering in Iran's internal affairs.<sup>140</sup> Further, Ayatollah Khomeini, Iran's religious leader, passed a decree releasing only detainees not accused of spying, while the others who Iran suspected of espionage did not "enjoy international diplomatic respect."<sup>141</sup> While the Court did not expressly address the issue of consular rights granted to persons detained on charges of espionage, it held Iran violated Article 36 of the VCCR.<sup>142</sup> The Court also noted that even if the United States committed the alleged criminal activities of espionage, Iran had to take action within the ambit of the rights provided under the VCCR.<sup>143</sup> Thus, it appears that the ICJ regarded Article 36 as a right granted to all detainees, including those charged with espionage and other similar crimes.

Additionally, the practice of States has been in favor of providing consular access to detainees accused of terrorism. For example, when the United States restricted consular access to terrorist suspects detained in Guantanamo Bay after the September 11th attack, many States including Egypt, Saudi Arabia, and Yemen, protested and considered the restriction to be a violation of Article 36 of the VCCR.<sup>144</sup> Similarly, Pakistan sought consular access for Pakistani students who

---

137. Mr. Santiago Giraldo Florez v. Venez., Working Group on Arbitrary Detention, Opinion No. 31/2010, U.N. Doc. A/HRC/WGAD/2010/31 (2010), <http://hrlibrary.umn.edu/wgad/31-2010.html>.

138. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3 (May 24) [hereinafter *Tehran Hostages*].

139. *See generally id.*

140. *Id.* ¶¶ 82–83.

141. *Id.* ¶ 73.

142. *Id.* ¶ 67.

143. *Id.* ¶ 83.

144. Warren, *supra* note 126, at 31.

2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 61

had been detained in the United Kingdom on charges of terrorism in 2009.<sup>145</sup> In light of the preceding information, any support for Pakistan's argument of carving out an inherent exception in Article 36 for denying consular access to Mr. Jadhav is tenuous at best.

*C. The Relationship Between Article 36 and Article 55 of the VCCR*

In support of its interpretation of Article 36, Pakistan argues Article 55 of the VCCR excludes the application of the VCCR to acts of espionage.<sup>146</sup> This argument also lacks merit. Article 55(1) of the VCCR imposes an obligation on the persons enjoying immunities and privileges under the VCCR to respect the laws of the receiving State by not interfering within the internal affairs of that State.<sup>147</sup> Relying on Article 55, Pakistan contends that because espionage amounts to an interference in a State's internal affairs, there is no basis for providing consular access to an individual accused of espionage.<sup>148</sup> This argument is flawed on two counts.

First, Article 55 prohibits persons enjoying immunities from interfering in the internal affairs of the State. The prohibition is phrased as a duty to "respect the laws and regulations of the receiving State" owed by those "persons enjoying such privileges and immunities," and is thus only applicable to the consular staff.<sup>149</sup> Article 55 is silent on detained individuals. Thus, Article 55 states that the only situation in which Pakistan could perhaps have claimed a violation of Article 55 was if a member of the Indian consulate in Pakistan committed acts of espionage, which is clearly not the circumstance in *Jadhav*.<sup>150</sup> Second, Article 55 does not prevent consulate members from protecting the interests of their nationals in the receiving State.<sup>151</sup> Protection of human

---

145. Tim Shipman, *Pakistan Condemns Home Office Over Student Terror Arrests*, MAIL ONLINE (Apr. 16, 2009), <http://www.dailymail.co.uk/news/article-1170661/Pakistan-condemns-Home-Office-student-terror-arrests.html>.

146. Oral Submissions-Pakistan, *supra* note 3, at 20.

147. VCCR, *supra* note 85, art. 55(1).

148. *Id.* at 21.

149. *International Law Commission, Draft Articles on Consular Relations With Commentaries*, [1961] 2 Y.B. Int'l Comm'n, 123 [hereinafter *Commentary-Consular Relations*].

150. Such an event was discussed in *Tehran Hostages*, *supra* note 138, ¶ 84.

151. *Commentary-Consular Relations*, *supra* note 149, at 124.

## 62 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48

rights is an international concern that does not lie exclusively within the scope of a State's internal affairs.<sup>152</sup> Accordingly, when a State exercises its right to seek consular access to its national or exercise diplomatic protection on his behalf, the action does not constitute an interference in the receiving State's internal affairs.<sup>153</sup>

In *Regina v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Ferhut Butt*, the family member of a British national detained in Yemen for terrorism allegations requested intervention by the English Court of Appeal.<sup>154</sup> Specifically, the family member wanted the English Court of Appeal to interfere with an adjudication in a Yemen court.<sup>155</sup> The Court found that because the local remedies were not exhausted, direct intervention in the judicial process of another State would amount to a violation of Article 55 of the VCCR.<sup>156</sup> In contrast, extending consular protection to the British national detained on charges of terrorism was found to be well within the rights of the United Kingdom and did not constitute an intervention in the other State's internal affairs.<sup>157</sup> It follows that even if Pakistan can establish that Jadhav did commit acts of espionage, India would still be within its rights to request consular access under the VCCR.

#### D. Article 36 of the VCCR: A Fundamental Human Right?

An issue that arises in context of Article 36 of the VCCR is whether apart from creating a legal right flowing from the treaty, it also enshrines a fundamental human right in the context of arrested individuals, a contention that was raised by Germany in *LaGrand*.<sup>158</sup> The *LaGrand* Court found that it was unnecessary to decide whether

---

152. See SIR IVOR ROBERTS, *SATOW'S DIPLOMATIC PRACTICE* 358 (6th ed., 2009).

153. Annemarieke Künzli, *Exercising Diplomatic Protection: The Fine Line Between Litigation, Demarches and Consular Assistance*, 66 *ZAÖRV* 333 (2006).

154. *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Ferhut Butt*, Court of Appeal 9 July 1999, 116 *I.L.R.* 607–22, as cited in EILEEN DENZA, *DIPLOMATIC LAW: COMMENTARY TO THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* 380 (4th ed., 2016).

155. DENZA, *supra* note 154, at 380.

156. *Id.*

157. *Id.*

158. *LaGrand*-Judgment, *supra* note 8, ¶ 78.

2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 63

Article 36 had assumed the character of a human right, given that it had already concluded that the United States violated its obligations under that Article.<sup>159</sup> However, the Inter-American Court of Human Rights (IACtHR), in a 1999 advisory opinion, noted the right of consular notification was part of the due process guarantees enshrined in the ICCPR.<sup>160</sup> The IACtHR also held that the lack of consular notice and access, in cases of capital punishment, also violate the individual's right to life.<sup>161</sup> Whether Article 36 of the VCCR is interpreted as a fundamental human right or merely an individual right under the Convention will likely not affect the decision of the ICJ on the merits. However, the IACtHR's advisory opinion underscores the importance of consular access and the rights enshrined under Article 36, for both the national as well as the sending State.

#### V. 2008 BILATERAL AGREEMENT ON CONSULAR ACCESS

In oral submissions, Pakistan heavily relied on a 2008 agreement between the two States, governing consular access.<sup>162</sup> The short, seven-paragraph bilateral agreement establishes rules governing foreign nationals arrested, detained or imprisoned in the other State and provisions of reciprocal consular facilities.<sup>163</sup> Pakistan emphasizes paragraph six of this agreement, which provides, "In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits."<sup>164</sup> Pakistan contends that since

---

159. *Id.*

160. The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 121–24 (1999) [hereinafter IACHR-Advisory Opinion].

161. *Id.* ¶ 137. During the drafting of Article 36, States also took the view that the greater the punishment involved, the higher the necessity would be for adherence to norms of consular access, given the degree of infringement of personal freedoms of the foreign national. For an example of the statement of the USSR representative, see VCCR-Travaux, *supra* note 107, at 37.

162. Oral Submissions-Pakistan, *supra* note 3, at 21.

163. The text of the entire treaty can be found in Annex 10 to India's application instituting proceedings before the ICJ. *See* Jadhav Case (India v. Pak.), Application, Annex 10, (May 8, 2017), <http://www.icj-cij.org/files/case-related/168/19422.pdf> [hereinafter Application-India].

164. *Id.*

Jadhav is facing espionage and terrorism charges,<sup>165</sup> the interpretation of the security exception in this Agreement as allowing a denial of consular access is justified. In the alternative, Pakistan submits that the claim is being evaluated on merits in accordance with the agreement.<sup>166</sup> India raised two grounds for disputing the applicability of this Agreement, in its oral submissions. First, the Agreement was not registered with the United Nations in accordance with Article 102 of the U.N. Charter, and hence cannot be relied upon before the ICJ.<sup>167</sup> Second, pursuant to Article 73 of the VCCR, bilateral agreements between the parties cannot restrict the rights provided for in the VCCR.<sup>168</sup> Both contentions merit detailed scrutiny.

#### A. Registration of the Agreement

Article 102 of the U.N. Charter requires that every treaty shall be registered with U.N. Secretariat, and no party shall be able to invoke any unregistered treaty before any organ of the United Nations.<sup>169</sup> Since the ICJ is the principal judicial organ of the United Nations,<sup>170</sup> it follows no party to a case before the Court can rely on a treaty that is not registered with the United Nations. However, Article 102 of the U.N. Charter appears to have been diluted by the organs of the United Nations, in post-Charter practice. For example, the ICJ has recognized that an agreement that is not registered or registered late is nonetheless valid and binding.<sup>171</sup> In another decision, the Court accepted jurisdiction based on a special agreement between the parties that had not been registered.<sup>172</sup> In fact, a commentator concluded, based on survey on the practice of the U.N. Security Council and ICJ, both organs

---

165. Oral Submissions-Pakistan, *supra* note 3, at 21–23.

166. *Id.* at 14, 22.

167. Oral Submissions-India, *supra* note 2, ¶¶ 16, 66.

168. *Id.* ¶ 66.

169. U.N. Charter art. 102.

170. *Id.* art. 92.

171. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 1994 I.C.J. 112, ¶ 29 (July 1).

172. Corfu Channel (U.K. v. Alb.), Preliminary Objection, 1948 I.C.J. 15 (Mar. 25). For the decision on merits on the basis of the special agreement concluded between the parties see Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4 (Apr. 9). See also ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE 543 (2014).

2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 65

have shown “little or no inclination to ascertain whether an agreement has been registered with the U.N. Secretariat before permitting it to be invoked in proceedings before them.”<sup>173</sup> Therefore, States have been permitted to rely “on unregistered treaties on a number of occasions.”<sup>174</sup>

Most instructive is that the obligation to register a treaty can be discharged by any party to the agreement *and* registration by one party, relieves all the other parties of this obligation.<sup>175</sup> Moreover, neither Article 102 nor the Registration Regulations adopted by the General Assembly to give effect to Article 102 prescribe a time-period within which registration must be affected. Regarding the absence of any designated period, another commentator inferred that a “failure to register can be cured in the course of proceedings before the ICJ, that is, even after the Court has been seized.”<sup>176</sup> In short, the Court does not strictly apply the registration requirement, as evidenced by its historically relaxed approach to unregistered treaties.<sup>177</sup> Therefore, the fact that the 2008 Agreement was not registered with the U.N. Secretariat will likely not be fatal to Pakistan’s arguments that rely on provisions of the Agreement. In fact, registration is available to Pakistan even now, after the Court has begun adjudicating the dispute.

#### *B. Subsequent Agreements under Article 73 of the VCCR*

One of India’s counterarguments against Pakistan’s contentions contingent on the 2008 agreement is based on Article 73 of the VCCR.<sup>178</sup> Article 73(1) of the VCCR addresses existing agreements between parties on the date of the ratification of the Convention.<sup>179</sup>

---

173. D.N. Hutchinson, *The Significance of the Registration or Non-Registration of an International Agreement in Determining Whether or Not it is a Treaty*, 46(2) CURRENT LEGAL PROBS. 257, 279 (1993).

174. *Id.*

175. See G.A. Res. 97(1), Registration and Publication of Treaties and International Agreements: Regulations to Give Effect to Article 102 of the Charter of the United Nations, Article 1(3), Article 3(1) (Dec. 14, 1946) as modified by G.A. Res. 364 B (IV) (Dec. 1, 1949); G.A. Res. 482 (V) (Dec. 12, 1950) and G.A. Res. 33/141 A (Dec. 18, 1978).

176. KOLB, *supra* note 172, at 543.

177. See JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 84 (1996).

178. Oral Submissions-India, *supra* note 2, ¶ 66.

179. VCCR, *supra* note 85, art. 73(1).

66 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48

This paragraph declares the VCCR's provisions shall not affect agreements that pre-date the VCCR.<sup>180</sup> Article 73(2) provides that the VCCR does not preclude States from entering into agreements "confirming or supplementing or extending or amplifying" the provisions of the Convention.<sup>181</sup> Since the 2008 Agreement was entered into after the VCCR became effective, India contends that an agreement made subsequent to the ratification of the VCCR cannot *restrict* the rights provided in the VCCR.<sup>182</sup>

The drafting history supports India's interpretation and application of Article 73. During the debates on Article 73,<sup>183</sup> the Indian delegation proposed an amendment that following ratification of the VCCR, parties would remain free to enter into particular agreements that granted more rights than those prescribed by the Convention and prevent agreements that restricted or reversed those rights.<sup>184</sup> Limitations on the ability to proscribe rights available under the VCCR, it was suggested, were necessary to ensure that multilateral attempts at codifying international law on consular relations remained effective.<sup>185</sup> The question of the VCCR's efficacy in light of the ability to proscribe rights caused States to agree to the amendment proposed by the Indian delegation. As a result, bilateral agreements made subsequent to the VCCR's ratification can only "confirm, supplement, extend or amplify" the provisions of the Convention and by implication, not restrict the rights available therein.<sup>186</sup> Thus, even if the Court accepts the validity of the 2008 Agreement, Article 73 of the VCCR prevents the Court from interpreting the Agreement in any way that restricts the rights available to India and Jadhav under Article 36.

### *C. Provisions of the 2008 Agreement*

With regard to Jadhav's case, it is illuminating to examine the substantive provisions of the 2008 Agreement. Paragraph 2 of the

---

180. *Id.*

181. *Id.* art 73(2).

182. Oral Submissions-India, *supra* note 2, ¶ 66(d).

183. During the drafting process Article 73 was designated as Article 71.

184. VCCR-Travaux, *supra* note 107, at 233.

185. *Id.* at 233.

186. *Id.* at 240.



2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 67

Agreement requires that “immediate” notification of any arrest or detention be provided to the respective High Commissions of each country.<sup>187</sup> As noted earlier, one of India’s alleged violations is the twenty-two-day delay in notification of Jadhav’s arrest.<sup>188</sup> Similarly, paragraph 4 obligates both governments to provide consular access within three months of arrest.<sup>189</sup> Pakistan, admittedly, a year after Jadhav’s arrest, has yet to provide Jadhav with consular access or allowed the Indian consular post to communicate with him.<sup>190</sup> Given its provisions and Pakistan’s failure to meet the obligation set forth therein, it appears that Pakistan’s actions violate the 2008 Agreement.

However, Pakistan relies heavily on the security exception in paragraph 6. Unfortunately, Paragraph 6 is rather unhelpfully drafted and confuses more than it clarifies. The provision allows for arrests or detentions made on security (or political) grounds, stating that each side *may examine the case on its merits*.<sup>191</sup> What remains unclear is the precise import of the term “examine the case on its merits.” Paragraph 6 does not explicitly state that it would supersede the obligations under paragraph 2 or paragraph 4. One could argue that given its placement in the Agreement (that is after the obligations in paragraph 2 and 4), it would constitute the *lex specialis* in relation to arrests made on security grounds, and to that extent, would override the obligations under the rest of the Agreement. This theory is just that, a theory; and paragraph 6 remains ambiguous, as it does not stipulate any standard of conduct expected from either side or provide guidance as to how each State is supposed to act while examining “the case on merits.”

Considering the ambiguity of paragraph 6, if read expansively, it could mean that for an arrest made on security grounds, either State would be correct in denying consular access on the pretext of examining the case on the merits. There is credibility, however, in the argument that the preamble of the Agreement would not admit of such an

---

187. See Application-India, *supra* note 163.

188. Oral Submissions-India, *supra* note 2, ¶ 6.

189. See paragraph 4 of the 2008 Agreement. Application-India, *supra* note 163, Annex 10.

190. See Oral Submissions-India, *supra* note 2, ¶¶ 5–6. Pakistan does not deny the fact that it has not provided Jadhav consular access. See also Oral Submissions-Pakistan, *supra* note 3, at 14.

191. See paragraph 6 of the 2008 Agreement. Application-India, *supra* note 163, at Annex 10.

68 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48

expansive interpretation to paragraph 6. In fact, the Agreement's preamble memorializes both States' intentions to *further the objective of humane treatment* of nationals of either country who were arrested, detained or imprisoned. Further, should the ICJ reconcile the agreement with Article 73 of the VCCR, it would likely attempt to interpret paragraph 6 of the Agreement in a manner that does not contradict the guarantees of consular access under Article 36.

Thus, the Court, notwithstanding Pakistan's reliance on paragraph 6 of the 2008 Agreement, would likely find that such an excessive and undue delay in providing consular access to Jadhav, would be unlawful under the VCCR and the 2008 Agreement.

#### VI. VIOLATIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Pakistan is accusing Jadhav of espionage, terrorism, and other sabotage activities.<sup>192</sup> Consequently, Jadhav has been charged and tried under Section 3 of the Official Secrets Act, 1923<sup>193</sup> and Section 59 of the Pakistan Army Act, 1952.<sup>194</sup> In response to Jadhav's trial and conviction, India alleges Pakistan violated its obligations under the

---

192. Application-India, *supra* note 163, Annex 2.

193. The Official Secrets Act, No. 19 of 1923 PAK. CODE [hereinafter Official Secrets Act]. Section 3, reads:

"Penalties for spying: (1) If any person for any purpose prejudicial to the safety or interests of the State: (a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or (b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; or (c) obtains, collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or in directly, useful to an enemy; he shall be guilty of an offence under this section . . .").

194. The Pakistan Army Act, No. 39 of 1952, PAK. CODE [hereinafter Pakistan Army Act]. Section 59, reads: "Civil offences: (1) Subject to the provisions of subsection (2), any person subject to this Act who at any place in or beyond Pakistan commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be dealt with under this Act.").

2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 69

ICCPR, which is binding on both States.<sup>195</sup> In this regard, India has made three contentions. First, Jadhav's detention was unlawful as he was kept *incommunicado*.<sup>196</sup> Second, the trial by Pakistan's military court was in violation of Article 14 of the ICCPR, which grants a person the right to a fair trial.<sup>197</sup> Third, Jadhav's right to appeal his sentence and conviction has been violated.<sup>198</sup>

#### A. Legality of Detention

Article 9 of the ICCPR guarantees every individual the right to liberty and security, and that no person shall be deprived of his liberty by arbitrary detention.<sup>199</sup> A legal detention pursuant to Article 9(1) requires the detention comply with the procedure established by law.<sup>200</sup> Article 9(2) provides that the detainee must be informed of the reasons for his arrest and the charges (if any).<sup>201</sup> Article 9(3) safeguards against arbitrary detention by obligating States to bring the detention of the person under judicial supervision.<sup>202</sup> For this, the detainee must "promptly" be brought before a judge.<sup>203</sup> Finally, Article 9(4) provides that any person, even those who have not been detained on criminal charges, can question the legitimacy of his detention before a court.<sup>204</sup>

Article 9(3) of the ICCPR is particularly relevant in Jadhav's case. Specifically, Article 9(3) prevents prolonged or *incommunicado* detentions.<sup>205</sup> If a detainee is kept *incommunicado*, they are isolated

195. Oral Submissions-India, *supra* note 2, ¶¶ 86, 91. *See also* International Covenant on Civil and Political Rights [ICCPR], Dec. 16, 1966, 999 U.N.T.S. 171 (both India and Pakistan are State Parties to the ICCPR).

196. *See* Oral Submissions-India, *supra* note 2.

197. *Id.*

198. Application-India, *supra* note 163, at 24, 26.

199. ICCPR, *supra* note 195, art. 9; *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights art. 5, July 18, 1978, 1144 U.N.T.S. 123.

200. ICCPR, *supra* note 195, art. 9(1).

201. *Id.* art. 9(2).

202. *Id.* art. 9(3).

203. *Id.*

204. *Id.*

205. U.N. Human Rights Comm., General Comment No. 35, U.N. Doc. CCPR/C/GC35, at 11 (Dec. 16, 2014).

## 70 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48]

from the outside world, his family members, consulate, legal counsel, etc., so as to prevent any interference in the investigation.<sup>206</sup> This form of detention can only be permitted for a few days, after which the detainee must be brought before a judicial authority.<sup>207</sup> For example, a detainee's detention was found to be in violation of Article 9 when he was detained for seven days without a warrant or being brought before a judge.<sup>208</sup> Similarly, the Human Rights Committee ("HRC") found a thirty-three-day, warrantless, military detention to be in violation of Article 9(3).<sup>209</sup> In cases involving terrorist suspects, detentions without judicial supervision have been allowed for up to a week only in instances when the detainee was given prompt access to legal counsel.<sup>210</sup> In the oral submissions, India alleged that Jadhav was kept *incommunicado* in military custody, without access to his family members, his home State or any legal counsel.<sup>211</sup> Pakistan has not responded directly to the allegation and maintains that Jadhav was provided with legal assistance at the time of the court proceedings.<sup>212</sup> Still unclear, is whether Jadhav was provided with legal assistance *during* his detention (apart from the court proceedings), and if he was provided access to medical treatment and other care, both of which can only be addressed once the ICJ determines the facts in this case.

Another relevant issue the Court must examine is the duration within which Jadhav's detention was brought under judicial supervision. The statement issued by Pakistan's advisor to the Prime Minister indicates the first time Jadhav was brought before a Magistrate was when Jadhav's confession was recorded on July 22, 2016—eighty-two days after his arrest.<sup>213</sup> This delay is consistent with the provisions

---

206. NIGEL RODLEY & MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 11 (3d ed., 2009).

207. SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* 374 (3d ed., 2013).

208. U.N. Human Rights Comm, *Kurbanov v. Tajikistan*, Communication No. 1096/2002, ¶ 7.2, U.N. Doc. CCPR/C/79/D/1096/2002 (2003).

209. U.N. Human Rights Comm., *Saker v. Algeria*, Communication No. 992/2001, ¶ 9.6, U.N. Doc. CCPR/C/86/D/992/2001 (2006).

210. *Brannigan & McBride v. U.K.*, 258 Eur. Ct. H. R. (ser. A) 29, at 50 (1993).

211. Oral Submissions-India, *supra* note 2, at 11.

212. Application-India, *supra* note 163, at 62.

213. *Id.* Annex 4.

## 2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 71

of Pakistan's domestic law, which does not provide for prompt judicial supervision in case a person is detained under the Pakistan Army Act ("PAA").<sup>214</sup> Jadhav could have been arrested either under the Official Secrets Act ("OSA") or under the PAA.<sup>215</sup> If his arrest was made under the OSA, then under Section 12 of the Act, any member of the armed forces would be entitled to arrest a person who has violated the provisions of the said Act, without a warrant, and after arrest, the person must be brought before a magistrate *or* a police officer.<sup>216</sup> The powers of the police officer before whom such a person is brought is then supplemented by the PAA.<sup>217</sup> The detainee may be transferred by the police officer to military custody pursuant to Section 76 of the PAA.<sup>218</sup> Therefore, if Jadhav was arrested under the OSA, the current facts indicate that he was remanded to military custody without being brought before a Magistrate.

Conversely, if Jadhav has been arrested under the PAA, then as per Section 74, a detainee remains under military custody of the commanding officer only.<sup>219</sup> The PAA makes no provision for judicial supervision of detention.<sup>220</sup> Therefore, it is clear, under either law, there is a high likelihood that Jadhav's detention was not appropriately reviewed by a judicial entity. In light of the requirements of both laws upon which Jadhav's arrest and detention are based, India may claim a violation of Article 9(3) of the ICCPR. India can either argue Jadhav's detention in itself was arbitrary because the judicial supervision of the detention was not prompt or that there was no judicial supervision at all.

---

214. Pakistan Army Act, *supra* note 194, § 74 (Under this Section, the detainee can be detained beyond 48 hours by the commanding officer after an application explaining the reasons for such delay is submitted to the superior officers).

215. *See* Official Secrets Act, *supra* note 193, § 12; *see also* Pakistan Army Act, *supra* note 183, § 74.

216. Official Secrets Act, *supra* note 193, § 12.

217. *See* Pakistan Army Act, *supra* note 194, § 76.

218. *Id.*

219. *Id.* § 74.

220. *See id.*

*B. Right to a Fair Trial*

Article 14(1) of the ICCPR embodies the right to a fair trial by a competent, independent and impartial tribunal established by law.<sup>221</sup> Further, Article 14(3) provides the procedural guarantees that are to be accorded to a person during trial.<sup>222</sup> These guarantees include the right to be tried without undue delay, to engage a counsel of his choosing, to cross-examine witnesses, and freedom from compulsion to confess.<sup>223</sup>

A military court in Pakistan conducted Jadhav's trial.<sup>224</sup> This fact raises the preliminary question as to whether a military court is a "competent tribunal" to try civilians under international human rights law. This issue was considered by the HRC in General Comment No. 32. The HRC noted that while the Covenant did not expressly prohibit civilian trials by military courts or specialized tribunals, there would only be justification to do so in exceptional circumstances.<sup>225</sup> Recently, the HRC expressed its preference for ordinary criminal courts over military courts even when dealing with terrorism cases.<sup>226</sup> Similarly, the IACtHR<sup>227</sup> and the African Commission of Human Rights<sup>228</sup> have

---

221. See ICCPR, *supra* note 194, art. 14(1).

222. *Id.* art. 14(3).

223. *Id.*

224. See Application-India, *supra* note 163, Annex 4.

225. U.N. Human Rights Comm., General Comment No. 32, Aug. 23, 2007, ¶ 22, U.N. Doc. CCPR/C/GC/32 [hereinafter General Comment 32]. The ICJ in the *Ahmadou Sadio Diallo Case* has ascribed great weight to the interpretation adopted by Human Rights Committee, as it is an independent body established to interpret the ICCPR. It has also taken into account the jurisprudence of the Inter-American Court of Human Rights and European Court of Human Rights to interpret ICCPR obligation. See *Ahmadou Sadio Diallo* (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 639, ¶ 65 (Nov. 30).

226. U.N. Human Rights Comm., Concluding Observations, U.N. Doc. CCPR/CO/70/PER (2000) (In the case of Peru, the Human Rights Committee, "welcomes with satisfaction the fact that "faceless" courts have been abolished as the Committee recommended (CCPR/C/79/Add.67); the fact that the offence of terrorism has been transferred from the jurisdiction of the military courts to that of the ordinary criminal courts.").

227. Castillo Petruzzi et al. v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 52, ¶¶ 127–28 (May 30, 1999) [hereinafter Petruzzi].

228. Law Office of Ghazi Suleiman v. Sudan, Communication No. 222/98 and 229/99, Afr. Comm'n H.P.R., ¶ 64 (May 29, 2003),

2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 73

placed an absolute prohibition on military courts dealing with civilian offenses. Moreover, the European Court of Human Rights (“ECHR”) has held that the circumstances surrounding trials of civilians by military courts must be exceptional and in accordance with the fair trial guarantees.<sup>229</sup>

Assuming Pakistan’s military court is competent to try defendants accused of terrorism, our analysis must then turn to whether the military court is an “independent and impartial” tribunal. In consideration of this issue, the Draft Principles governing the Administration of Justice through Military Tribunals is particularly instructive.<sup>230</sup> These principles were formulated by the Special Rapporteur on Protection and Promotion of Human Rights as a part of her work on “independence of judiciary [and] administration of justice” and were subsequently adopted by the Commission on Human Rights.<sup>231</sup> Draft Principle No. 13 addresses the right to an independent and impartial tribunal that requires the judges of the military tribunals to be independent.<sup>232</sup> This right requires judges not be under direct subordination of the military. Additionally, these principles advise that the presence of civilian judges in military tribunals can reinforce the impartiality of such tribunals.<sup>233</sup>

The jurisprudence of both the ECHR and the IACtHR yield a framework to determine the appropriate composition of a military tribunal. For example, in *Findlay v. United Kingdom*,<sup>234</sup> the ECHR scrutinized the British court-martial system. The Court held that the military court was not an independent and impartial tribunal as all

---

[http://www.achpr.org/files/sessions/33rd/comunications/228.99/achpr33\\_228\\_99\\_eng.pdf](http://www.achpr.org/files/sessions/33rd/comunications/228.99/achpr33_228_99_eng.pdf).

229. Emmanuel Decaux (Special Rapporteur), *Civil and Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice, Impunity: Issue of the Administration of Justice through Military Tribunals*, U.N. Econ. & Soc. Council, Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/58 (Jan. 13, 2006) [hereinafter Draft Principles-Military Tribunals]. “Jurisdiction of military courts to try civilians: Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.” *Id.*

230. *Id.*

231. *Id.* ¶¶ 2–3.

232. *Id.* Principle No. 13.

233. *Id.* ¶ 46.

234. *Findlay v. U.K.*, App. No. 22107/93, 24 Eur. H.R. Rep. 221 (1997).

judges reported to the convening officer and were his subordinates.<sup>235</sup> The judgment of the military court, the convening officer, and the judge advocate appointed to advise the convening officer on legal issues, were not sufficient safeguards in guaranteeing independence.<sup>236</sup> Similarly, in *Palamara Iribarne v. Chile*,<sup>237</sup> the IACtHR held that the military tribunals in Chile lacked independence because they were composed of officers who were active military members and, therefore, subordinate to higher-ranking officers in the chain of command.<sup>238</sup> Additionally, their lack of legal education and professional qualifications made them incompetent to form an impartial and independent tribunal.<sup>239</sup>

In Jadhav's case, the composition of the military tribunal is similar to the aforementioned military courts in the United Kingdom and Chile. Section 87 of the Pakistan Army Act of 1952 provides that a Field General Court Martial ("FGCM"), the same form of tribunal that tried Jadhav, be composed of three or more military officers.<sup>240</sup> These military officers comprise the State's executive branch, which falls within the military hierarchy and have no prior judicial experience.<sup>241</sup> Additionally, the power to convene an FGCM lies with the Chief of Army Staff or an officer above the rank of a brigadier.<sup>242</sup> The convening officer, in the present case, is the Chief of Army Staff, who has the power to confirm the finding and sentence of the FGCM<sup>243</sup> as well as dissolve the Court martial at his discretion.<sup>244</sup> Although the members of the Judge Advocate branch can provide legal services and supervise the operation of military courts, they do not have the power to sit on the bench to hear the cases.<sup>245</sup> In light of this, India's argument

---

235. *Id.*

236. *Id.*; see also *Yalgin & Others v. Turk.*, App. No. 31892/96, Eur. Ct. H.R. ¶ 37 (2001), <http://www.hri.ca/fortherecord2001/euro2001/documentation/judgments/applno31892-96.htm>.

237. *Palamara Iribarne v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 135, ¶¶ 124, 139, 269 (2005).

238. *Id.*

239. *Id.*

240. Pakistan Army Act, *supra* note 194, § 87.

241. *Id.* § 2.

242. *Id.* § 84.

243. *Id.* § 123.

244. *Id.* § 89(3).

245. *Id.* § 103.



## 2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 75

that Jadhav was tried before a “*kangaroo*”<sup>246</sup> court seems plausible. If India is correct, the Court may find a violation of Article 14 of the ICCPR on this ground.

The next detail of Jadhav’s trial requiring attention is his right to legal counsel of his own choosing. Article 14(3)(b) and (d) guarantee a person the right to communicate and retain counsel of his choosing. While this right is not absolute and can be restricted where the accused is facing charges of terrorism, it is essential that the accused is provided some legal assistance in order to be able to defend himself efficiently.<sup>247</sup> In the oral submissions, India argued that Jadhav has been kept and is still currently being held *incommunicado*, which raises the issue of whether he was ever provided legal assistance.<sup>248</sup> In response, Pakistan asserts that he was afforded all fair trial guarantees, including a qualified legal officer throughout the proceedings.<sup>249</sup> However, it must be noted that the PAA, under which Jadhav has been tried and convicted, does not provide for the right to legal assistance to the accused.<sup>250</sup> This fact contradicts Section 340 of the Code of Criminal Procedure of 1898, which requires the State to provide and bear the expense of legal assistance for the accused. The determination of whether Jadhav’s right was violated would ultimately depend on facts presented before the ICJ during the merits stage. However, concerns have been consistently raised regarding Pakistan’s denial of legal counsel to defendants tried in a military court.<sup>251</sup> Therefore, it is possible that there is merit in India’s argument.

Finally, India alleged Jadhav’s confessional video was taken in captivity, where he was coerced and forced to testify against his will.<sup>252</sup> Article 14(3)(g) of the ICCPR protects the accused from being compelled to testify or confess against their will.<sup>253</sup> This procedural safeguard was included in Article 14 to ensure that the investigating

---

246. Oral Submissions-Pakistan, *supra* note 3, ¶ 14.

247. General Comment 32, *supra* note 225, ¶ 37.

248. Oral Submissions-India, *supra* note 2, ¶¶ 91, 93.

249. Application-India, *supra* note 163, ¶ 17(d).

250. *Id.* ¶¶ 51–52.

251. Int’l Comm’n of Jurists, *Military Injustice in Pakistan: A Briefing Paper* 8, 21 (June 2016), <https://www.icj.org/wp-content/uploads/2016/06/Pakistan-Military-court-Advocacy-Analysis-brief-2016-ENG.pdf>.

252. Oral Submissions-India, *supra* note 2, ¶ 71.

253. ICCPR, *supra* note 195, art. 14(3)(g).

## 76 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48]

authorities do not put undue physical or mental pressure to obtain a confession of guilt.<sup>254</sup> Additionally, the burden of proof is on the State to prove that the statements have been made voluntarily and of the accused's free will.<sup>255</sup> In Jadhav's case, Pakistan has the burden to prove the confessional video was taken of Jadhav's free will and in the presence of legal assistance. It is quite peculiar that, in Pakistan, at least 135 out of 144 people convicted by military courts have confessed to their involvement in terrorist activities during their trials.<sup>256</sup> Considering the rate of confessions is almost 94%, doubts have been raised as to the voluntariness of these confessions and the treatment of the convicts in military custody.<sup>257</sup> This fact lends support to India's claim that fair trial guarantees of Jadhav as per the ICCPR have been violated.

### C. Right to Appeal

Article 14(5) of the ICCPR states that any person convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal.<sup>258</sup> The right to appeal is available to all those who have been convicted, including persons tried by military courts.<sup>259</sup> In fact, Principle No. 17 of the Draft Principles governing the Administration of Justice through Military Tribunals states that appeals from decisions of military courts must be brought before civil courts.<sup>260</sup> In Jadhav's case, an appeal from the Pakistan's FGCM was later confirmed by the Court of Appeals established under the martial law

---

254. General Comment 32, *supra* note 225, ¶ 41.

255. Human Rights Comm., *Singarasa v. Sri Lanka*, Communication No. 1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001, ¶ 7.4 (2004).

256. Int'l Comm'n of Jurists, *Military Injustice in Pakistan: Questions and Answers*, at 2 (Dec. 2016) <https://www.icj.org/wp-content/uploads/2016/12/Pakistan-military-courts-QA-Advocacy-2016-ENG.pdf>.

257. *Id.*

258. ICCPR, *supra* note 195, at 177.

259. Gabriela Knaul (Special Rapporteur), Human Rights Council, *Independence of Judges and Lawyers*, U.N. Doc. A/68/285, ¶ 82 (Aug. 2013).

260. Draft Principles-Military Tribunals, *supra* note 229, at 21.

## 2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 77

system itself.<sup>261</sup> In fact, no civil court can exercise jurisdiction (appellate or otherwise) over matters falling under the Pakistan Army Act.<sup>262</sup> Thus, the bar on civil courts to exercise appellate jurisdiction itself is in some ways a *prima facie* violation of Jadhav's right to appeal.

The due process of an appeal must be substantially similar to the due process guarantees provided in a trial: an independent and impartial tribunal, adequate facilities for the preparation of the appeal, and the right to represent one's defense through a legal counsel.<sup>263</sup> In oral submissions, India argued the appellate proceedings before a military tribunal are illusory because the officers convening the tribunal are subordinate to the Chief of Army Staff, who has already confirmed Jadhav's death sentence.<sup>264</sup> Under Section 133B of the Pakistan Army Act, 1952, the Court of Appeals shall consist of the Chief of Army Staff or an officer above the rank of a brigadier that has been appointed by him.<sup>265</sup> The implication of this section is that the officers that are part of the Court of Appeals are subject to the military chain of command. It is difficult to imagine a scenario where an officer designated by the Chief of Army Staff would reverse a sentence that has been confirmed by the latter. Similarly, in *Castillo Petruzzi v. Peru*, the IACtHR ruled an appeal before a tribunal that is a component of the military structure violates the independence and impartiality of the tribunal itself.<sup>266</sup>

India also argued that Pakistan has not provided Jadhav or India with copies of the charge sheet, proceedings of the Court of Inquiry, the summary of evidence, or the judgment convicting him.<sup>267</sup> This fact strengthens India's argument that Jadhav has not been given adequate facilities to prepare his defense, one of the due process guarantees under Article 14(3)(b). The HRC has held that the right to appeal can only be exercised effectively if the convicted person has access to a duly reasoned judgment, trial transcripts, and other documents to prepare his

---

261. *Pak Army Chief Analyzing Jadhav's Plea, Decision on Merit*, THE HINDU BUS. LINE (July 16, 2017), <http://www.thehindubusinessline.com/news/pak-army-chief-analysing-jadhavs-plea-decision-on-merit/article9770932.ece>.

262. Pakistan Army Act, *supra* note 194, § 133B.

263. General Comment 32, *supra* note 225, ¶ 91.

264. Application-India, *supra* note 163, at 26–27.

265. Pakistan Army Act, *supra* note 194, § 133B.

266. Petruzzi, *supra* note 227, ¶ 161.

267. Oral Submissions-India, *supra* note 2, ¶ 83.

78 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 48

defense.<sup>268</sup> It follows that if Pakistan has indeed denied access to all these documents, its conduct will violate Jadhav's right to appeal under the ICCPR.

Finally, India has argued that Jadhav will have no legal assistance at the appellate stage, rendering his right to appeal nugatory. India has relied on the news reports of the Lahore High Court Bar Association's threats to cancel the membership of lawyers who represent Jadhav at the appellate stage before the military courts.<sup>269</sup> Under Pakistan's domestic law, it is bound to provide legal assistance at the expense of the State as under Section 340 of the Code of Criminal Procedure, 1898.<sup>270</sup> Therefore, to prove a violation of the right to counsel for the appellate process India must prove that the ICJ requirement of adequate legal representation was not granted to Jadhav even at the appellate stage.

#### VII. THE ISSUE OF REMEDIES

Under general principles of law, every State that commits a wrongful act must make reparations for it.<sup>271</sup> In the *Chorzow Factory Case*, the PCIJ held that restitution or re-establishment of the situation that existed prior to committing the wrongful act is a primary remedy in international law.<sup>272</sup> In its Application and oral submissions, India requested four separate remedial measures: (1) a declaration that the military court's decision violated Article 36 of the VCCR and Article 14 of the ICCPR; (2) an annulment of the military court's decision; (3) a declaration that the military court's decision was illegal; and (4) an order for the release of Jadhav.<sup>273</sup> At a minimum, India requests the Court annul the decision of Pakistan's military court and subsequently order Jadhav's release.<sup>274</sup> In response to this, Pakistan has relied on

---

268. General Comment 32, *supra* note 225, ¶ 49.

269. Application-India, *supra* note 163, at 28–29.

270. PAK. CODE CRIM. PROC. § 340 (Pak.).

271. *Articles on Responsibility of States for Internationally Wrongful Acts*, 2001(1) Y.B. Int'l L. Comm'n art. 34, U.N. Doc. A/56/49/Corr.4 (2001) [hereinafter *State Responsibility Articles*].

272. *Case Concerning the Factory at Chorzow (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No. 13 at 47 (Sept. 13).

273. Application-India, *supra* note 163, at 33.

274. *Id.* at 31.

2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 79

*Breard*, *LaGrand*, and *Avena* to argue that the reliefs sought by India are “manifestly unavailable.”<sup>275</sup> The juxtaposing positions raise questions of the appropriate remedy in cases concerning violations of VCCR and ICCPR, as well as the authority of the Court to grant such remedies.

In *Breard*, *LaGrand*, and *Avena*, the ICJ addressed the remedies that can be granted in response to an Article 36 violation.<sup>276</sup> In *Breard*, Paraguay argued that an Article 36 violation entitled it to a remedy of restitution by absolving Mr. Breard of all criminal liability.<sup>277</sup> Paraguay also requested the United States conduct a whole new proceeding compliant with the VCCR.<sup>278</sup> Because the case was withdrawn before the merits phase, the ICJ was not able to decide on the issue of what remedies were available to Paraguay.<sup>279</sup>

The ICJ, in the 2001 *LaGrand* decision, held an Article 36 violation during the adjudication of a case involving death penalty would require the United States to effectively, “review and reconsider” the convictions taking into account the VCCR violation, using a means of its own choosing.<sup>280</sup> In *Avena*, the ICJ clarified how “review and reconsideration of convictions” function as a remedial measure.<sup>281</sup> The ICJ held that the appropriate remedy required the United States to review the convictions and ascertain whether the conviction was prejudiced by the violation of Article 36.<sup>282</sup> Further, the ICJ denied Mexico’s request to annul the convictions and noted the convictions and sentences were not in violation of international law.<sup>283</sup> However, this was likely due in part because only the detention of the detainees was in violation of Article 36, while the subsequent trial and the convictions were consistent with international law.<sup>284</sup>

---

275. See Oral Submissions-Pakistan, *supra* note 3, at 16.

276. *Breard*, *supra* note 10, ¶¶ 30–37; *LaGrand*-Judgment, *supra* note 8, ¶ 125; *Avena*-Judgment, *supra* note 67, ¶ 121.

277. *Breard*, *supra* note 10, ¶ 5, § 4 1-3.

278. *Id.* ¶ 30.

279. *Id.* ¶ 40.

280. *LaGrand*-Judgment, *supra* note 8, ¶ 125.

281. *Avena*-Judgment, *supra* note 67, ¶ 122.

282. *Id.* ¶ 134.

283. *Id.* ¶ 152.

284. *Id.* ¶ 128–29.

An analysis of the preceding decisions might support Pakistan's contention that the remedial measures sought by India are ones that the ICJ has not granted in its practice. In the event the ICJ finds India's argument meritorious, it appears the only remedial measure available to India is the review and reconsideration of the sentence of Jadhav, provided by means of Pakistan's "own choosing." The review and reconsideration must be judicial, and an executive review by way of a clemency proceeding is not permitted.<sup>285</sup> The ICJ clarified this requirement in *Avena*, holding, a review and reconsideration must analyze the effect the Article 36(1) breach had on the detainee's conviction and sentence.<sup>286</sup> Such a review is possible only through a judicial system.<sup>287</sup>

It is instructive after analysis of Pakistan's argument, to consider the disparity in the facts in Jadhav's case and the facts relevant to the three cases mentioned above. In all three cases, Paraguay, Germany, and Mexico merely alleged a violation of the VCCR and did not dispute the legality of the conviction, sentence or the judicial proceedings.<sup>288</sup> Accordingly, the Court held that a violation of Article 36 did not automatically trigger an annulment of the convictions.<sup>289</sup> Conversely, India alleges not just an Article 36 violation, but argues the circumstances of Jadhav's detention, trial, and adjudication before the military court violate the ICCPR and international law generally.<sup>290</sup> Thus, it is a viable possibility that the ICJ may find that India is entitled to the remedies sought. However, India's success rests on its ability to establish both that the remedial measure sought is appropriate, and that the ICJ possesses the authority to grant such measures.

An appropriate remedy for a violation of a human right is restitution or restoration of those human rights.<sup>291</sup> In the event a trial is found to

---

285. *Id.* ¶ 141.

286. *Id.* ¶ 138.

287. *Id.* ¶ 141.

288. *See* Breard, *supra* note 10; LaGrand-Judgment, *supra* note 8; *Avena*-Judgment, *supra* note 67.

289. *Avena*-Judgment, *supra* note 67, ¶ 129.

290. *Application-India*, *supra* note 163, ¶ 2.

291. G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ 19 (Mar. 21, 2006).

## 2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 81

be unfair and in violation of due process, a retrial following the annulment of the previous adjudication is appropriate.<sup>292</sup> This remedial measure represents a form of legal restitution.<sup>293</sup> In the event a detainee was found to have been arbitrarily or unlawfully detained, the appropriate remedial measure is release to restore the personal liberty of the individual.<sup>294</sup> It follows, that in a situation where the detention is legal and only the subsequent trial is unfair, the remedy is a retrial by annulling the previous judicial act, and not the release of the individual.<sup>295</sup> To secure Jadhav's release, India will not only need to prove that the trial before the military court was in violation of Article 14 of the ICCPR, but it will also need to establish that the detention itself was unlawful and arbitrary (judged by the standards of Article 9, as argued above).

The second hurdle India must overcome in obtaining relief for Jadhav is establishing the ICJ's authority to grant a remedial order that directs a State to act in a particular manner. The issue of the ICJ's authority in this realm has been the subject of debate for years.<sup>296</sup> The Court's Statute does not provide any guidance on its remedial authority or the existence and scope of limits to this authority.<sup>297</sup> This issue is

---

292. See Vladimir Romanov v. Russ., App. No. 41461/02, Eur. Ct. H.R. (July 24, 2008), [http://hudoc.echr.coe.int/eng#{"appno":\["41461/02"\],"itemid":\["001-87836"\]}](http://hudoc.echr.coe.int/eng#{); Salduz v. Turk., App. No. 36391/02, 49 Eur. H. R. Rep. 19 (2008); FOLLESDAL ET AL., CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 157 (2013).

293. State Responsibility Articles, *supra* note 271, at 97 (Legal restitution denotes the alteration or revocation of a legal measure taken in violation of international law, whether a judicial decision or an act of legislation or even a constitutional provision.).

294. Assanidze v. Geor., 2004-II Eur. Ct. H. R. ¶ 203 [hereinafter Assanidze]; Ilaşcu and Others v. Russ. and Mold., App. No 48787/99, 40 Eur. H. R. Rep. 1030 (2005); Human Rights Comm., Sarma v. Sri Lanka, Communication No. 950/2000, U.N. Doc. CCPR/C/78/D/950/2000 ¶ 11 (2003); Loayza Tamayo v. Peru, Merits, Reparation and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 3 (Sept. 17, 1997) [hereinafter Loayza Tamayo].

295. Petruzzi, *supra* note 227, ¶ 221.

296. See FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 563 (Vaughan Lowe et. al. eds., 1996); CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 209 (2007); CHRISTINE GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 64 (1990).

297. Statute of the International Court of Justice art. 36, 33 U.N.T.S. 933 (June 26, 1945).

clear in cases that come before the Court through a special agreement or a *compromis* where the parties may specify remedial measures the Court can grant. However, the same clarity is not available in a case brought before the ICJ under the compulsory clauses of Article 36(1).<sup>298</sup> An analysis of the ICJ's jurisprudence indicates a history of caution in granting mandatory orders.<sup>299</sup> For example, in the *Asylum Case* between Peru and Colombia, the parties requested that the ICJ decide the means of implementation of its judgment. The ICJ denied the request finding that the authority to make such a determination was not within its judicial function.<sup>300</sup>

Subsequently, however, the ICJ has been more assertive in granting mandatory orders for legal restitution. For example, the Court has ordered the return of cultural objects to Cambodia in the *Temple of Preah Vihear Case*,<sup>301</sup> and the cessation of the construction of a wall in the *Legality of Construction of Wall Opinion*.<sup>302</sup> In the context of the Jadhav dispute, the remedial measures granted by the Court in the *Tehran Hostages Case*,<sup>303</sup> the *Arrest Warrant Case*,<sup>304</sup> and the *Jurisdictional Immunities Case*<sup>305</sup> are particularly relevant. In the *Tehran Hostages Case*, the ICJ ordered Iran to release the detainees.<sup>306</sup> Moreover, the ICJ has issued orders for legal restitution in both the *Arrest Warrant Case* and *Jurisdictional Immunities Case*.<sup>307</sup> In the *Arrest Warrant Case*, the ICJ ordered Belgium to cancel the arrest

---

298. GRAY, *supra* note 296, at 64.

299. *Asylum (Colom. v. Peru)*, Judgment, 1950 I.C.J. 266 (Nov. 20).

300. *Id.*

301. *Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.)*, Judgment, 1962 I.C.J. 6 (June 15).

302. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9) (This approach of the ICJ is also in line with the jurisprudence of other international tribunals such as the European Court of Human Rights and the Inter American Court of Human Rights that have adopted a robust view of their remedial jurisdiction and granted mandatory orders.). *See* Loayza Tamayo, *supra* note 294; Assanidze, *supra* note 294.

303. *Tehran Hostages*, *supra* note 138.

304. *Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. of Congo v. Belg.)*, Judgment, 2002 I.C.J. 3 (Feb. 14) [hereinafter *Arrest Warrant*].

305. *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. 99 (Feb. 3) [hereinafter *Jurisdictional Immunities*].

306. *Tehran Hostages*, *supra* note 138.

307. *Arrest Warrant*, *supra* note 304.



## 2017] MAPPING THE JADHAV DISPUTE AT THE WORLD COURT 83

warrant as it was in violation of the immunities of the Foreign Minister of Congo.<sup>308</sup> Similarly, in the *Jurisdictional Immunities Case*, Italy was ordered to annul its domestic judicial decisions that infringed the sovereign immunities of Germany.<sup>309</sup>

However, the ICJ's willingness to assume jurisdiction and grant mandatory orders in the recent past does not indicate the Court will abandon its previous approach of allowing States to choose the means of implementation of its judgment.<sup>310</sup> The commitment to its original restraint is evidenced by the ICJ's willingness to allow parties to implement its mandatory orders by "means of [the State's] own choosing."<sup>311</sup> This approach is indicative of the interests the ICJ must balance. Specifically, the ICJ must protect its authority to grant appropriate and effective remedies for violations of international law, while at the same time, respecting the State's sovereignty in exercising discretion to determine the manner in which to follow the Court's orders.

Should Pakistan object to a remedial annulment of the conviction or an order to release Jadhav, the foundation of this objection will likely be rooted in the assertion that such an order represents an interference by the ICJ in Pakistan's domestic judicial system. The ICJ addressed this argument in *Breard* and *LaGrand*. The ICJ found that violations of the VCCR, which require an analysis of the domestic proceedings, are not proper because the ICJ is not a court of appeal, but rather a court that assesses a State's conduct *vis-a-vis* the rules of international law.<sup>312</sup> Accordingly, the ICJ's powers are limited, and it cannot perform other functions of an appellate court such as review evidence submitted at the trial or hear arguments of the accused. However, Pakistan's argument does not prevent the ICJ from issuing an order in the event the ICJ finds it possesses authority to grant India the relief sought.

---

308. *Id.*

309. *Jurisdictional Immunities*, *supra* note 305.

310. *See, e.g.*, *LaGrand-Judgment*, *supra* note 8; *Avena-Judgment*, *supra* note 67; *Jurisdictional Immunities*, *supra* note 305; *Arrest Warrant*, *supra* note 304.

311. *See, e.g.*, *LaGrand-Judgment*, *supra* note 8; *Avena-Judgment*, *supra* note 67; *Jurisdictional Immunities*, *supra* note 305; *Arrest Warrant*, *supra* note 304.

312. *LaGrand-Judgment*, *supra* note 8, ¶ 52; *Breard*, *supra* note 10, ¶ 38.

## CONCLUSION

This Article attempts an exhaustive analysis of all possible questions that the Jadhav dispute raises; however, how many of these issues the ICJ touches upon in its final decision remains to be seen. Traditionally, the ICJ's approach has been narrow and restricted to an analysis of only the issues that are absolutely necessary for arriving at its decision. As the principal judicial organ of the United Nations, the ICJ understands that its holdings can have a significant effect on the evolution of international law and more often than not, adopts a rather circumspect approach to deciding a dispute. It also remains to be seen, whether, as a matter of legal strategy, either party raises new arguments or concomitantly, drops some of the contentions raised at the provisional measures hearing. In fact, Pakistan has indicated that it will change its legal team for the merits phase of the dispute.<sup>313</sup> Whether, and to what extent, such change will result in a shift legal strategy or in the kind of arguments it raises at the merits phase, will likely prove to be interesting. The shift in legal strategy appears necessary due to the possibility that many of Pakistan's submissions on the merits lack significant legal backing and are not likely to find favor with the Court. However, based on both parties' oral submissions and the inferences that can be made from them, India has a strong case on the merits. Irrespective of which way the Court ultimately decides, Jadhav's case raises a plethora of interesting international law issues, all of which are likely to pique the interest of international law enthusiasts.

---

313. See Dev Goswami, *After ICJ ruling in India's favour, Pakistan to change legal team in Kulbhushan Jadhav case*, INDIA TODAY (May 19, 2017), <http://indiatoday.intoday.in/story/pakistan-to-change-legal-team-in-kulbhushan-jadhav-case/1/957618.html>.