

# *RETHINKING THE JADHAV CASE: INFLUENCE, AFTERMATH, AND ENFORCEMENT*

*REPENSANDO O CASO JADHAV: INFLUÊNCIA, CONSEQUÊNCIAS E APLICAÇÃO*

*REPENSAR EL CASO JADHAV: INFLUENCIA, SECUELAS Y CUMPLIMIENTO*

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## **ABSTRACT**

**Contextualización:** The Jadhav Case (India v. Pakistan) concerned the conviction and sentencing to death of Kulbhushan Sudhir Jadhav, who had been captured and detained by Pakistan on allegations of terrorism and espionage and sentenced to death by a Pakistani military court, without any consular access. This was the fourth case to be put before the International Court of Justice (hereinafter the ICJ) concerning the interpretation of Article 36 of the Vienna Convention on Consular Relations (hereinafter VCCR).

**Objective:** The discussion in this article shall be limited to understanding the contributions that the Jadhav case makes to international law through its interim measures, and its recognition of a state's international obligations to implement the decisions of the ICJ, particularly where both time and political tensions/mistrust are heightened. The article also explores the options that India would have if Pakistan failed to comply with the decision. In cases involving the capture or detention of foreign nationals, it is common for states to try all their means to

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rescue their nationals. This becomes even more politically sensitive in the case of India and Pakistan, where government rhetorics routinely accuse each other of sponsoring terrorism and cross-border intervention.

**Methodology:** This work uses a constitutional-comparatist methodology, as well as bibliographic narrative.

**Result:** This case serves as a reminder that allegations such as espionage, mingled with the political agenda being brought to the world court, will affect the rights of individuals and their access to their legal rights, including those individual rights guaranteed under international law.

**Keywords:** Jadhav Case; Terrorism; Espionage; International Court of Justice.

## RESUMO

**Contextualização:** O Caso Jadhav (**Índia v. Paquistão**) dizia respeito à condenação à morte de Kulbhushan Sudhir Jadhav, que havia sido capturado e detido pelo Paquistão, sob alegações de terrorismo e espionagem e condenado à morte por um tribunal militar paquistanês, sem qualquer acesso consular. Esse foi o quarto caso perante a Corte Internacional de Justiça (doravante CIJ) sobre a interpretação do artigo 36 da Convenção de Viena sobre Relações Consulares (doravante VCCR).

**Objetivo:** A discussão, neste artigo, limitar-se-á a compreender as contribuições que o caso Jadhav traz para o direito internacional, por meio de suas medidas provisórias e seu reconhecimento das obrigações internacionais de um Estado para implementar as decisões da CIJ, particularmente quando, tanto o tempo, quanto as tensões/desconfianças políticas são importantes à essência. O artigo também explora quais opções a Índia teria, caso o Paquistão não cumprisse a decisão. Nos casos de captura ou detenção de estrangeiros, é comum que os Estados tentem todos os meios para resgatar seus nacionais. Isso se torna ainda mais politicamente sensível no caso da Índia e do Paquistão, onde a retórica do governo, rotineiramente, alega um ao outro de patrocinar o terrorismo e a intervenção transfronteiriça.

**Metodologia:** Vale-se da metodologia constitucional-comparatista, assim como da bibliográfica, de cunho narrativo.

**Resultado:** O caso serve como um lembrete de que alegações como espionagem, confusas com a agenda política que estão sendo levadas à corte mundial, devem afetar os direitos dos indivíduos e seu acesso aos seus direitos legais, mesmo aqueles direitos individuais garantidos pelo direito internacional.

**Palavras-chave:** Caso Jadhav; Terrorismo; Espionagem; Corte Internacional de Justiça.

## RESUMEN

**Contextualización:** El caso Jadhav (India c. Pakistán) se refería a la condena a muerte de Kulbhusan Sudhir Jadhav, que había sido capturado y detenido por Pakistán por acusaciones de terrorismo y espionaje y condenado a muerte por un tribunal militar pakistaní sin acceso consular. Este fue el cuarto caso ante la Corte Internacional de Justicia (en adelante, la CIJ) relacionado con la interpretación del artículo 36 de la Convención de Viena sobre Relaciones Consulares (en adelante, la CVRC).

**Objetivo:** La discusión en este artículo se limitará a comprender las contribuciones que el caso Jadhav hace al derecho internacional a través de sus medidas provisionales y su reconocimiento de las obligaciones internacionales de un estado para implementar las decisiones de la CIJ, particularmente, tanto el tiempo como las tensiones/desconfianza políticas son importantes a la esencia. El artículo también explora qué opciones tendría India en caso de que Pakistán no cumpla con la decisión. En los casos de captura o detención de extranjeros, es común que los Estados intenten por todos los medios rescatar a sus nacionales. Esto se vuelve aún más sensible desde el punto de vista político en el caso de India y Pakistán, donde la retórica del gobierno rutinariamente se acusa mutuamente de patrocinar el terrorismo y la intervención transfronteriza.

**Metodología:** Utiliza la metodología constitucional-comparatista, así como la narrativa bibliográfica

**Resultado:** El caso sirve como un recordatorio de que las acusaciones como el espionaje, mezcladas con la agenda política que se presenta ante el tribunal mundial, afectarán los derechos de las personas y su acceso a sus derechos legales, incluso aquellos derechos individuales garantizados por el derecho internacional.

**Palabras clave:** Caso Jadhav; Terrorismo; Espionaje; Corte Internacional de Justicia.

## INTRODUCTION

The Jadhav Case (India v. Pakistan)<sup>3</sup> concerned the conviction and sentencing to death of Kulbhusan Sudhir Jadhav, who had been captured and detained by Pakistan on allegations of terrorism and espionage and sentenced to death by a Pakistani military court without any consular access. This was the fourth case to be put before the International Court of Justice (hereinafter the ICJ) concerning the interpretation of Article 36 of the Vienna Convention on Consular Relations (hereinafter VCCR)<sup>4</sup>. In contrast to previous applicants in

3 HAlA. International court of justice. **Jadhav case (India v. Pakistan)**, I.C.J. Rep. 2019. Judgment (17 July 2019). Judgment, 17 Jul. 2019. Available at: <<https://www.icj-cij.org/en/case/168>>.

4 HAlA. International. **Avena and Other Mexican Nationals** (Mexico v. the U.S), I. C. J. Reports 2004 Judgment (31 March 2004) and LaGrand case (Germany v. U.S) I. C. J. Reports 2001, Judgment (27 June 2001) [hereinafter LaGrand case. Earlier in 1998, Paraguay had initiated proceedings against the United States which was later discontinued See Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J. 248, 41 (Apr. 9); See also Order of 10 November 1998. Available at: <<https://www.icj-cij.org/public/files/case-related/128/128-20040331-JUD-01-00-EN.pdf>>

consular rights cases, India had asked for reliefs such as the annulment of Jadhav's conviction in Pakistan, his release from custody, and his safe transport to India. After unanimously determining jurisdiction, the ICJ held on the merits that by failing to inform Jadhav of his rights, and the Indian consulate in Pakistan; and by not allowing him to communicate with India, Pakistan had violated the VCCR. Accordingly, Pakistan must inform Jadhav of his rights as soon as possible and provide Indian consular authorities with access to him. The ICJ further held that as a remedy to the breach of its international obligations, Pakistan must provide, through means of its choosing, an effective review and reconsideration of Jadhav's conviction and sentence to ensure that the full weight of the breach of his rights is given. To this end, a continuous stay on the execution was a necessary condition. In all these findings, Judge ad hoc Jilani was the sole dissenting judge. Judge Cançado Trindade appended a separate opinion, while Judges Sebutinde, Robinson, and Iwasawa appended declarations to the Judgment<sup>5</sup>.

The geopolitical aftershocks of this verdict could be seen when both sides claimed victory. India applauded the decision, as it resulted in a stay of execution for Mr. Jadhav and forced Pakistan to review the decision effectively. Pakistan also welcomed the decision, noting that the ICJ had rejected India's plea to ascertain the correctness of the conviction and had decided not to acquit or release Jadhav<sup>6</sup>. Be that as it may, much has been written critiquing the decision and its interpretation of the VCCR<sup>7</sup>. The decision involved various questions that were analyzed by the court, such as the admissibility of the role of the Bilateral Agreement between India and Pakistan of 2008, and whether Article 36 of the VCCR permits an exception for espionage cases.

The discussion in this article shall be limited to understanding the contributions that the Jadhav case makes to international law through its interim measures, and its recognition of a state's international obligations to implement the decisions of the ICJ, particularly where both time and political tensions/distrust are of the essence. Section II analyses the role and impact of the order of the Provisional measures, and how it highlighted the importance of 'urgency' in determining provisional measures. Such thresholds have been argued in various subsequent international law disputes. In section III, the attempts by Pakistan to enforce the decision for effective review and reconsideration are described. The next section examines the substantive content of the obligation to provide effective review and reconsideration. The article also explores what options India would have if Pakistan failed to comply with the decision.

5 HAlA. International court of justice. **Avena and Other Mexican Nationals**. 149 Dispositif (1-8) Available at: <<https://www.icj-cij.org/public/files/case-related/128/128-20040331-JUD-01-00-EN.pdf>>

6 BHAUMIK, Anirban. **Jadhav Case: Both India and Pakistan Claim Victory** Deccan Herald (2019) <<https://www.deccanherald.com/national/jadhav-case-both-india-and-pakistan-claim-victory-747835.html>> accessed 20 February 2022.

7 KATTAN, Victor. **Jadhav Case** (India v. Pakistan). (2020) 114 American Journal of International Law 281. <<https://www.cambridge.org/core/journals/american-journal-of-international-law>>

## 1. INDIA RESCINDING FROM JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

It is important to emphasize India's unwillingness vis-à-vis international obligations and peaceful dispute settlement; reference must be made to India's latest Declaration of September 27, 2019<sup>8</sup>. Under Article 36(2) of the International Court of Justice (hereinafter ICJ/ World Court) Statute, India, under renewed terms, accepted the compulsory jurisdiction of the ICJ. The new Declaration replaces India's 1974 Declaration and is the harbinger of acute trepidation, as the list of R/reservations<sup>9</sup> has increased and become even more detailed. As a result, the additional reservations diminish the value of India's voluntary submission to the World Court's compulsory jurisdiction. Paragraphs 4, 7, and 13, in particular, clearly demonstrate India's new reservations. Paragraph 7 is reproduced as hereunder:

(7) disputes concerning the interpretation or application of a multilateral treaty to which India is not a party; and disputes concerning the interpretation or application of a multilateral treaty to which India is a party, unless all the parties to the treaty are also parties to the case before the Court or the Government of India especially agree to jurisdiction; [Emphasis supplied]

The emphasis that can be given to this portion of text is that India has limited its jurisdiction to a limited set of treaties. However, it must be noted that under Paragraph 7, new modifications will not be covered for the obligations to the Court's jurisdiction. To this end, it should also be acknowledged that under Paragraph (4), especially the section that reads "including the measures taken for the protection of national security and ensuring national defense"<sup>10</sup>, India has created the potential to exclude itself from disputes that may fall under the umbrella of customary international law by using national defense and security as smokescreens. At this point, we should emphasize that Customary International Law is an integral source of international law as per Article 38, Paragraph 1 of the Statute of the ICJ which refers in subparagraph (b) to "international custom, as evidence of a general practice accepted as law"<sup>11</sup>. Thus, the newly adopted measures of India contravene the mandate and spirit of the ICJ's compulsory jurisdiction and objective of peaceful dispute settlement. To summarize, we see that the 2019 Declarations renew and reinvigorate the

8 HAIA. International court of justice. ICJ-cij.org. 2019. India | **Declarations recognizing the jurisdiction of the Court as compulsory**. International Court of Justice. [online] Available at: <<https://www.icj-cij.org/en/declarations/in>> [Accessed 11 November 2021].

9 This is to suggest the formal and legal meaning of Reservation under international law and also to highlight the general meaning of the word.

10 This is to suggest the formal and legal meaning of Reservation under international law and also to highlight the general meaning of the word.

11 HAIA. (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14, at pp. 93–96, paras. 174–179; **Application of the Convention on the Prevention and Punishment of the Crime of Genocide**. (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3, at pp. 47–48, para. 88). [https://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_13\\_2018.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf)

scope of skepticism towards the Court.

## 2. THE ROLE OF THE ORDER FOR PROVISIONAL MEASURES

This section examines the role of 'urgency' in the request for provisional measures in the particular context of Jadhav's case, and how the court decided to place a stay on the impending death sentence pending a decision on the merits of the case. This was particularly important after, in two of its previous cases, its interim measures failed to materialize into the protection of the individuals who were executed by the United States in neglect of the ICJ's orders.

### 2.1 THE URGENCY FOR PROVISIONAL MEASURES

After learning of Jadhav's arrest on 25 March 2016, India requested consular access to Jadhav from Pakistan. Pakistan responded in January 2017, stating that consular access may be considered "in the light of" India's assistance in the investigation process concerning Mr. Jadhav and his alleged accomplices<sup>12</sup>. Four months later, in April 2017, Jadhav was sentenced to death by a military court on the grounds of "espionage, sabotage, and terrorism"<sup>13</sup>.

From the perspective of Pakistan, we highlight that Sir Arthur Watts QC's commentary<sup>14</sup> on Article 36(1)(b) of the International Law Commission (hereinafter ILC)'s Draft Convention do not indicate that the ILC draft is to provide consular access to individuals who are prima facie accused of espionage. On the contrary, the Commentary affirmed circumstances where States would be entitled to hold persons, who are involved in criminal investigations, incommunicado, or without access to communication for a specific period<sup>15</sup>. Additionally, the United Kingdom Representative to the ILC, Sir Gerald Fitzmaurice, while deliberating on the draft proposal on consular access, opined that national security could be the only

<sup>12</sup> HAIA. International court of justice. **Jadhav Case (India v, Pakistan)**, Índia V. Paquistão: Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017, 18 May 2017. p. 13-14. Available at: < <https://www.icj-cij.org/en/case/168/orders>>.

<sup>13</sup> HAIA. International court of justice. **Jadhav Case (India v, Pakistan)**, Índia V. Paquistão: Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017, 18 May 2017. p. 13-14. Available at: < <https://www.icj-cij.org/en/case/168/orders>>.

<sup>14</sup> WATTS, S., n.d. **International Law Commission 1949-1998- Volume One: The Treaties Part 1**. 1st ed. Oxford: Oxford University Press, pp.298-299.

<sup>15</sup> UNITED NATIONS. Legal.un.org. 1960. **Yearbook of the international law commission 1960**. [online] Available at: <[http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1960\\_v2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_1960_v2.pdf)> [Accessed 11 November 2021]. And

justified reason to restrict immediate consular communication by other States<sup>16</sup>. Similarly, Mr. Grigory Tunkin, former head of the Legal Department of the Soviet Union's Foreign Ministry said that including the words, 'without delay, in the Draft Article was inconsistent with state practice and Customary International Law and would be difficult to adhere to in cases of espionage<sup>17</sup>. Moreover, Professor Zourek, the Special Rapporteur for the ILC's Draft VCCR Articles, in his reply on why the words "without undue delay," should be included, stated that cases of espionage should be considered as separate and distinct from the normal criminal activity for which the draft articles are being codified<sup>18</sup>. Finally, it is pertinent to point out that during the negotiation, deliberation, and drafting of the convention on consular relations, cases of espionage were not considered as a possibility when determining these obligations. A relevant example in support of this argument is the case of Mexico's request for Advisory Opinion from the Inter-American Court of Human Rights on the question of consular access violations in capital cases. In that discussion, the VCCR's literal meaning was studied to determine the rights of the detainee. The Court said that the preamble phrase referred to consular officers. It said that it had examined the drafting history of the phrase, which would be the statements of delegates just cited, and that they reflect the fact that it is consular officers, not sending-state nationals, who enjoy "privileges and immunities" under the VCCR<sup>19</sup>.

On 8 May 2017, India moved the ICJ seeking provisional measures stressing upon the "extreme gravity and immediacy of the threat that authorities in Pakistan will execute an Indian citizen in violation of obligations Pakistan owes to India"<sup>20</sup>. This was under article 41 of the ICJ Statute<sup>21</sup> which grants the Court the power to issue provisional measures when irreparable prejudice could be caused to rights that are the subject of judicial proceedings<sup>22</sup>. India requested the immediate suspension of the death sentence, annulment of the military court decision, and the declaration that Jadhav's detention and sentence violated his rights

16 UNITED NATIONS. Legal.un.org. 1961. **Yearbook of the international law commission 1961** Volume II. [online] Available at: <[http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1960\\_v2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_1960_v2.pdf)> [Accessed 11 November 2021].

17 UNITED NATIONS. Legal.un.org. 1961. **Yearbook of the international law commission 1961** Volume II. [online] Available at: <[http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1960\\_v2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_1960_v2.pdf)> [Accessed 11 November 2021].

18 UNITED NATIONS. Legal.un.org. 1961. **Yearbook of the international law commission 1961** Volume II. [online] Available at: <[http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1960\\_v2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_1960_v2.pdf)> [Accessed 11 November 2021].

19 ACEVES. William J. **The right to information in consular Assistance in the framework of the guarantees of the due process of law**, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 74 (Oct. 1, 1999).

20 ACEVES. William J. **The right to information in consular assistance in the framework of the guarantees of the due process of law**, 1999 Inter-Am. Ct. H.R. (ser. A) No. at para 5. (Oct. 1, 1999).

21 HAIA. **Statute of the International Court of Justice**, 26 June 1945 U.S.T.S.993 (entered into force October 1945), art. 41.

22 UNITED NATIONS. **Application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination** (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017, p. 136, para. 88<<https://www.icj-cij.org/en/case/166>>

under Article 36 of the VCCR and his due process rights under the ICCPR<sup>23</sup>. Pakistan submitted that there was no real urgency, given that the prospect of sentencing was about six months away, which in its opinion, did not constitute an urgent or imminent risk<sup>24</sup>. On the other hand, India submitted that in *Avena*, three of the nationals were given the benefit of provisional measures when their execution was impending in the “coming months”<sup>25</sup>. Furthermore, India highlighted the uncertainty regarding the criminal appeal and the clemency process in Pakistan, given that it did not have access to Jadhav or the military court judgment<sup>26</sup>. Later, on 18 May 2017, the provisional measures order was delivered. The Court found that it had jurisdiction to admit the application and unanimously declared that “Pakistan shall take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision and shall inform the Court of all the measures taken in implementation of the present Order.”<sup>27</sup>

### 2.1.1 INFLUENCE OF THE PROVISIONAL ORDER

While the use of the final judgment in disputes concerning consular access or otherwise as a precedent is yet to be seen before international courts or tribunals, observations from the provisional order have been repeatedly used as an argument in asking provisional measures. In its provisional order, the Court engaged with the requirement to show irreparable prejudice when requesting a provisional measure. The court clarified that “the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision”<sup>28</sup>. For the court, the mere fact that Mr. Jadhav is under a sentence and might therefore be executed was sufficient to demonstrate the existence of imminent risk, and the uncertainty on his appeal was sufficient to demonstrate

23 UNITED NATIONS. **Application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination** (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017, p. 136, para. 88. <[http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1960\\_v2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_1960_v2.pdf)>.

24 HAIA. International court of justice. **Jadhav Case (India v. Pakistan)**. Índia v. Paquistão: Verbatim record, 08 maio 2017. Available at: <<https://www.icj-cij.org/en/case/168>> Verbatim record 2017/6 (15 May 2017) p. 15.

25 UNITED STATES. **Avena and Other Mexican Nationals** (Mexico v. the United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, para 55. <<https://www.icj-cij.org/en/case/128>>

26 HAIA. International court of justice. **Jadhav Case (India v. Pakistan)**. Índia v. Paquistão: Jadhav (India v. Pakistan), Verbatim record 2017/5 (15 May 2017) p.

27 HAIA. International court of justice. Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017, para. 61(1)

28 HAIA. International court of justice. Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017, para 50.

urgency<sup>29</sup>. These thresholds of imminent risk and urgency were subsequently argued before international courts and tribunals. For instance, Ukraine was able to successfully secure an order from the ITLOS tribunal to get released its three vessels from Russia's custody<sup>30</sup>. Russia had objected to the release of the Ukrainian vessels and crew on the ground that such a provisional measure would prejudice the merits, since it is demanded by Ukraine in both the request for provisional measures and relief on merits<sup>31</sup>. Ukraine's agents cited *Jadhav*, and the Court's suspension of *Jadhav*'s execution, in order to bring home the point that the similarity between certain requests on the merits and requests for provisional measures is not a reason to reject the provisional measures on the ground that they would prejudice the merits<sup>32</sup>.

Similarly while objecting to a request for Provisional Measures, Azerbaijan had argued that Armenia does not satisfy the urgency required to obtain provisional measures, since it failed to discuss Azerbaijan's proposals and it "abruptly move[d] this dispute out of negotiations and into the Court"<sup>33</sup>. Secondly, that there was no urgency since Azerbaijan had already given an undertaking to the measures requested by Armenia<sup>34</sup>. Rejecting these arguments, the court then observed that the condition of urgency is met when the acts causing irreparable prejudice can occur "at any moment before the court makes a final decision"<sup>35</sup>. The promotion of racial hatred by high-ranking state officials of Azerbaijan, and the extrajudicial killings of Armenian prisoners of war noted by the UN High Commissioner for Human Rights, were considered sufficient to show urgency<sup>36</sup>.

29 HAIA. **International court of justice. Jadhav Case (India v, Pakistan), Índia V. Paquistão**: Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017,18 May 2017. Para 53-54.

30 UNITED STATES. **Case concerning the detention of three Ukrainian naval vessels** (Ukraine v. Russian Federation), Provisional Measures, ITLOS Case No. 26, Order of 25 May 2019, para 113, 124. <<https://www.itlos.org/en/main/cases/list-of-cases/case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures/>>.

31 UNITED STATES **Case concerning the detention of three Ukrainian naval vessels** (Ukraine v. Russian Federation), Provisional Measures, ITLOS Case No. 26, Order of 25 May 2019, para 117, 122. <<https://www.itlos.org/en/main/cases/list-of-cases/case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures/>>

32 UNITED STATES. **Case concerning the detention of three Ukrainian naval vessels** (Ukraine v. Russian Federation), ITLOS Case No. 26, Verbatim record ITLOS/PV.19/C26/1 (10 May 2019) pp.32-33.<<https://www.itlos.org/en/main/cases/list-of-cases/case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures/>>

33 UNITED STATES. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan) Verbatim record, (14 October 2021) p.19, paras 15-16.< <https://www.icj-cij.org/en/case/180>>

34 UNITED STATES. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan) Verbatim record, (14 October 2021). at paras 19-20.< <https://www.icj-cij.org/en/case/180>>

35 UNITED STATES. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan) Provisional Measures Order (7 Dec 2021) para 70. Application of the International Convention on the Elimination of All Forms of Racial Discrimination.

36 UNITED STATES. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan) Provisional Measures Order (7 Dec 2021) para 70. Application of the International Convention on the Elimination of All Forms of Racial Discrimination, p. 83-88.

## COMPLIANCE WITH THE PROVISIONAL MEASURE

While the provisional measure was suspended the sentence, India's anxiety for Jadhav's situation was not mitigated. One of the primary reasons for this was that the history of requests for provisional measures in cases involving breaches of the VCCR shows a poor track record of compliance. In the LaGrand case, the court held that orders on provisional measures are legally binding and in the dispositive of its judgment of merit, it found that the US had breached the provisional measure order made by the Court<sup>37</sup>. Similarly, in the Request for Interpretation of the Avena Judgment, the court unanimously found that its provisional measure had been violated<sup>38</sup>. These two precedents justified Indian's apprehension that Pakistan was likely to follow the course of action adopted by the United States. Perhaps that is why, in its Provisional order, the Court reminded Pakistan that "orders on provisional measures under Article 41 [of the Statute] have binding effect"<sup>39</sup> However, no complaints of any violation of the provisional measure were made by India in its written submissions in the merits phase of the Jadhav case and consequently, the occasion to determine compliance with its provisional measure did not arise.

### 3. ENFORCEMENT ATTEMPTS

Besides Pakistan's violations of the VCCR, the court, in its provision, found that the appropriate remedy in the case is for Pakistan to provide "by the means of its choosing, effective review and reconsideration of the conviction and sentence of Mr. Kulbhusan Sudhir Jadhav"<sup>40</sup> It ruled that "a continued stay of execution constitutes an indispensable condition for the effective review and reconsideration of the conviction and sentence"<sup>41</sup> (of Mr. Jadhav). Subsequent attempts were made by Pakistan to enforce its obligations. After the decision by the ICJ, Pakistan offered consular access to India, proposing the date of 2<sup>nd</sup> August for such access. However, this offer was rejected by India, as it believed that Pakistan was not offering 'unimpeded consular access in an environment free from the fear

37 ACEVES J. William. **LaGrand Case** *supra*, at para 109, 128(5).

38 HAIA. Request for Interpretation of the Judgment of 31 March 2004 in the **Case concerning Avena and Other Mexican Nationals** (Mexico v. United States of America) (Mexico v. United States of America), Judgment of 19 January 2009, I.C.J. Reports 2009 [hereinafter "Avena Interpretation"], p. 21, para 61 (2) <<https://www.icj-cij.org/public/files/case-related/139/139-20090119-JUD-01-00-EN.pdf>>

39 HAIA. (India v. Pakistan), **Provisional Measures**, Order of 18 May 2017, I.C.J. Reports 2017, para. 59 LAGRANDE. (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 506, para. 109.

40 HAIA. International court of justice. **Jadhav Case (India v, Pakistan)**, **Índia V. Paquistão: Provisional Measures**, Order of 18 May 2017, I.C.J. Reports 2017, 18 May 2017. Para 149 (7).

41 HAIA. International court of justice. **Jadhav Case (India v, Pakistan)**, **Índia V. Paquistão: Provisional Measures**, Order of 18 May 2017, I.C.J. Reports 2017, 18 May 2017, para 149(8).

of intimidation and reprisal<sup>42</sup>. Finally, two hours of consular access was provided to India in September 2019, with the presence of Pakistani government officials<sup>43</sup>. A few months later India also demanded that Jadhav be provided with an Indian lawyer or queen's counsel. The request was denied<sup>44</sup>. Pakistan thus felt that India was not interested in representing Jadhav before the Pakistani courts, and subsequently, the Islamabad High Court gave one more chance to "put forth its reservations before the court"<sup>45</sup>. In June 2021, Pakistan's National Assembly, despite heavy resistance by opposition parties, passed a bill to provide Mr. Jadhav with the right to appeal<sup>46</sup>. India's response to the bill was that it did not create a mechanism to facilitate effective review and reconsideration of Mr. Jadhav's case as mandated by the ICJ judgment<sup>47</sup>. India's objections were described as follows:

it (the bill) invites municipal courts in Pakistan to decide whether or not any prejudice has been caused to Shri Jadhav on account of the failure to provide consular access. This is a breach of the basic tenet, that municipal courts cannot be the arbiter of whether a State has fulfilled its obligations under international law... Not only this, it further invites a municipal court to sit in appeal, as it were, over a judgment of the ICJ<sup>48</sup>.

For obvious political reasons, India is unlikely to go and argue Jadhav's case before Pakistani High Courts in appeal. However, it is unclear what India's expectations for an effective review entail. Firstly, municipal courts do regularly interpret the state's obligations under its international commitments under various treaties. Secondly, if not a municipal court then who can provide a review to Mr. Jadhav? India can surely not be suggesting an international court, and neither will Pakistan agree for Jadhav's trial to be held in India. Pakistan is right in asserting that the ICJ had ordered an effective review and reconsideration

42 THE WIRE. Jadhav: **India Rejects Pakistan's Friday Offer, Asks For 'Unimpeded' Consular Access'** (The Wire, 2019) <<https://thewire.in/south-asia/kulbhushan-jadhav-india-rejects-consular-access>> accessed 20 February 2022.

43 THE WIRE. **'India Accepts Pakistan's Offer Of Consular Access To Kulbhushan Jadhav Today'** (The Wire, 2019) <<https://thewire.in/diplomacy/pakistan-announces-consular-access-to-kulbhushan-jadhav-on-september-2>> accessed 20 February 2022.

44 THE HINDU. 2020. **Pak parliamentary panel approves government's bill to seek review of Kulbhushan Jadhav's conviction.** [online] Available at: <<https://www.thehindu.com/news/international/pak-parliamentary-panel-approves-governments-bill-to-see-review-of-kulbhushan-jadhavs-conviction/article32915653.ece>> [Accessed 11 February 2022].

45 Live Mint. 2021. **Kulbhushan Jadhav case: Pak court allows India more time to appoint lawyer.** [online] Available at: <<https://www.livemint.com/news/india/kulbhushan-jadhav-case-pak-court-allows-india-more-time-to-appoint-lawyer-11633455578232.html>> [Accessed 11 February 2022].

46 THE HINDU. 2021. **Pakistan's National Assembly passes bill to give right of appeal to Kulbhushan Jadhav.** [online] Available at: <<https://www.thehindu.com/news/international/pakistans-national-assembly-passes-bill-to-give-right-of-appeal-to-kulbhushan-jadhav/article34786810.ece>> [Accessed 11 February 2022].

47 THE HINDU. 2021. **Kulbhushan Jadhav case | India 'misrepresenting' ICJ verdict, says Pakistan.** [online] Available at: <<https://www.thehindu.com/news/national/kulbhushan-jadhav-case-india-misrepresenting-icj-verdict-says-pakistan/article34859788.ece>> [Accessed 11 February 2022].

48 ROY, S., 2021. **Pakistan passes law to give Kulbhushan Jadhav review option, Delhi believes not enough, 'nothing new'.** [online] The Indian Express. Available at: <<https://indianexpress.com/article/india/pakistan-passes-law-to-give-kulbhushan-jadhav-review-option-delhi-believes-not-enough-nothing-new-7628394/>> [Accessed 11 February 2022].

“using its choosing”<sup>49</sup>. It would be over-ambitious of India to expect Jadhav’s return especially when the ICJ had already clarified that it is not concerned with the correctness of the conviction or sentencing<sup>50</sup>.

#### 4. THE OBLIGATION TO EXECUTE ‘EFFECTIVE REVIEW AND RECONSIDERATION’

It is important to deconstruct what the obligation to provide effective review and reconsideration entails. First, the ICJ was particular in pointing out that “any potential prejudice and the implications for the evidence and the right of defense of the accused should receive scrutiny during the review and reconsideration”<sup>51</sup>. Second, it noted that the choice of means available to Pakistan is qualified<sup>52</sup>. Third, this is an obligation for the result to be performed unconditionally and if necessary, by enacting the appropriate legislation<sup>53</sup>. Previously in *Avena* this also included one “which must be met within a reasonable period, even serious efforts (of the of the United States), should they fall short of providing review and reconsideration consistent with paragraphs... would not be regarded as fulfilling this obligation of result”<sup>54</sup>. The requirement for legislative action to implement international obligations had also been held by the PCIJ in the following words – “ a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken”<sup>55</sup>.

#### ROLE OF MUNICIPAL COURTS

The second consideration that now arises is the role of municipal courts in ensuring compliance. Despite the ICJ held that the VCCR creates rights for individuals,<sup>56</sup> the decision

49 HAIA. International court of justice. **Jadhav Case (India v, Pakistan)**, Índia V. Paquistão: Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017,18 May 2017.p 149 (7). Available at:< <https://www.icj-cij.org/en/case/168/orders>>

50 HAIA. International court of justice. **Jadhav Case (India v, Pakistan)**, Índia V. Paquistão: Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017,18 May 2017. *Avena* case. p 122-123. Available at:< <https://www.icj-cij.org/en/case/168/orders>>

51 HAIA. International court of justice. **Jadhav Case (India v, Pakistan)**, Índia V. Paquistão: Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017,18 May 2017.p 145. Available at:< <https://www.icj-cij.org/en/case/168/orders>>

52 HAIA. International court of justice. **Jadhav Case (India v, Pakistan)**, Índia V. Paquistão: Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017,18 May 2017.p 146. Available at:< <https://www.icj-cij.org/en/case/168/orders>>

53 HAIA. International court of justice. **Jadhav Case (India v, Pakistan)**, Índia V. Paquistão: Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017,18 May 2017.p 146. Available at:< <https://www.icj-cij.org/en/case/168/orders>>

54AVENA Interpretation 27 (emphasis supplied).

55 *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 20

56 LAGRAND, Case at 490.

has not been implemented uniformly across jurisdictions<sup>57</sup>. A promising decision came from Germany's Federal Constitutional Court where it held that German authorities are bound to observe the obligations of the VCCR as interpreted by the ICJ in *Avena*, as a part of Germany's international legal obligations, particularly the Optional Protocol, failing which the applicant's constitutional right to a fair process would be violated<sup>58</sup>. The US Supreme Court in *Medellin v. Texas* had ruled that in the absence of implementing legislation in municipal law, the decision of the ICJ in *Avena* is not binding on the domestic courts of the US<sup>59</sup>. In *Medellin v. Texas*, Jose Ernesto Medellin was a Mexican national who was convicted of murder in the state of Texas. He was sentenced to death. On appeal, he argued that he had not been notified of his right of access to the Mexican Consulate as required by Article 36 of the Vienna Convention on Consular Relations, and that this treaty violation had prejudiced his defense. Mexico also brought a case for the International Court of Justice from the violation of the Vienna Convention where the ICJ held the Medellin and some other Mexican nationals were entitled to review and reconsideration of second elections and sentences in the United States.

The issue to consider in the Medellin case is whether the ICJ judgment was directly enforceable by the United States courts as domestic law the United States had ratified the Vienna Convention. As well as the Optional Protocol concerning the compulsory settlement of disputes to the Vienna Convention by which all disputes arising out of the Vienna Convention were to be submitted to the ICJ. Chief Justice Robert's main distinction between the grant of jurisdiction and agreeing to be bound by the judgment of the ICJ was that the text of the Convention and the Optional Protocol only required the United States to submit to the jurisdiction of the ICJ. The court agreed that the *Avena* decision "constitutes an international law obligation on the part of the United States"<sup>60</sup> however "the responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress"<sup>61</sup>. It is pertinent to note here that the US has been observed to be a monist state when it comes to its treaty obligations<sup>62</sup>. Before proceeding, it is important to observe the basic tenets of the monist approach.

57 WEINMAN, Jennifer Lynne. **The Clash Between U.S. Criminal Procedure and The Vienna Convention on Consular Relations: An Analysis of the International Court of Justice Decision in the LeGrand Case**, Vol.17(4) AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, 857 (2002); Cara Drinan, Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts after *LaGrand*, Vol.54(6) STANFORD LAW REVIEW, 1303–1319 (2002)

58 HEINLEIN, Peter. **The U.S. and German Interpretations of the Vienna Convention on Consular Relations: Is Any Constitutional Court Really Cosmopolitan?**, Vol.25 MARY. J. INT'L L., 317 (2010).

59 MEDELLIN Jose Ernesto, **Medellin v. Texas**. 552 U.S. 491, (2008) (United States Supreme Court) ('Medellin') Available at: < <https://supreme.justia.com/cases/federal/us/552/491/> >

60 MEDELLIN, Jose Ernesto, *Medellin v Texas*. 552 U.S. 491, (2008) (**United States Supreme Court**) ('Medellin') p.18.

61 MEDELLIN, Jose Ernesto, *Medellin V, Texas*. 552 U.S. 491, (2008) (**United States Supreme Court**) ('Medellin') p.30.

62 ROBERT E. Dalton, **National Treaty Law, and Practice: United States in DUNCAN B. HOLLIS, MERRITT R. BLAKESLEE & L. BENJAMIN EDERINGTON (EDS.), NATIONAL TREATY LAW AND PRACTICE**, 788–790 (Martinus Nijhoff, 2005).

The position of law in the United States focuses on treaties as a part of Article 2, Section 2 of the Constitution of the United States of America. Reads, “the President shall have power by and with the advice and consent of the Senate to make treaties provided two-thirds of the Senators present concur.” In addition, part of Article 6 of the Constitution reads, “all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land so treaty they consider to be at par with federal legislation and prevail over the law enacted by States”<sup>63</sup>. Although the President has the executive authority to enter into treaties and treaties that are considered to be the law of the land jurisprudence of the United States Supreme Court distinguishes self-executing and non-self-executing treaties<sup>64</sup>. Self-executing treaties are those treaties that are automatically executed upon being signed and ratified by the executive. non-self-executing treaties on the other hand are those treaties that require implementation by legislation or appropriate executive or administrative action. To be implemented, this distinction was established by Chief Justice Marshall when he held, in 1829,

a treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court<sup>65</sup>.

In essence, what are the factors that must be considered when determining whether a treaty is self-executing or non-self-executing? Different Judges and Commentators have considered different factors to be important. Some look at the purpose of the treaty, others at the objectives of the implementers, or the resistance of domestic institutions for direct implementation, or the availability and feasibility of alternative enforcement methods. For instance, some would argue that equal to native means of enforcement do not exist or are too inefficient or costly, and that the direct investment of treaty rights is the best alternative. Thus, the treaty should be considered to be self-executing. Some even argue that there is a presumption in favor of self-execution in the case of ambiguity in the position of the United States Supreme Court. The issue of what is a self-executing treaty is ambiguous and has changed over time.

63 HASWELL, John H. [United States Department of State](#) (1889). *Treaties and Conventions Concluded Between the United States of America Since July 4, 1776*. Government Printing Office. p. 1,232.

64 HASWELL, John H. [United States Department of State](#) (1889). *Treaties and Conventions Concluded Between the United States of America Since July 4, 1776*. Government Printing Office. p. 1,232.

65 FOSTER v. Neilson, 27 U.S. (2 Pet.) 253, 313–14 (1829). **THE FEDERALIST NO. 75** (J. Cooke ed. 1961), 504–505.

In the case of disputes under the Vienna Convention but not to the United States must comply with the decisions of the ICJ according to the majority. Therefore, the text of the treaty was paramount in determining whether it was a self-executing treaty or not. The text of the treaty had to be explicit in conveying the intention of self-execution. Since this intention was not present in the text of either the Vienna Convention or the Optional Protocol, the United States courts were not bound to automatically enforce the decisions of the ICJ. This decision is controversial, because of its commitment to test the duplication of the realities of international relations. This means that the texts of treaties do not specifically reflect the intentions of the parties relating to self-execution. Since the distinction between self-executing and not self-executing treaties is peculiar to the United States, it cannot be expected that other countries will change the text of their treaties to include such textual justification these difficulties related in the sent Foreign Relations Committee to change its practice<sup>66</sup>. It now includes explicit statements on whether treaties are intended to be self-executing or not. In its reports on treaties and other Resolutions at the time the Senate votes and prospective treaties, the position of customary international law in the United States is much clearer. The position was set out in *Paquete Habana v. the United States*<sup>67</sup>, where Justice Gray held that national law is part of the law of the United States. This basic position remains unchanged and the Supreme Court of the United States continues to treat customary international law as a branch of federal law. However, there is some criticism of this position by academic commentators, who argue that it goes against the democratic spirit.

Mexico had argued that the obligation of the result given to the US in *Avena* was incumbent on all its organs, including the American judiciary<sup>68</sup>. Yet the failure of the US Supreme court to give “direct effect” to the *Avena judgment* was not considered to be a breach of the obligation of result incumbent upon the US<sup>69</sup>. The ICJ went on to observe that an obligation of result does not necessarily mean that domestic courts are required to give direct effect to the judgment, nor does it mean that direct enforceability of the obligation in question is barred if such an effect is permitted by domestic law<sup>70</sup>. This created

66 SENATE Prints 106-71, ‘**TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE**’ (US Government Publishing Office 2001).

67 *HABANA, Paquete*. **O Lola**. 175 U.S. 677 (more) 20 S. Ct. 290; 44 L. Ed. 320; 1900 U.S. LEXIS 1714. Available at: <[https://stringfixer.com/pt/The\\_Paquete\\_Habana](https://stringfixer.com/pt/The_Paquete_Habana)>.

68 *AVENA*. Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)*, Judgment of 19 January 2009, I.C.J. Reports 2009 [hereinafter “*Avena Interpretation*”], p.31-33.

69 *AVENA*. Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)*, Judgment of 19 January 2009, I.C.J. Reports 2009 [hereinafter “*Avena Interpretation*”], p.44.

70 *AVENA*. Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)*, Judgment of 19 January 2009, I.C.J. Reports 2009 [hereinafter “*Avena Interpretation*”], p.44.

more questions than answers, and effectively made enforceability even more uncertain for domestic courts, thereby creating a chilling effect on the implementation of the VCCR<sup>71</sup>.

## 4.2 PRESENT DAY OBSTRUCTIONS AND RECOURSES AVAILABLE TO INDIA

Today, there is greater recognition of the principle that a state cannot invoke its domestic law to justify its failure to perform an international legal obligation<sup>72</sup>. Further that the acts of a judicial organ are also considered an act of the state<sup>73</sup>. The Medellin decision exemplifies how dualist understanding of international law obligations continues to plague even monist states, but more importantly, it shows how dualist assumptions continue to obstruct the execution of individual rights under international law. Something similar is possible in Jadhav's case. Pakistan's courts could create a 'Medellin' like situation in which Pakistan is seen as a dualist state that requires domestic legislation to enact international obligations<sup>74</sup>.

Mr. Jadhav was charged under the Pakistan Army Act, 1952 and the Official Secrets Act, 1923, and was tried by a Military Court. Mr. Jadhav's jurisdiction under the Pakistan Army Act, 1952 was proved for committing an offense under the Official Secrets Act, 1923, and for raging a war against the State of Pakistan<sup>75</sup>. Accordingly, he was charged under Section 59 (Civil Offences) of the Pakistan Army Act, 1952<sup>76</sup>. Additionally, Mr. Jadhav was also charged under Section 3 of the Official Secrets Act, 1923 for espionage<sup>77</sup>. In 2015, the State of Pakistan, through a constitutional amendment, had allowed the establishment of special military courts for the prosecution of persons charged with terrorism and other grave crimes against civilians. In the same year, all the accused involved in the Peshawar school massacre were prosecuted through this military court. Later, in 2017, the Pakistani Parliament decided to extend the operation of all military courts for two years through

71 ONAA. Hathaway, Sabrina Mc Elroy & Sara A. **Solow, International Law at Home: Enforcing Treaties in U.S. Courts**, 37(1) YALE INTERNATIONAL LAW JOURNAL, 70–71 (2012)

72 ILC ARSIWA art. 3; **Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion**, 1932, P.C.I.J., Series A/B, No. 44, p. 24

73 Art. 4(1); See also Commentary p.35, 6.

74 AHMER Bilal Soofi, International Law in Asian and Pacific States, South and Central Asia: Pakistan in SIMON CHESTERMAN, HISASHI OWADA, BEN SAUL, THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ASIA AND THE PACIFIC, 576 (OUP, 2019)

75 PAKISTAN. Section 2, Pakistan Army Act, 1952. < <https://www.pakistanarmy.gov.pk/>>

76 PAKISTAN. Section 2, Pakistan Army Act, 1952. < <https://www.pakistanarmy.gov.pk/>> Section 59, Pakistan Army Act, 1952

77PAKISTAN. Section 2, Pakistan Army Act, 1952. < <https://www.pakistanarmy.gov.pk/>> Section 3, Official Secrets Act, 1923

the 23<sup>rd</sup> Amendment to the Army Act<sup>78</sup>. According to the records of the Pakistani Military, there have been a total of 274 convictions by these military courts, with 161 persons being sentenced to the death penalty<sup>79</sup>. Hence, the trial of Mr. Jadhav, who is charged under the Pakistan Army Act, 1952 and the Official Secrets Act, 1923, was tried in the military court under Pakistani law through a legal military court. Moreover, Pakistan also submitted that its domestic legal system reflects an established and defined process of appeal, whereby the civil courts can undertake a substantive review of the decisions of the military tribunals to ensure procedural fairness and are well suited to carry out “review and reconsideration”. The Supreme Court of Pakistan affirmed this position through *Said Zaman Khan v Federation of Pakistan*<sup>80</sup> through Secretary Ministry of Defence, Government of Pakistan (Civil Petition N. 842 of 2016), wherein the court in Para 93 held:

It is by now a well-settled proposition of law, as is obvious from the judgments of this Court, referred to and reproduced hereinabove, that the powers of Judicial Review under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, against the sentences and convictions of the FGCM, is not legally identical to the powers of an Appellate Court. The evidence produced cannot be analyzed in detail to displace any reasonable or probable conclusion drawn by the FGCM nor can the High Court venture into the realm of the “merits” of the case. However, the learned High Court can always satisfy; itself that it is not a case of no evidence or insufficient evidence or the absence of jurisdiction<sup>81</sup>.

It is contended, therefore, that a fair trial was given to Mr. Jadhav by all principles of natural justice, and that no intervention is called for. In short, Mr. Jadhav was tried under the Official Secrets Act, 1923, for “espionage and sabotage activities against Pakistan”. Evidence against Mr. Jadhav includes a “confession”. Pakistan’s Army Act, 1952, and allows military courts to hear cases that arise out of the Official Secrets Act. Contrary to media reports, Kulbhushan Jadhav has not been tried under constitutional amendments that give military courts additional powers to try people accused of belonging to proscribed organizations who commit terrorism-related offenses. The Pakistani military courts are independent, and the proceedings before them follow national and international fair trial standards. Judges of military courts are part of the executive branch of the State and continue to be subjected to military command; the right to appeal to civilian courts is available; the right to a public hearing is guaranteed; and a duly reasoned, written judgment, including the essential

<sup>78</sup> UNITED STATES. Constitution (Twenty-third Amendment) Act, 2017

<sup>79</sup> ICJ., **International Commission of Jurists. n.d. Pakistan:** as military courts lapse, Government must prioritize reform of the criminal justice system. [online] Available at: <<https://www.icj.org/pakistan-as-military-courts-lapse-government-must-prioritize-reform-of-the-criminal-justice-system/>> [Accessed 11 November 2021].

<sup>80</sup> KHAN, Said Zaman V Federation of Pakistan, **Supreme Court of Pakistan**, Civil Petition No. 842 of 2016

<sup>81</sup> KHAN, Said Zaman V Federation of Pakistan, **Supreme Court of Pakistan**, Civil Petition No. 842 of 2016.

findings, evidence, and legal reasoning, can be availed<sup>82</sup>.

However, what is unique in Jadhav's case is that there is the benefit of national legislation that seeks to implement the ICJ Jadhav judgment as an international obligation. It remains to be seen whether the 2020 Bill passed by the Pakistani national assembly will suffice for this purpose, in India's opinion, especially when it has been exclusively passed for one person, coupled with India's objections to Pakistani' courts competence to determine international law obligations. While the lack of India's satisfaction may not provide sufficient grounds to state that Pakistan is not complying with the ICJ decision, India may still have an option to approach the ICJ to reinterpret the obligations of Pakistan for effective review and reconsideration<sup>83</sup>. Under Article 60 of the Statute, the ICJ can be requested by a party "in the event of a dispute as to the meaning or scope of the judgment"<sup>84</sup> India will then have to show that there exists a dispute or "difference of opinion"<sup>85</sup> regarding the scope or meaning of the term effective review and reconsideration, including the right of consular access. So, while India understands it to mean unhindered access, Pakistan may have a different interpretation that does not permit access to an Indian lawyer, or a private conversation. Consequently, the question will relate to the interpretation of "consular access" under the VCCR. The travaux préparatoires of article 36 show that this includes permitting the consulate to converse privately with the detained national<sup>86</sup>. At the same time, article 36(2) of the VCCR recognizes that the right to consular access is to be exercised "in conformity with the laws and regulations of the receiving State". Thus, Pakistan may also argue that it has sufficient discretion to decide the method and manner of providing consular access according to its Prison rules<sup>87</sup>.

Alternatively, India may also ask for a reinterpretation of the term fair trial and claim that the enacted legislation does not fulfill the requirements of a fair trial to give full weight to the rights under article 36 of the VCCR. However, it has been noted that for a request for interpretation of a judgment under article 60 of the ICJ Statute, the chances for the construction of the term "fair trial" to be admitted is lower than the chance for interpretation

82 ICJ. **International Commission of Jurists, "military injustice in Pakistan"**, June 2016, accessed at: <https://www.icj.org/wp-content/uploads/2016/06/Pakistan-Military-court-AdvocacyAnalysis-brief-2016-ENG.pdf>

83 ICJ. **For a longer discussion on this aspect see Abhishek Trivedi**, "The ICJ's Jadhav Judgment and Its Implications for Pakistan and India under International Law" in 11 Asian J. of Int. L. (2021) 13-23.

84 UNITED STATES. **Statute of the International Court of Justice**, 26 June 1945 U.S.T.S.993 (entered into force 24 October 1945), art. 60.

85 UNITED STATES. **Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)**, Preliminary Objections (Nigeria v. Cameroon), Judgment, 25 March 1999 [1999] I.C.J. Rep. 31 at 36-7, para.12. < <https://www.icj-cij.org/en/case/94>>

86 UNITED NATION. Summary Records of the Twelfth Session, Yearbook of the International Law Commission 1960 (Vol. I), UN Doc. A/CN.4/SER.A/1960. At 42. < [https://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1960\\_v1.pdf](https://legal.un.org/ilc/publications/yearbooks/english/ilc_1960_v1.pdf)>

87 MITRA, Deviupa. Devirupa MITRA, "India Likely Won't Be Allowed to Speak to Kulbhushan Jadhav in Private. Here's Why" The Wire (22 July 2019) <https://thewire.in/diplomacy/kulbhushan-jadhav-consular-access-icj-india-pakistan>

of the term “consular access”<sup>88</sup>. Nevertheless, Pakistan contested that, The VCCR does not talk about cases that involve the arrest or detention on “political” or “security grounds”. However, considering the turbulent relationship between India and Pakistan and the 2008 Agreement, it forgoes granting consular access. The Agreement supplements and amplifies the provisions of the VCCR. On the contrary, the United States has followed its construction of what is required in the event of a breach of the obligation to inform a foreign national<sup>89</sup>. After VCCR, 1963, at least fifty other bilateral consular treaties were signed between various states, which shows that this is common state practice to address bilateral consular issues. Hence, he concluded that the ICJ failed to consider this aspect while deciding the veracity of the Agreement in this case<sup>90</sup>. With a special focus on Art. 36 (1) (b) of the rights to an arrested foreign national, term “rights” for a foreign national for consular access are discussed. It has been determined that “[t]he right of an individual to communicate with his consular officials is derivative of the sending state’s right to extend consular protection to its nationals,” and therefore the VCCR does not establish “rights of individuals.” Pakistan through multiple note verbales (one of them dated 26 October 2017) to India’s Foreign Ministry, requested assistance in the investigation in the criminal case against Mr. Jadhav, but India failed to co-operate or respond to Pakistan’s requests<sup>91</sup>. All these comply with the United Nations Security Council resolution 1373 (2001).

## CONCLUSION

In cases involving the capture or detention of foreign nationals, it is common for states to try all means at their disposal to rescue their nationals. This becomes even more politically sensitive in the case of India and Pakistan, where government rhetorics routinely alleges each other of sponsoring terrorism and cross-border intervention. The Jadhav case, however, showed the generative possibilities of internationalizing a dispute before the world court that would otherwise have been expected to be settled through bilateral negotiations. The provisional order, instead of simply setting a time limit threshold for ‘urgency’, was successful in creating a fact-specific approach to ‘urgency’ and irreparable harm for granting provisional measures. Secondly, as seen from the exchange of communication between India and Pakistan, there seems to be a clear mismatch of expectations in terms of what would constitute an “effective review and reconsideration” The decision also highlights that geopolitical tensions and diplomatic conduct of the parties will continue to affect the

<sup>88</sup> ABHISHER. Abhishek Trivedi, “The ICJ’s Jadhav Judgment and Its Implications for Pakistan and India under International Law” in 11 Asian J. of Int. L. (2021) 13-23. at p.23.

<sup>89</sup> ABHISHEK, Trivedi. “The ICJ’s Jadhav Judgment and Its Implications for Pakistan and India under International Law” in 11 Asian J. of Int. L. (2021) 13-23. at p. 9.

<sup>90</sup>

<sup>91</sup> Letter dated: January 23, 2017, March 21, 2017, April 10, 2017. Appended According to the Rules of Court under Article 67.

fulfilment of Jadhav's rights under the VCCR. The case serves as a reminder that allegations such as espionage, confused with a political agenda being brought to the world court, are bound to affect the rights of individuals and their access to their legal rights, even those individual rights guaranteed under international law. At the same time, it shows a positive development from the Avena and LaGrand cases, where for the first time, a state's parliament has enacted a law to implement an ICJ decision, showing deference to the court. While the genuineness of the intentions of such state actions may continue to be scrutinized, it affirms the value states now ascribe to the binding character of an ICJ decision and strengthens the rule of international law in a more general sense.

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Recebido em: 22/02/2022

Aprovado em: 04/05/2022