

A COMMENTARY ON THE KULBHUSHAN JADHAV CASE – EXPLAINING THE RULES OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

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The international law doctrine of consular law was articulated from customary international law by international jurists to afford a lawful means by which States could respond to their obligations and violations pertaining to consular access. This paper critically analyses the theoretical value of the law of consular relations as embodied in the Vienna Convention on Consular Relations ('VCCR'), specifically in light of the recent case before the International Court of Justice ('ICJ') involving the detention incommunicado of Indian national, Kulbhushan Jadhav, at the behest of Pakistani authorities. It identifies several key shortcomings that problematise the implementation of the doctrine of consular relations. It subsequently examines the precedents before the ICJ invoking the application of the VCCR to preserve its nationals' due process rights as well as the drafting history of the convention. It uses the same to also analyse the arguments presented by the parties and the decision thereof. It is concluded that the law on consular relations as codified in the VCCR is insufficient and extremely ambiguous in its application, leaving states unwilling to fulfil their obligations under the VCCR as also witnessed in the Kulbhushan Jadhav case. There is a need to remedy this either by further codifying its loose ends or clarifying the meaning of the law. Even though the ICJ had an opportunity to tie these ends in the Kulbhushan Jadhav case, it did not conclusively ascertain the failings of this doctrine and its effect in the international legal community.

TABLE OF CONTENTS

I. Introduction.....	90	A. The Historical Development of the Consular Law and the Current Regime.....	92
II. The Vienna Convention on Consular Relations: A Misshapen Right to Consul?	91		

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B. <i>Shortcomings of the Law on Consular Relations Under the VCCR</i>	96	A. <i>Trial by the Military Court and Ensuing Due Process Rights</i>	116
1. <i>Whether the Treaty Provides for Enforcement of Individual Rights?</i>	98	B. <i>Consideration of Breach of Obligations under the ICCPR</i>	122
a. <i>The Apparent Dichotomy between the ICJ and the Domestic Courts</i>	98	C. <i>The Remedy of “Review and Reconsideration”</i>	125
b. <i>Testing the Integrity of the Prevailing Arguments</i>	101	VI. <i>Rules of Vienna Convention Vis-À-Vis Consular Access in Cases of Espionage</i>	129
2. <i>The Plight of Remedies</i>	105	A. <i>Historical Context of Consular Relations and the Travaux Préparatoires of the VCCR</i>	129
C. <i>Tracing the Step Forward</i>	106	B. <i>Customary International Law & State Practice</i>	131
III. <i>Procedural History of the Kulbhushan Jadhav Case</i>	108	C. <i>2008 Agreement</i>	134
IV. <i>Jurisdictional Challenges Raised by Pakistan</i>	111	VII. <i>India’s Blurred Victory: Tracing the Post-Verdict Development</i>	135
V. <i>Return of Jadhav – An Outlandish Remedy?</i>	115	VIII. <i>Conclusion</i>	140

I. INTRODUCTION

The *Jadhav Case (India v. Pakistan)* (‘Jadhav’) was heard in oral arguments in February, 2019. It is only the third instance where India has litigated a claim before the International Court of Justice (‘ICJ’).¹ The judgment of the Court, a landmark ruling that arrived in mid-July, 2019,² presents a ripe area for discussion of the legal considerations surrounding the dispute. The case raises several unsettled questions of international law. The objective of the paper is to highlight the different elements argued in the case and to analyse the same, having considered the arguments of the parties and the decision of the Court.

The law of consular relations oversees the route for the appointment of consular representatives,³ the duties of the receiving state⁴ towards the foreign defendant⁵ and the rights and immunities exercised by the foreign defendant, the

¹ See *Right of Passage over Indian Territory (Portugal v. India)*, Judgment, April 12, 1960, I.C.J. Rep. 6 (International Court of Justice); *Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, August 18, 1972, I.C.J. Rep. 46 (International Court of Justice).

² *Jadhav (India v. Pakistan)*, Judgment, July 17, 2019, I.C.J. G.L. No. 168 (International Court of Justice) (‘Jadhav Judgment’).

³ A consular representative is an official appointed by the government of one state in the territory of another to look after the welfare and security of its own citizens located in the latter. See generally, Luke T. Lee J.D. & Jon Quigley, *Consular Law and Practice*, 41 (3rd ed., 2008).

⁴ The receiving State is the State to which the consular representative is appointed as an official. See generally, Lee & Quigley, *supra* note 3.

⁵ The defendant may be any citizen of the sending State who has been arrested and detained by the receiving State on allegations, or a subsequent conviction, of a criminal offence punishable in the

sending state⁶ and the consular representatives. Under international law, consular access is governed by the Vienna Convention on Consular Relations ('VCCR') which consolidated and codified the erstwhile customary law on consular access. However, while the code is somewhat comprehensive and attempts to cover most facets of the law governing consular relations, it still suffers from certain ambiguities. There is no clarity in terms of whether it confers an individually enforceable right for the foreign defendant and it fails to provide a framework of remedies to be employed in case of a breach.⁷ Consequently, the treaty experiences irregular enforcement within the domestic courts, which use the ambiguity as an excuse to skirt away from their obligations under the treaty.⁸ Though the ICJ, in various judgments, has tried to ameliorate the position partially, an amendment is required in the treaty itself so as to ensure compliance in the international legal framework.

Against this backdrop, Part II will analyse the law on consular relations and the inherent ambiguity which sparked yet another debate before the ICJ.⁹ In Part III, I will introduce the Jadhav case and give a brief background to the case along with explaining the jurisdictional challenges raised by Pakistan at ICJ in Part IV. Part V, first, will consider the remedy of repatriation as sought for Jadhav by India especially in light of the fact that it has never been granted by the Court. This paper explores the precedents in the *Avena and Other Mexican Nationals (Mexico v. United States of America)* ('Avena') and the *LaGrand (Germany v. United States of America)* ('LaGrand') cases to argue against the possibility of such a remedy under international law. Second, Part V will examine the conduct of Jadhav's trial in Pakistan. Specifically, the paper considers whether there are any rules of international law which govern the assignment and legitimacy of military trials as well as ensure due process rights. Part VI will critically analyse Pakistan's position that the VCCR does not apply in cases of espionage. The paper assesses the customary international law ('CIL') on espionage as an exception to the VCCR. The legality of espionage under international law, thus, would arguably predicate the Court's response to the doctrine of unclean hands,¹⁰ as well as its response to the possibility of the exception claimed by Pakistan. In this context, the paper

latter State. *See generally*, Lee & Quigley, *supra* note 3.

⁶ The sending State is the State of which the consular representative and the defendant are nationals. *See generally*, Lee & Quigley, *supra* note 3.

⁷ Arwa J. Fidahusein, *VCCR Article 36 Civil Remedies and Other Solutions: A Small Step for Litigants but a Giant Leap Towards International Compliance*, Vol.5, Seton Hall Circuit Review, 273 (2008).

⁸ *See* discussion, *supra* Part II.B.1, II.B.2 on "Whether the Treaty Provides for Enforcement of Individual Rights" & "The Plight of Remedies".

⁹ *See* *LaGrand (Germany v. United States of America)*, Judgment, June 27, 2001, I.C.J. Rep. 466 (International Court of Justice) ('LaGrand'); *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, March 31, 2004, I.C.J. Rep. 12 (International Court of Justice) ('Avena').

¹⁰ The doctrine of clean hands dictates that a State which is guilty of illegal conduct may not claim necessary *locus standi* in bringing a claim against another State for a subsequent illegality, given the latter was prompted by the former. *See generally*, Rahim Moloo, *A Comment on the Clean Hands Doctrine in International Law*, 2010 Inter Alia: U of Durham Student LJ, 39 (2010).

considers the choice of remedy granted by the Court after acknowledging Pakistan's breach of VCCR; and the tussle between its jurisdictional instrument and its fear of possible subsequent interference with the domestic administration of Pakistan. Further, Part VII will assess the post-verdict enforcement phase of the case. It essentially aims at highlighting the ambiguity of the judgment in granting India Jadhav's consular access, thereby not making it a complete win for either of the countries. Part VIII, the final part, will offer concluding remarks. It is concluded that ICJ under the garb of procedural inimical tenets has yet again failed to clarify the scope of VCCR and the uncertainties that surround a foreign defendant's right to consular access.

II. THE VIENNA CONVENTION ON CONSULAR RELATIONS: A MISSHAPEN RIGHT TO CONSUL?

The principles governing consular relations between states have been evolving from the past two millennia in the form of CIL.¹¹ The VCCR, a multilateral treaty adopted to streamline the use of consular functions and to prevent the abuse of rights of foreign criminal defendants, codifies the said customary law.¹² It is the first treaty to govern consular relations in the international paradigm and enjoys a wide adherence of a total of 180 signatory States.¹³

Though the treaty, for the most part, has operated satisfactorily for its signatories, it has been facing substantial difficulties and global animosity for erratic enforcement of its provisions, specifically the ones dealing with access requirements and consular notice for quite some time now.¹⁴ The problem arose mainly because of the unprecedented transformation in international travel and immigration patterns over the years.¹⁵ The drafters of the VCCR could not have foreseen how the provisions of the same would operate in light of these shifts in the global paradigm. Mainly, the global community took cognisance of the turmoil caused by the judgment of the ICJ in the Avena and LaGrand cases, both of which found that the United States had dishonoured its obligations under the treaty by denying the foreign nationals their right to consular access. The turmoil manifested itself further with the withdrawal of the United States from the VCCR subsequent

¹¹ Office of the Legal Adviser and Bureau of Consular Affairs, *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, United States Department of State Publication, 42–43 (5th ed., September, 2003) ('Instructions for Consular Notification and Access').

¹² United Nations Conference on Consular Relations, *Commentary to Draft Articles on Consular Relations Adopted by the International Law Commission at its Thirteenth Session*, 7, U.N. Doc. A/CONF.25/16.ADD 1 (April 22, 1963) ('Convention Conference').

¹³ *Id.*

¹⁴ Cindy Galway Buys, *Reflection on the 50th Anniversary of the Vienna Convention on Consular Officials*, Vol.38, Southern Illinois University Law Journal, 57, 63 (2014).

¹⁵ Ivor Roberts (ed.), *Satow's Diplomatic Practice*, 143 (7th ed., 2018).

to the judgment of the ICJ in the Avena case.¹⁶ The recent claim by India in the Jadhav case has forced the international media to pay attention to these problems, which have been simmering since long.

A. *THE HISTORICAL DEVELOPMENT OF THE CONSULAR LAW AND THE CURRENT REGIME*

A foreign criminal defendant's right to consular access and notification is argued to act as a cultural bridge to his due process rights.¹⁷ The fundamental premise of the law governing consular relations is that the accredited consul, by communicating with the foreign defendant, can confirm that the fundamental human rights of the foreign defendant are preserved; and that no bodily or mental harm has occurred.¹⁸ Primarily, this purpose is fulfilled by the rights and obligations enshrined under Article 36 of the VCCR. For convenience, the text of the same is reproduced herein:

“Article 36. Communication and Contact With Nationals Of The Sending State.

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
 - (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
 - (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

¹⁶ Natasha Turak, CNBC News, *US Rejects International Court of Justice Ruling on Iran, Continuing its Isolationist Charge*, October 5, 2018, available at <https://www.cnbc.com/2018/10/05/us-rejects-international-court-of-justice-ruling-on-iran-continuing-its-isolationist-charge.html> (Last visited on January 5, 2020).

¹⁷ Sabina Veneziano, *The Right to Consular Notification: The Cultural Bridge to a Foreign National's Due Process Rights*, Vol. 49(1), Georgetown Journal of International Law, 501–551 (2018).

¹⁸ The United States Department of State, *Foreign Affairs Manual*, 7 Fam 422 (2004).

- (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.”

Thus, Article 36 confers a two-part obligation on its member States. First, it imposes a responsibility upon the receiving States to notify the consulates of the sending State on appeal by the foreign defendant who is arrested or detained. Thereafter, it necessitates the receiving state to give consular representatives physical access, and freedom of communication, to the foreign defendant in custody. This enables the foreign national to be aware of the rights and claims that he is entitled to, as a criminal defendant.¹⁹ Further, it also confers a right upon the consular representatives to visit the foreign defendant being imprisoned or detained. This provision allows for a line of communication between the sending state and the defendant and assists in legal representation. However, each of these rights and obligations shall operate strictly within the domestic legal scheme of the receiving state, provided that the object and purpose of the provisions itself is not defeated by such an operation.

The significance of consular access can be understood from the perspective of the foreign criminal defendant and the government of the sending State. Consular representatives function as guardians by providing the requisite legal and political expertise to assist foreign nationals under the effective control of an alien government.²⁰ This ensures safeguards for the foreign defendant, most of whom are unbeknownst and defenceless against the alien legal framework, against abuse of procedural and substantive due process rights.²¹ Moreover, consular representatives also function as a line of communication between the foreign criminal defendant, the sending state and the family of the defendant. Not only does this open a diplomatic channel between the sending State and the receiving State, with information regarding the physical and mental status reaching both sides, it also

¹⁹ John Quigley, William Aceves & S. Adele Shank, *The Law Of Consular Access: A Documentary Guide* (2010).

²⁰ See Howard S. Schiffman, *Beard and Beyond: The Status of Consular Notification and Access under the Vienna Convention*, Vol.8, *Cardozo J. Int'l & Comp. L.* 27, 32 (2000).

²¹ *Id.*

allows the home state to mitigate feelings of alienation and abandonment among its detained nationals.²² In some cases, such as when a language barrier impedes upon the essential communication between the foreign defendant and the executive or judicial authorities of the receiving state, the consular representative may act as an interpreter for the former.²³ In effect, a consular representative is an extension of the gubernatorial helping hand of the sending State.

Before the VCCR, consular relations between states were governed either by memoranda of understanding or bilateral consular relations treaties.²⁴ Even today, States enter into bilateral treaties for governing consular relations between them as per their tailored requirements. However, there existed no consistent basis for drafting or enforcing these treaties, and they often conflict with one another.²⁵

The international community documented the necessity of codifying the prevailing rules and practices governing consular relations in the 1950s.²⁶ The United Nations Conference on Consular Relations adopted it in 1963, based on a draft made by the International Law Commission ('ILC').²⁷ It came into force three years later on March 19, 1967.²⁸ The drafters disagreed on multiple issues during the codification of this treaty. The main bone of contention was whether Article 36 should contain a mandatory notification requirement²⁹ and consequently impose a higher burden on the receiving state or if it should provide consular access only at the request of the foreign defendant.³⁰ This discussion was significant during the 1960s as the decision could affect the Cold War hostages and the few civilian foreign nationals requiring defenses overseas.³¹ Given the background of the Cold War, the draft prepared by the ILC provided for a mandatory notification

²² See William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, Vol.31 Vand. J. Transnat'l L. 257, 267 (1998).

²³ Ronald L. Hanna, *Consular Access to Detained foreign Nationals: An Overview of the Current Application of the Vienna Convention in Criminal Practice*, Vol.25 S. Ill. U. L. J. 163, 164 (2000).

²⁴ Anthony Bishop, *The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the LaGrand Case?*, Vol.25 Hous. J. Int'l L. 1, 2–4 (2002); Lee & Quigley, *supra* note 3.

²⁵ *Id.*

²⁶ William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, Vol.31 Vand. J. Transnat'l L. 257, 315–317 (1998).

²⁷ Turak, *supra* note 16.

²⁸ Vienna Convention on Consular Relations, *United Nations Treaty Collection, Chapter III: Privileges and Immunities, Diplomatic and Consular Relations, etc.*, Ser. No. 6, 1, available at <https://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20III/III-6.en.pdf> (Last accessed on January 5, 2020).

²⁹ A mandatory notification obligation requires the receiving state to notify the arrest of a foreign criminal defendant to the sending state at a reasonable time after the arrest, regardless of whether a request by the defendant is made in this regard. See generally Veneziano, *supra* note 17.

³⁰ Convention Conference, *supra* note 12, at 4.

³¹ Roberts, *supra* note 15, at 16–19.

requirement.³² Nonetheless, the final treaty under Article 36(b) mandates notification only if the detainee requests the same.³³ This often prejudices the defendant's ability to seek consular access, as the same is dependent on his knowledge and familiarity with the law on consular relations.

The concluded version of the treaty contains most aspects of consular law. It is regarded to be a codification of CIL, which requires conformity from not just the signatories but also the non-signatories.³⁴ It embodies a wide-ranging outline of minimum standards to be maintained for consular relations between countries. It begins by recalling, "consular relations have been established between peoples since ancient times".³⁵ Additionally, it acknowledges the validity of the bilateral and regional treaties that were formulated prior to the codification of the VCCR. Further, two optional protocols were made a part of the treaty: The Optional Protocol concerning Acquisition of Nationality and the Optional Protocol concerning the Compulsory Settlement of Disputes ('Optional Protocol').³⁶

B. *SHORTCOMINGS OF THE LAW ON CONSULAR RELATIONS UNDER THE VCCR*

At first glance, the requirements of Article 36 are concise and self-explanatory. Nonetheless, Article 36 has had the "most tortuous and checkered background" of all the rules under the VCCR.³⁷ As established, the VCCR broadly deals with the rights of consular officials and the logistics of ascertaining consular posts.³⁸ A significant failure of Article 36 is enforcement.³⁹ The primary reason for this failure is that Article 36 recognises the rights of foreign defendants as opposed to the rest of the treaty that confers rights on the state or the foreign government or consular officials.⁴⁰

For instance, Article 35 ensures freedom of communication between the sending state and the consular representative. A violation of this provision

³² Yury A. Kolesnikov, *Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions*, Vol.40 McGeorge Law Review, 180–225 (2008).

³³ Vienna Convention on Consular Relations, April 24, 1963, 500 U.N.T.S. 95, Art. 36 ('VCCR').

³⁴ Lee & Quigley, *supra* note 3.

³⁵ VCCR, *supra* note 33, Preamble at 7.

³⁶ The Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, April 24, 1963, 500 U.N.T.S. 241, Art. 1 ('Optional Protocol') (Providing for an optional mechanism for submitting to the compulsory jurisdiction of the International Court of Justice for all disputes arising out of the interpretation or application of the VCCR).

³⁷ VCCR, *supra* note 33, Art. 36 at 7.

³⁸ Sarah Grey McCroskey, *Expanding the Vienna Convention on Consular Relations: Protecting Children by Protecting Their Parents*, Vol.46(5) Vand. J. Transnat'l L., 1423 – 1449 (2013).

³⁹ VCCR, *supra* note 33, Art. 37 (faces the same problem; however, the discussion on the same is beyond the scope of this paper).

⁴⁰ Cindy Galway Buys et al., *Do Unto Others: The Importance of Better Compliance with Consular Notification Rights*, Vol.21 Duke J. Comp. & Int'l L. 461, 481–86 (2011).

will result in diplomatic repercussions between the countries and is likely to be resolved by the governments of both countries. On the other hand, upon a violation of Article 36, it is possible that the country of the foreign defendant might not even be aware of the same.⁴¹ Due to the lack of a mandatory notification requirement, the obligations under Article 36 only apply to the receiving State when a request for consular access is made by the foreign defendant.⁴² Thus, in a case where the receiving State denies the request of the foreign defendant to be granted his right to consular access, there is a high possibility that the sending State will remain unaware of the arrest and detention of its national by the receiving State.

The difference between Article 36 and the remainder of the treaty leads to inconsistent enforcement of this right, thereby making it a misshapen right. Though it is clear that the VCCR is a valid international multilateral treaty that binds all the ratifying States, it has been shown over the years that the implementation of the VCCR in domestic courts depends on a wide range of additional factors.⁴³ First, in dualist states such as India and Pakistan,⁴⁴ an international treaty becomes enforceable before domestic courts only if the treaty has been incorporated within the domestic laws of the country by an implementing legislation.⁴⁵ Second, in monist States like the US,⁴⁶ an international treaty becomes justiciable in municipal courts only if it is a self-executing treaty,⁴⁷ as opposed to a non-self-executing treaty. This requires that the treaty confer such clear individual rights capable of enforcement in domestic courts.⁴⁸ Third, while conferring of individual rights, the treaty must provide for a definite remedy in cases of violations of the

⁴¹ Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: The International Court of Justice in Mexico v. United States (Avena) Speaks Emphatically to the Supreme Court of the United States About the Fundamental Nature of the Right to Consul*, Vol.36 Geo. J. Int'l L. 1, 2–28 (2004).

⁴² VCCR, *supra* note 33, Art. 36(1)(b).

⁴³ David Sloss & Michael Van Alstine, *International Law in Domestic Courts*, Research Handbook on the Politics of International Law, 79–115 (2017).

⁴⁴ A dualist State is one which requires an implementing legislation for the purposes of incorporating any international treaty within its municipal legal system, thereby making it enforceable by private individuals before domestic courts. For India, *see*, Jolly George Varghese v. Bank of Cochin, (1980) 2 SCC 360; P. C. Rao, *The Indian Constitution and International Law*, 58 (Taxman Publications, 1993). For Pakistan, *see*, 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).

⁴⁵ Sloss & Alstine, *supra* note 43, at 87.

⁴⁶ A monist state, upon ratification of an international treaty, automatically incorporates the same within its domestic legal system. For the US, *see*, 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).

⁴⁷ A self-executing treaty is one which becomes justiciable in a domestic court of law upon ratification of the same, without a need for a subsequent induction into the domestic legislative scheme. These are treaties which directly provide a private enforceable right to an individual as against a member state. *See generally*, Jordan J. Paust, *Self-Executing Treaties*, Vol.82(4) *The American Journal of International Law*, 760–783 (1988).

⁴⁸ Sloss & Alstine, *supra* note 43, at 85.

rights vested.⁴⁹ Lastly, however, as was observed in the Jadhav case, even if the rights and remedies are conferred, the procedural default rules⁵⁰ of the receiving state might defeat the purpose of such rights.⁵¹

Thus, to further the discussion, it is pertinent to discuss the key disparities that surround the enforcement of rights under Article 36 and the ramifications of the same on consular relations in the international legal framework. To this end, reasons for non-enforcement are critically analysed below with special focus on the reasoning adopted by the ICJ in the *Avena* and *LaGrand* case. It also analyses individual decisions of domestic courts of various jurisdictions to highlight the disparity in understanding of consular relations by multiple countries. For any treaty to be successfully adhered to by its ratifying States, it needs to be successfully implemented in the State's domestic legal framework and must be subsequently enforced. As explained below, it is clear that the VCCR is a self-executing treaty. Thereby, it automatically becomes a part of the legal framework of the domestic state. Consequently, ensuring obedience to its international obligations is left upon the state.⁵² As a result, once the treaty becomes law in a country, it is the domestic courts that play the role in ensuring that the rights and liabilities under the law are being adhered to and in this process often augment the understanding of the international law issues. However, in case of VCCR the interpretation of the treaty by domestic courts has only added to the existing confusion

1. Whether the Treaty Provides for Enforcement of Individual Rights?

a. *The Apparent Dichotomy between the ICJ and the Domestic Courts*

The question regarding whether the VCCR confers rights that can be individually enforced, has been an issue that has not been decided uniformly by various courts, resulting in inconsistent understanding of the issue.

On June 27, 2001, in the *LaGrand* case, the ICJ had clarified the position on whether Article 36 confers an individually enforceable right. In that case, the US had convicted two German brothers of murder and attempted bank

⁴⁹ Sloss & Alstine, *supra* note 43, at 103.

⁵⁰ Provisions such as Art. 36(2) of the VCCR mandate that the rights conferred by the treaty must be exercised in conformity with the laws and regulations of the receiving state, provided that the purpose of the conferment of rights is met. This allows the receiving state to take advantage of loopholes while citing its domestic legislative scheme in its defence. *See generally* Veneziano, *supra* note 17, at 529.

⁵¹ Sloss & Alstine, *supra* note 43, at 96.

⁵² Yury A. Kolesnikov, *Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions*, Vol.40 McGeorge Law Review, 180–225.

robbery⁵³ and sentenced them to death⁵⁴ without informing them about their right to consular access and notification under Article 36.⁵⁵ As soon as Germany was made aware of the same, it approached the ICJ and attempted to withhold the execution proceedings against the German brothers till the ICJ had conclusively decided on the merits of the case.⁵⁶ Notwithstanding the Provisional Order passed by the ICJ, the State of Arizona went ahead with the execution of the German nationals.⁵⁷ At the conclusion of the case, the ICJ held that the US had dishonoured its obligations by failing to notify the German nationals of their rights under Article 36. In holding so, the court rejected the argument of the US that the VCCR under Article 36 does not provide any individually enforceable rights.⁵⁸ It stated that the VCCR, to fulfil its purpose, “creates individual rights” for foreign defendants to be notified “without delay” of their right to seek consular access and notification.⁵⁹ The adversaries of the death penalty applauded this decision of the ICJ as with this decision came a significant promise of protection of due process rights of individuals.⁶⁰ On the other hand, advocates of States’ rights criticised this decision, as it was perceived to be an illicit exercise of criminal appellate jurisdiction.⁶¹

Three years later, the ICJ in the Avena case reiterated this position. Similar to LaGrand, this case was brought against the US by Mexico. The latter had claimed that the US had denied consular access to fifty-four of its nationals awaiting execution in the US, thereby breaching their right to consular notification and access under Article 36 of the VCCR.⁶² In deciding the case, the ICJ reasserted its opinion rendered in the LaGrand case that Article 36 bestows individual rights and held that the US had breached the VCCR in cases of fifty-one out of fifty-four nationals.⁶³

About two years after the Avena judgment, Germany’s Federal Constitutional Court held that the constitution of Germany binds the public

⁵³ LaGrand Judgment, *supra* note 9, ¶14 at 3.

⁵⁴ LaGrand Judgment, *supra* note 9, ¶475 at 3; 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).

⁵⁵ *Id.*, 475; Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: The International Court of Justice in Mexico v. United States (Avena) Speaks Emphatically to the Supreme Court of the United States About the Fundamental Nature of the Right to Consul*, Vol.36 Geo. J. Int’l L. 1, 2–28 (2004).

⁵⁶ LaGrand Judgment, *supra* note 9, ¶15 at 3.

⁵⁷ *Id.*, ¶¶479–480.

⁵⁸ *Id.*, ¶490.

⁵⁹ Michael John Garcia, *Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements*, CRS Report for Congress, 12–13 (2004).

⁶⁰ Jennifer Lynne Weinman, *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).

⁶¹ *Id.*

⁶² Avena Judgment, *supra* note 9, ¶¶24–26 at 3.

⁶³ *Id.*, ¶¶53–54.

authorities of Germany to observe the ICJ's construal of the VCCR. This is because Germany had signed the Optional Protocol.⁶⁴ The court ruled that adherence to the Avena decision was a part of their international law obligations, and any deviation from the same could infringe the applicant's constitutional right to a fair process.

Despite the settled position of law, various courts across jurisdictions have erroneously held to the contrary. Ideally, all parties to the VCCR would consider the decision rendered by the ICJ as final.⁶⁵ The reason for the same can be partially attributed to the fact that a lot of ratifying States signed the VCCR's Optional Protocol Concerning the Compulsory Settlement of Disputes ('the Optional Protocol')⁶⁶ which grants jurisdiction to the ICJ for any issues arising due to the breach of the VCCR.⁶⁷ For instance, the Supreme Court of the US in the landmark case of *Medellin v. Texas* ('Medellin') held that in the absence of an implementing legislation to the domestic law, the decision of the ICJ is not binding on the domestic courts of the US.⁶⁸ The court accepted that the judgments rendered by the ICJ in Avena "constitutes an international law obligation on the part of the United States".⁶⁹ Nonetheless, for it to have a binding effect, it examined the United Nations Charter, Optional Protocol, and the ICJ Statute. The court decided that all these are not self-executing and do not hold any value in the domestic courts in the absence of an implementing legislation.⁷⁰ Notably, while examining the Optional Protocol, the Court held that there exists a major distinction between "submitting to the jurisdiction of a court and agreeing to be bound by that decision of the court."⁷¹ Noting the absence of enforcement mechanism or consequences for breach of the ICJ decision on issues relating to VCCR, the court posited that as long as the Optional Protocol "says nothing about the effect of an ICJ decision" on the parties, "the most natural reading [. . .] is that it is a bare grant of jurisdiction."⁷²

Instead, it held that it is the United Nations Charter that creates an obligation for the state to comply with judgments rendered by the ICJ under Article 94.⁷³ Article 94 provides that "each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which

⁶⁴ Peter Heinlein, *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).

⁶⁵ The Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 993, Art. 36; Renata Szafarz, *Compulsory Jurisdiction Of The International Court Of Justice*, 3 (1993).

⁶⁶ Michael John Garcia, *Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements*, CRS Report for Congress, 12–13 (2004).

⁶⁷ Optional Protocol, *supra* note 36, at 7.

⁶⁸ *Medellin v. Texas*, 2008 SCC OnLine US SC 19 :170 L Ed 2d 190 :552 US 491 (2008) ('Medellin').

⁶⁹ *Id.*, ¶1356.

⁷⁰ *Id.*, ¶1357.

⁷¹ *Id.*, ¶1358.

⁷² *Id.*, ¶1358.

⁷³ *Id.*, ¶1358.

it is a party.”⁷⁴ As per the reasoning of the court, the words “undertakes to comply” are understood to imply “a commitment on the part of U.N. Members to take future action through their political branches to comply with an ICJ decision.”⁷⁵ However, it also stated, “where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.”⁷⁶ It stated that the only remedy for a violation of the UN Charter is a referral to the Security Council, which indicates that Article 94 is not constructed to be binding on the domestic courts by itself.⁷⁷ Therefore, by virtue of being non-self-executing, these treaties cannot be used to enforce the Avena decision in the domestic courts.⁷⁸

Over the years, the judgment given by the court in *Medellin* has influenced other judgments in the US, thus having a chilling effect on the implementation of VCCR.⁷⁹ The reasoning adopted by that court was used in the Second⁸⁰ and Eleventh⁸¹ Circuit decisions that refused to provide individual remedy to foreign defendants who sought a claim for violation of their rights under Article 36. The courts place reliance on a specific reference made in *Medellin* in that states, “the background presumption is that international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.”⁸² Thus, it is evident that even the explicit judgments of the ICJ have failed to improve the inconsistent execution of Article 36 in various courts across jurisdictions.

In theory, through its judgments in *LaGrand* and *Avena*, the ICJ has attempted to resolve several issues that have dogged domestic courts while dealing with consular law. It answered whether Article 36 creates an individual right in favour of the foreign defendant;⁸³ if the right capable of being enforced privately;⁸⁴ if the provisional measures pronounced by the ICJ are binding upon the ratifying States;⁸⁵ and if claims under Article 36 can be barred on account of a country’s procedural rules.⁸⁶ Nonetheless, the opinion rendered in these cases leaves more questions unanswered than it attempts to answer. It fails to provide a framework of remedies to be employed in case of a breach, thus rendering the individual right remedy-less. The judgment made by the ICJ in these cases calls for significant

⁷⁴ The Charter of the United Nations, October 24, 1945, 1 UNTS 16, Art. 94(1) (‘UN Charter’).

⁷⁵ *Medellin*, *supra* note 68, ¶1358 at 11.

⁷⁶ *Id.*, ¶491.

⁷⁷ UN Charter, *supra* note 74, Art. 94(2) at 11.

⁷⁸ *Medellin*, *supra* note 68, ¶1358-60 at 11.

⁷⁹ Oona A. Hathaway, Sabrina McElroy & Sara A. Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, Vol.37(1) Yale International Law Journal, 70–71 (2012).

⁸⁰ *Mora v. New York*, 524 F3d 183, 188 (2nd Cir 2008).

⁸¹ *Gandara v. Bennett*, 528 F3d 823, 833–34 (11th Cir 2008).

⁸² *Medellin*, *supra* note 68, ¶1357 at 11.

⁸³ *LaGrand Judgment*, *supra* note 9, ¶77 at 3; *Avena Judgment*, *supra* note 9, ¶40 at 3.

⁸⁴ *Id.*

⁸⁵ *LaGrand Judgment*, *supra* note 9 ¶109 at 3; *Avena Judgment*, *supra* note 9, ¶152 at 3.

⁸⁶ *LaGrand Judgment*, *supra* note 9, ¶91 at 3; *Avena Judgment*, *supra* note 9, ¶133 at 3.

reform in the consular law in the domestic States. The fact that specific questions are still unanswered and demand clarity often demotivates the countries to take in the added effort of addressing these issues comprehensively. As a consequence, domestic courts across jurisdictions differ widely in their willingness to abide by the law laid down by the ICJ. Hence, unless there is a clear enunciation of obligations, rights and remedies in the treaty itself, the law on consular access may continue to remain ambiguous.⁸⁷

b. Testing the Integrity of the Prevailing Arguments

Pursuant to Article 36, any person who is brought into the custody of a foreign country has a “right” to access assistance from a consul representative of his nation.⁸⁸ By its very nature, this is an individual right and, if violated, must evoke a private “right of action”.⁸⁹ Nonetheless, over the years, there have been disagreements among various municipal courts as to whether the VCCR confers individual rights. All this while, these courts have employed various methodologies for adjudicating if treaties give rise to individual rights. In most cases, the courts have employed the textualist approach⁹⁰ by looking at the text of the Convention to determine the original meaning of the language to assess if the statute gives rise to a private cause of action.⁹¹

The proponents of the textualist approach suggests that there is, in fact, no place for a conferment of individual right within Article 36 and the scheme of the VCCR itself.⁹² The said conclusion is arrived as follows: first, the title of the chapter where Article 36 is situated does not mention the individual or private rights of an individual. On the other hand, it is titled, “Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other Members of the Consular Post”.⁹³ Additionally, the beginning words of Article 36, “To facilitate the exercise of consular functions relating to nationals of the sending State[...]” have also been used to show that a broader understanding of Article 36 demonstrates that it does not confer any individual rights.⁹⁴ Lastly, a part of the

⁸⁷ 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).

⁸⁸ Kelly Trainer, *The Vienna Convention on Consular Relations in the United States Courts*, Vol.13, Transnational Law, 227, 233 (2000).

⁸⁹ By right of action, reference is made to the right of the individual to be able to challenge his detainment or sentence on the basis of violation under the VCCR. See discussion *supra* Part II.B.1 on “Whether the Treaty Provides for Enforcement of Individual Rights?”.

⁹⁰ See generally Mia Swart, *Is There a Text in This Court? The Purposive Method of Interpretation and the ad hoc Tribunals*, ZaöRV, 70, 767–787 (2010)

⁹¹ Richard Gardiner, *Treaty Interpretation*, 161 (2nd ed., 2015).

⁹² SitalKalantry, *The Intent-to-Benefit: Individually Enforceable Rights Under International Treaties*, 44 Stanford Journal of International Law, 63 (2008); David J. Bederman, *Medellin’s New Paradigm for Treaty Interpretation*, 102(3) The American Journal of International Law, 531 (2008).

⁹³ VCCR, *supra* note 33, Art. 36 at 7.

⁹⁴ *Id.*, Art. 36

confusion can also be attributed to the Preamble itself. It posits “the purpose of the treaty’s privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.”⁹⁵ These arguments are used to explain that Article 36 is intended to streamlining the role played by an appointed consular representative and explicitly removes out of its scope any conferral of individual rights.

Nonetheless, the application of these arguments can be contested on the following three grounds. First, the initial step to examining a treaty is an examination of the language of the text.⁹⁶ Article 36(b) of the VCCR mainly refers to individuals. It states that the officials of the receiving state must inform the officials of the sending State, without fail, on arrest or detention of the foreign defendant or if a request for the same is made by the same.⁹⁷ Additionally, the text of the article states that the officials of the receiving state “shall inform the person [in custody] concerned without delay” of the rights that are provided to him under the VCCR.⁹⁸ It is clear from the language of Article 36 that the foreign defendant has “a right” to get in touch with his country’s consulate upon being arrested by the authorities of a foreign state. In light of the otherwise clear and unambiguous text of the section itself, it is contrary to the established principles of statutory construction to defer to the general provisions such as the title or the Preamble.⁹⁹

Second, even if the Preamble is referred to,¹⁰⁰ the conclusion attained by adopting the reasoning from the text of the preamble is also flawed. As stated in the Preamble, the objective of the VCCR is to encourage amicability and peace among the states.¹⁰¹ Further, the Preamble mentions that the VCCR does not look at benefitting individuals. It is instead to facilitate consular relations between states.¹⁰² The Vienna Convention on the Law of Treaties (‘VCLT’) provides rules for the interpretation of treaties.¹⁰³ As per Article 31 of the VCLT, an interpretation of the treaty must begin by examining the fundamental understanding of its terms.¹⁰⁴ As noted above, the text of Article 36 proposes to bestow individual rights to a foreign criminal defendant detained in a country that is a party to the

⁹⁵ *Id.*, Preamble.

⁹⁶ The Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 31 (‘VCLT’); J.G.Merrills, *Two Approaches to Treaty Interpretation*, *Aus. Int’l L.*, 55–82 (1968).

⁹⁷ VCCR, *supra* note 33, Art. 36 at 7.

⁹⁸ *Id.*

⁹⁹ Richard Gardiner, *Treaty Interpretation*, 161 (2nd ed., 2015).

¹⁰⁰ VCCR, *supra* note 33, Preamble at 7.

“Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States [...]”

¹⁰¹ *Id.*

¹⁰² Lee & Quigley, *supra* note 3 at 2; *Id.*

¹⁰³ Lori Fisher Damrosch and Sean D. Murphy, *International Law: Cases And Materials* (6th ed., 2014).

¹⁰⁴ Vienna Convention on the Law of Treaties, 1969, United Nations, Treaty Series, Vol. 1155, p. 331 (‘VCLT’), Art. 31.

VCCR.¹⁰⁵ The general language appearing must be understood from the perspective of the more specific language present in the article. Therefore, a reasonable understanding of the text of the Preamble is that it is only intended to clarify that the principles of the VCCR, according privileges and immunities to individuals, are not aimed at benefitting the consular representatives in their individual capacity. The text of the Preamble is not to be read into the specific rights bestowed in Article 36. It is true that pursuant to Article 31(2) of the VCLT while interpreting a treaty, the objective of the same should be considered.¹⁰⁶ Bestowing individual rights upon a foreign criminal defendant would only facilitate friendly relations among States, thus furthering the purpose of the VCLT stated in the Preamble. Nevertheless, a disputation of the above-stated principle can be deemed to exist in the treaty as the Preamble mentions that the objective of the Convention is not to confer any individual rights. Except, there is no need to examine the Preamble as the text of the clear is explicit and unambiguously includes individual rights of foreign defendants.

Lastly, assuming in *arguendo* that Article 36 leads to two possible constructions, in such cases of prevailing doubts, one should follow the well-recognised standard of interpreting treaties liberally.¹⁰⁷ As per the rule of liberal interpretation of treaties, in a situation where a treaty's provision leads to two possible conclusions wherein one tends to restrict the scope and the other expands, then the more liberal interpretation is to be favoured.¹⁰⁸ In this case, an interpretative analysis may lead to two possible conclusions – recognising individual rights of the foreign defendant and ensuring enforceability of the same through the negative sanctions upon breach and designating the obligation as having a directory, rather than mandatory nature, thereby denying any remedial action against the wrongful conduct of a state. Therefore, the courts should recognise the individual rights enforced under Article 36, instead of categorically denying it.

In addition to these arguments, if the interpretation of a treaty under Article 31 does not settle a contradiction in the treaty conclusively, then the treaty can be interpreted as per Article 32 of the VCLT.¹⁰⁹ According to Article 32 of the VCLT, the preparatory works of the VCCR can be examined to ascertain the ambiguity concerning the enforcement of individual rights under Article 36.¹¹⁰ The *travaux préparatoires* of the VCCR can be used to ascertain the real intention of drafters in recognising individual rights under Article 36. The deliberations of the

¹⁰⁵ VCCR, *supra* note 33, Art. 36 at 7.

¹⁰⁶ VCLT, *supra* note 104, Art. 31 at 14.

¹⁰⁷ Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, 361 (2007).

¹⁰⁸ Michael Alstine, *Dynamic Treaty Interpretation*, Vol.146, University of Pennsylvania Law Review, 687–793 (1998); Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, Vol.48, Harvard Law Rev 748 (1935); *Bacardi Corp. of America v. Domenech*, 1940 SCC OnLine US SC 128 :85 L Ed 98 : 311 US 150, 163 (1940).

¹⁰⁹ VCLT, *supra* note 104, Art. 32 at 14.

¹¹⁰ *Id.*

ILC, which had taken charge of framing the draft articles to act as a basis for the negotiations at the Convention Conference, had an intention to focus only on the “*consul’s rights*”.¹¹¹ This is often used to argue that when states ratified the VCCR, their intention was not to confer any individual rights. However, at the drafting stage, while negotiating for the text of Article 36, it was suggested by the delegate of the United States at the Convention Conference that the consular notification be made at the application of the foreign defendant so as to “*to protect the rights of the national concerned*.”¹¹² During the treaty notification, it was recognised by several nations, including the US, that under Article 36, the right of consular access and notification was considered to be a right of the foreign defendant.¹¹³ This further strengthens the supposition that Article 36 can be read to contain the rights of individuals. In addition to this, the intention of the drafters at the ILC is accurate only to the extent that it is difficult to pinpoint their exact intention.¹¹⁴ The fact that the final intention is the one displayed by the delegates at the Convention Conference weakens the unclear intention of the drafters at the ILC. This indicates that while interpreting Article 36, one should prefer the intention evidenced by the drafting history as against the ratification history of the treaty.

Therefore, once one forsakes the flawed assumption that there exists a straight-out proscription on enforceable individual rights in treaties, the text of Article 36 noticeably and unequivocally provides for such rights which, as the foregoing analysis establishes, are individually enforceable.

2. The Plight of Remedies

Mere recognition of the presence of an individual right under Article 36 is not sufficient to fill all the gaps for effective enforcement of consular laws.¹¹⁵ Despite the judgments of the ICJ in the *LaGrand* and *Avena*, there still exist issues hindering enforcement of rights under Article 36. This gap concerns the availability of appropriate remedy to be granted on breach of its obligations under Article 36. The failure of Article 36 to lay down an explicit remedy on violation of rights raises several questions. Does the denial of consular access lead to dismissal of all charges against the infringed foreign defendant, or is it sufficient for the domestic court to issue an apology and an undertaking to be more careful in the future while safeguarding consular access? This prevalent confusion is used as an excuse by multiple courts in discarding claims raised for breach of obligations under Article 36.¹¹⁶ The same is not surprising, as the courts are not left with a lot of options

¹¹¹ Instructions for Consular Notification and Access, *supra* note 11, 42–43 at 4.

¹¹² Convention Conference, *supra* note 12, at 4.

¹¹³ *Id.*

¹¹⁴ Instructions for Consular Notification and Access, *supra* note 11, 42–43 at 4.

¹¹⁵ Sarah Grey McCroskey, *Expanding the Vienna Convention on Consular Relations: Protecting Children by Protecting their Parents*, Vol.46(5), Vand. J. Transnat’l L., 1423–1449 (2013).

¹¹⁶ See discussion *supra* Part II.B.1.a on “The Apparent Dichotomy Between the ICJ and Domestic Courts”.

when a multilateral treaty laying down international obligation does not prescribe for a remedy on breach. There is no threshold for courts to ascertain a conclusive proportionate remedy, thereby only leading to further ambiguity as the courts are forced to locate a remedy in a treaty where there exists none. On the other hand, if the breach is a violation of municipal constitutional safeguards, then the courts often adopt the recourse as is provided in their respective constitutions.

Even though Article 36 does not provide any clear remedy, it nonetheless mandates that the laws and regulations of the receiving state, “must enable full effect to be given to the purposes for which rights are intended.”¹¹⁷ The ICJ in the two distinct cases brought before it against the US, the LaGrand, and the Avena has interpreted this phrase.¹¹⁸

In both the LaGrand and the Avena case, the ICJ unequivocally held that the US had violated its obligations under Article 36 in failing to inform the foreign defendants of their right to consular access.¹¹⁹ With respect to the remedy in the LaGrand case, the Court had commented on the steps taken by the US (one of the steps was the issuance of an apology) to assure compliance with the obligations laid in the VCCR for future purposes.¹²⁰ The ICJ had posited that for future cases, “*an apology would not suffice*”.¹²¹ Particularly, it concluded that for any future breaches,

“it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights outlined in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.”¹²²

Further, in the Avena case, while spelling out the remedy for breach, the ICJ again reiterated that it was an obligation of the US “to permit review and reconsideration”.¹²³ Nevertheless, in this case, the ICJ placed the burden of performing this task on the domestic courts of the US as against the executive branch.¹²⁴ Additionally, it emphasised on the effectiveness of the “review and reconsideration”.¹²⁵ It is thereby obligating the courts to “take account of the violation of the rights outlined in the Convention” and ensure a thorough examination of the breach and the ramifications of the same in terms of the prejudice caused in

¹¹⁷ VCCR, *supra* note 33, Art. 36.

¹¹⁸ Avena Judgment, *supra* note 9, ¶¶60, 65 at 3; LaGrand Judgment *supra* note 9, ¶514 at 3.

¹¹⁹ LaGrand Judgment, *supra* note 9, ¶490, at 3.

¹²⁰ *Id.*, ¶¶511–513.

¹²¹ *Id.*, ¶¶511–513.

¹²² *Id.*, ¶514.

¹²³ Avena Judgment, *supra* note 9, ¶¶60–66 at 3.

¹²⁴ *Id.*

¹²⁵ *Id.*

the “review and reconsideration” process. Further, it asserted that the review and reconsideration should not only be of the sentence but also the conviction.¹²⁶

Regrettably, despite this clarification, ambiguity persists with respect to the remedies afforded in case of breach of obligations. Some questions that merit explanations are – what are the possible factors to take into account during the process of “review and reconsideration”? On what side does the burden of proof lie? What is the amount of prejudice that is to be proven before granting a remedy to the defendant? On finding the prejudice, what shall constitute the remedy? Despite these issues raised in multiple cases, the ICJ has failed to determine the answer to these questions conclusively.¹²⁷

C. TRACING THE STEP FORWARD

After examining the background of Article 36, it is evident that there exist several issues regarding its enforcement in the domestic courts. For claiming such relief under Article 36, an aggrieved individual has to prove that the treaty is self-executing or is a part of the ratifying state’s domestic law, in a monist and dualist state respectively. It has to persuade the court further that rights granted are capable of individual enforcement and to point at the specific remedy requested for violation subsequently. Such a cumbersome process more often than not disentitles the defendant from exercising its rights under Article 36. The problem of enforcement of Article 36 extends beyond domestic courts to claims raised before the ICJ as well. The debate surrounding Article 36 has emerged once again with the judgment of the ICJ in the Jadhav case. It is evident from the above discussion that the law on consular access and notification under the VCCR is not explicitly clear. Having examined various judgments of the ICJ that conclusively laid the same position, there still are doubts with regard to the remedy of consular access. These doubts are used by the member states to depart from their obligations prescribed under the treaty.

Given the inherent ambiguity and the narrow scope of its safeguards coupled with the lack of an appropriate enforcement mechanism, the VCCR fails to fulfil its purpose of protecting foreign nationals. The most efficient method of remedying these shortcomings is to amend the VCCR. Even though the ICJ has taken the position that the treaty does confer individually enforceable rights, the US, for instance, no longer accepts the jurisdiction of the ICJ and denies acknowledging rights that are individually enforceable except when the language of the text provides for the same expressly. The most efficient way to refute the position taken by the US is to amend the text of the treaty to provide for rights that are individually enforceable explicitly.

¹²⁶ *Id.*, ¶65.

¹²⁷ *Id.*, ¶66.

The current language of the treaty is contentious, particularly in light of the text of the Preamble and the title to Article 36. More effective enforcement of the treaty can be attained if the treaty is amended to plainly state that it does confer individual rights and if it clearly lays down the remedy for its breach. This shall eliminate the scope of countries arriving at their independent interpretation of treaty as against accepting the standard as put by the ICJ.

The amended text does not necessarily have to specifically lay down the remedy to be employed on breach of Article 36. Rather, it could just lay down some meaningful standard of remedy, for instance, the *Avena* test of “review and reconsideration”.¹²⁸ It could serve as a compromise against a command of the law. The point is to avoid the possibility of leaving it entirely at the discretion of the ratifying States to prescribe a remedy for them. This clarity in terms of a broader remedy also allows for the flexibility of defining a remedy and constructs the amendment to be more palatable to the ratifying States.

Amending the VCCR would allow the legislative branch to communicate with the judicial branch clearly. The domestic courts have been circumventing their obligations under the VCCR by refusing to read a right or a remedy within the text of Article 36 in the absence of a plain language. The States would undoubtedly have the choice of not ratifying the amendment. Still, at least an amendment would ensure that the ratifying states comply with the terms and are disabled from hiding behind the ambiguous language. Any State by not signing the amendment would make it evident that it is denying affording any remedy for breach of Article 36, instead of refusing the same due to a divergence of opinion in interpreting the treaty. This would also build more significant diplomatic and political pressure, as it would force the states that are denying providing individual remedies to be more overt and categorical about their choice.

III. PROCEDURAL HISTORY OF THE KULBHUSHAN JADHAV CASE

On May 8, 2017, India filed a case before the ICJ against Pakistan for purported violations of Article 36 of the VCCR.¹²⁹ India alleged that Pakistan had illegally detained Jadhav, an Indian national. Jadhav was executed by the military court in Pakistan and was sentenced to death on charges of espionage.¹³⁰ India’s main claim was with respect to Pakistan’s obligations under Article 36 of the VCCR. It submitted that pursuant to Article 36, Jadhav had a right to be informed

¹²⁸ *Id.*

¹²⁹ Priya Pillai, *Opinio Juris, A Primer on the Jadhav Case at the International Court of Justice*, July 17, 2019, available at <http://opiniojuris.org/2019/07/17/a-primer-on-the-jadhav-case-at-the-international-court-of-justice/> (Last visited on May 22, 2020).

¹³⁰ *Id.*

that he had a right to have Indian consular authorities notified “without delay” of his detention at any time prior to his conviction by the military court.¹³¹

The circumstances of the case, as presented by both the parties, are contradictory, thus adding to the difficulty of the ICJ in deciding the case. For instance, even with respect to origin of dispute there was no clarity. India claimed that Jadhav is a retired military officer and was conducting business activities at the Iran-Pakistan border when he was kidnapped by Pakistan.¹³² Juxtaposed to this, Pakistan argued that Jadhav was in possession of illegal passports that he was attempting to use to crossover into the Pakistani border.¹³³ Nonetheless, both India and Pakistan agreed that Jadhav was in Pakistan’s custody since March 3, 2016.¹³⁴ The Court chose to just look at facts that it considered were relevant and did not get into ascertaining all the factual claims raised by the Parties.¹³⁵

On March 25, 2016, Pakistan approached the High Commissioner of India in Pakistan and presented a confessional video of Jadhav in which he purportedly admitted of his engagement in acts of espionage and that he was a part of India’s Research and Analysis Wing (‘RAW’).¹³⁶ As agreed by both the parties, it was through this video that Jadhav’s arrest was made public.¹³⁷ The Court noted that the circumstance in which the confession was recorded was unclear.¹³⁸

Between March 25, 2016 and October 2017, India made multiple requests to Pakistan for gaining consular access to Jadhav. The court noted, “at least until 9 October 2017, India sent more than ten Notes Verbales in which it identified Mr. Jadhav as its national and sought consular access to him.”¹³⁹ In fact, in the annexure to its counter memorial, Pakistan produced nineteen such requests made by India as evidence.¹⁴⁰

On July 22, 2016, Jadhav had purportedly made a confessional statement that was recorded before the relevant magistrate.¹⁴¹ As Pakistan’s claims, the confessional statement was made in accordance with law, which required the

¹³¹ Freya Baetens, EJIL:Talk!, *The International Court of Justice Renders its Judgment in the Jadhav Case (India v. Pakistan)*, July 18, 2019, available at <https://www.ejiltalk.org/the-international-court-of-justice-renders-its-judgment-in-the-jadhav-case-india-v-pakistan/> (Last visited on May 22, 2020).

¹³² Jadhav (India v. Pakistan), Memorial of India, September 13, 2017, I.C.J. G.L. No. 168, ¶57 (‘Memorial of India’).

¹³³ Jadhav (India v. Pakistan), Counter-Memorial of Pakistan, December 13, 2017, I.C.J. G.L. No. 168, ¶23 (‘Counter-Memorial of Pakistan’).

¹³⁴ *Id.*, ¶32; Memorial of India, *supra* note 132, ¶6 at 18.

¹³⁵ Jadhav Judgment, *supra* note 2, ¶20 at 2.

¹³⁶ *Id.*, ¶22.

¹³⁷ Memorial of India, *supra* note 132, ¶6; Counter-Memorial of Pakistan, *supra* note 133, ¶25 at 18.

¹³⁸ Jadhav Judgment, *supra* note 2, ¶22 at 2.

¹³⁹ *Id.*, ¶23.

¹⁴⁰ Counter-Memorial of Pakistan, *supra* note 133, at 18.

¹⁴¹ *Id.*, ¶41.

magistrate to ensure that the same was without any inducement or pressure.¹⁴² The trial against Jadhav began in the military court on September 21, 2016 on the basis of a First Information Report¹⁴³ ('FIR') and a supplementary FIR filed subsequently.¹⁴⁴ On January 2, 2017, Pakistan sent a letter to the United Nations informing about Jadhav's arrest and India's intention of destabilising Pakistan.¹⁴⁵

On January 23, 2017, Pakistan had contacted Indian High Commissioner with a Request for Mutual Legal Assistance ('MLA Request').¹⁴⁶ Along with the MLA Request, Pakistan had sent a copy and relevant details of the illegal passport that they procured from Jadhav.¹⁴⁷ Through this, Pakistan had sought Indian government's help in procuring further evidence and material to aid in investigation of criminal charges against Jadhav.¹⁴⁸ Despite multiple requests, India did not substantively respond to Pakistan's request. However, it is to be noted that there was no Mutual Legal Assistance Treaty ('MLAT') in place between the parties. This fact was not disputed by Pakistan.¹⁴⁹ India, on the other hand, argued that it was Pakistan who had not responded to India's request for concluding a MLAT and in the absence of the same, it cannot now claim a right based on its denial.¹⁵⁰ Pakistan had relied on United Nations Security Council ('UNSC') Resolution 1373 which was enacted in the aftermath of terrorist attacks of 9/11, that mandates parties to assist in criminal investigations in cases of terrorism even in the absence of bilateral treaties or MLATs.¹⁵¹ It submitted that India cannot claim to seek its rights under international law after failing to fulfil its obligations under international law. Interestingly, Pakistan noted that it was willing to grant consular access to Jadhav, however, in light of India's failure in adhering to the MLA Request, thereby breaching international obligations, it has had no option but to reject India's request of Jadhav's consular access.¹⁵² On March 21, 2017, while responding to one of India's request for consular access, Pakistan noted that India's request would be observed "in the light of Indian side's response to Pakistan's request for assistance in investigation process and early dispensation

¹⁴² *Id.*, ¶41.

¹⁴³ *Id.*, ¶45.

¹⁴⁴ Jadhav Judgment, *supra* note 2, ¶24 at 2.

¹⁴⁵ Counter-Memorial of Pakistan, *supra* note 133, ¶50.

¹⁴⁶ A request for mutual legal assistance is a precursor to a Mutual Legal Assistance Treaty, which is an agreement between two or more nations for the purposes of promoting international cooperation in enforcing civil and criminal laws. *See generally* Clive Nicholls et al., *The Law of Extradition and Mutual Assistance*, 61 (3rd ed., 2013).

¹⁴⁷ Counter-Memorial of Pakistan, *supra* note 133, ¶73 at 18.

¹⁴⁸ Counter-Memorial of Pakistan, *supra* note 133, ¶52 at 18.

¹⁴⁹ Jadhav (India v. Pakistan), Verbatim Record, February 18, 2019, I.C.J. G.L. No. 168, ¶177

¹⁵⁰ Memorial of India, ¶587; Jadhav (India v. Pakistan), Verbatim Record, February 18, 2019, I.C.J. G.L. No. 168, ¶177.

¹⁵¹ S.C. Res. 1373, ¶2(f), U.N. Doc. S/RES/1373 (September 28, 2001):

"2. Decides also that all States shall: [...] (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings [...]."

¹⁵² Counter-Memorial of Pakistan, *supra* note 133, ¶60 at 18.

of justice".¹⁵³ As a reply to the same, on March 31, 2017, India noted that Jadhav's consular access is important in order to fulfil Pakistan's request, as the same will help in understanding the circumstances and facts of his detention.¹⁵⁴

Even if one were to assume that India had, in fact, breached its international obligation, Pakistan's reaction to the whole situation in turn raises several pertinent questions of international law. Is a state's obligation under Article 36 of VCCR of an unqualified nature? Can a state use another state's breach of international obligations as justification for its own breach? Is providing mutual legal assistance ('MLA') in the absence of any MLAT a *sine qua non* for gaining consular access? Even in the presence of a binding MLAT, can consular access be refused just because a state has failed to aid in criminal investigations? It is pertinent to note that as per the law of State Responsibility for Internationally Wrongful Acts, the wrongfulness of an act of non-compliance with an international obligation may only be precluded, *inter alia*,¹⁵⁵ if the same is undertaken as a countermeasure.¹⁵⁶ While Pakistan did not purport that its actions were adopted as a countermeasure,¹⁵⁷ either a retorsion or a reprisal,¹⁵⁸ it posited that India's non-compliance with the MLA Requests was one of the reasons for why it considered that India had approached the Court with unclean hands.¹⁵⁹ Hence, without arguing that its actions were taken as countermeasures to ensure the concurrent compliance on India's part for its own international obligations, Pakistan would still be committing an internationally wrongful act by breaching its own treaty obligations. Quite apart from these controversial issues, is the ICJ's unwillingness to provide answers to these questions. In its forty-four-page judgment, the Court barely even discussed the relationship between one state's obligation of providing MLA and other State obligation of providing consular access. Though the Court noted that a State's obligations under Article 36 VCCR are unconditional, it failed to provide a rationale or address the link between MLAT requests and/or other international obligations and a State's obligation to provide consular access.

On April 10, 2017, a press release published by Pakistan's Inter-Services Public Relations ('ISPR'), conveyed that Jadhav had been tried, convicted

¹⁵³ *Id.*, ¶59.

¹⁵⁴ Memorial of India, *supra* note 132, ¶56 at 18.

¹⁵⁵ Responsibility of State for Internationally Wrongful Acts, G.A. Res. 62/61 U.N. Doc. A/61/62 (January 8, 2008), Chapter V (stating the circumstances precluding wrongfulness).

¹⁵⁶ *Id.*, Art. 22.

¹⁵⁷ Countermeasures may be defined as the conduct adopted by injured states as a response to the internationally wrongful conduct of another state. *See generally* Federica Paddeu, Justification and Excuse in International Law: Concept and Theory of General Defenses, 225 (CUP, 2018).

¹⁵⁸ Retorsions, a subset of countermeasures, may be defined as lawful measures taken against a State as a response to an internationally wrongful act committed by that state. *See generally* Peter Malanczuk, Akehurst's Modern Introduction to International Law, 4 (Routledge, 7th ed., 1997).

¹⁵⁹ Reprisals, another subset of countermeasures, may be defined as the conduct of a state which is taken in derogation of a subsisting obligation, but is justified as a necessary and proportionate response to an internationally wrongful act committed by the state against which the countermeasure is taken. *Id.*

and has been sentenced to death by Pakistan's military court.¹⁶⁰ On the very same day, India received another *Note Verbale* from Pakistan stating that India's request for consular access will be considered only if India responds to its MLA request.¹⁶¹ India replied on April 10, 2017 itself pointing that Pakistan's act of giving such offers after conveying the news of Jadhav's death sentence "underlines the farcical nature of the proceedings and so-called trial by a Pakistan military court martial"¹⁶² and if the same was executed, India "will regard it as a case of premeditated murder".¹⁶³

IV. JURISDICTIONAL CHALLENGES RAISED BY PAKISTAN

In the backdrop of Jadhav's death sentence without any consular access, on May 8, 2019, India filed a case in the ICJ seeking an order on provisional measures.¹⁶⁴ India requested the Court to order Pakistan to not act in a way that would prejudice its rights. This, India claimed, included an order staying Jadhav's execution till the final judgment of the Court is out.¹⁶⁵ It also requested the Court to order Pakistan to report all actions it takes in pursuance of Jadhav's arrest.¹⁶⁶

India based the jurisdiction of the Court on Article 36(1) of the Statute of the Court,¹⁶⁷ which was applicable by virtue of the ratification of both states to the Optional Protocol.¹⁶⁸ The Optional Protocol provided for compulsory jurisdiction upon the Court for disputes arising out of the interpretation or application of the Convention.¹⁶⁹ It further pointed out that the mechanism for invoking jurisdiction under Article 36(1) was independent of declarations made under Article 36(2)¹⁷⁰ of the Statute.¹⁷¹ Thus, India restricted the jurisdiction of the Court to the application and interpretation of the Convention.

¹⁶⁰ Memorial of India, *supra* note 132, ¶58 at 18.

¹⁶¹ Memorial of India, *supra* note 132, ¶59 at 18.

¹⁶² Memorial of India, *supra* note 132, ¶60 at 18.

¹⁶³ Counter-Memorial of Pakistan, *supra* note 133, ¶67 at 18.

¹⁶⁴ Jadhav (India v. Pakistan), Application Instituting Proceedings, May 8, 2017, I.C.J. G.L. No. 168 ('Application Instituting Proceedings').

¹⁶⁵ *Id.*, ¶60.

¹⁶⁶ *Id.*

¹⁶⁷ Art. 36(1) of the Statute of the Court provides for the submission of a dispute for the purposes of adjudication by the ICJ *via* a special agreement, i.e., an agreement to resolve a specific legal dispute before the ICJ, or a compromissory clause given within a specific treaty to which both states are party. *See generally* Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 787 (3rd ed., 2019).

¹⁶⁸ Memorial of India, *supra* note 132, ¶32 at 18.

¹⁶⁹ Optional Protocol, *supra* note 36, Art. 1 at 6.

¹⁷⁰ Art. 36(2) of the Statute of the Court provides for the submission of a dispute for the purposes of adjudication by the ICJ *via* a declaration of compulsory jurisdiction of the ICJ when any legal dispute arises between the two nations. The nature of legal disputes which may be subjected to a compulsory jurisdiction of the ICJ are listed in Art. 36(2-5). *See generally* Zimmermann, *supra* note 167.

¹⁷¹ Memorial of India, *supra* note 132, ¶33 at 18.

India also pleaded that the Court had jurisdiction to examine the compliance of the actions of domestic courts in light of international law, as was held by the Court in the *Avena* case.¹⁷² It noted that the Court also had the authority to determine an obligation to make reparation once it was established that there had been a breach of the Convention itself.¹⁷³ Thus, the Court, by virtue of Article 36 of the Convention, could delve into the question of whether ‘due process’ standards in international law were accorded to Jadhav, synonymous to those enshrined under Article 14 of the International Covenant on Civil and Political Rights (‘ICCPR’).¹⁷⁴

India further noted that the mention of the 2008 Agreement by Pakistan had no bearing on the jurisdiction, since even the issues relating to the interplay of the Convention and the 2008 Agreement would involve an interpretation of the Convention.¹⁷⁵ Thus, the Court would nonetheless have jurisdiction under Article 36(1) of the Statute of the Court read with Article 1 of the Optional Protocol.

As is the practice of the Court, even in this case, it decided very quickly on the provisional measures order. In response to India’s claim, the ICJ on May 18, 2017 issued a binding order on provisional measures staying the execution of Jadhav pending a final ICJ ruling.¹⁷⁶ In its order, the Court observed that it had *prima facie* jurisdiction over the case in light of the Optional Protocol.¹⁷⁷

Pakistan had raised three main arguments militating against the Court’s exercising jurisdiction. First, it claimed that India could not seek a claim at the ICJ, as the same would amount to an abuse of process.¹⁷⁸ Pakistan relied on Article I-III of the Optional Protocol as per which the Parties are required to exhaust other methods of dispute resolution before approaching the Court.¹⁷⁹ Pakistan argued that this exhaustion of other remedies is a precondition under the VCCR for a dispute to be argued before the Court.¹⁸⁰ Nonetheless, the ICJ rejected this argument. In doing so it placed reliance on *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (‘Tehran Hostages’) case wherein it was held that the VCCR does not lay down any “precondition of the applicability of the precise and categorical provision establishing compulsory jurisdiction of the court”.¹⁸¹ Further, the Court noted that pursuant to Article II and III of the Optional Protocol the process of arbitration and conciliation is only a substitute for recourse to the Court and the parties may agree if they wish resort to

¹⁷² *Avena* Judgment, *supra* note 9, ¶28, ¶34 at 3.

¹⁷³ Memorial of India, *supra* note 132, ¶38 at 18.

¹⁷⁴ *Id.*, ¶39, ¶40.

¹⁷⁵ *Id.*, ¶46.

¹⁷⁶ Jadhav (India v. Pakistan), Order on Provisional Measures, May 18, 2017, I.C.J. G. L. No. 168.

¹⁷⁷ *Id.*, ¶15.

¹⁷⁸ Counter-Memorial of Pakistan, *supra* note 133, ¶142.

¹⁷⁹ Optional Protocol, *supra* note 36, Arts. 1–3.

¹⁸⁰ Counter-Memorial of Pakistan, *supra* note 133, ¶143.

¹⁸¹ Jadhav Judgment, *supra* note 2, ¶47 at 2.

the same.¹⁸² Therefore, the Court posited that India's claim before the Court does not amount to an abuse of process and India is under no obligation to consider other dispute resolution mechanisms before approaching the Court.

With respect to its second opposition to the admissibility of India's application, Pakistan claimed that it is an abuse of rights, as India has not acted in good faith. Primarily, Pakistan based this objection on two grounds. First, India's failure to assist in the criminal investigation pertaining to Jadhav in pursuance of the MLA request, and second, the alleged ambiguity with respect to Jadhav's nationality and the possession of illegal passports.

Pakistan argued that since India has failed to produce Jadhav's "actual passport in his real name", it has consequently not established Jadhav's nationality, which is a pre-requisite for seeking consular access to Jadhav under the VCCR.¹⁸³ It noted that the passport retrieved from Jadhav, at the time of his arrest, was an authentic Indian passport bearing the name "Hussein Mubarak Patel".¹⁸⁴ Pakistan emphasises on the inherent ambiguity associated with the identity of "*Hussein Mubarak Patel*" and Jadhav's ability to procure a passport in that name.¹⁸⁵ It alleges that India by granting Jadhav a "false cover name authentic passport" has violated the UNSC Resolution 1373 (2001) and other counter-terrorism resolutions.¹⁸⁶ This, as per Pakistan's submissions, is even more problematic in light of the fact that India has failed to verify his real identity or authenticate his passport.¹⁸⁷

Pakistan's recourse to questioning the nationality of Jadhav presents an inherent dichotomy evidenced from the contradictions in its conduct before the institution of the case and its arguments after.¹⁸⁸ India submitted that Pakistan has always regarded Jadhav to be of Indian nationality.¹⁸⁹ Pakistan has demonstrated the same in various ways including diplomatic exchanges where Pakistan alleged Jadhav's association with RAW and when Pakistan sought India's assistance in criminal investigation. In light of the same, India posited that there was not any need for it to corroborate Jadhav's nationality.

The Court agreed that Pakistan's conduct prior to the institution of the case demonstrates Pakistan's acceptance of Jadhav being an Indian national.¹⁹⁰ Further, it concluded that the relief sought by India couldn't be denied on the basis

¹⁸² *Id.*, ¶47.

¹⁸³ *Id.*, ¶52.

¹⁸⁴ *Id.*, ¶112.

¹⁸⁵ Counter-Memorial of Pakistan, *supra* note 133, ¶110 at 18.

¹⁸⁶ Jadhav Judgment, *supra* note 2, ¶52 at 2.

¹⁸⁷ Counter-Memorial of Pakistan, *supra* note 133, ¶179 at 18.

¹⁸⁸ Jadhav Judgment, *supra* note 2, ¶53 at 2.

¹⁸⁹ Memorial of India, *supra* note 132, ¶65 at 18.

¹⁹⁰ Jadhav Judgment, *supra* note 2, ¶56 at 2.

that India refused to assist in criminal investigations or that its conduct breached UNSC Resolution 1373 (2001) and other resolutions.¹⁹¹

Lastly, Pakistan argued that by virtue of doctrine of unclean hands and the principles of *ex turpi causa non oritur actio* India should not be allowed to invoke the jurisdiction of the Court. It relied on Jadhav's confession, which as per its claim confirms Jadhav's involvement in acts of espionage or spying in furtherance of terrorism.¹⁹² Further, it contended that Pakistan's denial in granting consular access to Jadhav is a consequence of India's breach of its *erga omnes* obligations¹⁹³ including the obligations contained in UNSC Resolution 1373.¹⁹⁴ To further establish its claim, Pakistan observed the Permanent Court of Justice ('PCIJ') decision in the *Factory at Chorzow (Germany v. Poland)* ('Chorzow Factory') case wherein it was held that "one Party cannot avail himself of the fact that the other has not fulfilled some obligation...if the former Party has by some illegal act prevented the latter from fulfilling the obligation in question".¹⁹⁵ It therefore submitted that India should not be allowed to take recourse for its own illegal acts through the ICJ.

In response to the same, India submitted that a state's obligations under Article 36 are unconditional admitting of no exceptions. Therefore, Pakistan cannot place reliance on the above to skirt away from its obligations under the VCCR.¹⁹⁶ The Court agreed with India's reasoning. It noted that in the case concerning *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* ('Iranian Assets'), it was held that "even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility".¹⁹⁷ Further, in response to Pakistan's reliance on the Chorzow Factory case, the Court observed that as per the same case, Pakistan has an obligation to show how India through its allegedly wrong actions may have prevented Pakistan from fulfilling its obligations under the VCCR.¹⁹⁸ The Court noted that Pakistan has failed to observe the same and therefore cannot avail of the principle.

Therefore, the Court rejected the three jurisdictional challenges posed by Pakistan and by drawing its jurisdiction from the Optional Protocol to the VCCR; it admitted India's application.

¹⁹¹ *Id.*, ¶57.

¹⁹² Counter-Memorial of Pakistan, *supra* note 133, ¶218.3 at 18.

¹⁹³ Obligations *erga omnes* are those which one state owes to every other state in the world. These may be distinguished from obligations *erga omnes partes*, which are those owed by one state party to a treaty to another. *See generally* Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law*, 97 (2009).

¹⁹⁴ Counter-Memorial of Pakistan, *supra* note 133, ¶218.6 at 18.

¹⁹⁵ *Id.*, ¶191.

¹⁹⁶ Memorial of India, *supra* note 132, ¶17 at 18.

¹⁹⁷ Jadhav Judgment, *supra* note 2, ¶61 at 2.

¹⁹⁸ *Id.*, ¶63.

V. RETURN OF JADHAV – AN OUTLANDISH REMEDY?

In the ICJ, India had primarily prayed for the return of Jadhav, a remedy which has never been granted by the Court. In Part IV of the paper, I have analysed the precedents in the *Avena* and *LaGrand* case.¹⁹⁹ As observed, in the absence of any remedy prescribed by the VCCR, the ICJ had allowed for “review and reconsideration”²⁰⁰ of the sentence of foreign criminal defendants as a remedy in response to the countries’ request for restoring of status quo thereby vacating the conviction and sentence.²⁰¹ A similar conclusion was arrived at in the *Jadhav* case too.

The Court based its reasoning on two grounds. First, by stating that even though Article 14 of the ICCPR bestows on everyone the right to fair trial, the court’s jurisdiction is limited to obligations arising from the VCCR.²⁰² Second, despite the difference as pointed out above, the Court by placing reliance on the *Avena* and *La Grande* case held that “the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing”.²⁰³ Similarly, India, itself, did not claim illegality in the nature of arrest or detention,²⁰⁴ but in “solely certain breaches of treaty obligations [on consular access] which preceded them.”²⁰⁵ Thereby, the Court rejected India’s request of annulment of the decision of the military court convicting Jadhav, his return and his safe passage to India.

In this section, I will first be discussing the correctness of the judgment laid by the military court and the ensuing due process rights. Second, I shall be discussing the relevance of the remedy of “review and reconsideration” granted in this case. Finally, I shall be considering the reasoning of the court particularly with respect to Article 14 of the ICCPR.

A. TRIAL BY THE MILITARY COURT AND ENSUING DUE PROCESS RIGHTS

Pakistan had presented multiple facts that may lead one to believe that the trial by the military court was in conformity with Jadhav’s due process rights. For instance, Pakistan had categorically stated in its memorial that on the day of the hearing in the military court, on a request made by Jadhav, the

¹⁹⁹ See discussion *supra* Part IV on “Jurisdictional Challenges raised by Pakistan”.

²⁰⁰ *Avena*, *supra* note 9, ¶121 at 3; *LaGrand* *supra* note 9, ¶126 at 3.

²⁰¹ *Avena*, *supra* note 9, at 3; Memorial of Mexico, ¶407.

²⁰² *Jadhav* Judgment, *supra* note 2, ¶36 at 2.

²⁰³ *Id.*

²⁰⁴ *Jadhav* Judgment, *supra* note 2, ¶18 at 2.

²⁰⁵ *Avena*, *supra* note 9, ¶¶122-123 at 3.

proceedings were adjourned for three weeks to allow Jadhav to prepare his defence.²⁰⁶ Further, Jadhav was allowed adequate representation in the form of an experienced Defending Officer.²⁰⁷ It stated that a “law qualified field officer” was present in the military court.²⁰⁸

In like manner, according to Pakistan’s claims, its actions have throughout been in conformity with international law.²⁰⁹ On January 2, 2017, the Adviser to the Prime Minister of Pakistan on Foreign Affairs forwarded a letter to the Secretary General of the United Nations wherein it based its allegation on Jadhav’s confessional statement that revealed India’s clandestine efforts at destabilising Pakistan.²¹⁰ In informing the United Nations, Pakistan regarded itself as “a responsible member of the international community seeking to draw attention to heinous violations of international law.”²¹¹

In this section, I attempt to ascertain the due process violations carried out by the Pakistani Government and the correctness of the trial by the military court. Contrary to what Pakistan has asserted, the way it has handled this case is fraught with violations of international standards of fair trial. This conclusion, which I seek to establish in this Part, shall be used in the subsequent sections to analyse the validity of the remedy of “review and reconsideration” granted by the Court.

On April 8, 2016, an initial FIR concerning Jadhav was filed after which the police authorities had begun investigation against him.²¹² The initial FIR recorded that Jadhav is a Commander of Indian Navy and is working with Indian foreign intelligence agency RAW.²¹³ It was alleged that he had illegally crossed over Pakistan and was in possession of an illegal passport.²¹⁴ Five months later, on September 6, 2016, a supplementary FIR was filed.²¹⁵ The trial of Jadhav commenced before Field General Court Martial on September 21, 2016.²¹⁶ He was subsequently awarded a death sentence on April 10, 2017.²¹⁷

²⁰⁶ Counter-Memorial of Pakistan, *supra* note 133, ¶45 at 18.

²⁰⁷ *Id.*, ¶46.

²⁰⁸ *Id.*, ¶75.6.

²⁰⁹ *Id.*, ¶3.

²¹⁰ *Id.*, ¶50.

²¹¹ *Id.*, ¶51.

²¹² *Id.*, ¶31.

²¹³ *Id.*, ¶76.

²¹⁴ *Id.*; Sartaj Aziz, the adviser to the Pakistan Prime Minister on Foreign Affairs had also alleged that Kulbhushan Jadhav had illegally crossed over while being in the possession of two passports bearing two different names. See THE Times of India, *India must explain why Jadhav had two passports: Sartaj Aziz*, April 14, 2017, available at <https://timesofindia.indiatimes.com/india/india-must-explain-why-jadhav-had-two-passports-sartaj-aziz/articleshow/58180984.cms> (Last visited on February 15, 2020)

²¹⁵ Jadhav Judgment, *supra* note 2, ¶24 at 2.

²¹⁶ Counter-Memorial of Pakistan, *supra* note 133, ¶45 at 18.

²¹⁷ *Id.*, ¶64.

The decision of the military court did not come as a surprise. Since the Constitution of Pakistan and the Pakistan Army Act was amended in 2015, military courts have tried and convicted alleged terrorists in 99.2 percent of cases.²¹⁸ These consisted of at least 646 trials, out of which 310 people had been sentenced to death and 234 people had been given imprisonment sentences.²¹⁹ Further, according to the Human Rights Commission of Pakistan, the military court sentenced at least thirty-one defendants to death after its jurisdiction over civilians ended.²²⁰ Article 6 of the ICCPR mandates that the death sentence only be imposed in cases of the most serious crimes.²²¹ This standard has been interpreted by the UN Human Rights Committee to be “read restrictively and appertain only to crimes of extreme gravity, involving intentional killing”.²²² It further qualifies that crimes not resulting directly and intentionally in death, such as attempted murder, although serious in nature, can never serve as the basis for the imposition of the death penalty.²²³ Accordingly, Pakistan’s continued implementation of the death penalty, despite the case not meeting the threshold of extreme gravity, is in violation of its obligations under the ICCPR.

It is suspected that the Pakistani authorities did not have sufficient evidence to conclusively convict Jadhav, due to the zealous efforts of the authorities to maintain a non-disclosure of the relevant evidence considered.²²⁴ Sartaz Aziz, National Security Advisor to the Pakistan’s Prime Minister had clearly revealed while directing a full senate chamber in December 2016 that the record submitted by Pakistan authorities on the conviction of Jadhav was composed of “mere statements” lacking conclusive evidence.²²⁵ The sentence by the military court was primarily based on the confession that Jadhav had given before the magistrate. In the confession, Jadhav appears to admit his entering Pakistan with the intention of engaging in espionage activities at the behest of RAW.²²⁶ Jadhav’s confession was the sole substantive evidence before the military court as most charges framed against him were based on it.²²⁷ In fact, Pakistan had not only used the confession

²¹⁸ International Commission of Jurists, *Briefing Paper on Military Injustice in Pakistan*, (January 2019), available at <https://www.icj.org/wp-content/uploads/2019/01/Pakistan-military-courts-Advocacy-Analysis-brief-2018-ENG.pdf> (Last visited on January 5, 2020) (“Briefing Paper”).

²¹⁹ Press Release, Inter-Services Public Relations, December 16, 2018, available at <https://www.ispr.gov.pk/press-release-detail.php?id=5096> (Last visited on January 5, 2020).

²²⁰ Human Rights Commission of Pakistan, *Punished for Being Vulnerable: How Pakistan Executes the Poorest and the Most Marginalized in Society* (October, 2019).

²²¹ International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 141, Art. 6.

²²² United Nations Human Rights Council, GA HRC/42, Preambulatory Clauses, U.N. Doc. A/HRC/42/L.37, (23 September 2019).

²²³ Human Rights Committee, Centre for Civil and Political Rights, General Comment No. 36 on Article 6 of the ICCPR on the Right to Life, ¶35, U.N. Doc. CCPR/C/GC/36 (October 30, 2018).

²²⁴ Memorial of India, *supra* note 132, ¶13 at 18.

²²⁵ Rediff, *What Was the Need for Jadhav to Be Tried by a Military Court*, April 11, 2017 available at <https://www.rediff.com/news/report/what-was-the-need-for-jadhav-to-be-tried-by-a-military-court/20170411.htm> (Last visited on January 12, 2020).

²²⁶ Jadhav Judgment, *supra* note 2, ¶22 at 2.

²²⁷ Memorial of India, *supra* note 132, ¶13 at 18.

to establish its own legitimacy and appropriateness before the United Nations²²⁸ but also while seeking assistance from India in the criminal investigation of the case.²²⁹ It even used the confessional video in the provisional measures hearing before the Court.²³⁰

Interestingly, in more than ninety-three percent of the cases involving the imposition of the death penalty by Pakistani military courts, the defendants allegedly ‘confess’ to their involvement in terrorist activities before a judicial magistrate.²³¹ The fact that almost all defendants have ended up confessing to the severest crimes also indicates the nature of the effect of the intimidating setting that compels them to confess. Jadhav’s confession was in fact made so promptly that it was recorded even before the filing of the FIR.²³² This raises numerous concerns with respect to their voluntariness including possibility of use of treatment and infliction of torture in deracination of the confessions. Such conduct is not only an internationally wrongful act,²³³ but also amounts to a *jus cogens* violation.²³⁴

The manner, in which the confession was recorded while Jadhav was kept incommunicado amid multiple versions of his statement circulating in the media,²³⁵ remains highly unclear. In light of this and the general practice of such military courts,²³⁶ it will not be unreasonable to doubt the voluntary aspect of such confessions. In fact, a few challenges to the decisions in the Supreme Court of Pakistan amongst other concerns, do question the voluntariness, and thereby, the admissibility of these confessions.²³⁷ The Supreme Court refused to entertain any such questions and comment on the infliction of torture and any ill-treatment on

²²⁸ Counter-Memorial of Pakistan, *supra* note 133, ¶51 at 18.

²²⁹ Memorial of India, *supra* note 132, ¶53 at 18.

²³⁰ *Id.*, ¶206.

²³¹ Reema Omer, *Suspect Confessions*, Dawn News, November 13, 2016, available at <https://www.dawn.com/news/1295973/suspect-confessions> (Last visited on January 5, 2020).

²³² While the confession was recorded on March 25, 2016, the FIR was not registered until April 8, 2016. For more information *see* Memorial of India, *supra* note 132, ¶61 at 18.

²³³ Art. 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) states that the term ‘torture’ includes intentional acts which cause severe pain or suffering, both physical or mental, inflicted for the purpose of obtaining information or confession. Further, Art. 15 of the CAT prohibits the use of information obtained through the means of torture as substantial evidence in a judicial proceeding. *See generally* Manfred Nowak, Moritz Birk & Guiliana Monina, *The United Nations Convention Against Torture and its Optional Protocol: A Commentary*, 36 (2nd ed., 2019).

²³⁴ *Jus cogens* or peremptory norms are those which are considered intransgressible under international law. Thus, these norms garner a mandatory compliance from all states regardless of whether these states are parties to treaties codifying the respective *jus cogens* norms. *See generally* Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, Vol.15(1), EJIL, 97 (2004).

²³⁵ *The Wire*, *Pakistan Releases Another Kulbhushan Jadhav ‘Confession’ Video; India Dismisses as ‘Propagandistic’*, January 4, 2018, available at <https://thewire.in/diplomacy/pakistan-releases-another-kulbhushan-jadhav-confession-video> (Last visited on May 23, 2020).

²³⁶ *See* discussion *supra* Part V.A on “Trial by the Military Court and Ensuring Due Process Rights”.

²³⁷ Press Release, Inter-Services Public Relations, December 16, 2018, available at <https://www.ispr.gov.pk/press-release-detail.php?id=5096> (Last visited on January 5, 2020).

the ground that they were recorded before the magistrates and were not retracted by the defendant.²³⁸ Essentially, the judicial review jurisdiction of the appellate courts and the secrecy that surrounds the pre- and post-trial proceedings raise questions regarding the legality of such statements.²³⁹

Additionally, apart from the evidentiary failings discussed above, the procedures inherent to the operation of the Pakistani military courts themselves remains non-conducive to achieve the international minimum standard for accord- ing the right to a fair trial.

It is a common feature of the Pakistani military courts to hold trials in secret.²⁴⁰ Defendants are also denied rights to legal representation and effective appeal mechanisms before civilian courts.²⁴¹ Further, defendants are also denied access to basic court documents, including evidence provided against them as also written judgments declaring the guilt and subsequent quantum of punishment re- ceived by the former.²⁴² Including this, defendants are prone to being detained in undisclosed remote locations, which increases the likelihood of torture being used as a means of obtaining information.²⁴³ The only manner in which informa- tion is made public is through media announcements made by the ISPR. They re- lease vague statements with respect to the accused, details of offenses committed by them, information about their alleged association with proscribed groups, the punishment that has been awarded to them, etc.²⁴⁴ The statements are imprecise and elusive and do not mention the role played by the accused in the alleged of- fense.²⁴⁵ Even in this case, Pakistan had persistently declined to make public or at the least inform India of the detailed charges against Jadhav or the evidence used to prove the same.²⁴⁶ These apprehensions are exacerbated by the fact that till date, the text of the judgment of the military court has not been provided to India.²⁴⁷

Every accused has a right to appeal his sentence. This principle is also enshrined in Article 14(5) of the ICCPR.²⁴⁸ Further, the Draft Principles

²³⁸ Omer, *supra* note 231, at 26.

²³⁹ United Nations Committee Against Torture, *Submission of the International Commission of Jurists and the Human Rights Commission of Pakistan in view of the Examination by the Committee Against Torture of the First Periodic Report of Pakistan under Article 19 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶24 (March 2017).

²⁴⁰ See discussion *supra* Part V.A on “Trial by the Military Court and Ensuring Due Process Rights”.

²⁴¹ *Id.*, ¶¶25, ¶32; International Commission of Jurists, *Military Injustice in Pakistan: Questions and Answers*, ¶4 (December 2016).

²⁴² Briefing Paper, *supra* note 218, 3 at 25.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Memorial of India, *supra* note 132, ¶13 at 18.

²⁴⁷ *Id.*

²⁴⁸ International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 141, Art. 14(5).

Governing the Administration of Justice Through Military Tribunals under Principle 17 categorically state that civil courts must hear appeals from military courts.²⁴⁹ In contrast, the Supreme Court of Pakistan in the case of *Said Zaman Khan v. Federation of Pakistan* had conclusively held that neither the High Court nor the Supreme Court could hear an appeal on the merits of any decision of the military courts.²⁵⁰ While the domestic criminal procedure of Pakistan prohibits appeals from judgments passed by military courts to civilian courts, the petitioners can invoke the writ jurisdiction of the High Courts and the Supreme Court in order to challenge these proceedings.²⁵¹ This may only be done on the grounds of *coram non judice*, i.e. the lack of a court's authority to make a legal determination, lack of jurisdiction, or bad faith.²⁵²

The right of appeal from the judgments passed by a military court, however, lies with the military appellate tribunals in the case of a death sentence, life imprisonment, imprisonment exceeding three months, or dismissal from service.²⁵³ The appellate tribunals exercise a broad range of powers, including the power to reduce or enhance the punishment awarded by the lower court. Notably, the verdict of the appellate tribunal is *res judicata* even with respect to the High Court and the Supreme Court; therefore, if the appellate tribunals uphold a military court decision, then it cannot be challenged on any ground at all.²⁵⁴

In this case, Mr. Jadhav was awarded the death sentence by the Field General Court Martial of Pakistan which was subsequently confirmed by the Chief of Army Staff on April 10, 2017.²⁵⁵ It was evidenced that an appeal to the same was filed and rejected before the Military Appellate Court under Section 133B of the Pakistan Army Act, 1952.²⁵⁶ Consequently, a mercy petition was filed to the Chief of Army Staff and another petition with the Government of Pakistan under Section 131 and an appeal under Section 133B of the Pakistan Army Act, 1952 was filed by Jadhav's mother.²⁵⁷ However, no information with regards to the outcome is available.

In the present case, despite the fact that the trial by the military court was in complete disregard of the international standards of fair trial, the Court

²⁴⁹ United Nations Economic and Social Council, Commission of Human Rights on Civil And Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice, Impunity, *Draft Principles Governing the Administration of Justice Through Military Tribunals*, Principle No. 17, U.N. Doc. E/CN.4/2006/58 (January 13, 2006), available at <http://hrlibrary.umn.edu/instree/DecauxPrinciples.html> (Last visited on January 12, 2020).

²⁵⁰ *Said Zaman Khan v. Federation of Pakistan*, Supreme Court of Pakistan, 2016 SCC OnLine Pak SC 2 ('Said Zaman Khan').

²⁵¹ The Pakistan Army Act, 1952, Act No. XXXIX of 1952, §133.

²⁵² *Said Zaman Khan*, *supra* note 250, at 28.

²⁵³ Briefing Paper, *supra* note 218, 3 at 25.

²⁵⁴ *Id.*

²⁵⁵ Counter-Memorial of Pakistan, *supra* note 133, ¶64 at 18.

²⁵⁶ Memorial of India, *supra* note 132, ¶70 at 18.

²⁵⁷ *Id.*

refused to annul the decision of the military court. It noted that in cases of violation of Article 36, annulment of conviction and sentence is not the “necessary and sole” remedy.²⁵⁸ With respect to the validity of Jadhav’s confessional statement, the Court merely noted that the circumstance in which the confession was recorded was unclear.²⁵⁹ However, the Court abstained from commenting any further on the conclusiveness of the confession.

The above analysis reveals that the military courts in Pakistan, both in principle and practice, are not apposite for trying terrorism cases. Military courts in Pakistan are neither independent nor impartial.²⁶⁰ These courts are presided by military officers who represent the state’s executive branch.²⁶¹ It functions as an isolated parallel justice system distinct from the national justice framework. In fact, there is no clarity on the cases that can be tried by these courts. Jurisdiction of such cases must lie with the civilian courts and military courts must be limited to for trying cases involving military personnel convicted of military offenses. In fact, the International Committee of Jurists, in its briefing paper published in 2016, had taken cognisance of this blanket violation of fair trial standards in Pakistan’s military courts.²⁶² The paper opined that Pakistan must review its anti-terrorism laws and the policies and practices governing the military justice system so that it is in conformity with the domestic laws of Pakistan and the international legal standards that it is mandated to adhere to.²⁶³

B. CONSIDERATION OF BREACH OF OBLIGATIONS UNDER THE ICCPR

The objective of granting consular access under Article 36 of the VCCR like the fair trial standard under Article 14 of the ICCPR, is geared towards protecting due process rights. India, while arguing that the trial and conviction of Jadhav by the military court did not fulfil the standards of a fair trial, had placed reliance on Article 14 of the ICCPR.²⁶⁴ Article 14 of the ICCPR states “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”²⁶⁵ The UN Human Rights Committee has clarified that pursuant to Article 14 of the ICCPR, the right to fair trial before an independent and impartial forum is applicable to all courts, irrespective of whether

²⁵⁸ Jadhav Judgment, *supra* note 2, ¶137 at 2.

²⁵⁹ *Id.*, ¶22.

²⁶⁰ Briefing Paper, *supra* note 218, 3 at 25.

²⁶¹ Muhammad Zubair, *Why Pakistan Should Not Renew Mandate of Military Courts to Try Terrorism Suspects*, Constitution Net, January 28, 2019, available at <http://constitutionnet.org/news/why-pakistan-should-not-renew-mandate-military-courts-try-terrorism-suspects> (Last visited on January 12, 2020).

²⁶² Briefing Paper, *supra* note 218, at 25.

²⁶³ *Id.*

²⁶⁴ Memorial of India, *supra* note 132, ¶¶24–25 at 18.

²⁶⁵ International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 141, Art. 14.

it is civilian or military, ordinary or specialised.²⁶⁶ Both India and Pakistan are contracting states to the ICCPR and the convention is thus applicable to both states *inter se*.²⁶⁷ Assuming that India claimed illegality of the military trial on the basis of the breach of obligations under Article 14 of the ICCPR, the Court inevitably ruled that it is not empowered to grant a remedy based on a breach of the ICCPR as its basis is limited to the interpretation and application of VCCR as it derives its jurisdiction from Article I of the Optional Protocol to the VCCR. It stated that “the remedy to be ordered in this case has the purpose of providing reparation only for the injury caused by the internationally wrongful act of Pakistan that falls within the Court’s jurisdiction.”²⁶⁸ Therefore, the Court had refused to read into the ICCPR to declare the military trial to be invalid.

Now, the question arises as to whether India argued illegality of the military court’s trial based on Article 14 of the ICCPR? If yes, then the Court’s reasoning is inevitable as it is bound to derive jurisdiction from the Optional Protocol. Nonetheless, in its memorial, acknowledging that the jurisdiction of the Court is based on the VCCR, India had stated that “Article 36, by creating the mechanism of consular access, enables the sending State to help its national realise the promise of due process. The place of Article 36 in the rubric of the due process guarantee must inform its interpretation.”²⁶⁹ Thus, India intended to claim its relief as a result of violation of Article 36 itself and not Article 14 of the ICCPR. Considering that both India and Pakistan are Contracting States to the ICCPR, India’s submission was that a remedy for the breach of Article 36 should be decided in accordance with international obligations. India argued that these international obligations, were driven by Article 14 of the ICCPR.²⁷⁰ In fact, the ICJ had itself noted that it was within its power to ascertain obligations under the VCCR in the context of Article 14 of the ICCPR.²⁷¹

In the *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (“Tehran Hostages”) case, the Court had opined “no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important.”²⁷² The protection of human rights is a recognised *erga*

²⁶⁶ Human Rights Committee, Centre for Civil and Political Rights, *General Comment No. 32 on Article 14 of the ICCPR on the Right to Equality Before Courts and Tribunals and To A Fair Trial*, ¶22, U.N. Doc. CCPR/C/GC/32 (August 23, 2017).

²⁶⁷ United Nations Treaty Collection, Status of Treaties, International Covenant on Civil and Political Rights, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (Last visited on January 13, 2020)

²⁶⁸ Jadhav Judgment, *supra* note 2, ¶135 at 2.

²⁶⁹ Memorial of India, *supra* note 132, ¶19 at 18.

²⁷⁰ Memorial of India, *supra* note 132, ¶¶175–176 at 18.

²⁷¹ Jadhav Judgment, *supra* note 2, ¶37 at 2.

²⁷² *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, May 24, 1980, I.C.J. G.L. No. 64, ¶36.

omnes obligation.²⁷³ It also includes obligation of a State to safeguard a foreign nationals due process rights.²⁷⁴ In the present case, India had submitted that Article 36 of the VCCR providing for consular access to foreign criminal defendants is an extension of this universal obligation.²⁷⁵

In fact, in the *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* ('Lockerbie') cases, the jurisdiction of the ICJ was limited to the Montreal Convention.²⁷⁶ Nonetheless, during the proceedings, the ICJ did consider UNSC Resolutions as defences.²⁷⁷ Additionally, in the *Oil Platforms (Islamic Republic of Iran v. United States of America)* ('Oil Platforms') case, Judge Buergenthal noted that it is not within the mandate of the Court to "deal with a subject in the disposit if of its judgment that the parties to the case have not, in their final submissions, asked it to adjudicate".²⁷⁸ Moreover, in the *Arrest Warrant* case, the ICJ posited that it is still not prevented "from addressing certain legal points in its reasoning."²⁷⁹ Therefore, in addressing an issue not directly submitted by the parties, it is well within the Court's powers to address "certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable."²⁸⁰

In the same way, in the present case, India had argued for the Court to consider states' obligations under Article 14 of the ICCPR as applicable rules of international law while fashioning a remedy for the breach of the VCCR. It had argued that the remedy prescribed by the Court in the *Avena* and *LaGrand* cases, that is of "review and reconsideration" is not sufficient in the present case, given the blatant disregard of Jadhav's due process rights.²⁸¹ Therefore, it had not relied on Article 14 of the ICCPR with the intention of claiming an independent breach but rather as a reason for the Court to alter its ways and grant a remedy that is proportional to the breach.

In fact, while rejecting India's prayer for annulling the decision of the military court, the Court had posited that "partial or total annulment" of the trial by the military court is not the only redress to cases involving breach of Article

²⁷³ Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (December 12, 1948), Preamble; Memorial of India, *supra* note 132, ¶129 at 18.

²⁷⁴ Lee & Quigley, *supra* note 3, at 2.

²⁷⁵ Memorial of India, *supra* note 132, ¶148 at 18.

²⁷⁶ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Judgment, February 27, 1998, I.C.J. G.L. No. 88 ('Lockerbie').

²⁷⁷ *Id.*, ¶50.

²⁷⁸ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, November 6, 2003, I.C.J. G.L. No. 90, ¶8 ('Oil Platforms').

²⁷⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, February 14, 2002, Judgment, I.C.J. Rep. 2002, ¶43.

²⁸⁰ *Id.*

²⁸¹ Memorial of India, *supra* note 132, ¶24 at 18.

36.²⁸² It is in consonance with this concern that India had used Article 14 to allow the Court to tweak its remedy accordingly. Instead, the Court considered India's argument as a separate plea requiring a relief independent of the VCCR, which it ruled was outside its jurisdictional basis to the prejudice of India.

India's arguments are primarily made from the vast jurisprudence of the Inter-American Court of Human Rights, which has recognised consular rights as a part of the larger due process rights enshrined under the ICCPR. Though the Court refused to read a state's obligations under the ICCPR, while granting a remedy for violation of Article 36 of the VCCR, it did take the first step at recognising human rights claims as a part of the breach of Article 36. It regarded the principle of fair trial to be of "cardinal importance in any review and reconsideration".²⁸³ To this end, while violations of human rights could not directly be contended due to lack of jurisdiction, it was still regarded as significant in laying the ambit of the remedy emanating from a violation of the Article 36. By virtue of it being the ICJ's first step, it is celebratory, notwithstanding whether it will make a reasonable contribution to the existing corpus of VCCR *vis-à-vis* international human rights.

C. THE REMEDY OF "REVIEW AND RECONSIDERATION"

In the present case, India differentiated the case of Jadhav from that of Avena and LaGrand fundamentally on the ground that those cases were tried in ordinary criminal courts, which ensured the minimum standards of fair trial.²⁸⁴ Juxtaposed to that, Jadhav's conviction was decided by a military court that did not assure a fair trial to Jadhav, breaching obligations enlisted in the VCCR along with international human rights obligations with regard to due process.²⁸⁵ India argued that this breach of fair trial guarantee should render the judgment of the military court as void and thus sought Jadhav's repatriation.²⁸⁶

Nonetheless, following a similar pattern as the Avena and LaGrand case, the Court while holding that Pakistan by not informing Jadhav of his rights without delay and by denying India consular access to Jadhav had breached its obligations under the VCCR, rejected India's unprecedented request for repatriation and held that "a continued stay of execution constitutes an indispensable condition for the effective review and reconsideration of the conviction and sentence" of the defendant, by a majority of 15-1.²⁸⁷

On the alleged due process violation and concomitant question of the adequacy of the remedy, Pakistan argued that, in any event, the appropriate

²⁸² Jadhav Judgment, *supra* note 2, ¶137 at 2.

²⁸³ *Id.*, ¶145.

²⁸⁴ Memorial of India, *supra* note 132, ¶185 at 18.

²⁸⁵ *Id.*, ¶183.

²⁸⁶ Memorial of India, *supra* note 132, ¶2143 at 18.

²⁸⁷ Jadhav Judgment, *supra* note 2, ¶148 at 2.

remedy in this case would be “review and reconsideration” of the sentence by the military court.²⁸⁸ The Court while granting the remedy of “review and reconsideration” emphasises that the same must be effective in order to hold any meaning.²⁸⁹ In determining the meaning of the term effective, the Court very briefly limited it to entail rectifying the breach of obligations under the VCCR and any possible prejudice caused by the same.²⁹⁰ Thereby, the Court did not necessarily mandate the remedy to undo the effects caused because of other due process violations like the absence of a fair trial.

Pakistan raised two arguments to establish that its judicial process is adept to allow for reconsideration of the judgment rendered by the military court. First, it relied on a High Court judgment pending execution, to argue that the defendants have a right to challenge the decision of the military court,²⁹¹ and second, that clemency procedures can be appropriately employed to further aid in the process of judicial review.²⁹² Using this conclusion, it posited that the remedy of “review and reconsideration” is appropriate and effective in the present case.

Pakistan relied on a 2009 judgment given by the Peshawar High Court to establish the effectiveness, robustness and generally, the competence of Pakistan’s judicial review process.²⁹³ In the concerned case, conviction of over seventy people convicted by the military court on charges of terrorism was set aside by the High Court.²⁹⁴ In doing so, it commented on the insufficiency of the evidence and the fact that the proceedings were conducted in bad faith.²⁹⁵ Pakistan used this judgment to make the Court believe in the legitimacy of its judicial process²⁹⁶ and to establish the irrelevancy of India’s due process arguments with respect to fair trial.²⁹⁷

India argued that the Court must not take into consideration the decision of the Peshawar High Court as it was a matter of an appeal and thereby has no significance as its operation is suspended till the judgment of the Supreme Court.²⁹⁸

Surprisingly, the ICJ accepted Pakistan’s arguments and declined to interfere with the fairness of the trial by the military court. This it did despite

²⁸⁸ Counter-Memorial of Pakistan, *supra* note 133, ¶390 at 18.

²⁸⁹ Jadhav Judgment, *supra* note 2, ¶139 at 2.

²⁹⁰ *Id.*

²⁹¹ Counter-Memorial of Pakistan, *supra* note 133, ¶¶465–470 at 18.

²⁹² Counter-Memorial of Pakistan, *supra* note 133, ¶¶459–464 at 18.

²⁹³ Abdur Rashid v. Federation of Pakistan, Writ Petition No. 536-P of 2018, decided on October 18, 2018 (Peshawar) (‘Abdur Rashid’).

²⁹⁴ *Id.*

²⁹⁵ *Id.*, 173.

²⁹⁶ Jadhav (India v. Pakistan), Verbatim Record, February 19, 2019, I.C.J. G.L. No. 168, ¶22.

²⁹⁷ Jadhav (India v. Pakistan), Verbatim Record, February 21, 2019, I.C.J. G.L. No. 168, ¶100.

²⁹⁸ *Id.*; See also Said Zaman Khan, *supra* note 250, at 28.

knowing that the same is a pending decision in the Supreme Court.²⁹⁹ It held that the domestic legal system of Pakistan offers a well-defined and recognised method of judicial review, and therefore the remedy of review and reconsideration is adequate in itself.³⁰⁰

The Court's reliance on the judgment by the Peshawar High Court is highly erroneous. An in-depth scrutiny reveals that the judgment supports the arguments presented by India. The said judgment confirms that the military courts in Pakistan do witness blatant human rights violations, including non-adherence of the minimum standard of a fair trial.³⁰¹ First, while delivering the judgment, the Peshawar High Court suspected the qualification of the defendant's counsel. It noted that surprisingly a single lawyer from Punjab was employed to present the defence case in all the cases.³⁰² This was particularly strange, as the same convicts had appointed highly qualified, expensive, and distinct lawyers to argue their case before high courts in review petitions.³⁰³ The court found it highly improbable for all defendants to 'consent' to the same lawyer who barely had half a decade of experience.³⁰⁴ Further, the court noted the ambiguity with respect to the language in which the communication was facilitated between the defence counsel and the accused and if the same was ever maintained to be confidential as required by its own constitution and other international laws.³⁰⁵ In light of these observations, the court was of the opinion that said counsel was a "dummy" and the trial as a "complete prosecution show" completely disrespectful of the legal and fundamental rights of the accused.³⁰⁶ Second, the court held all the confessional statements on which the conviction was based to be inadmissible as the same had flouted the international law on confession.³⁰⁷ The court stated that it is very odd that in all the cases, the accused had confessed to their crimes.³⁰⁸ Further, it observed that all the confessions were recorded in the same handwriting, tone and style.³⁰⁹ Additionally, these confessions were recorded when accused were kept in incommunicado detention. Thus, the court raised concerns with respect to the voluntariness of these confessions and if the same were extracted after inflicting torture or ill treatment.³¹⁰ Lastly, the court commented on the undefined nature of proceedings in military courts, the sheer unpredictability coupled with the general

²⁹⁹ Jadhav Judgment, *supra* note 2, ¶142 at 2.

³⁰⁰ *Id.*, ¶145.

³⁰¹ See discussion *supra* Part V.A on "Trial by the Military Court and Ensuring Due Process Rights".

³⁰² Abdur Rashid, *supra* note 293, ¶¶ 159-160 at 33.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*, ¶¶ 151, ¶¶ 154-155.

³⁰⁶ Reena Omer, *Pakistan: Malice of Fact and Law*, The Statesman, November 15, 2018, available at <https://www.thestatesman.com/supplements/law/pakistan-malice-of-fact-and-law-1502708194.html> (Last visited on July 15, 2020)

³⁰⁷ Abdur Rashid, *supra* note 293, ¶¶ 157, 160 at 33.

³⁰⁸ *Id.*

³⁰⁹ *Id.*, ¶¶ 152, 155-156, 160.

³¹⁰ *Id.*, ¶¶ 168, 170.

opacity.³¹¹ Thus, it regarded these cases to be “based on malice of facts and law” and set aside the convictions.

An analysis of the 2008 Peshawar High Court judgment unfolds the reality of the cases tried in military courts. The decision of the ICJ based on the same judgment, which has been challenged and is pending decision, in favour of Pakistan, reveals that the ICJ relied on the *prima facie* appearance of the arguments presented. This raises several doubts on the depth in which the Court has gone to decide the case.

Further, Pakistan argued that the other recourse to challenging the conviction by the military court is by seeking clemency.³¹² Under the domestic laws of Pakistan, clemency can be sought within a period of 150 days first from the Chief of Army Staff, and subsequently from the President of Pakistan.³¹³ The trust of the Court in Pakistan’s judicial system was further reinforced by the existence of the constitutional right to file a clemency petition as was argued by Pakistan.³¹⁴ In the present case, Jadhav’s appeal to the military appellate court was rejected and pending the decision of this case, he had sought mercy from the Chief of Army Staff.

India, on the other hand, argued that given the seriousness of the allegations and the special circumstances of this case, the remedy of clemency is illusory, facetious and inadequate.³¹⁵ The Court by relying on the Avena case held that clemency methods can “*supplement judicial review and reconsideration*”.³¹⁶ However, it very briefly recognised that the same is not solely sufficient to grant an effective remedy of review and if judicial review could occur through clemency procedure was unclear under Pakistan’s domestic law.³¹⁷

The right to afford a minimum international standard of due process is a fundamental right under international law.³¹⁸ In general, nations fall below the minimum international standard by subjecting foreign nationals to ‘the maladministration of justice which unduly prejudice the rights of the same.’³¹⁹ The circumstances of breach in the Avena and LaGrand cases are not the same as in the present case. Unlike the convictions in the LaGrand and Avena cases, a military court conducted Jadhav’s trial. Thereby, the question of consular access was

³¹¹ *Id.*, ¶¶167–171.

³¹² Jadhav (India v. Pakistan), Verbatim Record, February 19, 2019, I.C.J. G.L. No. 168, ¶22.

³¹³ Counter-Memorial of Pakistan, *supra* note 133, ¶¶460–463 at 18.

³¹⁴ Jadhav (India v. Pakistan), Order on Provisional Measures, May 18, 2017, I.C.J. G.L. No. 168, ¶¶53–56.

³¹⁵ *Id.*, ¶¶28–34.

³¹⁶ Jadhav Judgment, *supra* note 2, ¶143 at 2.

³¹⁷ *Id.*

³¹⁸ Malanczuk, *supra* note 158, at 20.

³¹⁹ *Id.*, 261.

imbued with fair trial, both being essential elements of due process.³²⁰ Thus, it was opined that since consular notification and free access allow foreign nationals to defend themselves in alien criminal justice systems, the same implicitly falls under the due process standard of international law.³²¹

In this instant case, the Court should have looked beyond the narrow remit of its precedents. This difference must have been taken into consideration by the Court to establish the extent of injury sustained by India on account of Pakistan's breach of Article 36, and thus must have led to a distinct remedy than that of "*review and reconsideration*". The difference in cases is coupled with Pakistan's conduct in basing Jadhav's conviction on a purported confession in a military court with no consideration of minimum standards of fair trial recognised in international law. In light of the fact that the Court did not wish to invade in the domestic matters of a state, even if the Court did not deem fit to entirely invalidate the verdict of the military court, it would not be unreasonable to expect the Court to at the least tailor-make an effective remedy in light of the unique circumstances of the case.

VI. RULES OF VIENNA CONVENTION VIS-À-VIS CONSULAR ACCESS IN CASES OF ESPIONAGE

The issue of consular remedy, however, is more controversial in light of the exception of espionage. In response to India's submission that denial of consular access to Jadhav results in an egregious breach of Article 36 of the VCCR, Pakistan had posited that Article 36 is inapplicable in cases of individuals guilty or suspected of espionage. Pakistan had based this argument on four grounds; first, on the basis of the historical context of consular relations; second, the *travaux préparatoires* of the VCCR; third, the CIL at the time of the codification of the VCCR; and fourth, the Agreement on Consular Access between the Government of the Islamic Republic of Pakistan and the Government of the Republic of India, 2008 ('2008 Agreement') signed between the Parties.³²² In this section we will be dealing with these four submissions separately.

³²⁰ Monica F. Tinta, *Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the LaGrand Case*, 12 EJIL 2, (2001), 363–366; Brittany P. Whitesell, *Diamond in the Rough: Mining Article 36(1)(b) of the Vienna Convention on Consular Relations for an Individual Right to Due Process*, 54 Duke Law Journal 2, (2004), 587–619.

³²¹ Inter-American Court of Human Rights, *Advisory Opinion on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, October 1, 1999, Inter-Am. C.H.R. (Ser. A) No. 16, (October, 2019), ¶¶121–22.

³²² Counter-Memorial of Pakistan, *supra* note 133, at 18; See discussion *infra* Part VI.B on "Customary International Law and State Practice".

A. *HISTORICAL CONTEXT OF CONSULAR RELATIONS AND THE TRAVAUX PRÉPARATOIRES OF THE VCCR*

Pakistan submitted that as expressed in the Preamble to the Convention, the VCCR was drafted in furtherance of friendly relations between states.³²³ In light of the same, it would be contrary to its objective if a state were compelled to grant consular access to foreign defendants engaged in acts of espionage or spying that are against the very purpose of the Convention.³²⁴ Further, it argued that the Convention aims at protecting legitimate interests of the foreign criminal defendant and espionage is not a legitimate interest.³²⁵ In establishing that espionage is not a legitimate interest, and thereby is an exception to obligations under Article 36, it relied on the statement made by the delegate of China at the UN Conference on Consular Relations.³²⁶ At the conference, the delegate of Union of Soviet Socialist Republics (‘USSR’) had expressed concerns with respect to China’s participation in the conference positing the continual violations of international law by the latter regime.³²⁷ In response to the same and arguing against its exclusion, China had posited that its actions have always been in furtherance of the objectives of the UN and that “it did not arrest diplomatic and consular agents on false charges of espionage, and did not violate the premises of embassies and consulates [...]”.³²⁸

Pakistan used this argument as a historical justification that in cases of acts of espionage, the mandatory obligation of providing consular access cannot be imposed on the state. Additionally, Pakistan submitted that there was no evidence in the *travaux préparatoires* that support the argument that consular access be granted in a *prima facie* case of espionage.

India, on the other hand, argued that a state should not be allowed to unilaterally withdraw from its obligation to afford protection under the VCCR by raising accusations of espionage.³²⁹ It submitted that if the Court assumed such an exception in the absence of any explicit mention in the text itself, the same would be contrary to the objectives and purpose of the VCCR. To support the same, India relied on the *travaux préparatoires* of the VCCR. At the time of codification of the VCCR, there was a mention of cases of espionage.³³⁰ A member of the Commission had raised concerns with respect to the phrase “without delay” in the text of the Article 36 as in his opinion the same would be rendered ineffective in cases where

³²³ *Id.*, ¶233.

³²⁴ *Id.*, ¶234.

³²⁵ *Id.*, ¶¶272–274.

³²⁶ *Id.*, ¶281.

³²⁷ *Id.*, ¶281.

³²⁸ *Id.*

³²⁹ Jadhav (India v. Pakistan), Reply of the Republic of India, April 17, 2018, I.C.J. G.L. No. 168, ¶98.

³³⁰ Lee & Quigley, *supra* note 3, 86–87 at 2.

defendants are held *in communicado* by the foreign state.³³¹ He had particularly mentioned the exception of espionage cases in which the defendants are in certain jurisdictions detained *in communicado*. Therefore, in his opinion, to avoid future debates the phrase “without delay” must be deleted.³³² The Commission clearly did not act on the same as in the present day the phrase “without delay” is a part of the text. Further, the Chairman of the Drafting Committee noted that it is not possible for a statement of general principles of law to be exhaustive. It further stated, “if the Commission went into the question of whether cases of espionage should be made an exception, the whole principle of consular protection and communication with nationals would have to be re-opened.”³³³ Thus, India noted that the *travaux préparatoires* never contemplated an exception for espionage.

The Court had accepted the arguments presented by India and held that the *travaux préparatoires* of the VCCR does not mention any such exception.³³⁴ The decision of the Court on this point is particularly logical in light of the historical context in which the VCCR was drafted. The VCCR was implemented at the time of the Cold War when it was a common practice for states to initiate espionage and related activities in other states.³³⁵ Despite such awareness, neither did any state raise concerns with respect to espionage, to not be governed by the VCCR, at the stage of drafting nor did they create any reservations or interpretative declarations to Article 36 while ratifying the Convention.³³⁶ Therefore, it is amply clear that the drafters of VCCR did not envisage any such exception.

B. CUSTOMARY INTERNATIONAL LAW & STATE PRACTICE

In its submissions, Pakistan had heavily relied on CIL to argue against the possibility of granting consular access to defendants against whom a *prima facie* case of espionage is established. India, in its memorial, had argued that the VCCR “was intended to be an exhaustive rubric of consular access”.³³⁷ Pakistan rebutted this on two grounds; first, on the basis of the Preamble to the Convention which states “the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention.”³³⁸ Pakistan had used the same to establish that CIL in this regard exists and governs matters of espionage irrespective of the VCCR; and second, by contending that contrary to India’s claim, VCCR is not exhaustive of consular rights, citing specific examples

³³¹ Counter-Memorial of Pakistan, *supra* note 133, ¶288 at 18.

³³² *Id.*

³³³ United Nations, *Yearbook of the International Law Commission*, 58, ¶48, A/CN.4/SER.A/1960 (July 1960).

³³⁴ Jadhav Judgment, *supra* note 2, ¶¶77–83 at 2.

³³⁵ Lee & Quigley, *supra* note 3 at 2.

³³⁶ United Nations, *Vienna Convention on Consular Relations*, April 24, 1963, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3 (Last visited on January 12, 2020).

³³⁷ Memorial of India, *supra* note 132, ¶96 at 18.

³³⁸ VCCR, Preamble.

of asylum and dual nationality that are subject matters of consular rights but are excluded from the purview of the VCCR.³³⁹ Pakistan submits that in both these cases the state authorities have to exercise “a degree of judgment” in notifying the consular officer.³⁴⁰ In the same fashion, Pakistan submits that cases of espionage would also not be entirely regulated by the VCCR.³⁴¹

In response to the contention raised by Pakistan, in its first enquiry on November, 2017, the ICJ sought opinion of all the 177 states that were parties to the VCCR to comment on the exception of espionage. Surprisingly, not a single state commented on the same. The legality of espionage under international law, thus, would arguably predicate the Court’s response to the doctrine of unclean hands,³⁴² as well as to the possibility of the exception claimed by Pakistan.

As expected, Pakistan used the silence of the states to further its argument and stated that “it simply cannot be said that the customary international law position has now crystallized to support the contention India advances.”³⁴³ It emphasised that it was a result of the studied ambiguity that the parties chose to deliberately leave the issue unaddressed.

The States chose to not answer this question, thereby staging a debateable issue for resolution by the ICJ. Unfortunately, the Court’s judgment with respect to CIL is rather unhelpful and confuses more than it clarifies. While refusing to read an espionage exception under the VCCR, the Court categorically denied establishing a conclusive position under the CIL on the subject. It noted that the “Court does not find it necessary to determine whether, when the Vienna Convention was adopted in 1963, there existed the rule of customary international law that Pakistan advances”.³⁴⁴ This deliberate position of the Court in excluding its enquiry with respect to CIL, raises several questions of international law and runs contrary to the already established position.

Even prior to the adoption of the VCCR, it was a recognised principle that consular access is granted in cases of espionage. For instance, in 1956, in a case involving British nationals who were accused of being involved in espionage and related activities in the state of Egypt, they were granted consular access.³⁴⁵ The recent cases also support the same conclusion. In 2009, three American citizens

³³⁹ Counter-Memorial of Pakistan, *supra* note 133, ¶298 at 18.

³⁴⁰ *Id.*, ¶300.

³⁴¹ *Id.*, ¶ 311.

³⁴² The doctrine of clean hands dictates that a state which is guilty of illegal conduct may not claim necessary locus standi in bringing a claim against another state for a subsequent illegality, given the latter was prompted by the former. *See generally* Moloo, *supra* note 10, at 3.

³⁴³ Counter-Memorial of Pakistan, *supra* note 133, ¶311 at 18.

³⁴⁴ Jadhav Judgment, *supra* note 2, ¶90 at 2.

³⁴⁵ Biswanath Sen, *A Diplomat’s Handbook of International Law and Practice* 323 (1965).

were granted consular access³⁴⁶ by Iran even though they were detained on indictments of espionage and illegal entry.³⁴⁷ In 2010, Venezuela was found in violation of its obligations under the VCCR for not granting consular access to nationals of Columbia accused of espionage.³⁴⁸ Further, in 2011, the United Kingdom managed to get consular access of four British nationals under Article 36, despite resistance by the state of Eritrea.³⁴⁹ The British nationals were held *incommunicado* by Eritrea on charges of espionage and sabotage.³⁵⁰ In fact, it is quite hypocritical of Pakistan to argue terrorism and espionage as defences in granting consular access when it itself sought the same for Pakistani National indicted for terrorism in 2009 against United Kingdom.³⁵¹

The leading case governing the relationship between treaties and CIL is the case of *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* ('Nicaragua').³⁵² In this case, it was observed that in the event that distinct rights and liabilities arose pursuant to treaty interpretation and CIL, the Court would be required to ascertain if the divergence between the two is "to such an extent that a judgment of the Court as to the rights and obligations of the parties under customary law, disregarding the content of the multilateral treaties binding on the parties, would be a wholly academic exercise, and not susceptible of any compliance or execution whatever".³⁵³ Therefore, it is evident that it was well within the mandate of the ICJ to analyse whether espionage is an exception to consular access under CIL and as per the judgment in Nicaragua to ascertain whether the same is "susceptible of any compliance or execution whatever".³⁵⁴

The reason behind the approach taken by the Court is unclear. A possible argument could be the Court's understanding of its limited jurisdiction

³⁴⁶ Amnesty International, *Amnesty International Again Demands that Iran Release Americans Jailed for Two Years Case of Two American Hikers Due to be Heard Again on Sunday*, July 29, 2011, available at <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/> (Last visited on January 12, 2020); Buys, *supra* note 14, at 4.

³⁴⁷ Buys, *supra* note 14, at 4.

³⁴⁸ Santiago Giraldo Florez v. Bolivarian Republic of Venezuela, Opinion No. 31/2010, Working Group on Arbitrary Detention, U.N. Doc. A/HRC/WGAD/2010/31 (2010).

³⁴⁹ Mark Warren, *Rendered Meaningless? Security Detentions and the Erosion of Consular Access Rights*, Southern Illinois University Law Journal, 31 (2014).

³⁵⁰ The Telegraph, *Eritrea Accuses Four Detained Britons of 'Espionage' And 'Terrorism'*, June 10, 2011, available at <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/eritrea/8568409/Eritrea-accuses-four-detained-Britons-of-espionage-and-terrorism.html> (Last visited on January 12, 2020).

³⁵¹ Mail Online, *Pakistan Condemns Home Office Over Student Terror Arrests*, April 16, 2009, available at <http://www.dailymail.co.uk/news/article-1170661/Pakistan-condemns-Home-Office-student-terror-arrests.html> (Last visited on January 12, 2020).

³⁵² *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, June 27, 1986, I.C.J. G.L. No. 70.

³⁵³ *Id.*, ¶181.

³⁵⁴ *Id.*

pursuant to the Optional Protocol, which, as per the ICJ, limits it to look at violations pertaining specifically to the VCCR. The Court employed similar argumentation when it refused to look at any breach under the ICCPR. However, this approach taken by the Court is not entirely in conformity with the position the ICJ has taken in previous cases. In the Oil Platforms case, the jurisdiction of the ICJ was derived from the 1955 Treaty between the parties.³⁵⁵ The ICJ, while ascertaining the lawfulness of the claims raised by the Parties, took into account obligations enumerated under the UN Charter and CIL.³⁵⁶ The Court, in arriving at this conclusion, observed that as per Article 31(3)(c) of the VCLT, the treaty interpretation must account for all relevant rules of international law that are commonly applicable to both the parties.

Similarly, in the *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) ('Pulp Mills')³⁵⁷ and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) ('Bosnian Genocide')³⁵⁸ case, the ICJ reaffirmed its ability to look beyond the treaty recognising the Court's jurisdiction. In both the cases, the ICJ observed other principles of international law to conclusively determine the claims raised by the Parties.

More importantly, in the Lockerbie cases, the Court took into account UNSC resolutions to substantiate the claims raised by one of the parties.³⁵⁹ The Court stated that there was no bar on relying on the resolutions, as it was a question of applicable law and not of jurisdiction.³⁶⁰ Similarly, even if the ICJ derives its jurisdiction from the Optional Protocol, there is no bar for the Court to take into account exceptions under the CIL.

Therefore, in light of these precedents, I believe that the Court should have gone deeper in analysing whether espionage constitutes a relevant exception to consular access under CIL. This topic opens a plethora of questions and has significant international political ramifications. Though the Court in granting India's claim has recognised that espionage cases are not an exception to a state's obligations under the VCCR, it would have only added to the clarity if the Court confirmed the position in CIL. This is considering that CIL is an ambit broader than Article 36, which is also poorly drafted and often leads to ambiguities.³⁶¹ The

³⁵⁵ Oil Platforms, *supra* note 278, at 31.

³⁵⁶ *Id.*, ¶42.

³⁵⁷ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, April 20, 2010, I.C.J. G.L. No. 135, ¶¶204-05.

³⁵⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, February 26, 2007, I.C.J. G.L. 91, ¶149 ('Bosnian Genocide').

³⁵⁹ Lockerbie, *supra* note 276, ¶¶38-39 at 3.

³⁶⁰ *Id.*, ¶¶37-39.

³⁶¹ See discussion *supra* Part IV on "Jurisdictional Challenges raised by Pakistan".

Court's half-hearted comment on the same is based on convenience and warrants sufficient explanation.

C. 2008 AGREEMENT

The 2008 Agreement is a short seven-paragraph bilateral statement signed by the parties for governing matters of consular access between the States. Both the parties differ as to the legal significance of the Agreement in the present case. Pakistan had contended that India in seeking Jadhav's consular access seeks to resile from its formal position pursuant to the 2008 Agreement between the Parties.³⁶² It relied on the 2008 Agreement to establish that consular access need not be granted in cases of espionage. It specifically emphasised on paragraph six of the Agreement that states, "In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits".³⁶³ As per Pakistan, paragraph six of the Agreement lists exceptions to consular access.³⁶⁴ It contends that espionage or spying activities are an infringement of the state's security, and therefore the state is free to exercise its discretion in granting consular access.

India, on the other hand, submitted that the 2008 Agreement was in no way intended to qualify the rights and obligations as listed under the VCCR.³⁶⁵ Rather the 2008 Agreement was entered into, in order to supplement the same. It primarily based its arguments on two grounds. First, it submitted that since the Agreement is not registered under Article 102 of the United Nations Charter, it could not be invoked before any organ of the UN.³⁶⁶ Second, it argued that confirming Pakistan's interpretation of the 2008 Agreement would be in violation of Article 73 of the VCCR as per which bilateral agreements between parties cannot be used to skirt away from their obligations under the convention.³⁶⁷

In giving its judgment pertaining to the 2008 Agreement, the Court agreed with India's argument on Article 73 of the VCCR.³⁶⁸ Additionally, in response to Pakistan's argument under Paragraph 6 of the 2008 Agreement, the Court observed that the Preamble to the Agreement³⁶⁹ declares that the states were, "desirous of furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country."³⁷⁰ In light of the ob-

³⁶² Counter-Memorial of Pakistan, *supra* note 133, ¶84 at 18.

³⁶³ The Agreement on Consular Access between the Government of the Islamic Republic of Pakistan and the Government of the Republic of India (Pakistan and India), May 21, 2008, ¶6 ('2008 Agreement').

³⁶⁴ Counter-Memorial of Pakistan, *supra* note 133, ¶353 at 18.

³⁶⁵ Memorial of India, *supra* note 132, ¶99 at 18.

³⁶⁶ Jadhav (India v. Pakistan), Verbatim Record, May 15, 2017, I.C.J. G.L. No. 168, ¶16.

³⁶⁷ Memorial of India, *supra* note 132, ¶97 at 18.

³⁶⁸ Jadhav Judgment, *supra* note 2, ¶¶96–97 at 2.

³⁶⁹ *Id.*, ¶94.

³⁷⁰ 2008 Agreement, *supra* note 363, Preamble at 40.

jectives mentioned under the Preamble, the Court noted that any reservation to or deviation from Article 36 would have to be categorically stated in the Agreement, which is not the case.³⁷¹

VII. INDIA'S BLURRED VICTORY: TRACING THE POST-VERDICT DEVELOPMENT

Though the judgment accepted the majority of India's claims, it is unclear as to what extent India has emerged victorious and to what extent Pakistan will enforce the judgment. Even in the *LaGrand* and *Avena* case, the post-verdict enforcement phase in the US has been blemished with scarce compliance and in some instances, even a blatant repudiation of the decree of the Court.³⁷² This is particularly problematic in the present case as the judicial review system of Pakistan is in stark contrast with that of the US and does not stimulate enough credence.

As India submitted, the Court upheld its jurisdiction over the case and found that Pakistan has violated its obligations under the VCCR. It also directed Pakistan to stay Jadhav's execution and review his sentence and conviction. However, at the same time, the Court did not grant repatriation of Jadhav. Additionally, as noted, on the point of annulment of trial by the military court, the Court granted the remedy of "review and reconsideration". The Court while giving its judgment noted that India be given Jadhav's consular access "without further delay". This it did despite its suspicion pertaining to the probability of a judicial review in Pakistan, it noted, "it is not clear whether judicial review of a decision of a military court is available".³⁷³

One may argue that the Court did attempt to limit the ambit of what may appear to be a rather wide remedy by stating that the Court must take "all measures"³⁷⁴ and by adding the requisite of "effectiveness" of the remedy.³⁷⁵ So, even if the "choice of means" of implementing the remedy is a discretion to be exercised by Pakistan, the same is "without qualification".³⁷⁶ Nonetheless, a lot depends on the manner in which Pakistan decides to mend its ways to enforce the decision of the Court. To effectively grant the remedy Pakistan will be required to go beyond the constricted and narrow provisions of judicial review of military trials. There is no clarity as to what extent Pakistan is required to undertake particular legal modifications to effectuate the decision of the Court and if India will have any say in the same.

³⁷¹ Jadhav Judgment, *supra* note 2, ¶97 at 2.

³⁷² See discussion *supra* Part II.B.1.a on "The Apparent Dichotomy Between the ICJ and Domestic Courts".

³⁷³ Jadhav Judgment, *supra* note 2, ¶141 at 2.

³⁷⁴ *Id.*, ¶146.

³⁷⁵ *Id.*, ¶¶133–146.

³⁷⁶ *Id.*

The peculiarity of the judgment in the Jadhav case is highlighted by the fact that both the countries exclaimed it be to their victory. As the verdict arrived on July 17, 2019, the headlines in India Today read “Victory for India in Kulbhushan Jadhav case”.³⁷⁷ Contrariwise, the same day’s headline in Pakistan Today stated, “ICJ rejects India’s plea for Kulbhushan Jadhav’s acquittal”.³⁷⁸ Several issues arise in the context of this partial victory. In this section we will be outlining the events after the verdict to trace the avenues for execution of the ICJ’s judgment in accordance with the international law.

Post the ICJ’s verdict, Pakistan informed India that in light of its obligations under the VCCR, it would be granting Jadhav’s consular access to India.³⁷⁹ In its decision, the Court did not draw any uniform or minimum standard for consular access that Pakistan needs to adhere. Consequently, there occurred differences between Pakistan and India with respect to the terms of access. The political tensions between the states was further exacerbated by the fact that the judgment of the Court came at a time when relations between India and Pakistan were already problematic due to India’s abrogation of Article 370 of the Constitution that granted a special status to Jammu and Kashmir.³⁸⁰

In furtherance of its promise to grant consular access, the Pakistan Foreign Office had notified that they shall be affording consular access to Jadhav on August 2, 2019.³⁸¹ Pakistan sought the presence of a Pakistani diplomat at the time when Indian officers were meeting Jadhav.³⁸² To this, India had objected and alternatively sought, “immediate, effective and unhindered” consular access.³⁸³ Consequently, the meeting was called off. As a reply to India’s demand, Pakistan expressed that it would provide consular access “in line with the Vienna

³⁷⁷ India Today, *Victory for India in Kulbhushan Jadhav Case: What This Case is All About*, July 17, 2019, available at <https://www.indiatoday.in/india/story/kulbhushan-jadhav-case-icj-verdict-all-you-need-know-1570414-2019-07-17> (Last visited on January 5, 2020).

³⁷⁸ Pakistan Today, *ICJ Rejects India’s Plea for Kulbhushan Jadhav’s Acquittal*, July 17, 2019, available at <https://www.pakistantoday.com.pk/2019/07/17/icj-to-rule-on-indian-spy-kulbhushan-jadhav-case-today/> (Last visited on January 5, 2020).

³⁷⁹ India Today, *Kulbhushan Jadhav: India, Pak Wage a Diplomatic Tug of War*, September 6, 2019, available at <https://www.indiatoday.in/magazine/up-front/story/20190916-kulbhushan-jadhav-india-pak-wage-a-diplomatic-tug-of-war-1595817-2019-09-06> (Last visited on January 5, 2020).

³⁸⁰ Faizan Mustafa, *Explained: What’s Changed in Jammu and Kashmir?*, The Indian Express, August 7, 2019, available at <https://indianexpress.com/article/explained/explained-article-370-has-not-been-scrapped-but-kashmirs-special-status-has-gone-5880390/> (Last visited on January 5, 2020).

³⁸¹ The Hindu, *How to Solve a Problem Like Kulbhushan Jadhav*, July 20, 2019, available at <https://www.thehindu.com/thread/politics-and-policy/how-to-solve-a-problem-like-kulbhushan-jadhav/article28620457.ece> (Last visited on January 5, 2020).

³⁸² Geeta Mohan, *India, Pakistan in Touch Over Consular Access for Kulbhushan Jadhav*, India Today, August 30, 2019, available at <https://www.indiatoday.in/mail-today/story/india-pakistan-consular-access-kulbhushan-jadhav-1593284-2019-08-30> (Last visited on January 5, 2020) (‘Mohan’).

³⁸³ *Id.*

Convention, the ICJ judgment and the laws of Pakistan”.³⁸⁴ In fact, due to the culmination of these differences on August 7, 2019, Pakistan dismissed Ajay Basaria, the Indian High Commissioner.³⁸⁵

After multiple diplomatic discussions, Jadhav was granted consular access on September 2, 2019.³⁸⁶ Gaurav Ahluwalia, the India *Charge d’Affaires*, met Jadhav at a Pakistan sub-jail.³⁸⁷ While seeking Jadhav’s consular access, India had argued that the same would amongst other things, allow India “to oversee his physical and mental state of being” and to allow Jadhav to “share his miseries as it were, would have been relief at a humanitarian level”.³⁸⁸ Further in pursuance of the same, post the verdict; India had sought unhindered access to Jadhav.³⁸⁹ Nonetheless, despite multiple efforts, India’s demands did not materialise. At the first consular meeting, a Pakistani official was present while Jadhav was communicating to the Indian authorities and the entire session was recorded.³⁹⁰ In fact, post the session Mr. Ahluwalia reported, “It was clear that Kulbhushan Jadhav appeared to be under extreme pressure to parrot a false narrative to bolster Pakistan’s untenable claims”.³⁹¹ It is clear that the atmosphere in which Jadhav was granted consular access was clearly not ideal. Till now, there is no notification of a second consular meeting.³⁹² In fact, certain news reported that Pakistan has refused to grant Indian officials a second consular meeting with Jadhav.³⁹³

³⁸⁴ The Economic Times, *Senior Indian Diplomat Meets Kulbhushan Jadhav After Pakistan Grants Consular Access*, September 2, 2019, available at <https://economictimes.indiatimes.com/news/defence/senior-indian-diplomat-meets-kulbhushan-jadhav-after-pakistan-grants-consular-access-media-report/articleshow/70944432.cms> (Last visited on January 5, 2020).

³⁸⁵ *Id.*

³⁸⁶ Business Standard, *India in Contact with Pakistan on Consular Access to Kulbhushan Jadhav: MEA*, December 6, 2019, available at https://www.business-standard.com/article/current-affairs/india-in-contact-with-pakistan-on-consular-access-to-kulbhushan-jadhav-mea-119120601189_1.html (Last visited on January 5, 2020).

³⁸⁷ The Hindu Business Line, *Pakistan to Amend Army Act to Allow Kulbhushan Jadhav Appeal Against Conviction*, November 13, 2019, available at <https://www.thehindubusinessline.com/news/pakistan-to-amend-army-act-to-allow-kulbhushan-jadhav-appeal-against-conviction/article29962660.ece> (Last visited on January 5, 2020); Business Standard, *India in Contact with Pakistan on Consular Access to Kulbhushan Jadhav: MEA*, December 6, 2019, available at https://www.business-standard.com/article/current-affairs/india-in-contact-with-pakistan-on-consular-access-to-kulbhushan-jadhav-mea-119120601189_1.html (Last visited on January 5, 2020).

³⁸⁸ Memorial of India, *supra* note 132, ¶34 at 18.

³⁸⁹ Mohan, *supra* note 382, at 42.

³⁹⁰ India Today, *Pakistan in Violation of International Rules in Kulbhushan Jadhav Case*, October 31, 2019, available at <https://www.indiatoday.in/india/story/pakistan-in-violation-of-international-rules-in-kulbhushan-jadhav-case-icj-president-to-unga-1614437-2019-10-31> (Last visited on January 5, 2020).

³⁹¹ *Id.*

³⁹² Facts last updated on June 3, 2020.

³⁹³ Business Standard, *India in Contact with Pakistan on Consular Access to Kulbhushan Jadhav: MEA*, December 6, 2019, available at https://www.business-standard.com/article/current-affairs/india-in-contact-with-pakistan-on-consular-access-to-kulbhushan-jadhav-mea-119120601189_1.html (Last visited on January 5, 2020).

The Court while granting the remedy of review had not stated the means by which the same will be enforced. But it did state that Pakistan needs to ensure that the same is effective to be meaningful. In light of the same, the Court had indicated the possibility of Pakistan enacting “an appropriate legislation” to suit the remedy.³⁹⁴ This suggestion is slightly problematic and facetious. As was observed, the Court refused to annul the decision of the military court as it did not wish to interfere with the internal affairs of Pakistan’s judicial system.³⁹⁵ Nonetheless, by asking Pakistan to consider the possibility of enacting a new legislation, the Court did interfere with Pakistan’s legislative system. This is hypocritical as the Court deemed it fit to take the risk of asking a State to possibly ‘amend its constitution’ but considered it out of its mandate to assess the ‘correctness’ of the trial by the military court and the confessional statement despite the blatant due process violations.

Thus, in the second week of November, 2019, Indian media outlets reported that Pakistan is likely to afford an opportunity to Jadhav to file an appeal against his conviction in a civilian court.³⁹⁶ To that end, there was news that Pakistan is looking to amend the Army Act to lay a procedure to seek redress in the civil courts against decree by Army courts.³⁹⁷ However, this hope for Jadhav’s family and other fellow Indians was only short lived as Pakistan declined the possibility of any such amendments.

After a period of more than five months, communications again stirred between the parties when during an online interaction organised by Akhil Bharatiya Adhivakta Parishad, an all-India lawyers’ association associated with the RSS, Mr. Harish Slave, Indian counsel on the case, suggested that given the lack of response from Pakistani authorities, India might have to again move to ICJ for seeking an appropriate remedy or effective execution of the already granted remedy.³⁹⁸ Pakistan replied to Mr Salve’s comments categorically rebuffing the “baseless and inaccurate” allegations, while maintaining that Pakistan had at all times “complied with the judgment and is committed to continue doing so as the case proceeds”³⁹⁹ driving us back to the continued impasse.

³⁹⁴ Jadhav Judgment, *supra* note 2, ¶146 at 2.

³⁹⁵ See discussion *supra* Part IV.A on “Trial by the Military Court and Ensuring Due Process Rights”.

³⁹⁶ Business Standard, *India in Contact with Pakistan on Consular Access to Kulbhushan Jadhav: MEA*, December 6, 2019, available at https://www.business-standard.com/article/current-affairs/india-in-contact-with-pakistan-on-consular-access-to-kulbhushan-jadhav-mea-119120601189_1.html (Last visited on January 5, 2020).

³⁹⁷ *Id.*

³⁹⁸ The Indian Express, *Kulbhushan Jadhav Case: Pakistan Call Salve’s Claim on Back-Channel Talks ‘Baseless and Inaccurate’*, May 10, 2020, available at <https://indianexpress.com/article/india/kulbhushan-jadhav-case-pakistan-harish-salve-icj-6403316/> (Last visited on January 5, 2020); Pakistan Observer, *FO Rejects Indian Counsel’s Statements in Kulbhushan Case*, May 11, 2020, available at <https://pakobserver.net/fo-rejects-indian-counsels-statements-in-kulbhushan-case/> (Last visited on January 5, 2020).

³⁹⁹ Omer Farooq Khan, *Fully Complied with ICJ Ruling in Jadhav Case, Says Pakistan*, The Times of India, May 10, 2020, available at <https://timesofindia.indiatimes.com/india/>

From over three years now, the Pakistani authorities have attempted to portray Jadhav as a terrorist engaged in espionage activities and had sentenced him to death defying even the international standards. In light of the fact that the remedy prescribed by the Court does not trace a path out of the military court which is needed for the review to be effective, the next step is unclear. Is Pakistan required to undertake a *de novo* review? Is all the evidence to be reconsidered? There is not enough incentive for Pakistan to map the path ahead. As long as it is taking any steps, however vague it may be, it cannot be said to be disobeying the judgment of the Court. The Court has stated that consular access be granted as per the domestic laws of Pakistan. How the Court aims to resolve the disjunction between Pakistan's laws and the ICCPR and other international standards is blurred. Even if the matter were to go to a civilian court, Pakistan has all options to stymie the steps ahead just by delaying the matter like it did in the case of Mumbai attacks.⁴⁰⁰ Even eleven years after the case, despite repercussions from the international community, Pakistan has continued to dilly-dally it.⁴⁰¹ Thus, in light of the continued political tensions between the states added the unclear judgment of the ICJ, Jadhav has limited hopes of returning to India.

VIII. CONCLUSION

Today the VCCR is one of the most influential and successful international mechanisms to be ever established under the auspices of the United Nations.⁴⁰² Nonetheless, due to changes in the current legal landscape, there have arisen a lot of ambiguities concerning its scope, thus making its enforcement difficult. In this paper, I have highlighted the need to revamp the current regime of the law on consular relations in the international framework. The main problem arises because VCCR does not explicitly lay down whether it allows for enforcement of individual rights. Along with this, it also does not prescribe an appropriate remedy for breach. This has led to ambiguities within domestic courts of various jurisdictions. The ICJ, in its judgment in the LaGrand case, answered this long-standing question for the first time. However, the issue again surfaced in the Avena case and also recently in the Kulbhushan Jadhav case.

In theory, the opinion rendered by the ICJ calls for a significant shift in the law of consular relations. The classification of right to consular access as a separate right granted to the foreign defendant calls for more diligence by the judiciary and in effectively enforcing the modified treatment of foreign nationals

fully-complied-with-icj-ruling-in-jadhav-case-says-pakistan/articleshow/75664895.cms (Last visited on January 5, 2020).

⁴⁰⁰ Meena Menon, *26/11 Mumbai Terror Attacks: Justice Delayed Could Well be Justice Denied if Pakistan Continues to Drag Its Feet on Trial*, Firstpost, December 5, 2018, available at <https://www.firstpost.com/india/2611-mumbai-terror-attacks-justice-delayed-could-well-be-justice-denied-if-pakistan-continues-to-drag-its-feet-on-trial-5663021.html> (Last visited on January 5, 2020).

⁴⁰¹ *Id.*

⁴⁰² Buys, *supra* note 14, at 4.

detained within their jurisdiction. In fact, the basis of the LaGrand decision was to aid courts in the future as, by the time of the decision, the LaGrand brothers had already been executed. However, an analysis of cases of various jurisdictions reveals that the domestic courts have failed to conform to these mandates in practice.⁴⁰³ The reoccurrence of the same issues in not just different domestic courts but also the ICJ demonstrates that even though the judgments rendered by the ICJ are binding on all signatory states, the domestic courts are reluctant to enforce them. The typical justification for the same is the ambiguous language of the treaty. Eventually, the decision rendered by the ICJ did not alter the legal landscape with respect to consular relations to the extent as was anticipated by the ICJ.

Given the importance accorded to consular relations in the current paradigm, effective enforcement of consular laws is essential. As was observed, an amendment to the VCCR aimed at removing the ambiguity in the text of Article 36 would serve as a significant step in the right direction. If the consular relations were to be governed in the same manner as they are today, then that would effectively hamper not just the due process rights but also the basic human rights of foreign defendants. Failure to develop effective principles that clear the abstruseness will further erode the states commitment to protecting rights of foreign criminal defendants and may undermine the effectiveness of the convention.

An instance of the same was witnessed recently in the Jadhav case. Quite apart from the controversial law surrounding the case, the judgment is remarkable in a number of other aspects and has received accolades globally. For instance, at the United Nations, Mexico appreciated the ruling and postulated the same to have deepened the jurisprudence on consular law. It regarded the ruling to have reminded the VCCR's ratifying States of the seriousness associated with the obligations enlisted therein.⁴⁰⁴ The Court's finding that the obligations under the VCCR are not superfluous and need to be respected by States is therefore sensible. While the ICJ conclusively did read an espionage exception under the VCCR, it stopped short of recognising whether it is a valid exception under CIL, thus prudently avoiding a politicisation of the debate. Additionally, as indicated earlier, the Court also did not elaborate on Pakistan's alleged exception of mutual legal assistance in granting consular access in CIL. The ICJ's failure in finding answers to questions concomitant to the main claim coupled with rare compliance due to the vagueness of the judgment will undoubtedly undermine the legitimacy of the ICJ and may embolden States to challenge its rulings on unimportant or frivolous ground.

⁴⁰³ See discussion *supra* Part II.B on "Shortcomings of the Law on Consular Relations Under the VCCR".

⁴⁰⁴ The Economic Times, *Mexico Praises ICJ Ruling in Kulbhushan Jadhav's Case*, November 2, 2019, available at https://economictimes.indiatimes.com/news/politics-and-nation/mexico-praises-icj-ruling-in-kulbhushan-jadhavs-case/articleshow/71863551.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last visited on January 5, 2020).