

unwilling to ensure respect for the Court's pronouncements concerning the Mandate for South West Africa.³⁶ The stark contrast of the Constitutional Court's defense of the Tribunal is a sign of how far things have come since.

SEBASTIAN BATES
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International Court of Justice—Vienna Convention on Consular Relations—consular communication, access, and visitation—customary international law—espionage—terrorism

JADHAV CASE (INDIA V. PAKISTAN). Judgment, Merits. At <https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf>.

International Court of Justice, July 17, 2019.

Jadhav Case (India v. Pakistan) concerned Pakistan's arrest, detention, conviction, and death sentence of Kulbhushan Sudhir Jadhav, asserted by India to be an Indian national, who had been convicted of engaging in acts of terrorism and espionage in Pakistan.¹ This is the third dispute over the interpretation of Article 36 of the Vienna Convention on Consular Relations (VCCR) to come before the International Court of Justice (ICJ).² In contrast to the Applicants in the previous consular rights cases, India sought relief that included the annulment of Jadhav's conviction in Pakistan, his release from custody, and his safe transfer to India.³ After unanimously finding it had jurisdiction, fifteen judges of the ICJ, with only Judge ad hoc Jilani dissenting, held on the merits that Pakistan had breached VCCR Article 36 by failing to inform Jadhav without delay of his rights under that provision; by failing to notify without delay the appropriate consular post of India in Pakistan of his detention; and by depriving India of its right to communicate with Jadhav, to visit him in detention, and arrange for his legal representation. In addition, the Court, with only Judge ad hoc Jilani dissenting, found that Pakistan is under an obligation to inform Jadhav of his rights without further delay and is obliged to provide Indian consular officers access to him. The Court further found that appropriate reparation required Pakistan to provide, by means of its own choosing, effective review and reconsideration of Jadhav's conviction and sentence to ensure that full weight is given to the effect of the violation of his rights. Finally, the ICJ, again with Judge ad hoc Jilani dissenting, declared that a continued stay of execution constituted an indispensable condition for the effective review and reconsideration of Jadhav's conviction and sentence.

³⁶ See, e.g., John Dugard, *The South African Judiciary and International Law in the Apartheid Era*, 14 S. AFR. J. HUM. RTS. 110, 116–18 (1998). This is not to say that these pronouncements were universally ignored by the judiciary. See, e.g., *S. v. Sagarius en Andere* 1983 (1) SA 833, 836 (SWA).

¹ *Jadhav Case (India v. Pak)*, Judgment, Merits (Int'l Ct. Just. July 17, 2019).

² The other cases were: *LaGrand Case (Ger v. U.S.)*, Judgment, Merits, 2001 ICJ Rep. 466 (June 27) [hereinafter *LaGrand Case*]; and *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, Merits, 2004 ICJ Rep. 12 (Mar. 31) [hereinafter *Avena Case*].

³ See *Jadhav Case (India v. Pak)*, Application Instituting Proceedings, para. 60 (Int'l Ct. Just. May 8, 2017), available at <https://www.icj-cij.org/files/case-related/168/168-20170508-APP-01-00-EN.pdf>.

The *Jadhav Case* is consistent with the ICJ's previous jurisprudence on Article 36 of the VCCR in *LaGrand* and *Avena and Other Mexican Nationals*,⁴ where the Court held that Article 36 of the VCCR imposed an obligation on the parties to provide consular communication, access, and visitation to detained nationals of VCCR state parties without delay. The broader importance of the *Jadhav Case* is that it makes it clear that these obligations apply to all VCCR party nationals in the territory of another state party, including those accused of terrorism and espionage, even where their nationality is disputed by one of the parties.

The facts of the case were disputed by India and Pakistan. According to India, Jadhav was kidnapped from Iran, where he was residing and carrying out business activities after his retirement from the Indian navy. According to Pakistan, Jadhav had been performing acts of espionage and terrorism on behalf of India in Balochistan, near the border between Iran and Pakistan, where he illegally entered Pakistani territory. According to Pakistan, Jadhav was in possession of an Indian passport bearing the name "Hussein Mubarak Patel," a claim denied by India (para. 21). In support of its allegations, Pakistan released a video in which Jadhav appeared to confess to his involvement in acts of espionage and terrorism in Pakistan at the behest of India's foreign intelligence agency "Research and Analysis Wing" (known as RAW) (para. 22). On March 25, 2016, the same day the video was released, India requested consular access at the earliest date to Jadhav. India sent more than ten Notes Verbales to Pakistan in which it identified Jadhav as an Indian national and sought consular access to him.

The trial of Jadhav began on September 21, 2016 before a Field General Court Martial. On January 23, 2017, Pakistan's Ministry of Foreign Affairs sent a letter to the High Commission of India in Islamabad seeking support in obtaining evidence for the criminal investigation. In response, India requested consular access to Jadhav, but Pakistan's Foreign Ministry explained that India's request would only be considered in the light of its response to Pakistan's request for assistance in the investigation process and the early dispensation of justice. On March 31, 2017, India replied that consular access to Jadhav was an essential prerequisite to verify the facts and understand the circumstances of his presence in Pakistan. Less than two weeks later, however, on April 10, Pakistan announced that Jadhav had been sentenced to death.

On May 8, 2017, India instituted proceedings against Pakistan under Article 36, paragraph 1 of the Statute of the ICJ, and Article 1 of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (Optional Protocol) alleging violations of the VCCR by Pakistan. In assessing the jurisdictional basis for the request, the ICJ observed that India and Pakistan have been parties to the VCCR since December 28, 1977, and May 14, 1969, respectively. They were also, at the time of the filing of the Application, and remain at the time of writing, parties to both the VCCR and the Optional Protocol, and neither had made any reservations or declarations.

The ICJ observed that its jurisdiction in the case arose from Article 1 of the Optional Protocol and that Pakistan had not contested that the dispute related to the interpretation or application of the VCCR. The Court also explained that its jurisdiction did not extend to alleged breaches of international law obligations beyond the VCCR such as alleged violations of the 1966 International Covenant on Civil and Political Rights (ICCPR) (para. 36). The ICJ acknowledged, however, that this conclusion would not preclude it from considering

⁴ *LaGrand Case*, *supra* note 2; *Avena Case*, *supra* note 2.

other obligations under international law in so far as they were relevant to the interpretation of the VCCR (para. 37).

After dispensing with Pakistan's three objections to the admissibility of India's application (paras. 39–65), and after explaining that Pakistan did not expressly raise any objection to the jurisdiction of the court (para. 67), the ICJ turned its attention to Pakistan's arguments concerning the applicability of the VCCR to the facts of the case.

The Court summarized Pakistan's arguments as follows: First, Pakistan argued that VCCR Article 36 did not apply to "prima facie cases of espionage" (para. 68). Second, it contended that "customary international law governed cases of espionage in consular relations" and allowed states "to make exceptions to the provisions on consular access contained in Article 36 of the [VCCR]" (*id.*). Third, Pakistan claimed that the 2008 Agreement on Consular Access between India and Pakistan (2008 Agreement)⁵ regulated consular access rather than the provisions of VCCR Article 36 (*id.*).

Regarding Pakistan's first argument, the ICJ explained that VCCR Article 36, when read in its "context and in light of the object and purpose of the Convention," did not exclude from its scope "certain categories of persons, such as those suspected of espionage" (para. 73). In the Court's view, "it would run counter to the purpose of that provision if the rights it provides could be disregarded when the receiving state alleges that a foreign national in its custody is involved in acts of espionage" (para. 74).

Regarding Pakistan's second argument, the ICJ explained that it did not need to "resort to supplementary means of interpretation, such as the *travaux préparatoires* of the VCCR and the circumstances of its conclusion" in order "to determine the meaning of Article 36 of the Convention" (para. 76). Nonetheless, considering Pakistan's argument, the ICJ proceeded to look at these (paras. 76–85) and concluded from its own analysis that Article 36 does not exclude from its scope persons accused of espionage. The ICJ further explained that "Article 36 of the Convention, not customary international law, govern[ed] the matter at hand" (para. 89).

Regarding Pakistan's third argument, the ICJ explained that the 2008 Agreement⁶—which provided that "each side may examine a case on its merits"⁷ in situations of "arrest, detention, or sentence made on political or security grounds"—could not be read as denying consular access (para. 94). In its view, "if the Parties had intended to restrict in some way the rights guaranteed by Article 36, one would expect such an intention [would have been] unequivocally reflected in the [2008 Agreement]," which was not the case (*id.*). The ICJ explained that the 2008 Agreement could only "confirm, supplement, extend or amplify" the VCCR and could not displace Pakistan's obligations under Article 36 (para. 97).

Turning to the substance of India's complaint, the ICJ concluded that Pakistan breached its obligation to inform Jadhav of his rights under Article 36, paragraph 1(b), which it said was clear from the facts of the case and from Pakistan's argument that the VCCR did not apply to an individual suspected of espionage.

⁵ See Agreement on Consular Access Between the Government of the Islamic Republic of Pakistan and the Government of the Republic of India, Islamabad (May 21, 2008), available at <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54471/Part/I-54471-08000002804b7dde.pdf>. The agreement was registered by Pakistan at the UN Secretariat on May 17, 2017.

⁶ *Id.*

⁷ No explanation is provided in the agreement as to what examining a case "on its merits" means.

With regard to India's complaint that Pakistan had failed to inform India, without delay, of the arrest and detention of Jadhav, the Court referred to its previous jurisprudence in *Avena and Other Mexican Nationals* that the words "without delay" did not necessarily mean that a state had to inform consular officials "immediately upon arrest" (para. 105). However, the ICJ observed that as Pakistan had not informed Jadhav of any of his rights under Article 36, "he may not [have been] aware of his rights and consequently may not have been in a position to make a request to the competent authorities of the receiving State to inform the sending States' consular post of his arrest" (para. 107). Accordingly, the Court was of the view that "Pakistan was under an obligation to inform India's consular post of the arrest and detention of Jadhav in accordance with Article 36, paragraph 1(b)" (para. 109). Referencing its decision in *Avena*, the Court explained that "without delay" should be measured on the basis of "each individual's circumstances" (para. 113). In *Avena*, the ICJ "found that there had been a violation of the obligation to inform under Article 36, paragraph 1(b), with regard to a delay of just forty hours when the foreign nationality of the detained person was apparent from the outset of his detention" (*id.*, citing *Avena*, para. 89).⁸ "However, the Court found no violation in respect of a delay of five days when the foreign nationality was less obvious at the time of arrest" (*id.*, citing *Avena*, para. 97). Taking account of the particular circumstances of the present case, the ICJ determined that the three weeks between the arrest and notification in this case constituted a breach of the obligation to inform "without delay," required by Article 36, paragraph 1(b), of the Vienna Convention (*id.*).

In the ICJ's view, it must have been clear to Pakistan from the outset of his arrest and from its communications with the Indian consular officials that Jadhav was an Indian national. Therefore, Pakistan had no reasonable excuse for the delay or its refusal to respond to the ten Notes Verbales sent by India. Nor did India's alleged failure to cooperate with Pakistan in the investigation of Jadhav's activities there relieve Pakistan of its obligation to grant consular access to Indian officials.

Accordingly, the Court found that Pakistan had breached its obligations under Article 36 of the Vienna Convention, by denying consular officers of India access to Jadhav, contrary to their right to visit him, to converse and correspond with him, and to arrange for his legal representation (para. 133).

Pakistan next argued that India's violations of international law under UN Security Council Resolution 1373 (2001), adopted under Chapter VII of the Charter of the United Nations, which called on states to 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, was an abuse of rights by India. India, Pakistan argued, was claiming rights for Jadhav under the VCCR while, at the same time, providing him with false travel documents to engage in international terrorism in Pakistan.⁹ In response to this argument, the ICJ explained that "there is no basis under the [VCCR] for a State to condition the fulfilment of its obligations under Article 36 on the other state's compliance with other

⁸ *Avena Case*, *supra* note 2, para. 89.

⁹ See *Jadhav Case (India v. Pak)*, Counter-memorial of the Islamic Republic of Pakistan, paras. 48–52 (Int'l Ct. Just. Dec. 13, 2017), available at <https://www.icj-cij.org/files/case-related/168/168-20171213-WRI-01-00-EN.pdf>.

international law obligations” (para. 123). To hold otherwise would severely undermine the whole system of consular assistance (*id.*).

The judgment was not all bad news for Pakistan, however. Significantly, India was unsuccessful in achieving the ambitious relief that it sought. The ICJ rejected India’s request to declare that the sentence imposed by Pakistan’s military court violated the VCCR and international law and to direct Pakistan to release Jadhav and facilitate his safe return to India. India had also requested that should the ICJ not order Jadhav to be released, it should direct Pakistan to begin a trial in civilian courts, excluding his confession, in strict conformity with the ICCPR, with full consular access, and with a right for India to arrange for Jadhav’s legal representation (para. 125). In support of this argument, “India argu[ed] that Pakistan’s criminal justice system . . . did not satisfy the minimum standards of due process in its application to civilians” (para. 127). Pakistan responded by arguing that such relief could only be granted by a criminal appellate court, that the ICJ does not function as such a court, and that consular assistance differs from legal assistance in criminal proceedings (para. 129). In Pakistan’s view, the appropriate remedy, at most, was “effective review and reconsideration of the conviction and sentence of the accused” (para. 130). Pakistan explained that its domestic legal system provided an established and defined process whereby civil courts undertake a substantive review of the decisions of military tribunals.

The ICJ agreed with Pakistan that the appropriate remedy was effective review and reconsideration of Jadhav’s conviction and sentence, rather than a trial under civilian courts (para. 138). The Court, however, explained that the review and reconsideration had to be “effective,” which presupposed the “existence of a procedure . . . suitable for this purpose” (para. 139). To be effective, the ICJ explained, full weight had to be given to the effect of the violations of the rights set forth in Article 36, paragraph 1 of the VCCR, including a guarantee that any possible prejudice caused by the violation would be fully examined. A judicial process, in the ICJ’s view, is best suited to the task. Given the available evidence presented to the Court, it was not clear whether Pakistani law provided for judicial review of a decision of a military court on the ground that there had been a violation of the VCCR (para. 141). Accordingly, the Court “considered” that Pakistan’s violations of the VCCR, and specifically, its implications for a fair trial of the accused, should be fully examined and properly addressed during the review and reconsideration process. The ICJ explained that although the choice of means was left to Pakistan, it may have to consider enacting appropriate legislation in order to provide for an effective review and reconsideration of the initial judgment of the military court if judicial review was otherwise unavailable (para. 146). In this context, “a continued stay of execution [was] an indispensable condition for the effective review and reconsideration of the conviction and sentence of Mr. Jadhav” (para. 148).

In his dissenting opinion, Judge ad hoc Jilani drew attention to the evidence presented by Pakistan as to the authenticity of Jadhav’s passport, referencing the expert’s report,¹⁰ which had concluded that the Indian passport was genuine, and detailing some of the offenses Jadhav was accused of committing in Pakistan (diss. op., Jilani, J. ad hoc, paras. 7–16). In

¹⁰ This is a reference to the independent expert report written by David Westgate, who had served as part of the United Kingdom Home Office and Immigration Intelligence Directorate for more than twenty-seven years, including serving on attachment to New Delhi and Karachi. For the report and a copy of Jadhav’s passport, which showed that he had entered and left India seventeen times, see *id.*

Jillani's view, the issuance of a valid Indian passport with a false Muslim identity for the express purpose of engaging in terrorist activities for the Baloch Liberation Movement was an "abuse of process" (diss. op., Jillani, J. ad hoc, para. 16). Next, Jillani reasoned that the 2008 Agreement was meant to clarify and inform certain provisions of the VCCR given the special circumstances faced by the two countries (diss. op., Jillani, J. ad hoc, para. 31). He also expressed his view that the delay in notifying the Indian consular authorities about the arrest of Jadhav was understandable, especially after he disclosed that he was involved in espionage and terrorism in two cities of Pakistan. Given the seriousness of the offenses committed by Jadhav, the threat these had posed to the Pakistan's national security, and that several accomplices whom he named were still being investigated, a delay "of three weeks between his arrest and notification [was] reasonable and thus did not amount to a breach of Article 36 (1)(b) of the Vienna Convention" (diss. op., Jillani, J. ad hoc, para 37). Jillani contrasted the situation in this case from the situations in *Avena* and *LaGrand*, where there were no bilateral agreements between the sending states and the receiving states.

Jillani also took exception to some of the assumptions made by the majority about Pakistan's judicial system; specifically, whether judicial review of a military court's decision was available in Pakistan. According to the dissenting judge, the High Court and Supreme Court of Pakistan exercise judicial review over decisions of the Field General Court Martial (citing at para. 47 of his dissent decisions of the Peshawar High Court). He also admonished the majority for its request that Pakistan adopt legislation for effective review and reconsideration of that court's decision regarding Jadhav. He explained that such legislation is already in place in Pakistan, and that "it is also not the Court's role to dictate to [Pakistan] the means by which it has to comply with its obligation to ensure effective review and reconsideration" of the case (diss. op., Jillani, J. ad hoc, para. 48).

By way of contrast, Judge Cañado Trindade's separate opinion admonished the ICJ for not considering the "pioneering" advisory opinion of the Inter-American Court of Human Rights concerning the VCCR,¹¹ and expressed his view that the ICJ should have described the rights enshrined in Article 36 as a human right (sep. op., Cañado Trindade, J., paras. 96–97). In his declaration, Judge Robinson also reached the conclusion that Pakistan, by breaching VCCR Article 36(1), had breached a human right, but he went further than Cañado Trindade, considering the breach of the VCCR closely connected to a breach of the fair trial rights of an accused under ICCPR Article 14(3) (dec., Robinson, J., para. 2(xii)). In her declaration, Judge Sebutinde stated that Pakistan's objection relating to the false passport that India had given Jadhav was unconvincing, as Pakistan had reasonable grounds to believe that Jadhav was an Indian national when it arrested him, and "only raised the issue of [his] nationality 19 months after India's first request for consular access" (dec., Sebutinde, J., para. 11). In her view, the facts in Pakistan's possession, from its interrogation of Jadhav and from its communications with India, were sufficient to demonstrate to the Pakistani authorities responsible for his arrest and detention that he was a foreign national, which was a sufficient basis to invoke the obligations under VCCR Article 36 (dec., Sebutinde, J., para. 12). Finally, in his declaration, Judge Iwasawa questioned whether Pakistan needed to carve out an

¹¹ Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, n. 16 (Inter-Am. Ct. Hum. Rts. Oct. 1, 1999), available at http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf.

exception to VCCR Article 36 with respect to individuals accused of espionage and terrorism when states have concluded a number of anti-terrorism conventions subsequent to the conclusion of the VCCR “in which they have included the right of a person suspected of terrorism to have access without delay to the representative of the State of which he [or she] is a national” (dec., Iwasawa, J., para. 4). Although Iwasawa admitted that engaging in espionage is a different crime, in his view, “the anti-terrorism conventions offer helpful guidance on the practice of the parties to the VCCR in respect of consular access, thus providing additional support for the interpretation that Article 36 of the VCCR requires consular access without delay also for persons suspected of espionage” (*id.*).

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The *Jadhav Case* makes it clear that the obligations imposed by VCCR Article 36 apply to all VCCR state party nationals that find themselves in the territory of another state party to the VCCR, without exception, including those accused of terrorism and espionage, even where their nationality is disputed by one of the parties. The virtual unanimity of the ICJ in reaching this decision serves to reinforce the Court’s previous jurisprudence on Article 36 of the VCCR in *LaGrand* and *Avena and Other Mexican Nationals* cases, including as to the appropriate relief.

On September 2, 2019, six weeks after the ICJ delivered its judgment, Pakistan allowed Indian consular officers access to Jadhav for two hours, pursuant to the ICJ’s decision, although he remains on death row for acts of espionage, terrorism, and sabotage.¹² Unless a diplomatic solution is found, he will have to wait for the outcome of the review and reconsideration process in Pakistan, which is being undertaken by the Pakistan Army, although it has ruled out any amendment to the Army Act.¹³

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¹² Naveed Siddiqui, *Indian Envoy Meets Jadhav at Sub-jail After Pakistan Grants Consular Access*, DAWN (Sept. 2, 2019), at <https://www.dawn.com/news/1502960>.

¹³ See *Legal Options for Jadhav Case Review Under Study, Says Army*, DAWN (Nov. 14, 2019), at <https://www.dawn.com/news/1516578/legal-options-for-jadhav-case-review-under-study-says-army>.