

# **The Right to Consul under Article 36 of the Vienna Convention on Consular Relations, 1963 after the *Jadhav Case***

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## **Abstract**

*The International Court of Justice, in its decision on the matter relating to Kulbushan Yadav held that in failing to provide consular access, Pakistan stood in breach of its international obligation under article 36(1)(b). After the judgment, an important step forward was made with regards to the nature of the right created by the aforementioned article. In line with the constant jurisprudence of the ICJ on the issue, this paper maintains that even though VCCR is a treaty that intended to only benefit states, the wording of Article 36(1)(b) is such that it creates an individual right. Furthermore, and this is the novelty the case brought, it was the first time that this right was granted notwithstanding the detained person's alleged involvement in acts of espionage and terrorism. This exhibits an expansive interpretation given by the ICJ to Article 36(1)(b), thus upholding the importance accorded to the right to consul within international law and the role it plays in ensuring due process and a fair trial.*

## Introduction

On 17 July 2019, the International Court of Justice (ICJ) delivered its judgement on yet another<sup>1</sup> dispute between Pakistan and India. Contingent upon the detention and trial of Indian National Kulbushan Jadhav by the military courts of Pakistan, the *Jadhav case*,<sup>2</sup> inter alia, engaged Article 36, one of the most controversial provisions of the Vienna Convention on Consular Relations of 1963 (VCCR). Setting aside the nationalist sentiments and undue sensationalism surrounding the case this paper seeks to provide an impassive assessment of the practical impact of the case on the application of this provision with specific focus on the detainee's right to request consular access under Article 36(1)(b).

This article explores the construction of Article 36(1)(b) over the years, to show how the ICJ removed the uncertainty pertaining to the preamble of the treaty. It will be submitted that even though VCCR is a treaty that intended to only benefit states, the wording of Article 36(1)(b) is such that it creates individual rights. While the creation of these rights still benefits the states by enabling the consular posts to perform their functions effectively, the impact of the right to consul goes beyond the mere facilitation of inter-state relations. This was recognised, in 2007, by the Federal Constitutional Court of Germany which held that Article 36(1)(b) of VCCR

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<sup>1</sup> The other disputes being: *Appeal to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgement, 1972 I.C.J. 46; *Trial of Pakistani Prisoners of War (Pakistan v. India)*, 1973 I.C.J. 347; *Aerial Incident of 10 August 1999 (Pakistan v. India)*, Jurisdiction of the Court, 2000 I.C.J. 12.

<sup>2</sup> *Jadhav case (India v Pakistan)* (2019) ICJ 168.

constitutes an important aspect of a fair trial, being essential in enabling an effective defence.<sup>3</sup>

This article only aims to address whether via the particularisation of the detained individual's acts, consular access may be refused.<sup>4</sup> It argues that over the years, the jurisprudential construction provided by the ICJ, concerning the interpretation and application of this right has been such that it plays a crucial role in assisting due process and a fair trial. For the first time in the *Jadhav case* (2019) this right was granted notwithstanding the detained person's alleged involvement in acts of espionage and terrorism. This exhibits an expansive interpretation given by the ICJ to the right to consul under Article 36(1)(b), thus upholding the importance accorded to this right within international law.

The argument will be presented in three parts. The first part provides a historical context to the issue of consular relations. It sets the background against which the other arguments will be developed. The second part deals with the interpretation of Article 36(1)(b): the rules on treaty interpretation of the Vienna Convention on the Law of Treaties of 1969 (VCLT) and the jurisprudence of the ICJ will be used to shed light on the actual content of the provision. Moreover, the facts of the *Jadhav case*, the arguments put forth by India and Pakistan, and the decision of the Court will be analysed to support the claim that after the decision in *Jadhav*, the scope of the individual right to consul under Article 36 of VCCR has been actually expanded. Lastly, in the final part, the expansive interpretation given by the ICJ

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<sup>3</sup> Bodansky D and Gärditz KF, 'Case Nos. 2 BvR 2115/01, 2 BvR 2132/01, & 2 BvR 348/03.60 Neue Juristische Wochenschrift 499 (2007)' (2007) 101 American Journal of International Law 627.

<sup>4</sup> Reema Omer, 'Beyond "Winners" and "Losers": Understanding the International Court of Justice's Judgment in the *Jadhav case*' (*Opinio Juris*, 31 July 2019) <<http://opiniojuris.org/2019/07/31/beyond-winners-and-losers-understanding-the-international-court-of-justices-judgment-in-the-jadhav-case/>> accessed on 18 Dec 2019.

will be analysed. For this, the debate between state security and provision of due process will be elaborated upon. The opinions of Judge *ad hoc* Tassadaq Hussain Jilani and Judge Antonio Augusto Trindade will be discussed, to provide further depth to the analysis previously conducted.

## A. Historical Context

The VCCR came into being in 1963, when ninety-five states met at Neue Hofburg in Vienna to ‘codify the existing international law on consular relations.’<sup>5</sup> The Treaty was the result of the post-World War II efforts by the United Nations (UN)<sup>6</sup> towards achieving the purpose of maintaining international peace and security.<sup>7</sup> After the devastation of the war it was necessary to codify international law in various treaties which could meet the intents laid down in the UN Charter, in particular international co-operation, equality, peaceful co-existence, and the establishment of friendly relations among nations.<sup>8</sup> The VCCR aimed to contribute to the development of friendly ties among nations.<sup>9</sup>

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<sup>5</sup> Mark J Kadish, ‘Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul’ (1997) *Michigan Journal of International Law* 565, 612.

<sup>6</sup> Sanderijn Duquet & Jan Wouters, ‘From Vienna to New York and Back: The UN’s Contribution to International Treaty Making on Diplomatic and Consular Relations’ (2017) *Leuven Centre for Global Governance Studies, Working Paper No. 191*, 1, 5.

<sup>7</sup> United Nations, ‘Maintain International Peace and Security’ <<https://www.un.org/en/sections/what-we-do/maintain-international-peace-and-security/>> accessed 10 November 2019.

<sup>8</sup> Duquet (n 6) at 5

<sup>9</sup> VCCR, Preamble.

Notwithstanding the UN's efforts to establish peace, the tensions between the states competing for world hegemony were not quite over. The Great Alliance formed between United States, Soviet Union and United Kingdom during the war had broken. This marked the beginning of a long period of rivalry between the US and the Soviet Union from 1947 till 1991,<sup>10</sup> famously known as the Cold War. The rift created by the Cold War was also apparent when the states met to deliberate upon the draft of the VCCR prepared by the International Law Commission (ILC).<sup>11</sup> The United States and the USSR were divided on the jurisdiction concerning dispute resolution: while the former wanted the provision for dispute settlement to be contained within the text of VCCR;<sup>12</sup> the latter seemed to shy away from the possibility.<sup>13</sup> A middle ground was established by mentioning dispute settlement in a separate agreement.<sup>14</sup> This was just one of the concerns of the states. During the cold war, both countries relied heavily on deploying a network of spies for gathering intelligence about the enemy.<sup>15</sup> The consulates and consular officers found themselves vulnerable to espionage or suspicion of

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<sup>10</sup> Wesley W. Widmaier, 'Constructing Foreign Policy Crises: Interpretive Leadership in the Cold War and War on Terrorism' (2007) 51(4) *International Studies Quarterly* 779.

<sup>11</sup> John B. Quigley, 'Vienna Convention on Consular Relations: in Retrospect and into the Future' (2013) 38 *Southern Illinois University Law Journal* 1, 2.

<sup>12</sup> United Nations Conference on Consular Relations, Mar. 4-Apr. 22, 1963, *Official Records*, 87-89, U.N. Doc. A/CONF.25/16 (Vol. 1), (Apr. 20, 1963) (statement of Mr. Cameron, U.S.A.)

<sup>13</sup> UN Conference on Consular Relations (n 12), 85 (statement of Mr. Avilov, U.S.S.R.).

<sup>14</sup> *Ibid.*

<sup>15</sup> Alpha History, 'Cold War Espionage' <<https://alphahistory.com/coldwar/espionage/>> accessed 12 November 2019.

espionage.<sup>16</sup> The situation should have made it pertinent to discuss the impact of these spying activities on consular functions and how it may be addressed by the VCCR. However, during the process of drafting the treaty the matter of espionage was not taken into account. The Chairman of the ILC was of the view that ‘a general statement of law could not possibly cover all conceivable cases.’<sup>17</sup> Thereby, no considerations regarding the interplay between intelligence gathering and consular functions were mentioned expressly in the Treaty. This was in line with the United Nations General Assembly’s claim that rather than becoming a ‘tragic theatre to cold war’ the newly formed international organisation had less sensational long-term goals to attend to.<sup>18</sup>

Albeit the main focus of this article is on the rights created by the VCCR, two notions are to be deduced from the aforementioned account which will facilitate tracing the evolution, both logical and chronological, of the scope of its provisions.

First, with Kulbushan Jadhav’s alleged involvement in espionage activities, the case brought an unmistakable sense of *deja vu*. It made the interplay between spying activities and consular access pertinent again. The ambiguity created during the drafting process of the VCCR by avoiding a discussion the topic of espionage now required clarity and, as it happened, Pakistan relied on this historical, intentional omission to claim that the application of consular access did not apply to Jadhav.

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<sup>16</sup> Luke T. Lee & John Quigley, *Consular Law and Practice* (3<sup>rd</sup> edn. OUP 2008) 49.

<sup>17</sup> United Nations, *Yearbook of The International Law Commission 1960* (Volume 1 25<sup>th</sup> April- 1 July 1960) 58, at paragraph 48.

<sup>18</sup> United Nations, Official Records, United Nations General Assembly 7th Session (1952) <[https://www.un.org/ga/search/view\\_doc.asp?symbol=A/P.V.400](https://www.un.org/ga/search/view_doc.asp?symbol=A/P.V.400)> accessed on 16 Dec 2019.

Second, while in 1963, States focused on the legal technicalities<sup>19</sup> and long term goals which brought about the consensus on drafting VCCR, after the end of the Cold War the situation has changed. The UN has undergone significant changes in its ideology in the past thirty years. Human rights have become increasingly popular. The UN narrative on human rights has moved away from a segmented approach towards rights to an indivisible one, where civil, political, cultural and all other rights are often placed on an equal footing.<sup>20</sup> This has led to greater emphasis on the universal nature of human rights and their application.<sup>21</sup>

This paradigm shift, from focusing just on the legal technicalities of treaties towards a more holistic and substantive approach while applying them, will help contextualise the construction of Article 36(1)(b) as done by ICJ over the years.

## **B. Interpreting Article 36(1)(b) to Define the Nature of the Right to Consul**

This part shall examine Article 36(1)(b) through the lens of the Vienna Convention on the Law of Treaties (VCLT)<sup>22</sup> and various case laws in an attempt to understand the function of the provision. To facilitate reference, Article 36(1)(b) has been reproduced below:

(1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

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<sup>19</sup> Duquet (n 6) at 7.

<sup>20</sup> Jean Philippe Therien & Philippe Joly, “‘All Human rights for all’: The United Nations and Human Rights in the Post-Cold War Era’ (2014) 36 *Human Rights Quarterly* 374, 378.

<sup>21</sup> *Ibid.*

<sup>22</sup> The Vienna Convention on the Law of Treaties, 1969.



(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.

### 1. Interpreting Article 36(1)(b): VCLT and the *LaGrand* case

Since the inception of the VCCR, there were disagreements regarding the existence of an individual right in Article 36.<sup>23</sup> This could be attributed to a number of reasons. First, the language of the Article 36(1)(b) contains the phrase ‘if he so requests’ which seems to be creating individual rights. It further states that the ‘said authorities shall inform the person concerned without delay of *his* rights under this subparagraph’.<sup>24</sup> Secondly, the deliberations of the ILC, put on record in the *travaux préparatoires*, stipulate the intent to safeguard the individual’s right.<sup>25</sup> The apparent clarity of both the text and the preparatory material of the Article 36(1)(b) seem to leave no room for doubt about the existence of an individual right. However, the preamble of the VCCR states: ‘the purpose of the [the treaty’s]

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<sup>23</sup> Britany 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’ (2004) 54(2) *Duke Law Journal* 587, 589.

<sup>24</sup> *Ibid.*, at 591.

<sup>25</sup> Yury A. Kolesnikov, ‘Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions’ (2009) 40 *McGeorge Law Review* 179, 197.

privileges and immunities is *not to benefit individuals* [emphasis added] but to ensure the efficient performance of the functions by consular posts on behalf of their respective state<sup>26</sup> thereby, appearing to disclaim the creation of any individual rights.<sup>27</sup> This creates a dichotomy and opens the door for two opposite interpretations of the scope of Article 36(1)(b). Questions of interpretation need to be solved by using the criteria enunciated in the VCLT, discussed next.

### **1.1 Provisions on Treaty Interpretation under the VCLT**

The VCLT contains three provisions on treaty interpretation, namely Articles 31-33, but the ones relevant to this article are Articles 31 and 32.<sup>28</sup> The text of Article 31 of VCLT emphasizes on the principle of effectiveness, stating that ambiguous provisions must be explained in a manner that gives full effect to the object and purpose of the treaty where they are contained. This method of interpretation, also known as the teleological approach, was pointed out by ICJ in the case of *Application of the Interim Accord of 13 September 1995*.<sup>29</sup> In addition to this, Article 32 of VCLT stipulates that preparatory material of the treaty may be referred to ‘in order to confirm the meaning’ resulting from teleological interpretation, a) if the interpretation leaves the meaning ambiguous or obscure; b) if the interpretation leads to a result which is manifestly absurd or unreasonable. According to Article 31 of VCLT the treaty must be

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<sup>26</sup> VCCR, Preamble.

<sup>27</sup> *United States v Emuegbunam*, 286 F. 3d 377, 392 (6 Cir. 2001), *United States v Li*, 206 F. 3d 56, 62 (1<sup>st</sup> Cir. 2000) ([T]he Vienna Convention’s preamble explicitly disclaims any attempt to create individual rights.....Moreover, the preamble drafter’s cite an intent to ‘contribute to the development of friendly relations among nations’ without ever mentioning any intent to equip the defendants with [remedies])

<sup>28</sup> Antonio Cassese, *International Law* (2<sup>nd</sup> ed. OUP, 2005) 178-179.

<sup>29</sup> *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)* (2011) ICJ Rep 644, 5.

first interpreted by the ordinary meaning of its terms.<sup>30</sup> The original text of Article 36 of the VCCR explicitly creates individual rights.<sup>31</sup> It imposes a duty on the receiving state ‘to inform the person concerned without delay of *his* [emphasis added] rights’, as a result of which ‘he requests’ that the consular post of the sending state be informed. The phrase ‘if he so requests’ suggests that it is mandatory for the individual to ask for consular access once he is aware of his rights. Therefore, if the detained individual does not ask for consular access, the right to consul can be forfeited. Yuri A. Kolensikov states that the text of the Article shows that it creates individually enforceable rights.<sup>32</sup>

As far as the purpose of the treaty under Article 31(2) is concerned, granting rights to individuals who happen to be in a foreign state only promotes friendly relations among states.<sup>33</sup> It also allows the consular posts of the sending state to perform their functions effectively. It does not go against the purpose of the Treaty.

The discrepancy between the preamble and text of Article 36(1)(b) of the VCCR may then be solved by keeping in mind that recourse to the *travaux préparatoires* may only be made when the provision remains ambiguous after applying the criteria of interpretation contained in Article 31 of the VCLT. This was confirmed by the Federal Court of Appeal of the 7<sup>th</sup> District of the United States, in the case of *Jogi v Voges*,<sup>34</sup> which stated that: ‘It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists. Courts

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<sup>30</sup> Sabina Veneziano, ‘The Right to Consular Notification: The Cultural Bridge to a Foreign National’s Due Process Rights’ (2018) 49 *Georgetown Journal of International Law* 501, 510.

<sup>31</sup> *Ibid.*

<sup>32</sup> Kolensikov (n. 25) at 196.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Jogi v. Voges*, 480 F.3d 822.

should look to materials like preambles and titles only if the text of the instrument is ambiguous.<sup>35</sup> That is not the case for Article 36(1)(b) of the VCCR, whose provisions are clear.

However, even if one argued that after applying the criteria of interpretation mentioned in Article 31 of the VCLT, the provision of Article 36(1)(b) of the VCCR remains still ambiguous; and resorted to the preparatory works, under Article 32 of the VCLT, the same conclusion would be reached: during the drafting of the VCCR, the United States delegate acknowledged that Article 36 is meant to ‘protect the rights of the national concerned.’<sup>36</sup> The next section will show how the ICJ has interpreted the provision in the first case where the question of its interpretation was raised by a state.

### 1.2 The *LaGrand Case*

The question of interpretation of the scope of Article 36(1)(b) was raised for the first time before the ICJ almost fifty years after the VCCR was drafted. The United States raised it in *Germany v United States* (the ‘*LaGrand case*’),<sup>37</sup> stating in the written submissions:

The rights of consular notification and access under the Vienna Convention in any event are rights of States, not individuals. Clearly they can benefit individuals by permitting – not requiring – States to offer them consular assistance, but the Convention’s role is not to articulate or confer individual rights. Rather, the Convention establishes a set of legal rules regulating consular relations between States, including

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<sup>35</sup> *Ibid.*, at 834.

<sup>36</sup> Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, Mar. 4 to Apr. 22, 1963, reprinted in S. EXEC. DOC. NO. E, (1963) at 337.

<sup>37</sup> *Germany v United States of America (LaGrand)* (2001) ICJ Rep 466.

such matters as the establishment of consular relations, the appointment of consular staff, and various exemptions from host State regulation. The Preamble emphasizes the inter-State character of this system.<sup>38</sup>

The above mentioned argument reflects the uncertainty which surrounded the status of Article 36(1)(b) before the matter ever reached the ICJ. However, the ICJ, delivering a judgment which was inconsistent with this approach of United States, concluded that:

The Court notes that Article 36, paragraph (1)(b), spells out the obligations the receiving State has towards the detained person and the sending State. It provides that, *at the request of the detained person*, [emphasis added] the receiving State must inform the consular post of the sending State of the individual's detention without delay.<sup>39</sup>

Noting that the court explicitly recognised that the request for consular access must be made by the detainee, it can be safely maintained that a correct interpretation of Article 36(1)(b) points towards the existence of an individual right to consul.

Interestingly, in the *Jadhav case* the right enshrined in Article 36(1)(b) was enforced by the State of India and not Jadhav himself, since India contended that Pakistan prevented Jadhav from knowing about his right. The purpose of the discussion so far conducted on individual right conferred by Article 36(1)(b) was twofold. First, to understand the operation of Article 36(1)(b). Had Kulsbushan Jadhav been made aware of his rights under this provision, there may not have been a dispute in the first place. Secondly, to examine the structure of Article 36(1)(b) which will facilitate the discussion on its

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<sup>38</sup> Written Proceedings, LaGrand, at paragraph 97.

<sup>39</sup> *Germany v United States of America (LaGrand)* (2001) ICJ Rep 466, at paragraph 77.

nature and its evolutionary interpretation, which forms the topic of the next part.

## **C. The Evolution on the Scope of the Right to Consul in the Jurisprudence of the ICJ**

### **1. The Case Law of the ICJ prior to the *Jadhav case***

In the predecessors of the *Jadhav case*, the *LaGrand*<sup>40</sup> and *Avena*<sup>41</sup> cases, the ICJ shed light on the interpretation of Article 36(1)(b) of the VCCR by responding to similar issues raised in both cases. The *LaGrand* case involved a claim brought by Germany against United States before the ICJ regarding the conviction of two German nationals, Karl and Walter LaGrand.<sup>42</sup> The two brothers were arrested for killing a man and severely injuring a woman while conducting an armed robbery. It was argued by Germany that United States denied the two brothers of their rights under Article 36(1)(b) of the VCCR, a provision which had assumed the nature of a human right.<sup>43</sup> Germany contended that: ‘the character of the right under Article 36 as a human right renders the effectiveness of this provision even more imperative.’<sup>44</sup>

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Avena and Other Mexican Nationals Mexico v United States (Avena)* (2004) ICJ Rep 12.

<sup>42</sup> *Germany v United States of America (LaGrand)* (2001) ICJ Rep 466 at 10.

<sup>43</sup> *Ibid.*, at 78.

<sup>44</sup> *Ibid.*

While the ICJ concluded that Article 36(1)(b) of the VCCR creates an individual right, it did not comment on whether the right was a human right: ‘The Court having found that the United States violated the rights accorded by Article 36, paragraph 1, to the *LaGrand* brothers, it does not appear necessary to it to consider the additional argument developed by Germany in this regard.’<sup>45</sup>

A similar issue was raised by Mexico in the *Avena* case against the United States where Mexico contended that the nature of the right enshrined in Article 36 of the VCCR is such that it must be treated as a fundamental right within the territory of each Member State.<sup>46</sup> The case involved fifty-four Mexican national who were at the risk of persecution for various crimes. According to Mexico, ‘this right [to consul], as such, is so fundamental that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right.’<sup>47</sup>

The Court acknowledged the right to be an essential part of due process by drawing a comparison with the *Miranda* rights of United States.<sup>48</sup> These rights include, inter alia, the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed at government expense if the person cannot afford one. Informing the individual of its rights under VCCR allows the detainee to contact the consulate of its state which may then arrange for legal representation for the detainee.

Both cases show the ICJ’s reluctance to comment on the nature of the rights under Article 36(1)(b) of the VCCR. Whether this

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Avena and Other Mexican Nationals Mexico v United States (Avena)* (2004) ICJ Rep 12, at 124.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, at 64.

Article is to be treated as a human right under international law or as a fundamental human right within the territory of each member state still remains open to question. It will be shown later<sup>49</sup> that Judge Cançado Trindade in the *Jadhav case* will consider the ICJ's reasoning to this effect, in both cases, insufficient.<sup>50</sup>

## 2. The *Jadhav case*.

The ICJ, in its judgement on the dispute concerning detention and trial of Kulbushan Jadhav, reached eight conclusions. In the first one, a unanimous vote<sup>51</sup> was observed regarding the jurisdiction of the Court arising from Article 1 of the Optional Protocol to the VCCR. Apart from that, the remaining seven conclusions were subjected to a dissent by Judge Tassaduq Hussain Jilani.

While the *Jadhav case* allowed the judges to examine the multi-tiered issues submitted by both parties, this article will solely focus on the issues pertaining to Article 36(1)(b) of the VCCR. The next section shall briefly lay out the pertinent facts of the case and the arguments presented by both parties regarding the individual right envisaged in the aforementioned provision.

### 2.1 Factual Background

On 3 March 2016, an Indian national Kulbushan Sudhir Jadhav was arrested by Pakistani authorities on the subject of alleged involvement in acts of espionage and terrorism. The arrest was followed by a confessional statement by Jadhav. The confession reiterated the purpose of his arrest by asserting that he was directing various activities in Balochistan and Karachi on the instructions of the

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<sup>49</sup> Part D, Section 2.

<sup>50</sup> *Jadhav case (India v Pakistan)* (2019) ICJ 168, Separate Opinion of Judge Cancado Trindade, at paragraph 31.

<sup>51</sup> Since the composition of the Court in the *Jadhav case* included a judge from India, Pakistan selected Tassaduq Hussain Jilani, former Chief Justice of Pakistan, to serve as ad hoc judge in the proceedings.



Research and Analysis Wing (RAW), an Indian intelligence agency, with the purpose of deteriorating the law and order situation in those areas. In his confession Jadhav stated the following:

My purpose was to hold meetings with Baloch insurgents and carry out activities with their collaboration. These activities have been of criminal nature. These also include anti-national and terrorist activities leading to the killing or maiming of the Pakistani citizens. I realized during this process that RAW is involved in activities related to the Baloch Liberation Movement within Pakistan and the region around it. Finances are fed into the Baloch movement through various contacts and ways and means into the Baloch liberation. The activities of these Baloch liberation and RAW handlers are criminal and anti-Pakistan. Mostly these activities are centred around Ports of Gawadar, Pasni, Jeevani and various other installations which are around the coast aims to damage the various installations which are in Balochistan. The activities are revolving around trying to create a criminal mind set within the Baloch people and lead to instability within Pakistan.<sup>52</sup>

As a result, a trial of Mr Jadhav was conducted before a Field Court Martial,<sup>53</sup> subjected to Section 3 of the Official Secrets Act of 1923 and the Pakistan Army Act 1952. Consequently, on 10 April 2017, Sudhir Jadhav was convicted and sentenced to death. In the judgement the factual background provides that during this time Jadhav was not informed of his right to speak to the Indian consulate

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<sup>52</sup> Written Proceedings, Pakistan, at 25.

<sup>53</sup> A court martial is a military court which tries a person accused of an offence subject to military law.

and seek legal representation, a right secured by Article 36(1)(b) of the VCCR. Similarly, the Indian Authorities were not notified about Jadhav's arrest until after twenty-two days, causing a delay in consular notification, another obligation enshrined in Article 36. These 'egregious' violation of obligations laid down in VCCR created a dispute between India and Pakistan, which eventually found its way to the ICJ.

## **2.2 India's Submissions**

India made a threefold submission regarding the breach of consular notification and access enshrined in Article 36 of the VCCR by Pakistan: First, it failed to inform India '*without delay*' about Jadhav's arrest; Secondly, it failed to inform Jadhav of his rights; and finally, it denied consular access to Jadhav by consular officers of India.

The second fold addresses the individual right of Jadhav to be informed about his right to consul. India points out that the Court has previously recognised the text of Article 36 to be creating individual rights.<sup>54</sup> India further contended that the nature of the right is such that espionage creates no exception to the application of the right:

It is significant that on its plain language Article 36 admits of no exceptions. The reason is obvious – there is no circumstance which justifies a deviation from the principles of due process which ensures a fair trial. Article 36 makes this right a living reality in relation to aliens. Denying the rights under Article 36 would seriously jeopardise due process rights themselves. International institutions have been at pains to remind States of their obligation to adhere to the due process standards even in the matter of investigating terrorism-related offences and prosecuting the offenders.

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<sup>54</sup> Written Proceedings, India, at 136.

Conventions dealing with terrorism have expressly recognised consular access, reiterating and reinforcing the criticality of a provision such as Article 36. As far as states which have signed and ratified the Vienna Convention are concerned, their obligation under Article 36 is untrammelled by the seriousness of the accusations against an accused. On the contrary, the more serious the allegations, the greater the need for procedural fairness.<sup>55</sup>

India in its submissions before the ICJ argued for the right to consul as minimum guarantee of due process<sup>56</sup> since it allowed the state to converse with the detained individual and arrange for its legal representation.<sup>57</sup> While Pakistan argued for espionage as an exception to the right to consul, India claimed that it became indispensable to provide the right in more serious allegations where the detainee's life was at risk. India also showed reliance on Article 14 of the International Covenant on Civil and Political Rights (ICCPR)<sup>58</sup> to establish consular access as minimum standards of due process and strengthen its claim. India maintained that Article 14 of the ICCPR and Article 36 of the VCCR belong to the 'same strands of the rubric of fairness'<sup>59</sup> thereby stating the rights enshrined in both provisions to become intertwined as the individual right under Article 36 of the VCCR was an essential part of due process guaranteed under Article 14 of ICCPR.<sup>60</sup> Lastly, India contended the irreparable nature of

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<sup>55</sup> *Ibid.*, at 148.

<sup>56</sup> Written Proceedings, India, at 62.

<sup>57</sup> *Ibid.*, at 74

<sup>58</sup> 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...'

<sup>59</sup> Written Proceedings, India, at 39.

<sup>60</sup> *Ibid.*, at 175.

Jadhav's death penalty, especially when it believed the facts presented by Pakistan concerning Jadhav's apprehension to be muddled.

### 2.3. Pakistan's Submission

This section will solely focus on Pakistan's argument contending that VCCR does not apply to cases involving espionage. Pakistan provided alternate arguments for a scenario where the provisions of VCCR are invoked, however, these fall out of the scope of this article.

Pakistan replied to India's submissions by taking an approach which altogether excludes the application of Article 36 of the VCCR, both as a state-based right and as an individual right. In its submissions Pakistan consistently maintained that VCCR does not apply to individuals suspected of espionage.<sup>61</sup>

Pakistan contended that there is no express mention of espionage cases in VCCR since states were very reluctant to touch upon the matter in the course of the treaty's construction,<sup>62</sup> and, therefore, matters that are not expressly stated in the treaty should be handled under customary international law. In furtherance of the argument Pakistan submitted that there is no state practice or academic writing which expands on the application of Article 36 of the VCCR as applied to *prima facie* cases of espionage.<sup>63</sup> Pakistan expanded state practice, by quoting examples from the Cold War era, where no consular access was granted in several espionage cases. The examples provided, mainly from the pre-VCCR era, were meant to substantiate the idea that under customary international law there is no state practice of allowing consular access to individuals detained

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<sup>61</sup> *Jadhav case* 2019 ICJ 168, at 102.

<sup>62</sup> Written Proceedings, Pakistan, at 289.

<sup>63</sup> *Ibid.*, at 311.

under suspicion of espionage.<sup>64</sup> As will be shown in the next section, the ICJ did not accept this argument.

## 2.4 The ICJ Judgement

By fifteen votes to one, the ICJ declared a breach of Article 36(1)(b) by Pakistan by omitting to notify India about Jadhav's arrest without delay and depriving Jadhav of any assistance that could be provided as a result.<sup>65</sup>

The judgement succinctly touches upon the matter of individual rights. The ICJ established an 'inherent connection' between the obligation of a receiving State to inform the detained person of his rights and the ability of the detained individual to seek consular access.<sup>66</sup> The court further explained this 'inherent connection' with the help of the *travaux préparatoires* of the VCCR. When, during the Conference, the phrase 'if he so requests' was added to the original draft of the ILC, the United Kingdom feared that this pre-condition to right of consul may lead to abuse of powers or misapprehension of the phrase in cases where the detained individual may not be aware of his rights under VCCR. How can a detainee request for something which (s)he is unaware of? This is why it becomes essential that the State informs the individual of his rights without any delay.<sup>67</sup> ICJ explicitly acknowledges the right to hold this essential position since it allows the national to be legally represented in a way which ensures fair trial.

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<sup>64</sup> Ibid, at 315. For example: 'In 1949, Judith Coplon, a US national, was arrested along with her MGB handler Valentin Gubitchev. Both stood trial together. Valentin Gubitchev was convicted, sentenced and deported. There is no evidence that the USSR ever sought consular access to Valentin Gubitchev'.

<sup>65</sup> *Jadhav case*, 2019 ICJ 168, at paragraph 149.

<sup>66</sup> Ibid., at paragraph 107.

<sup>67</sup> Ibid., at paragraph 108.

## **D. Two Conflicting Approaches: Due Process versus State Security**

The analysis so far conducted highlights two conflicting approaches to the issues raised by the *Jadhav case*. One which disallows the application of consular access to espionage cases and the other which holds it as an integral part of due process that must be applied in all possible scenarios. The explanation of these conflicting approaches is found in the separate opinions of Judge *ad hoc* Jillani and Judge Trindade.

### **1. Dissenting Opinion of Tassaduq Hussain Jillani and State Security**

Ad hoc Judge Tassaduq Hussain Jillani in his dissenting opinion provides a comprehensive analysis on why the VCCR should not apply to cases of espionage. His opinion more or less seems to be a reproduction of the arguments Pakistan made in its submissions during the proceedings. He states that: 'In my view, India's reliance on the Vienna Convention on Consular Relations in the present case is misplaced and subverts the very object and purpose of that instrument.'<sup>68</sup>

The opinion regarding VCCR not having an application on cases of espionage has been substantiated by Judge Jillani through a number of reasons. Judge Jillani starts by discussing the confessional statement of Jadhav, where he confesses involvement with the RAW to plan and execute acts of terror and causing loss of life in various areas of Pakistan with the intent to destabilise the country.<sup>69</sup>

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<sup>68</sup> Jadhav (India v Pakistan), *Dissent Opinion of Judge Ad hoc Jillani* at para 1

<sup>69</sup> *Ibid*, at paragraph 13.

Justice Jillani held such activities to be a matter of national security for Pakistan.<sup>70</sup> He further asserted these acts to be illegal under international law and therefore allowing disregard for the rules of VCCR.<sup>71</sup>

The major argument against application of VCCR in the *Jadhav case* by Pakistan was that particular acts can allow the receiving state to deny consular access. Justice Jillani's dissent advances by stating that customary international law disallows the application of consular access for cases of espionage. He stated that since there is no express mention of espionage and spies in VCCR, the matter is governed by the customary international law and is therefore in a class of cases which are addressed differently under customary international law.<sup>72</sup> The same argument was presented by Pakistan's lawyer Khawar Qureshi in its submissions. However, not mentioning spies and espionage in the VCCR could go either way: it may be treated as an exception to consular access, or may not affect the application of Article 36 of the VCCR at all. The latter argument was followed by the Court, which stated that matters concerning consular access are expressly governed by Article 36 of VCCR and therefore customary international law was not applicable.

Furthermore, Judge Jillani's note points out the bonafide intentions of Pakistan by stating how, despite Jadhav's confessional statement it did not try Jadhav under terrorism offences due to lack of evidence and cooperation from India. He insists that such conduct on Pakistan's part shows the desire to 'uphold the truth and dispense justice'.<sup>73</sup> While this may be true, the more relevant question here is whether the intent to dispense justice alone is sufficient to ensure a

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<sup>70</sup> Ibid, at paragraph 2.

<sup>71</sup> Separate Opinion (n. 50) at paragraph 31.

<sup>72</sup> Dissent Opinion, (n. 68) at paragraph 30.

<sup>73</sup> Dissent Opinion, (n. 68) at paragraph 14.

fair trial, or if more, namely providing timely consular access, must be done.

## 2. Separate Opinion of Judge Trindade and Due Process

Judge Trindade takes a different approach from Justice Jillani. He explains the interrelationship between right to information on consular assistance and due process of law and fair trial.<sup>74</sup> He comments on the unqualified nature of the right and thereby points out the insufficiency ICJ showed in addressing Article 36(1)(b) of the VCCR in *LaGrand, Avena* and now *Jadhav*.

In furtherance of his opinion, he quotes his own reasoning in the *Advisory Opinion on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*<sup>75</sup> of the Inter-American Court of Human Rights (IACtHR): ‘one can no longer pretend to dissociate the (...) right to information on consular assistance from the *corpus juris* of human rights’<sup>76</sup>. He accredits India’s arguments which expound on this statement by explaining how due process standards envisaged in the *corpus juris* of international human rights law are bound to oversee the application of consular assistance.<sup>77</sup>

In its arguments India had quoted the *Advisory Opinion 16/99* stating the following: ‘the individual rights under analysis in this Advisory Opinion must be recognised and counted among the minimum guarantees essential to providing foreign nationals the

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<sup>74</sup> Separate Opinion (n 50) at paragraph 3.

<sup>75</sup> *Advisory Opinion on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 1999 IACtHR OC-16/99, (Concurrent Opinion of Judge Cancado Trindade) (hereinafter ‘*Advisory Opinion 16/99*’).

<sup>76</sup> *Ibid.*, at paragraph 1.

<sup>77</sup> Separate Opinion (n. 50) at 25.



opportunity to adequately prepare their defence and receive a fair trial.<sup>78</sup>

This reasoning deflates the idea that international law consists of multiple watertight compartments, where treaty law, international human rights law, customary international law exists separately and application of one can disallow the application of the other.<sup>79</sup> Such an approach is inaccurate and misguided.<sup>80</sup> In fact, the sources complement each other and usually require a ‘side by side’ application.<sup>81</sup>

The opinion progresses by commenting on abolition of death penalty due to human rights concern, which falls out of the scope of this article and therefore will not be discussed.

### 3. Expansion of Article 36

The construction of Article 36 of the VCCR serves as a measure of the progress of international law and its application over the years. The drafting of VCCR, the *Advisory Opinion 16/99* of the IACtHR, the *LaGrand*, *Avena* and now *Jadhav* cases of the ICJ, are all milestones in this process, each demonstrating the step by step progression towards recognising the unqualified nature of the individual right to consul.

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<sup>78</sup> *Advisory Opinion 16/99*, at 122.

<sup>79</sup> Monica Feria Tinta, ‘Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the *LaGrand Case*’ (2001) 12(2) *European Journal of International Law* 363.

<sup>80</sup> This was the approach United States took in the case of *LaGrand* against Germany, which the ICJ rejected.

<sup>81</sup> P. Malanczuk, *Akehurst’s Modern Introduction to International Law* (7<sup>th</sup> rev. ed. 1997) at 57.

### 3.1 Cross Fertilisation between Various Bodies of International Law

Treaties are usually defined as ‘contracts between nations’.<sup>82</sup> Therefore, it is generally assumed that treaties only legally bind, and create rights for, the nations that are party to them.<sup>83</sup> Such an assumption can easily be rebutted by looking at how international law developed post Second World War. In the VCCR as well, the main focus was on the relations between the nations, thereby resulting in states to presume that it must not apply to individuals. One of the reasons to adopt this narrow approach could be the development in international law right after cold war ended. It led to the creation of ‘special bodies of law’ for example the human rights, the humanitarian law of armed conflict, international criminal law etc.<sup>84</sup> This developed into the assumption that they were tight compartments. As stated above, such an approach was adopted by United States in *LaGrand*. However, gradually the perception changed. These bodies started having an impact on each other.<sup>85</sup> An ‘interpenetration’ and ‘cross fertilization’ between various bodies of international law was observed. Article 36(1)(b) of the VCCR served to be a perfect example by creating ‘individual rights’ which can be enforced both as a primary and secondary right in the courts.<sup>86</sup>

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<sup>82</sup> *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890); *Foster v. Neilson*, 27 U.S. (2. Pet.) 253, 314 (1829).

<sup>83</sup> *United States v. Zabeneh*, 837 F.2d 1249, 1261 (5th Cir. 1988); *United States v. Cordero*, 668 F.2d 32, 37-38 (1st Cir. 1981); *United States ex rei. Lujan v. Gengler*, 510 F.2d 62,67 (2d Cir.), cert. denied, 421 U.S. 1001 (1975); *United States v. Yunis*.

<sup>84</sup> Cassesse (n. 28) at 45.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

### 3.2 Consular Assistance: An Important Aspect of Fair Trial

Consular assistance refers to the action of states providing ‘support, help and guidance’ to their detained nationals abroad.<sup>87</sup> The substance of consular assistance seems to go beyond mere support and help when the environment in which the detained individual finds himself is brought into the picture. This could be allocated to a number of reasons. Principally, the foreigner may be more vulnerable to the danger of conviction because of the inability to understand a foreign language and an estranged criminal justice system.<sup>88</sup> While the language argument here can possibly be deemed irrelevant since both Pakistan and India share a few languages,<sup>89</sup> the latter argument holds solid ground. In such a case foreign national may resort to the procedures contained in the system of his home country.<sup>90</sup> Even if he is provided with legal assistance in line with the criminal justice system of the detainee’s country he simply may not consider the appointed attorney to be trustworthy.<sup>91</sup> To counter what was stated above in Justice Jillani’s dissent, even if Pakistan had a bona fide intention to provide a fair trial to Jadhav, it is essential that the detained individual is able to trust his attorney and communicate freely. Therefore, consular assistance provides the foreign national with a buffer that attempts to eliminate the possibility of unfairness or bias during trial.

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<sup>87</sup> Conall Mallory, ‘Abolitionists at Home and Abroad: A Right to Consular Assistance and the Death Penalty’ (2016) 17(1) *Melbourne Journal of International Law* 51.

<sup>88</sup> Whitesell (n.23) at 616.

<sup>89</sup> Sarmad Iqbal, India and Pakistan: United by Languages but Divided by Borders, *International Policy Digest* (15 Sept 2018) <<https://intpolicydigest.org/2018/09/15/india-and-pakistan-united-by-languages-but-divided-by-borders/>> accessed 18 Dec 2019.

<sup>90</sup> Whitesell (n.23) at 616.

<sup>91</sup> *Ibid.*

Consular assistance is designed not only to remove the disparity that arises during the trial but also to ensure that the outcome of the proceedings is fair. This seems to be an obvious proposition since the main purpose of due process and fair trial is to ensure an outcome that is just. However, its importance cannot be underplayed, especially in cases where the death penalty is involved. In the words again of Justice Cancado Trindade, in *Advisory Opinion 16/99*:

In the case to which this Advisory Opinion refers, the real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance. In such circumstances, it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person.<sup>92</sup>

Even though the ICJ has been reluctant to comment on the nature of this right, it has implied at various instances that it is an individual right and an essential part of due process. In *LaGrand*, the right was granted to two brothers who were involved in an armed robbery during which they ended up killing a man and injuring a woman. In *Avena*, the right was granted when fifty-four Mexican nationals were arrested, detained, tried, convicted, and sentenced to the death penalty for various crimes. In the *Jadhav case*, the right was granted notwithstanding his alleged involvement in destabilising activities which threatened national security. The application of

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<sup>92</sup> *Advisory Opinion 16/99*, at 121.

consular assistance in all three cases regardless of the conduct of the detainees suggests that the right is of an unqualified nature.

India's reliance on the ICCPR as a separate claim seems unnecessary in this case. The ICJ did not deliberate on this matter primarily because it was considered to be out of the court's jurisdiction. However, it also seems to imply that due process can now be granted by treaties that are not essentially concerned with human rights.

Judge Trindade in *Advisory Opinion 16/99* states the following: 'At this end of century, we have the privilege to witness the process of humanization of international law, which today encompasses also this aspect of consular relations.'<sup>93</sup>

## Conclusion

The case of Kulbushan Jadhav did not just bring the two neighbouring countries before the ICJ in yet another dispute, it raised questions that for a long time had remained unanswered. Interpreting the right to consular access as given under article 36(1)(b) was a task that the ICJ had undertaken before, but not quite in the context that this case put forth. In light of all this, the above discussion aimed at answering a rather simple question: to what extent did the *Jadhav case* impact the way the right to consular access is to be understood?

Having gone through a detailed discussion of the nature of the right, the various interpretive tools including the VCLT, the previous judgements pronounced by the ICJ in *Avena* and *LaGrand*, and the court's decision in the *Jadhav case*, this article argued that willingly or not, the drafters of the VCCR phrased the wording of article

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<sup>93</sup> *Ibid.*, at 35.

36(1)(b) in a manner so as to create an individual right. Moreover, the unique facts of the case prompted the court to comment upon the extent of the right as well. In doing so, the court gave an expansive interpretation to the right and the types of people who could ask for a relief under it and thereby, reinforcing its importance in assisting the provision of due process and a fair trial. This applies in all circumstances, irrespective of the type of crime the detained person is accused of.

The construction of Article 36 of the VCCR will, from now on, serve as an example of how international law and its application has evolved over the years. In light of this, states should be cognisant of their responsibilities so as to fully realise the objectives of the VCCR.

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