

**THE WAY FORWARD IN THE JADHAV DISPUTE-**

**GOING BACK TO THE INTERNATIONAL COURT OF JUSTICE**

**Maham Naweed**

**About the Author**

**Maham Naweed** is an international lawyer who completed her Bachelors of Law from the Lahore University of Management Sciences and her Masters of Law from Yale Law School. Currently, she is the Chair, Lawfare and International Law at the Islamabad Policy Research Institute. Her areas of interest and research expertise include public international law, particularly international human rights law and laws of conflict.

**About IPRI**

The Islamabad Policy Research Institute (IPRI) is one of the oldest non-partisan think tanks on all facets of National Security, including international relations and lawfare, strategic studies, governance, public policy, and economic security in Pakistan.

## TABLE OF CONTENTS

<b>I) Case Facts &amp; Timeline.....</b>	<b>4</b>
<i>Arrest &amp; Conviction.....</i>	4
<i>Case Before the International Court of Justice.....</i>	4
<i>Implementing the Judgment of the International Court of Justice.....</i>	5
<i>Effective Review &amp; Reconsideration.....</i>	6
<b>II) Jurisdiction of the International Court of Justice.....</b>	<b>7</b>
<b>III) Legal Issues.....</b>	<b>8</b>
<i>Modalities of Review and Reconsideration Under International Law.....</i>	8
<i>Review as Per the Judgment of the ICJ v. Review in Domestic Law in Pakistan.....</i>	9
<i>Appointment of Legal Counsel for Commander Jadhav.....</i>	10
<i>Obligation of Result in International Law.....</i>	12
<i>Obligation of Result in Contradistinction from Obligation of Conduct.....</i>	13
<i>Steps to Be Taken By Pakistan To Fulfill its “Obligation of Result”.....</i>	14
<b>IV) Recommendations and Way Forward.....</b>	<b>15</b>

**Abstract**

*The Jadhav dispute has remained a point of legal and political tension between Pakistan and India since the arrest of the Indian Commander in 2016. Following the judgment of the International Court of Justice, Pakistan has repeatedly asked India to avail of the remedy provided by Pakistan, in accordance with international law, but India has refused to do so. It is time that the judgment of the International Court of Justice is implemented in letter and spirit.*

**Keywords:** Jadhav, International Court of Justice, Vienna Convention, Consular Relations, Pakistan, India

## I) Case Facts & Timeline

- Arrest & Conviction

On 3 March 2016, an officer of the Indian Navy, Commander Kulbushan Jadhav illegally entered Pakistan and was arrested by the Pakistani authorities in the course of a Counter Intelligence Operation from Mashkel Balochistan.

At the time of his arrest, Commander Jadhav was in possession of an Indian Passport. He subsequently admitted to being a serving officer of the Indian Navy.

On 25 March 2016, Commander Jadhav publicly confessed to his involvement in espionage, sabotage and terrorism in Pakistan upon the direction of the Indian Research and Analysis Wing (“RAW”). He confessed that he was involved in various criminal activities including holding meetings with the Baloch Liberation Army to cause terror and unrest in the province of Balochistan.

Commander Jadhav was tried, convicted and sentenced by the Field General Court Martial (“FGCM”). He appealed his sentence and conviction, which was denied by the Military Appellate Court.

- Case Before the International Court of Justice

On 8 May 2017, India filed an application before the International Court of Justice (“ICJ”), alleging a violation of Article 36 of the Vienna Convention on Consular Relations 1963 (“VCCR”) and prayed for, inter alia, to direct Pakistan to annul the decision of the FGCM and to provide full consular access to India and Commander Jadhav.

The ICJ delivered a Judgment in the Jhadav (India v. Pakistan) case on 17 July 2019.

In its Judgment, the Court ordered Pakistan to:

- i. Inform, without further delay, Commander Jhadav of his rights under Article 36 of the VCCR;
- ii. Allow, without delay, Indian consular officers to “*communicate with and have access to Mr. Kulbhushan Sudhir Jadhav, to visit him in detention and to arrange for his legal representation*”<sup>1</sup>;
- iii. “*Take all measures to provide for effective review and reconsideration, including, if necessary, by enacting appropriate legislation*”<sup>2</sup>; and

<sup>1</sup> Jadhav Case (India v. Pakistan), 17 July 2019, Judgment, Para. 134

<sup>2</sup> Jadhav Case (India v. Pakistan), 17 July 2019, Judgment, Para. 147

- iv. Stay execution till such time that effective review and reconsideration is done.

The Judgment of the ICJ, delivered in the Jadhav case, placed an obligation upon Pakistan to provide effective review and reconsideration of the sentence and conviction of Commander Jadhav. Paragraph 146 of the Judgment stated,

“The Court notes that the obligation to provide effective review and reconsideration can be carried out in various ways. The choice of means is left to Pakistan [...] The obligation to provide effective review and reconsideration is “an obligation of result” which “must be performed unconditionally” [...] *Consequently, Pakistan shall take all measures to provide for effective review and reconsideration, including, if necessary, by enacting appropriate legislation.*”

- *Implementing the Judgment of the International Court of Justice*

Pakistan immediately complied with three out of the four directives of the Court, mainly:

- Commander Jhadav was informed of his rights of consular access under Article 36 of the VCCR;
- On 2 August 2019, Pakistan invited a diplomatic officer of the High Commission of India, Islamabad (“High Commission”), an offer that was belatedly accepted by India on 2 September 2020, when a diplomatic officer of the High Commission met with Commander Jhadav;
- Pakistan continues to maintain a stay on the execution of Commander Jhadav, pending effective review and reconsideration of his sentence and conviction.

Notwithstanding a legal obligation to do so, Pakistan arranged a second consular meeting between Commander Jadhav and officers of the Indian High Commission. Article 36, paragraph 2, of the VCCR, states that,

“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.”

Pakistan’s laws on consular access give full effect to the objective of Article 36 of the Vienna Convention, and are similar to India’s own laws on this matter. Both the consular access were conducted in full conformity with Pakistan’s domestic and international legal obligations.

- Effective Review & Reconsideration

Pakistan has conducted an exhaustive review of its existing laws to assess the most appropriate manner by which to provide effective “review and reconsideration” in the context of Article 36 of the VCCR.

Although the laws of Pakistan provide for the right to review, to ensure that full weight is accorded to the letter and spirit of the Judgment of the ICJ, on 20 May 2020, Pakistan enacted the International Court of Justice (Review and Reconsideration) Ordinance, 2020, which became an Act on 3 December 2021 (“Act”).

Under the Act, a petition for review and reconsideration can be made to the Islamabad High Court, through a simple application that must be filed within sixty (60) days from the date of promulgation of the Ordinance, i.e. 20 May 2020.

As per Section 2 of the Act, a petition for review and reconsideration can be filed by:

- i. Commander Jhadav himself;
- ii. A legally authorized representative of Commander Jhadav;
- iii. A consular officer of the High Commission; or,
- iv. The Secretary, Ministry of Law and Justice.

On 17 June 2020, Commander Jhadav was informed of the promulgation of the Ordinance, now Act, and was invited to file a petition for review and reconsideration of his sentence and conviction. Pakistan also offered to assist in arranging legal representation for the accused.

Commander Jhadav exercised his lawful right and refused to file a petition for the review and reconsideration of his sentence and conviction.

Pakistan repeatedly requested India to avail of the remedy provided by the Government of Pakistan, and file a petition at the Islamabad High Court to initiate the process for the review and reconsideration of the sentence and conviction of Commander Jhadav.

India refused to avail the remedy provided by the Act and did not file a petition for the review and reconsideration of the conviction and sentence of Commander Jadhav, despite repeated requests to do so by Pakistan. Since the burden of providing effective review and reconsideration of the conviction and sentence of Commander Jadhav falls on Pakistan, a petition for the appointment of Commander Jadhav’s legal counsel was filed before the Hon’ble Islamabad High Court on 21 July 2020 by Secretary, Ministry of Law of Justice.

Since then, monthly hearings have been held before the Islamabad High Court, in which the Court has requested the Indian High Commission to appear and assist the Court in the matter. The Indian High Commission, through Note Verbale sent to the Ministry of Foreign Affairs of Pakistan, has refused to appear before the Court by providing baseless reasons to do so.

Pakistan is a responsible sovereign and is fully cognizant of its international obligations. Hence, Pakistan is fully committed to implementing the Judgment of the Court in letter and spirit.

## **II) Jurisdiction of the International Court of Justice**

Jurisdiction refers to the legal authority of a court of law to preside and decide over a dispute. The ICJ only has jurisdiction to listen to cases between state parties, which essentially means those states that have, in some way, voluntarily accepted the jurisdiction of the international court. There are a number of ways in which the ICJ's jurisdiction can be invoked. The primary one is based on Article 36(2) of the Statute of the ICJ which states that countries can accept the "compulsory jurisdiction" of the ICJ by submitting a "declaration". This is a completely voluntary act by State Parties and while submitting the "declaration", States can limit the grounds on which a case can be brought against them in the ICJ. The "declaration" submitted by India, accepting the jurisdiction of the ICJ, has a number of reservations and hence, Pakistan has been unable to approach the international court on issues such as Kashmir. Similarly, the "declaration" submitted by Pakistan under Article 36(2), also has a number of reservations and so it was not possible for India to bring the Jadhav case against Pakistan under Article 36(2) of the Statute.

However, another frequently utilized means of accepting the jurisdiction of the ICJ is under Article 36(1) of the Statute of the Court. Article 36(1) refers to the jurisdiction of the Court in "...all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." This essentially means that if two countries are signatory to the same international treaty and that treaty has a clause that states that issues arising between state parties will be referred to the ICJ, then under Article 36(1), a State Party can approach the ICJ. The only way to circumvent the jurisdiction of the Court in such a situation is to have a reservation to the dispute resolution clause of the treaty and that is what happens in most situations.

In the Jadhav situation, India adopted the Article 36(1) route. Pakistan and India are both signatory to the VCCR and its Optional Protocol. The Optional Protocol relates to the settlement of disputes arising out of the application of the VCCR. Article 1 of the Optional Protocol states that, "Disputes arising out of the interpretation and application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice...". Pakistan does not have a reservation against the Optional Protocol to the VCCR and so India was able to use this Optional Protocol to bring the case before the ICJ and the Court's jurisdiction was established.

Moreover, the declarations made by Pakistan under Article 36(2) do not preclude the possibility of a case being brought against the country under the Optional Protocol of the VCCR. Hence, India was able to establish the jurisdiction of the ICJ in this matter.



### III) Legal Issues

The Judgment of the ICJ requires the understanding of certain legal issues that are crucial to fulfilling the obligation placed upon Pakistan by the international court. The two main issues are as follows:

- i. The scope of the obligation of “*providing effective review and reconsideration*” and its modalities in the context of the principles and law of the ICJ. The ICJ placed upon Pakistan,

“an obligation to provide, by means of its own choosing, effective review and reconsideration of the conviction and sentence of Mr. Jadhav, so as to ensure that full weight is given to the effect of the violation of the rights set forth in Article 36 of the Vienna Convention [...]”<sup>3</sup>

- ii. The interpretation of the expressions “*an obligation of result*” and “*must be performed unconditionally*”, as stated by the ICJ,

“The Court notes that the obligation to provide effective review and reconsideration can be carried out in various ways. The choice of means is left to Pakistan [...] Nevertheless, freedom in the choice of means is not without qualification [...] The obligation to provide effective review and reconsideration is “an obligation of result” which “must be performed unconditionally” [...] Consequently, Pakistan shall take all measures to provide for effective review and reconsideration, including, if necessary, by enacting appropriate legislation.”<sup>4</sup>

- *Modalities of Review and Reconsideration Under International Law*

In the Jadhav Case, the ICJ has placed upon Pakistan, an obligation to provide effective review and reconsideration of the conviction and sentence of Kulbushan Jadhav. Looking at the jurisprudence of the ICJ and its Judgment in the Jadhav Case, effective review and reconsideration, as ordered by the ICJ, has the following scope and modalities:

- i. As a response to any illegal action, “*reparation must, as far as possible, wipe out all the consequences of the illegal act*”.<sup>5</sup> The ICJ has stated that any remedial action by a State who has engaged in an internationally wrongful act, should be aimed towards eradicating the effect of the illegal act.

<sup>3</sup> Jadhav Case (India v. Pakistan), 17 July 2019, Judgment, Para. 147

<sup>4</sup> Jadhav Case (India v. Pakistan), 17 July 2019, Judgment, Para. 146

<sup>5</sup> Factory at Chorzów (Claim for Indemnity), Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, Para. 47

- ii. Pakistan can decide how to carry out the review and reconsideration of the conviction and sentence of Commander Jadhav. The ICJ has stated that, “*The choice of means is left to Pakistan [and] Pakistan shall take all measures to provide for effective review and reconsideration, including, if necessary, by enacting appropriate legislation.*”<sup>6</sup> This direction of the ICJ is in line with its previous jurisprudence in the La Grand and Avena Cases. However, the means should be chosen “*by taking account of the violation of the rights set forth in the Convention*” [...] *including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.*”<sup>7</sup>
- iii. However, it is important to note that Pakistan’s right to choose the means of review and reconsideration are not without qualification. The ICJ has specifically stated that the obligation to conduct review and reconsideration is “*an obligation of result*” which “*must be performed unconditionally*”. This is discussed in detail below.
- iv. In the present case, the ICJ has provided Pakistan with parameters within which review and reconsideration has to be conducted. The ICJ has asked Pakistan to examine the prejudice caused by the violation of Article 36 of the VCCR. The ICJ has stated that Pakistan, “*must ensure that full weight is given to the effect of the violation of the rights set forth in Article 36, paragraph 1, of the Convention and guarantee that the violation and the possible prejudice caused by the violation are fully examined.*”<sup>8</sup> Moreover, Pakistan has also been directed to examine the violation of the VCCR in light of “*its implications for the principles of a fair trial [...]*”.<sup>9</sup>
- v. Lastly the ICJ has stated that the “*clemency process is not sufficient in itself to serve as an appropriate means of review and reconsideration*”.<sup>10</sup>

- *Review as Per the Judgment of the ICJ v. Review in Domestic Law in Pakistan*

The High Courts of Pakistan can exercise judicial review under Article 199 of the Constitution of Pakistan. However, Article 199, paragraph 3, limits such power of judicial review in certain cases involving the armed forces. The Supreme Court of Pakistan has stated that the High Courts and the Supreme Court may exercise judicial review over a decision of the FGCM on

<sup>6</sup> Jadhav Case, (India v. Pakistan), Judgment, 2019, Para. 146

<sup>7</sup> Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I. C. J. Reports 2004, p. 12, Para. 131

<sup>8</sup> Jadhav Case, (India v. Pakistan), Judgment, 2019, Para. 139

<sup>9</sup> Jadhav Case, (India v. Pakistan), Judgment, 2019, Para. 145

<sup>10</sup> Jadhav Case, (India v. Pakistan), Judgment, 2019, Para. 143

“the grounds of *coram non judge*, without jurisdiction or suffering from *mala fides*, including *malice in law only*”<sup>11</sup>. Thus, as interpreted by the Supreme Court of Pakistan, review for a person who is subject to any law relating to the Armed Forces of Pakistan, including the Pakistan Army Act of 1952, is limited.

In light of the above, the ICJ stated that, “*it is not clear whether judicial review of a decision of a military court is available on the ground that there has been a violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention.*”<sup>12</sup> Since the remedy provided in the Constitution has been considered insufficient by the ICJ, to give full weight to the letter and spirit of the Judgment of the ICJ, the Act was enacted to give the High Courts of Pakistan the power to review and reconsider an order of conviction or sentence of a Military Court operating under the Pakistan Army Act, 1952.

This power of review, provided in pursuance of the Judgment of the ICJ, is hence distinct from the High Courts’ power of review provided under the Constitution of Pakistan.

- *Appointment of Legal Counsel for Commander Jadhav*

Section 2 of the Act states that a petition for review and reconsideration can be filed by one of the following:

- i. the foreign national himself,
- ii. through an authorized representative of the foreign national,
- iii. through a consular officer of the mission of foreign national’s country, or
- iv. in the event of default of the above three, the Secretary, Ministry of Law and Justice of Pakistan.

Moreover, the obligation to conduct review and reconsideration cannot be looked at in isolation from the “*right to fair trial*”. The Judgment of the ICJ places an obligation upon Pakistan to review and reconsider the conviction and sentence of Commander Jadhav while observing the principles of the right to a fair trial. Para 145 of the Judgment of the ICJ states,

“The Court points out that respect for the principles of a fair trial is of cardinal importance in any review and reconsideration, and that, in the circumstances of the present case, it is essential for the review and reconsideration of the conviction and sentence of Mr. Jadhav to be effective.”

Accordingly, it is understood that Pakistan is under an obligation to conduct the review and reconsideration proceedings in line with the principles of fair trial. Independent of the

<sup>11</sup> Said Zaman Khan et al. v. Federation of Pakistan, Supreme Court of Pakistan, Civil Petition No. 842 of 2016, 29 August 2016, Para. 73

<sup>12</sup> Jadhav Case, (India v. Pakistan), Judgment, 2019, Para. 141

Judgment of the ICJ, the right to a fair trial is also enshrined in Article 10A of the Constitution of Pakistan as a fundamental right.

As per existing jurisprudence, one of the main components of the right to a fair trial is access to legal representation. In the case titled *Muhammad Hussain alias Julfikar Ali vs. State Government of NCT, Delhi*<sup>13</sup>, it was decided by the court that the object of legal representation was to ensure the provision of a fair trial to the defendant. This goes in line with the cardinal principle of law as stated in the case titled, *Muhammad Yasin alias Mithou vs. State*<sup>14</sup>, that no one should be condemned unheard. Accordingly, every accused person has a right to be represented by legal counsel to ensure that he is accorded an opportunity to be heard and his trial is conducted fairly.

Several existing laws of Pakistan and jurisprudence allow for the appointment of a lawyer by the state in cases where the defendant has refused to engage legal counsel, as in the present case, or has been unable to do so. For instance, Section 19(8) of the Anti-Terrorism Act 1997 states that, “*If the defence counsel does not appear after two consecutive adjournments, the Court may appoint a State Counsel [...].*” Similarly Section 7 of the Protection of Pakistan Rules 2013 states that, “*The Judge of the Special Court shall [...] appoint an advocate to defend the accused at State expense [...].*” The statutory obligation placed upon the judiciary to ensure legal representation for the accused shows the acceptance in the laws of Pakistan of upholding the right to a fair trial of an accused, even when the State has to step up and take necessary action to ensure this right.

Through a bare perusal of judicial decisions, it can be deduced that the Supreme Court of Pakistan has held a similar view towards the compulsory appointment of legal representation. In the case titled, *Said Zaman Khan and others v Federation of Pakistan*<sup>15</sup>, it was held that, “*The Convict chose not to engage a Civil Defence Counsel thus a Defending Officer was appointed.*” This principle was expounded in greater detail in the case titled, *Hakim Khan v The State*<sup>16</sup>, in which the court explained that, “*It is no doubt true that, under the Constitution, an accused person has a right to be defended by counsel of his own choice, but not necessarily at State expense. He can engage any counsel he likes; but, when he is not able to engage one, then the choice is no longer available to him.*”

Similar laws and jurisprudence exist in other jurisdictions, including India itself. In India, in the case titled, *Bani Singh v. State of Uttar Pradesh*<sup>17</sup>, the Supreme Court of India stated that, “*If the lawyer is absent, and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so.*” This case relied on the case titled, *Ram Naresh Yadav & Ors. Vs. State of Bihar*<sup>18</sup>, where the same Supreme Court of

<sup>13</sup> 2012 SCMR 1610

<sup>14</sup> 2010 PCr.LJ 1253

<sup>15</sup> 2017 SCMR 1249, Para 137

<sup>16</sup> 1975 SCMR 1, Para 5

<sup>17</sup> 1996 SCC (4) 720, JT 1996 (6) 287, 1996 SCALE (5) 126

<sup>18</sup> AIR (SC) 1987, Page 1500

India, while expounding on the importance of legal representation for a defendant, stated, “*It is no doubt true that if counsel do not appear when criminal appeals are called out it would hamper the working of the court and create a serious problem for the court. And if this happens often the working of the court would become well-nigh impossible. We are fully conscious of this dimension of the matter but in criminal matters the convicts must be heard before their matters are decided on merits. [...] But the matter can be disposed of on merits only after hearing the appellant or his counsel. The court might as well appoint a counsel at State cost to argue on behalf of the appellants.*”

The laws and jurisprudence of the United States have affirmed the same principle. The Supreme Court of the United States, in *Carnley v. Cochran*<sup>19</sup>, stated that, “[i]t is settled that, where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.” Similarly, in the United Kingdom, there are few instances where a court is actually required to provide representation to protect the rights of an accused person. The governing provisions are in the Criminal Justice Act 1967 that make the appointing of counsel mandatory in cases where a defendant is charged with murder.

The importance of legal representation for an accused defendant can also be deduced from a perusal of international legal instruments. For instance, Article 14 of the International Covenant on Civil and Political Rights, 1966, states that every accused defendant has the right, “*to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it*”. Moreover, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2013, provides that, “[t]o provide representation in any court proceedings by a lawyer of choice, where appropriate, or by a competent lawyer assigned by the court or other legal aid authority at no cost when the person does not have sufficient means to pay and/or where the interests of justice so require [...]”<sup>20</sup>.

Thus it can be deduced that under Section 2 of the Act and existing domestic and international jurisprudence, the Court has the power to appoint “*an authorized legal representative*” for Jadhav when he is unwilling or unable to arrange for one himself.

- *Obligation of Result in International Law*

Having discussed the modalities of “*review and reconsideration*”, as ordered by the ICJ, the rationale behind the enactment of the Act, and the appointment of an authorized legal representative for Commander Jadhav, it will now be analyzed what is meant by “*an obligation of result*” which “*must be performed unconditionally*”.

<sup>19</sup> 369 U. S. 506, 513 (1962)

<sup>20</sup> Guideline 5. Legal aid during court proceedings

The ICJ has placed an “*obligation of result*” on Pakistan with regards to the review and reconsideration of the conviction and sentence of Kulbushan Jadhav. An “*obligation of result*” requires a State to guarantee the achievement of a prescribed result. In other words, the State is under an obligation to ensure that its actions attain conclusion. For instance in the *Request for the Interpretation of Avena*, the obligation to perform review and reconsideration of the Mexican nationals, was deemed to be an obligation of result that must be performed unconditionally. It can be inferred that unconditional performance of obligation is tied to the doctrine of “*obligations of result*”, whereby the obligation requires the fulfillment of a specific act, and non-performance can only be precluded on the basis of *force majeure*.<sup>21</sup>

- *Obligation of Result in Contradistinction from Obligation of Conduct*

An “*obligation of result*” can be better understood in contradistinction with “*an obligation of conduct*”. An “*obligation of conduct*” requires a State to do the best they can in the furtherance of a specific goal, but “*the State does not thereby guarantee the outcome*”<sup>22</sup>. International law scholars have weighed heavily on the differentiation between the two obligations. In *Bosnia and Herzegovina v Serbia and Montenegro*, the ICJ distinguished the two obligations by stating that “[...] *it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, [...]*”<sup>23</sup>.

Some notable comments, by leading academics, on the difference between the two obligations helps clarify the difference between the two,

- The International Law Commission’s Special Rapporteur on State Responsibility, has stated,

“a breach by the State of an international obligation specifically calling for it to adopt a particular course of conduct exists simply by virtue of the adoption of a course of conduct different from that specifically required”<sup>24</sup>, whereas “a breach of an international obligation requiring the State to achieve a particular result in concreto, but leaving it free to choose at the outset the means of achieving that result, exists if, by the

<sup>21</sup> Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America), Judgment, I.C.J. Reports 2009, p. 17, Para. 44

<sup>22</sup> Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008, p. 177, Para. 123

<sup>23</sup> Application of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, Para. 430

<sup>24</sup> Draft Article 20, YBILC 1977, Vol. II, Part I, 8

conduct adopted in exercising its freedom of choice, the State has not in fact achieved the internationally required result”<sup>25</sup>

- ii. James Crawford, former judge of the ICJ and eminent international law jurist, stated,

“In particular, ‘the conditions in which an international obligation is breached vary according to whether the obligation requires the State to take some particular action or only requires it to achieve a certain result, while leaving it free to choose the means of doing so’. *The essential basis of the distinction is that obligations of conduct, while they will have some purpose or result in mind, determine with precision the means to be adopted; hence they are sometimes called obligations of means. By contrast, obligations of result do not do so, leaving it to the State party to determine the means to be used*”<sup>26</sup>

- iii. P.-M. Dupuy, a prominent French jurist who has appeared before the ICJ in numerous cases, writes,

“[A]n obligation of conduct is, as rightly pointed out by Combacau, ‘une obligation de s’efforcer’, i.e., an obligation to endeavor or to strive to realize a certain result . . . In contrast, in the case of an obligation of result, as it is commonly understood, there is a burden on the person who owes such an obligation to attain a precise result”<sup>27</sup>

Looking at the jurisprudence of the ICJ in *Bosnia v. Serbia* and the understanding of international law scholars, it can be deduced that there are two salient features of “obligation of result”. First, the obligation is one that includes the attainment of a precise result.<sup>28</sup> Second, the means of attaining an “obligation of result” is left to the State.<sup>29</sup>

- *Steps to Be Taken By Pakistan To Fulfill its “Obligation of Result”*

As elaborated above, an obligation of result requires the fulfillment of a specified result, by means of a state’s own choosing. The specified result, in this case, is the conclusion of the effective review and reconsideration of Commander Jadhav’s conviction and sentence. To

<sup>25</sup> Draft Article 21, YBILC 1977, Vol. II, Part I, 20

<sup>26</sup> J. Crawford, Second Report on State Responsibility, UN doc. A/CN.4/498, Para. 53

<sup>27</sup> P.-M. Dupuy, “Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility”, *European Journal of International Law*, 1999, Vol. 10, No. 2, 375-378

<sup>28</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007

<sup>29</sup> *Jadhav (India v. Pakistan)*, 2019, Para. 146; *LaGrand (Germany v. United States)*, 2001, Para. 125; *Avena (Mexico v United States)*, 2004, Para. 153

achieve this end and for reasons expounded above, Pakistan enacted the Act. Fulfillment of this obligation of review and reconsideration entails the completion of the following steps, the first of which have been fulfilled:

- i. Choosing an appropriate means of providing for the review and reconsideration of the conviction and sentence.
  - The Act fulfilled this purpose.
- ii. Since the “*obligation of result*” has to be “*unconditionally performed*”, appointing a lawyer for Jadhav, in the event Jadhav or India do not appoint one.
  - Since Jadhav refused to appoint one and India also abstained from doing so, Pakistan filed a petition before the Islamabad High Court for the appointment of legal counsel for Commander Jadhav.
- iii. Initiate review and reconsideration proceedings.
  - Once, a lawyer is appointed for Commander Jadhav, by himself, India or the Court, this lawyer can then initiate proceedings before the Islamabad High Court for the review and reconsideration of his conviction and sentence, pursuant to Section 3 of the Act.
- iv. The proceedings must examine the prejudice caused to Commander Jadhav due to the violation of the rights set forth in Article 36 of the VCCR.
  - This is the direction of the ICJ and the purpose of the review and reconsideration proceedings is to see the effect that the violation of Article 36 of the VCCR has had on the conviction and sentence of Commander Jadhav.
- v. Conclude the review and reconsideration proceedings.
  - Once an examination of the prejudice caused to Commander Jadhav has been undertaken, remedial action, if required, will be ordered by the Court accordingly and the case will be concluded. This will fulfill the obligation placed upon Pakistan by the ICJ.

#### **IV) Recommendations and Way Forward**

Since the decision of the ICJ in July 2019, Pakistan has taken every possible step to fulfill the obligations placed upon it by the Judgment of the Court. However, India has refused to engage with Pakistan, despite repeated attempts by Pakistan for India to do so.

For instance, Pakistan has offered India to avail of another consular access to Commander Jadhav so that the Indian High Commission can arrange for his legal representation; the Islamabad High Court has repeatedly requested the Indian High Commission to appear before it and ‘assist’ in appointing a legal counsel for Commander Jadhav; and, the Ministry of



Foreign Affairs of Pakistan has repeatedly requested the High Commission to engage legal representation for Commander Jadhav. India has not responded positively to any of the requests made by Pakistan or shown any inclination towards engaging with the legal system with Pakistan to ensure review and reconsideration of the conviction and sentence of Commander Jadhav.

It is advised that in light of India's uncooperative behavior, Pakistan should approach the ICJ, under Article 60 of the Statute of the Court. Article 60 states that,

“In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.”

Pakistan can claim that it has all taken the necessary steps to fulfill its “*obligation to provide effective review and reconsideration*”<sup>30</sup> of the conviction and sentence of Commander Jadhav but India has not responded positively to Pakistan's efforts.

Pakistan can claim that a dispute has arisen under Article 60 of the Statute because there is a disagreement between the two countries as to the obligation placed upon Pakistan by the ICJ in the Jadhav Judgment.

It should be kept in mind that this option is available to India as well and it will be better if Pakistan is on the offensive rather than the defensive and approaches the Court first. Pakistan should put forth the argument that it has acted in good faith and because India has failed to act according to the direction of the ICJ, the Court should now “*construe*” its judgment.

---

<sup>30</sup> Jadhav Case, (India v. Pakistan), Judgment, 2019, Para. 146