

DECLARATION OF JUDGE ROBINSON

Jurisdiction of the Court — Relationship between Article 14 of the International Covenant on Civil and Political Rights and Article 36 (1) (c) of the Vienna Convention on Consular Relations — Systemic Integration and Article 31 (3) (c) of the Vienna Convention on the Law of Treaties — Interpretation of Subsequent Agreements under Article 73 (2) of the Vienna Convention on Consular Relations — Relationship between Article 73 (2) of the Vienna Convention on Consular Relations and the 2008 Agreement between India and Pakistan on Consular Access.

A. THE HUMAN RIGHTS CHARACTER OF THE RIGHTS AND OBLIGATIONS
UNDER ARTICLE 36 OF THE VIENNA CONVENTION

1. The question of the relationship between the Vienna Convention on Consular Relations (“the Vienna Convention”) and the International Covenant on Civil and Political Rights (“the Covenant”) was addressed three times by the Court in its Judgment. First, in response to India’s submission that the Court declare Pakistan to be in breach of Mr. Jadhav’s “elementary human rights” as reflected in Article 14 of the Covenant, the Court held that its jurisdiction was based on Article I of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes and “[did] not extend to the determination of breaches of international law obligations other than those under the Vienna Convention” (see paragraph 36 of the Judgment). Second, in response to India’s submission that the Court should declare that the sentence [of death] handed down by Pakistan’s military courts violated international law, including Article 14 of the Covenant, the Court stressed that the remedies to be ordered can only provide reparation for breaches of obligations under the Vienna Convention, which is the basis of its jurisdiction in the case brought by India (see paragraph 135 of the Judgment). In that regard, it is to be noted that the relief sought by India was the annulment of Mr. Jadhav’s conviction and sentence as well as his release. Third, the Court acknowledged that the Covenant could, however, play a role in the interpretation of the Vienna Convention through Article 31 (3) (c) of the Vienna Convention on the Law of Treaties (see paragraph 135 of the Judgment).

2. Against the background of these findings the following propositions are advanced concerning the relationship between the Vienna Convention and the Covenant:

- (i) There is a strong and meaningful legal connection between Article 36 of the Vienna Convention and Article 14 of the Covenant that might impact on the question of the Court's jurisdiction.
- (ii) The Covenant is, as its name implies, a human rights treaty. The greatest development in international law following the Second World War has been the growth of a body of law, reflected in international declarations and treaties, designed to protect the inalienable rights of the individual. This development is a response to the atrocities committed in the war, against individuals. The Covenant is the leading conventional instrument for the protection of the rights of the individual.
- (iii) The rights set out in Article 14 of the Covenant apply to "everyone" (see, in particular, paragraphs 1, 2 and 3 of Article 14); as such, they apply as much to persons in a foreign country as they do to persons in their own country; they also apply "in full equality", meaning that a national in a foreign country is entitled to the same protection through the rights set out in Article 14 as a national of his own country or a national in the receiving State. The right of equal access to a court means that States parties to the Covenant have a positive international legal obligation to ensure that there exist independent and impartial courts which enable them to conduct a fair trial in criminal proceedings which grant to accused persons the minimum rights that are set out in Article 14 (2) to 14 (7) of the Covenant.
- (iv) The bundle of rights in Article 14 (3) of the Covenant is not an exhaustive list of those rights; it comprises "minimum guarantees" to which "everyone" is entitled "in full equality". Thus other rights may be added to the list, provided they share the essential characteristics of the seven rights in the bundle, that is, they are rights designed to ensure that an individual has the right to a fair hearing guaranteed by Article 14 (1) of the Covenant.
- (v) A human right is a right that applies to all persons without distinction of any kind, such as race, colour, national or social origin and sex. The essence of human rights is that, as the preamble to the Covenant indicates, they "derive from the inherent dignity of the human person" and are "the foundation of freedom, *justice* and peace in the world" (emphasis added). Notice that justice is one of the ends served by the enjoyment of a human right. The right to a fair trial in Article 14 of the Covenant and the notion of equality

before the law means that persons must be granted an equal access to the Court without any distinction based on the factors in Article 2 (1) of the Covenant including national or social origin. Where a foreign national, who may not even speak the language of the receiving State, is prevented from communicating with his consul to arrange his legal representation it is questionable whether he has been granted access to the Court in full equality with the nationals of the receiving State.

(vi) It follows from the fifth proposition that the rights to consular access and protection under Article 36 of the Vienna Convention are as much human rights as any of the seven rights in Article 14 (3) of the Covenant. This is so because they offer to a person facing a criminal charge in a foreign country protection that may be taken for granted or, at any rate, may be much easier to access by a national of the sending State facing a criminal charge in that State or by a national of the receiving State facing a criminal charge in that State. Absent the rights set out in Article 36 of the Vienna Convention, the universality of the protection guaranteed by Article 14 for “everyone” “in full equality” may prove to be illusory. The condition of being a foreigner in a country facing a criminal charge calls for heightened scrutiny, because such a person may be less able to cope with the intricacies of a foreign criminal justice system than a national of the sending State facing a criminal charge in that State or a national of the receiving State facing a criminal charge in that State. The inherent dignity of the foreign national requires that he be given the same access to justice as a national of the sending State facing a criminal charge in that State or as a national of the receiving State facing a criminal charge in that State, and in any event that he be given no less than a fair trial as required by the peremptory norm set out in Article 14 (3) of the Covenant.

(vii) Article 36 of the Vienna Convention therefore should be seen as providing a kind of foreign parity with the rights enjoyed by a person facing a criminal charge in the receiving State. That is why so many modern day treaties require that the right to consular access be observed in relation to a person facing a criminal charge in a foreign country. For example, Article 6 (3) of the United Nations Convention against Torture mandates that a person in custody “shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national”¹. This is as much a substantive obligation as any of the obligations set out in the other paragraphs of this Article, including paragraph 1 requiring a State party to take into custody a person in its territory who is alleged to have committed an act of torture. If, for

¹ See also Article 13 (3) of the Convention on Offences and Certain Other Acts on Board Aircraft, 1963; Article 6 (3) of the Convention for the Suppression of Unlawful

example, as a result of a person in custody being denied the right to communicate with his consular representative, that person was not represented at his trial by a lawyer and was convicted, in most systems of law that trial would be null and void. By the same token, the obligation to provide consular access under Article 36 (1) of the Vienna Convention, which also applies to a person who, *inter alia*, is in custody, has a substantive character in view of its importance in securing the rights under that Article.

- (viii) The right to consular access and the corresponding obligation to grant it, whether under Article 36 of the Vienna Convention or under any of the above-mentioned treaties, have passed into customary international law.
- (ix) The right of a person under Article 36 (1) (b) of the Vienna Convention to have his consular post informed of his arrest or detention and to be informed of this right is of fundamental importance in securing the universality and equality of treatment guaranteed by Article 14 of the Covenant. But of even greater significance is the right of a consular officer under Article 36 (1) (c) of the Vienna Convention to visit, converse and correspond with, and arrange for the legal representation of a national of the sending State who is in prison, custody or detention. This right enures for the benefit of the foreign national in prison, custody or detention who may be in need of legal representation in a forthcoming trial. The fact that the foreign national is the beneficiary of this provision is clearly indicated by the statement in the last sentence that the consular officer cannot provide assistance “if [the national] expressly opposes such action”. Without a foreign national’s consular officer being able to arrange for his legal representation, it is very likely that none of the

Acts against the Safety of Civil Aviation, 1971; Article 6 (2) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1973; Article 6 (3) of the Convention against the Taking of Hostages, 1979; Article 17 (2) of the Convention on the Safety of United Nations and Associated Personnel, 1994; Article 9 (3) of the Convention for the Suppression of the Financing of Terrorism, 1999; Article 17 of the Convention for the Protection of All Persons from Enforced Disappearances, 2006. All of these conventions provide for the right of a person in custody to be assisted in communicating immediately with a representative of the State of which he is a national. These provisions are to be found in articles which undoubtedly create substantive legal obligations. There is nothing to suggest that they create anything other than a substantive legal obligation on the part of the country where the person is in custody.

seven rights set out in Article 14 of the Covenant would be given effect. In that bundle, the right that is most at peril in relation to a person in a foreign country facing a criminal charge is the right under Article 14 (3) (b) “[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”; it is also a right that is closely connected to the right of the foreign national to have that national’s consular officer arrange for his legal representation. Absent arrangements for legal representation, there is a strong possibility that the foreigner in custody will not be able to prepare his defence adequately by selecting and communicating with a lawyer of his choice.

- (x) In light of the foregoing, it is difficult to accept the submission that “unlike legal assistance, consular assistance is not regarded as a predicate to a criminal proceeding” (paragraph 129 of the Judgment). This submission was made by Pakistan in this case in response to the claim by India that breach of Article 36 (1) (b) of the Vienna Convention resulting from failure to notify the consul should lead to an annulment of the trial proceedings. The right to consular access can have a significant relationship with a criminal trial even if it does not result in an annulment of the trial. But in my view there are situations in which the failure to notify the consul that his national is in custody facing a criminal charge can, and should, lead to an annulment of the trial procedures. I hasten to add that such action would be taken by a domestic court and not by the Court, which should content itself with adverting in its Judgment to the fundamental breach and requiring that full weight is given to the effect of the violation of the rights by the domestic court in carrying out any review that it may order. An example of such a fundamental breach requiring an annulment would be a case in which, as a result of the failure to notify the consul that its national is in custody, that national has no legal representation in his trial, and this failure was a substantial factor in the national’s conviction. In any event, the assistance given by a consul in making arrangements for his national’s legal defence when that national is in a foreign country facing a criminal charge is an integral part of a sequence that involves choosing his lawyer, consulting with that lawyer in the preparation of his defence, and being represented in his trial by a lawyer of his choice. In the peculiar circumstances in which that foreign national finds himself this assistance is very much an indispensable and foundational step leading up to the trial proceedings. Thus it is incorrect to treat the consul’s assistance

under Article 36 (1) (c) of the Convention as though it does not have a fundamentally important relationship with trial proceedings, and this is particularly the case because the Vienna Convention provides that one of the functions of a consul is to arrange “representation for nationals of the sending State before the tribunals . . . of the receiving State” (see Article 5 (i) of the Vienna Convention).

- (xi) In the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*, the Court declined to characterize consular access as a human right. In doing so the Court took the position that such a conclusion was neither supported by the text, object and purpose nor the *travaux préparatoires* of the Vienna Convention². While it is true that the preamble speaks in general of the development of friendly relations among States as one of the purposes of the Vienna Convention, and has no explicit reference to the human rights of nationals of the sending State, the Convention must be interpreted in light of that grand development of international law following the Second World War which focused on the rights of individuals in their relations with States. Support for such an interpretation that views the Convention through a global lens comes from what McLachlan calls the “general principle of treaty interpretation, namely that of *systemic integration* within the international legal system”³, reflected in Article 31 (3) (c) of the Vienna Convention on the Law of Treaties; it also comes from the Court’s Advisory Opinion in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* case⁴, in which it held: “Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”⁵ The text of Article 36 (1) of the Vienna Convention, and in particular subparagraph (c), does in fact portray the kind of concern with the rights of an individual, based on the inherent dignity and worth of the human person, that one finds in human rights treaties such as the United Nations Convention against Torture. Given that Arti-

² *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, *I.C.J. Reports 2004 (I)*, p. 61, para. 124.

³ McLachlan, Campbell, “The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention” *International and Comparative Law Quarterly*, Vol. 54, Issue 2, April 2005, p. 280.

⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 16.

⁵ *Ibid.*, p. 31, para. 53.

cle 36 (1) (c) of the Vienna Convention is so closely connected to the right of an accused person under Article 14 (3) (b) of the Covenant “to have adequate time and facilities for the preparation of his defence”, it is submitted that it may be seen as a fair trial right that could be added to the bundle of rights in Article 14 (3) of the Covenant.

- (xii) It follows therefore that a breach of the obligations under Article 36 (1) of the Vienna Convention and, in particular, of Article 36 (1) (c) is a breach of a human right closely connected to a breach of the fair trial rights of an accused person under Article 14 (3) of the Covenant, and in particular, a breach of the right set out in Article 14 (3) (b). If the right under Article 36 (1) (c) has the status of a fair trial right so that it is incorporated in the bundle of rights under Article 14 (3) of the Covenant, may it not be argued that a breach of Article 14 (3) (b) of the Covenant resulting from a failure on the part of the receiving State to allow the consular officer to arrange for the legal representation of the foreign national in custody is also a breach of Article 36 (1) (c) of the Vienna Convention; and that this would be sufficient to give the Court jurisdiction on the basis of Article I of the Optional Protocol to the Vienna Convention and in respect of a breach of Article 14 (3) of the Covenant?

B. THE 2008 AGREEMENT

3. Article 73 (2) of the Vienna Convention provides: “Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.”

4. In 2008, India and Pakistan concluded the Agreement on Consular Access (“the Agreement”). The Court had to consider whether this Agreement falls within the provisions of Article 73 (2). If the Agreement was one that did not confirm, supplement, extend or amplify the provisions of the Vienna Convention, it would not have been authorized by Article 73 (2). It would be *ultra vires* the enabling provision of Article 73 (2).

5. There is a clear difference between the Parties concerning the interpretation of the Agreement. According to Pakistan, and as the Court has

noted in paragraph 97, the Agreement displaces Article 36 of the Vienna Convention as between India and itself. Point (vi) of the Agreement provides that “[i]n case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits”. Pakistan argues that this paragraph displaces the obligations under Article 36 of the Vienna Convention in relation to espionage cases. On the other hand India contends that point (vi) must be read with point (v) which provides: “Both Governments agree to release and repatriate persons within one month of confirmation of their national status and completion of sentences.” India therefore contends that Pakistan and India have agreed that they may examine on the merits of each case the release and repatriation of persons within one (1) month of confirmation of their national status and completion of their sentence where their arrest, detention and sentence was made on political or security grounds.

6. In interpreting the words “each side may examine the case on its merits” stress should be placed on the word “may”. The Parties have agreed to afford each side a discretionary power in considering arrests made on political or security grounds. These cases would include arrests for espionage activities. The words mean that each side, having examined each case of an arrest for espionage activities on its merits, may then decide whether to grant consular access to the person arrested. The Agreement and in particular point (vi) cannot therefore be considered as confirming, supplementing, extending or amplifying the provisions of the Vienna Convention, which mandates the grant of consular access in the circumstances set out in Article 36. For this reason the Agreement cannot be considered as having been authorized by Article 73 (2) of the Vienna Convention. The Agreement is *ultra vires* Article 73 (2) and cannot have any application in relation to the provisions of the Convention. The Parties therefore remain bound by Article 36 of the Vienna Convention.

7. The Court has adopted an approach to the Agreement that is entirely different from the analysis above. In paragraph 97 of the Judgment, it finds that the Parties have negotiated the Agreement in full awareness of Article 73 (2) of the Vienna Convention. That statement is not merely descriptive of a factual situation; if it were, it would not be problematic. However, it is clear from what follows in the paragraph that the Court is using the Parties’ awareness of Article 73 (2) as a pivotal basis for its conclusion that point (vi) does not “as Pakistan contends, displace the obligations under Article 36”. The finding is important more for what it implies than for what it actually states. The implication is that,

since the Parties negotiated the Agreement fully aware of Article 73 (2), it is appropriate to presume that in concluding the Agreement they acted in accordance with that provision. Any such presumption would have to be rebuttable and is in fact rebutted by the analysis above showing that the discretionary powers to grant consular access in respect of arrests on political or security grounds (including in espionage cases) under point (vi) are in direct conflict with the mandatory obligation under Article 36 to grant consular access in respect of all cases of arrests, including those relating to espionage activities.

8. In the second sentence of paragraph 97 the Court concludes :

“Having examined that Agreement and in light of the conditions set out in Article 73, paragraph 2, the Court is of the view that the 2008 Agreement is a subsequent agreement intended to ‘confirm, supplement, extend or amplify’ the Vienna Convention. Consequently, the Court considers that point (vi) of that Agreement does not, as Pakistan contends, displace the obligations under Article 36 of the Vienna Convention.”

But even if that conclusion is correct, that intention cannot be relied on by itself to support the conclusion that there was no breach of the obligation in Article 73 (2) of the Vienna Convention to confine the adoption of a subsequent agreement to one that confirms, supplements, extends or amplifies the Vienna Convention. In other words, if as a matter of law the Agreement does not confirm the provisions of the Vienna Convention, there is no basis for the contention that it confirms the provisions of the Vienna Convention merely by reason of a presumption that the Agreement was intended to confirm the Vienna Convention. For there must be a reasonable basis for a presumption if it is to function as a useful interpretative tool.

9. The question whether the Agreement is consistent with Article 73 (2) is not resolved simply by presuming that the Parties must have intended it to be consistent on the ground that they were aware of the provisions of Article 73 (2). There is no reasonable basis for such a presumption. Parties to a treaty frequently take action that breaches a treaty even though they are aware of its provisions. The Court’s reasoning is further developed in paragraph 94 of the Judgment where, after recalling the preambular provision of “furthering the objective of humane treatment of nationals . . .”, it finds that point (vi) cannot be interpreted as denying consular access in the case of an arrest on political or security grounds. The Court concludes that in light of the importance of the rights involved in relation to the humane treatment of nationals, had the Parties intended

to restrict in some way the rights guaranteed by Article 36, “one would expect such an intention to be unequivocally reflected in the provisions of the Agreement”. In my view this is not a reasonable conclusion, particularly in light of the clarity of point (vi).

10. It is, of course, acknowledged that Article 26 of the Vienna Convention on the Law of Treaties requires that treaties must be performed in good faith by the parties thereto. As the Court held in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the good faith obligation requires parties to apply a treaty “in a reasonable way and in such a manner that its purpose can be realized” (*Judgment, I.C.J. Reports 1997*, p. 79, para. 142). There is nothing in this obligation that generates a presumption that parties to a particular treaty intend to act or have acted consistently with their obligations under the treaty. Whether parties have so acted requires a careful examination of all the relevant circumstances including the treaty in question and their conduct.

11. The danger in paragraph 97 of the Judgment, and in particular its second sentence, is that it may be construed as meaning that when a treaty sets out specific criteria for subsequent conduct by parties, as is the case here with the requirement that a subsequent agreement must “confirm, supplement, extend or amplify” the provisions of the Vienna Convention, the Court is thereby enabled to presume an intention on the part of the parties to act consistently with those criteria, and this presumption more readily arises when the treaty has a noble objective such as furthering humane treatment.

(Signed) Patrick L. ROBINSON.
