

TO REGISTER OR NOT TO REGISTER? THE POSSIBILITY OF AN ARTICLE 102 SANCTION IN *JADHAV*

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ABSTRACT

This paper argues that Bilateral Agreement on Consular Access between India and Pakistan is a legal, binding treaty, but, since the treaty was not registered with the United Nations by the initiation of *Jadhav*, Article 102 of the United Nations Charter directly governs the treaty. According to Article 102(2), nonregistered agreements are sanctioned by being unable to be invoked before any organ of the United Nations. Under this provision, the Bilateral Agreement should not be considered by the International Court of Justice. The paper concludes, however, that the International Court of Justice, due to the lax adherence to Article 102 in previous International Court of Justice cases, will most likely decide that Pakistan's belated registration of the Bilateral Agreement on Consular Access is valid, allowing the International Court of Justice to maintain jurisdiction over *Jadhav*.

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INTRODUCTION

Jadhav is a case currently before the International Court of Justice and hinges on the issue of treaty applicability and registration.¹ On March 3, 2016, Pakistani authorities arrested Kulbhushan Jadhav in the Balochistan province of Pakistan after Jadhav reportedly entered Pakistan from Iran.² Indian sources, however, claim that Jadhav was kidnapped from Iran by Pakistan-affiliated terror organizations.³ Depending on the story of each party, Jadhav is either currently or was previously a member of the Indian Navy.⁴ India demanded consular access throughout Jadhav's detainment, but Pakistan repeatedly denied these requests.⁵ Jadhav was later sentenced to death by hanging on counts of espionage and sabotage by a Pakistani military court on April 10, 2017.⁶

India brought the issue to the International Court of Justice (ICJ), claiming that Pakistan violated its obligations under the Vienna Convention on Consular Relations (VCCR) to provide India consular access to Jadhav.⁷ Pakistan responds that it did not have to provide India consular access to Jadhav in adherence to a 2008 agreement, the Bilateral Agreement on Consular Access, that was unregistered at the initiation of proceedings. The Bilateral Agreement states that the parties can refuse to

¹ *Kulbhushan Jadhav Case: A Timeline*, TIMES OF INDIA (May 18, 2017, 04:03 PM), <https://timesofindia.indiatimes.com/india/kulbhushan-jadhav-case-a-timeline/articleshow/58609227.cms>.

² Syed Ali Shah, 'RAW officer' Arrested in Balochistan, DAWN (March 24, 2016), <https://www.dawn.com/news/1247665>.

³ Manoj Gupta, *Kulbhushan Jadhav Was Kidnapped from Iran by Terror Outfit Close to Pak Army*, NEWS18 (January 4, 2018), <https://www.news18.com/news/india/kulbhushan-jadhav-was-kidnapped-from-iran-by-terror-outfit-close-to-pakistan-army-1622869.html>.

⁴ Shubhajit Roy, *Balochistan Arrest: Pakistan Calls Him Spy, MEA Says He Retired from Navy, Has No Links with Govt*, THE INDIAN EXPRESS (April 12, 2017), <http://indianexpress.com/article/india/india-news-india/man-arrested-in-pakistan-is-former-navy-officer-has-no-links-with-govt-mea/>.

⁵ *Iran President Dismisses Pakistan's RAW Spy Claim*, THE NEW INDIAN EXPRESS (March 27, 2016), <http://www.newindianexpress.com/nation/2016/mar/27/Iran-President-Dismisses-Pakistans-RAW-Spy-Claim-916482.html>.

⁶ *Pakistan Sentences Indian Spy Kulbhushan Jadhav to Death*, DAWN (April 10, 2017), <https://www.dawn.com/news/1326109/pakistan-sentences-indian-spy-kulbhushan-jadhav-to-death>.

⁷ *International Court of Justice Stays Execution of Kulbhushan Jadhav by Pakistan*, HINDUSTAN TIMES (May 10, 2017), <https://www.hindustantimes.com/india-news/international-court-of-justice-stays-kulbhushan-jadhav-s-hanging-sentenced-to-death-by-pakistan-for-spying/story-BE9fEvvwuZUAdTTjMLP4dL.html>.

grant consular access to nationals of the other party in cases where national security is at stake.⁸

The Bilateral Agreement on Consular Access, negotiated and agreed upon between India and Pakistan, creates a unique dilemma for the ICJ. Article 102 of the United Nations Charter requires treaties to be registered through the United Nations.⁹ Unregistered treaties are sanctioned under Article 102(2), disallowing any unregistered agreement from being invoked before any organ of the United Nations. Since the Bilateral Agreement was not registered by the initiation of proceedings, the Article 102 sanction is now pertinent to the events in *Jadhav*.¹⁰

Issues concerning unregistered treaties have been recognized by the United Nations and litigated previously, creating a line of controlling precedent in United Nations courts. This precedent, however, does not address the situation presented in *Jadhav*—where a party invokes an unregistered treaty directly before the International Court of Justice. Furthermore, India objects to Pakistan's reliance upon the unregistered Bilateral Agreement in the country's application to the Court.¹¹ India, in opening arguments, argues that since the Bilateral Agreement was unregistered at the time of the initiation of the *Jadhav* proceedings, the Bilateral Agreement cannot be invoked before and, therefore, considered by the ICJ in the dispute.¹² The Bilateral Agreement is the controlling document in the dispute, and the ICJ will struggle to resolve the matter without the document. Since Article 102 has been directly raised in the *Jadhav* proceedings, the ICJ will have to explicitly answer an unresolved, determinative treaty application question: whether the sanction in Article 102 applies.

This paper argues that the unregistered Bilateral Agreement is a legal, binding treaty, but, since the treaty was not registered with the United Nations by the initiation of *Jadhav*, Article 102 of the United Nations Charter should directly govern the treaty. The ICJ should be restricted from determining the applicability of the treaty in *Jadhav*. This

⁸ *Jadhav Case (India v. Pak.)*, Verbatim Record, 13 (May 15, 2017, 3 p.m.), <https://www.icj-cij.org/files/case-related/168/168-20170515-ORA-02-00-BI.pdf?forcedefault=true> [hereinafter Pakistan's Opening Arguments].

⁹ UN Charter, art. 102.

¹⁰ *Id.*

¹¹ *Jadhav Case (India v. Pak.)*, Application Instituting Proceedings, 20-23 (May 8, 2017), <https://www.icj-cij.org/files/case-related/168/168-20170508-APP-01-00-EN.pdf?forcedefault=true> [hereinafter India's Application].

¹² *Jadhav Case (India v. Pak.)*, Verbatim Record, 34 (May 15, 2017), <https://www.icj-cij.org/files/case-related/168/168-20170515-ORA-01-00-BI.pdf> [hereinafter India's Opening Arguments].

paper considers previous treaty registration precedent and concludes that the ICJ, due to the lax adherence to Article 102 in previous ICJ cases, will accept Pakistan's belated registration of the treaty as valid to circumvent this sanction and make a judgement in *Jadhav*.

The background Part of this paper will introduce the facts and procedural history of *Jadhav*, discuss how states come to legal, binding agreements in international law, and explain the process of registering treaties through the United Nations. The analysis Part will consider the relevant factors influencing the ICJ's decision and will compare the various options at the ICJ's disposal. Part A of the analysis will closely examine the text of the Bilateral Agreement to determine what exactly the obligations were for both Pakistan and India under the treaty. Part B will discuss the controlling precedent for the ICJ's decision and if this precedent offers any guidance towards how the ICJ will consider *Jadhav*. Part C will consider the potential outcomes of the registration issue in *Jadhav*, focusing on the previous paths taken by the ICJ in prior precedent and the implications the potential decisions will have on the applicability of the Article 102 sanction in future disputes.

I. BACKGROUND

The Bilateral Agreement on Consular Access between India and Pakistan was negotiated in a brief period of cooperation between the two countries. Historically, India and Pakistan have had an adverse relationship marked by conflict. Due to international pressure and a desire for stability, the countries initiated the Composite Dialogue, a series of talks held in 1997 by the Indian Prime Minister Inder Kumar Gujral and the Pakistan Prime Minister Nawaz Sharif at Malé, the Maldives.¹³ The subject matter of the Composite Dialogue revolved around disputes between the two countries, including terrorism and territorial claims.¹⁴ These talks, however, only continued intermittently throughout the following years as conflict between India and Pakistan escalated and deescalated.¹⁵

¹³ Sajad Padder, *The Composite Dialogue between India and Pakistan: Structure, Process and Agency* 1-2 (S. Asia Inst. of the Dep't of Pol. Sci., Heidelberg U., Working Paper No. 65, 2012).

¹⁴ *Id.* at 2. Many of the talks resulted in little to no progress, and the parties have continuously renegotiated or ignored provisions agreed upon earlier in the Composite Dialogue process. *Id.*

¹⁵ *Id.*

The Bilateral Agreement was a result of the fourth session of the Composite Dialogue.¹⁶ During that session, the Indian Home Ministry and the Pakistani Interior discussed terrorism.¹⁷ The two sides considered the issue of consular access.¹⁸ A previous consular access agreement was reached on August 25, 2005, but the agreement only dictated that consular access must be granted within three months of the arrest of a party's national and then that national must be extradited as soon as his or her period of imprisonment ended.¹⁹

Both parties desired more effective consular access provisions, so the Bilateral Agreement was finalized and entered into force on May 21, 2008.²⁰ The agreement strengthened the responsibilities of both parties for keeping account of arrests, detainment, and imprisonment of the other party's nationals.²¹ Also, the parties now had immediate duties to notify the other of sentences imposed on opposing nationals.²² The consular access provision of the previous agreement was kept intact, but a new provision was added that allowed the arresting party to "examine the case on its merits" for any arrest of an opposing national made on political or security grounds.²³ Talks quickly disbanded soon after the treaty entered into force, and, after striking up a fifth round of talks that quickly fell apart, the two Ministries have yet to resume any further discussion.²⁴

The Bilateral Agreement is now at the center of a dispute between India and Pakistan. As with most disagreements, many of the details are contested, but the core facts are consistent. On March 3, 2016, Pakistani authorities arrested Kulbhushan Jadhav in the Balochistan province of Pakistan after Jadhav reportedly entered Pakistan from Iran.²⁵

¹⁶ *Id.* at 16.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 15-16.

²⁰ Agreement on Consular Access between the Government of the Islamic Republic of Pakistan and the Government of the Republic of India, India-Pak., May 21, 2008 [hereinafter *Bilateral Agreement*].

²¹ *Id.* The Bilateral Agreement does not yet have a UNTS registration number because the Pakistan's unilateral registration of the treaty was so recent. *Id.*

²² *Id.*

²³ *Id.*

²⁴ Padder, *supra* note 13, at 16-17.

²⁵ *Kulbhushan Jadhav Case: A Timeline*, *supra* note 1.

On March 25, India was informed of his arrest when Pakistan brought the issue to Indian High Commissioner in Islamabad.²⁶

Pakistan submitted a protest about an illegal crossing into Pakistan of an allegedly Indian naval officer tasked with generating insurrection in Pakistan's Balochistan province.²⁷ On March 29, Pakistan released a video of Jadhav confessing to his crimes and implicating India's involvement in his activities.²⁸ The following month, Jadhav was charged with terrorism and sabotage.²⁹ Pakistan, however, admitted later that there was limited evidence of his activities.³⁰ On December 7, Pakistan's Prime Minister of Foreign Affairs, Sartaj Aziz, stated that there is "not enough evidence" on Jadhav, and the dossier on Jadhav consisted of "mere statements."³¹ By March 3, 2017, that stance had changed, and Aziz declared that Jadhav would not be extradited to India under any conditions.³² On April 10, Pakistan announced that a military court found Jadhav guilty of espionage and sabotage and sentenced Jadhav to death by hanging.³³ On May 8, India filed an application to the ICJ claiming that Jadhav's right to consular access was denied repeatedly by Pakistan.³⁴

Several details surrounding the core issue of India's claim – that Jadhav was denied his right to consular access during his arrest, confinement, and sentencing – are disputed between the two parties. India submitted that Jadhav was not an Indian-sponsored spy or terrorist but rather that Jadhav is a former member of the Indian Navy who received early retirement.³⁵ Additionally, India maintained that the country requested consular access to Jadhav on March 25, 2016, the day

²⁶ *Id.*

²⁷ India's Application, *supra* note 11, at 18.

²⁸ *Govt Airls Video of Indian Spy Admitting Involvement in Balochistan Insurgency*, DAWN (March 29, 2016), <https://www.dawn.com/news/1248669/govt-airls-video-of-indian-spy-admitting-involvement-in-balochistan-insurgency>.

²⁹ *Kulbhushan Jadhav Case: A Timeline*, *supra* note 1.

³⁰ *Id.*

³¹ *Pak's Sartaj Aziz Said Not Enough Proof of Kulbhushan Jadhav As Spy*, NDTV (April 10, 2017), <https://www.ndtv.com/india-news/paks-sartaj-aziz-said-not-enough-proof-of-kulbhushan-jadhav-as-spy-1679661>.

³² APP, *Kulbhushan Jadhav Will Not Be Extradited, Sartaj Assures Lawmakers*, THE EXPRESS TRIBUNE (March 3, 2017) <https://tribune.com.pk/story/1344870/kulbhushan-jadhav-will-not-extradited-sartaj-assures-lawmakers/>.

³³ *Pakistan Sentences Indian Spy Kulbhushan Jadhav to Death*, *supra* note 6.

³⁴ India's Application, *supra* note 11, at 4.

³⁵ Press Statement on Video Released by Pak. Auth., Gov't of India, Ministry of External Aff. (March 29, 2016).

India learned that Jadhav had been arrested.³⁶ India claimed that the request was ignored, so India sent a reminder to Pakistan requesting consular access five days later on March 30. India stated that the reminder was also ignored and that thirteen additional reminders, sent from May 6, 2016 to April 19, 2017, were pushed aside.³⁷

India argued that Pakistan knew Jadhav's nationality almost immediately after his arrest. On January 23, 2017, India received a letter from Pakistan requesting assistance with an investigation into Jadhav.³⁸ In the letter, Pakistan acknowledged that the criminal complaint against Jadhav, which was filed on April 8, 2016, had been registered against an Indian national.³⁹ Since Pakistan knew that Jadhav was an Indian national, India argued that Pakistan should have provided consular access to India pursuant to the VCCR.

India made several other arguments in support of their understanding of the facts. According to India, Pakistan would only consider granting consular access if India would offer assistance in Pakistan's investigation of the circumstances of Jadhav's arrest.⁴⁰ Furthermore, India disputed the reliability of Jadhav's video confession.⁴¹ In conclusion, India announced that the lack of evidence in Jadhav's case, combined with Pakistan's actions, show that Jadhav's trial and sentencing were a farce and flew in the face of international law.⁴² India was concerned that Jadhav could be executed any day, so India implored the ICJ to stay the execution and resolve the consular access issue at the heart of the case.⁴³

Pakistan, unsurprisingly, took a different stance towards both parties' actions in Jadhav's situation. Pakistan immediately rebutted India's claim that Jadhav's trial was a farce and that Jadhav could be executed at any time. Pakistan declared that Jadhav's trial was complex, deliberate, and methodical.⁴⁴ The trial had four stages and took place

³⁶ India's Application, *supra* note 11, at 6.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 6. Pakistan disputed India's claim that they knew immediately that Jadhav was an Indian national by pointing at Jadhav's passport that displayed a Muslim name. However, Pakistan never addresses how they arrived at the decision to ask India for assistance in the investigation.

⁴⁰ *Id.* at 8.

⁴¹ *Id.* at 6.

⁴² *Id.* at 4.

⁴³ *Id.* at 4, 24.

⁴⁴ Pakistan's Opening Arguments, *supra* note 8, at 12.

from September 21, 2016 to February 12, 2017.⁴⁵ The clemency process was clearly stated and was followed correctly.⁴⁶ Pakistan also disputed India's description of Pakistan's request for India's cooperation in an investigation.⁴⁷ Pakistan provided the substantive material of that request.⁴⁸ Pakistan requested access to Jadhav's phone records and bank account details.⁴⁹ According to Pakistan, these requests were all reasonable and unextraordinary.⁵⁰

Pakistan also attacked India's argument that Pakistan immediately knew that Jadhav was an Indian national. Jadhav was arrested with a passport that bore a Muslim name—Hussein Mubarak Patel.⁵¹ India gave no explanation for why Jadhav had two different passports with two different names.⁵² Pakistan argued that since India had never replied to this dual passport problem, India had never established that Jadhav is an Indian national.⁵³ Pakistan also supported the legitimacy of Jadhav's confession. Pakistan argued that the confession was aired before India sought consular access, a timeline that contradicts India's own telling of the facts.⁵⁴

Pakistan's final claim was that Jadhav did not have a right to consular access because of the terms of the Bilateral Agreement.⁵⁵ Pakistan pointed out that India avoided referencing the Bilateral Agreement in their application because the Bilateral Agreement stated that the question of access to Jadhav, as with all national security arrests, would be decided on the merits.⁵⁶ Pakistan believed that the Bilateral Agreement preempts any duty under the VCCR.⁵⁷

India disputed this understanding of the Bilateral Agreement. India, in their opening argument, responded to the invocation of the

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 13.

⁴⁸ *Id.* Pakistan contends that India is misleading the ICJ by not providing all the substance of Pakistan's request for assistance in their investigation in Jadhav's activities and background. In a move for transparency, Pakistan included the entirety of their request for India's assistance. *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ India's Application, *supra* note 11, Annex 6.

⁵² Pakistan's Opening Arguments, *supra* note 8, at 13.

⁵³ *Id.*

⁵⁴ *Id.* at 14. The ICJ decided that the confession video would be too unreliable to play before the Court. This decision implies that the Court doubts the veracity of the confession. *Id.*

⁵⁵ *Id.* at 23.

⁵⁶ *Id.* at 13.

⁵⁷ *Id.* at 19.

Bilateral Agreement by creating two counterarguments. First, India argues that the Bilateral Agreement could only supplement the VCCR, not modify or preempt it. Second, India claims that, since the Bilateral Agreement was not registered by either party before the initiation of proceedings, Article 102(2) of the United Nations Charter should sanction the parties from invoking the Agreement before any organ of the United Nations, including the ICJ.⁵⁸ This paper will examine that second argument.

Before discussing the treaty registration concern in *Jadhav* and the treaty registration process, this paper will give a brief background into what constitutes an international agreement, how these agreements are formulated, and what rules govern this process. The Vienna Convention of the Law of Treaties (VCLT) is the governing tool for treaty formation. The VCLT describes what can and cannot be a treaty. The discussion about treaty formation and treaty registration generally will set the stage for the analysis of treaty registration in *Jadhav*.

Article 2 of the VCLT defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”⁵⁹ This definition, however, is not an exhaustive explanation of what exactly constitutes a treaty. Treaties come in many different forms, some obvious and some subtle, and the question of whether an international agreement is a treaty often arises in international law.

The VCLT definition is a place to start. The definition can be broken down into component parts. First, an “international agreement” is the creation of a legal obligation or the undertaking of a legal relationship.⁶⁰ The creator must have the intent to create a legal obligation.⁶¹ The VCLT, however, does not reference what embodies a treaty. A treaty “intends to create rights and obligations” upon the parties.⁶²

While the VCLT definition requires that a treaty be written, it does not mandate that the treaty be written in a particular form or

⁵⁸ India’s Opening Arguments, *supra* note 12, at 17.

⁵⁹ Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 332, 333.

⁶⁰ M. FITZMAURICE & OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 7 (2005).

⁶¹ *Id.*

⁶² G. Fitzmaurice, *First Report on the Law of Treaties*, YILC (1950), Vol. II, U.N. Doc. A/CN.4/101, 107.

manner.⁶³ This ambiguity creates problems when certain written instruments, lacking the same concrete basis as a formal, published agreement, are invoked as a treaty. For example, simplified forms of a treaty can include exchanges of notes or letters, agreed minutes, memoranda of agreement, joint declarations, and any other documents drafted by a similar method.⁶⁴ The broad category of treaty instruments has left room for questions about what kinds of documents are treaties.

Treaties must be conducted between states to apply under the VCLT.⁶⁵ The VCLT definition does not extend to international organizations.⁶⁶ Also, treaties cannot be formed between states and non-state entities, such as corporations and individuals. Such agreements are generally not considered to be “international agreements” and are thus outside of the scope of the VCLT.⁶⁷

The final component of the VCLT definition is that treaties must be governed by international law.⁶⁸ The purpose of this condition is to exclude all agreements from the category of treaties that are governed by some other system of law. This requirement also implies that since the agreement is governed by international law, the agreement is binding under international law.⁶⁹ For an agreement to be a treaty, the treaty designation shows an intent by the parties to be bound by international law.⁷⁰

After concluding a treaty, the parties may decide to register the treaty with the Secretariat of the United Nations. Registration is not a requirement to conclude a treaty; however, it is a way for the United Nations to monitor, compile, and publish international agreements.⁷¹ Registration, however, is not evidence that the agreement is a treaty.⁷²

⁶³ FITZMAURICE & ELIAS, *supra* note 60, at 10. The Vienna Convention on the Law of Treaties went into force in 1969, a substantial period after the Permanent Court of International Justice, the Covenant of the League of Nations international dispute resolution body, decided in *Eastern Greenland*, *infra* note 95, that a verbal declaration can be a binding treaty. Under the Vienna Convention on the Law of Treaties, this verbal declaration would not have been binding. *Id.*

⁶⁴ *Id.* at 11.

⁶⁵ Vienna Convention on the Law of Treaties, *supra* note 59.

⁶⁶ FITZMAURICE & ELIAS, *supra* note 60, at 16-17.

⁶⁷ *Id.* at 17.

⁶⁸ Vienna Convention on the Law of Treaties, *supra* note 59.

⁶⁹ Anthony Aust, *Modern Treaty Law and Practice* 17 (3rd. ed. 2013).

⁷⁰ *Id.* at 18.

⁷¹ *Id.* at 297.

⁷² FITZMAURICE & ELIAS, *supra* note 60, at 22. The ICJ rejected the use of registration as evidence in *Bahrain*, *infra* note 105, when Bahrain argued that the timing of Qatar's registration was evidence that Qatar did not intend to be bound by the minutes. *Id.*

After a treaty has been registered, the United Nations will publish the treaty in the United Nations Treaty Series (UNTS).⁷³

The registration requirement has changed throughout the development of international law. The desire for international agreements to be registered came into being when secret treaties were discovered after the end of World War I.⁷⁴ President Woodrow Wilson spearheaded the charge for transparency in treaties and created Article 18 of the Covenant of the League of Nations.⁷⁵ Article 18 required every new treaty by a member of the League to be registered by the Secretary.⁷⁶ The Secretary would then publish the treaty as soon as possible.⁷⁷ Without registration, according to the Article, the treaties would not be binding.⁷⁸

The United Nations has a slightly different registration requirement. During the creation of the United Nations, the member states did not want to be subject to such a stringent registration requirement.⁷⁹ Member states argued that the binding nature of a treaty should not be subject to registration.⁸⁰ The response to their desire is Article 102 of the United Nations Charter.⁸¹ Article 102(1) states:

Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.⁸²

The obligation to register treaties under Article 102(1) falls on the member states and applies to all treaties.⁸³ The Secretary-General is in charge of the compilation and publication of the registered treaties, and the UN General Assembly, along with the Secretary-General, has

⁷³ *Id.* at 23.

⁷⁴ AUST, *supra* note 69, at 297.

⁷⁵ *Id.*

⁷⁶ League of Nations Covenant art. 18.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See HANS Kelsen, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 699 (9th ed. 2000) Kelsen argued that the United Nations members realized how impractical a strict, treaty-invalidating registration sanction can be. Because of this realization, the United Nations Charter drafters weakened the sanction to not completely invalidate an international agreement but rather limit its applicability. *Id.*

⁸⁰ See *Id.*

⁸¹ *Id.* at 722-723.

⁸² *Id.*

⁸³ AUST, *supra* note 69.

issued additional regulations to clarify the registration obligation.⁸⁴ Several of those regulations prohibit registration until the treaty is in force and provide that registration may be done by any party to the treaty, which relieve others of the obligation.⁸⁵ The other regulations concern what kinds of treaties can be registered, how changes to treaties should be registered, and what the date of registrations should be for the treaty.⁸⁶

Article 102(2) of the United Nations Charter is the sanction for nonregistration of a treaty. The Article declares that an unregistered treaty cannot be invoked before any organ of the United Nations.⁸⁷ The organs of the United Nations include the International Court of Justice; therefore, an unregistered treaty cannot be invoked before the ICJ.⁸⁸ Invocation means citing or appealing to something as an authority for an action or as support for an argument.⁸⁹ There have been several instances where unregistered treaties have been invoked before the ICJ. This paper will analyze how the ICJ has tackled the issue of nonregistration and what precedent will control or influence *Jadhav*.

II. ANALYSIS

This Part of the paper will analyze what materials, precedent, and arguments the International Court of Justice will consider while preparing a decision on treaty registration in *Jadhav*. Section A of this Part will closely examine the text of the Bilateral Agreement to determine the exact obligations for both Pakistan and India under the treaty. Part B will discuss the controlling precedent for the ICJ's decision. Part C will postulate potential outcomes of the registration issue in *Jadhav* and will ponder the implications for future decisions.

⁸⁴ KELSEN, *supra* note 79, at 721.

⁸⁵ AUST, *supra* note 69. A sizable portion of registration regulations are simply for easing the process of registration and to incentivize states to register their agreements with the UNTS. *Id.*

⁸⁶ *Id.*

⁸⁷ KELSEN, *supra* note 79, at 721.

⁸⁸ ROBERT KOLB, *THE INTERNATIONAL COURT OF JUSTICE* 543 (2014).

⁸⁹ *Invoke*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2016).

A. TEXTUAL ANALYSIS OF THE BILATERAL AGREEMENT ON
CONSULAR ACCESS

As previously noted, the controlling document in *Jadhav* is the disputed Bilateral Agreement. Both parties have different arguments for why the treaty should or should not apply. India argues that the Bilateral Agreement, while supplementing preexisting obligations under the VCCR, does not change those obligations or Pakistan's duty to provide Jadhav consular access to India.⁹⁰ Pakistan, however, argues that the VCCR does not mandate immediate consular access and allows for states to modify, supplement, and interpret the duties imposed under the treaty with respect to internal law and international agreements.⁹¹ Pakistan also claims that the registration requirement is just a technicality and that the ICJ should use its discretion to consider the Bilateral Agreement as part of the *Jadhav* proceedings.⁹² A brief textual analysis of the document will help capture the nuances of the dispute between the two parties and will be followed by a discussion of the relationship between the Bilateral Agreement and the VCCR.

The Bilateral Agreement is a brief document introducing the goal and purpose of the treaty followed by a seven-part list of the provisions of the agreement. The document ends with the formalities of its conclusion. The language of document includes words such as "agree," "shall," and "undertakes."⁹³ This language supports the understanding that the treaty is creating binding obligations on the parties. The goal Section of the document explains why India and Pakistan came to this conclusion and creates the framework for how the provisions should take effect. India and Pakistan are "desirous of furthering the objective of human treatment of nationals of either country arrested, detained, or imprisoned."⁹⁴

The treaty's seven provisions are purportedly in furtherance of the human treatment of the imprisoned national. The first two provisions mandate that each country keep a list of detained, arrested, or imprisoned nationals, exchange the lists twice annually, and immediately notify the

⁹⁰ India's Application, *supra* note 11, ¶ 48. India argues that the VCCR sets a baseline for providing consular access and the supplementing provisions cannot substantively change these duties, only elaborate or clarify them. *Id.*

⁹¹ Pakistan's Opening Arguments, *supra* note 8, at 19.

⁹² *Id.*

⁹³ Bilateral Agreement, *supra* note 20.

⁹⁴ *Id.*

High Commission of the other country whenever an arrest, detention, or imprisonment of an opposing national is made.⁹⁵ The third provision requires the arresting, detaining, or imprisoning state to inform the other party of any sentences placed upon the national.⁹⁶ The fourth provision requires that each state “shall provide consular access within three months” to the national at issue.⁹⁷ The fifth provision is a statement that the parties agree to return the national within a month of confirming their status as a national and the completion of their detainment, imprisonment, or sentence.⁹⁸ The sixth provision allows each party to “examine the case on its merits” for any “arrest, detention, or sentence made on political or security grounds.”⁹⁹ Lastly, the seventh provisions allows for the detaining, arresting, or imprisoning state to exercise their discretion to allow the early release of a national according to compassionate and humanitarian considerations.¹⁰⁰ These provisions are to be understood with the stated goal of the treaty in mind.

The two main provisions at issue in *Jadhav* are the fourth and sixth provisions.¹⁰¹ According to the fourth provision, the parties have voluntarily created a duty to provide consular access in accordance with the similar provision of the VCCR, Article 36. The Bilateral Agreement specifies that consular access must be granted within three months while Article 36 of the VCCR requires consular access to be granted “without delay.”¹⁰² The aim of the fourth provision was to provide a concrete timeline for the granting of consular access, ensuring this process would be concluded by a specific date.

The sixth provision of the Agreement introduces an exception to the fourth provision. The sixth provision grants the use of discretion when an opposing national is arrested on political or security grounds. Each party may examine these cases “on its merits.”¹⁰³ Since this

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See Pakistan’s Opening Arguments, *supra* note 8, at 13.

¹⁰² Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261, 292 [hereinafter VCCR]. Article 36 imposes a duty upon parties to provide consular access to detained foreign nations “without delay.” A lack of a concrete timeline, however, creates many practical problems, leading to many different states to negotiate their own agreements with more defined procedures. *Id.*

¹⁰³ Bilateral Agreement, *supra* note 20.

provision is placed in a treaty regarding consular access, Pakistan argues that the parties can deny consular access in cases of political or security importance. The issue is whether this provision is compatible with the VCCR's wide-reaching requirement that consular access be granted. Pakistan and India take differing viewpoints,¹⁰⁴ but this dispute is contingent on the undecided issue of whether the treaty can be invoked before the ICJ.

B. TREATY REGISTRATION PRECEDENT IN THE PERMANENT COURT
OF INTERNATIONAL JUSTICE AND THE INTERNATIONAL COURT
OF JUSTICE

This Section will discuss prior ICJ cases where treaty registration was at issue and compare the similarities and differences of these precedents with *Jadhav*. Treaty registration and informal treaties have been problematic before the Permanent Court of International Justice (PCIJ), the court of the League of Nations, and the ICJ. Sanctions in the Covenant of the League of Nations and the United Nations Charter abolish or restrict the invocation of the treaty in question if the treaty was not or had not been registered with these past and present governing bodies.¹⁰⁵ Both courts have found innovative ways of maintaining jurisdiction of the dispute without entirely subverting the purposes of these sanctions. *Jadhav* will most likely be decided using some mix of precedent from earlier international court cases resolving issues over nontypical treaties.

The first dispute over treaty form and registration arose before the PCIJ in Eastern Greenland. This case revolved around the Ihlen Declaration of 1919—a verbal affirmation made by the Foreign Minister of Norway, Nils Claus Ihlen, about Danish sovereignty over Greenland. This agreement resulted from a meeting between Norway and Denmark, where Denmark declared that the country would not object to any claim Norway might make on Spitzbergen if Norway would recognize the Danish claim to all of Greenland.¹⁰⁶ At the time, Norway occupied considerable territory on the eastern coast of Greenland.¹⁰⁷ In response to

¹⁰⁴ See India's Opening Arguments, *supra* note 12, at 34; Pakistan's Opening Arguments, *supra* note 8, at 19.

¹⁰⁵ See League of Nations Covenant art. 18; U.N. Charter art. 102, ¶ 2.

¹⁰⁶ Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, ¶ 191 (Apr. 5).

¹⁰⁷ *Id.* at ¶ 15.

this proposition, Ihlen declared that the Danish claim “would be met with no difficulties on the part of Norway.”¹⁰⁸ The issue arose when Norway refused to leave Greenland, and parties stipulated to bring the dispute to the PCIJ.

Several issues needed to be resolved in the case. The first question is the one relevant to *Jadhav*: are verbal affirmations made by one government to another legally binding? The verbal affirmation could not have been registered in any form and bears some similarities to the unregistered Bilateral Agreement in *Jadhav*. The PCIJ held that the Ihlen Declaration was binding on Norway and constituted a treaty under international law.¹⁰⁹ The Ihlen Declaration was made by a representative of one state to another, promising not to interfere with Denmark’s plans to establish and confirm sovereignty over Greenland.¹¹⁰ The PCIJ determined that the Declaration was binding in the same manner as a treaty, but the court curiously did not extend their analysis to any formal requirements such as registration. By ignoring the stringent sanction from Article 18 of the Covenant of the League of Nations, the PCIJ maintained jurisdiction over the issue and laid the foundation for a precedent that international courts can ignore the registration requirement when unreferenced.

Eastern Greenland was litigated in the PCIJ. The ICJ, the successor court to the PCIJ, has seen more examples of unregistered and atypical treaties at the heart of disputes over the years. Many of these treaties have been unregistered, and the ICJ has found ways to maintain jurisdiction, resolve disputes, or ignore the registration requirement entirely. Each of these cases include similarities and differences to *Jadhav* and provide further direction toward how the registration issue in *Jadhav* will and should be decided.

The first ICJ case involving an unregistered agreement is *Corfu Channel* of 1949. In that case, the United Kingdom and Albania had concluded a Special Agreement giving the ICJ jurisdiction to resolve two disputes between the states: (1) whether Albania was responsible for damage sustained by the United Kingdom by sailing through a minefield in Albanian waters, and (2) whether Albania’s sovereignty was violated

¹⁰⁸ *Id.* at ¶ 15.

¹⁰⁹ *Id.* at ¶ 191 The decision is blatantly at odds with the Covenant of the League of Nations. A verbal affirmation cannot physically be registered. However, the nascent PCIJ most likely wanted to cement its credibility as the arbiter of international disputes, so the Court could not allow this matter to be settled on registration grounds. *Id.*

¹¹⁰ *Id.*

by the United Kingdom by doing so.¹¹¹ The Special Agreement granting the ICJ jurisdiction was not registered with the United Nations and thus was subject to the Article 102 sanction.¹¹² The ICJ, along with both Albania and the United Kingdom, did not make any reference to this requirement during the proceedings. The ICJ, therefore, ignored the lack of registration and accepted jurisdiction pursuant to the Special Agreement.¹¹³ This decision echoed the PCIJ's decision in *Eastern Greenland* to ignore registration requirements when not explicitly invoked by either party.

The ICJ next considered *Aegean Sea Continental Shelf*, a dispute between Greece and Turkey over the delineation of the continental shelf in the Aegean Sea between the two states.¹¹⁴ Before resolving the substantive dispute, the ICJ had to deal with a jurisdictional question. Turkey did not partake in the jurisdictional arguments, but Greece argued that the ICJ had jurisdiction over the matter for two reasons: (1) that the General Act for the Pacific Settlement of International Disputes, when read with Articles 36 and 37 of the Statute of the International Court of Justice, gives Greece the right to pursue judicial settlement in front of the ICJ, and (2) that a press communique, issued jointly by Turkey and Greece, constituted a binding international agreement giving the ICJ the right to resolve the dispute between the two parties.¹¹⁵ The ICJ rejected both arguments. The specific joint press communique and the context surrounding the negotiations clearly demonstrated that Turkey did not change their stance on dispute resolution and did not show an immediate commitment to the ICJ's jurisdiction over the matter. The Court, however, left room for joint press communiqués that did signify these characteristics but failed to mention how registration would factor into such informal agreements.¹¹⁶

Maritime Delineation and Territorial Disputes between Qatar and Bahrain considered an informal international agreement, similar to some of the preceding cases, but registration played more of a role. The Qatar and Bahrain dispute, existing in some form since the mid-1900s,

¹¹¹ Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 6 (April 9).

¹¹² KOLB, *supra* note 88, at 543.

¹¹³ Corfu Channel, *supra* note 111, 149 I.C.J. Rep 4, 6-7.

¹¹⁴ Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. Rep. 3, ¶16 (Dec. 19).

¹¹⁵ *Id.* at ¶¶ 34, 39, 94.

¹¹⁶ KOLB, *supra* note 88, at 543. The ICJ implies that many informal documents can constitute treaties but did not consider that most of the informal documents will not have the formality to require registration. *Id.*

focused upon a territorial dispute over several islands off the coast of Qatar and a town on the Qatari mainland. Both parties wanted to reach an acceptable agreement on this dispute, so they, along with Saudi Arabia in a mediating role, negotiated provisions aimed to that end.¹¹⁷ The negotiations led to two documents relied upon by Qatar in the case. First, the parties exchanged letters in 1987 which granted the ICJ jurisdiction over the matter. Both parties agreed that the exchange constituted a valid international agreement.¹¹⁸ Second, the parties recorded minutes of the meeting of the Tripartite Committee, the negotiating body created in accordance with the provisions agreed upon by Bahrain, Qatar, and Saudi Arabia.¹¹⁹ The minutes gave the parties a set timeframe when the dispute could be submitted to the ICJ for a judgement.¹²⁰

This second document was the agreement at issue in the case. Qatar relied upon the minutes as support for their submission of the dispute to the ICJ. Bahrain contested that reliance by arguing that the minutes were never intended to constitute a binding international agreement but rather just to record a political understanding.¹²¹ Bahrain claimed, furthermore, that Qatar's delay of several months before registering the minutes with the UN Secretary supported Bahrain's assertion.¹²² Bahrain argued that Qatar did not consider the minutes a legally binding international agreement because Qatar would have immediately registered the minutes if the intent was to create a binding agreement.¹²³ The ICJ then had to definitely rule on the registration requirement, but the Court found another creative solution. The Court declared agreements had to be registered in accordance with Article 102, but that late registration did not impact the nature of the agreement in question.¹²⁴ The ICJ implied that if one of the parties unilaterally registered the treaty at any point after the conclusion of the treaty, then that registration would fulfill the Article 102 requirement.

¹¹⁷ Maritime Delimitation and Territorial Disputes between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 1994 I.C.J. Rep. 112, ¶¶ 18-19 (July 1, 1994) [hereinafter Bahrain].

¹¹⁸ *Id.* at ¶ 22.

¹¹⁹ *Id.* at ¶ 19.

¹²⁰ *Id.* at ¶ 26.

¹²¹ *Id.*

¹²² *Id.* at ¶ 28.

¹²³ KOLB, *supra* note 88, at 544. Bahrain is specifically using the time of registration as evidence of Qatar's intent. Bahrain argues that the belated registration is indicative of Qatar not intending the minutes to be binding. *Id.*

¹²⁴ *Id.*

The registration issue at the heart of *Jadhav* will be decided by using PCIJ and ICJ precedent. *Jadhav* and the Bilateral Agreement have some similarities with precedent that can help guide the ICJ towards finding a proper solution. The first and most pressing similarity to many of the preceding cases is the lack of any formal registration with the United Nations. The Bilateral Agreement, finalized in 2008, was not submitted by either party to the United Nations until after the initiation of proceedings in *Jadhav*.¹²⁵ Both of the parties agree that the Bilateral Agreement is a binding treaty, but the parties disagree as to the interpretation of the treaty and as to whether the treaty can be invoked before the ICJ.¹²⁶

An additional similarity to precedent is uncertainty regarding the ICJ's jurisdiction over the matter. In some of the precedent, the agreement in question claimed to grant jurisdiction over the dispute to the ICJ.¹²⁷ Unsurprisingly, the ICJ would normally prefer to maintain complete jurisdiction. Maintaining jurisdiction allows the ICJ to fulfill its purpose as the nonpartial, judiciary body of the United Nations. The registration requirement, along with its sanction, presents a question as to whether, and to what extent, the ICJ will retain jurisdiction over a dispute. Since a possible Article 102 sanction in *Jadhav* will directly remove the Bilateral Agreement from consideration before the Court, the ICJ will have to ultimately decide whether the registration requirement will be a determinant factor over the Court's jurisdiction. As precedent shows, the ICJ is very hesitant to do so.¹²⁸

The Bilateral Agreement has several striking differences from precedent, and the ICJ will have to tackle the unique questions that *Jadhav* presents. First, the Bilateral Agreement is a standard-form treaty. The document was intended to impose obligations on the parties and has all the requisite aspects of a binding document.¹²⁹ The ICJ will not have to determine whether the Bilateral Agreement constitutes a valid

¹²⁵ India's Opening Arguments, *supra* note 12.

¹²⁶ India's Application, *supra* note 11.

¹²⁷ Corfu Channel, *supra* note 111, 1949 I.C.J. Rep 4, 25; Bahrain, *supra* note 117, 1994 I.C.J. Rep. 112. Both documents are agreements that submit the dispute to the jurisdiction of the ICJ, not documents at issue in the dispute itself. *Id.*

¹²⁸ See Corfu Channel, *supra* note 111, 1949 I.C.J. Rep 4; Bahrain, *supra* note 117, 1994 I.C.J. Rep. 112.

¹²⁹ See Bilateral Agreement, *supra* note 20. (The Agreement is a written instrument that commits the parties to a set of responsibilities regarding consular access. Neither party argues that the Agreement is not a treaty but rather that the Article 102(2) sanction prohibits the Agreement from being considered by the ICJ).

agreement. However, the parties disagree as to whether the Bilateral Agreement replaces or only augments the conditions of the VCCR. The ICJ will have to answer whether parties, in their own bilateral negotiations, can change the provisions of the VCCR between them. The Article 102(2) sanction is critical because the sanction would prohibit the ICJ from deciding this question.

A further difference is India's express invocation of the Article 102 requirement.¹³⁰ In most of the precedent, neither party makes any reference or invocation of the treaty registration requirement. The PCIJ and ICJ used such lack of attention to the Article 102 requirement as an excuse not to enforce the provision. The only case where the ICJ considered the registration component of an agreement was *Bahrain*. The document at issue in that case had been registered at a significantly later time than the conclusion of the agreement.¹³¹ Bahrain pointed to the time of registration as evidence that Qatar did not intend for the document to be binding.¹³² That situation differs from *Jadhav* because the Bilateral Agreement had not been registered by the initiation of the proceedings and the parties have not been using the Bilateral Agreement as evidence of intent, but rather as a determinant factor in deciding the extent of the ICJ's jurisdiction.

The final major difference with precedent is that the Bilateral Agreement was registered after the initiation of proceedings. In each of the previous cases, the document in question was either never registered or registered late. The ICJ managed to escape the Article 102 sanction by either ignoring it entirely or allowing late registration to suffice. *Jadhav*, however, brought an unregistered agreement to the ICJ. Then, India invoked the Article 102 sanction, arguing that the ICJ could not consider the Bilateral Agreement since it was unregistered.¹³³ However, Pakistan unilaterally registered the treaty with the United Nations after the initiation of the proceedings.¹³⁴ Now, the ICJ has to consider whether registration after the initiation of the proceedings is sufficient to fulfill the Article 102 requirement or whether the lack of registration at the

¹³⁰ India's Opening Arguments, *supra* note 12, at 17, 34. *Jadhav* is the first ICJ case where a party has directly claimed, in argument, that the Article 102(2) sanction applies. See Ashrutha Rai, The *Jadhav* Case and the Legal Effect of Non-Registration of Treaties, EJIL TALK! (June 19, 2017), <https://www.ejiltalk.org/the-jadhav-case-and-the-legal-effect-of-non-registration-of-treaties/>.

¹³¹ *Bahrain*, *supra* note 117, ¶ 29, 1994 I.C.J. Rep. 112.

¹³² *Id.*

¹³³ India's Opening Arguments, *supra* note 12.

¹³⁴ See Bilateral Agreement, *supra* note 20.

initiation of proceedings bars the Bilateral Agreement from being invoked. These similarities and differences with precedent will guide the ICJ towards a solution for the Article 102 issue in *Jadhav*.

C. POTENTIAL RULING ON THE TREATY REGISTRATION ISSUE IN
JADHAV AND THE CONSEQUENCES OF THESE OUTCOMES

The ICJ will have several different potential rulings and outcomes for the registration issue. The uniqueness of India's invocation of the Article 102 requirement in their initial argument means that the ICJ will have to directly address that claim in their decision. Due to this situation, the ICJ must carefully consider all options and choose the one that matches the facts and political situation between the two parties. The ICJ's decision will significantly influence a very turbulent relationship between the states and create a new line of precedent for how Article 102 registration issues should be decided.

The ICJ has several options at its disposal to use when deciding *Jadhav*. As the discussion of precedent shows, previous courts have taken different routes to creatively diffuse an Article 102 claim. The first option is to ignore the Article 102 claim altogether. In several preceding cases such as *Eastern Greenland*, *Corfu Channel* and *Aegean Continental Shelf*, the ICJ did not consider the registration issue.¹³⁵ As long as the parties themselves did not quibble over registration, the PCIJ and ICJ did not allow registration to remove the treaties from their respective jurisdictions. The Court would much prefer to keep disputes under its jurisdiction due to the ICJ's unique nature as the dispute resolution mechanism for the United Nations.

The ICJ has a second option. The Court could take the unprecedented step of following the sanction in Article 102. The Bilateral Agreement was not registered before the initiation of the *Jadhav* proceedings before the ICJ, so the Court can and, according to the UN Charter, should disallow the Bilateral Agreement from being invoked before the ICJ.¹³⁶ The validity of the treaty is at the center of *Jadhav*. Without the Bilateral Agreement in effect, Jadhav's right of consular access reverts to the standard set in the VCCR without any

¹³⁵ See Legal Status of Eastern Greenland, *supra* note 106, 1933 P.C.I.J. (ser. A/B) No. 53; Corfu Channel, *supra* note 111, 1949 I.C.J. Rep 4; Aegean Sea Continental Shelf, *supra* note 114, 1978 I.C.J. Rep. 3.

¹³⁶ U.N. Charter art. 102 ¶ 2.

augmentation.¹³⁷ The Bilateral Agreement is, as Pakistan claims, the binding document that allows for Pakistan to refuse to grant Jadhav consular access.¹³⁸ In this scenario, however, the ICJ would have to remove the conflict from its jurisdiction, a decision that could have substantial consequences.

The ICJ was designed to resolve disputes like the current one. If the ICJ has to limit its jurisdiction over the dispute, there may not be other sufficient dispute resolution mechanisms in international law with the combination of jurisdiction, gravitas, and influence to create a binding decision. Both states could have reached a solution if one were possible through direct, bilateral negotiation, but the political situation between the two parties would interfere and make any negotiation extremely difficult, if not next to impossible.

The third and final option would be to accept Pakistan's belated registration of the treaty as valid and allow the Bilateral Agreement to fulfill the registration requirement. This approach would be like the ICJ's approach in the *Bahrain* case. The ICJ would allow the matter to be resolved without violating the Article 102 sanction. However, since Pakistan registered the Bilateral Agreement with the United Nations after the initiation of the proceedings, the ICJ would create a precedent that substantively removes any bite from the Article 102 sanction.¹³⁹ If a party can unilaterally register any agreement before, during, or after a dispute, the Article 102 requirement will fail to hold any punitive power and will just become a technicality. Pakistan has itself embraced this mentality, referring to the Article 102 requirement as a "what can best be described as a technicality" in its initial argument.¹⁴⁰

After considering the assorted options, the ICJ will most likely accept Pakistan's belated registration of the treaty as valid and issue a judgement on the case in its entirety. The ICJ will choose this option because this allows the ICJ to maintain jurisdiction over the Bilateral Agreement while complying with the Article 102 restriction. The ICJ, as

¹³⁷ VCCR, *supra* note 102. The VCCR is binding on all the parties, but the Bilateral Agreement is claimed to be a voluntary augmentation of the provision of the VCCR. Without the Bilateral Agreement, the VCCR is left unchanged and returns as the primary imposer of consular duties upon the parties. *Id.*

¹³⁸ Pakistan's Opening Arguments, *supra* note 8.

¹³⁹ See Bilateral Agreement, *supra* note 20. Note that the Bilateral Agreement can be found in several different places, but the United Nations Treaty Series official document has Pakistan listed as the registering party. The date of registration is May 17, 2017, after the submission of India's application in *Jadhav*. *Id.*

¹⁴⁰ Pakistan's Opening Arguments, *supra* note 8, at 11.

the foremost dispute resolution body in international law, would prefer to keep jurisdiction because it is the proper arena for these sorts of conflicts. If the registration requirement were to keep the Bilateral Agreement from being invoked before the ICJ, the Court would lose a sizable portion of its jurisdiction over the matter due to the Bilateral Agreement's vital role in the dispute.

The *Jadhav* conflict will most likely not be resolved through other methods, and Jadhav may be executed without a proper judgement. The ICJ could issue a final decision that both India and Pakistan must abide by; the nonpartial nature of the ICJ makes the Court the proper venue. Ignoring the registration requirement is not a strong possibility for the ICJ. India directly raised the argument that the Agreement cannot be invoked before the ICJ due to Article 102.¹⁴¹ The ICJ cannot just ignore this argument because it wants to. The *Jadhav* situation is different than prior cases where the ICJ ignored registration.

However, the ICJ should rule that the Agreement cannot be invoked before the Court. The Article 102 sanction should apply in this case. If the ICJ were to allow any registration, even after the initiation of proceedings, the Court would be effectively removing the sanction in its entirety from the UN Charter. There would be no incentive to register the treaty with the UN in the first place. The drafters of the UN Charter and of the Article most likely did not intend to create a sanction that would have no penalty.¹⁴² Registration is supposed to signify a final nature to international agreements.¹⁴³ The treaty will be published and made known to all other international actors.¹⁴⁴ The UN Charter aims to encourage this sort of behavior.¹⁴⁵

Without this sanction, an aggrieved party can claim many different documents to be a binding international agreement after the initiation of proceedings.¹⁴⁶ As PCIJ and ICJ precedent has shown, the

¹⁴¹ India's Opening Arguments, *supra* note 12.

¹⁴² AUST, *supra* note 69, at 297-98. (discussing how the purpose behind both the PCIJ's Article 18 sanction and the UN Charter's Article 102(2) sanction can be traced back to a disdain for the secret treaties that were a hallmark of the World War I era).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See Legal Status of Eastern Greenland, *supra* note 106, 1933 P.C.I.J. (ser. A/B) No. 53; Corfu Channel, *supra* note 111, 1949 I.C.J. Rep 4; Aegean Sea Continental Shelf, *supra* note 114, 1978 I.C.J. Rep. 3; Bahrain, *supra* note 117, 1994 I.C.J. Rep. 112.

ICJ must consider many different forms of treaties.¹⁴⁷ Letters, minutes, and verbal statements have all been held to be binding forms of treaties.¹⁴⁸ Registration, if the Court decides that Pakistan's belated registration is valid, will no longer be seen as evidence of treaty validity. Regardless of the direction the ICJ goes, *Jadhav* will finally bring the interpretation and implementation of the Article 102 sanction to the forefront of international litigation. Hopefully, a definitive answer will be given as to the requirement to register treaties.

III. CONCLUSION

The Bilateral Agreement on Consular Access is the key to *Jadhav*. Kulbhushan Jadhav, an Indian national, is currently detained and imprisoned in Pakistan, sentenced to death by a military tribunal on charges of espionage and sabotage. Jadhav never received access to India's consulate throughout his legal proceedings and sentencing. Yes, parties to the Vienna Convention on Consular Relations have a duty to provide foreign nationals detained within their borders access to their native consulate. Pakistan believed that this duty was relieved by the Bilateral Agreement that allowed each party to examine national security cases on their merits. India claimed, however, that since the Agreement was unregistered, the parties still had to adhere to the duty imposed by the VCCR.

Article 102 of the United Nations charter imposes an obligation on treaty-forming states to submit the treaty to the Secretariat and to register the treaty with the United Nations. Registered treaties are published openly in the United Nations Treaty Series. The goal of registering treaties is to create and uphold transparency in relationships between states, removing the unwelcome surprises of secret agreements that plagued the pre-United Nations international balance. To add some force to the registration requirement, the drafters of the Charter included a sanction declaring that any unregistered treaty cannot be invoked before any organ of the United Nations. The International Court of Justice is the primary dispute resolution body in international law and is

¹⁴⁷ See Legal Status of Eastern Greenland, *supra* note 106, 1933 P.C.I.J. (ser. A/B) No. 53; Corfu Channel, *supra* note 111, 1949 I.C.J. Rep 4; Aegean Sea Continental Shelf, *supra* note 114, 1978 I.C.J. Rep. 3; Bahrain, *supra* note 117, 1994 I.C.J. Rep. 112.

¹⁴⁸ See Legal Status of Eastern Greenland, *supra* note 106, 1933 P.C.I.J. (ser. A/B) No. 53; Corfu Channel, *supra* note 111, 1949 I.C.J. Rep 4; Aegean Sea Continental Shelf, *supra* note 114, 1978 I.C.J. Rep. 3; Bahrain, *supra* note 117, 1994 I.C.J. Rep. 112.

the Court of the United Nations. Therefore, unregistered treaties should not be invoked before the ICJ.

Prior case law, however, has shown the unregistered treaties have made their way to and have been considered by the ICJ. Rather than allow a dispute to remain unresolved due to a single sanction, the ICJ found creative solutions in previous cases to retain jurisdiction. *Jadhav* presents a unique problem; India is directly arguing that the Bilateral Agreement cannot be invoked due to registration. The ICJ will have to issue some sort of ruling on the registration requirement, and the unsettled nature of the Article 102 sanction will finally be clarified.

The ICJ has several different options to consider. The ICJ can accept India's claim that the sanction applies and refuse to consider the Agreement. The ICJ can also attempt to ignore India's argument about registration, a method used in earlier cases. However, since India directly raised the issue, this route could damage the ICJ's credibility. A final option is to recognize Pakistan's belated, unilateral registration of the treaty after the initiation of the *Jadhav* proceedings as valid. This would allow the ICJ to continue to hold jurisdiction over the dispute while circumventing the sanction. This choice seems to severely impair the viability of the Article 102 sanction. If a party can unilaterally register a treaty at any point, even after the initiation of proceedings, then the sanction will lose any existing bite. The Court will have to consider if the goal of the sanction is less important than maintaining jurisdiction over this complicated, sensitive diplomatic and human rights issue.

The *Jadhav* decision will have a dynamic impact on Indian-Pakistani relations. A man's life hangs from a thread in the balance between two regional rivals. At the heart of this dispute lies an almost forgotten sanction that could push this balance one way or another. How the ICJ chooses to act, including whether to follow their own Charter, will not only decide the fate of Kulbhushan Jadhav but will also validate one of these two parties in their continual struggle for regional control. Treaty registration has never been so visible, and the world will be watching as the ICJ announces their decision.