

JADHAV AND THE ICJ: THE ENFORCEABILITY CONUNDRUM

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INTRODUCTION

On 8 May 2017, India instituted proceedings against Pakistan before the International Court of Justice (ICJ) for its failure to comply with obligations under the Vienna Convention on Consular Relations, 1963 (VCCR).¹ India bases its claim on the conviction of an Indian national, Kulbushan Jadhav, who was sentenced to death by the Field General Court Martial in Pakistan without being granted consular access. The Military Court found that Jadhav had been involved in sabotage and espionage activities in Baluchistan in the capacity of an Indian government agent.² India, on the other hand, contended that Jadhav, having retired from Indian Navy, was kidnapped from Iran, where he was carrying out business activities.³

Upon acquiring knowledge of Jadhav's conviction, India allegedly demanded consular access, which was denied by Pakistan.⁴ India claimed that this constituted a violation of Article 36 of the VCCR and Jadhav's sentence be immediately suspended and the decision of the Military Court annulled.⁵ India also submitted a request for the indication of provisional measures demanding that Pakistan should take all measures to ensure that Jadhav is not executed pending the final decision of the proceedings.⁶ The court unanimously granted the request.⁷ In doing so, the *prima facie* jurisdiction of the Court was traced from Article 1 of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963 (Optional Protocol) which allows for bringing disputes concerning the application and

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¹ 'International Court of Justice Press Release' [2017] <<http://www.icj-cij.org/files/case-related/168/19420.pdf>> accessed 16 October 2017.

² 'Inter Services Public Relations Pakistan Press Release' (10 April 2017) <http://www.ispr.gov.pk/front/t-press_release.asp?id=3906&print=1#pr_link3906> accessed 16 October 2017.

³ *Jadhav Case (India v Pakistan)* 'Request for Indication of Provisional Measures' [2017] <<http://www.icj-cij.org/files/case-related/168/19424.pdf>> accessed 15 October 2017.

⁴ *ibid* [6].

⁵ *ibid* [9].

⁶ *Jadhav Case (India v Pakistan)* 'Provisional Measures' [2017] <<http://www.icj-cij.org/files/case-related/168/168-20170518-ORD-01-00-EN.pdf>> accessed 15 October 2017 [5].

⁷ *ibid* [61].

interpretation of the VCCR before the ICJ. The court did not consider the 2008 Agreement on Consular Access between the two states to expressly limit jurisdiction under Article 36(1) of its Statute.⁸ Further, the ICJ did not consider the ‘national security’ reservation made by Pakistan to its declarations under Article 36(2) to bar the court’s jurisdiction under Article 36(1).⁹ As on date, the judgment on merits has not been rendered in this case. Therefore, it is incumbent to look at previous judgments of the ICJ dealing with similar issues to understand the *Jadhav Case* better.

ICJ ON CONSULAR ASSISTANCE

Article 36(1) (a) of the VCCR provides freedom of communication and access between consular officers and nationals of the officers’ state. Subparagraph (b) obligates the authorities of the arresting state to inform the consular post of the detainee’s statements about the arrest or detention if so requested by the detainee. Importantly, the authorities are obligated to inform the detainee of this right. Subparagraph (c) grants consular officers a right to visit a national of their state who is in prison, custody or detention and to arrange for their legal representation. This article has come for interpretation before the ICJ thrice before the *Jadhav Case*: in the *Case Concerning the Vienna Convention on Consular Relations* between Paraguay and the USA,¹⁰ the *LaGrand Case* between Germany and the USA¹¹, and the *Avena and Other Mexican Nationals Case* between Mexico and the USA.¹²

CASE CONCERNING VIENNA CONVENTION ON CONSULAR RELATIONS (PARAGUAY V. USA)

In 1998, Paraguay instituted proceedings against the USA for violating Article 36(1) (b) by sentencing a Paraguayan national, Angel Breard, to death without informing him of his right to consular access. Paraguay withdrew the proceedings before the case could be decided on merits. However, the court did allow provisional measures in this case stating that the USA ‘*should take all measures at its disposal to ensure that Breard is not executed pending a final decision.*’¹³ Following the order of provisional measures, the case reached the Supreme Court of the US in

⁸ *ibid* [33].

⁹ *ibid* [26].

¹⁰ *Case Concerning the Vienna Convention on Consular Relations (Paraguay v United States of America)* ‘Provisional Measures’ [1998] ICJ Rep 248.

¹¹ *LaGrand Case (Germany v United States of America)* [2001] ICJ Rep 466.

¹² *Case Concerning Avena and other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep 12.

¹³ *Paraguay* (n 10) [41].

Breard v. Greene.¹⁴ The Supreme Court refused to stay the execution invoking the domestic rule of ‘procedural default’ that prevents defendants from raising new issues before federal courts in *habeas corpus* proceedings unless cause and prejudice is shown. Consequently, Breard was executed in violation of the ICJ’s order.

LAGRAND CASE (GERMANY V. USA)

Two German brothers, Karl LaGrand and Walter LaGrand, convicted of murder, robbery and kidnapping, were sentenced to death in the US. In proceedings before the ICJ, the US admitted that it had failed to inform the brothers of their right to inform the consular post of their arrest and detention under Article 36(1)(b). Karl was executed and the date for Walter’s execution was fixed for another day. One day prior to his execution, Germany filed an application for provisional measures before the ICJ. Using identical language as used in *Paraguay v. the USA*, the Court granted the said measures. Following this, Germany filed proceedings before the US Supreme Court to seek enforcement of the ICJ’s order and prevent Walter’s execution. The US Department of Justice in a letter addressed to the Supreme Court took the stance that the orders of provisional measures have no binding effect.¹⁵ Yet again, the court did not consider the order of the ICJ to be binding and dismissed the proceedings and as a result, they executed Walter LaGrand.¹⁶

On merits, the ICJ concluded that there was a violation of Article 36. The court also held that the provisional measures granted under Article 41 of the statute of the ICJ are binding and the US had violated the same.¹⁷ Insofar as the remedies are concerned, this case needs to be distinguished from *Jadhav*. In *LaGrand*, the restitution was impossible since the brothers had already been executed. Therefore, Germany argued for guarantees of non-repetition, which the court deemed to have been met through America’s good faith actions to spread awareness about consular notification.¹⁸

The court did not mandate all future convictions in violation of the obligation conferred by Article 36 to be struck down and allowed the US to choose the means of review, thereby granting it sufficient ‘margin of appreciation’. ‘Margin of appreciation’ refers to the latitude a state enjoys,

¹⁴ *Breard v Greene* 37 ILM 824.

¹⁵ *LaGrand* (n 11) [94].

¹⁶ *ibid* [33].

¹⁷ *LaGrand* (n 11) [128].

¹⁸ *ibid* [118].

in evaluating factual situations while applying international obligations.¹⁹ In granting this margin, the court held that if the German nationals are sentenced to severe penalties without their right under Article 36(1) being respected, the US ‘*by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.*’²⁰ The court took a forward-looking approach to delineate a precedent for conduct in future.

This approach of the court may be distinguished with its attitude towards the rule of procedural default. The court held that the rule *per se* did not violate Article 36; it only held that its particular application in *LaGrand* was incorrect.²¹ Here, the court should have taken a stronger stance to assert that although the rule itself is valid, any application *in the future* where the consequence is a denial of review and reconsideration would be invalid. This would have been the corollary of the court’s forward-looking holding to ensure review and reconsideration in all future cases and the established international law principle that domestic law cannot justify a violation of any international obligation.²²

AVENA AND OTHER MEXICAN NATIONALS (MEXICO V. USA)

This case was concerned with the denial of consular access to 54 Mexican nationals sentenced to death in the USA. The ICJ granted provisional measures staying the imminent execution of three Mexican nationals.²³ The order on preliminary objections in this case differed from the previous two cases only insofar as it used the word ‘shall’ instead of ‘should’ in the operative part.²⁴ The US complied with the provisional measures in this case.

On merits, the court seems to have exactly followed *LaGrand*. It came to a finding that the US had acted against the obligations under Article 36. The fact that the defendants were still alive when the case on merits came to be heard distinguishes this from *LaGrand* and likens it with *Jadhav*.

¹⁹ Yutaka Arai-Takahashi, ‘*The Margin of Appreciation Doctrine and the Principle of Proportionality In The Jurisprudence Of The ECHR*’ [Intersentia 2002] 2.

²⁰ *LaGrand* (n 11) [128].

²¹ *ibid* [125].

²² International Law Commission, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) UN Doc A/56/83 art 32.

²³ *Case Concerning Avena and other Mexican Nationals (Mexico v United States of America)* ‘Provisional Measures’ [2003] ICJ Rep 77 [59].

²⁴ *ibid*.

This influenced how the claim of reparation was constructed and the Indian Application in *Jadhav* has emulated this construction. Mexico demanded *restitution in integrum* and annulment of the convictions.²⁵ The court refused to grant these remedies and reiterated the *LaGrand* dictum: the US Court ought to grant a review and reconsideration giving full weight to the violation of the VCCR with a view to determine whether actual prejudice was caused due to non-compliance.²⁶ Therefore, the ICJ again granted the US the same ‘margin of appreciation’ that it did in *LaGrand*.

CONSEQUENCES OF THE JUDGMENT

Following *Avena*, the US withdrew from the Optional Protocol, which had been the source of the Court's jurisdiction. There were two domestic cases following *Avena*, which evince the problem of enforceability. The first was *Sanchez-Llamas v. Oregon*²⁷ dealing with a Mexican national who had been denied consular access. The Supreme Court, yet again, invoked the ‘procedural default’ rule to prevent reliance on rights under the VCCR. It also observed ICJ’s decision did not bind it. Another case that came before the Supreme Court was *Medellin v. Texas*,²⁸ which involved a person whose claim had directly been presented before the ICJ. The court reiterated that the ICJ decision was not directly enforceable federal law and would not override limitations on the filing of *habeas corpus* petitions. The court stated that the obligations emanating from ICJ decisions only bind the political branches of the state.

Following this judgment, Mexico invoked Article 60 of the ICJ Statute that allows states to request for interpretation of its own judgments in case there is a dispute regarding its meaning and scope. Prior to the judgment on the request of interpretation, the court allowed provisional measures while the final judgment on the interpretation was pending. *Medellin*, who was explicitly named in the Provisional Order, was executed in blatant violation thereof. US argued that there was no dispute between the parties since they concurred that granting a review and reconsideration was an obligation of result, leaving the means open to the US.²⁹ Mexico claimed that there was a dispute since the US had failed to enforce this result in its domestic legal order.³⁰ The court stated that,

²⁵ *Avena* (n 12) [116].

²⁶ *ibid* [121].

²⁷ 548 US 331 (2006).

²⁸ 552 US 491 (2008).

²⁹ *Case Concerning Avena and other Mexican Nationals (Mexico v United States of America)* ‘Merits’ [2009] ICJ Rep 3 [14].

³⁰ *ibid* [24].

regardless of whether there is a dispute or not, Mexico's request did not pertain to an interpretation of the meaning and scope of the *Avena* judgment, but rather the general question of the effects of the judgments of the court on the domestic legal orders of state parties.³¹ On this basis, the request for interpretation was declined.³²

JADHAV: A CONTINUATION OR A DEVIATION

In this part, the author undertakes to highlight certain reasons that could influence the court in *Jadhav* to deviate from its previous judgments, where it only ordered a review, to take a stronger stand and consider the annulment of Jadhav's conviction. *Jadhav*, like the other consular access cases, does not involve complex facts. There are official communications between India and Pakistan where India has demanded consular access but was explicitly denied by Pakistan.³³ Therefore, the decision is very likely to be rendered in India's favour. This paper proceeds on the assumption that this would happen and seeks to look into the aspect as to how the court could then deal with the question of remedies.

Pakistan's domestic law allows the remedy to be tailored the way it was done in *LaGrand* and *Avena* by allowing Pakistan to reconsider and review the conviction of Jadhav. A seventeen-judge bench of the court stated that an order passed by the military court would be subject to judicial review on certain grounds.³⁴ At the same time, it is also possible for the court to deviate from its jurisprudence, annul the conviction, and order a *de novo* trial. The Pakistan Army Act also permits this possibility, which allows for annulment of the proceedings of the Military Court on the ground that they were illegal or unjust.³⁵ Therefore, there is no rule, like the procedural default rule, that could create any legal barriers to the enforcement of ICJ's decision.

The author advocates the latter approach, of the ICJ considering the annulment of Jadhav's conviction, which is more assertive and does not involve the ICJ showing diffidence towards national authorities. In the past, the ICJ has taken a powerful stance, illustratively in the *Legal Construction of Wall in Occupied Palestine Case*. The court, in that case, found the construction

³¹ *ibid* [45].

³² *ibid* [44].

³³ *Jadhav Case* (n 3) [33].

³⁴ *District Bar Association, Rawalpindi v Federation of Pakistan* PLD 2015 SC 401 [73].

³⁵ Pakistan Army Act 1952, s 132.

of the wall to violate international law and ordered immediate cessation, the return of seized immovable property, dismantling of parts of the wall, and repeal of legislative and regulatory acts pertaining to the construction.³⁶ In contrast, prior to the judgment of the ICJ, the Israeli Supreme Court had taken a deferent approach on the same facts and granted the Israeli authorities discretion with regard to planning an alternate route for the wall.³⁷

Nevertheless, there still have to be some cogent reasons for the court to deviate from the remedy prescribed in *LaGrand* and *Avena*. It is pertinent to mention that precedents do not bind the ICJ³⁸ although it seeks to maintain jurisprudential consistency.³⁹ It is also a cardinal principle of international law that reparations must ‘*wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*’⁴⁰ Therefore, by definition, reparations entail a fact-specific inquiry and the context of violation of a legal obligation would have implications on the reparations granted.⁴¹ Therefore, it is incorrect to presume that the remedy in *Jadhav* ought to be a replication of the remedy in *LaGrand* and *Avena*.

There are certain differences between *Jadhav* and the previous judgments of the court. In both *LaGrand* and *Avena*, the court sought to grant the US a ‘margin of appreciation’ in terms of the remedy prescribed. The margin of appreciation is inevitable in international law. However, its application should be limited to treaties, which like legislations tend to prescribe general conduct for acts that have not yet occurred. On the other hand, judicial decisions are retrospective and responsive and hence should prescribe precise conduct. Granting a margin of appreciation in a remedy where none exists in the treaty, tends to obliterate the boundaries of legality and perpetuates normative ambiguity, thereby permitting states to avoid inconvenient international obligations, while still claiming compliance.⁴² Objective and precise orders would make any non-compliance apparent. In situations of manifest non-compliance, pressure from the international

³⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [151]-[153].

³⁷ *Beit Sourik Village v Government of Israel* H CJ 2056/04 [80], [85].

³⁸ Statute of the International Court of Justice 1945 art 38(1)(d)(ICJ Statute).

³⁹ Hersch Lauterpacht, *Development of International Law by the International Court* [OUP 1958] 14.

⁴⁰ *Factory at Chorzów (Germany v Poland)* [1928] PCIJ Rep Series A No 17 [47].

⁴¹ International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries Thereto’ [2001] A/CN.4/SER.A/2001/Add.1 94.

⁴² Yuval Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’ (2005) 16 EJIL 907, 909.

community is easier to elicit and the reputation costs are more tangible.⁴³ Further, a state may engage in undertaking counter-measures more easily in situations where non-compliance is clear and would be reluctant to do so when it is uncertain whether the state is complying with its obligations or not.

In *LaGrand*, Germany did not claim restitution as a form of reparation since the two brothers had already been executed. Therefore, when the court ordered the US to engage in review and reconsideration, it was exceeding a traditional judicial role and prescribing measures to be taken in the future if a situation of denial of the rights to consular access arose. Since the court could not have possibly examined the facts of situations that had not occurred, it ended up granting the US a margin of appreciation to examine future cases. In *Avena*, although Mexico claimed *restitution in integrum*, the sheer number of cases of convictions that the court was dealing with, made it impossible for it to engage in a dedicated factual inquiry for every person sentenced to execution. The court hence had to leave discretion with the US authorities to examine the cases. In contrast, in the *Jadhav Case*, India has claimed restitution in a case involving just one person. This makes it possible for the court to undertake a detailed factual inquiry and not grant Pakistan the margin of appreciation that it had previously granted to the US.

Further, the nature of the rights in question affects the remedy.⁴⁴ The Inter-American Court of Human Rights has read the right to consular access to be a human right and a minimum guarantee, a denial of which would render proceedings arbitrary.⁴⁵ Germany and Mexico raised the argument that the right to consular access is a human right in *LaGrand* and *Avena* but the court deemed the question irrelevant. However, this argument is pertinent since recognition as a human right could imply that a denial of consular access *per se* renders the conviction unlawful and the additional inquiry of actual prejudice would become redundant. This argument can hold more value given its context in the *Jadhav case*. The trial of a citizen is being conducted by a Military Court, a practice that has been considered to be immensely problematic.⁴⁶ Further, the military courts of Pakistan

⁴³ Heather Jones, 'Why Comply? An Analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua' (2012) 12 Chi-Kent J, Int'l L57, 60.

⁴⁴ Draft Articles of ILC (n 41) 96.

⁴⁵ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (Advisory Opinion) OC-16/99 [122], [141].

⁴⁶ Human Rights Committee, 'General Comment No. 32: Right to equality before courts and tribunals and to fair trial' [2007] CCPR/C/GC/32 [22].

are infamous for their clandestine operation and secretive internal functioning.⁴⁷ There is often no access to the proceedings granted to the accused's family members or even the legal counsel.⁴⁸ These facts if brought to the court's notice could have a bearing on the remedy granted by the court.

ENFORCEMENT: THE COURT'S ROLE

The author has already indicated facts that might influence the court in the *Jadhav case* to deviate from its previous judgments and undertake a more proactive role. In this part, the author builds upon the same theme of conceptualizing the ICJ as a stronger institution to undertake a more assertive role in the enforcement of its own decisions. The author has explored the important provisions of the Statute, which might enable a higher level of participation of the ICJ in the enforcement of its own decisions.

The three cases that have come before the ICJ prior to *Jadhav* exemplify the problem of non-compliance, at one stage or another. The US Supreme Court disregarded the provisional measures given by the ICJ in *Paraguay v. USA*⁴⁹. The ICJ accorded a similar treatment to provisional measures in *LaGrand*⁵⁰. Following *Avena*, non-compliance was clear when Medellin was executed in direct violation of the order on provisional measures prior to the judgment on request for interpretation.⁵¹ Under Article 94(2) of the UN Charter, the Security Council may make recommendations or undertake measures to give effect to the judgments of the ICJ, if requested. The politics of the Security Council has rendered reliance on this power redundant. It was invoked for the only time in *Nicaragua Case* where the draft resolution was vetoed by the US.⁵² All the cases referred to in this piece, had the US as the respondent and hence non-compliance may be attributed to its status as a powerful permanent member of the Security Council. However, the

⁴⁷ Maria Kari, 'No Sunset for Pakistan's Secret Military Courts' [2017] <<http://thediplomat.com/2017/04/no-sunset-for-pakistans-secret-military-courts/>> accessed 16 October 2017.

⁴⁸ *ibid.*

⁴⁹ *Case Concerning the Vienna Convention on Consular Relations (Paraguay v United States of America)* 'Provisional Measures' [1998] ICJ Rep 248.

⁵⁰ *LaGrand Case (Germany v United States of America)* [2001] ICJ Rep 466.

⁵¹ *Case Concerning Avena and other Mexican Nationals (Mexico v United States of America)* 'Provisional Measures' [2003] ICJ Rep 77 [59].

⁵² United Nations Security Council Resolution (1990) 2785th meeting UN Doc S/PV2718.

problem of enforceability is more entrenched and pervasive. Illustratively, states like Uganda,⁵³ Nigeria⁵⁴ and Iceland⁵⁵ have refused to comply with the decisions of the court in the past. However, in none of these cases has the Security Council undertaken to enforce the judgments of the ICJ. Thus, in the absence of an external body enforcing the decisions of the court, it becomes incumbent for the court to play a key role in the enforcement of its own decisions. This deviates from the traditional understanding of the role of the judiciary in national legal systems. Although the Court's statute is silent on the provisions of enforcement, nothing disallows the court from partaking in the enforcement of its own decisions.⁵⁶

Reisman proposed amendments to the Statute to allow states to re-apply unilaterally to the Court for a declaration of non-compliance.⁵⁷ This would serve as a reminder to a defaulting state from a body on a higher pedestal, in an otherwise horizontal structure of international law. Reiteration of the binding nature of decisions and acknowledgement of non-compliance have important implications in international law.⁵⁸ Given the cumbersome amendment procedure, the court should read its pre-existing powers more expansively.⁵⁹ Under international law, subsequent practice plays a role in the interpretation of any treaty, like the Statute of the ICJ.⁶⁰ The ICJ may develop its own practice to expand its powers over a period under the Statute. A parallel can be drawn with the veto power of the Security Council, which has been read into Article 27(3) of the Charter despite the text of the Article not providing for it and such a reading not being originally intended by the drafters.⁶¹

One such provision is Article 61(3) of the Statute, where the court requires compliance with its decision before an application for revision of the decision is entertained.⁶² Here, reference may be made to the Andean Court, which has jurisdiction over five South American states. Its statute has

⁵³ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 'Provisional Measures' [2000] ICJ Rep 111.

⁵⁴ *Land and Maritime Boundary (Cameroon/ Nigeria: Equatorial Guinea intervening)* 'Merits' [2002] ICJ Rep 303.

⁵⁵ *Fisheries Jurisdiction (United Kingdom v Iceland)* [1974] ICJ Rep 3.

⁵⁶ Mutlaq Al-Qahtani, *The Role of the International Court of Justice in the Enforcement of Its Judicial Decisions* [2002] 15 *Leiden J Int'l L* 781, 803.

⁵⁷ William Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Yale University Press 1971) 671.

⁵⁸ Nagendra Singh, *The Role and Record of International Court of Justice* (Springer 1989) 124.

⁵⁹ UN Charter art 108.

⁶⁰ Vienna Convention on the Law of Treaties 1980 1155 UNTS 331 art 31(3)(b).

⁶¹ Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2000) 195.

⁶² ICJ Statute art 61(3).

specific powers of dealing with non-compliance and in situations of non-compliance, it may restrict the benefits that the country can obtain from the Cartagena Agreement.⁶³ The ICJ could similarly restrict the party that fails to comply with its decision from invoking benefits of the treaty that the state had violated in the first place.

Another provision under which the court could expand its power is Article 60, which empowers it to interpret its own judgments. The ICJ can utilize its interpretation powers under Article 60 to make declarations of non-compliance. The potential of such usage has been seen in the Special Agreement between Benin and Niger which allowed either party to seize the court pursuant to Article 60, in case of a difficulty in implementation of its decision.⁶⁴

Another recent example comes from the 2012 judgment in the *Territorial and Maritime Dispute* between Nicaragua and Colombia where the court determined the maritime boundary delimiting between the states.⁶⁵ In 2013, Nicaragua filed an application for the alleged violations of sovereign rights and maritime spaces, as demarcated by the 2012 judgment. Colombia raised objections to the jurisdiction of the court, *inter alia*, on the ground that Nicaragua seeks to obtain enforcement of the 2012 decision through the ICJ, by circumventing the Security Council's prerogative. The court rejected Colombia's objection and admitted the application. Interestingly, as an alternate source of jurisdiction, Nicaragua invoked the inherent power of the court to pronounce on the actions required by its own judgments. The court refrained from dealing with this issue since it traced its jurisdiction through a treaty.⁶⁶ This leaves open possibilities for the court to read in this inherent power.

Therefore, the recent jurisprudence of the court does permit the possibility of adopting a more assertive role. Any expansion of the ICJ's power has to be gradual. *Jadhav* - although does not require the court to interpret Article 60 or 61 - serves an opportunity for the court to take a small step towards assuming the role of a strong judicial body. Any substantial change has to come through a culmination of such small steps so that the court can eventually elicit deference, command compliance and secure respect.

⁶³ Treaty Creating the Court of Justice of the Cartagena Agreement 1979 18 ILM 1203 art 27.

⁶⁴ Special Agreement between Benin and Niger 2002 art 7(3).

⁶⁵ *Territorial and Maritime Dispute (Nicaragua v Colombia)* 'Merits' [2012] ICJ Rep 624 [142].

⁶⁶ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* 'Preliminary Objections' 2016 <<http://www.icj-cij.org/files/case-related/155/155-20160317-JUD-01-00-EN.pdf>> accessed 16 October 2017.