INTERNATIONAL COURT OF JUSTICE

JADHAV CASE
(India v. Pakistan)

MEMORIAL

OF

THE REPUBLIC OF INDIA

सत्यमेव जयते

13 SEPTEMBER 2017

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I. INTRODUCTION

1) On 8 May 2017, the Republic of India **(India)** instituted an Application, in accordance with Article 40, Paragraph 1 of the Statute of the International Court of Justice **(Court),** read with Article 38 of the Rules of the Court, and Article 1 of the Optional Protocol concerning the Compulsory Settlement of Disputes **(Optional Protocol)** concluded at Vienna on 24 April 1963.

2) The Application sought redress in relation to egregious violations by the Islamic Republic of Pakistan (**Pakistan**) of the Vienna Convention on Consular Relations, 1963 **(Vienna Convention)** in the matter of arrest, detention and trial of an Indian national, Kulbhushan Sudhir Jadhav **(Jadhav)**.

3) Article 1 of the Optional Protocol concerning the Compulsory Settlement of Disputes, 1963[1] (**Optional Protocol**) stipulates that disputes in relation to the interpretation or application of the Vienna Convention shall lie within the compulsory jurisdiction of the International Court of Justice.

4) Article 36[2] of the Vienna Convention, applied to the facts of the Jadhav case, mandated:
   (a) As Pakistan "arrested" Jadhav, they should have notified the Indian Consular officers *without delay*;
   (b) that India's **consular officers were (are) free to communicate with, and have access to** Jadhav;
   (c) that Jadhav had (has) **similar freedom with respect to communication with, and access to India's consular officers**;
   (d) Pakistan was (is) **bound to inform** Jadhav of his **rights to communicate with, and access to** India's **consular officers**;

[1] The full text of Article 1 of the Optional Protocol, is set forth in paragraph 29, under Section II, titled 'Jurisdiction'

[2] The full text of Article 36(1) and (2) of the Vienna Convention, is set forth in paragraph 31, under Section II, titled 'Jurisdiction'

(e) any **communication addressed** by Jadhav **to India's consular post**, while under arrest, in prison, custody or detention, was **liable to be forwarded by Pakistan** to India's consular officers **without delay**;

(f) India's consular officers had (have) a **right to visit Jadhav, to converse and correspond with him and to arrange for his legal representation.**

5) The actions of Pakistan, in denying consular access to a person who they claim, and thus do not dispute, is an Indian citizen, who was "arrested" and put on "trial" by a Military Court, are not disputed. Indeed, none of the elements, which would trigger obligations under Article 36 of the Vienna Convention, are in dispute. The violation of the Vienna Convention is, thus, not in dispute.

6) Jadhav was "arrested" on 3 March 2016, and it was only when the Foreign Secretary, Pakistan, raised the matter with the Indian High Commissioner in Islamabad, on 25 March 2016, that India was informed of this "arrest".

7) Article 36(1)(b) of the Vienna Convention obliged Pakistan to inform India of the arrest of an Indian national "*without delay*". Pakistan has not offered any explanation as to why it took over three weeks to inform the Indian High Commissioner as to the arrest of Jadhav.

8) India sought consular access to Jadhav right from the time it was informed of the arrest of Jadhav, and repeatedly reiterated this request to Pakistan.

9) It is not known whether Pakistan informed Jadhav of his right to communicate with the Indian consular post. The conduct of Pakistan, which at one point suggested, in public statements, through government functionaries, that the detenu was not entitled to consular access, strongly suggests Pakistan has not informed Jadhav of his right to communicate with the Indian consular post.

10) Pakistan's only reaction has been by way of mention of matters concerning access to Jadhav, is to be found in a *note verbale* of 21 March 2017, wherein Pakistan stated that India's case for consular access would be **considered** in light of India's response to Pakistan's request for assistance in its investigation process.

11) The 21 March 2017 *note verbale* was preceded by a purported "request" on 23 January 2017 from Pakistan for assistance from India in the matter of "investigation" relating to a purported criminal complaint registered by its authorities on 8 April 2016.

12) The *note verbale,* of 21 March 2017, facially, constitutes denial of India's request for consular access.

13) In the interregnum, it appears that some charges were framed based substantially, if not solely, on a purported confession by Jadhav, and that Jadhav was "tried" by a Military Court convened under the Pakistan Army Act, 1952. Significantly, Pakistan has steadfastly refused to make public, or even disclose to India, the "charges" or the "evidence" against Jadhav, or even the text of the "judgment" of the purported Military Court that "tried" Jadhav, including that of the purported appellate Court.

14) Even after the conclusion of the "trial" by a purported Military Court, consular access to Jadhav was not granted. From the moment of Jadhav's arrest, through to his conviction, and beyond, the conduct of Pakistan has been marked by opacity.

15) India does not have any formal information as to whether Jadhav filed an appeal, and if so, in what manner and in what circumstances, including any legal representation afforded to Jadhav. From recent information in public domain, India learns that an appeal filed by Jadhav was purportedly dismissed, and that a mercy petition filed by Jadhav is now pending before the Chief of Army Staff, Pakistan.

16) Jadhav's mother, in order to file an appeal, sought access to the records of the trial, but her attempts were in vain. Nonetheless, she filed an appeal, and sought a visa to travel to Pakistan along with her husband (Jadhav's father), to pursue her appeal, and to meet her son, who by now was on death row. Applications for grant of visa were submitted on 25 April 2017, but no visa has been granted.

17) Article 36 of the Vienna Convention, in plain language, casts an unconditional obligation upon Pakistan to grant consular access to Jadhav, admitting of no exceptions, whether in relation to rights conferred upon the individual Jadhav, and/or to India's rights. Pakistan has deliberately breached its obligations under Article 36 of the Vienna Convention.

18) The jurisprudence on 'human rights', as it has evolved, especially after the coming into force of International Covenant on Civil and Political Rights **(ICCPR)**, recognises Article 36 of the Vienna Convention as an inextricable constituent in the 'due process' rubric. A vital element of due process is the right to an effective defence against criminal charges, and to a fair and impartial trial, in which the accused is represented by a lawyer of his choice. This is the due process guarantee, whether viewed in the context of 'minimum standards', or through the prism of Article 14 of the ICCPR.

19) Article 36, by creating the mechanism of consular access, enables the sending State to help its national realise the promise of due process. The place of Article 36 in the rubric of the due process guarantee must inform its interpretation.

20) The construction of Article 36, in this context, must also inform the application of the principles of State responsibility in fashioning remedies, including that of *restitutio in integrum*. Remedies for the violation of multilateral treaties must be effective and complete. As Article 36 is now considered a part of the rubric of due process, the remedy for violation of Article 36 must be such as to ensure that the failure of due process, occasioned by violation of Article 36 of the Vienna Convention, is effectively remedied, fully and completely.

21) The use of Military Courts for the trial of civilians has been deprecated as violative of due process standards. *A fortiori*, the trial of foreign national civilians by Military Courts, is *per se* violative of the ICCPR, and also of the minimum standards recognised as principles of international law *erga omnes.*

22) The violation has two dimensions, one actionable as violation of the ICCPR *per se,* and the other as a factor in applying principles of State Responsibility to violations of other Conventions or Treaties or principles of International law.

23) The first dimension is a challenge to actions of the receiving State for violation of provisions of the ICCPR *per se*, where remedies are available for such violations either before bilateral or multilateral tribunals created under specific treaties, or where this Court has compulsory jurisdiction under Article 36(2) of the Statute of this Court.

24) The second dimension is where in the moulding of relief for the violation of Article 36, the *review and reconsideration* by a Military Court would not be considered sufficient reparation. A remedy that considers it sufficient discharge of State Responsibility, for addressing a breach of Article 36, to direct *review and reconsideration* by a Military Court would also tend to legitimise a procedure that *per se* violates Article 14 of the ICCPR.

25) As the legal regime in Pakistan does not admit of solutions consistent with Article 14 of the ICCPR and the minimum standards, the principles of State Responsibility that demand adequate reparation for a serious breach of a treaty, would demand that the accused Jadhav be released forthwith. As violation of Article 36 has been occasioned on account of opacity that surrounds the working of a Military Court, an effective remedy by way of restitution must necessarily result, as a first step, in annulment of the "conviction". But this would be incomplete, without considering the way forward. If the legal regime under which a fresh trial were held is incapable of remedying the Article 36 violations, in manner that would make the remedy meaningful and real, then in the extreme facts and circumstances of the case, and particularly in the light of the conduct of Pakistan, and considering that Pakistan claims Jadhav's conviction is founded upon a purported confession, due process standards, whether seen as the minimum standards recognised in international law or as standards established by the ICCPR, must inform the interpretation of Article 36, and thus the remedies for its violation would demand that the accused Jadhav be released forthwith.

II. JURISDICTION

26) India has brought the present case against Pakistan before this Court for violation of the Vienna Convention, based on the jurisdiction of this Court under Article 40, paragraph 1 of the Statute of the Court**,** read with Article 38 of the Rules of the Court, and Article 1 of the Optional Protocol.

27) Article 40, paragraph 1 of the Statute of the Court confers upon this Court the exclusive and compulsory jurisdiction to decide *"all matters specially provided for… in Treaties and Conventions in force"*.

28) India and Pakistan are members of the United Nations, and thus *ipso facto* parties to the Statute of the International Court of Justice. India and Pakistan are also parties to the Vienna Convention and the Optional Protocol. Both States have accepted the Vienna Convention and the Optional Protocol, without notifying any reservation.

29) Article 1 of the Optional Protocol, stipulates:

> *"Disputes arising out of the* ***interpretation or application*** *of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."*

30) Both India and Pakistan have also accepted the compulsory jurisdiction of the Court under paragraph 2 of Article 36 of the Statute of the Court, subject to declarations in which "*they recognise as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court….*", and specifically in legal disputes relating to, amongst other things, interpretation of treaties or questions of international law.

31) Article 36 of the Vienna Convention, reads thus:

"Communication and contact with nationals of the sending State

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

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2.The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

32) India is invoking jurisdiction under paragraph 1 of Article 36 of the Statute of the Court on the basis of a Treaty (i.e. the Optional Protocol) that expressly provides for the jurisdiction of this Court, and does not seek to invoke the jurisdiction of this Court under paragraph 2 of Article 36. As such, the declarations made by

India and Pakistan under paragraph 2 of Article 36, or any reservations in such declarations, have no application.

33) The issue of jurisdiction of this Court under Article 36, paragraph 1 being independent of any limitations in its jurisdiction under Paragraph 2, is no longer *res integra*. In the *Case Concerning Border and Transborder Armed Actions* (*Nicaragua v Honduras*)[3], this Court held that the Pact of Bogota created jurisdiction *independent of the declarations of compulsory jurisdiction* as may have been made under paragraph 2 of Article 36.

34) In the *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, apart from questioning the competence of this Court under Article 84 of the Chicago Convention and Article II, Section 2, of the Transit Agreement (termed, "the: jurisdictional clauses of the Treaties"), Pakistan also relied on India's reservation to acceptance of this Court's compulsory jurisdiction under paragraph 2 of Article 36. This Court held:

> "*the various objections made to the competence of the Court cannot be sustained, whether they are based on the alleged inapplicability of the Treaties as such, or of their jurisdictional clauses. Since therefore the Court is invested with jurisdiction under those clauses and, in consequence ..., under Article 36, paragraph 1, and under Article 37, of its Statute, it becomes irrelevant to consider the objections to other possible bases of jurisdiction*"[4].

35) In the *La Grand*[5] case, this Court accepted – albeit not a matter put in issue – that the application filed by the Federal Republic of Germany for violation of the Vienna Convention was based on the jurisdiction of this Court under paragraph 1 of Article 40, of the Statute of the Court and on Article I of the Optional Protocol.

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3 *Case Concerning Border and Transborder Armed Actions (Nicaragua v Honduras), Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, p.69,* para 41.

4 *Appeal Relating to the Jurisdiction of the ICAO Council, (India v. Pakistan), Judgment, ICJ Reports 1972, p.46,* para 25.

5 *LaGrand (Germany v. United States of America), Judgment, ICJ Reports 2001, p.466.*

Similarly, in the *Avena*[6] case, this Court noted in its judgment that Mexico based the jurisdiction of the Court on Article 36, paragraph 1 of the Vienna Convention and on Article I of the Optional Protocol concerning compulsory settlement of disputes.

36) The Optional Protocol, read with Article 36 paragraph 1, confers upon the Court the jurisdiction to remedy the violations of the Vienna Convention. Thus, the jurisdiction of this Court to entertain applications for relief in cases of breach of the Vienna Convention, is immutable.

37) If necessary, this Court would also examine the actions of the domestic courts of the receiving State in the light of international law[7]. The discussion in paragraph 34 of the judgment in the *Avena case* is dispositive of the issue of the jurisdiction of the Court to grant appropriate restitution. This Court held that *"the Court is unable to uphold the contention of the United States that, even if the Court were to find that breaches of the Vienna Convention have been committed by the United States, of the kind alleged by Mexico, it would still be without jurisdiction to order restitutio in integrum as requested by Mexico.... Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court in order to consider the remedies a party has requested for the breach of the obligation. Whether or how far the Court may order the remedy requested by Mexico are matters to be determined as part of the merits of the dispute."*[8]

38) It must follow that once it is established that there has been a violation of Article 36 of the Vienna Convention, then the relief would have to be modulated applying settled principles of State Responsibility – the *"...principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form." (Factory at Chorzow, Jurisdiction, 1927, P.C.I.J., Series A, No.9, p.21). What constitutes "reparation in an adequate form" clearly varies depending upon the concrete circumstances surrounding each case and the*

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[6] *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, ICJ Reports 2004, p.12*.

[7] *Ibid.,* para 28.

[8] *Ibid.,* para 34.

precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the "reparation in an adequate form" that corresponds to the injury".[9]

39) Article 36 of the Vienna Convention is now recognised, in international law jurisprudence, as a measure beyond the norms and conventions applicable to dealings between two States – it is now recognised as conferring a valuable right upon an accused who is a national of the sending State, and is detained and put to trial on criminal charges in the receiving State, to consular access, which is a vital step in the direction of ensuring a fair trial that accords to the "due process" standards in international law. Article 14 of the ICCPR and Article 36 are increasingly viewed as two strands of the same rubric of fairness, and thus a trial conducted where a national of the sending State is denied consular access by the receiving State is *ex hypothesi* a trial that does not conform to the norms of due process.

40) In fashioning the relief that would meet with the established standard of State Responsibility, this Court would take into account the nature and extent of violations, the degree of injury suffered on account of the violations, and all other relevant facts. This Court would have jurisdiction to examine these facts, and establish in the facts of a case, the consequences of the breach of Article 36, and the extent to which the trial distanced itself from the norms of due process. The principles of State Responsibility have to be applied in manner that the remedy also conforms to what are now settled principles of human rights recognised in international law.

41) As set forth in Section III, the circumstances in which Jadhav was "arrested" remain shrouded in mystery. India believes that Jadhav was kidnapped from Iran. Jadhav was then show to have been arrested in Baluchistan, and has since then been in the custody of the Pakistan Army. Besides, from the nature of the allegations levelled against him, and public statements by high functionaries

[9] *Ibid.,* para 119.

against him, it is obvious that Jadhav is being held in an extremely hostile environment. The fact that a Bar Association passed a resolution **(Annex 11)** threatening sanction against any member lawyer who agreed to appear for Jadhav, is testimony to the public hatred to which Jadhav is subject.

42) The atmosphere has been so vitiated that even the Order of this Court was criticised as impinging on Pakistan's sovereignty in a reported statement issued by the Lahore High Court Bar Association of Pakistan, which condemned the Provisional Measures Order by this Court stating that "Pakistan's Judiciary possesses all the rights for Jadhav's execution" (**Annex 11**).

43) Unsurprisingly, Jadhav is supposed to have "confessed" to alleged crimes. Jadhav was then tried by a Military Court. As detailed in the later Section, 95% of civilians tried by the Military Court of Pakistan have "confessed". While the information of his fate is released by the administration from time to time, neither the charges, nor the evidence, have seen the light of day.

44) In such circumstances, where Jadhav was held *incommunicado* and continues to be so held, and was compelled to run his so-called defence in the circumstances, without consular access, the trial has been farcical. The denial of the protection of Article 36 has destroyed any sanctity which a military trial may otherwise have had. In any event, Military Courts, when they try civilians, are highly suspect.

45) All these dimensions of the violation of Article 36, and its consequences, will be required to be examined by this Court, in order to fashion an appropriate remedy that would meet the high standards of international law in the matter of human rights, of which Article 36 is increasingly considered a significant element.

46) Finally, the repeated mention by Pakistan of a bilateral Agreement between India and Pakistan[10] has no bearing on the jurisdiction of this Court. The interplay between the Vienna Convention and the bilateral Agreement, even if raised by Pakistan, would involve interpretation of the Vienna Convention, and thus this

[10] A Bilateral Agreement relating to certain facets of Consular Access and related matters was entered into in 2008.

Court would have the jurisdiction to decide all issues, including any such issue under Article 36, Paragraph 1 of the Statute of the Court read together with the Optional Protocol.[11]

[11] This issue is dealt with separately in the Section V dealing with the 2008 Agreement.

III. STATEMENT OF FACTS

47) An Indian national, Mr. Kulbhushan Sudhir Jadhav **(Jadhav)** was "arrested" on 3 March 2016.

48) On 25 March 2016, India was informed of this "arrest", when the Foreign Secretary, Pakistan raised the matter with the Indian High Commissioner in Islamabad.

49) On that very day, 25 March 2016, India sought consular access to Jadhav.

50) Although Pakistan was bound to grant consular access, without delay, India's request did not evoke any response.

51) On 30 March 2016, India sent a reminder reiterating its request for consular access to Jadhav, at the earliest. Thirteen reminders were sent by India on 6 May 2016, 10 June 2016, 11 July 2016, 26 July 2016, 22 August 2016, 3 November 2016, 19 December 2016, 3 February 2017, 3 March 2017, 31 March 2017, 10 April 2017, 14 April 2017 and 19 April 2017 **(Annex 1.3 to 1.15).**

52) Almost ten months after India's first request for consular access, on 23 January 2017, India received a request **(Annex 2)** from Pakistan claiming to seek assistance in the investigation of what it described as "FIR No. 6 of 2016". Under the Pakistan Code of Criminal Procedure, the expression "FIR" is an acronym for the expression "First Information Report", which is a report registered when the police is first informed of the commission of a crime. The request pertained to a criminal complaint registered against an Indian National, apparently on 8 April 2016. It is significant that this letter acknowledged an "FIR" had been registered against "an Indian national". The nationality of Jadhav has not ever been in question.

53) On 3 February 2017 **(Annex 1.10),** India protested in a *demarche* against the continued denial of consular access, despite Jadhav's Indian nationality affirmed by Pakistan. The letter from Pakistan seeking assistance portrayed a purported

"confession" by Jadhav, which was the basis of, or at least a significant part of the case against him. India, therefore, raised the concern of Jadhav's safety, pointing out that:

"questions about his treatment in Pakistan's custody continue to mount, given especially his coerced purported confession, and the circumstances of his presence in Pakistan remain unexplained."

54) On 3 March 2017, India reminded Pakistan of its various requests, including its *demarche* of 3 February 2017, and again requested consular access.

55) India received another *note verbale* dated 21 March 2017 **(Annex 3)** from Pakistan. In this *note verbale*, Pakistan stated:

"the case for the consular access to the Indian national…shall be considered in the light of Indian side's response to Pakistan's request for assistance in investigation process and early dispensation of justice".

56) India responded to the *note verbale* on 31 March 2017 **(Annex 1.12)** pointing out that,

"consular access to Mr. Jadhav would be an essential pre-requisite in order to verify the facts and understand the circumstances of his presence in Pakistan."

57) Jadhav was kidnapped from Iran, where he was residing and carrying on business after retiring from the Indian Navy. The circumstances surrounding his presence in Pakistan are not clear, and there has been a stoic, almost deafening, silence of the Pakistan authorities on these issues. Beyond asserting that Jadhav has been "arrested", there is no further clarification of the circumstances of his arrest. These matters require verification, the first step towards which would have been to interview Jadhav, upon obtaining consular access.

58) A press release issued by Inter Services Public Relations (Pakistan)[12] on 10 April 2017, about Mr. Jadhav conveyed:

"The spy has been tried through Field General Court Martial (FGCM) under Pakistan Army Act and awarded death sentence. Today COAS, Gen. Qamar Javed Bajwa has confirmed his death sentence awarded by FGCM." (**Annex 4**)

59) India received, on 10 April, 2017, another *note verbale* from the Ministry of Foreign Affairs, Islamabad, conveying that consular access shall be considered in the light of India's response to Pakistan's request (**Annex 5**) for assistance in the investigation process.

60) India responded to this *note verbale* on 10 April 2017 itself **(Annex 1.13)**, pointing out that such offer received after the death sentence had been confirmed, as per information issued in a press briefing by Pakistan, *"underlines the farcical nature of the proceedings and so-called trial by a Pakistan military court martial"*. India reiterated that despite repeated requests, consular access had not been granted.

61) On 14 April 2017, a press statement made by the Adviser to the Prime Minister of Pakistan on Foreign Affairs (**Annex 6**), established the following facts:

i) After Jadhav's "arrest", a "confessional video statement" was recorded on 25 March 2016. The FIR was, however, registered only on 8 April 2016.

ii) The accused was interrogated in May 2016, and in July 2016, a confessional statement by the accused was recorded before a magistrate.

iii) The court martial recorded the summary of evidence on 24 September 2016, and in four proceedings, culminating on 12 February 2017, the trial was over.

iv) In the course of the trial, the accused *"was allowed to ask questions from the witnesses",* and *"a law qualified field officer was provided to defend him throughout the court proceedings"*.

[12] An agency of the Government of Pakistan.

62) Since the last round of proceedings in the case was held on 12 February 2017, obviously, by the time of receipt of the *note verbale* on 21 March 2017, even conditional consular access, which was bound to be granted upon arrest *without delay*, and then in the course of the trial, offered by Pakistan had, in any event, became meaningless, as the trial stood concluded. Nonetheless, if consular access had been granted, it may have enabled India to assist Jadhav in seeking remedies in appeal, although the nature of the appeal under the laws of Pakistan was entirely non-compliant with the minimum standards of due process.

63) India states that the factual matrix set forth above, establishes incontrovertibly, that right from the time of the "arrest" of Jadhav, Pakistan has acted in brazen violation of the rights of the accused, and of the rights of India under the Vienna Convention, by declining consular access throughout. Pakistan has, thus, conducted itself in manner that constitutes egregious violation of the Vienna Convention.

64) Following the Press Statement of 14 April 2017, India through a *note verbale* issued on 14 April 2017, requested Pakistan to provide certified copies of the "charge-sheet" and the "judgment" of the Military Court, and (once again) sought consular access **(Annex 1.14).** But there was no response received by India.

65) In a further briefing on 17 April 2017, on behalf of the Government of Pakistan, the authorised spokesperson reportedly stated that the Indian National is not eligible for consular access, nor will he be granted consular access. **(Annex 7).** No basis for such assertion by Pakistan was forthcoming. It is clear, therefore, that the provisions of the Vienna Convention have been continually violated, and the ongoing conduct of Pakistan remains in defiance of the provisions of the Vienna Convention.

66) On 19 April 2017, India handed over a *note verbale* **(Annex 1.15)** to Pakistan, through its High Commission in New Delhi, once again seeking copies of the "charge sheet", the "proceedings" of the Court, the summary of "evidence" and

the purported order of "conviction". In addition to once again seeking consular access, India also asked Pakistan, to:

i) Relay the procedure for appellate remedies,
ii) Facilitate appointment of a defence lawyer, who may be put in contact with the High Commission of India in Islamabad,
iii) Provide certified copies of medical reports,
iv) Issue visitor visas to members of family of Jadhav to visit Pakistan, so as to enable pursuit of legal remedies, available under the Pakistan Army Act 1952 (howsoever circumscribed these may prove).

67) Pakistan has, in a press briefing on April 20, 2017 **(Annex 9),** referred to the bilateral Agreement on Consular Access between India and Pakistan, concluded in 2008 **(Annex 10)** and contended that the matter of consular access between the two countries is exhaustively dealt with in this bilateral Agreement.

68) Pakistan's position articulated above lacks merit, both because of the express provisions of the Vienna Convention, as well as the plain language of the Agreement on Consular Access signed between the two countries on 21 May 2008.[13]

69) The elderly parents of Jadhav applied for visas on 25 April 2017, through the offices of the Ministry of External Affairs of the Union of India. No response has been received on these applications.

70) The mother of Jadhav sought to file an appeal under Section 133(B) and a petition to the Federal Government of Pakistan under Section 131 of the Pakistan Army Act, 1952. The appeal and the petition were handed over by the Indian High Commissioner in Islamabad to Pakistan's Foreign Secretary in Islamabad on 26 April 2017. During this meeting, the representatives of India once again sought consular access to Jadhav **(Annex 1.16)**. The appeal and petition were prepared, based on information available in public domain, as no particulars of the "charges", the "evidence" or the "judgment" have been formally provided by

[13] This issue is dealt with in Section V.

Pakistan. Without consular access, and access to all relevant information and documents, no effective appellate remedy is capable of being availed, and any right to appeal would be liable to be classified as farcical, as was the "trial" by a Military Court.

71) The External Affairs Minister of India wrote a letter to the Adviser to the Pakistan Prime Minister on Foreign Affairs on 27 April 2017 **(Annex 8)** in which she reiterated India's requests for certified copies of the charge-sheet against Jadhav, proceedings of the Court of Inquiry, the summary of evidence in the case, the judgment, appointment of a defence lawyer, contact details of a defence lawyer and medical report of Jadhav. She also reiterated the request for the visa for the parents of Jadhav. She sought the personal intervention of the Advisor, in the matter. No response has been received to this missive.

72) On 22 June 2017, the Inter Services Public Relations (ISPR) of Pakistan (Spokesperson of the Pakistan Military) issued a Press Release (Annex 12) stating that Jadhav *"has made a mercy petition to the Chief of the Army Staff."* The Press Release *inter alia* also stated that Jadhav "*had earlier appealed to the Military Appellate Court which was rejected. Under the law he is eligible to appeal for clemency to the COAS (which he has done) and if rejected, subsequently, to the President of Pakistan*." The Spokesperson released a "second confessional video", which was purportedly 'shot' in April 2017 (well before this Court's hearings on provisional measures in May 2017) while Jadhav was in custody of the Pakistan military.

73) India does not have any definite information of whether Jadhav filed an appeal to the Military Appellate Court, and if so, in what manner or circumstances. Pakistan has not disclosed to this Court, whether during the hearing on the Application for Provisional Measures, or otherwise, about Jadhav's purported appeal to the Military Appellate Court in Pakistan. There is also no information about any status of the appeal and petition relayed by the mother of Jadhav in April 2017. In effect, Pakistan has prevented the mother of Jadhav from pursuing her appeal and petition.

IV. EGREGIOUS VIOLATIONS OF THE VIENNA CONVENTION

74) Article 36 (1) (b) of the Vienna Convention confers, in language that admits of no ambiguity, indefeasible rights to consular access to a national of the sending State, who has been arrested, or committed to prison, or to custody pending trial, or detained in any other manner. The Vienna Convention also confers upon the sending State, acting through its consular officers, the right to visit its national in prison, custody or detention, so as to converse and correspond with him, and also to arrange for his legal representation. The access and visitation rights continue to a national of the sending State who is in prison, custody or detention, in pursuance of a judgment.

75) The requirements for compliance with obligations ensconced within the Vienna Convention admit of no exception.

76) Article 36 has increasingly been recognised as a vital constituent of the overall rubric of due process.

77) Neither the nature of the charges, nor the conduct of the sending State is relevant in examining the allegations of the violation of Article 36. The reason is not far to seek. Although rights are created by a Treaty, the remedy for the breach of which may be pursued by the sending State, parallel recognition has been duly accorded to rights enshrined for the arrested or detained national.

78) Due process, which was recognised as a facet of the *international minimum standard*, is also now expressly engrafted in a multilateral Treaty – i.e., the ICCPR, which Treaty has been signed and ratified not only by India and Pakistan, but also by a large number of States to the extent its principles are being recognised as general principles of international law, as a code of conduct which must be adhered to by civilised nations.

79) Article 36, in which Treaty rights are ensconced, has evolved, following a long history of practice. Consular access, all along in the history of diplomatic

relations, has been considered to be a vital element in ensuring peace and harmony in the relationships between sovereign States, and one of the important functions of consuls of the sending State has been to assist their nationals in the receiving State who are subjected to arrest or detention and put on trial on criminal charges. The Vienna Convention of 1963 crystallised existing practices, and elevated this function of consular access to an indefeasible right. This Court has construed this right as being conferred not merely on the sending State, but also on its national, i.e. the individual of the sending State. The Vienna Convention has been interpreted by this Court *inter alia* in its judgments in the *Tehran* case[14], in *LaGrand*[15] and in *Avena*[16]. The institution of consular relations, which are governed now under the rubric of the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention of Consular Relations of 1963, has also been discussed, and its *raison d'être* expostulated in the judgments of this court.

80) In the 1980, the *Tehran* case, censuring the Government of Iran for its violations of all established norms of consular relationships, this Court stated "*Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. But what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm. In its Order of 15 December 1979, the Court made a point of stressing that the obligations laid on States by the two Vienna Conventions are of cardinal importance for the maintenance of good relations between States in the interdependent world of today. "There is no more fundamental prerequisite for the conduct of relations between States", the Court there said, "than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have*

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[14] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3*.

[15] *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 466*.

[16] *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, p. 12*.

observed reciprocal obligations for that purpose." The institution of diplomacy, the Court continued, has proved to be "an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means" (I.C.J. Reports 1979, p. 19).”[17]

81) In the *LaGrand* case, Germany brought a complaint for violation of Article 36 (1)(b) by the US authorities in relation to German nationals, who were arrested and put on trial. This Court held “…*The Court notes that Article 36, paragraph 1 (b), spells out the obligations the receiving State <u>has towards the detained person and the sending State</u>. It provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the individual's detention "without delay". It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State "without delay". Significantly, this subparagraph ends with the following language: "The said authorities shall inform the person concerned without delay of his rights under this subparagraph" (emphasis added). Moreover, under Article 36, paragraph 1 (c), the sending State's right to provide consular assistance to the detained person may not be exercised "if he expressly opposes such action". <u>The clarity of these provisions, viewed in their context, admits of no doubt</u>. It follows, as has been held on a number of occasions, that the Court must apply these as they stand (see Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7, p. 20; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, p. 8; Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991, pp. 69-70, para. 48; Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 25, para. 51). Based on the text of these provisions, the Court concludes that <u>Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the</u>*

[17] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3,* para 91.

Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case."[18]

82) In the 2004 Avena judgment, delivered on the application by Mexico based on allegations of violations of Article 36 of the Vienna Convention by the United States of America, this Court held that "*The Court would recall that it is in any event essential to have in mind the nature of the Vienna Convention.* ***It lays down certain standards to be observed by all State parties****, with a view to the "unimpeded conduct of consular relations", which, as the Court observed in 1979, is important in present-day international law "in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States" (United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, pp. 19-20, para. 40). Even if it were shown, therefore, that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim. The fifth objection of the United States to admissibility cannot therefore be upheld.*"[19] ***[Emphasis Added]***

83) In paragraph 40 of the Avena judgment, this Court held "*It would further observe that violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State: and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 (b)….*"[20]

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[18] *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 466,* para 77.

[19] *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, p. 12,* para 47.

[20] *Ibid.,* para 40.

84) The rights of consular access and assistance under Article 36 have, thus, been recognised as not only vesting in the sending State, but also with the individual who was subjected to arrest, custody, detention or trial without due process.

85) There are, in some jurisdictions, *fora* created under independent Treaties where the violation of human rights, including rights enshrined under the Vienna Convention, may be asserted, and remedies sought by the national[21]. Nonetheless, this Court has recognised the right of the sending State to seek reparations and remedies on behalf of the individual who has been subjected to arrest and put on trial in breach of the right to consular access and assistance guaranteed under the Vienna Convention.

86) Pakistan's conduct in refusing consular access despite repeated reminders by the sending State, i.e. India, plainly violates obligations under Article 36. It is obvious that Pakistan has violated, and continues to violate the Vienna Convention, knowingly and wilfully. In its *note verbale* of 21 March 2017, Pakistan expressly stated that the request for consular access would be considered in the light of India's response to the request for assistance and investigation. This establishes that Pakistan was aware of the institution of consular access, but chose to deny it in brazen defiance of the Vienna Convention.

87) Request for assistance in investigation, amongst sovereign States, is the subject of mutual legal assistance treaties, which are bilateral. India invited Pakistan to enter into a Mutual Legal Assistance Treaty (MLAT), but Pakistan has not responded. India has a number of requests pending with Pakistan for investigation into terror-related offences committed in India. While these issues relating to the absence of an MLAT are irrelevant to the present case, in any event, purported denial of legal assistance in investigation of crime does not clothe the receiving State with the authority to reject requests for consular access under Article 36 of the Vienna Convention.

[21] For example, the Inter-American Court of Human Rights.

88) It is India's assertion that in the present case, that the far-reaching consequences of the denial of consular access have been so grave, that the entire trial and conviction of Jadhav is rendered a travesty, and a blatant violation of the due process.

V. 2008 BILATERAL AGREEMENT ON CONSULAR ACCESS - INDIA & PAKISTAN

89) In a press briefing by a Spokesperson of the Pakistan government, on 20 April 2017 **(Annex 9)** in response to a question from a journalist (referring to India's request for consular access) the spokesperson stated "*Then regarding consular access we have said this earlier also that we have bilateral agreement on consular access and according to Art IV, in all such cases as the one of commander Kulbhushan the request of this nature would be decided on the basis of merits*".

90) In the first instance, the statement that they have also "*said this earlier*" would at best be possibly referable to some public utterances – in no official *communique* to the Government of India has Pakistan ever suggested that consular access to Jadhav was circumscribed by the 2008 Agreement.

91) In any event, the question of consular access sought under Article 36 being denied or being subjected to the provisions of some bilateral treaty does not arise. Article 36 is the provision of a multilateral treaty, and bilateral treaties covering the same subject matter can be accommodated as long as they are Treaties "*confirming, or supplementing or extending or amplifying the provisions*.." of the Vienna Convention. This is the clear mandate of Article 73 of the Vienna Convention.

92) The 2008 Agreement, was entered into for "*furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country*….", and by which the two signatory States, India and Pakistan, agreed to certain measures. These included the release and repatriation of persons within one month of confirmation of their national status and completion of sentences. The Agreement recognised that in case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its own merits, and that in special cases which call for or require compassionate and humanitarian considerations, each side may exercise its discretion subject to its laws and regulations to allow early release and repatriation of persons. India does not seek early release or repatriation of Jadhav, as contemplated by the 2008 Agreement.

93) The existence of a bilateral agreement, some of the provisions of which may appear to supplement or amplify the provisions of the Vienna Convention, is thus irrelevant to the assertion of rights of consular access under the Vienna Convention. This is also consistent with Article 41 of the Vienna Convention on the Law of Treaties, 1969 which recognises the principle that two or more parties could modify the terms of the Treaty, as long as the Treaty permits such modification, or at least does not prohibit such modification, and that any such modification cannot relate to a provision, the derogation from which is incompatible with the effective execution of the object and purpose of the Treaty as a whole.

94) The Vienna Convention creates specific rights in favour of States and in favour of the nationals of Sending States in relation to consular access – and creates corresponding obligations upon Receiving States that arrest, detain or try and sentence nationals of other member States. Bilateral treaties which create obligations can only supplement the provisions of the Vienna Convention, and cannot modify these rights and corresponding obligations which form the object and purpose of Article 36 of the Vienna Convention.

95) The history of the Vienna Convention also establishes that the Vienna Convention was deliberately and consciously rendered non-derogable by bilateral agreements/treaties.

96) Prior to the Vienna Convention, there were a host of bilateral treaties encompassing areas of consular relationship. The Vienna Convention was intended to be an exhaustive rubric of consular access, and any further bilateral agreements/treaties were accommodated only to supplement, extend or amplify the provisions of this Convention.

97) The drafting history of Article 73 of the Vienna Convention also establishes that different approaches were discussed, and in fact it was India which advocated the narrow approach in relation to bilateral agreements. The approach which placed bilateral agreements above a multilateral convention was criticised by the Indian delegate as it would be a measure *"impairing the value of a multilateral*

convention and obstructing the progressive development of international law…".[22]

98) The final version which was accepted, described as the "six power amendment", without the explicit duty to review and revision was finally adopted unanimously. The result is that, as far as future bilateral consular treaties are concerned, *"they are valid only insofar as they confirm, supplement, extend, or amplify the provisions…"* of the Vienna Convention.[23]

99) There is nothing in the language of the 2008 Agreement which would suggest that India or Pakistan ever intended to derogate from Article 36 of the Vienna Convention. But even if there were any such language, it would have to yield to the provisions of the Vienna Convention.

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[22] Consular Law and Practice by Luke T. Lee and John Quigley, Third edition, page 568-9.

[23] *Ibid.,* page 571.

VI. HISTORY OF CONSULAR ACCESS

100) In recognition of the reality that an individual, prosecuted in a foreign country, is bound to encounter serious difficulties in defending a criminal charge, which may stem from unfamiliarity with the law, with language, or even the *"risk of discrimination – overt or subtle – for the foreign national"*,[24] the "*protection of nationals when they are abroad is accepted as an important function of government"*.[25]

101) Providing assistance to sending State nationals is a major function for sending State Consuls. The assistance that they provide *"to nationals who find themselves in situations of difficulty is referred to as "protection" activity."*[26] *"Protection of nationals is a consul's most basic function. While this function has long been important, in recent years it has assumed an even greater share of a consul's time… ."*[27] "*A major protective function of consuls is to communicate with nationals who are in pre-trial detention on a criminal charge, or who have been sentenced to prison after being convicted. This function has assumed growing importance as a result of the growth in travel for employment, business and pleasure."*[28] In addition, *"[c]onsular access to nationals in detention has long been a feature of consular practice."*[29]

102) Significantly, the Preamble to the Vienna Convention begins by recalling that consular relations have been established between peoples since ancient times. *"The efforts to conclude a multilateral treaty on consular relations was part of*

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[24] *The Law of Consular Access, A Documentary Guide, John Quigley, William J. Aceves and S. Adele Shank,* page 1.

[25] *Ibid*., page 3.

[26] *Ibid*., page 6.

[27] *Consular Law and Practice, Third Edition,* Luke T Lee and John Quigley, page 116.

[28] *Ibid.,* page 139.

[29] *Ibid.,* page 140.

the effort by the newly formed United Nations to promote the development and codification of international law."[30]

103) The Vienna Convention reflects the efforts of 92 States that participated in the conference of March-April 1963. Some Communist states were slow to ratify and/or accede. The USSR acceded only in 1989 – one of its objections was that *"it created a system for protection of arrested co-nationals that, in the Soviet view, left room for the receiving State to block access of a consul to a co-national"*[31]. While, by 2008, 171 States had ratified or acceded to the Convention, currently, 179 States are parties to the Convention.

104) The Vienna Convention has come to be regarded as an example of a *law-making Treaty*. The principles of the Vienna Convention are considered as establishing the contents of the consular function *"not only for States Parties to the Convention pursuant to the rule pacta sunt servanda, but also for non-parties in view of the metamorphosis of most of the substantive rules of the Convention into customary rules of international law, thus binding on parties and non-parties alike"*.[32]

105) The history of the drafting of the Vienna Convention bears testimony to the importance which nations placed upon the provisions of Article 36. Its significance is also underscored by the fact that a concern (expressed by the USSR) that such a provision would elevate the Treaty provision over domestic law, and an amendment placing domestic law over Article 36 was rejected[33]. The Harvard research draft of the Convention concluded *"that a receiving State is required under customary law to allow a consul to visit nationals 'when they are imprisoned or detained by authorities of the receiving State' "*.[34]

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[30] *Ibid.,* page 21.

[31] *Ibid.,* page 23.

[32] *Ibid.,* page 111-112.

[33] *The Law of Consular Access, A Documentary Guide, John Quigley, William J. Aceves and S. Adele Shank,* page 9-10.

[34] *Consular Law and Practice, Third Edition, Luke T Lee and John Quigley,* page 142.

106) Countries have issued instructions to consuls, which stress the importance of assisting incarcerated nationals. The Canadian Instruction explains the circumstances which may require particular attention – and it is directly relevant in the present case. It states – *"The system of justice in some countries may be complex, slow-moving or possibly venal. Local laws may differ greatly from our own and, with the addition of language barriers, may be difficult for Canadians to understand."*[35]

107) A consul arbitrarily refusing to assist, in particular, an arrested national, would be considered to be in breach of duty by the sending State. It is on this principle that in actions in domestic courts, brought on behalf of nationals of sending States, have concluded in courts in the United Kingdom and Canada establishing that governments bear an obligation to assist their nationals.[36]

108) Article 36 sets out, in language of clarity and precision, the principles applicable to consular access, in the matter of the protective function discharged by consuls. The wisdom of such a protective function, sanctified through decades of practice can be demonstrated with reference to the facts in the present case.

109) The ubiquitous "confession", is the hallmark of processes by Military Courts in Pakistan[37]. The 'arrest' of Jadhav, viewed in this backdrop, and the 'confession' purportedly recorded after his arrest, in circumstances where Pakistan admittedly failed to inform India "*without delay"* of Jadhav's arrest, and where Jadhav remains held incommunicado, amidst versions of his so-called *"confession"* floating in social media, establishes a clear disregard for obligations to India. Other 'evidence', purportedly produced before the Military Court, remains zealously preserved and undisclosed. 'Charges' brought, or the

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35 *Ibid.,* page 147.

36 This was in the context of a national incarcerated by the United States in Guantánamo Bay, Cuba.

37 This issue is elaborated upon in Section XI.

‘*verdict’* itself remain shrouded in mystery, and are steadfastly not being shared by Pakistan with India, despite conclusion of legal processes[38].

110) Based on statements made by and/or the communications received by India from Pakistan, it would appear that registration of the commission of a criminal offence originally occurred *vide* FIR 06/2016 registered on 8 April 2016, followed by FIR no. 22/2016 registered on 6 September 2016, both of which described Jadhav as an Indian national, and asserted that these were premised on *“… his involvement in espionage and terrorist activities in Pakistan”*.

111) The first formal reaction by Pakistan, after the large number of India’s requests for consular access, received on 23 January 2017, refers to two criminal cases registered, for which Pakistan claimed entitlement to assistance for carrying on criminal investigation in India. Pakistan steered clear of any mention of consular access, while it sought India’s cooperation in its ‘investigation’. A bare reading of the letter of request for assistance **(Annex 2)** betrays an attempt at posturing, rather than a serious request for assistance relating to any investigations.

112) The tenor of such communication of 23 January 2017, only served to heighten India’s concerns over Jadhav’s well-being, and the state of play in relation to the “investigation” into the criminal cases registered against him. These concerns were exacerbated by the assertion of Jadhav having “confessed” to crimes.

113) The assertion by Pakistan regarding Jadhav’s ‘confession’ is liable to be viewed in the backdrop of the Report of the International Commission of Jurists to the UN Human Rights Committee (considered in its 120th session in Geneva, in July 2017) which had noticed that *“159 out of the 168 civilians (95%) whose convictions have been publicly acknowledged by the military have allegedly*

[38] A recent press release suggested that Jadhav’s appeal stands dismissed, and a mercy petition is pending before the Army Chief.

"confessed" to the charges."[39] Family members of some of those individuals convicted by military courts petitioned the Supreme Court of Pakistan, in which they, amongst other things, questioned the voluntariness of the 'confessions'. The Report records that in August 2016 the Pakistan Supreme Court dismissed all these petitions, reiterating *"the limitations of its judicial review jurisdiction, and noted that since the "confessions" were recorded by a magistrate and were not retracted, they stood "proved" "*.[40] The Commission, in its report, commented on the Supreme Court's treatment of the questions regarding the veracity and voluntariness of the confessions, noting that in relation to confessions in military trials, the approach of the court was markedly different from its treatment of these issues in the context of cases before civilian courts.[41] It noted that since January 2017, 161 people had been given the death penalty premised on evidence recorded by way of a "confession", by military courts.[42]

114) The institutional bias against Jadhav is starkly apparent from communications that have emanated from high officials of the Islamic Republic of Pakistan. The Adviser to the Prime Minister of Pakistan on Foreign Affairs issued a press statement on 14 April 2017 (**Annex 6)** in which he mentioned the 'confessional' video statement, which has repeatedly been placed by Pakistan into public domain. An earlier press release of 10 April 2017 mentioned Jadhav had *"confessed before a magistrate and the court that he was tasked by RAW to plan, co-ordinate and organise espionage/sabotage activities aiming to destabilise and wage war against Pakistan by impeding the efforts of Law Enforcement agencies for restoring peace in Baluchistan and Karachi."* Although Jadhav stood 'convicted' of offences, which led to his being awarded a death sentence, which was confirmed on 10 April 2017, in its parallel communication of 10 April 2017, Pakistan informed India that its request for

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[39] *International Commission of Jurists, UN Human Rights Committee, 120th Session, Geneva, 3-28 July 2017,* para 15.

[40] *Ibid.,* para 18.

[41] *Ibid.,* para 15, 19.

[42] *Ibid.,* para 28.

consular access would be considered in the light of India's response to Pakistan's request for assistance in the investigation process.

115) The statement by the Adviser to the Prime Minister on Foreign Affairs acknowledged a sense of hostility, when it advocated "active diplomacy" to arrest the growing crisis in the relationship between the two countries, failing, however, to address why consular access was not provided.

116) Although Jadhav theoretically had a right to appeal, this lay to a Military Appellate Court constituted under the military law. The farcical nature of this appeal is apparent from the fact that it was liable to be heard by officials below the rank of the Chief of Army Staff, who had confirmed the sentence of 'conviction'. Viewed, thus, in the backdrop of an assertion by the Adviser to the Prime Minister of Pakistan on Foreign Affairs, that Jadhav's "sentence" is based on credible, specific evidence proving his involvement in espionage and terrorist activities in Pakistan, it is plain that Jadhav has been rendered remediless, and the processes followed, or the lack of them in any event, constitute a travesty of justice. As per available information, on 22 June 2017, the Inter Services Public Relations (ISPR) of Pakistan issued a Press Release (**Annex 12**), inter alia, stating that Jadhav "had earlier appealed to the Military Appellate Court which was rejected."

117) While Jadhav was, and continues to be, held *incommunicado* by the Pakistan military authorities, he, as so many others before him, is claimed to have "confessed", and on that basis (substantially, if not wholly) awarded the penalty of a death sentence, in like manner as others similarly sentenced by Pakistan's Military Courts.

118) Indeed, it defies credulity that Jadhav was in any position to conduct an effective defence of charges levelled against him, or even to retract his 'confession' or challenge the credibility of any confession asserted to have been made by Jadhav. Had consular access been provided "*without delay*", India would have been put into a position whereby it could have ensured Jadhav's safety and well-being, and ensure that he is in a position to effectively defend

himself – to whatever extent that may have been possible – albeit circumscribed by virtue of a trial being conducted by the Military Court. While these trials are conducted *in camera,* if access had been given, a consular officer could have been present in the course of the hearing, and thereby India would have been in a position to assess the fairness and impartiality of the presiding officer of the Military Court.

VII. ARTICLE 36 IS A FACET OF DUE PROCESS

119) Article 36 of the Vienna Convention recognises what is, and has since times immemorial, been considered a critical function of consuls, and has been understood as the protective function of consular engagement.

120) Article 36 serves to creates international obligations designed to assist a foreign national, who has been arrested or put on trial, to defend himself effectively in a foreign country.

121) International law recognises that one of the functions of diplomatic engagement, and thus an underlying theme of international law as it has evolved over the last century, is the recognition of the obligations of States based on elementary considerations of humanity, especially so, in times of peace.

122) In the 1949 Corfu Channel case, this Court found that Albania carried obligations to notify the existence of mine fields, for the benefit of shipping in general, in Albanian territorial waters. This obligation was derived from "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war".[43]

123) The obligations of States towards aliens features as a recurrent theme of international law, in the evolution of the jurisprudence of International law.

124) In the Barcelona Traction, Light and Power Company case, this Court expostulated the principles that created obligations *erga omnes* upon States in relation to foreign investments or foreign nationals. This Court, held *"…When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis*

[43] *Corfu Channel Case, Judgment of April 9th, 1949: ICJ Reports 1949, p.4,* p.22.

another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes".[44] It then added *"…"Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character".*[45]

125) In paragraph 37, this Court said that "In seeking to determine the law applicable to this case, the Court has to bear in mind the continuous evolution of international law. Diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign, a fact of which the general law on the subject has had to take cognizance in order to prevent abuses and friction. From its origins closely linked with international commerce, diplomatic protection has sustained a particular impact from the growth of international economic relations, and at the same time from the profound transformations which have taken place in the economic life of nations…".[46]

126) In the context of human rights, this Court held "*With regard more particularly to human rights, to which reference has already been made in paragraph 34 of this Judgment, it should be noted that these also include protection against denial of justice***.** *However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of*

[44] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3,* para 33.

[45] *Ibid.,* para 34.

[46] *Ibid.,* para 37.

infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim."[47]

127) The protection of human rights generally, and specifically in the context of aliens has also been a significant strand in the evolving jurisprudence of international law.

128) The Preamble to the Universal Declaration of Human Rights is instructive. It states,

"*Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,*

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

[47] *Ibid.*, para 91.

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge….".

129) This is a recognition of the universality of human rights, and the recognition that basic rules of what is generally understood as due process, has evolved into principles of international law binding on all States *erga omnes*.

130) The ICCPR, in 1966, was another landmark step in the acceptance of common baseline standards of fundamental and basic human rights, in all citizens of all countries, necessary to enable human beings to live with dignity.

131) The Vienna Convention fills in a gap at the multilateral level, almost at a universal level, by guaranteeing the facility of consular access to foreign nationals who have been put on trial in a foreign country. The principles of due process, which have now been expressly recognised in the ICCPR can fairly be considered to be a universal obligation binding upon all States *erga omnes*. In relation to a foreign national, consular practice, which has stood the test of time, has established the need for consular access to render meaningful the right to a fair and impartial trial, and the right to defend oneself against criminal charges, including the right to engage a lawyer of one's own choice in a foreign country.

132) The observations of this Court in the Tehran case, on this dimension of the law bear repetition *"…Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights…".*[48] This general principle would apply not merely to members of the diplomatic corps, but to all human beings, and in the present context, to nationals of the sending State.

[48] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3,* para 91. Extracted *in extenso* in Paragraph 80 above.

133) The nature of the impact of the intimidating environment of the military establishment when it detains and tries civilians is obvious from the fact that 95% of those arrested "confess" to the gravest of crimes – including nationals of Pakistan. The effect of such an environment upon a national of India, who is kidnapped from Iran and appears in Pakistan, and then held *incommunicado* by the Military establishment would require no proof; but if any proof was necessary, then it is available in ample measure in the "confession" so promptly made to the authorities, that it was recorded even before the First Information Report was registered.

134) When detained in a hostile environment, and subjected to military pressure of the kind which has led Jadhav to "confess" in manner which has resulted in granting of a death sentence, consular access which would have allowed Jadhav access to people from his home country, and to share his miseries as it were, would have been relief at a humanitarian level. Consular access would also have enabled officers of the consular post to oversee his physical and mental state of being, apart from providing him with assistance in mounting a defence to "charges" levelled against him. Article 36 of the Vienna Convention reflects the nature and character, as well as the importance, on the level of humanitarianism, of the rights created, and the corresponding obligations cast.

135) As was observed by this Court of the Geneva Convention[49], so can it be said about the Vienna Convention, that in some respects the principles enshrined were a development, and in other respects no more than expression of the fundamental principles of humanitarian law and diplomacy. These measures were designed to put in place "… an instrument essential for effective co-operation in the international community, and for enabling States, irrespective

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49 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p.14*, para 218.

of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means".[50]

136) Consistent with these general principles, in the cases dealing with Article 36 violations, this Court has recognised, that Article 36:

a) Creates not merely a right in favour of the party States, but also creates a right in favour of the individual.
b) This right is not diluted by allegations made against the sending State, whether of similar or other violations, including any general failure of creating a system in consonance with obligations of the sending State.
c) The obligations under Article 36 cast upon the receiving State are not conditional upon the sending State complying with requests for cooperation in investigation of crimes et cetera.
d) These rights are intended to ensure against denial of justice, and are not circumscribed by or subject to any rule of exhaustion of remedies.
e) The breach of Article 36 would entitle the sending State to seek remedies, based on international principles of State responsibility, including those by way of full restitution and reparation.
f) Any disputes relating to the violation of these rights would fall within the jurisdiction of this Court under Article 36 paragraph 1 of the Statute by virtue of the provisions of the Optional Protocol.

137) In a judgment delivered in 2010 in the *Diallo* case[51], this Court considered a challenge to the actions of the Democratic Republic of Congo in respect of the detention and expulsion of a national of the Republic of Guinea, in the backdrop of the rights and obligations under the ICCPR and the African Charter. This Court also considered allegations of the violation of Article 36 paragraph 1 (b) of the Vienna Convention.

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[50] *Case Concerning United States Diplomatic and Consular Staff in Tehran, Request for the indication of Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979,* p. 19.

[51] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010, p.639*

138) In the context of Article 36, this Court held that *"These provisions, as is clear from their very wording, are applicable to any deprivation of liberty of whatever kind, even outside the context of pursuing perpetrators of criminal offences. They therefore apply in the present case, which the DRC does not contest."*[52] This is consistent with the absolute nature of the obligation, as also the fundamental principle of due process, that the greater the severity of the charge, the greater the need for punctilious compliance with the procedural safeguards recognised as elements of the due process.

139) In any event, as held by this Court in the *Diallo* case "*…. It is true, as the DRC has pointed out, that Article 13 of the Covenant provides for an exception to the right of an alien to submit his reasons where "compelling reasons of national security" require otherwise. The Respondent maintains that this was precisely the case here. However, it has not provided the Court with any tangible information that might establish the existence of such "compelling reasons". In principle, it is doubtless for the national authorities to consider the reasons of public order that may justify the adoption of one police measure or another. But when this involves setting aside an important procedural guarantee provided for by an international treaty, it cannot simply be left in the hands of the State in question to determine the circumstances which, exceptionally, allow that guarantee to be set aside…. "*.[53]

140) These observations would establish that Article 36, in contrast with ICCPR, provides for no exceptions, and thus creates obligations that are absolute in nature. Even where States are allowed to depart from obligations for compelling reasons of national security, this Court insisted that the State satisfied, when challenged, circumstances that would justify denial of guaranteed rights – the State is not the sole arbiter of its obligations under the ICCPR

141) Where, therefore, in contrast to obligations that recognise exceptions, an obligation under Article 36, paragraph 1 does not recognise exceptions, it

[52] *Ibid*., para 91.

[53] *Ibid.,* para 74.

cannot be side-stepped by the State, on self-serving allegations of national security. Any attempt at a departure from this obligation, whatever the circumstances, would necessarily constitute a breach of the Vienna Convention.

142) Citing Article 13 of the ICCPR and Article 12 of the African Charter (both of which deal with expulsion of a national of another state), this Court observed – *"It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with "the law", in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law. However, it is clear that while "accordance with law" as thus defined is a necessary condition for compliance with the above-mentioned provisions, it is not the sufficient condition. First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; second, an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case."*[54]

143) In interpreting the ICCPR, this Court cited the jurisprudence of the Human Rights Committee established by the ICCPR to ensure compliance with that instrument by the State parties. It also cited the interpretation by the European Court of Human Rights and the Inter-American Court of Human Rights.

144) This approach also harmonises with, and fulfils the objects of, the Universal Declaration of Human Rights. The inalienable rights recognised in Articles 5, 9 and 10 are non-derogable. Article 5 provides that "…*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*…". Article 9 provides that "…*No one shall be subjected to arbitrary arrest, detention or exile*…". Article 10 provides that "…*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal,*

[54] *Ibid.,* para 65.

in the determination of his rights and obligations and of any criminal charge against him…".

145) The Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment adopted by the General Assembly Resolution 43/173 of 9 December 1988[55] recognises consular access in Principle 16. Paragraph 2 of Principle 16 provides that "if a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national of which is otherwise entitled to receive such communication in accordance with international law…". The language of this provision suggests that Article 36 had, by 1988, been considered a principle of "international law".

146) The 1985 Declaration on The Human Rights of Individuals Who Are Not Nationals of The Country in Which They Live[56] recognises in Article 10 that *"any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national…".*

147) While the Vienna Convention stands out as the first exposition of the standards of conduct in relation to the treatment to be meted out to nationals of other states, the evolution of the principles of international law with an increasing accent on due process as a fundamental facet of human rights finds resonance in later instruments by way of treaties as well as resolutions of the General Assembly and of other bilateral or multilateral bodies charged with the duty of taking measures for the protection of human rights. It could be stated without fear of contradiction that consular access has become an indispensable feature, recognising its significance as being fundamental to affording a fair process to a national of a foreign state.

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[55] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly on 9 December 1988, A/RES/43/173.

[56] Declaration on the Human Rights of Individuals Who are not Nationals on the Country in Which they Live, adopted by the UN General Assembly on 13 December 1985, A/RES/40/144.

148) It is significant that on its plain language Article 36 admits of no exceptions. The reason is obvious – there is no circumstance which justifies a deviation from the principles of due process which ensures a fair trial. Article 36 makes this right a living reality in relation to aliens. Denying the rights under Article 36 would seriously jeopardise due process rights themselves. International institutions have been at pains to remind States of their obligation to adhere to the due process standards even in the matter of investigating terrorism-related offences and prosecuting the offenders. Conventions dealing with terrorism have expressly recognised consular access, reiterating and reinforcing the criticality of a provision such as Article 36. As far as states which have signed and ratified the Vienna Convention are concerned, their obligation under Article 36 is untrammelled by the seriousness of the accusations against an accused. On the contrary, the more serious the allegations, the greater the need for procedural fairness.

149) Article 36, by the mechanism of consular access creates a machinery in which consular officers of the sending State can ensure that the rights of the nationals of their States against torture, arbitrary arrest and a fair and public trial are fully respected. [57]

150) The remedies for violation of Article 36, and the principles of State Responsibility in their application to violations of Article 36 are premised on Article 36 constituting a vital element in the rubric of due process, and as a corollary, any violation of Article 36 results not just in a violation of a rule for conduct between two States, but may result, in the facts of a case, in a violation of the basic inalienable rights of human beings.

[57] The comment by the International Commission of Jurists on the culture of “confessions” in Military Trials in Pakistan, is eloquently stated.

VIII. JURISPRUDENCE OF INTER-AMERICAN COURT OF HUMAN RIGHTS

151) Article 36 has been interpreted and applied by the Inter-American Court of Human Rights (**IACtHR**) in a number of cases; these judgments are of considerable assistance in expounding the jurisprudence of Article 36, and its inextricable connection with the ICCPR specifically, and due process generally.

152) Over the decades, States have, apart from multilateral Treaties, supplemented the efforts of safeguarding human rights by entering into bilateral treaties that supplement overarching rights covered by multilateral Treaties, and have created institutions that resolve disputes arising out of these Treaties – for example, the IACtHR. The cross-pollination of jurisprudence of rights recognised across Treaties, and judgments of these institutions has enriched and advanced international law.

153) On 1 October 1999, the IACtHR rendered an Advisory Opinion on *"several treaties concerning the protection of human rights in the American States"*.[58] As noted by the Court – "*According to the requesting State, the application concerned the issue of minimum judicial guarantees and the requirement of the due process when a court sentences to death foreign nationals whom the host State has not informed of their right to communicate with and seek assistance from the consular authorities of the State of which they are nationals"*.[59]

154) The IACtHR analysed the Vienna Convention, dispelling the notion that the reference to the purpose of the privileges and immunities as being "not to benefit individuals" in the preamble, only refers to the individuals who perform consular functions – in other words, the privileges and immunities granted to consular officers were for the performance of their functions, and then went on to hold that "*The Court observes, on the other hand, that in the Case Concerning United States Diplomatic and Consular Staff in Tehran, the United States linked Article 36 of the Vienna Convention on Consular*

[58] *Advisory Opinion OC-16/99 of October 1, 1999, "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law",* para 1.

[59] *Ibid.,*para 1.

Relations with the rights of the nationals of the sending State. The International Court of Justice, for its part, cited the Universal Declaration in the respective judgment".[60] The IACtHR also held that *"Mexico, moreover, is not requesting the Court's interpretation as to whether the principal object of the Vienna Convention on Consular Relations is the protection of human rights; rather, it is asking whether one provision of that Convention concerns the protection of human rights. This is an important point, given the advisory jurisprudence of this Court, which has held that a treaty can concern the protection of human rights, regardless of what the principal purpose of that treaty might be. Therefore, while some of the comments made to the Court concerning the principal object of the Vienna Convention on Consular Relations to the effect that the treaty is one intended to 'strike a balance among States' are accurate, this does require that the Treaty be dismissed outright as one that may indeed concern the protection of an individual's fundamental rights in the American hemisphere"*.[61]

155) The IACtHR held, in addition, that the *"...provision recognising consular communication serves a dual purpose: that of recognising a State's right to assist its nationals through the consular officer's actions and, correspondingly, that of recognising the co-relative right of the national of the sending State to contact the consular officer to obtain that assistance."*[62] In paragraph 82, the IACtHR noted *"The bearer of the rights mentioned in the preceding paragraph, which the international community has recognized in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, is the individual. In effect, this article is unequivocal in stating that rights to consular information and notification are "accorded" to the interested person. In this respect, Article 36 is a notable exception to what are essentially States' rights and obligations accorded elsewhere in the Vienna Convention on Consular Relations. As interpreted by this Court in the present Advisory*

[60] *Ibid.,* para 75.

[61] *Ibid.,* para 76.

[62] *Ibid.,* para 80.

Opinion, Article 36 is a notable advance over international law's traditional conceptions of this subject."[63]

156) The conclusions arrived at by the IACtHR on this issue were as follows: - *"The Court therefore concludes that Article 36 of the Vienna Convention on Consular Relations endows a detained foreign national with individual rights that are the counterpart to the host State's correlative duties. This interpretation is supported by the article's legislative history. There, although in principle some States believed that it was inappropriate to include clauses regarding the rights of nationals of the sending State, in the end the view was that there was no reason why that instrument should not confer rights upon individuals"*[64] and that *"The Court must now consider whether the obligations and rights recognized in Article 36 of the Vienna Convention on Consular Relations concern the protection of human rights."*[65]

157) The IACtHR then proceeded to examine the question whether non-observance of the right of information violates the rights under Article 14 of the ICCPR, Article 3 of the Charter of the Organization of American States (OAS) and Article II of the American Declaration of the Rights and Duties of Man. It cited the Advisory Opinion of this Court in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* on the principles of construction of treaties where this Court held that *"[...] the Court must take into consideration the changes which have occurred in the supervening half-century, and <u>its interpretation cannot remain unaffected by the subsequent development of law</u> [...] 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. In the domain to which the present proceedings relate, the last fifty years [...] have brought important developments [...]. In this domain, as elsewhere, the corpus juris gentium has*

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[63] *Ibid.,* para 82.

[64] *Ibid.,* para 84.

[65] *Ibid.,* para 85.

been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore."[66]

158) The IACtHR traced the genesis of the ICCPR, insofar as it recognises the right to due process of law "from the inherent dignity of the human person". It held that *"In the opinion of this Court, for "the due process of law" a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants…"*.[67] It also held – *"To accomplish its objectives, the judicial process must recognise and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defence of one's interests. Absent those countervailing measures, widely recognised in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages"*.[68]

159) In words that resonate, in the present case, the Court held *"In the case to which this Advisory Opinion refers, the real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance. In such circumstances, it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of defending oneself and the proceedings conducted in the respective cases.."*.[69] It further held that *"…the individual rights under analysis in this Advisory Opinion must be recognised and counted among the minimum guarantees essential to providing foreign*

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66 *Ibid.,* para 113; *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 ad 31).*

67 *Ibid.,* para 117.

68 *Ibid.,* para 119.

69 *Ibid.,* para 121.

nationals the opportunity to adequately prepare their defence and receive a fair trial."[70].

160) Citing the approach taken in a number of cases involving the death penalty, by the United Nations Human Rights Committee, the IACtHR noticed that the view of the Committee was that *"if the guarantees of the due process established in Article 14 of the ICCPR were violated, then so, too, were those of Article 6.2 of the Covenant if sentence was carried out."*[71]. Consistent with this approach, the IACtHR held in paragraph 135 to 137 as follows:

"135. This tendency, evident in other inter-American and universal instruments, translates into the internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases. It is obvious that the obligation to observe the right to information becomes all the more imperative here, given the exceptionally grave and irreparable nature of the penalty that one sentenced to death could receive. If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life.

136. Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result.

137. For the foregoing reasons, the Court concludes that non observance of a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be

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[70] *Ibid.,* para 122.

[71] *Ibid.,* para 130.

"arbitrarily" deprived of one's life, in the terms of the relevant provisions of the human rights treaties (eg the American Convention on Human Rights, Article 4; the International Covenant on Civil and Political Rights, Article 6) with the juridical consequences inherent in a violation of this nature, i.e., those pertaining to the international responsibility of the State and the duty to make reparations."[72]

161) Consistent with this approach, the Inter-American Commission on Human Rights (IACHR) has treated any violation of Article 36 (1)(b) of the Vienna Convention as the failure of due process. Illustratively, in *Ramon Martinez Villareal v. United States*: -

"*81. The Commission therefore concludes that the State failed to inform Mr. Martinez Villareal of his rights under Article 36(1)(b) of the Vienna Convention on Consular Relations and likewise failed to inform the Mexican consulates of Mr. Martinez Villareal's arrest and subsequent prosecution as required under that provision.*

…

83. These circumstances strongly suggest that the quality of due process afforded to Mr. Martinez Villareal suffered as a consequence of his status as a foreign national, a circumstance that compliance with the notification requirements under Article 36(1)(b) of the Vienna Convention on Consular Relations may well have mitigated. The Commission also cannot find that the standard of due process owing to Mr. Martinez Villareal under the American Declaration and under general principles of international law was satisfied based upon the State's contentions in this matter as to the possible state of knowledge or involvement of Mexican consular officials.

…

97. As to the Commission's competence in relation to the Vienna Convention on Consular Relations, it was clearly determined in the merits decision in this matter that the Commission may properly consider the extent to which a state party to the Vienna Convention on Consular

72 *Ibid.*, para 135-137.

Relations has given effect to the requirements of Article 36 of that treaty, insofar as these requirements constitute part of the corpus juris gentium of international legal rules applicable in evaluating that state's respect for the rights under the American Declaration. As the Commission concluded in the circumstances of Mr. Martinez Villareal's complaint, non-compliance with the obligation under Article 36 can have a direct and deleterious effect on the quality of due process afforded to a defendant and thereby call into question compliance with the requirements of Articles XVIII and XXVI of the American Declaration as well as similar provisions of other international human rights instruments."[73]

And in *Cesar Fierro v. United States*,

> *"30. The claim raised by the Petitioners before this Commission is the contention that the United States failed to inform Mr. Fierro upon his arrest of his right to consular notification as provided for under Article 36 of the Vienna Convention on Consular Relations, as well as correspondent customary international law and U.S. domestic law, and is thereby responsible for violations of Mr. Fierro's rights under Articles II, XVIII and XXVI of the American Declaration. As described above, the Petitioners argue that Mr. Fierro was precluded by the August 4 and October 12, 1994 decisions of the Texas Court of Criminal Appeals from pursuing this claim before the Texas State courts by limiting his proceedings to issues that did not include the consular notification allegation and that the U.S. Federal Courts precluded Mr. Fierro from raising any claims based upon limitations in the Anti-Terrorism and Effective Death Penalty Act of 1996. The judicial decisions on the record before the Commission support the Petitioners' contentions in this regard. On this basis, the Petitioners argue that Mr. Fierro should be considered to have exhausted the domestic remedies available to him concerning his consular notification issue, or alternatively that he has been precluded from pursuing that claim before the domestic courts.*
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> …

[73] *Ramon Martinez Villareal v. United States, Case 11.753, Report No.52/02, Inter-Am. C.H.R, Doc.5 rev.1 at 821 (2002),* para 81, 83, 97.

40. Based upon the foregoing, the Commission concludes that Mr. Fierro's right to information under Article 36(1)(b) of the Vienna Convention on Consular Relations constituted a fundamental component of the due process standards to which he was entitled under Articles XVIII and XXVI of the American Declaration, and that the State's failure to respect and ensure this obligation constituted serious violations of Mr. Fierro's rights to due process and to a fair trial under these provisions of the Declaration.

…

41. Accordingly, should the State execute Mr. Fierro based upon the criminal proceedings for which he is presently convicted and sentenced, the Commission finds that this will constitute an arbitrary deprivation of Mr. Fierro's life contrary to Article I of the Declaration.

…

66. Upon considering the State's observations concerning the Commission's conclusions and recommendations, the Commission wishes to state that it is encouraged by the measures taken by the United States to enhance compliance with its obligations under the Vienna Convention on Consular Relations regarding consular notification and access. To this extent, the State appears to have taken some measures to implement the Commission's second recommendation, as reproduced below. At the same time, the Commission cannot accept the State's contention that compliance with a foreign national's right to consular notification and assistance is irrelevant to the due process and fair trial protections under international human rights instruments, including the American Declaration. As the Commission has previously held, fundamental due process protections, such as the right to prior notification in detail of the charges against a defendant and the right to effective counsel, are of such a nature that, in the absence of access to consular assistance, a foreign national could be placed at a considerable disadvantage in the context of a criminal proceeding taken against him or her by a state. Each case must be evaluated on its individual circumstances. Once a failure to inform a foreign national of his right to consular notification and assistance has

been proven, however, a formidable presumption of unfairness will arise unless it is established that the proceedings were fair notwithstanding the failure of notification. While the State contends in the present case that the protections provided for in its legal system are among the strongest and most expansive in the world, this does not foreclose situations in which access to consular assistance may have an impact on the fairness of a foreign national's criminal proceedings in the United States. This could arise, for example, in relation to a defendant's ability to gather mitigating evidence or other relevant information from his or her home country."[74]

162) The history of the *Medellin* case presents an important example of the significance of Article 36 vis-à-vis due process standards. In that case, the United States argued that the domestic law provides stringent due process protections not dependent on consular notification, access or assistance, and the guarantees and the domestic law are amongst the strongest and most expansive in the world. Medellin also moved the US Supreme Court, and by its judgment of 25 March 2008, the US Supreme Court, although recognising that the *Avena* judgment creates an international obligation on the part of the United States, held that it does not constitute binding domestic law in the absence of implementing legislation, and on that basis declared as unconstitutional the President's memorandum seeking to enforce the *Avena* judgment. The IACHR, nonetheless, held that:

"132. Based upon the foregoing, the Commission concludes that the State's obligation under Article 36.1 of the Vienna Convention on Consular Relations to inform Messrs. Medell.n, Ramírez Cardenas and Leal García of their right to consular notification and assistance constituted a fundamental component of the due process standards to which they were entitled under Articles XVIII and XXVI of the American Declaration, and that the State's failure to respect and ensure this obligation deprived them of a criminal process that satisfied the minimum standards of due process and a fair trial required under Articles XVIII and XXVI of the Declaration.

[74] *Cesar Fierro v. United States, Case 11.331, Report No.99/03, Inter-Am.C.H.R., OEA/Ser./L/V/II.114 Doc.70 rev. 1 at 769 (2003),* para 30, 40, 41, 66.

...

155. In the instant case, the Commission has established that the State is responsible for violations of its obligations under Articles XVIII and XXVI of the American Declaration, based upon its failure to provide the victims with competent legal representation in the course of the criminal proceedings, and its failure to afford Messrs. Medellín, Ramírez Cardenas and Leal García their right to consular information under Article 36.1.b of the Vienna Convention. Therefore, the Commission finds that the imposition of the death penalty in the instant case involves an arbitrary deprivation of life, prohibited by Article I of the Declaration. Additionally, once the State executed Mr. Medellín pursuant to his death sentence, it committed a deliberate and egregious violation of Article I of the American Declaration; likewise, should it execute Messrs. Ramírez Cardenas and Leal García, it would also commit the same violation."[75]

163) On that basis, the IACHR issued a declaration that *"Vacate the death sentences imposed and provide the victims with an effective remedy, which includes a new trial in accordance with the equality, due process and fair trial protections, prescribed under Articles I, XVIII and XXVI of the American Declaration, including the right to competent legal representation."*[76]

[75] *Report No. 90/09 Case 12.644, Admissibility and Merits (Publication) Medellin, Ramirez Cardenas and Leal Garcia, United States, August 7 2009,* para 132, 155.

[76] *Ibid.,* para 160.1.

IX. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

164) The Human Rights Committee in its 90th Session in Geneva in July 2007, discussed Article 14 of the ICCPR in General Comment No. 32. It said *"…the right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party….".*[77] It explained that *"The notion of a "tribunal" in Article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. Article 14, paragraph 1, second sentence, guarantees access to such tribunals to all who have criminal charges brought against them…."*[78] . Furthermore, "*The requirement of Independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature….."*[79] and "*… the tribunal must also appear to be a reasonable observer to be impartial…"*[80] The Committee noted the phenomenon of "faceless judges" and in that context observed that in such cases the accused suffer not only from the fact that the identity and status of the judges is not made known "*... But also from irregularities such as exclusion of the public or even the accused or their representatives from the proceedings; restrictions of the right to a lawyer of their own choice; severe restrictions or denial of the right to communicate with*

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[77] General Comment No. 32, Human Rights Committee, 90th Session, Geneva, 9-27 July 2007, para 9.

[78] *Ibid.,* para 18.

[79] *Ibid.,* para 19.

[80] *Ibid.,* para 21.

their lawyers, particularly when held incommunicado; threats to the lawyers; inadequate time for preparation of the case; or severe restrictions or denial of the right to summon and examine or have examined witnesses, including prohibitions on cross-examining certain categories of witnesses, e.g. police officers responsible for the arrest and interrogation of the defendant. Tribunals with or without faceless judges, in circumstances such as these, do not satisfy basic standards of fair trial and, in particular, the requirement that the tribunal must be independent and impartial."[81]

165) In paragraph 37, the Committee observed *"Second, the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing and to be informed of this right, as provided for by article 14, paragraph 3 (d), refers to two types of defence which are not mutually exclusive. Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf. At the same time, the wording of the Covenant is clear in all official languages, in that it provides for a defence to be conducted in person "or" with legal assistance of one's own choosing, thus providing the possibility for the accused to reject being assisted by any counsel. This right to defend oneself without a lawyer is, however not absolute. The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. However, any restriction of the wish of accused persons to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. Therefore, domestic law should avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel."*[82] The right of an accused to a lawyer for his defence, when being tried by a foreign

[81] *Ibid.,* para 23.

[82] *Ibid.,* para 37.

State, is given meaning by following the procedure of Article 36 of the Vienna Convention.

166) The evolution of jurisprudence of international law in this Court has had the underpinnings of human rights in their broader dimension, for in the ultimate analysis, good relations between the States, which make for conditions of peace and harmony, are conditions in which the human right to life, to live with dignity and enjoy those privileges so inherent to mankind, are considered inviolable.

167) Article 36 which crystallised into a multilateral treaty, a practice of the consular posts, is *concerned* with human rights, even if by itself it is not intended to create rights which can be characterised as human rights.

168) After the Treaty in 1963, human rights were crystallised in the ICCPR and States which have signed and ratified the Treaty should be judged by the standards of the covenants of that multilateral treaty. Pakistan also signed and ratified the ICCPR on 17 April 2008 and 23 June 2010 respectively. India acceded to the ICCPR on 10 April 1979.

X. INTERNATIONAL MINIMUM STANDARDS

169) The principles of international law, which have come to be considered as 'international minimum standards', are recognised by international bodies. Domestic laws and practices of States do not afford a defence, where the conduct of a State is such that it would violate international minimum standards of due process. The conduct of a State that can be considered to be cruel and inhuman would violate the minimum standard rule of international law.

170) In the words of the General Claims Commission in *United States v Mexico*[83] *(the Neer* case) the propriety of governmental acts should be put to the test of international standards, and the treatment of an alien would amount to an international delinquency where it is an outrage, in wilful neglect of duty, or is governmental action which is "…so *far short of international standards that every reasonable and impartial man would readily recognise its insufficiency*.".[84]

171) In *Roberts v United Mexican States*[85], the General Claims Commission held that "*… Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of the complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with the ordinary standards of civilisation…*"[86]

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[83] *L.F.H Neer and Pauline Neer (U.S.A) v United Mexican States (15 October 1926), Reports of International Arbitral Awards Volume IV pp. 60-66.*

[84] *Ibid.,* para 4.

[85] Harry Roberts (U.S.A) v United Mexican States (2 November 1926), Reports of International Arbitral Awards, Volume IV pp. 77-81.

[86] *Ibid.,* para 8.

172) In his essay on the Minimum Standard of Treatment of Aliens, Edwin Borchard[87] notes that "*due process of law has been to some extent internationalised by the fact that international tribunal have grown on the moors of the average and not of the crudest municipal practice…*"[88]. He says "*it is thus apparent that both in its substantive and procedural aspects international law, as evidenced by diplomatic practice and arbitral decision, has established the existence of an international minimum standard to which all civilised states are required to confirm under penalty of responsibility….*"[89] and adds "*… Fair courts, readily open to aliens, administering justice honestly, impartially, without bias of political control, seem essentials of international due process*"[90].

173) The ICCPR is clearly a "*law-making*" treaty that creates legal obligations and creates general norms framed as legal propositions to govern the conduct of the parties, not necessarily limited to that conduct *inter se*. The number of parties, the explicit acceptance of the rules of the treaty and the declaratory character of the provisions of a treaty "*combine to produce a powerful law creating effect*.[91]

174) In the arbitration award by the North American Free Trade Agreement (NAFTA) Tribunal in the case between *Pope and Talbot Inc v Government of Canada*[92] after considering the number of Bilateral Investment Treaties that had been negotiated over the decades, the Tribunal held "*therefore applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those*

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87 Edwin Borchard, 'The "Minimum Standard" of the Treatment of Aliens', [1940] 38 Michigan Law Review 4, page. 445.

88 *Ibid.,* page. 449.

89 *Ibid.,* page.456-7.

90 *Ibid.,* page 460.

91 Brownlie's Principles of Public International Law, Eighth Edition, James Crawford*,* page 31.

92 *Pope and Talbot Inc. v Government of Canada, Award in Respect of Damages of 31 May 2002, 41 I.L.M (2002), 1347.*

treaties."[93]. Citing the passage from the judgment of this Court in the case concerning *Elettronica Sicula S.p.A. (ELSI)*[94] the Tribunal held ".. *Arbitrariness is not so much something opposed to **a** rule of law, as something opposed to **the** rule of law*..."[95]. It held that "*the International Court of Justice has moved away from the Neer formulation ... That formulation leaves out any requirement that every reasonable and impartial person be dissatisfied and perhaps permits a bit less injury to the psyche of the observer, who need no longer be outraged, but only surprised by what the government has done. And, of course replacing the neutral "government action" with the concept of "due process" perforce makes the formulation more dynamic and responsive to evolving and more rigorous standards for evaluating what governments do to people and companies.".*[96]

175) The principles of the Vienna Convention and the ICCPR can, in view of their wide-spread acceptance, now be characterized as obligations *erga omnes*. Where States have signed and ratified both the Vienna Convention along with the Optional Protocol and the ICCPR, the rights under Article 14 of the ICCPR become inextricably interwoven, for the reason that the procedure under Article 36 (1) (b) creates a mechanism for the elements of due process, i.e. the right of an alien to defend himself in a foreign State after being duly informed of the charges and of the right to engage a lawyer of one's choice, to become a reality. A breach of Article 36 could entail a violation of Article 14 of the ICCPR.

176) Although the violation of Article 14 may not be amenable to a remedy by itself in all cases, where the violation of Article 36 has resulted in the violation of, or the aggravation of the violation of the right under Article 14 of the ICCPR, the principles of State Responsibility, as applied to the violation of Article 36 of the Vienna Convention must recognise this synergy between Article 14 and Article 36 and must therefore address the serious consequences of the violation of

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93 *Ibid.,* para 62.

94 *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy) [1989] ICJ Reports 1989, p.15.*

95 *Ibid.,* para 76.

96 *Pope and Talbot Inc. v Government of Canada, supra,* para 63-4.

Article 36, which results in the violation of, or an aggravation of the violation of, the right under Article 14 of the ICCPR.

177) Thus, the interplay between Article 36, the guarantees of the ICCPR, as well as the principles of due process, as minimum guaranteed human rights, would have a vital bearing on the fashioning of an appropriate remedy, so as to achieve the desired aim of *restitutio in integrum*.

178) Human rights, and measures in diverse treaties that were fashioned to fulfil the fundamental promise of human dignity have to be considered in their confluent effect, and where the conduct of a State results in violating a web of principles, some derived from treaties and some founded in principles of international law binding on States *erga omnes,* the principles of State Responsibility would have to be applied keeping in view the egregious nature of the violation of international law by the delinquent State, and not by considering the violation of individual treaties or obligations *erga omnes* in isolation.

179) When a remedy is fashioned to afford relief of effective restitution and reparation, a violation of Article 14 of the ICCPR, including a potential continuing violation, would be a very material factor to be taken into consideration. The restitution or relief that risks continuing a violation of Article 14 of the ICCPR or confer legitimacy on a delinquency is not consistent with international law and principles of State Responsibility.

XI. PAKISTAN MILITARY COURT

180) The Military Court that "tried" Jadhav was established under the Pakistan Army Act, 1952. Section 2 of the Act, has been amended from time to time, and in January 2015 Pakistan empowered military courts to try civilians for terrorism-related offences. The Pakistan Constitution was amended, as also were amendments made to the Army Act, 1952.[97]

181) The Courts Martial are in Chapter IX of the 1952 Act. Jadhav was tried by a Field General Court Martial (FGCM) established under Section 59 of the Army Act, 1952. Section 59 extends the jurisdiction of the Army Tribunals to civilians. A FGCM is convened by the Chief of Army Staff or an officer empowered by him, and must consist of not less than three officers (under section 84 read with section 87). The President of the FGCM is appointed by the authority convening the court (Section 102). The finding and sentence of a FGCM is confirmed by the convening officer. Appeals in the case of persons awarded a death sentence, under section 133B, lie to an appeal court, which either consists of the Chief of Army staff, or one or more officers designated by him, of or above the rank prescribed.

182) In the present case, the Chief of Army Staff has confirmed the sentence of the FGCM. The Adviser to the Prime Minister on Foreign Affairs (a high-ranking functionary of the Pakistan establishment) made a press statement on 14 April 2017, in which he also noted that *"first of all, political parties are unanimous that the award of death penalty after due process and overwhelming evidence to a foreign spy, who was not only carrying out subversive activities in Pakistan but actually promoting terrorism, is the correct decision"*.

183) It is clear that Jadhav's trial is a farce, and a mockery of the due process. Even before Jadhav could file an appeal, a high-ranking functionary of the Government in his statement endorsed the correctness of the sentence and the conviction. The appeal stated to be filed by Jadhav and its purported result has

[97] International Commission of Jurists, UN Human Rights Committee, 118th session, Geneva, from 17th October to 4th November 2016, para 5.

been a further travesty. It is not known whether Jadhav's mother's appeal was ever entertained; however, clearly an appeal filed to a Military Appellate Court subordinate to the Chief of Army Staff (who has already confirmed the sentence), filed without sight of the evidence of the charges, or the order convicting Jadhav, is not a remedy which accords with the due process standards.

184) The working of the Military Courts in Pakistan has been censured by the European Parliament. In a resolution of 15 June 2017, the European Parliament stated *"whereas military courts were authorised for two years while the civilian judiciary was supposed to be strengthened; whereas there has been little progress in developing the judiciary, and on 22 March 2017 the military courts were controversially reinstated for a further two-year period"*[98]. The Resolution goes on to state that the European Parliament "*deplores the use in Pakistan of military courts that hold hearings in secret and have civilian jurisdiction; insists that the Pakistani authorities grant access to international observers and human rights organisations for purposes of monitoring the use of military courts; called also for an immediate and transparent transition to independent civilian courts, in line with international standards on judicial proceedings; underscores that third country nationals brought to trial must be allowed access to consular services and protections;"*[99]

185) A report was submitted by the International Commission of Jurists to the UN Human Rights Committee for its consideration in its 118th Session in Geneva. Some of the significant observations in this report are as follows:

"8. International standards clarify that the Jurisdiction of military tribunals should be restricted solely to specifically military offences committed by military personnel: They should not, in general, be used to try civilians, or to try people for gross human rights violations.

…

[98] European Parliament Resolution of 15 June 2017 on Pakistan, notably the situation of human rights defenders and the death penalty (2017/2723(RSP)), para F.

[99] *Ibid*., para 5.

10. The Draft Principles Governing the Administration of Justice Through Military Tribunals, which were adopted by the former UN Sub-Commission on the Promotion and Protection of Human Rights in 2006, affirm that the Jurisdiction of military courts should be restricted to military personnel in relation to military offences. The principles also emphasize the right to a fair trial, including the right to appeal to civilian courts, and also that civilians accused of a criminal offence of any nature shall be tried by civilian courts.

…

12. International standards require that military courts, like all other courts, must be independent, impartial and competent, and must respect minimum guarantees of fairness, including those set out in Article 14 of the ICCPR.

13. Pakistani military courts are not independent and the proceedings before them fall far short of national and international fair trial standards. Judges of military courts are military officers who are a part of the executive branch of the State and do not enjoy independence from the military hierarchy - They are not required to have judicial or legal training, or even a law degree, and do not enjoy any security of tenure, which are prerequisites of Judicial competence and Independence.

…

*22***.** *For these reasons, the ICJ recommends that the following question be included in the List of Issues for the examination of Pakistan:*

Does Pakistan intend to renew the 21st Amendment after it expires in January 2017?

What measures has Pakistan taken since January 2015 to bolster the regular criminal justice system to effectively try terrorism-related cases?

How does the Government ensure people tried by military courts are guaranteed basic fair trial rights?

What measures has the Government taken to ensure military courts do not try children?

Do people tried by military courts have the right to a lawyer of their choice?

Do military courts issue judgments with detailed reasons explaining the courts' verdicts? Are such judgments open to public scrutiny?

What steps has the Government taken to ensure people tried by military courts are not subjected to torture and other ill-treatment while in the custody of military authorities?

…

38. The Pakistan Army Act bars civilian courts from exercising their appellate jurisdiction over decisions of military courts. Civilian courts in Pakistan have held they may use their extraordinary writ jurisdiction to hear cases related to military courts where "any action or order of any authority relating to the Armed Forces of Pakistan is…either coram non judice, mala fide, or without jurisdiction. Relying on this, Javed Iqbal Ghauri challenged his son's conviction and sentence on grounds of violation of the right to a fair trial. However, on 27 January 2016, the Lahore High Court dismissed his petition. The three-page order of the Court did not address the specific concerns raised by the petitioner, including allegations of enforced disappearance. The case is currently pending before the Supreme Court."[100]

186) A second submission was made in June 2017, in advance of the examination of the initial report, by the Commission to the UN Human Rights Committee, in its

[100] International Commission of Jurists, Un Human Rights Committee, 118th Session, Geneva, from 17th October to 4th November 2016, para 8,10,12,13,22,38.

120th session in Geneva in July 2017. Some of the significant observations in this report are as follows:

"*5. Pakistan's system of "military justice" has placed the country in clear violation of its legal obligations and political commitments to respect the right to life, the right to a fair trial, and the independence and impartiality of the judiciary.*

6. In the two years since military courts were initially empowered to try civilians in connection with purported terrorism-related offences, they have convicted at least 274 civilians, including, possibly, children, in opaque, secret proceedings. They have sentenced 161 civilians to death and at least 48 civilians have been hanged after trials that are grossly unfair. In all these cases, the government and military authorities have failed to make public information about the time and place of the trials; the specific charges and evidence against the defendants; as well as the judgments of military courts, including the essential findings, legal reasoning, and evidence on which the convictions were based.

…

12. Pakistani military courts are not independent and the proceedings before them fall far short of national and international fair trial standards. Military court judges are military officers who are a part of the executive branch of the State and do not enjoy independence from the military hierarchy. They are not required to have judicial or legal training, or even a law degree, and do not enjoy any security of tenure, which are prerequisites of judicial competence and independence.

…

15. At least 159 out of 168 civilians (95 per cent) whose convictions have been publicly acknowledged by the military have allegedly "confessed" to the charges. In the absence of adequate safeguards and independent review mechanisms in military proceedings, this very high rate of "confessions" raises serious questions about their voluntariness, including

with respect to the infliction of torture and other ill treatment to extract confessions.

16. States must ensure that no one is held secretly in detention, whether in officially recognized detention facilities or elsewhere. The Human Rights Committee has made it clear that secret detention under the Covenant is itself prohibited and "detainees should be held only in facilities officially acknowledged as places of detention. " The UN Committee against Torture has repeatedly stated that people accused of a crime must be detained and interrogated in officially recognized places of detention, and provision should also be made against incommunicado detention where suspects are deprived of communication with the outside world. In its Concluding Observations on Pakistan, the CAT Committee urged Pakistan to "ensure that no one is held in secret or incommunicado detention anywhere in the territory of the State party as detaining individuals in such conditions constitutes, per se, a violation of the Convention.

17. However, suspects tried by military courts were often kept in secret detention and family members, lawyers and NGOs did not have access to them; military proceedings were completely secret and closed to the public; and the right to appeal to civilian courts was not available. Without any access to the outside world, the detainees were at high risk of torture and ill treatment.

18. Family members of some of the people convicted by military courts petitioned the Supreme Court of Pakistan challenging, among other things, the lawfulness and voluntariness of the defendants' "confessions". In August 2016, however, the Supreme Court dismissed all petitions without considering the allegations of torture and other ill-treatment in any detail. The Court reiterated the limitations of its review jurisdiction, and noted that since the "confessions" were recorded by a magistrate and were not retracted, they stood "proved".

19. The ICJ notes that the Supreme Court's treatment of questions regarding the veracity and voluntariness of "confessions" in military trials is markedly different from its treatment of the same issues in the context of cases before civilian courts. Pakistani law and jurisprudence spanning decades clarify that in recording confessions, the magistrate has to observe a number of mandatory precautions. The fundamental logic of these precautions, in the words of the Supreme Court, is to shed "all signs of fear inculcated by the Investigating Agency in the mind of the accused and provide "complete assurance" to the accused that in case they are not making a confession voluntarily, they will not be handed over back to the police. The Supreme Court has also held that the confessions will have no legal or evidentiary worth if these directions are not followed.

…

21. Procedures of "military justice", however, made a complete mockery of these safeguards. Suspects were at all times in military custody, even after the magistrate recorded their "confessions". They also had no access to the outside world, further compounding their vulnerability to external pressure and coercion. And reportedly, some of them were subjected to enforced disappearance by military authorities as far back as 2010 and kept in secret detention in internment centers in the Federally Administered Tribal Areas (FATA) for many years before their military trials. In such circumstances, the "confessions" of suspects before military courts raise serious questions about their voluntariness and over the legitimacy of the manner in which they were obtained, including concerns of torture and other ill treatment.

…

25. It should be noted that under Pakistani law, the scope of judicial review is severely limited. Courts have also interpreted their review jurisdiction narrowly, and have held that "the High Court in its constitutional jurisdiction is not a Court of Appeal and hence is not empowered to analyze each and every piece of evidence in order to return

a verdict and "controversial questions of facts...cannot be looked into in this limited extraordinary writ jurisdiction.

…

*28***.** *Since January 2017, at least 161 people were given the death penalty after being convicted on the basis of "confession" evidence by military courts (see section above for concerns about the high rate of "confessions" and the circumstances in which such 'confessions" are likely to have been obtained). Out of the 161 people given the death penalty, at least 48 civilians have already been executed from January 2015 to May 2017. Under international law, including under Article 6 of the Covenant, the death penalty can only be carried out pursuant to a final judgment of a competent court. The safeguards to be afforded throughout the legal proceedings to ensure a fair trial in cases in which the death penalty may be imposed should be at least equal to those contained in Article 14 of the Covenant."*[101]

187) The UN Human Rights Committee considered these reports and adopted concluding observations some of which are of relevance and are as follows:

"*23***.** *The Committee is concerned at the extension of the jurisdiction of military courts to cases transferred from Anti-Terrorism Courts and to persons detained under the Actions (in Aid of Civil Power) Regulation. The Committee is also concerned that the courts have convicted at least 274 civilians, allegedly including children, in secret proceedings and sentenced 161 civilians to death. It is also concerned that about 90 percent of convictions are based on confessions; that the criteria used for the selection of cases to be tried by these courts are not clear; that defendants are not given the right to appoint legal counsel of their own choosing in practice or an effective right to appeal in the civilian courts; and that the charges against the defendants, the nature of evidence, and written judgments explaining the reasons for conviction are not made public. It is further concerned that the military courts allegedly convicted at least five*

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[101] International Commission of Jurists, UN Human Rights Committee, 120th Session, Geneva, 3rd to 28th July 2017, para 5,6,12,16,17,18,19,21,25,28.

"missing persons" whose cases were being investigated by the Commission of Inquiry on Enforced Disappearances (Arts. 2, 6, 7, 9, 14 and 15).

*24**.** The State party should (a) review the legislation relating to the military courts with a view to abrogating their jurisdiction over civilians as well as their authority to impose the death penalty; (b) reform the military courts to bring their proceedings into full conformity with Articles 14 and 15 of the Covenant to ensure a fair trial.*

*25**.** The Committee is concerned that the domestic legislation fails to provide a definition of torture and to criminalize it in compliance with Article 7 of the Covenant and international standards; that torture is allegedly widely used by the police, military and security forces, and intelligence agencies; and that allegations of torture are not promptly and thoroughly investigated and perpetrators are rarely brought to justice (Arts. 2, 7, 14 and 15)*

*26**.** The State party should (a) amend its laws to ensure that all elements of the crime of torture are prohibited in accordance with article 7 of the Covenant and to stipulate sanctions for acts of torture that are commensurate with the gravity of the crime; (b) ensure prompt, thorough and effective investigations into all allegations of torture and ill treatment, prosecute and, if convicted, punish the perpetrators, with penalties commensurate with the gravity of the offence, and provide effective remedies to victims, including rehabilitation; (c) ensure that coerced confessions are never admissible in legal proceedings; (d) take all measures necessary to prevent torture including by strengthening the training of judges, prosecutors, the police and military and security forces."*[102]

188) The concerns of human rights violations imminent in Military Courts trying civilians has been the subject matter of reports of various organisations. The Special Rapporteur on the Independence of Judges and Lawyers tendered a

[102] Human Rights Committee, Concluding Observations on the Initial Report of Pakistan, Adopted by the Committee at its 120th Session (3-28 July 2017), para 23-26.

report which was transmitted to the General Assembly in its 68th session in August 2013. Some of the observations in this report are significant. They are as follows:

"1. The present report is submitted in accordance with resolution 17/2 of the Human Rights Council.

...

13. Issues relating to the establishment and functioning of military tribunals lie at the core of the Special Rapporteur's mandate. Both the current Special Rapporteur and her predecessor, Leandro Despouy, have paid considerable attention to the question of the establishment and operation of military and special tribunals, in particular for the trial of terrorism-related cases (See A/HRC/8/4, A/HRC/11/41, A/HRC/20/19, E/CN.4/2004/60, E/CN.4/2005/60, A/61/384, A/62/207 and A/63/271).

14. The Special Rapporteur has observed that the administration of justice through military tribunals raises serious concerns in terms of access to justice, impunity for past human rights abuses, the independence and impartiality of military tribunals and respect for the fair trial rights of the accused.

15. In the present report, the Special Rapporteur addresses these concerns and proposes a number of solutions that are premised on the view that States that establish military tribunals should ensure that such tribunals are an integral part of the general judicial system and function with competence, independence and impartiality, guaranteeing the exercise and enjoyment of human rights, in particular the right to a fair trial and the right to an effective remedy. Also, their jurisdiction should be restricted to offences of a military nature committed by military personnel.

...

20. Over time, there has been an increasing tendency to curb the jurisdiction of military tribunals. The traditional model of military justice, according to which the person who gives the orders sits in judgment, has

progressively undergone important changes, with the result that military tribunals have increasingly been incorporated, as a specialized branch, into the general justice system. Several countries have abolished the operation of military tribunals in peace time altogether and transferred the responsibility for adjudicating alleged wrongdoings by military personnel to the ordinary courts and/or disciplinary bodies.

…

*31**.** Sometimes, the personal jurisdiction of military tribunals extends to include civilians who are assimilated to military personnel by virtue of their function and/or geographical presence or the nature of the alleged offence. These may include civilians who are employed by the armed forces or are stationed at or in proximity of a military installation, persons who have committed crimes that are treated as military offences and persons who have committed crimes in complicity with military personnel. In some countries, cases concerning terrorism and other serious crimes against the State are also referred to military tribunals.*

…

*38**.** The principle of the separation of powers requires that military tribunals be institutionally separate from the executive and the legislative branches of power so as to avoid any interference, including by the military, in the administration of justice. In this regard, principle 13 of the draft principles governing the administration of justice through military tribunals states that military judges should have a status guaranteeing their independence and impartiality, in particular in respect of the military hierarchy. In the commentary to this principle, it is noted that the statutory independence of military judges vis-å-vis the military hierarchy must be strictly protected, avoiding any direct or indirect subordination, whether in the organization and operation of the system of justice itself or in terms of career development for military judges (E/CN.4/2006/58, para. 46).*

…

46. The Special Rapporteur on the independence of judges and lawyers has stated on several occasions that using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism is a regrettably common practice that runs counter to all international and regional standards and established case law (see, for example, E/CN.4/2004/60, para. 60). This observation is also reflected in the findings of other special procedures mandate holders.

47. International human rights treaties do not address the trial of civilians by military tribunals explicitly. Nevertheless, a number of soft law instruments and the jurisprudence of international and regional mechanisms show that there is a strong trend against extending the criminal jurisdiction of military tribunals over civilians.

…

49. In line with this position, principle 5 of the draft principles governing the administration of justice through military tribunals states that military courts should, in principle, have no jurisdiction to try civilians and that, in all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts. In the commentary to that principle, it is noted that the practice of trying civilians in military tribunals presents serious problems as far as the equitable, impartial and independent administration of justice is concerned, and is often justified by the need to enable exceptional procedures that do not comply with normal standards of justice (see E/CN.4/2006/58, para. 20).

50. A number of other international instruments also recommend that States restrict the jurisdiction of military tribunals over civilians in favour of ordinary jurisdiction.

…

74. The right of the accused to legal representation of his or her choice assumes particular relevance with regard to proceedings before military

tribunals. In line with the International Covenant on Civil and Political Rights, principle 15 (e) of the draft principles governing the administration of justice through military tribunals states that everyone charged with a criminal offence has the right to defend himself or herself in person or through legal assistance of his or her own choosing and the right to be informed of the right to counsel and to receive legal assistance if he or she does not have sufficient means and the interests of justice so require.

…

85. ***In most countries where a military justice system exists, persons convicted of a military crime have the right to appeal the conviction before a higher tribunal, either a military or a civilian court of appeal. Sentences handed down by courts of second instance may be appealed further before the supreme court, which is in some cases integrated by military personnel. In some countries, the decisions of military tribunals cannot be appealed and the only remedy available is recourse to a court of cassation, where there is one.***

86. The integrity of the justice system is a precondition for democracy and the rule of law. The justice system must be structured on the pillars of independence, impartiality, competence and accountability in order for the principles of independence of the judiciary and the separation of powers can be duly respected." [103]

189) The Human Rights Committee has also had occasion to deal with complaints in relation to trial by Military Courts. In a complaint relating to an accused tried in Cameroon, the Human Rights Committee made the following observations,
"7.5 The Committee notes the State party's argument that the author's trial was conducted according to the legislation in force and that he benefited from an official interpreter during the hearings. It also notes the author's argument that the court was not independent, that he had little

[103] Note by the Secretary General, General Assembly (A/68/285) 7 August 2013, para 1,13,14,15,20,31,38,46,47,49,50,74,85,86.

opportunity to communicate with his lawyer, who had no access to the indictment and was therefore not able to prepare his defence adequately, and that the written evidence on which the indictment was based was not produced in court. The Committee recalls its general comment No. 32, in which it considers that the State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate for the task and that recourse to military courts is unavoidable. The State party must further demonstrate how military courts ensure the full protection of the rights of the accused pursuant to article 14. In the present case, the State party has not shown why recourse to a military court was required. In commenting on the gravity of the charges against the author, it has not indicated why the ordinary civilian courts or other alternative forms of civilian court were inadequate for the task of trying him. Nor does the mere invocation of conduct of the military trial in accordance with domestic legal provisions constitute an argument under the Covenant in support of recourse to such courts. The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14. The Committee concludes that the trial and sentencing of the author by a military court discloses a violation of article 14 of the Covenant."[104]

190) In a similar complaint relating to Uzbekistan, the Human Rights Committee made the following observations,

"9.3 The Committee has also noted the author's claim that her son was never brought before a judge or other officer authorized by law to exercise judicial power in order to verify the legality of his arrests and placement in pre-trial detention, but that the decisions to have him arrested and detained were taken by prosecutors only. The Committee recalls its established jurisprudence, according to which article 9, paragraph 3, of

[104] *Akwanga v Cameroon* (1813/08), para 7.5.

the Covenant is intended to bring the detention of a person charged with a criminal offence under judicial control and recalls that it is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the present case, the Committee is not satisfied that the public prosecutor may be characterized as having the institutional objectivity and impartiality necessary to be considered an ―officer authorized to exercise judicial power‖ within the meaning of article 9, paragraph 3. The Committee therefore concludes that there has been a violation of this provision."[105]

191) The Inter-American Court of Human Rights has also been critical of States which allow civilians to be tried by Military Courts. In *Petruzzi et al. v. Peru*, the IACtHR observed that,

"128. The Court notes that several pieces of legislation give the military courts jurisdiction for the purpose of maintaining order and discipline within the ranks of the armed forces. Application of this functional jurisdiction is confined to military personnel who have committed some crime or were derelict in performing their duties, and then only under certain circumstances. This was the definition in Peru's own law (Article 282 of the 1979 Constitution). Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.

[105] *Musaev v Uzbekistan* (1914-6/09), para 9.3.

129. A basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create "[t]ribunals that do not use the duly established procedures of the legal process […] to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

…

131. This Court has held that the guarantees to which every person brought to trial is entitled must be not only essential but also judicial. "Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency.

132. In the instant case, the Court considers that the military tribunals that tried the alleged victims for the crimes of treason did not meet the requirements implicit in the guarantees of independence and impartiality that Article 8(1) of the American Convention recognizes as essentials of due process of law.

133. What is more, because judges who preside over the treason trials are "faceless," defendants have no way of knowing the identity of their judge and, therefore, of assessing their competence. Compounding the problem is the fact that the law does not allow these judges to recuse themselves.

…

161. The Court observes, as it did earlier (supra 134), that proceedings conducted in the military courts against civilians for the crime of treason violate the guarantee of the competent, independent and impartial tribunal previously established by law, recognized in Article 8(1) of the Convention. The right to appeal the judgment, also recognized in the Convention, is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse. For a true review of the judgment, in the sense required by the Convention, the higher court must have the jurisdictional

authority to take up the particular case in question. It is important to underscore the fact that from first to last instance, a criminal proceeding is a single proceeding in various stages. Therefore, the concept of a tribunal previously established by law and the principle of due process apply throughout all those phases and must be observed in all the various procedural instances. If the court of second instance fails to satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal previously established by law, then the phase of the proceedings conducted by that court cannot be deemed to be either lawful or valid. In the instant case, the superior court was part of the military structure and as such did not have the independence necessary to act as or be a tribunal previously established by law with jurisdiction to try civilians. Therefore, whereas remedies, albeit very restrictive ones, did exist of which the accused could avail themselves, there were no real guarantees that the case would be reconsidered by a higher court that combined the qualities of competence, impartiality and independence that the Convention requires."[106].

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[106] *Castillo Petruzzi et al. v. Peru* (1999), Series C No. 52, para 128,129, 131-133, 161.

XII. RESTITUTION

192) The protection of human rights is now generally recognised to be a fundamental aim of modern international law, and as a result, international human rights law has inevitably reduced the content of the reserved domain of State sovereignty. "…*No state can credibly claim that its treatment of those within its territory or jurisdiction is exclusively an internal matter*"[107]. As a precursor to human rights law, the law on diplomatic protection has played an important role in setting some benchmarks for the protection of individuals. From the international minimum standard to the ICCPR and beyond, international law has increasingly accommodated within its rubric, principles and standards that seek to further the cause of protection of human rights.

193) The Commentary on Remedies in International Human Rights Law notes that, "*The atrocities perpetrated during the Second World War brought about a fundamental change in the law. Today, concern for the promotion and protection of human rights is woven throughout the United Nations Charter, beginning with the preamble, which "reaffirm[s] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small…".*[108]

194) The principles of State Responsibility are now well entrenched. Attempts at codification of principles that would apply for fixing State Responsibility and fashioning remedies have been attempted by different institutions since the early 20th Century and on 31 May 2001, the International Law Commission (ILC) adopted the Articles on the Responsibility of States for Internationally Wrongful Acts **(ARSIWA).**

195) Although, the articles have not attained the status of a Convention, they are *"…an active and useful part of the process of international law. They are considered by courts and commentators to be in whole or in large part an*

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[107] *Remedies in International Human Rights Law*, Third Edition, Dinah Shelton, page 1.

[108] *Ibid.,* page 7.

accurate codification of the customary international law state responsibility …".[109]

196) In the *Bosnian Genocide* case, this Court noted that *"The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed lex specialis. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the state's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility".*[110]

197) Pakistan has knowingly, wilfully and brazenly violated the provisions of Article 36 of the Vienna Convention. The rights under Article 36 of the individual Jadhav and of the sending State, India, have been violated. Consequences must follow and these consequences would be based on the principles of State Responsibility. *"Of all the breaches of international law that give rise to State Responsibility, those involving injury to aliens are the closest to modern international human rights violations. The considerable jurisprudence developed by Claims Commissions and other Tribunals... provides instructive precedent on the theory and practice of remedies for violations of individual rights..."*[111]

198) Sources of international law, such as conventions (the Vienna Convention is one such source) are intended to crystallize principles of law, which transcend State sovereignty in the application of some of the principles. These principles encompass the foundation of the rule of law which must govern the conduct of nations. The commentary to Article 30 of ARSIWA states that, *"The function of cessation is to put an end to a violation of international law and to safeguard*

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[109] State Responsibility, The General Part, First Edition, James Crawford, page 43.

[110] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Rep. 2007 p.43,* p. 209.

[111] Remedies In International Human Rights Law, Third Edition, Dinah Shelton, page 35.

the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law"[112].

199) There are situations where the *"result of cessation may be indistinguishable from that of restitution, for example where the conduct required by each is the freeing of hostages or the return of objects on premises seized…While the consequences of past acts cannot always be erased, it is always possible to take action in relation to future events."* [113]

200) Article 35 of the ARSIWA deals with restitution. It reads thus:

"A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

201) The commentary on Article 35 in the ARSIWA discusses the remedy of restitution and states that "*Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory, the restitution of ships, or other types of property, including documents, works of art, share certificates, etc. The term "juridical restitution" is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible*

[112] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Article 30 §5. – The text was adopted by International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10)

[113] State Responsibility, The General Part, First Edition, James Crawford, page 465.

State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law, the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty…".[114]

202) The ARSIWA recognises restitution as a remedy which is foremost amongst the forms of reparation, because "…*restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed*…".[115]

203) The notion of juridical restitution expressly covers the annulment or rescinding of a judicial measure, i.e. if the verdict of a Military Court is at all capable of elevation to the notion of a judicial measure. Material restitution includes measures such as the release of an arrested individual. Material impossibility is not the same as legal or practical difficulties[116] –*"As Article 32 makes clear, a State 'may not rely on the provisions of its internal law as justification for failure to comply with its obligations'."*[117]

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[114] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Article 35 §5. – The text was adopted by International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10)

[115] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Article 35 §3. – The text was adopted by International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10)

[116] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Article 35 §5, 8. – The text was adopted by International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10)

[117] State Responsibility, The General Part, First Edition, James Crawford, page 513.

204) The Human Rights Committee has, in cases where allegations of violation of the ICCPR were established, applied principles of State Responsibility by ordering the release, or a retrial with all the guarantees, and if not possible then release of the detenu whose rights were violated. [118]

205) This Court fashioned the relief in *Avena* based upon facts that presented themselves. In those cases, the United States argued that while even if there had been a breach of Article 36, the internal systems and the domestic law were robust and fully protective of the rights of an accused so as to conform to the highest standards of due process. In the circumstances, this Court accepted that the review and reconsideration within the American system was sufficient by way of restitution.

206) In the present case, the elements that would merit restitution by way of release of the person detained and annulment of the verdict of the Military Court, include:

a) The facts surrounding his arrest have been preserved by Pakistan as a closely guarded secret. Jadhav was kidnapped from Iran, and circumstances surrounding his presence in Pakistan are not clear. No details of his "arrest", or his whereabouts at the time of the "arrest" are known. A former official of the Pakistan Army also purportedly stated on electronic media that Jadhav had been taken from Iran.
b) For three weeks after his "arrest", he was kept in captivity, without intimation to India about his "arrest".
c) He was "arrested" on 3 March 2016. On 25 March 2016, his "confession" was recorded – even before the "First Information Report" was registered (on 8 April 2016).
d) Pakistan has tried to use every opportunity – including at the hearing of the application for provisional measures – to play his "confessional" video, to justify its conduct.
e) Despite repeated requests by India, Pakistan has brazenly violated Article 36 of the Vienna Convention.

[118] A list of these decisions is in **Annex 13**

f) Even when Pakistan stated it shall consider consular access based on India's response to request for assistance in investigations, that came at a stage after Jadhav's "trial" was already over. Such offer has to be viewed in the context in which it was made. First, Pakistan aired the video of Jadhav's "confession", then it made a request to India for "assistance" in regard to investigation of offences which had been "disclosed" by Jadhav in his "confession". Pakistan is aware that rights under Article 36 of the Vienna Convention cannot be subject to conditions of the kind notified.

g) Despite repeated requests, including by the parents of Jadhav, Pakistan has refused to disclose, even after conclusion of the so-called "trial", the "charges" against Jadhav, the "evidence" that was used against Jadhav and the "judgment" of the Military Court. Jadhav's parents have been denied visas to visit him even after his conviction – knowing that he faces the death sentence, he is not allowed to meet anyone from the Indian High Commission or even his parents.

207) Finally, if the decision of the Military Court is merely annulled without releasing Jadhav, he will be left at the mercy of the Military authorities in Pakistan, for a fresh "trial" by the Military authorities, which would defeat the established principles of international law mandating due process. In fashioning reliefs, the Court will not sanctify the working of a Military Court that has taken over the prosecution of civilians, applying the military codes of procedure, and which court was presided over by a military official, and in which no lawyers of Jadhav's choice were allowed to assist him in his defence, due regard also being had to the offences with which he was "charged" involving the penalty of a death sentence. The nature of the institution where Jadhav would be tried is such that it fails to meet the standards required by international law – even by the minimum standard test, and in any event, it is an institution censured by the Human Rights Committee.

XIII. CONCLUSION

208) In its Application, filed on 8 May 2017, India set out its case that established beyond a shadow of a doubt that Pakistan has been in egregious breach of its obligations under Article 36 of the Vienna Convention.

209) India sought reliefs in the following terms:

a) A relief by way of immediate suspension of the sentence of death awarded to the accused.

b) A relief by way of restitutio in integrum, by declaring that the sentence of the military court arrived at, in brazen defiance of the Vienna Convention rights under Article 36, particularly Article 36 paragraph 1(b), and in defiance of elementary human rights of an accused, which are also to be given effect as mandated under Article 14 of the 1966 International Covenant on Civil and Political Rights, is violative of international law and the provisions of the Vienna Convention, and

c) Restraining Pakistan from giving effect to the sentence awarded by the military court, and directing it to take steps to annul the decision of the military court as may be available to it under the law in Pakistan,

d) If Pakistan is unable to annul the decision, then this Court to declare the decision illegal being violative of international law and treaty rights and restrain Pakistan from acting in violation of the Vienna Convention and international law by giving effect to the sentence or the conviction in any manner, and directing it to release the convicted Indian National forthwith.

210) The Pakistan Army Act, 1952 contains a provision [Section 132], which confers upon the federal government the power to annul the proceedings of any court martial on the ground that they are illegal or unjust. For the reasons and grounds set out in the Application and in this Memorial, there can be little doubt that the conviction and sentence of the Military Court, based on a so-called "confession", in whole or in part, of Jadhav, is illegal and patently unjust. This Court is empowered to declare the conviction and sentence arrived at in brazen violation of Article 36 rights as being unjust and illegal, and can direct Pakistan to exercise its powers under Section 132 to annul the decision.

211) In any event, this Court can declare the actions of Pakistan in convicting and sentencing Jadhav as being illegal, for the reason that the conviction and sentence has been vitiated by a brazen violation of consular access rights under the Vienna Convention and also by virtue of egregious violations of international law, being a denial of the minimum standards of due process and violation of the rights under the ICCPR.

212) An appropriate remedy, by way of restitution in the present case, would be to direct the Indian national to be released forthwith and to be permitted to return to India safely, following annulment of the illegal and unjust decision of the Military Court. The question of review and reconsideration in the present case would not arise, for three reasons:

i) Under Pakistan law, the trial will once again be conducted by a Military Court. The Pakistan Military Courts, to the extent they exercise jurisdiction over civilians, are not compliant with the provisions of the ICCPR, and do not even satisfy the minimum standards of international law. If this Court were to ask such a court to review and reconsider its decision, it would in a manner sanctify, in some form or manner, the working of a system of "trial" contrary to the ICCPR, to which Pakistan is a party, contrary to international law, and thereby confer some legitimacy on a court which has been the subject-matter of criticism by the European Parliament, and the Human Rights Committee of the United Nations. Any such review or reconsideration, if ordered, would be a setback to the work done by human rights commissions seeking to persuade countries to give up this practice of military courts being conferred with jurisdiction to try civilians;

ii) Considering the surcharged atmosphere evidenced by the statement of the Adviser to the Prime Minister on Foreign Affairs, a high-ranking functionary of the Pakistan establishment, and

iii) The stated belief that Jadhav is guilty, expressed publicly in this fashion, defies credulity to believe that Jadhav could, indeed, receive a 'fair trial' in Pakistan.

213) It is significant that on its plain language Article 36 admits of no exceptions. The reason is obvious – there is no circumstance which justifies a deviation from the principles of due process, which ensures a fair trial. Article 36 makes this right a living reality in relation to aliens. Denying rights under Article 36 would seriously jeopardise due process rights themselves. International institutions have been at pains to remind States of their obligation to adhere to the due process standards even in the matter of investigating terrorism-related offences and prosecuting offenders. Conventions dealing with terrorism have expressly recognised consular access, reiterating and reinforcing the criticality of a provision such as Article 36. As far as States which have signed and ratified the Vienna Convention are concerned, their obligations under Article 36 are untrammelled by the seriousness of the accusations against an accused. On the contrary, the more serious the allegations, the greater the need for procedural fairness.

XIV. SUBMISSIONS

214) FOR THESE REASONS, the submissions of the Government of India, respectfully request this Court to adjudge and declare that,

a) Pakistan acted in egregious breach of Article 36 of the Vienna Convention on Consular Relations, in:

(i) Failing to inform India, without delay, of the arrest and/or detention of Jadhav,

(ii) Failing to inform Jadhav of his rights under Article 36 of the Vienna Convention on Consular Relations,

(iii) Declining access to Jadhav by consular officers of India, contrary to their right to visit Jadhav, while under custody, detention or in prison, and to converse and correspond with him, or to arrange for his legal representation.

And that pursuant to the foregoing,

(i) Declare that the sentence of the Military Court arrived at, in brazen defiance of the Vienna Convention rights under Article 36, particularly Article 36 paragraph 1(b), and in defiance of elementary human rights of Jadhav, which are also to be given effect as mandated under Article 14 of the 1966 International Covenant on Civil and Political Rights, is violative of international law and the provisions of the Vienna Convention;

(ii) Declare that India is entitled to *restitutio in integrum*;

(iii) Restrain Pakistan from giving effect to the sentence or conviction in any manner, and direct it to release the Indian National, Jadhav, forthwith, and to direct Pakistan to facilitate his safe passage to India;

(iv) In the alternative, and if this Court were to find that Jadhav is not to be released, then restrain Pakistan from giving effect to the sentence awarded by the Military Court, and direct it to take steps to annul the decision of the military court, as may be available to it under the laws in force in Pakistan, and direct a trial under the ordinary law before civilian courts, after excluding his confession that was recorded without affording consular access, in strict conformity with the provisions of the ICCPR, with full consular access and with a right to India to arrange for his legal representation.

215) India reserves the right to modify or extend the terms of its submissions, as well as the grounds invoked in this Memorial.

RESPECTFULLY SUBMITTED

Dr. Deepak Mittal

Agent of the Republic of India

Before the International Court of Justice

13 September 2017

Certification

I certify that the Annexes are true copies of the documents referred.

Dr. Deepak Mittal

Agent of the Republic of India

LIST OF ANNEXES

Annex 1	*Notes Verbale* issued by India on 25 March 2016 (1.1), 30 March 2016 (1.2), 6 May 2016 (1.3), 10 June 2016 (1.4), 11 July 2016 (1.5), 26 July 2016 (1.6), 22 August 2016 (1.7), 3 November 2016 (1.8), 19 December 2016 (1.9), 3 February 2017 (1.10), 3 March 2017 (1.11), 31 March 2017 (1.12), 10 April 2017 (1.13), 14 April 2017 (1.14), 19 April 2017 (1.15) and 26 April 2017 (1.16).
Annex 2	*Note Verbale* issued by Pakistan, on 23 January 2017 (without attachment)
Annex 3	*Note Verbale* issued by Pakistan, on 21 March 2017
Annex 4	Press Release issued by Inter Services Public Relations, on 10 April 2017
Annex 5	*Note Verbale* issued by Pakistan, on 10 April 2017
Annex 6	Press Statement made by the Adviser to the Prime Minister of Pakistan, on 14 April 2017
Annex 7	News reports in 'Jehan Pakistan' and 'Business Standard' Newspapers about briefing by Spokesperson of the Inter Services Public Relations of Pakistan, on 17 April 2017
Annex 8	Letter from External Affairs Minister, Government of India, to the Adviser to the Pakistan Prime Minister on Foreign Affairs, on 27 April 2017
Annex 9	Press Briefing of Government of Pakistan, on 20 April 2017
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Annex 11	Copy of news report in 'Dawn' Newspaper, of 15 April 2017 and news report in Lahore News, of 18 May 2017
Annex 12	Press Release issued by Inter Services Public Relations, on 22 June 2017
Annex 13	List of decisions by the Human Rights Committee under the International Covenant on Civil and Political Rights