INTERNATIONAL COURT OF JUSTICE

THE JADHAV CASE

THE REPUBLIC OF INDIA v. THE ISLAMIC REPUBLIC OF PAKISTAN

COUNTER-MEMORIAL OF THE ISLAMIC REPUBLIC OF PAKISTAN

13TH DECEMBER 2017

Contents

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. On behalf of the Islamic Republic of Pakistan ("Pakistan"), it is an honour to present this Counter-Memorial to the Court pursuant to the Procedural Order dated 13 June 2017.

2. On 8 May 2017, the Republic of India ("India") instituted proceedings before this Court and filed a Request for the Indication of Provisional Measures alleging (at paragraph 3 of that request) that "*the authorities of Pakistan arrested, detailed, tried and sentenced to death on 10 April 2017 an Indian national, Mr. Kulbhushan Sudhir Jadhav, in egregious violation of the rights of consular access guaranteed by Article 36, paragraph 1, of the Vienna Convention [on Consular Relations 1963]*" ("VCCR 1963") and ("Article 36").

3. Pakistan rejects any suggestion that it has committed any breach of any of its obligations as a matter of Public International Law.

4. Save where expressly admitted herein, India is put to proof of all facts and matters relied upon in support of its Application, Memorial and claims for relief.

5. In this Counter-Memorial, references to annexures are given in the form **[volume/annex/page/paragraph]**.

Executive Summary

6. Pakistan respectfully submits that India's Application is misconceived. The key arguments identified herein have previously been raised at the Provisional Measures hearing on 15 May 2017.

7. It is therefore regrettable that India has not used the vehicle of its Memorial to advance its position with further clarity, or to address the arguments raised by Pakistan in any meaningful manner.

   (I). India sought to engineer "urgency" to justify exceptional provisional measures without any hearing, and by deliberately failing to draw material facts and matters to the attention of the Court which negated the "imminence"/"any day" assertions regarding the carrying out of the sentence upon Commander Jadhav.

   (II). It is a matter of considerable concern and regret that India has failed to explain how Commander Jadhav entered Pakistan in possession of an authentic Indian passport clothed with a false Muslim identity. Instead, seizing upon the fact that Commander Jadhav was using a false Muslim name, India stated "*the question of authenticating a declared false document does not arise*" **[Volume 2/Annex 33]**. This is evasive sophistry (at best) to conceal, Pakistan says, India's wrongdoing in providing an authentic passport with a false Muslim identity.

(III). Whilst India has thus far evaded providing any explanation on the passport issue, Pakistan has engaged an independent expert to examine the passport. The expert (a former Chief Immigration Officer at the UK National Document Fraud Unit for 13 years) has confirmed that the passport in the possession of Commander Jadhav (in a false name) is an authentic Indian passport **[Volume 7/Annex 141]**. Commander Jadhav must have been provided with this passport by the Indian authorities who must also have clothed him with a false Muslim identity (in pursuit of his illegal activities).

(IV). In addition thereto, India remains unwilling to address legitimate requests for mutual legal assistance. Indeed, in a frank admission no less a person than India's Ministry of External Affairs Spokesperson on 13 April 2017 accepted that **[Volume 2/Annex 22/page 6/para 7]** "*The Pakistani authorities asked us to assist them in completing the investigation [concerning Commander Jadhav] this year*". There is simply no justification for refusing to provide such assistance – apart from a desire to deflect criticism – to Pakistan and obstruct the investigation and prosecution of Commander Jadhav.

8. These facts and matters, *inter alia*, engage the principles of:
   8.1. Abuse of process;
   8.2. Abuse of rights;
   8.3. Illegality;
   8.4. *Ex turpi causa* (clean hands doctrine).

9. Given the egregious, deliberate nature of its acts and omissions, India's claims should be the subject of a preliminary evaluation in this regard and dismissed accordingly.

10. Further or in the alternative, these aforesaid facts and matters are highly relevant when considering India's claim that the VCCR 1963, specifically Article 36 thereof, has been breached by Pakistan.

11. Article 36 is not engaged until and unless the "sending state" furnishes evidence of the nationality of the individual.

12. In this case, whilst India now states that Pakistan proceeded at all times upon the basis that Commander Jadhav was a spy of Indian origin, it would be curious if a passport in a false identity and a confession of illegal activity would absolve a "sending state" of the treaty requirement to establish nationality. Indeed, India's Ministry of External Affairs Spokesperson appears to have accepted this was a requirement as in his press briefing on 13 April 2017 **[Volume 2/Annex 22/page 3/para 2]**, he stated, inter alia, that the fact that "*he [Commander Jadhav] is an Indian... was communicated to Pakistan more than a year ago*". At no point in time (despite repeated reminders) has India furnished any evidence of the Indian nationality of Commander Jadhav – no doubt for the reasons explained further below.

13. Customary International Law and State practice provide no support (or clear and cogent support) to the contention that Article 36 is engaged in the context of an individual against whom a *prima facie* case of espionage exists, not least an individual who possesses an authentic passport in a false identity for which the putative "sending state" refuses to provide an explanation.

14. India itself advanced a bilateral agreement which was eventually entered into titled "Agreement on Consular Access" dated 21 May 2008 **[Volume 7/Annex 160]**. Article (vi) thereof in terms addresses the specific cases of arrest, detention or sentence made on "*political or security grounds*" and provides that each party may "*examine the case on its merits*". In the Provisional Measures phase, India asserted that it did not "*rely*" upon the 2008 Agreement which was "*irrelevant*" **[Volume 1/Annex 5.1/page 34/para 66]**. In India's Memorial (at paragraphs 89-99), a somewhat vague assertion is advanced to the effect that whilst some parts of the 2008 Agreement "*supplement or amplify*" the 2008 Agreement, Article (vi) is not such a provision.

15. However, yet again, the official position adopted by India through its Spokesperson on 13 April 2017 with regard to Consular access to Commander Jadhav was both frank and accurate **[Volume 2/Annex 22/page 5/last para]**:

    "*Both India and Pakistan have also an agreement on consular access bilaterally. So we are not merely speaking about an international practice, we are speaking here of a bilateral agreement.*"

16. No doubt based upon advice from its lawyers, India now seeks to resile from its formal position (that it was in fact relying upon the 2008 Agreement less than 3 weeks prior to launching its Application before the Court). Indeed, India seeks to pretend that the 2008 Agreement can be conveniently ignored in respect of a central aspect. The 2008 Agreement was clearly intended to have legal effect, and can only be viewed as amplifying and supplementing the provisions of the VCCR 1963 as otherwise operative between these two States, whose relationship has been fractious at times.

17. Within the context of an overall abuse of process, India has sought relief from the Court (an order for "acquittal/release") which the Court has stated, time and again, is not available. India has used the Courts process to engage in political grandstanding and a media/cyber war which belies its ultimate objective – to use the Court as a vehicle for a theatre of sorts.

18. Indeed, somewhat regrettably, India's use of inflammatory language extended to insinuating that the military courts of Pakistan were akin to *kangaroo courts*. This is most unfortunate, not least because the military courts of India and Pakistan share the same origins. Moreover, independent pre-eminent military law experts from the United Kingdom have provided a report **[Volume 7/Annex 142]** which, *inter alia*, states that the

military courts of Pakistan are "*soundly based*" **[Volume 7/Annex 142/page vi/para 3(b)]**, and they did not consider that "*the espionage jurisdiction of the military courts of Pakistan... is per se unfair or otherwise improper*" **[Volume 7/Annex 142/page vii/para 3(c)]**.

19. Nevertheless, even if India were correct (which it is not), the Court would (assuming Article 36 VCCR 1963 is engaged and is breached, which is not accepted) direct a State at most to provide for "*review and reconsideration*".

20. That task has been amply provided for by the Pakistani Courts, as confirmed by the Supreme Court in its decision in the case of *Said Zaman Khan v Federation of Pakistan through Secretary Ministry of Defence, Government of Pakistan* (Civil Petition No. 842 of 2016) **[Volume 4/Annex 81/pages 50-52/para. 93 and pages 59-62/paras. 103-104]** where it stated:

"*93. ... It is by now a well settled proposition of law, as is obvious from the judgments of this Court, referred to and reproduced hereinabove, that the powers of Judicial Review under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, against the sentences and convictions of the FGCM is not legally identical to the powers of an Appellate Court. The evidence produced cannot be analyzed in detail to displace any reasonable or probable conclusion drawn by the FGCM nor can the High Court venture into the realm of the "merits" of the case. However, the learned High Court can always satisfy itself that it is not a case of no evidence or insufficient evidence or the absence of jurisdiction.*

...

103. The nature and extent of the power of Judicial Review in matters arising from an action taken under the Pakistan Army Act, 1952, has by and large been settled by this Court through its various judgments, referred to above. It now stands clarified that neither the High Court nor this Court can sit in appeal over the findings of the FGCM or undertake an exercise of analyzing the evidence produced before it or dwell into the "merits" of the case. However, we have scanned the evidence produced and proceedings conducted by the FGCM. The Convict pleaded guilty to the charges, which were altered to not guilty by operation of the law. There was a judicial confession of the Convict before a learned Judicial Magistrate, which was proved in evidence by the said Judicial Magistrate, who appeared as a witness. Such confession was never retracted by the Convict. Other relevant evidence, including eye witnesses of the occurrence was also produced. The prosecution witnesses made their statements on Oath and were cross-examined by the Defending Officer. Opportunity to produce evidence in defence was given, which was declined. The Convict was permitted to address the Court and made a statement, wherein he again admitted his guilt. In the above circumstances, it is not possible for us to conclude that it was a case of no evidence or insufficient evidence nor is it possible to hold that the conclusions drawn by the FGCM are blatantly unreasonable or wholly improbable.

104. A perusal of the record of the FGCM reveals that in order to ensure a fair trial and to protect the rights of the Convict, the relevant Rules were complied with. The Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. An Interpreter was appointed with the consent of the Convict in terms of Rule 91 of the Pakistan Army Act Rules, 1954. The nature of the offence for the commission whereof, the Convict was charged, was explained to him as too the possible sentence that would be awarded, as required by Rule 95. He was given an opportunity to prepare his defence and engage Civil Defence Counsel, if he so desired, in terms of Rules 23 and 24. On his exercising the option not to do so, a Defending Officer was appointed in terms of Rule 81. He was given an opportunity to object to the constitution of the FGCM and to the Prosecutor as well as the Defending Officer, in terms of Section 104 and Rule 35 also. No objection, in this behalf, was raised. The Members of the FGCM, the Prosecutor, the Defending Officer and the Interpreter were duly sworn in, as required by Rules 36 and 37. The charge was formally framed to which incidentally, the Convict pleaded guilty. The evidence was recorded on Oath. An opportunity to cross-examine was granted, which was availed off and an opportunity was also given to produce evidence in defence in terms of Rule 142, which was declined. He was also allowed to record his own statement and to address the Court in terms of Rule 143 wherein he admitted his guilt. The sentence was passed, which has been confirmed in accordance with Section 130 and the Appeal therefrom was dismissed by the Competent Authority. It appears that the provisions of the Pakistan Army Act and the Rules framed thereunder, applicable to the trial at hand have not been violated. Even otherwise, the procedural defects, if any, would not vitiate the trial in view of Rule 132 of the Pakistan Army Act Rules, 1954 nor did the High Court have the jurisdiction to enter into the domain of the procedural irregularities in view of the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (supra), especially as no prejudice appears to have been caused to the Convict nor any such prejudice has been pointed out by the learned counsel or specifically pleaded before the High Court."

21. Accordingly, the claim brought by India (in every respect, including the relief sought), is (at best) adventurous, at worst abusive, and should be dismissed.

II. FACTUAL BACKGROUND

Arrest

22. On 3 March 2016, a man illegally and clandestinely entered Pakistan from across the Saravan border with Iran and was arrested by the Pakistani authorities in the course of a Counter Intelligence Operation from Mashkel in Balochistan Province **[Volume 2/Annex 17/page 15/para. 5]**. A map showing the region is provided **[Volume 6/Annex 139]**.

23. He was in possession of an Indian passport (number L9630722, issued on 12 May 2015, valid until 11 May 2024) bearing the Muslim name 'Hussein Mubarak Patel' **[Volume 2/Annex 17/pages 12-14]**. However, he subsequently admitted and/or claimed to be Officer 41558Z, Commander Kulbhushan Sudhir Jadhav ("Commander Jadhav"), a serving officer of the Indian Navy **[Volume 2/Annex 17/page 15/paras. 1, 3]**. He is apparently 49 years of age at the date of this Counter-Memorial – his date of birth is 30 August 1968 **[Volume 2/Annex 17/pages 12-14]**. India has asserted he has "retired" from the Armed Forces. Commander Jadhav has stated he is due for retirement in 2022 (as set out in his first confession, reproduced in full below). From public source materials on the internet, the retirement age for an officer of his rank is understood to be not less than 52 **[Volume 6/Annex 140].** No doubt India can confirm whether this is correct. Curiously therefore, whilst India has asserted (conveniently) that Commander Jadhav retired at some point in his career before being caught spying in Pakistan, Commander Jadhav himself appears to have referred to his future eligibility for retirement – perhaps a small but significant indication of the overall veracity of his confession – repeated for the benefit of the authorities, the Magistrate, the Court, and the world at large over a period of more than 1 year.

24. Without prejudice to the consequent doubts that still linger regarding that individual's true identity, he is referred to in this Counter-Memorial (for the purposes of these proceedings) as "Commander Jadhav". India has maintained its assertion (still without any substantiation) that this man was "*kidnapped from Iran, where he was residing and carrying on business after retiring from the Indian Navy*" (para. 57 of the Memorial).

Confession to Espionage and Terrorist Activities

25. As was made public on 25 March 2016, Commander Jadhav voluntarily confessed in detail to his involvement in the facilitation and commission of acts of espionage and terrorism in Pakistan at the behest of India's Research & Analysis Wing ("RAW") (the primary foreign intelligence agency of India). The transcript of that confessional statement is reproduced in full below:

"***TRANSCRIPT IN ENGLISH***

CONFESSIONAL STATEMENT OF COMMANDER KULBHUSHAN JADHAV

1. I am Commander Kulbhushan Jadhav Number 41558Z. I am a serving officer of the Indian Navy. I am from the cadre of engineering department in the Indian Navy and my cover name was Hussain Mubarak Patel, which I had taken for doing some intelligence gathering for the Indian cover/ agencies.

2. I joined National Defence Academy in 1987 and I subsequently joined the Indian Navy in 1991 and was commissioned into the Indian Navy and subsequently served in the Indian Navy till around 2001 December when Indian Parliament attack occurred and that is when I started contributing my services towards the gathering of information and intelligence within India. I lived in the city of Mumbai in India.

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3. I am still a serving officer in the Indian Navy and will be due for retirement by 2022 as a commissioned officer in the Indian Navy. After having completed 14 years of service by 2002, I commenced intelligence operations in 2003 and established a small business in Chabahar in Iran. As I was able to achieve undetected existence and visits to Karachi in 2003 and 2004 and having done some basic assignments within India for RAW, I was picked up by RAW in 2013 end. Ever since, I have been directing various activities in Balochistan and Karachi at the behest of RAW and deteriorating law and order situation in Karachi. I was basically the man for Mr Anil Kumar Gupta who is the joint secretary RAW and his contacts in Pakistan especially in the Balochistan Student Organisation.

4. My purpose was to hold meetings with Baloch insurgents and carry out activities with their collaboration. These activities have been of criminal nature. These have been of anti- national and terrorist activities leading to killing or maiming of Pakistani citizens also. I realized during this process that RAW is involved in some activities related to the Baloch Liberation Movement within Pakistan and the region around it. There are finances which are fed into the Baloch Movement through various contacts or various ways and means into the Baloch Liberation and the various activities of these Baloch Liberation and the RAW handlers go towards activities which are criminal, which are anti-national, which can lead to maiming or killing of people within Pakistan and mostly these activities were centred around what I have knowledge of Ports of Gawadar, Pasni, Jeevani and various other installations, which are around the coast, damaging various other installations, which are in Balochistan. So the activities seem to be revolving around and trying to create a criminal sort of mindset within the Baloch liberation and lead to instability within Pakistan.

5. In my pursuit towards achieving the set targets by my handlers in RAW, I was trying to cross over into Pakistan from the Saravan border in Iran on March 3, 2016 and was apprehended by Pakistani authorities while on the Pakistani side and the main aim of this crossing over into Pakistan was to hold meetings with BSN personnel in Balochistan for carrying out various activities, which they were supposed to undertake and carrying for backwards the messages which they had to deliver backwards to Indian agencies. The main issues regarding this were that they were planning to conduct some operations within the next immediate future, near future. So that was to be discussed mainly and that was the main aim of trying to coming into Pakistan.

6. So the moment I realized that my intelligence operations have been compromised on my being detained in Pakistan, I revealed that I am an Indian Naval officer, and it is on mentioning that I am Indian naval officer, the total perception of the establishment of the Pakistani side changed and they treated me very honourably and with utmost respect and due regards, and have handled me subsequently on a more professional and proper courteous way and they have handled me in a way that befits that of an officer and once I realized that I have been compromised in my process of intelligence operations, I decided to just end the mess I have landed myself in and just wanted to subsequently move on and cooperate with the authorities in removing complications which I have landed myself and my family members into, and whatever I am stating just now, it is the truth and it is not under any duress or pressure. I am doing it totally out of my own desire to mention and come clean out of this entire process which I have gone through for the last 14 years."

India Informed of Arrest

26. On 25 March 2016, the Foreign Secretary of Pakistan gave express notification of the arrest of Commander Jadhav to the Indian High Commissioner in Islamabad. On the same day, Pakistan's Ministry of Foreign Affairs issued a *demarche* to the Indian High Commissioner in Islamabad conveying Pakistan's protest and deep concern on the illegal entry into Pakistan by a RAW officer and his involvement in subversive activities in Balochistan and Karachi **[Volume 2/Annex 11]**.

27. On the same day, Pakistan, *inter alia*, also notified the P5 States (China, France, Russia, the United Kingdom and the United States of America) of the arrest by providing a 10-page briefing document which, *inter alia*, provided details of Commander Jadhav's confession (as set out above) and photographs of the passport in his possession at the time of his arrest **[Volume 2/Annex 12]**. These are not the actions of a State trying to evade or conceal its conduct. These are the actions of a wronged State engaging with the "sending State" of the suspected spy/terrorist. They are the actions of a member of the United Nations which has nothing to hide from the Security Council or the international community.

28. Not unreasonably, Pakistan expects India to be held responsible for its conduct. Pakistan does not expect the "conceal/evade"/"attack to defend" approach of India to succeed in the face of such a serious violation of international law.

29. Later on the same day, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which referred to "*the purported arrest of an Indian in Baluchistan*" and requested access to that individual, but did not identify that the individual in question was Commander Jadhav **[Volume 2/Annex 13.1]**.

30. On 30 March 2016, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which again referred to "*the purported arrest of an*

Indian national in Baluchistan" and requested access to that individual but again did not identify that the individual in question was Commander Jadhav **[Volume 2/Annex 13.2]**.

First Information Report registered / Criminal proceedings initiated

31. On 8 April 2016, an initial First Information Report (No. 6 of 2016) concerning Commander Jadhav was registered **[Volume 2/Annex 17/pages 5-9]**. Pursuant to Section 154 of Pakistan's Code of Criminal Procedure 1898 **[Volume 5/Annex 82]** (promulgated in the era of British rule in India), information given to the police authorities concerning the commission of a cognisable offence (i.e. an offence over which the police authorities have jurisdiction) must be put into writing by the police authorities – the resulting document is commonly known as a First Information Report ("FIR"). Once a FIR is registered, the police authorities may utilise their powers of investigation in order to investigate the offence complained of **[Volume 2/Annex 18]**.

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32. In summary, the FIR stated, *inter alia*:

    32.1. "*Kulbhushan Jadhev, alias, Hussain Mubarak Patel, is serving Commander of Indian Navy, and working with Indian Intelligence Agency / RAW, was apprehended by Pakistani Intelligence / Security Agencies on 3 March 2015 after he illegally crossed over to Pakistan from Iranian 'Saravan' border*". Commander Jadhav was in possession of an Indian passport, maps of Balochistan, and currency in US dollars, Iranian riyals and Pakistani currency.

    32.2. Commander Jadhav was a serving officer of the Indian Navy, due to retire in 2022, and started rendering services to RAW/Indian Intelligence Agency after the attacks on the Indian Parliament in 2001.

    32.3. Commander Jadhav stated that on instructions of RAW (and under the direct instruction of Anil Kumar Gupta (Joint Secretary, RAW)), he commenced intelligence operations against Pakistan, and planned and executed terrorist attacks and waged war against Pakistan "*with a view to disintegrate by fomenting separatists movements in Balochistan, Pakistan*". For the said purpose, he established a small scale business in Chahbahar, Iran, during 2003-2004. In addition, he had been organizing, planning, conspiring and abetting waging of war in Pakistan through Baloch Insurgents/Baloch Liberation Organization/Baloch Students Organization and MQM.

    32.4. In addition, he collected/obtained sensitive information about the Pakistani Armed Forces and their installations with a view to targeting the same, and planted several local residents, collaborators, co-conspirators, non-state actors and individuals from the proscribed organisations to carry out acts of terrorism and kidnapping for ransom in order to create unrest, insurgency, target killings, suicide bombings and targeted operations to achieve his objectives.

32.5. In addition, he stated that he had been involved in destroying civilian properties, carrying out attacks on law enforcement agencies particularly in Karachi and Balochistan. He would provide financial support to his collaborators to carry out subversive activities against Pakistan, and had also been providing training to the non-state actors in use of firearms, explosives, and improvised explosive devices in Balochistan.

32.6. Commander Jadhav stated that the unlawful activities were to destabilise Pakistan and obstruct the military and other law enforcement agencies from restoring peace in Balochistan and Karachi. It was also aimed to scuttle the Pak-China Economic Corridor Project. Commander Jadhav said that one of his co-accused/accomplices facilitated his illegal entry into Pakistan.

32.7. Commander Jadhav was subject to the Pakistan Army Act 1952, and was being dealt with under that Act, and was in the custody of the Pakistan Army.

33. The FIR concluded that the accused was under interrogation and was subject to other offences not falling under the Pakistan Army Act 1952, and it was requested to register the case of the Counter Terrorism Department under the relevant provision of law for those offences.

34. On 15 April 2016, Pakistan's Ministry of Foreign Affairs notified the envoys of members of the Arab League and the Association of Southeast Asian Nations ("ASEAN") Member States based in Islamabad of the arrest of Commander Jadhav and gave a briefing on Commander Jadhav's confession about Indian-sponsored subversive activities and terrorist financing to destabilise Pakistan **[Volume 2/Annex 16]**.

35. Between 2 and 22 May 2016, Commander Jadhav was further questioned by the Pakistani authorities **[Volume 2/Annex 23/page 2]**.

36. On 6 May 2016, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which again referred to "*the purported arrest of an Indian national in Baluchistan*" and requested access to that individual but again did not identify that the individual in question was Commander Jadhav **[Volume 2/Annex 13.3]**.

India purports to identify Commander Jadhav

37. On 10 June 2016, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs. The full text of that *Note Verbale* is provided below:

"*No.ISL/103/14/2016*

The High Commission of India to Pakistan presents its compliments to the Ministry of Foreign Affairs, Government of the Islamic Republic of Pakistan, and has the honour to refer to its earlier Notes Verbale No.ISL/103/1/2016 dated March 25, 2016, No.ISL/103/14/2016 dated March 30, 2016 and May 06, 2016 regarding purported arrest of an Indian national viz. Kulbhushan Jadhav in Baluchistan.

The Mission reiterates its request to the esteemed Ministry to provide Consular Access to the said individual at the earliest. It is reiterated that safety, security and well being of all Indian and believed-to-be Indian prisoners, may please also be ensured till they are in Pakistani jails.

The High Commission of India to Pakistan avails itself of this opportunity to renew to the Ministry of Foreign Affairs, Government of the Islamic Republic of Pakistan, the assurances of its highest consideration" **[Volume 2/Annex 13.4]**.

38. The *Note Verbale* on 10 June 2016 was thus the first in which India actually identified that the individual in question was Commander Jadhav. No attempt has been made at any time by India to rebut or explain the serious implications of the conduct of Commander Jadhav. Instead (perhaps unsurprisingly) India has sought to evade or deflect the same.

39. On 11 July 2016, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which again referred to the "*purported*" arrest of Commander Jadhav and requested access to him **[Volume 2/Annex 13.5]**.

40. On 12 July 2016, a Joint Investigation Team was established **[Volume 2/Annex 23/page 2]**.

Confession before a Magistrate

41. On 22 July 2016, Commander Jadhav's confessional statement was recorded before a magistrate under Section 164 of Pakistan's Code of Criminal Procedure 1898[1] **[Volume**

[1] "***164. Power to record statements and confessions.*** *(1) Any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Provincial Government may, if he is not a police-officer, record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.*

[(1A) Any such statement may be recorded by such Magistrate in the presence of the accused, and the accused given an opportunity of cross-examining the witness making the statement.]

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason

2/Annex 23/page 2]. In accordance with that procedure (which it is understood is similar to that in India), the magistrate specifically asked questions which address matters such as inducement and pressure. The confessional statement is taken in circumstances where the judicial magistrate seeks to ensure that the individual is providing the statement voluntarily. The judicial magistrate is required by law to satisfy themselves that the individual appearing before them is voluntarily making a confessional statement.

42. On 26 July 2016, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which again referred to the "*purported*" arrest of Commander Jadhav and requested access to him **[Volume 2/Annex 13.6]**.

43. On 22 August 2016, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which again referred to the "*purported*" arrest of Commander Jadhav and requested access to him **[Volume 2/Annex 13.7]**.

44. On 6 September 2016, FIR No. 22 of 2016 concerning Commander Jadhav was registered **[Volume 2/Annex 17/pages 10-11]**. This FIR stated that, as reflected in the joint interrogation and recording of confessional statement, Commander Jadhav had given a list of 15 names (plus two unknown persons) as his handlers' organization / persons / accomplices and facilitators.

45. On 21 September 2016, the trial of Commander Jadhav commenced before a Field General Court Martial ("FGCM") **[Volume 2/Annex 23/page 2]**. On the first day of the hearing, Commander Jadhav requested an adjournment of three weeks to prepare his defence in conjunction with his Defending Officer and that adjournment was granted.

46. On 19 October 2016, the FGCM proceedings against Commander Jadhav resumed **[Volume 2/Annex 23/page 2]**. Commander Jadhav was provided with access to representation in the form of a qualified Defending Officer, who was appointed to advance Commander Jadhav's defence before the FGCM **[Volume 2/Annex 23/page 2 – see also the statement made by Commander Jadhav set out at page 29/para 107 below]**.

47. On 3 November 2016, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which again referred to the "*purported*" arrest of Commander Jadhav and requested access to him **[Volume 2/Annex 13.8]**.

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to believe that it was made voluntarily: and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect: ['I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe] that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him. (Signed) A.B., Magistrate

Explanation. *It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case*" **[Volume 5/Annex 82]**.

48. On 29 November 2016, the FGCM proceedings against Commander Jadhav resumed **[Volume 2/Annex 23/page 2]**.

49. On 19 December 2016, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which again referred to the "*purported*" arrest of Commander Jadhav and requested access to him **[Volume 2/Annex 13.9]**.

50. On 2 January 2017, H.E. Sartaj Aziz, the then Adviser to the Prime Minister of Pakistan on Foreign Affairs ("the Adviser") sent a letter to H.E. Antonio Guterres, the UN Secretary-General, in which, *inter alia*, the following was stated **[Volume 2/Annex 15]**:

> "*Earlier this year, our law enforcement authorities apprehended an agent of the Indian intelligence agency RAW, Kulbhushan Jadhav, from the Balochistan Province of Pakistan. Jadhav is a serving officer of the Indian Navy, working for RAW. In his confessional statement, Jadhav admitted to his involvement in activities aimed at destabilizing Pakistan. These include providing support to terrorist elements to carry out activities aimed at killing or maiming Pakistani citizens in Balochistan and Karachi. Investigations in the case are ongoing and further concrete details of his activities will be shared with the United Nations*
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> ...
>
> *The arrest of Kulbhushan Jadhav and his confessional statement has vindicated Pakistan's longstanding position that India is involved in activities aimed at destabilizing Pakistan. It is using terrorism as an instrument of state policy to achieve these ends. Such activities are in clear contravention of Article 2(4) of the Charter of the United Nations that refrain states from the threat or use of force against the territorial integrity or political independence of any state. India's actions are also in violation of the various Security Council resolutions particularly 1373 and those related to Taliban/Al-Qaeda/ISIL and international conventions on terrorism*".

51. This is not the conduct of a State engaged in "*pre-meditated murder*". This is the conduct of a responsible member of the international community seeking to draw attention to heinous violations of International Law.

Pakistan Requests Assistance from India in the Investigation of Terrorism

52. As is routine in cross-border investigations and proceedings, on 23 January 2017, Pakistan's Ministry of Foreign Affairs sent to the Indian High Commission in Islamabad a Request for Mutual Legal Assistance ("MLA Request") seeking the assistance of the Government of India in obtaining evidence, material and record for the criminal investigation of Commander Jadhav's activities **[Volume 2/Annex 17]**.

53. Tellingly, India (both in its Application/Request for the Indication of Provisional Measures on 8 May 2017 and in its Memorial on 13 September 2017) has chosen to adduce only the first page (i.e. the cover letter) in evidence before the Court but has failed to adduce any of the substantive material attached to that letter.

54. Pakistan at the Provisional Measures Hearing on 15 May 2017 adduced the entirety of the MLA Request in evidence **[Volume 1/Annex 4/page 22]**, and does so again. Amongst other things, the MLA Request asked India for assistance in obtaining statements of 13 identified individuals and access to records and materials, namely: (i) a search of Commander Jadhav's flat/house; (ii) certified records of Commander Jadhav's cell phone records; and (iii) certified records of Commander Jadhav's bank account and those of his family **[Volume 2/Annex 17/pages 2-3]**. Unfortunately, however, Pakistan received no substantive response from India to its MLA Request. This remains the position despite reminders sent on 31 May 2017, 30 August 2017 and 26 October 2017 **[Volume 2/Annex 42; Annex 43; Annex 44]**.

55. On 3 February 2017, India's Ministry of External Affairs sent a *demarche* to the High Commissioner for Pakistan in New Delhi which again referred to the "*purported*" arrest of Commander Jadhav and requested access to him **[Volume 2/Annex 13.10]**. The Ministry of External Affairs stated that Commander Jadhav's Indian nationality "*has been affirmed on several occasions by the Government of Pakistan*" and also referred to Commander Jadhav's "*coerced*" confession (without a shred of evidence in support of that allegation).

56. Despite the opportunity to provide explanations regarding Commander Jadhav's entry, presence and activities in Pakistan afforded by Pakistan's MLA Request dated 23 January 2017, India's Ministry of External Affairs asserted that "*the circumstances of his presence in Pakistan remain unexplained*". With respect, it was open to India to categorically refute the detailed facts as stated by Commander Jadhav, as opposed to evade them. Furthermore, whilst Pakistan assumed the illegal acts carried out by Commander Jadhav were done on behalf of India (as he confessed), the onus was (and remains) on India to provide lawful evidence that he is an Indian national.

57. On 12 February 2017, the FGCM proceedings against Commander Jadhav resumed **[Volume 2/Annex 23/page 2]**.

58. On 3 March 2017 (incorrectly dated 31 March 2016 in the *Note Verbale* itself), the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which again referred to the "*purported*" arrest of Commander Jadhav and requested access to him. Again, no response was made by India to Pakistan's MLA Request **[Volume 2/Annex 13.11]**.

59. On 21 March 2017, Pakistan's Ministry of Foreign Affairs sent a *Note Verbale* to the Indian High Commission in Islamabad stating that access to Commander Jadhav "*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" **[Volume 2/Annex 14]**.

60. There was certainly no doubt at this juncture that Pakistan was prepared in principle to allow India consular access to Commander Jadhav. Unfortunately, India was not and is not prepared to assist in the investigation and collection of evidence in relation to the underlying offences committed by Commander Jadhav in the manner sought by Pakistan's MLA Request, or indeed any meaningful manner.

61. On 31 March 2017 (incorrectly dated 31 March 2016 in the *Note Verbale* itself), the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs **[Volume 2/Annex 13.12]**. India stated that it noted "*the willingness of the Pakistan side to provide consular access*". Thus, it is clear that India plainly understood that Pakistan was prepared in principle to allow India consular access to Commander Jadhav. Again, however, no response was made by India to Pakistan's MLA Request. Regrettably, India (as with other statements it made) now seeks to sidestep its previously stated position, for the purposes it pursues in these proceedings.

62. On 10 April 2017, Pakistan's Ministry of Foreign Affairs sent a *Note Verbale* to the Indian High Commission in Islamabad reiterating that access to Commander Jadhav "*shall be considered, in the light of India's response to Pakistan's request for assistance in the investigation process and early dispensation of justice which is still pending with the Indian side*" **[Volume 2/Annex 19]**.

63. With respect, in the context of the serious crime of espionage, the failure of India – "the sending State" – to provide any explanation at all in response to legitimate questions would be most unlikely to engender trust or confidence that any communication by its officials with its alleged (and subsequently proven) spy, whose mission was to kill and destroy, would be purely innocent.

Conviction and Sentence

64. On 10 April 2017, Pakistan's Inter Services Public Relations ("ISPR") (the media arm of the Pakistan Armed Forces) issued a Press Release stating as follows **[Volume 2/Annex 20]**:

"*Indian RAW Agent / Naval officer 41558Z Commander Kulbushan Sudhir Jadhav alias Hussein Mubarak Patel was arrested on March 3, 2016 through a Counter Intelligence Operation from Mashkel, Balochistan, for his involvement in espionage and sabotage activities against Pakistan. The spy has been tried through Field General Court Martial (FGCM) under Pakistan Army Act (PAA) and awarded death sentence. Today COAS, Gen Qamar Javed Bajwa has confirmed his death sentence awarded by FGCM.*

RAW agent Commander Kulbushan Sudhir Jadhav was tried by FGCM under section 59 of Pakistan Army Act (PAA) 1952 and Section 3 of official Secret Act of 1923. FGCM

found Kulbushan Sudhir Yadhav guilty of all the charges. He confessed before a Magistrate and the Court that he was tasked by RAW to plan, coordinate and organize espionage / sabotage activities aiming to destabilize and wage war against Pakistan by impeding the efforts of Law Enforcement Agencies for restoring peace in Balochistan and Karachi.

The accused was provided with defending officer as per legal provisions".

65. Section 59 of the Army Act 1952 **[Volume 5/Annex 83]** provides, at relevant part:

"*59. Civil offences.–(1) Subject to the provisions of subsection (2), any person subject to this Act who at any place in or beyond Pakistan commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be dealt with under this Act,*

and, on conviction, to be punished as follows, that is to say,---

(a) if the offence is one which would be punishable under any law in force in Pakistan with death or with imprisonment for life, he shall be liable to suffer any punishment assigned for the offence by the aforesaid law or such less punishment as is in this Act mentioned...

(4) Notwithstanding anything contained in this Act or in any other law for the time being in force a person who becomes subject to this Act by reason of his being accused of an offence mentioned in clause (d) of sub-section (1) of section 2 shall be liable to be tried or otherwise dealt with under this Act for such offence as if the offence were an offence against this Act and were committed at a time when such person was subject to this Act; and the provisions of this section shall have effect accordingly".

66. Section 3 of the Official Secrets Act 1923 **[Volume 5/Annex 84]** provides, at relevant part:

"*3. Penalties for spying.*

(1) If any person for any purpose prejudicial to the safety or interests of the State-
(a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or
(b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to any enemy; or
(c) obtains, collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy;

(2) On a prosecution for an offence punishable under this section with imprisonment for a term which may extend to fourteen years, it shall not be necessary to show that the accuse

person was guilty of any particular act tending to State, and notwithstanding that no such act is proved against him, he may be convicted, if from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interest of the State; and if any sketch, plan, model, article, note, document, or relating to any thing in such a place, or any secret officials code or pass word is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, and from the circumstances of the case or his conduct or his purchase prejudicial to the safety or interests of the State, such shall be presumed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interest of the State.

(3) A person guilty of an offence under this section shall be punishable,-
(a) where the offence committed is intended or calculated to be, directly or indirectly, in the interest or for the benefit of a foreign power, or is in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine-field, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affaires of Pakistan or in relation to any secret official code, with death or with imprisonment for a term which may extend to fourteen years..."

67. On 10 April 2017, India's Ministry of External Affairs sent a *Note Verbale* to the Pakistani High Commission in New Delhi in which the trial of Commander Jadhav was described as "*farcical*" and stated that if Commander Jadhav's death sentence was carried out, India "*will regard it as a case of premeditated murder*" **[Volume 2/Annex 13.13]**. Again, no substantive response was made by India to Pakistan's MLA Request.

68. On 11 April 2017, the External Affairs Minister of India made a statement in the Rajya Sabha (the Upper House of the Parliament of India) on the case of Commander Jadhav in which she stated, *inter alia*:

"*4. Given this exchange, it is extraordinary that yesterday, a decision is suddenly announced awarding a death sentence in this case when previous exchanges with India itself underlines the insufficiency of evidence. To make matters even more absurd, three hours after the death sentence was announced, the Indian High Commission received an official communication from the Foreign Ministry of Pakistan reiterating the Pakistani proposal for conditional consular access. That tells us a lot about the farcical nature of the alleged proceedings which have led to an indefensible verdict against an innocent kidnapped Indian.*

5. Our position on this matter is clear. There is no evidence of wrongdoing by Shri Jadhav. If anything, he is the victim of a plan that seeks to cast aspersions on India to deflect international attention from Pakistan's well-known record of sponsoring and supporting terrorism. Under these circumstances, we have no choice but to regard the sentence, if carried out, as an act of pre-meditated murder".

[Volume 2/Annex 21]

69. Despite having received the MLA Request, the External Affairs Minister asserted that there was "*no evidence of wrongdoing*". Indeed, what is "*farcical*" (with respect) is the assertion that Commander Jadhav was kidnapped from within Iranian territory and transported across the border (apparently at least a nine hour journey by car from Chabahar and an approximately 3 hour journey by car from Saravan) **[Volume 6/Annex 139]**) for the purposes of engaging in his "*premeditated murder*" – after more than a year had passed since he was arrested during which period India was asked to provide assistance for the investigation of Commander Jadhav – and patently avoided doing so.

II

70. At this juncture, given India's vociferous criticism of the application of the death penalty in Pakistan (which appears to have been at the root of the Request for the Indication of Provisional Measures and the "*pre-meditated murder*" rhetoric), the following points are noted:

70.1. India maintains the death penalty for certain offences;

70.2. Indeed, on 31 August 2015, the Law Commission of India provided the Government of India with its Report No. 262 **[Volume 6/Annex 122/page 217]** on the death penalty, in which it recommended the retention of the death penalty for terrorism offences:

"*7.2.3 Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of the death penalty for terrorism related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.*

7.2.4 The Commission accordingly recommends that the death penalty be abolished for all crimes other than terrorism related offences and waging war".

70.3. At the time of this Counter-Memorial, India is not a party to the First Optional Protocol to the ICCPR Recognising the Jurisdiction of the Human Rights Committee **[Volume 6/Annex 123; Annex 124]**. Pakistan therefore questions India's reliance in its Memorial upon the decisions of a body that it does not recognise the jurisdiction of. In addition, India is not a party to the Second Optional Protocol to the ICCPR Toward the Abolition of the Death Penalty **[Volume 6/Annex 125; Annex 126]**.

70.4. Recently, India voted against a Human Rights Council resolution ("36/17. The question of the death penalty") dated 29 September 2017 at the thirty-sixth session of the Human Rights Council on the question of the death penalty which (at paragraph 7): "*Calls upon States to comply with their obligations under article 36 of the Vienna*

Convention on Consular Relations, and to inform foreign nationals of their right to contact the relevant consular post" **[Volume 6/Annex 127]**[2].

70.5. India has repeatedly voted against UN General Assembly Resolutions imposing a Moratorium on the Death Penalty, including those in 2007, 2008, 2010, 2012, 2014 and 2016 **[Volume 6/Annexes 128-133]**.

71. Thus, with respect, it is somewhat inconsistent for India to use such language focusing on the sentence imposed on Commander Jadhav.

II

72. Continuing with the chronology of key facts, on 13 April 2017, in a weekly media briefing for India's Ministry of External Affairs, an Official Spokesperson stated, *inter alia*, **[Volume 2/Annex 22/page 5/para. 6]**:

"*As to the question of his so-called fake identity or original Indian passport, we can only ascertain all this once we have consular access. We have not seen the passport but it certainly begs a question if the allegation is that he is serving officer of Indian Navy and a spy, it begs the question what type of a serving officer and spy will carry his original passport with him especially if he is going to a country on "spying mission"*".

73. This was despite a copy and relevant details of the passport in the name of 'Hussein Mubarak Patel' having been sent to India on 23 January 2017 as part of the MLA Request. Indeed, the Official Spokesperson must therefore be taken to know that Commander Jadhav was carrying an authentic passport with a false identity – not his "*original passport*". It is those indisputable facts which "beg" questions India refuses to answer.

Press Statement by Adviser to the Prime Minister of Pakistan on Foreign Affairs

74. On 14 April 2017, the Adviser gave a very detailed Press Statement in which he set out the facts of Commander Jadhav's arrest, trial, conviction and sentence, as well as avenues for appeal and clemency available to Commander Jadhav **[Volume 2/Annex 23]**.

75. H.E. Sartaj Aziz's Press Statement included the following key points:

75.1. Commander Jadhav was apprehended on 3 March 2016 after he illegally crossed over into Pakistan from the Saravan border in Iran.

75.2. He was found in possession of an Indian passport, and confessed that he was a resident of Mumbai, India, still serving in the Indian Navy and was due to retire in 2022.

[2] The other States which voted against the resolution were Bangladesh, Botswana, Burundi, China, Egypt, Ethiopia, Iraq, Japan, Qatar, Saudi Arabia, United Arab Emirates and United States of America.

75.3. Commander Jadhav was tried by Field General Court Martial under Section 59 of the Pakistan Army Act 1952 and Section 3 of the Official Secrets Act 1923, and was provided with representation in accordance with the provisions of law. Commander Jadhav confessed that he was tasked by RAW to plan, coordinate and organize espionage and sabotage activities aimed at destabilizing and waging war against Pakistan.

75.4. Commander Jadhav was involved in both espionage and terrorist/sabotage activities resulting in the loss of many lives and damage to property, and 7 examples of such terrorist activities were given by H.E. Sartaj Aziz.

75.5. The proceedings of the case, from the confessional video statement of Commander Jadhav on 25 March 2016 to the confirmation of the death sentence on 10 April 2017, lasted over a year and went through different stages in accordance with legal requirements.

75.6. A number of steps were taken during the legal proceedings to ensure transparency, including the recording of his confessional statement before a Magistrate under section 164 of the Code of Criminal Procedure; proceedings were conducted under the Law of Evidence (Qanun-e-Shahadat 1984) in the competent court; a qualified field officer was appointed to defend him; all statements of witnesses were recorded under oath in the present of the accused in court, and Commander Jadhav was allowed to ask questions; and a fully qualified law officer of Judge Advocate General Branch remained part of the Court during the trial.

75.7. H.E. Sartaj Aziz identified the options available to Commander Jadhav and applicable time limits, namely the right of appeal, a mercy petition to the Chief of Army Staff ("COAS"), and a mercy petition to the President of Pakistan.

75.8. A Letter of Assistance requesting specific information and access to certain key witnesses was shared with the Government of India on 23 January 2017, but no response was received.

76. The Adviser made reference to the fact that India had not responded to Pakistan's MLA Request and made the following specific request of the Government of India **[Volume 2/Annex 23/page 3]**:

"*I would like to ask India why Kulbushan Jhadav was using a fake identity impersonating as a Muslim? Why would an innocent man possess two passports, one with a Hindu name and another with a Muslim name? Since India has no credible explanation about why their serving Naval Commander was in Balochistan, it has unleashed a flimsy propaganda campaign. Inflammatory statements and rhetoric about "pre-meditated murder" and "unrest in Balochistan", will only result in escalation, serving no useful purpose*".

77. On 14 April 2017, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which requested access to Commander Jadhav and copies of the charge sheet and judgment of the FGCM **[Volume 2/Annex 13.14]**. Again, no response was made by India to Pakistan's MLA Request.

78. On 17 April 2017, the Director General of Pakistan's Inter Services Public Relations, Major General Asif Ghafoor, is reported to have stated that Commander Jadhav was not entitled to consular access. A press report apparently in Jehan Pakistan newspaper (18 April 2017) was deployed by India previously (the said newspaper is not a newspaper of record and its accuracy is not accepted). Nevertheless, no doubt to advance its contentions, India relies upon this newspaper which purports to state that the Director General remarked:

"*Kulbhushan Jadhav was sentenced to death by a Field General Court Martial after fulfilling all legal requirements. Kulbhushan Jadhav was apprehended on the basis of fake name, fake identity and fake passport. No compromise has been made and would not be made. Jadhav is a spy and consular access can't be given to a spy*".

[Volume 2/Annex 24]

79. However, the official ISPR statement of the date referred to in the translation of the Jehan newspaper report makes no reference to such comments **[Volume 2/Annex 25]**.

80. On 18 April 2017, it was reported in *The Hindustan Times* that the External Affairs Minister of India had stated in the Lok Sabha (the Lower House of India's Parliament, comprised of representatives of the people chosen by direct election), during the course of discussions concerning the potential drafting of a resolution condemning Pakistan, that Commander Jadhav could not be a spy because he had a "*valid Indian visa*" **[Volume 2/Annex 26]**. Assuming this leading Indian newspaper carried an accurate report, the "explanation" given simply raises more questions.

81. On 19 April 2017, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which requested **[Volume 2/Annex 13.15]**: (i) the provision of certified copies of the charge sheet, proceedings of the Court of Inquiry, the judgment and the summary of evidence in the case of Commander Jadhav; (ii) the sharing of the procedure for appeal to the relevant court; (iii) the facilitation of the appointment of a defence lawyer for Commander Jadhav and contact with the Indian High Commission in Islamabad; (iv) the provision of a certified copy of a medical report of Commander Jadhav; (v) the issuing of appropriate visas to Commander Jadhav's family members to travel to Pakistan; (vi) the provision of consular access to Commander Jadhav.

82. Yet again, India evaded Pakistan's MLA Request.

83. In a Press Briefing on 20 April 2017, the Spokesperson for Pakistan's Ministry of Foreign Affairs, in the course of answering journalists' questions concerning Commander Jadhav,

drew attention to the 2008 Agreement on Consular Access between India and Pakistan and stated **[Volume 2/Annex 27/page 1]**:

"*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*". [N.B. The version of the transcript of this press briefing adduced in evidence by India is described on its face as a "rush transcript". The reference to "Art IV" should in fact read "Art VI".]

II

84. The Spokesperson went on to state of Commander Jadhav, *inter alia*, as follows **[Volume 2/Annex 27/page 2]**:

"*His sentence is based on credible, specific evidence proving his involvement in espionage and terrorist activities in Pakistan, resulting in the loss of scores of precious lives of Pakistanis.*

The reaction from India, especially withholding the release of Pakistani prisoners, who have completed their sentences, for a spy and terrorist working against Pakistan's national interests, is disappointing. Inflammatory statements emanating from India are against international norms and will only result in escalation, serving no constructive purpose. Indian reaction should be seen in the backdrop of exposure of its state involvement in perpetrating subversive and terrorist activities in Pakistan.

I would once again underscore the point that Indian reaction must be seen in the backdrop of its exposure of involvement in terrorism and terror-financing in Pakistan".

85. On 21 April 2017, writing in *The Indian Express*, the highly respected Indian journalist, Mr. Karan Thapar (formerly of CNN), had asked India's Ministry of External Affairs to explain why Commander Jadhav had been in possession of two passports in two different names **[Volume 2/Annex 28]**. The Ministry of External Affairs reportedly responded that the answer could be obtained only if Indian officials managed to gain access to Commander Jadhav. The journalist wrote: "*But why not check the record attached to the passport numbers? Surely they would tell a story?*" – quite. No response from the Ministry of External Affairs was reported.

86. It would appear from Mr. Thapar's Wikpedia page that his article "*caused great hue and cry in Indian including article's comment section asking why Mr Thapar is showing such an anti-national stand against his own country fellow persons on sensitive issues which can embarrass its own country in International level*" **[Volume 2/Annex 29]**.

87. The same article by Mr. Thapar also quoted one Amarjit Singh Dulat, identified (on the website of the Indian Institute of Peace & Conflict Studies, of which he is a member of staff **[Volume 2/Annex 30]**) as a former Chief of RAW and a former special director of India's Intelligence Bureau), as "*unhesitatingly said Jadhav could be a spy*" **[Volume**

2/Annex 28], but that if he was then the Government of India would be very unlikely to admit that fact.

88. On 26 April 2017, a petition and appeal by the mother of Commander Jadhav was handed by the Indian High Commissioner in Islamabad to the Foreign Secretary of Pakistan **[Volume 2/Annex 13.16]**.

89. On 27 April 2017, the External Affairs Minister of India wrote to H.E. Sartaj Aziz, the then Adviser, requesting **[Volume 2/Annex 31]**: (i) the provision of certified copies of the charge sheet, proceedings of the Court of Inquiry, the judgment and the summary of evidence in the case of Commander Jadhav; (ii) the appointment of a defence lawyer for Commander Jadhav and his contact details; (iii) the provision of a certified copy of a medical report of Commander Jadhav; and (iv) the issuing of appropriate visas to Commander Jadhav's family members to travel to Pakistan. Again, no response was made by India to Pakistan's MLA Request.

90. On 27 April 2017, it was reported in *The New Indian Express* that two Indian "defence experts" identified as P.K. Sehgal (a retired Major-General of the Indian Army) and Qamar Agha had "*both opined that the denial [of consular access] hints towards that Kulbhushan has already been tortured to an extent that either he is already dead or no longer in a condition that he can be presented in front of the Indian consulate*" **[Volume 2/Annex 32]**.

India institutes the instant proceedings

91. On 8 May 2017, and without any prior intimation to Pakistan, India filed an Application instituting the instant proceedings before the Court. In its Application (at paragraph 60) India sought the following relief:

"*(1) A relief by way of immediate suspension of the sentence of death awarded to the accused.*

(2) A relief by way of restitution in interregnum 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

(3) 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.

(4) 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".

92. At the same time, India filed a Request for the Indication of Provisional Measures seeking (at paragraph 22) the Court to indicate the following provisional measures:

"*(a) That the Government of the Islamic Republic of Pakistan take all measures necessary to ensure that Mr. Kulbhushan Sudhir Jadhav is not executed;*

(b) That the Government of the Islamic Republic of Pakistan report to the Court the action it has taken in pursuance of sub-paragraph (a); and

(c) That the Government of the Islamic Republic of Pakistan ensure that no action is taken that might prejudice the rights of the Republic of India or Mr. Kulbhushan Sudhir Jadhav with respect to any decision this Court may render on the merits of the case".

93. In its Request for the Indication of Provisional Measures, India contended (at paragraph 23) that the situation concerning Commander Jadhav was sufficiently grave and immediate as to justify the Court granting Provisional Measures without affording an opportunity for Pakistan to appear and make submissions before the Court:

"*In view of the extreme gravity and immediacy of the threat that authorities in Pakistan will execute an Indian citizen in violation of obligations Pakistan owes to India, India respectfully urges the Court to treat this Request as a matter of the greatest urgency and pass an order immediately on provisional measures suo-motu without waiting for an oral hearing*".

94. In its letter to the Court of 8 May 2017 submitting the Application and the Request for the Indication of Provisional Measures **[Volume 1/Annex 1]**, India stated:

"*The request for provisional measures is of extreme urgency. Given the lack of transparency in the entire trial process, there is a high likelihood that Pakistani authorities may execute Indian national Kulbhushan Sudhir Jadhav at any time without any notice and this eventuality would deprive both this Court and India of the opportunity to have the case decided on its merits*".

95. On 9 May 2017, as is normal in such circumstances, the President of the Court wrote a letter to the Prime Minister of Pakistan in the exercise of the power under Article 74(4) of the Rules of Court calling upon the Government of Pakistan, pending the Court's decision on India's Request for the Indication of Provisional Measures, "*to act in such a way as will enable any order the Court may make on this Request to have its appropriate effects*" **[Volume 1/Annex 3]**.

96. On 15 May 2017, the Court held a hearing on Provisional Measures. The verbatim transcripts of that hearing and Pakistan's written submissions to the Court are exhibited to this Counter-Memorial for ease of reference **[Volume 1/Annex 5]**.

97. On 18 May 2017, the Court indicated the following Provisional Measures **[Volume 1/Annex 6/page 15/para 61]**:

"*Pakistan shall take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order*".

98. Not without significance, in its Order, the Court also stated **[Volume 1/Annex 6/page 13]**:

"*56. The Court notes that the issues brought before it in this case do not concern the question whether a State is entitled to resort to the death penalty. As it has observed in the past, "the function of this Court is to resolve international legal disputes between States, inter alia when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal" (LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I), p.15, para. 25; Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, p.89, para. 48)*". (emphasis added)

99. Separate opinions were delivered by Judge Bhandari of India, and Judge Cançado Trindade of Brazil.

100. On 31 May 2017, Pakistan's Ministry of Foreign Affairs sent a letter to the Indian High Commission in Islamabad concerning India's continued failure to respond to or engage with Pakistan's MLA Request, and drew attention, *inter alia*, to India's failure to explain "*as to how and in what circumstances Commander Jadhav came to be in possession of this passport bearing a false name"*. India's cooperation and assistance in the investigation of "*the most serious acts of terrorism conducted by its nationals*" was again sought – to no avail **[Volume 2/Annex 42/page 2]**.

101. On 8 June 2017, Pakistan's Ministry of Foreign Affairs sent a letter to the Court responding to the Court's indication of Provisional Measures stating:

"*Without prejudice to Pakistan's position on jurisdiction and justiciability of the matter before the Court and the domestic legal processes concerning the investigation, conviction and sentencing of Commander Kulbhushan Sudhir Jadhav (under the cover name Hussein Mubarak Patel bearing Indian Passport number L9630722) on charges of, inter alia, espionage, sabotage and terrorism, the Government of the Islamic Republic of Pakistan has instructed the relevant departments of the government to give effect to the Order of the Court dated 18 May 2017. We reiterate that legal processes remain available to Commander Jadhav*" **[Volume 1/Annex 9]**.

102. On 8 June 2017, the President of the Court held a meeting to fix the time limits for the filing of the written pleadings. On 13 June 2017, the Court made an Order fixing the time limits for the filing of the initial pleadings. India was given until 13 September 2017 to file its Memorial. Pakistan was given until 13 December 2017 to file its Counter-Memorial **[Volume 1/Annex 10]**.

103. On 19 June 2017, India's Ministry of External Affairs sent a letter to Pakistan's Ministry of Foreign Affairs as a purported response to Pakistan's letter of 31 May 2017, and purported to return Pakistan's MLA Request, without engaging with any of its substantive content **[Volume 2/Annex 33]**.

104. On 20 June 2017, Pakistan's then High Commissioner in New Delhi reiterated in an interview with *The Hindu* newspaper that Commander Jadhav was able to petition for clemency first to the COAS and then to the President of Pakistan **[Volume 2/Annex 34]**. As explained above, this had already been made clear to India and to the rest of the world by the Adviser in his Press Statement on 14 April 2017 **[Volume 2/Annex 23/pages 2-3]**.

Commander Jadhav's Continued Confession

105. On 22 June 2017, Pakistan's ISPR issued a Press Release stating that Commander Jadhav "*has made a mercy petition to the Chief of Army Staff*" and that Commander 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*" **[Volume 2/Annex 35/pages 1-2]**.

106. A video of a contrite statement by Commander Jadhav (made prior to 10 April 2017) was shown at this press conference and will be adduced in evidence. The transcript of that further confession was attached to the aforementioned press release **[Volume 2/Annex 35/pages 2-3]** and is set out in full below:

"***TRANSCRIPT OF 2ND STATEMENT OF COMMANDER KULBHUSHAN SUDHIR JADHAV***

I am Commander Kulbhushan Sudhir Jadhav. Number 41558 Zulu of the Indian Navy I am a commissioned officer in the Indian Navy. And my alias name was Hussain Mubarak Patel. And I was basically; I'd visited Karachi on 2 occasions in 2005 and 2006 for basic intelligence gathering on Naval installations and subsequent detail. Basically gathering information on the landing sites around Karachi and various naval vessels or whatever I could gather about the navy.

The RAW officials had started sniffing that the Modi government will be in power by 2014. So I was inducted and my services were handed over to Research and Analysis Wing (RAW). And the aim was to see that all the activities around the Mekran Coast and Karachi and Balochistan Interior. Turbat and Quetta were to be organized and nicely coordinated.

Subsequently, me along with Anil Kumar had a meeting with Alok Joshi [former chief of RAW]. *Where in the plans and the finalization of the activities along the Mekran Coast and Karachi were finalized. I was stationed in Chahbahar, The Iranian Port City under a fictitious name "Hussein Mubarak Patel" and I was running a business there "Kaminda Trading company". It was a discreet non embassy based operation exclusively meant to conduct meetings with Baloch insurgents and terrorists. The aim of these meetings was always to see that the Aims and the Targets of RAW to conduct the various terrorist activities within Balochistan are conveyed properly to the insurgents and any kinds of requirements of them are conveyed back to the RAW officials.*

II

My purpose of this time visit to Pakistan was to establish and meet the basic leadership of Baloch sub nationals, the BLA or the BRA and establish and Infiltrate around 30 to 40 RAW operatives along the Mekran Coast for Operations along with Baloch sub nationals and miscreants or Terrorists.

The aim was to have RAW operatives on field so that they could facilitate and help the Baloch sub nationals in carrying out precision targets to be carried out. Precision, I would say sort of a military sort of a connection to the entire Operation.

Balochistan doesn't have a movement on the sea, so the aim was to raise within the Baloch sub nationals a sea front, so that the activities could be properly coordinated from the sea side and subsequently taken on further inwards, may be Quetta or Turbat or maybe interiors of various places.

The subsequent activities which were then handed over by RAW when I subsequently started working for Research and analysis wing, the main aim was focused to Balochistan and the Karachi region. The idea was to see to it that the sub nationals with in this region were facilitated and supported financially and with arms and Ammunition, weapons and some kind of maybe man and material movement also across the coast.

So me being a naval officer I was given the task of seeing that how they could be landed across the Mekran coast, between Gwadar, Jewani or whichever suitable points were there across this belt. And the main ideology beyond this was that the economic and the various activities which go along the CPEC [China-Pakistan Economic Corridor] *region between Gwadar and China had to be distorted and disrupted and some destabilized so that the aim was to just basically raise the level of insurgency within Balochistan and the Karachi region.*

Research and Analysis Wing through Mr Anil Kumar has been abetting and financing and sponsoring a lot of activities within Balochistan and Sindh. The entire Hundi and Hawala operations are undertaken from Delhi and Mumbai via Dubai into Pakistan and during one such important transaction was the 40,000 dollars which was transferred to Baloch sub Nationals via Dubai. Also the finances which are coming into Balochistan and Sindh for various anti National activities are coming through consulates in Jalalabad and Kandhar and the Consulate in Zahidan. These are very important consulates which

are used by Research and Analysis Wing to transfer dollars into the Balochistan movement.

And one such instance was where I was directly involved and I was observing the transaction was when 40,000 Dollars were recently transferred from India via Dubai to one such Baloch National operative within Pakistan.

Research and Analysis Wing and Mr Anil Kumar on behalf of RAW had been sponsoring regularly the various terrorist activities within Pakistan. Especially Hazara Muslims, Shia Muslims who move around on pilgrimage between Iran, Afghanistan and Pakistan were basically to be targeted and killed. They were already being done, it was being done but the level had to be raised to the very high level so that the movement completely stops.

II

Then the targets on various workers of FWO [Frontier Works Organization, a military engineering organization] *who were conducting construction of various roads within Balochistan and the third major activity was the IED attacks which were being carried out by the Baloch sub nationals within Quetta, Turbat or various other cities of Balochistan.They were being directly sponsored by RAW.*

Mr Anil Kumar has been sponsoring sectarian violence across Sindh and Balochistan and also sponsoring various assassinations across this same region so that instability or some kind of fear is set into the mindsets of the people of Pakistan, and in one such process SSP Chaudhary [a Pakistani Superintendent of Police] *was assassinated. This was a direct mention by Mr Anil Kumar to me.*

The various financing which subsequently happened for the TTP [Tehreek-e-Taliban Pakistan] *and various other Afghan anti Pakistani terrorist groups led to the attack by TTP on one of the Mehran Naval Bases in which a lot of damage was cost to the Pakistani Navy. Other sort of radar installation attack, the Sui pipeline gas attack, then attacks on civilian bus Stations where some I suppose Pakistani Nationals were being targeted by Sub Nationals and murdered and massacred so that a sort of disruption in the CPEC is done that was being funded and directly supported by Mr Anil Kumar. He wanted it to be raised to the next level so that complete disruption and complete stoppage of the Economic corridor between Gwadar and China is achieved.*

One of the operations which was being planned by RAW officials along with Baloch insurgents was a military style attack on Zahidan Pakistani consulate. The aim was to either attack it with a grenade or some kind of RPG or IED attack or then try to harm the consulate General or some kind of vicious attack on the Pakistani consulate in Zahidan. It was being militarily planned, the RAW officials were involved in Iran and the Baloch Sub Nationals who were supposed to carry out the attack or facilitate the entire process were being involved and I was well aware of the plan which was being conducted and how it was being planned.

RAW was sponsoring the setting up of the modern website, a new website which was being already run through Nepal which the Balochistan movement was carrying on, on

the Cyber world and the creation of the website, the previous maintenance of the already existing website was being handled by the Research and Analysis wing from Nepal, Kathmandu which was luring people from within Pakistan for various activities to be carried out in the future.

This time while crossing over into Pakistan I travelled all the way from Chahbahar in a private Taxi along with Rakesh [Sub Inspector Rakesh, RAW] *to the Iranian Pakistan border near Sarawan. From wherein I crossed into Pakistan along with Baloch Sub Nationals and after about an hour or so I was apprehended by the Pakistani authorities in Pakistan.*

Basically the movement into Pakistan for me was, I was on a visa and official visa in Iran and I was moving with my passports so I carried my passports with till the border almost so that if Iranian authorities or Iranian people who are about to check me or I am stopped or checked I should have a legitimate reason for movement with in Iran and my subsequent movement into Pakistan and then backwards. While I was not intending to having being caught so on my movement backwards again I would have had a legitimate reason to go about, With that passport with the legitimate visa of Iran.

During my judicial proceedings which were held under the field General court martial, I was accorded a defense council by the officials here which were conducting the entire proceedings.

Today I genuinely after the time having spent in Pakistan I feel very ashamed and I genuinely seek pardon of the acts and sins and crimes I have committed here against the Nation and the people of Pakistan".

107. Thus over a period of more than one year, there were repeated and consistent narrations by Commander Jadhav of his illegal acts.

108. On 17 July 2017, a report in *The Indian Express* reported Indian "defence expert" P.K. Sehgal (a former Major-General of the Indian Army) as stating that "*Pakistan was trying to solve the Kulbhushan Jadhav case on its own due to lack of evidences against former Indian Naval officer*" and that "*Pakistan is very much aware that it was a sham case; sham military trial; they do not have any evidence that is why they are trying to finish this case on their own level. Pakistan is trying to hoodwink the International Court of Justice to the extent that is possible*" **[Volume 2/Annex 36/pages 1-2]**. The said article reported another Indian "defence expert" Praful Bakshi (who describes himself as an ex-Wing Commander Fighter Pilot and an ex-Chief Spokesman of India's Ministry of Defence **[Volume 2/Annex 37]**) as stating that "*It's a serious matter that the Pakistan military court has rejected Jadhav's mercy petition and declared him as criminal. But, Kulbhushan Jadhav has more options. The ICJ has already instructed to Pakistan that they can prepare their new team and put the case once again in a proper manner. Now, it depends on the ICJ that what steps it will take. The ICJ is a world body and Pakistan*

cannot take it lightly" **[Volume 2/Annex 36/page 2]**. With respect, the tendentious comments attributed to these gentlemen manifest their expertise (or otherwise).

109. On 24 July 2017, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which requested access to Commander Jadhav. Again, no response was made by India to Pakistan's MLA Request **[Volume 2/Annex 13.17]**.

110. On 30 August 2017, Pakistan's Ministry of Foreign Affairs sent a letter to India's Ministry of External Affairs concerning India's continued failure to engage with the substantive content of Pakistan's MLA Request and, *inter alia*, made specific enquiries of India with regard to Commander Jadhav's passport **[Volume 2/Annex 43]**:

"*5. By way of example, the Government of India was provided with a clear copy of passport No. L9630722 in the name of 'Hussein Mubarak Patel'.*

6. It is incumbent upon the Government of India to explain:

a) Whether Commander Jadhav is indeed Commander Jadhav or 'Hussein Mubarak Patel'.

b) If he is not 'Hussein Mubarak Patel', does such a person exist?

c) If 'Hussein Mubarak Patel' does exist or does not exist, what attempts has the Government of India made at the very latest since 23rd January 2017 to investigate how Commander Jadhav was able to obtain Passport issued by the competent authorities in India?

d) The travel history of Commander Jadhav.

7. In the alternative, is it the Government of India's position that Commander Jadhav was in possession of a false and inaccurate document such that either:

a. His name is not 'Hussein Mubarak Patel': or

b. It is not a passport from the competent Indian authorities?

8. If that is the case, does the Government of India consider that Commander Jadhav has committed a crime or crimes under Indian Law? If so, what is /are the crimes?

9. The Islamic Republic of Pakistan does not consider that the purported return of the request in any way excuse the failure on the part of the Republic of India to comply with its international obligations as aforesaid. To facilitate the Republic of India's compliance the request is provided again".

111. On 13 September 2017, India filed its Memorial with the Court.

112. On 20 September 2017, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which requested access to Commander Jadhav. Again, no response was made by India to Pakistan's MLA Request **[Volume 2/Annex 13.18]**.

113. On 9 October 2017, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which requested access to Commander Jadhav. Again, no response was made by India to Pakistan's MLA Request **[Volume 2/Annex 13.19]**.

II

114. On 11 October 2017, by a letter to the Court, Pakistan nominated the former Chief Justice of the Supreme Court of Pakistan Tassaduq Hussain Jillani to sit as judge *ad hoc* in the instant case **[Volume 2/Annex 38]**.

115. On 26 October 2017, Pakistan's Ministry of Foreign Affairs sent a letter to India's Ministry of External Affairs concerning India's continued failure to engage with the substantive content of Pakistan's MLA Request and, *inter alia*, reiterated specific enquiries of India with regard to Commander Jadhav's passport asking whether **[Volume 2/Annex 44/pages 2-3]**:

"(1) Commander Jadhav is indeed Commander Jadhav or 'Hussein Mubarak Patel'

(2) If he is not 'Hussein Mubarak Patel', does such a person exist?

(3) If 'Hussein Mubarak Patel' does exist or does not exist, what attempts has the Government of India made at the very latest since 23rd January 2017 to investigate how Commander Jadhav was able to obtain what appears to be an authentic Indian passport issued by the competent authorities in India?

(4) In the alternative, is it the Government of India's position that Commander Jadhav was in possession of a false and inaccurate document either:

a. because his name is not 'Hussein Mubarak Patel'; or

b. because it is not a passport from the competent Indian authorities?

(5) If that is the case, does the Government of India consider that Commander Jadhav has committed a crime or crimes under Indian law? If so, what is/are the crimes?

(6) What is the actual authentic passport for Commander Kulbhushan Sudhir Jadhav (assuming he was issued with a passport)? Please provide full particulars of the date of issue, date of expiry, passport number, place of issue, name and photograph in the actual (presently valid) passport issued to Commander Jadhav if such a document exists. Without prejudice to the foregoing, the Islamic Republic of Pakistan has already put the

Republic of India on notice that it has failed to establish the Indian nationality of Commander Jadhav".

116. Pakistan made expressly clear that, if Commander Jadhav was considered by the Government of India to have violated Indian criminal law, then Pakistan would be prepared to consider assisting India by considering any extradition request that India may make **[Volume 2/Annex 44/page 3]**.

117. On 6 November 2017, the Registrar of the Court communicated to Pakistan that India had raised no objection to Pakistan's nomination of former Chief Justice Jillani to sit as judge *ad hoc* in this case **[Volume 2/Annex 39]**.

118. On 10 November 2017, Pakistan's Ministry of Foreign Affairs sent a *Note Verbale* to the Indian High Commission in Islamabad stating that: "*the Government of Pakistan has decided to arrange a meeting of Commander Kulbhushan Jhadev with his wife, on humanitarian grounds*" **[Volume 2/Annex 40]**.

119. This was responded to by a letter dated 13 November 2017 **[Volume 2/Annex 41]**.

120. At the time of finalising the Counter-Memorial the offer of a meeting is the subject of ongoing correspondence.

III. PRELIMINARY ISSUES MILITATING AGAINST THE COURT EXERCISING JURISDICTION

121. India refuses to engage with a central question; namely, how is it that Commander Jadhav (an individual that India admits was a member of its armed forces, but (conveniently) suggests retired shortly prior to his arrest) was able to travel frequently to and from India using an authentic Indian passport bearing a false identity in a Muslim name?

122. The provision of an authentic Indian passport with a false identity and/or possession thereof (conduct which is apparently punishable by imprisonment according to the domestic criminal law of India as contained in India's Passport Act 1967 **[Volume 5/Annex 85]** and/or Passport Rules 1980 **[Volume 5/Annex 86]**) raises serious questions as to the Government of India's complicity in or (at the least) facilitation of that course of conduct by Commander Jadhav.

123. Even if the Government of India has 'merely' facilitated (as distinct from being complicit in) Commander Jadhav's frequent travel by providing an authentic Indian passport with a false identity, Pakistan respectfully submits that that is sufficient grounds for the Court to reject India's claim on one or more of the following three grounds: (A) abuse of process; (B) abuse of rights; and (C) illegality/unclean hands/*ex injuria jus non oritur*.

(A) ABUSE OF PROCESS

124. Pakistan respectfully submits that India's approach to these proceedings, following its invocation of the Court's jurisdiction by its Application and Request for the Indication of Provisional Measures on 8 May 2017, amounts to an abuse of the Court's process.

125. Robert Kolb, Professor of Public International Law at *Université de Genève*, has described the principle of 'abuse of process' in public international law as a principle that:

> "*...consists of the use of procedural instruments or rights by one or more parties for the purposes that are alien to those for which the procedural rights were established...*". (Kolb R, '*General Principles of Procedural Law*' in Zimmerman A, Oellers-Frahm K, Tomuschat C and Tams CJ (eds), *The Statute of the International Court of Justice: A Commentary* (2012), page 904 **[Volume 5/Annex 108]**)

126. The principle of abuse of process has been invoked before the Court on several occasions. The central premise is that legal processes and rights should not be deployed in a manner which evinces an improper and/or collateral purpose.

127. In *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America) (Mexico v United States of America)*, Counsel for the United States of America advanced six propositions, described as "*sound propositions of international law*", concerning abuse of the Court's processes (verbatim transcript, Thursday 19 June 2008 at 3pm, page 47, paragraph 7) **[Volume 3/Annex 45]**:

"*7. In developing this submission, Madam President, I have six propositions to put before you. They are these:*

1. That the Court has an inherent power to regulate its own proceedings in the interests of justice and in order to safeguard the integrity of the Court.

2. That that power includes the power to dismiss applications where they amount to an abuse of process.

3. That the Court is not bound by the party's characterization of its application.

4. That where a party asserts that it is making an Application to the Court for a judgment or order for a specific purpose and the Court considers that the party is in reality pursuing some different purpose which takes the application outside the scope of the provision on which it is purportedly based, then the Court is entitled to dismiss that application.

5. And specifically, that where it appears to the Court that a party is making an application for a judgment or order solely for the purpose of bringing pressure upon the other party to comply with an earlier Judgment or Order of the Court, the Court is entitled to reject the application on the ground that it amounts to an abuse of process.

6. And finally, that the Court may dismiss an application in the circumstances that I have described at any stage in the proceedings, because the dismissal is an exercise of the Court's inherent power to regulate its own proceedings in the interests of justice and in order to safeguard the integrity of the Court". (emphasis added)

128. Notwithstanding that the Court, in the circumstances of that case, did not address these arguments as advanced by the United States of America, Pakistan respectfully adopts these propositions, and submits that the Court should apply them in its consideration of India's commencement of the instant proceedings, as well as India's conduct during these proceedings. It should not be a matter of dispute that any court of justice possesses an inherent power to prevent the misuse of its procedures.

129. In light of the above, Pakistan respectfully submits that, in the instant case, India's Application and its Request for the Indication of Provisional Measures invoked the exceptional Provisional Measures jurisdiction and its Memorial seeks from the Court plainly unavailable relief comprising "*remedies and relief far beyond those that would flow*" (in India's own words in *Obligations concerning Negotiations relating to Cessation*

of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India[3]), if (contrary to Pakistan's position), the Court were to find that Pakistan had not complied with Article 36 VCCR 1963 in the instant case. The unavailability of the relief sought by India is explained further in Section VII below. Again, in India's own words, "*the entire venture has been an abuse of process*" (see footnote 3).

(i) Some material facts

130. India brought its Application and the Request for the Indication of Provisional Measures on the basis of what India projected as the extremely urgent nature of the case, and wrongly sought to assert (in its Request for the Indication of Provisional Measures, at paragraphs 12-13) that the carrying out of the death sentence for the crimes committed by Commander Jadhav was imminent:

"*The request for provisional measures assumes great urgency as Mr. Jadhav has already been sentenced to death and he has only forty days to file an appeal… An appeal has been filed on his behalf by his mother, and from press reports it appears that a court of appeal has already been constituted. There is thus great urgency in the matter as it is possible that the appeal may be disposed of even prior to the expiry of the period of 40 days available for filing*".

131. Indeed, to accentuate its claim of urgency, India suggested (at paragraph 21) that an execution could occur "*any day*":

"*As stated above, there is immense urgency in the matter as the 40 day period expires in any event on 19th May, and besides the appeal by the mother already having been filed, and the court of appeal already having been constituted, the disposal of the appeal may take place any day*".

[3] In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, Counsel for India (Mr. Harish Salve) stated, in the course of oral submissions on questions of jurisdiction and admissibility (verbatim transcript, Thursday 10 March 2016 at 10am, page 21, paragraph 9) **[Volume 3/Annex 46]**, as follows:

"*9. The course of the proceedings, Mr. President, leaves no manner of doubt that the entire venture has been an abuse of process. The proceedings were initiated by an application that raised various disputes, and sought remedies and relief far beyond those that would flow if this Court were to accept that paragraph 2 (F) of the dispositif in the Advisory Opinion of the Court reflected a principle of customary international law*".

Counsel for India subsequently stated (verbatim transcript, Wednesday 16 March 2016 at 10am, page 17, paragraph 13) **[Volume 3/Annex 47]** as follows:

"*13. Remedies under Article 36, Mr. President and Members of the Court, have to be pursued in good faith and one of the first elements of good faith is candour in pleadings. The conduct of the Marshall Islands in conducting these proceedings falls far short of this standard – it was rightly, I submit, even if harshly, criticized by me as an abuse of process*".

132. As was apparent at the time (from the evidence put forward by India itself), and as was explained by Pakistan at the hearing before the Court on 15 May 2017, such a suggestion by India was simply not correct. It was, in fact, the manner in which India's Application and Request for the Indication of Provisional Measures were brought that engineered the impression of extreme urgency, rather than the true underlying facts of the case themselves.

133. In its Request for the Indication of Provisional Measures, India asserted (at paragraph 21) that:

"*There is immense urgency in the matter as the 40 day (appeal) period expires in any event on 19th May…The disposal of the appeal may take place any day*".

134. However, India's assertion in this regard was flatly contrary to the evidence that it had put before the Court in support of its Application and Request for the Indication of Provisional Measures.

135. By 14 April 2017 (if not before), following the Press Statement by H.E. Sartaj Aziz, the then Adviser, India was aware that Commander Jadhav was entitled as of right to petition, first to the COAS and, thereafter, the President of Pakistan for clemency. The prescribed time period within which those petitions could be made was, as explained by the Adviser, potentially 150 days **[Volume 2/Annex 23/pages 2-3]**. India exhibited but did not draw the attention of the Court to this material.

136. India, accordingly, sought to invoke the exceptional provisional measures procedure of the Court and simultaneously failed to draw the Court's attention to the existence of highly material facts regarding Commander Jadhav's position at that time – namely that there was a constitutional right to seek clemency which (as explained above) provided for a minimum time period of 150 days.

137. Furthermore, as explained above, India omitted material evidence in its Application and Request for the Indication of Provisional Measures to the Court on 8 May 2017. India attached to its Application the first page of Pakistan's 23 January 2017 MLA Request (i.e the cover letter) but failed to attach any of the substantive material comprising that MLA Request. This was so notwithstanding that India was seeking to persuade the Court to grant the relief sought in its Request for the Indication of Provisional Measures without holding a hearing (without any opportunity for Pakistan to appear and to make representations). Pakistan submits that any State inviting the Court to take action on an *ex parte* basis is under a heightened duty of disclosure so as to ensure that the Court is presented with all materials relevant to the exercise it is invited to undertake. Numerous jurisdictions around the world recognise this as a principle of their own domestic laws and court procedures.

138. The fact that India has failed to address this omission in its Memorial can, in Pakistan's submission, only be interpreted as a considered and deliberate refusal or failure to furnish the Court with relevant and material evidence. There was, with respect, a distinct lack of candour.

139. Accordingly, notwithstanding that the Court acceded to India's Request for the Indication of Provisional Measures by its Order of 18 May 2017 (given India's claim of urgency), Pakistan respectfully submits that India's approach to these proceedings as described above amounts to a clear abuse of the Court's process.

140. Indeed, a State seeking provisional measures without any hearing, or within an extremely tight timeframe, must be subject to a rigorous duty of candour. It must draw the attention of the Court to all material facts. It must not omit or misrepresent any such facts. It must not invoke an "*exceptional process*" by distorting facts and exaggerating, or generating urgency. India regrettably fell far short in this regard, and has failed to explain its conduct, even though these matters were raised at the Provisional Measures Hearing on 15 May 2017 **[Volume 1/Annex 5.2/page 12 et seq]**.

III

141. Moreover, as had been stated at the provisional measures hearing on 15 May 2017, there was a serious risk that the Court was being used for political grandstanding – as was borne out by the manner in which the Court proceedings were covered in Indian mainstream and social media.

(ii) India's "ambush" by avoiding the dispute resolution mechanisms of the Optional Protocol

142. In Pakistan's respectful submission, further conduct of India evidencing an abuse of the Court's process can be seen by reference to India's evasion of the detailed treaty-based mechanisms that exist for the resolution of "*disputes*" arising out of the VCCR 1963.

143. Articles I-III of the VCCR 1963's Optional Protocol concerning the Compulsory Settlement of Disputes ("the Optional Protocol") provides as follows **[Volume 5/Annex 87]**:

"*Article I.*

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.

Article II.

The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application.

Article III.

1. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice.

2. The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application". (emphasis added)

144. It is apparent from a straightforward interpretation of the above that there was an intention for State Parties to the VCCR 1963 to give consideration to recourse to dispute resolution mechanisms, before escalating to the Court. In this regard, formal notification of a dispute was stipulated.

145. India, in its Application, its Request for the Indication of Provisional Measures and its Memorial, appears to adopt the position that there has been a "*dispute*" between India and Pakistan regarding the provision of consular access in respect of Commander Jadhav since 25 March 2016 when the Foreign Secretary of Pakistan notified the Indian High Commissioner in Islamabad of his arrest and the Indian High Commission in Islamabad sent its *Note Verbale* of the same date.

146. Pakistan rejects the contention that India thus notified its "*opinion*" that a "*dispute*" existed as required. Pakistan observes that the first formal notification in this regard was upon receipt of India's Request for the Indication of Provisional Measures dated 8 May 2017. Indeed, as late at 31 March 2017 (see paragraph 61 above), India had clearly accepted that Pakistan was willing to provide consular access.

147. Nevertheless, notwithstanding the potential availability of dispute resolution mechanisms that could have begun a binding arbitration process within 2 months of the notification of a dispute or could have caused a conciliation commission to be established within 2 months of the notification of a dispute (with recommendations to be given within 5 months of its establishment), India instituted proceedings before the Court on 8 May 2017 – without prior intimation. No doubt India will assert it was responding to the exigencies of the situation – that would be incorrect as the "situation" (on India's case) arose on 25 March 2016.

148. By so doing, India effectively ambushed Pakistan with legal proceedings: (i) after 14 months had elapsed since 25 March 2016; and (ii) with no attempt made to engage the dispute resolution mechanisms envisaged by Articles II and III of the Optional Protocol.

149. Pakistan submits that India's conduct as described above constitutes a breach of the letter and spirit of the Optional Protocol and manifests abuse of process, and/or is yet further evidence in this regard.

Concluding observations

150. Pakistan submits that, as a result of the aforesaid matters, the Court should dismiss the claim advanced through India's Memorial as inadmissible.

III

(B) ABUSE OF RIGHTS / LACK OF GOOD FAITH

151. Further, or in the alternative, Pakistan submits that the Court should dismiss India's claim on the grounds of abuse of rights.

(i) The legal principles

152. In Professor Kolb's '*Good Faith in International Law*' (1st ed, 2017), it is stated (at pages 133-134) **[Volume 5/Annex 109]** that:

"*The concept of abuse of rights has many facets. ... The core point is that a subjective right or a competence is exercised in some way that the legal order disapproves*".

153. These are principles that the Court (and the Permanent Court of International Justice) has recognised many times throughout its jurisprudence. The relevant legal principles established through the Court's judgments concerning the impact of an applicant State's abuse of rights are set out below.

III

154. In *Certain Norwegian Loans (France v Norway)*, France instituted proceedings seeking declarations as to the terms on which certain Norwegian loans floated in France between 1885 and 1909 should be repaid.

155. In a Separate Opinion to the Court's Judgment of 6 July 1957, Judge Sir Hersch Lauterpacht (UK) (at page 53) **[Volume 3/Annex 48]** held:

"*Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law*".

156. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Bosnia and Herzegovina instituted proceedings against the Federal Republic of Yugoslavia alleging violations of the Genocide Convention 1948. In oral submissions at the preliminary objections stage, Counsel for Bosnia and Herzegovina (verbatim transcript, Wednesday 1 May 1996 at 10.00am, page 70) **[Volume 3/Annex 49]** stated:

"*more simply as, Mr. Alexandre-Charles Kiss has written, the "unjustified and unjustifiable" exercise of State powers may be considered to be an abuse of rights ("L'abus de droit en droit international" [The Abuse of Rights in International Law], LGDJ, Paris, 1953, p. 186)*". (emphasis added)

157. In *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Djibouti instituted proceedings claiming that France had wrongfully refused to execute an international letter rogatory concerning the transmission to the Djiboutian judicial authorities of the investigation record in a murder case. In its Judgment of 4 June 2008, the Court held that France's refusal amounted to a failure to comply with international obligations.

158. In a separate Declaration, Judge Keith (New Zealand) (at paragraph 5) **[Volume 3/Annex 50]** held:

"*5. The two decisions of the Permanent Court of International Justice to which the Court refers support not only absence of good faith but also abuse of rights as a restraint on the exercise by a State of a power conferred on it by a treaty. This Court in the Admissions opinion in 1948 similarly said that, while Article 4 of the Charter of the United Nations exhaustively prescribes the conditions for the admission of new Members, that provision did not "forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with [those] conditions"; further, Article 4 allowed for "a wide liberty of appreciation" (Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, pp. 63-64; see also the joint dissenting opinion, pp. 91-92, para. 20). And counsel for France accepted that the principles of abuse of rights and misuse of power (abus de droit and détournement de pouvoir) may be relevant to the exercise of the power in this case. The Agent added that, while the requested State retains for itself a wide discretion, this in no way means that States indiscriminately invoke these derogation clauses; it is moreover obvious, she said, that the notion of essential interests remains very narrow, as the words themselves indicate*". (emphasis added)

159. In *Free Zones of Upper Savoy and the District of Gex (second phase)* (1930) PCIJ (Series A) No. 24, the Permanent Court of International Justice was asked to determine whether two free zones created by treaties in 1815 and 1816 were maintained or abolished by the Treaty of Versailles. In its Order of 6 December 1930, the Permanent Court of International Justice, finding that French fiscal legislation applied in the free zones as in any other part of French territory, held (at page 12) **[Volume 3/Annex 51]**:

"*a reservation must be made as regards the case of abuses of a right, an abuse which however cannot be presumed by the Court*".

160. In *Free Zones of Upper Savoy and the District of Gex* (1932) PCIJ (Series A/B) No. 46, in its Judgment of 7 June 1932, the Permanent Court of International Justice reiterated (at page 167) **[Volume 3/Annex 52]**:

"*A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon. But an abuse cannot be presumed by the Court*".

161. In *Electricity Company of Sofia and Bulgaria* (1939) PCIJ (Series A/B) (No. 77), Belgium requested the Permanent Court of International Justice to declare that Bulgaria had acted in breach of international obligations through various measures and decisions taken by legislative, administrative and judicial authorities in respect of the Sofia Electricity Company. In a Separate Opinion to the Judgment of 4 April 1939, Judge Anzilotti (Italy), on the issue of whether the Bulgarian Government had committed an

abuse of rights in the manner of its denunciation of a treaty, held (at pages 97-98) **[Volume 3/Annex 53]**:

"*True, the representatives of the Belgian Government alluded cautiously to an abuse of right said to have been committed by the Bulgarian Government when it denounced the Treaty in order to remove from the jurisdiction of this Court the case which the Belgian Government was proposing to submit.*

The theory of abuse of right is an extremely delicate one, and I should hesitate long before applying it to such a question as the compulsory jurisdiction of the Court. The old rule, a rule in such complete harmony with the spirit of international law, Qui iure suo utitur neimnem lædit, would seem peculiarly applicable. The Bulgarian Government was entitled to denounce the Treaty and was sole judge of the expediency or necessity of doing so.

The situation might be somewhat different if the Bulgarian Government, being free to denounce the Treaty at any time, had chosen the particular moment at which it had been informed of the Belgian Government's intention to apply to the Court. But that is not the case. At the time when it learnt of the Belgian Government's decision, the Bulgarian Government had only a few days in which to denounce the Treaty under Article 37, Nos. 2 and 3, if it did not wish to be bound for a further period of five years".

162. In *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, I.C.J. Reports 1948*, page 57, the Court was asked to interpret the conditions laid down for the admission of States to the United Nations and determine, *inter alia*, whether those conditions were exhaustive.

163. In an Individual Opinion to the Court's Advisory Opinion of 28 May 1948, Judge Azevedo (Brazil) (at page 80) stated **[Volume 3/Annex 54]**:

"*Any legal system involves limitations and is founded on definite rules which are always ready to reappear as the constant element of the construction, whenever the field of action of discretionary principles, adopted in exceptional circumstances, is overstepped.*

This is a long-established principle, and has served, during centuries, to limit the scope of the principle qui suo jure utilitur neminem laedit.

The concept of the misuse of rights has now been freed from the classical notions of dolus and culpa ; in the last stage of the problem an enquiry into intention may be discarded, and attention may be given solely to the objective aspect ; i.e., it may be presumed that the right in question must be exercised in accordance with standards of what is normal, having in view the social purpose of the law. (Cf. Swiss Civil Code, Art. 2 ; Soviet, Art. I ; and Brazilian, Art. 160)". (emphasis added)

164. In *Nottebohm (Liechtenstein v Guatemala)*, Liechtenstein instituted proceedings against Guatemala seeking restitution and compensation for the manner in which Guatemala had acted towards a Liechtenstein citizen. In its Judgment of 6 April 1955, the

Court held that Mr. Nottebohm's nationality was not based on any genuine prior link with Liechtenstein and his acquisition of Liechtenstein nationality was done solely in order to acquire the status of a neutral national in wartime.

165. In a Dissenting Opinion, Judge Klaestad (Norway) (at pages 31-32) **[Volume 3/Annex 55]** held:

"*It is alleged by the Government of Guatemala that the Government of Liechtenstein, by granting its nationality to a German national at a time when Germany was at war, has committed an abuse of right or a fraud. For the purpose of the present case, it is unnecessary to express any views as to the possible applicability of the notion of abuse of right in international law. All I need say is that it would, if so applicable, in my view presuppose the infliction of some kind of injury upon the legitimate interests of Guatemala by the naturalization of Mr. Nottebohm. But it is not shown that an injury of any kind was thereby inflicted upon Guatemala, which at that time was a neutral State.*

As to the contention that fraud was committed by the Government of Liechtenstein, it suffices to say that no evidence has been produced in support of such a contention. The various irregularities in the naturalization procedure of which the Government of Guatemala has complained, and the financial conditions fixed for the grant of naturalization, cannot be considered as involving a fraud".

166. In a Dissenting Opinion, Judge Read (Canada) (at pages 37-38) **[Volume 3/Annex 56]** held:

"*Abuse of right is based on the assumption that there is a right to be abused. In the present case it is based upon the assumption that Liechtenstein had the right under international law to naturalize Mr. Nottebohm, but that, in view of the special circumstances and the manner in which the right was exercised, there was an improper exercise of the right – an exercise so outrageous and unconscionable that its result, i.e. the national status conferred on Mr. Nottebohm, could not be invoked against Guatemala.*

The doctrine of abuse of right cannot be invoked by one State against another unless the State which is admittedly exercising its rights under international law causes damage to the State invoking the doctrine.

As this ground is not relied upon in the Judgment of the Court, it is unnecessary for me to examine the particular grounds relied on by Counsel. It is sufficient to point out that Liechtenstein caused no damage to Guatemala, and that it is therefore necessary to reject the Final Conclusion 2 (b)".

167. In *Aerial Herbicide Spraying (Ecuador v Colombia)*, Ecuador instituted proceedings claiming that aerial spraying by Colombia of toxic herbicides at border locations had caused serious damage. In its Reply, Ecuador (at paragraph 7.51) **[Volume 3/Annex 57]** stated:

"*7.51 Colombia's interpretation of the 1988 Narcotics Convention constitutes an abuse of right to the extent that Colombia believes that it can combat illicit drug crops without having regard to the human rights of individuals living in the border regions across from its own territory. It would be wrong to presume that the Contracting States to the 1988 Narcotics Convention intended to secure respect for human rights only within the territory of the State adopting coercive measures and not also in neighbouring States, if such measures have potentially extra-territorial effects. This is all the more so where such effects are so serious in their consequence*".

(ii) The Abuse

168. In the light of India's abject refusal to engage with Pakistan's requests for information regarding the passport in Commander Jadhav's possession when he was arrested, Pakistan was compelled to engage an independent expert. Mr. David Westgate served as Chief Immigration Officer at the UK National Document Fraud Unit (NDFU) for 13 years. Overall, he served as part of the United Kingdom Home Office and Immigration Intelligence Directorate for more than 27 years. He was asked to examine the passport in the name of 'Hussein Mubarak Patel'. He prepared an expert report on the authenticity of the passport **[Volume 7/Annex 141]**.

169. The report is discussed in further detail in Section III(C) below, but in summary, Mr. Westgate concluded:

169.1. The passport is a genuine and authentic Indian travel document and not a counterfeit (paragraph 9 of Mr. Westgate's report **[Volume 7/Annex 141/page 2]**);

169.2. The laminate has a security print on the inside which is clear and undamaged, and there is no evidence that the image is not original to the document (paragraph 9 of Mr. Westgate's report **[Volume 7/Annex 141/page 2]**);

169.3. "*From my knowledge and understanding of the airport immigration system in India, the immigration counters are connected to a central database, and any irregularities in the authenticity [of] a passport would ordinarily be flagged up on such a database. Thus I would observe that the frequency with which the individual presented the passport at the immigration counter in India for entry and for exit* [Mr. Westgate having earlier observed that it had been used thus on at least 17 occasions] *is very strong supportive evidence of the authentic nature of the passport. In addition, if there were issues concerning the holder of an authentic passport, such as an Interpol I24/7 notice, and Indian central watch-list entry, criminal proceedings, issues relating to identity, these would be very likely to be spotted at the point of encounter with the immigration authorities when the passport was scrutinised by the officials in India. Such officials would be examining hundreds of passports on a daily basis, and would thus have considerably more experience in respect of such documents*" (paragraph 15 of Mr. Westgate's report **[Volume 7/Annex 141/page 7]**).

170. In light of the above, Pakistan respectfully submits:

170.1. that India, in purporting to exercise its legitimate rights to grant passports, in order to clothe an espionage agent with a false identity so as to facilitate his travel to Pakistan to commit acts of espionage and terrorism, has committed a fundamental abuse of rights. It cannot possibly be said that this is legitimate or acceptable having in view the purpose of the domestic and international law and practice regarding the granting of passports;

170.2. that India, in purporting to exercise its treaty-based consular access rights in order to access an espionage agent that it has clothed with a false identity and despatched to Pakistan to commit acts of espionage and terrorism in grave violation of the territorial integrity and political sovereignty of Pakistan, with the significant risk that further damage to Pakistan would be likely to ensue (as is the stated intention of many senior officials of the Government of India[4,5]), has committed and continues to commit a fundamental abuse of rights;

170.3. It cannot possibly be said, having in view the purpose of the law on consular access and its role in the "*promotion of friendly relations among nations*" (as expressed in the Preamble of the VCCR 1963 **[Volume 5/Annex 88]**), that this is a normal exercise of those rights. Indeed, Pakistan submits that such an exercise would be "*unjustified and unjustifiable*";

170.4. that India, by invoking the provisional measures jurisdiction in the manner that it did, abused the right to seek exceptional recourse from the Court. Such a right must be exercised responsibly and not as a tactical or political weapon – let alone to use the Court's process for a malicious and misleading media campaign.

(iii) Violations of public international law by India

171. Furthermore, Pakistan submits that throughout the course of its domestic investigation and proceedings concerning Commander Jadhav, India's conduct has evidenced a marked failure to act in good faith to the standard required by international law.

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[4] On 21 February 2014 (according to a report in *The Economic Times* in India), Mr. Ajit Doval (a former Director of India's Intelligence Bureau (2004-2005) and the current National Security Advisor to the Prime Minister of India) had given a speech at SASTRA University in India in which, *inter alia*, the following was stated **[Volume 7/Annex 143/page 2]**:

"*Pakistan's vulnerability is many times higher than that of India. Once they know that India has shifted its gear from the defensive mode to defensive offence, they will find that it is unaffordable for them. You can do one Mumbai, you may lose Balochistan. There is no nuclear war involved in that and there is no troops engagement. If you know the tricks, we know the tricks better than you*".

[5] On 30 September 2017, Mr. Subramanian Swamy, a senior figure of the ruling Bharatiya Janata Party (BJP) in India, is reported to have stated in a television interview that India would break Pakistan into four:

"*I think we'll be ready probably by March-April of 2018, then we shall break Pakistan into four*" **[Volume 7/Annex 144]**.

172. As previously outlined, on 23 January 2017, Pakistan sent to India a MLA Request **[Volume 2/Annex 17]**. The MLA Request required India, *inter alia*, to provide explanations on a range of issues relating to the ongoing investigation into Commander Jadhav's unlawful activities in Pakistan, including the issue of his possession of what appeared to be an authentic Indian passport but which did not bear his true name **[Volum 2/Annex 17/pages 12-14]**. To date, Pakistan has yet to receive any substantive response to the MLA Request. Indeed, India eventually purported to return the MLA Request unanswered **[Volume 2/Annex 33]**. Pakistan's latest letter on this issue to India's Ministry of External Affairs of 26 October 2017 **[Volume 2/Annex 44]** has not elicited any response at all from India.

173. India's failure to respond to Pakistan's MLA Request is even more stark in the light of India's public international law obligations concerning State-to-State assistance in the investigation of terrorism, which, Pakistan submits, are properly to be viewed as obligations *erga omnes* or otherwise binding in nature.

III

174. Following the appalling terrorist attacks committed against the United States of America on 11 September 2001, the UN Security Council passed UN Security Council Resolution 1373 (2001) **[Volume 5/Annex 89]**. India is taken not to dispute that Chapter VII UN Security Council Resolutions can create binding obligations as a matter of public international law. UN Security Council Resolution 1373 (2001) is such a resolution.

175. By virtue of Article 2(f) of UN Security Council Resolution 1373 (2001) **[Volume 5/Annex 89/page 2]**, all UN Member States are under an obligation in public international law to:

"*Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings*".

176. India, as a UN Member State, is under this obligation, yet has persistently and deliberately refused to afford Pakistan any measure of assistance whatsoever as regards the investigation of Commander Jadhav – who has himself voluntarily and repeatedly confessed to the financing and supporting of terrorist acts against Pakistan at the behest of India.

177. Pakistan notes that India, in its Memorial (at paragraph 87), purports to excuse its conduct in this regard on the basis that India and Pakistan have not at this time entered into a Mutual Legal Assistance Treaty ("MLAT"). However, in Pakistan's respectful submission, a lack of a MLAT does not affect the applicability and binding nature of an obligation contained in a Chapter VII UN Security Council Resolution. Therefore, such

an excuse is no answer to and no justification for India's manifest non-compliance with UN Security Council Resolution 1373 (2001).

178. Further, Article 2(g) of UN Security Council Resolution 1373 (2001) **[Volume 5/Annex 89/page 2]** obliges all UN Member States to:

"*Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents*". (emphasis added)

179. India, as a UN Member State, is under this obligation, yet has continually failed to answer Pakistan's reasonable requests (as contained in its 23 January 2017 MLA Request **[Volume 2/Annex 17]** and repeated subsequently (most recently on 26 October 2017 **[Volume 2/Annex 44]**)) for explanations as to how Commander Jadhav was allowed to acquire what appeared to be an authentic Indian passport bearing a false identity and to use it frequently to travel to and from India and to clandestinely enter Pakistan. The absence of any explanation, and steadfast refusal to engage with Pakistan's concerns in this regard, give rise (at the very least) to serious questions as to whether India, in relation to the case of Commander Jadhav, has acted in manifest non-compliance with UN Security Council Resolution 1373 (2001). India thus far seeks to evade its obligations in this regard.

180. Evidence of how important the matter of State-to-State cooperation concerning the use/misuse of travel documents by terrorists is can be seen from Article 3(a) of UN Security Council Resolution 1373 (2001) **[Volume 5/Annex 89/page 3]**, by which the UN Security Council called upon the UN Member States to:

"*Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups*". (emphasis added)

181. UN Security Council Resolution 1373 (2001) made it crystal clear that States must have effective controls on the issuance of identity papers and travel documents. Moreover, States must ensure forged or falsified travel documents are subject to robust action given that they facilitate terrorist operations.

182. It is thus plain that for a State itself to make provision of travel documents facilitating terrorism, whether or not forged or falsified, would be a contravention of UN Security Council Resolution 1373 (2001), in addition to being a violation of the Principles of the Charter of the United Nations if they are tools for illegal conduct. Indeed, it would seem highly likely that such conduct would constitute a threat to international peace and security.

183. In light of the above, India's continuing refusal to accede to Pakistan's requests for information concerning Commander Jadhav's passport (used in the facilitation of his entry into Pakistan to commit acts of espionage and terrorism) is, Pakistan submits, an ongoing violation of binding obligations of public international law.

184. In the face of the above and in the face of Commander Jadhav's voluntary confessions (repeated before a judge in accordance with legal requirements) that his heinous criminal activities in Pakistan were authorised by RAW, India nevertheless persists in demanding that it is entitled to (and Pakistan is obliged to allow) untrammelled access to its instrument of espionage and terror, Commander Jadhav, without any attempt to address legitimate questions in this regard.

185. Pakistan respectfully submits that this course of conduct manifests that India has acted in bad faith.

III

186. Pakistan respectfully submits that India:

186.1. in purporting to use/abuse Article 36 VCCR 1963 to seek consular access to Commander Jadhav (a self-confessed State-sponsored spy/terrorist traveling with the use of authentic travel documentation in a false identity provided by the competent Indian authorities), is committing a fundamental abuse of rights;

186.2. in refusing to provide any measure of assistance whatsoever in the investigation of the offences committed by Commander Jadhav against Pakistan (including the purported returning unanswered of Pakistan's MLA Request), *erga omnes* and/or otherwise binding obligations are being violated by India.

187. Accordingly, Pakistan respectfully invites the Court to declare India's claim, as advanced through its Application and its Memorial, inadmissible as an abuse of rights.

(C) *EX TURPI CAUSA* (ILLEGALITY) / UNCLEAN HANDS / *EX INJURIA JUS NON ORITUR*

188. Further, or in the alternative, Pakistan respectfully submits that the Court should declare India's claim as advanced through its Memorial to be inadmissible on the grounds of:

188.1. India's illegal conduct; and/or

188.2. on the basis that India has invoked the Court's jurisdiction with unclean hands; and/or

188.3. on the basis of the principle of *ex injuria jus non oritur* ("a right cannot derive from a wrong"),

such illegal conduct being the provision to Commander Jadhav of an authentic Indian passport clothing him with a false Muslim identity in the name of 'Hussein Mubarak Patel'.

189. These are principles that the Court (and the Permanent Court of International Justice) has recognised in its jurisprudence.

190. In *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction) (Federal Republic of Germany v Poland)* (1927) PCIJ (Series A) No. 9, a factory was constructed during wartime under a contract between Germany and a private German enterprise on territory allotted to Poland. Germany contended that the application of Polish law by which Poland subsequently took over the factory was unlawful. The Permanent Court of International Justice subsequently held that the cancellation by Poland of the German company's rights was contrary to the 1922 Geneva Convention. Poland and Germany then entered into negotiations regarding the claim for indemnity.

191. In its Judgment of 26 July 1927 on jurisdiction, the Permanent Court of International Justice held (at page 31) **[Volume 3/Annex 58]**:

"*It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him*". (emphasis added)

192. Pakistan accepts that a distinction exists between a situation in which an illegal act prevents performance of an obligation and a situation in which, as a consequence of an illegal act, performance is not required. Pakistan submits nevertheless that the prior illegal

act has the consequence of negating any correlative obligation that may otherwise flow directly from an act which is otherwise legal.

193. In *Legal Status of Eastern Greenland (Denmark v Norway)* (1933) PCIJ (Series A/B), No. 53, Denmark instituted proceedings against Norway following the latter's announcement of its occupation of territories over which Denmark claimed to have sovereignty.

194. The Permanent Court of International Justice gave judgment on 5 April 1933. Judge Anzilotti, in his Dissenting Opinion, stated clearly (at page 95) **[Volume 3/Annex 59]**:

"*an unlawful act cannot serve as the basis of an action at law*".

195. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, I.C.J. Reports 1986*, page 14, by an application dated 9 April 1984, Nicaragua instituted proceedings against the United States of America concerning a dispute relating to responsibility for the use of force against Nicaragua.

196. The Court gave its Judgment on the Merits on 27 June 1986. Judge Schwebel (US), in his Dissenting Opinion, provided a comprehensive restatement in this regard as follows (at paragraphs 268-272) **[Volume 3/Annex 60]**:

"*268. Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible – but ultimately responsible – for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail.*

269. As recalled in paragraph 240 of this opinion, the Permanent Court of International Justice applied a variation of the "clean hands" doctrine in the Diversion of Water from the Meuse case. The basis for its so doing was affirmed by Judge Anzilotti "in a famous statement which has never been objected to : 'The principle ... (inadimplenti non est adimplendum) is so just, so equitable, so universally recognized that it must be applied in international relations ...'" (Elisabeth Zoller, Peacetime Unilateral Remedies : An Analysis of Countermeasures, 1984, pp. 16-17). That principle was developed at length by Judge Hudson. As Judge Hudson observed in reciting maxims of equity which exercised "great influence in the creative period of the development of Anglo-American law", "Equality is equity", and "He who seeks equity must do equity". A court of equity "refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper" (citing Halsbury's Laws of England, 2nd ed., 1934, p. 87). Judge Hudson noted that, "A very similar principle was received into Roman law ... The

exceptio non adimpleti contractus ...” He shows that it is the basis of articles of the German Civil Code, and is indeed “a general principle” of law. Judge Hudson was of the view that Belgium could not be ordered to discontinue an activity while the Netherlands was left free to continue a like activity – an enjoinder which should have been found instructive for the current case. He held that, “The Court is asked to decree a kind of specific performance of a reciprocal obligation which the demandant is not performing. It must clearly refuse to do so.” (Loc. cit., pp. 77-78. And see the Court’s holding, at p. 25.) Equally, in this case Nicaragua asks the Court to decree a kind of specific performance of a reciprocal obligation which it is not performing, and, equally, the Court clearly should have refused to do so.

270. The “clean hands” doctrine finds direct support not only in the Diversion of Water from the Meuse case but a measure of support in the holding of the Court in the Mavrommatis Palestine Concessions case, P.C.I.J., Series A, No. 5, page 50, where the Court held that : “M. Mavrommatis was bound to perform the acts which he actually did perform in order to preserve his contracts from lapsing as they would otherwise have done.” (Emphasis supplied.) Still more fundamental support is found in Judge Anzilotti’s conclusion in the Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53, page 95, that “an unlawful act cannot serve as the basis of an action at law”. In their dissenting opinions to the Judgment in United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, pages 53-55, 62-63, Judges Morozov and Tarazi invoked a like principle. (The Court also gave the doctrine a degree of analogous support in the Factory at Chorzòw case, P.C.I.J., Series A, No. 9, p. 31, when it held that “one party cannot avail himself of the fact that the other has not fulfilled some obligation ... if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question ...”) The principle that an unlawful action cannot serve as the basis of an action at law, according to Dr. Cheng[6], “is generally upheld by international tribunals” (Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, 1958, p. 155). Cheng cites, among other cases, the Clark Claim, 1862, where the American Commissioner disallowed the claim on behalf of an American citizen in asking : “Can he be allowed, so far as the United States are concerned, to profit by his own wrong ? ... A party who asks for redress must present himself with clean hands ...” (John Bassett Moore, History and Digest of the International Arbitrations to which the United States Has Been a Party, 1898, Vol. III, at pp. 2738, 2739). Again, in the Pelletier case, 1885, the United States Secretary of State “peremptorily and immediately” dropped pursuit of a claim of one Pelletier against Haiti – though it had been sustained in an arbitral award – on the ground of Pelletier’s wrongdoing :

> *“Ex turpi causa non oritur : by innumerable rulings under Roman common law, as held by nations holding Latin traditions, and under the common law as held in England and the United States, has this principle been applied.” (Foreign Relations of the United States, 1887, p. 607.)*

[6] Dr. Bin Cheng was a Lecturer in International Law at University College London

The Secretary of State further quoted Lord Mansfield as holding that : "The principle of public policy is this : ex dolo malo non oritur actio." (At p. 607.)

271. More recently, Sir Gerald Fitzmaurice – then the Legal Adviser of the Foreign Office, shortly to become a judge of this Court – recorded the application in the international sphere of the common law maxims : "He who seeks equity must do equity" and "He who comes to equity for relief must come with clean hands", and concluded :

> *"Thus a State which is guilty of illegal conduct may be deprived of the necessary locus standi in judicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality – in short were provoked by it." ("The General Principles of International Law", 92 Collected Courses, Academy of International Law, The Hague, (1957-II), p. 119. For further recent support of the authority of the Court to apply a "clean hands" doctrine, see Oscar Schachter, "International Law in the Hostage Crisis", American Hostages in Iran, 1985, p. 344.)*

272. Nicaragua is precisely such a State which is guilty of illegal conduct. Its conduct accordingly should have been reason enough for the Court to hold that Nicaragua had deprived itself of the necessary locus standi to complain of corresponding illegalities on the part of the United States, especially because, if these were illegalities, they were consequential on or were embarked upon in order to counter Nicaragua's own illegality – "in short were provoked by it"". (emphasis added)

197. In the *Legality of Use of Force* cases, by applications dated 29 April 1999, the Federal Republic of Yugoslavia instituted proceedings against the NATO countries concerning alleged violations of the obligation not to use force against Yugoslavia. The doctrine of clean hands was raised by several of the major NATO Powers (including the United Kingdom, the United States of America, Canada, the Netherlands, Germany and Portugal) in opposition to Yugoslavia's request for the indication of provisional measures.

198. In oral submissions, the Agent for Canada stated (verbatim transcript, Monday 10 May 1999 at 4.15pm, paragraph 5) **[Volume 3/Annex 61]** as follows:

"*5. That, Mr. President, is one branch of our argument today. The other is that this is not an appropriate case for the exercise of the Court's authority to grant provisional measures under Article 41. This is a discretionary power. Its exercise should never be automatic but should depend on the circumstances of the case. The Court should accordingly exercise its authority judiciously, taking account of all the circumstances under which the request is brought and of the underlying dispute. I respectfully suggest that it would be an inappropriate use of the power under Article 41 to lend aid and comfort to an applicant that comes to the Court, in such a matter as this, without clean hands. It would be a tragically misguided use of the power to lend credence to the unsubstantiated humanitarian accusations of a party whose own humanitarian abuses are at the root of the present dispute. It would turn reality on its head*". (emphasis added)

199. In oral submissions, the Agent for Canada stated (verbatim transcript, Wednesday 12 May 1999 at 3.20pm, page 6) **[Volume 3/Annex 62]** as follows:

"*I first wish to draw the attention of the Court to a glaring omission in the response of the Federal Republic of Yugoslavia: the absence of any reference to the second branch of our arguments: the inappropriateness of provisional measures. This is all the more striking that not only Canada, but I believe all the other Respondents, drew attention to the numerous breaches by the Federal Republic of Yugoslavia of international legal obligations erga omnes, and to the dreadful consequences of these violations on the Kosovar people and in neighbouring countries. That the Federal Republic of Yugoslavia did not even attempt to address these issues speaks volumes on its own awareness that it has come to the Court without clean hands. On this point, I will simply refer the Court to Canada's original submission*". (emphasis added)

200. In oral submissions, the then Attorney General of the United Kingdom stated (verbatim transcript, Tuesday 11 May 1999 at 3pm, paragraph 24) **[Volume 3/Annex 63]** as follows:

"*24. I come therefore, Mr. President, to my final point. This is whether the Court ought to be entertaining this request from the Federal Republic of Yugoslavia at all. I have already described it, in its careless disregard of the legal requirements, as an abuse of the process of the Court. It deserves to be dismissed on that ground alone. There is, however, Mr. President, a deeper point. In my own legal system a remedy like "provisional measures" would lie at the discretion of the Court. In considering whether or not to exercise that discretion, the Court would weigh up all the equities. In weighing up all the equities, the Court would pay particular attention as to whether the party seeking its assistance came with clean hands. The Court would not, however, allow its process to be used as an engine to assist turpitude. I can see no reason why exactly the same principles should not be applied by this honourable Court. They are deeply rooted in the essential nature of the judicial function. They should be regarded as "general principles of law" within the meaning of Article 38 of the Statute*". (emphasis added)

201. In oral submissions, the Co-Agent for the United States of America stated (verbatim transcript, Tuesday 11 May 1999 at 4.30pm, paragraphs 3.17-3.18) **[Volume 3/Annex 64]** as follows:

"*3.17. Finally, the indication of provisional measures against the United States and other Respondents would be inappropriate because the Applicant does not come to the Court with clean hands. Having committed a campaign of extensive ethnic cleansing and other atrocities in Kosovo, the Applicant has now come to the Court asking for protection against the consequences of those unlawful acts.*

3.18. The principle that a party in litigation may not attempt to reap advantages from its own wrong is well established in international law (see B. Cheng, General Principles of Law as Applied by International Courts and Tribunals, pp. 149-158 (reprint ed. 1987)). This principle is often expressed in the Latin phrase nullus commodum capere de sua

injuria propria ("no one can be allowed to take advantage of his own wrong"). Numerous arbitral decisions reflect the unwillingness of international tribunals to grant relief to parties whose own conduct with respect to the underlying dispute was wrongful (see, for example, Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA, 6 Iran-U.S.C.R.T., pp. 219, 228 (1994); Diversion of Water from the River Meuse, P.C.I.J., Series A/B, No. 70, p. 77). Since the Court must assess all relevant circumstances in considering whether to grant provisional measures, it should take due account of this principle as well". (emphasis added)

202. In that case, the Court dismissed Yugoslavia's request for the indication of provisional measures on other grounds and thus did not engage with the arguments advanced concerning the clean hands doctrine. However, the reliance by several of the major Powers upon the clean hands doctrine provides, Pakistan submits, not only strong evidence of the existence of the doctrine as a matter of customary international law, but also an indication of the compelling reasons why the doctrine ought to be applied when the facts of the instant case are viewed in their proper context.

III

203. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, page 136, the UN General Assembly requested the Court to give an advisory opinion on a question concerning the legal consequences of Israel's construction of a wall in the Occupied Palestinian Territory considering the rules and principles of international law.

204. Judge Elaraby (Egypt), in a Separate Opinion, in his discussion of the rule that States may not recognise an unlawful territorial acquisition, emphasised the existence of the principle of *ex injuria jus non oritur* and stated (at paragraph 3.1) **[Volume 3/Annex 65]** that:

"*The general principle that an illegal act cannot produce legal rights – ex injuria jus non oritur – is well recognized in international law*".

205. The relevance and significance of illegal conduct by a State that purports to exercise diplomatic protection in respect of an individual it claims to be one of its nationals was made clear by Professor John Dugard SC, a former judge *ad hoc* of the Court. As Special Rapporteur on Diplomatic Protection to the International Law Commission, Professor Dugard, in his Sixth Report on Diplomatic Protection dated 11 August 2004, stated (at paragraphs 8-9) **[Volume 5/Annex 110/page 4]** as follows:

"*8. If an alien is guilty of some wrongdoing in a foreign State and is as a consequence deprived of his liberty or property in accordance with due process of law by that State, it is unlikely that his national State will intervene to protect him. Indeed it would be wrong for the State of nationality to intervene in such a case because no internationally wrongful act will have been committed in most circumstances. In this sense, the clean hands doctrine serves to preclude diplomatic protection. The position assumes a different character, however, where an internationally wrongful act is committed by the*

respondent State in response to the alien's wrongful act – where, for instance, an alien suspected of committing a criminal offence is subjected to torture or to an unfair trial. In such a case, the State of nationality may exercise diplomatic protection on behalf of the individual because of the internationally wrongful act. The clean hands doctrine cannot be applied in the latter case to the injured individual for a violation of international law, first, because the claim has now assumed the character of an international, State v. State claim and secondly, because the individual has no international legal personality and thus cannot (outside the field of international criminal law) be held responsible for the violation of international law. In short, as a consequence of the fiction that an injury to a national is an injury to the State itself, the claim on behalf of a national subjected to an internationally wrongful act becomes an international claim and the clean hands doctrine can be raised against the protecting State only for its conduct and not against the injured individual for misconduct that may have preceded the internationally wrongful act.

III

9. As a consequence of the above reasoning, it follows that the clean hands doctrine has no special place in claims involving diplomatic protection. If the individual commits an unlawful act in the host State and is tried and punished in accordance with due process of law, no internationally wrongful act occurs and the unclean hands doctrine is irrelevant. If, on the other hand, the national's misconduct under domestic law gives rise to a wrong under international law as a result of the respondent State's treatment of the national's misconduct, the claim becomes international if the injured national's State exercises diplomatic protection on his behalf. Then the clean hands doctrine may only be raised against the plaintiff State for its own conduct. This is illustrated by the LaGrand and Avena cases. In both cases, foreign nationals committed serious crimes, which warranted their trial and punishment, but in both cases the United States violated international law in respect of their prosecution by failing to grant them consular access. At no stage did the United States argue that the serious nature of their crimes rendered the hands of the foreign nationals unclean, thereby precluding Germany and Mexico respectively from protecting them under the Vienna Convention on Consular Relations. On the contrary, in both cases (as has been shown above) the United States contended that the plaintiff States themselves had unclean hands by virtue of their failure to apply the Vienna Convention in the manner required of the United States". (emphasis added)

23rd January 2017 and thereafter – queries ignored

206. As explained above, Pakistan sent to India on 23 January 2017 a detailed and perfectly legitimate MLA Request in respect of the investigation into the crimes committed by Commander Jadhav **[Volume 2/Annex 17]**. Amongst other things, the MLA Request asked India for assistance in obtaining statements of 13 identified individuals and access to records and materials, namely:

206.1. a search of Commander Jadhav's flat/house;
206.2. certified records of Commander Jadhav's cell phone records; and
206.3. certified records of Commander Jadhav's bank account and those of his family **[Volume 2/Annex 17/pages 2-3]**.

207. To date, India has failed to provide any substantive response to Pakistan's MLA Request and ultimately purported to return the MLA Request unanswered **[Volume 2/Annex 33]**.

208. Pakistan's latest letter on this issue to India's Ministry of External Affairs of 26 October 2017 referred to the copy of Passport No.L9630722 in the name of 'Hussein Mubarak Patel' and asked the Government of India to explain whether:

"*(1) Commander Jadhav is indeed Commander Jadhav or 'Hussein Mubarak Patel'*

(2) If he is not 'Hussein Mubarak Patel', does such a person exist?

(3) If 'Hussein Mubarak Patel' does exist or does not exist, what attempts has the Government of India made at the very latest since 23rd January 2017 to investigate how Commander Jadhav was able to obtain what appears to be an authentic Indian passport issued by the competent authorities in India?

(4) In the alternative, is it the Government of India's position that Commander Jadhav was in possession of a false and inaccurate document either:

a. because his name is not 'Hussein Mubarak Patel'; or

b. because it is not a passport from the competent Indian authorities?

(5) If that is the case, does the Government of India consider that Commander Jadhav has committed a crime or crimes under Indian law? If so, what is/are the crimes?

(6) What is the actual authentic passport for Commander Kulbhushan Sudhir Jadhav (assuming he was issued with a passport)? Please provide full particulars of the date of issue, date of expiry, passport number, place of issue, name and photograph in the actual (presently valid) passport issued to Commander Jadhav if such a document exists. Without prejudice to the foregoing, the Islamic Republic of Pakistan has already put the Republic of India on notice that it has failed to establish the Indian nationality of Commander Jadhav".

[Volume 2/Annex 44/pages 2-3]

209. This letter has not elicited any response at all from India. Furthermore, India's failure in this regard amounted to a contravention of binding *erga omnes* obligations and/or otherwise binding obligations to provide other States with assistance in the investigation of terrorism offences as contained in UN Security Council Resolution 1373 (2001) **[Volume 5/Annex 89]**.

Commander Jadhav's use of an authentic Indian passport clothed with a false identity

210. As outlined above, in the light of India's abject refusal to engage with Pakistan's requests for information regarding the passport in Commander Jadhav's possession when he was arrested ("the passport"), as explained above, Pakistan was compelled to engage an independent expert (Mr. David Westgate) to examine the passport in the name of 'Hussein Mubarak Patel'.

211. Mr. Westgate, *inter alia*, served as part of the United Kingdom Home Office and Immigration Intelligence Directorate for more than 27 years, and in particular, served on attachment to the Foreign & Commonwealth Office as Immigration Airline Liaison Officer based in New Delhi, and visa officer on secondment to the Foreign & Commonwealth Office in Karachi, Pakistan.

212. The findings of the independent expert as contained in his report dated 8 November 2017 ("the Westgate Report") are clear and conclusive **[Volume 7/Annex 141]**.

The Westgate Report

213. In summary, the Westgate Report concludes:

213.1. The passport is a genuine and authentic Indian travel document and not a counterfeit. This assessment is based on a review of the security elements in the document, including the presence of a high quality cylinder mould watermark through the document, random UV fluorescent fibres and high quality print, along with an additional ghost image (paragraph 9 of the Westgate Report) **[Volume 7/Annex 141/page 2]**;

213.2. The laminate has a security print on the inside which is clear and undamaged, and there is no evidence that the image is not original to the document (paragraph 9 of the Westgate Report **[Volume 7/Annex 141/page 2]**);

213.3. The various entry, exit and other official endorsements in the passport contain specific elements which give a strong indication that they are genuine. For example, there are detailed imprints in the ink endorsements using specialist inks, and there is no evidence of alteration or other forgery relating to any of the endorsements (paragraph 11 of the Westgate Report **[Volume 7/Annex 141/page 3]**);

213.4. "*From my knowledge and understanding of the airport immigration system in India, the immigration counters are connected to a central database, and any irregularities in the authenticity [of] a passport would ordinarily be flagged up on such a database. Thus I would observe that the frequency with which the individual presented the passport at the immigration counter in India for entry and for exit is very strong supportive evidence of the authentic nature of the passport. In addition, if there were issues concerning the holder of an authentic passport, such as an Interpol I24/7 notice, and Indian central watch-list entry, criminal proceedings, issues relating to identity, these would be very likely to be spotted at the point of*

encounter with the immigration authorities when the passport was scrutinised by officials in India. Such officials would be examining hundreds of passports on a daily basis and would thus have considerably more experience in respect of such documents" (paragraph 15 of the Westgate Report **[Volume 7/Annex 141/page 7]**).

214. On the basis of the information that Pakistan has put before the Court, the inferences that the Court is invited to draw have not been (and are incapable of being) rebutted:

214.1. India refuses to provide any evidence of the Indian nationality of the person that claims to be Commander Kulbhushan Sudhir Jadhav because India realises that in doing so India's own wrongdoing will be exposed;

214.2. India's wrongdoing in this case, *inter alia*, includes providing Commander Jadhav with an authentic Indian passport and clothing him with a false Muslim identity in the name of 'Hussein Mubarak Patel'. He appears to have presented the passport on at least 17 occasions to Indian immigration authorities when entering or leaving India. His ability to do so without any apparent hindrance leads to the conclusion that:

214.2.1. The provision of the authentic passport; and
214.2.2. The provision of a false identity in a Muslim name;

are both acts and/or culpable omissions of India and/or its instrumentalities.

215. Such acts cannot have been intended to facilitate anything other than clandestine/nefarious activity.

216. Commission of such a gross violation of basic norms upon which friendly relations between States are premised cannot provide a foundation for the invocation of Treaty rights intended to promote friendly relations.

217. Over and above the question dealt with in Section V(B) below as to whether 'espionage' is embraced by the VCCR 1963, it is a fundamental violation of the principles of good faith and of friendly relations amongst States for India to conduct itself in this manner.

218. Pakistan respectfully submits that:

218.1. Both Commander Jadhav's and India's entitlement to consular access are based upon the establishment as a matter of law of his Indian nationality. Typically, nationality is proved by a valid passport. However, the provision by India of a false identity to Commander Jadhav and/or Commander Jadhav's obtaining of a false identity within an authentic passport is *prima facie* (and unsurprisingly) an unlawful act as a matter of Indian domestic law. Therefore the basis of Commander Jadhav's

and India's claim to entitlement to consular access is rooted in an unlawful act (or acts) as a matter of Indian and public international law;

218.2. India's failure to provide any explanations and/or evidence regarding the false identity/authentic passport in Commander Jadhav's possession at the time of his arrest has meant that Pakistan was effectively obstructed and/or prevented by India from being able to establish with absolute certainty Commander Jadhav's true identity and his foreign nationality. It is ironic (if not perverse) for India to now contend that "nationality" required no proof – either because of Commander Jadhav possessing an Indian passport (in a false identity), or because of the confession to being an Indian spy;

Ex turpi causa

218.3. Commander Jadhav has voluntarily confessed in detail to having been despatched by India to commit acts of espionage and terrorism in Pakistan. The despatching of a spy/terrorist by a State into the territory of another State is a grave violation of international law, and is conduct that fundamentally contravenes the Principles of the Charter of the United Nations;

218.4. Pakistan respectfully submits that, by virtue of the doctrine of *ex turpi causa*, India's illegal acts in this regard deprive it of standing to invoke the jurisdiction of the Court in order to gain access to its spy/terrorist, let alone advance a claim in respect of denial of consular access;

218.5. Furthermore, any asserted denial of consular access in respect of Commander Jadhav by Pakistan was the direct consequence of India's own illegal activities, in using an espionage agent of terror to violate and/or undermine the territorial integrity and political sovereignty of Pakistan through gross violation of law;

218.6. India's failure to provide Pakistan with any measure of assistance whatsoever in the investigation of the crimes committed by Commander Jadhav is a violation of *erga omnes* obligations and/or otherwise binding obligations as contained in UN Security Council Resolution 1373 (2001) **[Volume 5/Annex 89]**.

219. On the basis of the above, Pakistan observes, (with regret to the Court), that India is guilty of egregious illegal conduct in providing Commander Jadhav with an authentic passport and false identity, and despatching him to carry out acts of espionage and terrorism in Pakistan in contravention of the Charter of the United Nations.

220. Pakistan respectfully invites the Court to declare India's claim as advanced through its Application and its Memorial to be inadmissible on the basis of the doctrine of illegality and/or the clean hands doctrine and/or the principle of *ex injuria jus non oritur*.

IV. FURTHER, OR IN THE ALTERNATIVE, EVEN IF THE THRESHOLD FOR JURISDICTION HAS BEEN ENGAGED, THE PRELIMINARY ISSUES SHOULD MILITATE AGAINST THE GRANTING OF ANY RELIEF

221. Further, or in the alternative, Pakistan respectfully submits that, even if the Court considers that the preliminary issues raised in Section III above do not operate so as to render India's claim inadmissible, the preliminary issues raised in Section III above nevertheless should militate against the granting of any relief to India.

222. Without prejudice to the foregoing, it may be the case that the Court considers that the preliminary issues raised in Section III above are more suited for discussion within the merits/relief elements, rather than as freestanding jurisdiction or admissibility considerations of an international claim.

223. For the avoidance of any doubt, Pakistan does not seek and is content to dispense with any possible bifurcation of proceedings in this regard.

224. The Court considered this point in *Oil Platforms (Islamic Republic of Iran v United States of America), Judgment, I.C.J. Reports 2003*, page 161. The Court (at paragraphs 27-30) **[Volume 3/Annex 66]** stated:

"*27. The Court will first consider a contention to which the United States appears to have attributed a certain preliminary character. The United States asks the Court to dismiss Iran's claim and refuse it the relief it seeks, because of Iran's allegedly unlawful conduct, i.e., its violation of the 1955 Treaty and other rules of international law relating to the use of force. The United States invokes what it suggests are three related principles in support of this request. First, a party that acts improperly with respect to the subject-matter of a dispute is not entitled to relief; according to the United States, Iran had committed, at the time of the actions against the platforms, manifestly illegal armed attacks on United States and other neutral shipping in the Persian Gulf, and it has misrepresented, in the present proceedings, the facts of the case before the Court. Second, a party that has itself violated obligations identical to those that are the basis for its application is not entitled to relief and Iran had allegedly infringed itself the "mutual and reciprocal" obligations arising from the 1955 Treaty. Third, an applicant is not entitled to relief when the actions it complains of were the result of its own wrongful conduct. Thus the United States claims that the attacks on the platforms were a consequence of Iran's previous wrongful behaviour in the Persian Gulf.*

28. Iran responds that the concept of "clean hands" underlying these arguments of the United States, "while reflecting and incorporating fundamental principles of law inspired by good faith, is not an autonomous legal institution". It contends that the concept of "clean hands" requires the operation of other institutions or legal rules for its implementation. Iran argues that the "plaintiff's own wrongful conduct" as a ground for

inadmissibility of a claim relates to claims arising in the context of diplomatic protection and concerns only a foreign individual's "clean hands", but that such a principle is irrelevant in direct State-to-State claims. According to Iran, as far as State-to-State claims are concerned, such principle may have legal significance only at the merits stage, and only at the stage of quantification of damages, but does not deprive a State of locus standi in judicio.

29. The Court notes that these issues were first raised by the United States in its Counter-Memorial, after the Judgment of the Court of 12 December 1996 on the preliminary objection of the United States to jurisdiction. In that pleading those issues were dealt with at the end, after the United States had set out its arguments on the merits, and not by way of a preliminary issue. In subsequent pleadings and in oral argument it has presented them as having a rather preliminary character, but it has nevertheless not gone so far as to suggest that they are issues of admissibility appropriate to be enquired into before any examination of the merits. Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits. That is not the case here. The United States does not ask the Court to find Iran's claim inadmissible; it asks the Court to dismiss that claim. It does not argue that the Court should be debarred from examining the merits of the Iranian claim on the grounds of Iran's conduct; rather it argues that Iran's conduct is such that it "precludes it from any right to the relief it seeks from this Court", or that it "should not be permitted to recover on its claim". The United States invites the Court to make a finding "that the United States measures against the platforms were the consequence of Iran's own unlawful uses of force" and submits that the "appropriate legal consequences should be attached to that finding". The Court notes that in order to make that finding it would have to examine Iranian and United States actions in the Persian Gulf during the relevant period – which it has also to do in order to rule on the Iranian claim and the United States counter-claim.

30. At this stage of its judgment, therefore, the Court does not need to deal with the request of the United States to dismiss Iran's claim and refuse the relief that it seeks on the basis of the conduct attributed to Iran. The Court will now proceed to the consideration of the claims made by Iran and the defences put forward by the United States".

225. The United States of America in the *Oil Platforms* case did not ask the Court to declare Iran's claim as inadmissible, but rather the Court was asked to dismiss the claim. By contrast, in the instant case Pakistan does invite the Court to declare India's claim inadmissible, on the basis of the preliminary issues discussed in Section III above.

226. However, further, or in the alternative, Pakistan submits that, should the Court consider that the preliminary issues discussed in Section III above do not render India's claim inadmissible, nonetheless the Court should consider whether those preliminary

issues militate against the granting of any relief to India, including that claimed in its Application and/or its Memorial.

227. Pakistan respectfully submits that the content of Article 39 of the International Law Commission's ("ILC") 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA 2001") (Contribution to the injury) **[Volume 6/Annex 134/page 109]** informs the deliberations of the Court regarding the relief claimed by India:

"*In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought*".

228. In the ILC's Commentary to Article 39 ARSIWA 2001, it is stated (at paragraph (2)) **[Volume 6/Annex 134/page 110]** that:

"*Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation*".

229. Further, the Commentary to Article 39 ARSIWA 2001 continues (at paragraph (6)) **[Volume 6/Annex 134/page 110]**:

"*The wilful or negligent action or omission which contributes to the damage may be that of the injured State or "any person or entity in relation to whom reparation is sought". This phrase is intended to cover not only the situation where a State claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party*". (emphasis added)

230. Accordingly, Pakistan respectfully submits that the conduct of India and/or the conduct of Commander Jadhav himself (as an instrument of India) must be taken into account in any consideration the Court undertakes as regards relief that might otherwise be granted, including whether the conduct is of such grave illegality that it militates against the granting of any relief at all.

V. THE VIENNA CONVENTION ON CONSULAR RELATIONS 1963 IS NOT ENGAGED

231. Pakistan submits that the VCCR 1963 is not engaged in the instant case.

232. The VCCR 1963 was adopted at Vienna on 24 April 1963 and entered into force on 19 March 1967.

233. The rationale for the drafting and promulgating of the VCCR 1963 was to promote friendly relations among nations. This is clear from the Preamble to the VCCR 1963 **[Volume 5/Annex 88]**:

> "*The States Parties to the present Convention,*
>
> ...
>
> *Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,*
>
> ...
>
> *Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems*".

234. Pakistan respectfully submits that it would be inimical to the promotion of friendly relations among nations, and to the purpose of the VCCR 1963, if it were to be the case that:

234.1. an individual is clothed by his "sending State" with a false identity in order to clandestinely enter the "receiving State",

234.2. for the purposes of carrying out criminal activity of the most grievous kind at the behest of the "sending State",

234.3. to then be able to communicate freely with the consular agents or consular authorities of the "sending State" following his arrest.

235. This is all the more so evident in the present situation. Despite repeated requests, India has failed to comply with a fundamental prerequisite to the engagement of the VCCR 1963 – that is, proof of nationality. India's failure or refusal to establish or prove that Commander Jadhav is an Indian national is not and cannot be dismissed as a mere technicality. Pakistan submits that the VCCR 1963 cannot be engaged in circumstances where the sending State does not establish that the accused individual is, in fact, its national – all the more so where the failure/refusal to is unexplained.

236. Indeed, India's failure or refusal in this regard arises because of the dilemma it faces: if India were to properly address the questions raised by Pakistan in respect of

Commander Jadhav's possession of an authentic Indian passport bearing a false (Muslim) name, Pakistan submits that this would lay bare India's use of Commander Jadhav as an instrument of espionage and terrorism.

237. Pakistan asked detailed, legitimate and necessary questions relating to the passport in its request dated 31 May 2017, and repeated the same in its requests dated 30 August 2017 and 26 October 2017:

237.1. 31 May 2017:

"*c) When Commander Jadhav was apprehended, he was in the possession of an Indian passport which bore a different name – 'Hussein Mubarak Patel' – a Muslim name, and one that was patently false. We have provided the Government of India with a copy of the passport and the confession of Commander Jadhav on 23rd January 2017 in the context of the terrorism investigation request for Mutual Legal Assistance ("MLA Request").*

d) We regret to note that the Government of India has failed to engage the MLA Request, which is a violation of the fundamental obligations enshrined in the UN Charter and numerous UN Security Council Resolutions including UNSC 1373 (2001).

e) On 14th April 2017, in a public statement, the Adviser to the Prime Minister of Pakistan on Foreign Affairs, inter alia, noted that India had provided no explanation as to how and in what circumstances Commander Jadhav came to be in possession of this passport bearing a false name – and called upon India to do so.

f) However, to date, India has made no response in this regard and has made no effort to provide any kind of explanation at all".

[Volume 2/Annex 42/pages 1-2]

237.2. 30 August 2017:

"*5. By way of example, the Government of India was provided with a clear copy of passport No. L9630722 in the name of 'Hussein Mubarak Patel'.*

6. It is incumbent upon the Government of India to explain:

a) Whether Commander Jadhav is indeed Commander Jadhav or 'Hussein Mubarak Patel'.

b) If he is not 'Hussein Mubarak Patel', does such a person exist?

c) If 'Hussein Mubarak Patel' does exist or does not exist, what attempts has the Government of India made at the very latest since 23rd January 2017 to investigate how Commander Jadhav was able to obtain Passport issued by the competent authorities in India?

d) The travel history of Commander Jadhav.

7. In the alternative, is it the Government of India's position that Commander Jadhav was in possession of a false and inaccurate document such that either:

a. His name is not 'Hussein Mubarak Patel': or

b. It is not a passport from the competent Indian authorities?

8. If that is the case, does the Government of India consider that Commander Jadhav has committed a crime or crimes under Indian Law? If so, what is /are the crimes?

9. The Islamic Republic of Pakistan does not consider that the purported return of the request in any way excuse the failure on the part of the Republic of India to comply with its international obligations as aforesaid. To facilitate the Republic of India's compliance, the request is provided again".

[Volume 2/Annex 43/pages 1-2]

237.3. 26 October 2017:

"*(1) Commander Jadhav is indeed Commander Jadhav or 'Hussein Mubarak Patel'*

(2) If he is not 'Hussein Mubarak Patel', does such a person exist?

(3) If 'Hussein Mubarak Patel' does exist or does not exist, what attempts has the Government of India made at the very latest since 23rd January 2017 to investigate how Commander Jadhav was able to obtain what appears to be an authentic Indian passport issued by the competent authorities in India?

(4) In the alternative, is it the Government of India's position that Commander Jadhav was in possession of a false and inaccurate document either:

a. because his name is not 'Hussein Mubarak Patel'; or

b. because it is not a passport from the competent Indian authorities?

(5) If that is the case, does the Government of India consider that Commander Jadhav has committed a crime or crimes under Indian law? If so, what is/are the crimes?

(6) What is the actual authentic passport for Commander Kulbhushan Sudhir Jadhav (assuming he was issued with a passport)? Please provide full particulars of the date of issue, date of expiry, passport number, place of issue, name and photograph in the actual (presently valid) passport issued to Commander Jadhav if such a document exists. Without prejudice to the foregoing, the Islamic Republic of Pakistan has already put the Republic of India on notice that it has failed to establish the Indian nationality of Commander Jadhav." **[Volume 2/Annex 44/pages 2-3]**

238. Pakistan submits that India's failure or refusal to furnish Pakistan (let alone the Court) with any evidence to date of Commander Jadhav's nationality requires the dismissal of its

claim on the basis that the VCCR 1963 was not and is not engaged as regards Commander Jadhav.

239. Further, or in the alternative, the rationale for a consul protecting the interests of their nationals abroad against potential violations by the receiving State was only ever intended to be used to protect the legitimate interests of those nationals.

240. This situation remains true today after the entry into force of the VCCR 1963, which contains many reminders (if needed) that consular functions are intended to be exercised in a manner that is in accordance with the international law and the domestic law of the receiving State, including:

240.1. Article 5: "*(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law*" **[Volume 5/Annex 88/page 5]**;

240.2. Article 5: "*(f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State*" **[Volume 5/Annex 88/page 5]**;

240.3. Article 5: "*(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State*" **[Volume 5/Annex 88/page 5]**;

240.4. Article 5: "*(h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons*" **[Volume 5/Annex 88/page 5]**;

240.5. Article 5: "*(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests*" **[Volume 5/Annex 88/page 5]**;

240.6. Article 5: "*(j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State*" **[Volume 5/Annex 88/pages 5-6]**;

240.7. Article 5: "*(l) extending assistance to vessels and aircraft mentioned in sub-paragraph (k) of this article, and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice*

to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State" **[Volume 5/Annex 88/page 6]**;

240.8. Article 5: "*(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State*" **[Volume 5/Annex 88/page 6]**;

240.9. Article 36: "*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*" **[Volume 5/Annex 88/page 17-18]**;

240.10. Article 38: "*In the exercise of their functions, consular officers may address: ... (b) the competent central authorities of the receiving State if and to the extent that this is allowed by the laws, regulations and usages of the receiving State or by the relevant international agreements*" **[Volume 5/Annex 88/page 18]**;

240.11. Article 55: "*1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State*" **[Volume 5/Annex 88/page 25]**.

(emphasis added)

241. Moreover, a consideration of the *travaux préparatoires* of the VCCR 1963 and State practice evinces no evidence that customary international law supports the contention that an individual arrested, who manifests from his own conduct and materials in his possession a *prima facie* case of espionage, is entitled to consular access pursuant to Article 36(1)(b) VCCR 1963.

242. Accordingly, Pakistan submits that the commission of acts of espionage by Commander Jadhav (and his confession to having committed those acts at the behest of India without any serious attempt at rebuttal) requires the dismissal of India's claim, on the basis that the VCCR 1963 was not and is not engaged as regards Commander Jadhav.

(A) INDIA HAS FAILED TO ESTABLISH THE NATIONALITY OF COMMANDER JADHAV

243. It is axiomatic from the nature of consular access that a receiving State's obligation to allow consular access only arises in respect of foreign nationals. A fundamental pre-condition to engage the overall scheme of consular access requires the fact that an arrestee or detainee is indeed a national of the "sending State" to be established before an entitlement to consular access can arise. India's answer is simple (albeit wrong): Commander Jadhav confessed to being an Indian spy and thus his nationality is not in issue. This would be a perverse outcome indeed. All the more so where India otherwise pours scorn on the confession of Commander Jadhav, and entirely dismisses its evidential status.

Proof of nationality – a valid passport

244. A valid passport is widely considered the primary official document that acknowledges and certifies the bearer to be a citizen of the issuing State. Professor Adam I. Muchmore[7] explains that:

"*The passport has developed from a somewhat ad-hoc letter addressed to foreign powers into a sophisticated, formalized document attesting to both the identity and nationality of its bearer. Although early passports were not always accepted as proof of nationality, even under the law of the issuing state, the modern passport is now widely accepted as proof of nationality under domestic law. Moreover, at least one major international tribunal has accepted the passport as near-conclusive evidence of domestic law nationality*". (Muchmore AI, '*Passports and Nationality in International Law*' in *University of California Davis Journal of International Law & Policy* (2004), pp. 301-355 at pages 305-306 **[Volume 5/Annex 111]**)

245. Furthermore, in the leading academic text on consular law, Lee & Quigley, *Consular Law and Practice* (1st edition, 1961), it was stated (at pages 175-176) **[Volume 5/Annex 112.2]** that:

"*A passport is an official document acknowledging and certifying the bearer as a citizen of the issuing state. It is regarded as a prima facie evidence of the national status of the holder and has become increasingly a necessity in foreign travels ... Because of the importance attached to a passport, it is understandable why states invariably require their consuls to establish the identity, allegiance and national status of the applicant beyond all reasonable doubt before issuing a passport*".

246. The International Civil Aviation Organization (ICAO) has issued Document 9303 (Seventh Edition, 2015) on Machine Readable Travel Documents, which contains recommendations to national governments on the format of passports. The entire document is exhibited hereto as it demonstrates the level of detail States have engaged in

[7] Associate Dean for Research & Partnerships, Professor of Law, Penn State Law

so as to ensure consistency in travel documents, and, perhaps most importantly, to eradicate abuse of them **[Volume 6/Annex 135]**.

247. The specifications are not intended to be a standard for national identity documents. However, Document 9303 provides that a State whose identity documents are recognised by other States as valid travel documents shall design its identity documents such that they conform to the specifications of Doc 9303-3 and Doc 9303-4, Doc 9303-5 or Doc 9303-6. Document 9303 comprises a number of sections, including Part 2: Specifications for the Security of the Design, Manufacture and Issuance of MRTDs (mandatory and optional specifications for the precautions to be taken by travel document issuing authorities to ensure that their MRTDs, and their means of personalization and issuance to the rightful holders, are secure against fraudulent attack. Mandatory and optional specifications are also provided for the physical security to be provided at the premises where the MRTDs are produced, personalized and issued and for the vetting of personnel involved in these operations.)

248. The adoption of common international standards for passports is necessary and understandable. If legitimate entry and exit is to be permitted by States for foreign nationals, they must to a very large extent rely upon the possession of an authentic travel document as a basis for eliminating what might otherwise be very cumbersome enquiries for each and every person entering the jurisdiction. The need for the issuance of travel documents not to be abused is obvious.

249. The principle that a passport that itself is in contravention of the law is not valid for any purpose was apparent in international law, long before the entry into force of the VCCR 1963, as demonstrated by *The Koszta Case* **[Volume 5/Annex 113/page 133-134]**.

250. In 1848-1849, one Martin Koszta participated in a failed rebellion against Austria and then fled to Turkey. After being arrested in Turkey, he was released on demand that he leave Turkey and he chose the United States of America as his country of exile. Notwithstanding that the applicable law required five years' residence before he could be naturalised as a US citizen, he returned to Smyrna (now Izmir, Turkey), having obtained a traveling pass stating that he was entitled to US protection. He was kidnapped by Austrian agents and the United States of America demanded his release – followed up by sending a warship to enforce its demand. The ensuing diplomatic crisis was ultimately settled through mediation by a French consul. However, Austria protested against the claim by the United States of America that it was entitled to exercise diplomatic protection over Martin Koszta. The question as to whether his incomplete naturalisation entitled him to protection was ultimately not determined.

251. Nevertheless, in his *Hand-Book of International Law* (1895), Professor Edwin F. Glenn[8] considered the effect of the US passport document that Martin Koszta had obtained and concluded (at page 134) **[Volume 5/Annex 113]** that:

"*In regard to the effect of the passport given to Koszta, and which it was claimed conferred upon him the right of protection by the United States, there is no valid ground for such a contention, as it appears that this was given in contravention of law, and possessed no validity for any purpose*".

252. In *Avena and Other Mexican Nationals (Mexico v United States of America)*, by an application dated 9 January 2003, Mexico commenced proceedings against the United States of America concerning alleged violations of Articles 5 and 36 VCCR 1963 in respect of (originally) 54 individuals who had been sentenced to death in certain states within the United States of America. The United States of America raised an objection that certain of the individuals in respect of which Mexico sought consular access were not Mexican nationals **[Volume 3/Annex 67/para. 41]**. In response to that objection, Mexico amended its submissions so as to withdraw its request for relief in the case of one of the individuals, Mr. Enrique Zambrano Garibi, having come to the conclusion that Mr. Garibi in fact was a dual Mexican-US national **[Volume 3/Annex 67/para. 7]**.

253. In its Judgment of 31 March 2004, the Court stated (at paragraphs 53-54) **[Volume 3/Annex 67]**:

"*53. The Parties have advanced their contentions as to nationality in three different legal contexts. The United States has begun by making an objection to admissibility, which the Court has already dealt with (see paragraphs 41 and 42 above). The United States has further contended that a substantial number of the 52 persons listed in paragraph 16 above were United States nationals and that it thus had no obligation to these individuals under Article 36, paragraph 1 (b). The Court will address this aspect of the matter in the following paragraphs. Finally, the Parties disagree as to whether the requirement under Article 36, paragraph 1 (b), for the information to be given "without delay" becomes operative upon arrest or upon ascertainment of nationality. The Court will address this issue later (see paragraph 63 below).*

54. The Parties disagree as to what each of them must show as regards nationality in connection with the applicability of the terms of Article 36, paragraph 1, and as to how the principles of evidence have been met on the facts of the cases".

254. The Court continued (at paragraphs 55-56) **[Volume 3/Annex 67]** to set out the parties' contentions on where the burden of proof lay as regards the establishing of

[8] Edwin F. Glenn was a Major-General in the US Army and a former Professor of Military Science & Tactics at the University of Minnesota. He served in the Judge Advocate General's Department in Dakota, Columbia and the Visayas. He was judge advocate of the Fifth Brigade and later was given command of the Eighty-Third Division in August 1917

nationality in the context of a sending State exercising diplomatic protection in respect of an individual:

"*55. Both Parties recognize the well-settled principle in international law that a litigant seeking to establish the existence of a fact bears the burden of proving it (cf. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 437, para. 101). Mexico acknowledges that it has the burden of proof to show that the 52 persons listed in paragraph 16 above were Mexican nationals to whom the provisions of Article 36, paragraph 1 (b), in principle apply. It claims it has met this burden by providing to the Court the birth certificates of these nationals, and declarations from 42 of them that they have not acquired United States nationality. Mexico further contends that the burden of proof lies on the United States should it wish to contend that particular arrested persons of Mexican nationality were, at the relevant time, also United States nationals.*

56. The United States accepts that in such cases it has the burden of proof to demonstrate United States nationality, but contends that nonetheless the "burden of evidence" as to this remains with Mexico. This distinction is explained by the United States as arising out of the fact that persons of Mexican nationality may also have acquired United States citizenship by operation of law, depending on their parents' dates and places of birth, places of residency, marital status at time of their birth and so forth. In the view of the United States "virtually all such information is in the hands of Mexico through the now 52 individuals it represents". The United States contends that it was the responsibility of Mexico to produce such information, which responsibility it has not discharged". (emphasis added)

255. The Court held (at paragraph 57) **[Volume 3/Annex 67]**:

"*57. The Court finds that it is for Mexico to show that the 52 persons listed in paragraph 16 above held Mexican nationality at the time of their arrest. The Court notes that to this end Mexico has produced birth certificates and declarations of nationality, whose contents have not been challenged by the United States*". (emphasis added)

256. In the instant case, despite multiple opportunities afforded by Pakistan to do so, India has not provided any evidence regarding Commander Jadhav's nationality.

257. The Court continued (at paragraph 57) **[Volume 3/Annex 67]**:

"*The Court observes further that the United States has, however, questioned whether some of these individuals were not also United States nationals. Thus, the United States has informed the Court that, "in the case of defendant Ayala (case No. 2) we are close to certain that Ayala is a United States citizen", and that this could be confirmed with absolute certainty if Mexico produced facts about this matter. Similarly Mr. Avena (case No. 1) was said to be "likely" to be a United States citizen, and there was "some possibility" that some 16 other defendants were United States citizens. As to six others, the United States said it "cannot rule out the possibility" of United States nationality. The*

Court takes the view that it was for the United States to demonstrate that this was so and to furnish the Court with all information on the matter in its possession. In so far as relevant data on that matter are said by the United States to lie within the knowledge of Mexico, it was for the United States to have sought that information from the Mexican authorities. The Court cannot accept that, because such information may have been in part in the hands of Mexico, it was for Mexico to produce such information. It was for the United States to seek such information, with sufficient specificity, and to demonstrate both that this was done and that the Mexican authorities declined or failed to respond to such specific requests. At no stage, however, has the United States shown the Court that it made specific enquiries of those authorities about particular cases and that responses were not forthcoming. The Court accordingly concludes that the United States has not met its burden of proof in its attempt to show that persons of Mexican nationality were also United States nationals". (emphasis added)

258. By contrast, in the instant case, as demonstrated by the evidence placed before the Court by Pakistan (and deliberately not put in evidence by India), Pakistan made repeated formal requests to the Indian authorities for explanations regarding the status of Commander Jadhav's passport, and has repeatedly reminded India that it has failed/refused to provide evidence as to his Indian nationality.

259. Had a substantive response been forthcoming, India's replies might have provided the necessary proof that Commander Jadhav was an Indian national. However, India made no attempt to engage with the requests dated 31 May 2017, 30 August 2017 and 26 October 2017 **[Volume 2/Annex 42; Annex 43; Annex 44]**.

260. In *Avena*, the Court held (at paragraph 63) **[Volume 3/Annex 67]**:

"*63. The Court finds that the duty upon the detaining authorities to give the Article 36, paragraph 1 (b), information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances*". (emphasis added)

261. Pakistan respectfully submits that, in a case such as that of Commander Jadhav, an espionage agent carrying a patently authentic passport with a false identity, the truth of an arrested individual's nationality is likely to take some time to establish and is bound to require confirmation from the authorities asserting any rights for consular access – unless they seek to disavow the individual or evade addressing the issue for fear of incrimination in illegal activity.

262. The Court held (at paragraph 65) **[Volume 3/Annex 67]**:

"*65. Bearing in mind the complexities explained by the United States, the Court now begins by examining the application of Article 36, paragraph 1 (b), of the Vienna Convention to the 52 cases. In 45 of these cases, the Court has no evidence that the*

arrested persons claimed United States nationality, or were reasonably thought to be United States nationals, with specific enquiries being made in timely fashion to verify such dual nationality. The Court has explained in paragraph 57 above what enquiries it would have expected to have been made, within a short time period, and what information should have been provided to the Court". (emphasis added)

263. As explained above, in contrast to the United States of America in the *Avena* case, Pakistan in the instant case did make specific enquiries of India, seeking the provision of evidence, not least to seek to conclusively establish Commander Jadhav's nationality. Those specific enquiries, as contained in Pakistan's 23 January 2017 MLA Request **[Volume 2/Annex 17]** and repeated thereafter, were made in a "*timely fashion*" in the context of the complex investigation of espionage and terrorism committed by Commander Jadhav and individuals and groups with whom he conspired.

264. No response to the MLA Request was received from India and no evidence in that regard was ever provided by India. Pakistan's latest letter (following other reminders, including one dated 31 May 2017 **[Volume 2/Annex 42]** and another dated 30 August 2017 **[Volume 2/Annex 43]**) on this issue to India's Ministry of External Affairs of 26 October 2017 **[Volume 2/Annex 44]** has not elicited any response at all from India.

265. Furthermore, that the inability, or failure, (let alone refusal) of the sending State to establish an individual's nationality before the Court is fatal to an entitlement to exercise diplomatic protection in respect of that individual is made clear by the Court's findings in its Judgment in *Avena* (at paragraphs 66 and 74) **[Volume 3/Annex 67]**:

"*66. Seven persons, however, are asserted by the United States to have stated at the time of arrest that they were United States citizens. Only in the case of Mr. Salcido (case No. 22) has the Court been provided by the United States with evidence of such a statement. This has been acknowledged by Mexico. Further, there has been no evidence before the Court to suggest that there were in this case at the same time also indications of Mexican nationality, which should have caused rapid enquiry by the arresting authorities and the providing of consular information "without delay". Mexico has accordingly not shown that in the case of Mr. Salcido the United States violated its obligations under Article 36, paragraph 1 (b).*

...

74. The Court concludes that Mexico has failed to prove the violation by the United States of its obligations under Article 36, paragraph 1 (b), in the case of Mr. Salcido (case No. 22), and his case will not be further commented upon". (emphasis added)

266. In light of the above, Pakistan respectfully submits that India has deliberately chosen not to seek to establish at all, or to the sufficient required standard, the Indian nationality of Commander Jadhav for reasons which are (depressingly) all too clear.

267. Accordingly, Pakistan respectfully submits that India's failure or refusal to establish the Indian nationality of Commander Jadhav is fatal to its claim to be entitled to seek consular access in respect of Commander Jadhav.

268. Furthermore, Pakistan respectfully submits, India's complete failure and/or refusal to establish the Indian nationality of Commander Jadhav means that the VCCR 1963 is not engaged, because the entire scheme of consular access is only engaged once an accused's nationality is established.

269. Thus, an authentic passport bearing a false identity on its own cannot be taken to be any, let alone sufficient, proof of nationality of an individual. It must follow that proof of nationality requires evidence of the lawful basis upon which the "nationality link" exists as a matter of domestic law and public international law.

270. In light of the above, Pakistan respectfully invites the Court to dismiss India's claim as advanced in its Application and its Memorial, on the basis that the VCCR 1963 is not engaged and does not apply in the case of Commander Jadhav.

(B) THE VIENNA CONVENTION ON CONSULAR RELATIONS 1963 IS NOT ENGAGED IN ESPIONAGE CASES

271. Further, or in the alternative, Pakistan submits that the VCCR 1963 does not apply in cases of individuals who manifest from their own conduct and the materials in their possession a *prima facie* case of espionage activity.

The Historical Context of Consular Relations

272. The historical context of consular relations reveals that consuls were charged with the protection of legitimate interests of nationals abroad, to protect against potential violations by the receiving State.

273. That this is so was apparent long before the VCCR 1963 was drafted and promulgated.

274. In 1904, Baron Alphonse Heyking (then the Imperial Russian Consul-General in London) published '*A Practical Guide for Russian Consular Officers and All Persons Having Relations with Russia*'. A second edition was published in 1916 in which the following was stated (at page 129) in his discussion of consular assistance to Russian subjects **[Volume 5/Annex 114.2]**:

> "*The duties of the Consul, besides those enumerated in separate paragraphs as under, comprise in general protection and assistance of any Russian subject, whether in his Consular district or not. The Consul must help any Russian subject in any legitimate aims as far as they appertain to his sphere of Consular activity*". (emphasis added)

The History of the Vienna Convention on Consular Relations 1963

275. In 1927, the Faculty of Harvard Law School undertook to organise research and prepare a Draft on the Legal Position and Functions of Consuls. Professor Quincy Wright was the Reporter on the Harvard Law School's Draft on the Legal Position and Functions of Consuls, which is described as having had a "*decisive*" impact upon the ILC's treatment of the subject (do Nascimento GE, '*The Vienna Conference on Consular Relations*' in *The International & Comparative Law Quarterly*, Vol. 13, No. 4 (Oct., 1964), pp. 1214-1254 at page 1216 **[Volume 5/Annex 115]**).

276. In 1928, the Convention on Consular Officers was drafted in Havana, based upon an earlier draft prepared by the International Commission of American Jurists in Rio de Janeiro in 1927. The 1928 Havana Convention on Consular Officers is also described as having had a "*strong influence*" in the preparation of the ILC's draft (do Nascimento GE, '*The Vienna Conference on Consular Relations*' in *The International & Comparative Law Quarterly*, Vol. 13, No. 4 (Oct., 1964), pp. 1214-1254 at page 1216 **[Volume 5/Annex 115]**).

277. In the 1950s, the ILC worked on a draft convention derived from international custom, a series of bilateral consular conventions and municipal law/general practice. In 1955, Professor Jaroslav Žourek[9] was appointed as Special Rapporteur and provided 3 reports for examination by the ILC. The ILC finalised its Draft Articles on Consular Relations in 1960. Following the signing of the Vienna Convention on Diplomatic Relations in 1961, the ILC met again in order to reword the original Draft Articles on Consular Relations (do Nascimento GE, '*The Vienna Conference on Consular Relations*' in *The International & Comparative Law Quarterly*, Vol. 13, No. 4 (Oct., 1964), pp. 1214-1254 at page 1218 **[Volume 5/Annex 115]**).

278. The ILC's Draft Articles on Consular Relations formed the basis of the UN Conference on Consular Relations (do Nascimento GE, '*The Vienna Conference on Consular Relations*' in *The International & Comparative Law Quarterly*, Vol. 13, No. 4 (Oct., 1964), pp. 1214-1254 at page 1219). Professor Žourek, as Special Rapporteur, attended the UN Conference on Consular Relations as an Expert (do Nascimento GE, '*The Vienna Conference on Consular Relations*' in *The International & Comparative Law Quarterly*, Vol. 13, No. 4 (Oct., 1964), pp. 1214-1254 at page 1220 **[Volume 5/Annex 115]**).

279. The UN Conference on Consular Relations was convened in Vienna from 4 March 1963 to 22 April 1963. As explained by the Brazilian Delegate to the UN Conference on Consular Relations, the principles of existing customary law concerning consular relations were not necessarily easily to ascertain at that time:

"*It is impossible to dissociate the 1961 Conference on Diplomatic Relations from the 1963 Conference on Consular Relations. The analogy between many of the legal situations which had to be resolved in 1961 brought to mind the rules adopted two years previously. There was, however, a big difference because in 1961 the Conference had before it a set of rules on which international custom was reasonably clear; in 1963 the problem was more complex and the Conference had before it not only certain customs but also a series of consular conventions, municipal laws and usages*" (do Nascimento GE, '*The Vienna Conference on Consular Relations*' in *The International & Comparative Law Quarterly*, Vol. 13, No. 4 (Oct., 1964), pp. 1214-1254 at pages 1214-1215 **[Volume 5/Annex 115]**).

280. The significance and the effect of the Cold War context upon the exercise of the codification of international law at this time cannot be overstated. Just a few years previously, at the 414th Meeting of the ILC on Tuesday 11 June 1957, at 3pm, the following was stated in general debate (ILC Yearbook 1957, volume 1, page 159, paragraph 16, column 2) **[Volume 5/Annex 90]**:

[9] Former legal consultant to the Czech Ministry of Foreign Affairs; former Professor of International Law at the University of Nancy; former Chairman of the International Law Commission.

"*16. The Special Rapporteur had had a thankless task, because what the Commission was in effect trying to do was to transplant rules of municipal law into the field of international law, and the rules of municipal law relating to civil responsibility differed greatly from one country to another. Moreover, it was a singularly unpropitious moment for such a task, since distrust and suspicion reigned everywhere, and almost all countries, both great and small, in their efforts to ward off the supposed threat of subversion, had recourse to emergency laws and regulations whose effect amounted in practice to denial of common law. In his view, it was no exaggeration to say that, no sooner had individual rights and freedoms been guaranteed by the constitutions of almost all countries, than the advent of the atomic era had rendered them almost illusory*". (emphasis added)

281. Furthermore, at the UN Conference on Consular Relations itself, the Union of Soviet Socialist Republics raised a question as to the right of the Government of the Republic of China to attend the conference. In response, the Chinese delegate stated (Official Records of the United Nations Conference on Consular Relations, vol. I (summary records of plenary meetings and of meetings of the First and Second Committees), page 3, paragraph 22) **[Volume 5/Annex 91]** as follows:

"*22. Mr. WU (China) regretted that, at the outset of the Conference, the friendly and harmonious atmosphere had been broken by a harsh and discordant statement merely repeating, for propaganda purposes, what the delegations of the State concerned had been saying for years in the United Nations. The United States representative had explained the situation clearly and succinctly. The reason why the Chinese communist regime had not been permitted to attend the Conference was that it had been created by Soviet imperialism as a tool of its policy of aggression in Asia and the Far East. That regime had violated every rule and principle the United Nations stood for; it was not qualified for membership of the United Nations or for representation at the Conference. Moreover, the question of participation had been settled at the sixteenth session of the General Assembly, so that any attempt to revive the dispute at the Conference was out of order. The Government of the Republic of China had more right to be represented in the Conference than the government of the country whose delegation had challenged that right: China was a staunch supporter of the ideals and concepts of the United Nations and fulfilled its duties under the Charter; it did not restrict the movement of foreign diplomats and consuls to a radius of fifty miles from its capital, it did not arrest diplomatic and consular agents on false charges of espionage, and it did not violate the premises of embassies and consulates to attach apparatus to their telephones and desks*". (emphasis added)

Travaux Préparatoires

282. Pakistan submits that there is no evidence or suggestion in the *travaux préparatoires* to the VCCR 1963 that customary international law principles positively support the contention that an individual arrested who evidences from his own conduct and materials in his possession a *prima facie* case of espionage is entitled to consular access pursuant to Article 36(1)(b) VCCR 1963.

283. *The International Law Commission 1949-1998* (1999), a three-volume work edited by the late and much respected Sir Arthur Watts QC, former Chief Legal Advisor to the UK Foreign & Commonwealth Office, is considered to provide authoritative commentaries on the ILC's deliberations and preparations of draft treaties from 1949-1998.

284. The commentary to Article 36(1)(b) of the ILC's draft convention on consular relations (at volume 1, page 273-274) is set out below in full **[Volume 5/Annex 92]**:

"*(1) This article defines the rights granted to consular officials with the object of facilitating the exercise of the consular functions relating to nationals of the sending State.*

(2) First, in paragraph 1 (a), the article establishes the freedom of nationals of the sending State to communicate with and have access to the competent consular official. The expression "competent consular official" means the consular official in the consular district in which the national of the sending State is physically present.

(3) The same provision also establishes the right of the consular official to communicate with and, if the exercise of his consular functions so requires, to visit nationals of the sending State.

(4) In addition, this article establishes the consular rights that are applicable in those cases where a national of the sending State is in custody pending trial, or imprisoned in the execution of a judicial decision. In any such case, the receiving State would assume three obligations under the article proposed:

(a) Firstly, the receiving State must, without undue delay, inform the consul of the sending State in whose district the event occurs that a national of that State is committed to custody pending trial or to prison. The consular official competent to receive the communication regarding the detention or imprisonment of a national of the sending State may, therefore, in some cases, be different from the one who would normally be competent to exercise the function of providing consular protection for the national in question on the basis of his normal residence;

(b) Secondly, the receiving State must forward to the consular official without undue delay any communication addressed to him by the person in custody, prison or detention;

(c) Lastly, the receiving State must permit the consular official to visit a national of the sending State who is in custody, prison or detention in his consular district, to converse with him, and to arrange for his legal representation. This provision is designed to cover cases where a national of the sending State has been placed in custody pending trial, and criminal proceedings have been instituted against him; cases where the national has been sentenced, but the judgement is still open to appeal or cassation; and also cases where the judgement convicting the national has become final. This provision applies also to other forms of detention (quarantine, detention in a mental institution).

(5) All the above-mentioned rights are exercised in conformity with the laws and regulations of the receiving State. Thus, visits to persons in custody or imprisoned are permissible in conformity with the provisions of the code of criminal procedure and prison regulations. As a general rule, for the purpose of visits to a person in custody against whom a criminal investigation or a criminal trial is in process, codes of criminal procedure require the permission of the examining magistrate, who will decide in the light of the requirements of the investigation. In such a case, the consular official must apply to the examining magistrate for permission. In the case of a person imprisoned in pursuance of a judgement, the prison regulations governing visits to inmates apply also to any visits which the consular official may wish to make to a prisoner who is a national of the sending State.

(6) The expression "without undue delay" used in paragraph 1 (b) allows for cases where it is necessary to hold a person incommunicado for a certain period for the purposes of the criminal investigation.

(7) Although the rights provided for in this article must be exercised in conformity with the laws and regulations of the receiving State, this does not mean that these laws and regulations can nullify the rights in question".

285. In Pakistan's respectful submission, there is nothing in the authoritative commentary of Sir Arthur Watts QC to indicate that the ILC's draft of the consular access provision was intended to embrace individuals arrested who evidence from their conduct and materials in their possession a *prima facie* case of espionage.

286. Rather, the draft recognised that there would be circumstances where States would be entitled to hold persons incommunicado for a certain time period for the purposes of criminal investigations.

287. When the ILC was deliberating on its draft of the proposed consular access convention, the United Kingdom representative, Sir Gerald Fitzmaurice made observations, in the context of discussion about whether a sending State's consular officials would have the right to communicate with their nationals that were situated in areas that the receiving State had declared off limits to foreign consular officials on grounds of national security. He stated that national security would be the only reason with sufficient weight to justify restricting communication between foreign nationals and their consular officials (ILC Yearbook 1960 volume 1, page 57, paragraph 39, column 2) **[Volume 5/Annex 93]**:

"*39. Moreover, the only real objection that had been made to paragraph (a) of his draft concerned communication with nationals in areas to which access was prohibited on grounds of national security. There was really no other ground on which the right of a consul to visit his nationals could be in question. He agreed that the matter of prohibited zones should be considered, but he thought Mr. Erim's amendment was too broad. There had to be weighty reasons (such as considerations of national security) for declaring a*

particular area closed to the consul. It would be better to follow the provisions of article 24 of the draft on diplomatic intercourse. With those reservations, he was prepared to accept in his draft of paragraph (a) a reference to limitations that might be imposed by national security".

288. In a similar vein, Mr. Grigory Tunkin, then head of the Legal Department of the Soviet Union's Foreign Ministry, considered, in discussion about the words "without delay" in the consular access provision, made a statement that was not inconsistent with State practice and Customary International Law at that time (for which see below) concerning espionage cases (ILC Yearbook 1960 volume 1, page 58-59, paragraph 47, column 1) **[Volume 5/Annex 93]**:

"*47. Mr. TUNKIN felt it might be best to delete the words "without delay". There were cases in which it was impossible to inform the consul immediately of the arrest or detention of a national. Sometimes – for instance in espionage cases, where there might be accomplices at large – it might be desirable that the local authorities should not be obliged to inform the consul.*

48. The CHAIRMAN remarked that a statement of a general principle of law could not possibly cover all conceivable cases. If the Commission went into the question of whether cases of espionage should be made an exception the whole principle of consular protection and communication with nationals would have to be re-opened".

289. Pakistan respectfully submits that the paragraphs above demonstrate that espionage cases were a matter that States were very reluctant to undertake a close examination of at this moment in time.

290. In the context of the negotiation, drafting and promulgation of the multilateral convention on consular relations, cases of espionage were seemingly "taken off the table" to arrive at the VCCR 1963. Spying was, and remains, a topic "too hot to handle", it seems, best avoided or denied.

291. As a further reflection of the limits upon consular access, the Special Rapporteur made express references to the fact that consular access obligations should not be capable of making domestic law enforcement harder for the receiving State (ILC Yearbook 1961, volume 1, page 288, paragraph 71, 73, column 2) **[Volume 5/Annex 94]**:

"*71. Mr. ŽOUREK, Special Rapporteur, pointed out that paragraph 1 (b) of the article was also concerned with cases where the authorities of the receiving State might be unwilling, so as not to put accomplices on guard, to disclose immediately the arrest of a person involved in a serious criminal case implicating a whole group of persons (e.g. a drug trafficking case). The words "without undue delay" were applicable to such cases and were fully justified.*

...

73. The CHAIRMAN, speaking as a member of the Commission, said that in the circumstances mentioned by the Special Rapporteur the authorities of the receiving State would certainly not wish to notify the consulate at once, for otherwise the task of the police would be made far more difficult."

292. Some States in fact expressly recognised that receiving States may be authorised to limit a sending State's freedom to communicate with its arrested nationals. On that subject, the Government of Denmark indicated as follows (ILC Yearbook 1961, volume 2, page 62, column 2) **[Volume 5/Annex 95]**:

"*2. Denmark: The Danish Government interprets paragraph 2 as authorizing the receiving State to restrict the consul's freedom to converse with the prisoner, if considerations of national security or relations with foreign Powers or special considerations render this necessary*".

293. Again, the understanding of Denmark as regards limitations upon a sending State's right to converse with its arrested nationals was stated as follows (ILC Yearbook 1961, volume 2, page 141, column 2) **[Volume 5/Annex 96]**:

"*Article 6*

The Danish Government understands the proviso in paragraph 2 to mean that it can authorize the receiving State to restrict the consul's freedom to converse with the prisoner when considerations of national security or relations with foreign powers or special consideration for same might otherwise require it".

294. At the UN Conference on Consular Relations, the Expert (Professor Žourek) was invited to give an explanation as to why the ILC had included the words "*without undue delay*" in its draft of what became Article 36 VCCR 1963.

295. Professor Žourek's reply confirms that arrests on suspicion of espionage were potentially to be considered as fundamentally different to arrests for other criminal activity (Official Records of the United Nations Conference on Consular Relations, vol. I (summary records of plenary meetings and of meetings of the First and Second Committees), page 338, paragraphs 8-9) **[Volume 5/Annex 97]**:

"*8. The CHAIRMAN invited Mr. Žourek to explain why the International Law Commission had included the words "without undue delay" in its draft, as they had given rise to considerable comment at the previous meeting.*

9. Mr. ŽOUREK (Expert) said that the words had not appeared in the original draft but had been added after long discussions both in plenary meetings and in the drafting committee. They were intended to allow for cases in which the receiving State's police might wish to held a criminal in custody for a time. For example, if a smuggler was suspected of controlling a network, the police might wish to keep his arrest secret until they had been able to find his contacts. Similar measures might be adopted in case of espionage. The International Law Commission had felt that if the provision was to be

capable of application and to be applied, such cases would have to be taken into account because they arose in practice". (emphasis added)

296. Pakistan respectfully submits that an examination of the history and the *travaux préparatoires* of the VCCR 1963 indicates that cases of espionage were not considered to be within the scope of the VCCR 1963 and/or that espionage matters or matters of national security were considered to be capable of constituting a justifiable limitation, qualification and/or exception to a sending State's freedom to communicate with its arrested nationals in the receiving State.

Customary International Law at the time of the Vienna Convention on Consular Relations 1963 – State Practice

297. The VCCR 1963 was intended to achieve some consolidation of international law on consular relations. However, it is also clear that the draftsmen understood that there would be matters pertaining to consular relations that would not be expressly regulated by the terms of the VCCR 1963. That is why the Preamble to the VCCR 1963 includes the following statement **[Volume 5/Annex 88]**:

"*Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention*".

298. Two important examples of matters pertaining to consular relations, specifically consular access, that appear not to be expressly regulated by the provisions of the VCCR 1963 are: (1) asylum; and (2) dual nationality.

299. Thus, India's necessary contention (that the VCCR 1963 "*was intended to be an exhaustive rubric of consular access*", as set out at paragraph 96 of its Memorial) is patently incorrect.

300. In terms of asylum cases, state practice appears to indicate that there are circumstances where the authorities have to exercise a degree of judgement in considering whether a foreign consulate should be informed of the arrest of one of its nationals if the national in question claims to be a refugee or has applied or intends to apply for asylum.

301. For example, in the United Kingdom, Section 66 of the Police and Criminal Evidence Act 1984 allows the Home Secretary to issue codes of practice relating to a wide range of police powers. Issued under that statutory provision, Code of Practice C covers 'Detention, Treatment and Questioning of Persons by Police Officers'. Paragraph 7.2 of Code of Practice C provides as follows **[Volume 5/Annex 98]**:

"*A detainee who is a citizen of a country with which a bilateral consular convention or agreement is in force requiring notification of arrest must also be informed that subject to paragraph 7.4, notification of their arrest will be sent to the appropriate High Commission, Embassy or Consulate as soon as practicable, whether or not they request it*".

302. Paragraph 7.4 of Code of Practice C provides as follows **[Volume 5/Annex 98]**:

"*Notwithstanding the provisions of consular conventions, if the detainee claims that they are a refugee or have applied or intend to apply for asylum, the custody officer must ensure that UK Visas and Immigration (UKVI) (formerly the UK Border Agency) is informed as soon as practicable of the claim. UKVI will then determine whether compliance with relevant international obligations requires notification of the arrest to be sent and will inform the custody officer as to what action police need to take*".

303. Another example is found in Ireland. The Irish Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 contain (at regulation 14(4)) an express qualification on the practice of consular notification as regards asylum cases **[Volume 5/Annex 99]**:

"*(4) If the member in charge has reasonable grounds for believing that an arrested person who is a foreign national is a political refugee or is seeking political asylum, a consular officer shall not be notified of his arrest or given access to or information about him except at the express request of the foreign national*".

304. Another clear example of a matter not expressly regulated by the terms of the VCCR 1963 is the provision of consular access to individuals with dual nationality.

305. In *The Law of Consular Access: A Documentary Guide* (2011), Quigley, Aceves and Shank state the position (at page 40) as follows **[Volume 5/Annex 116.1]**:

"*A situation may arise that an individual arrested is a national of more than one state. The VCCR does not address this circumstance but leaves it to the general international law on nationality as it affects the capacity of a state to claim a right of protection. If the individual is a national of more than one state, but not including the receiving state, little difficulty arises. It is accepted that any of the states of nationality may represent the person.*

...

More complex is the situation in which one of the individual's states of nationality is the receiving state, that is, the individual is a national both of the sending state and the receiving state. Many sending states do not seek to provide consular protection in these circumstances". (emphasis added)

306. The fact that the provision of consular access to individuals with dual nationality is not addressed by the VCCR 1963 is also reflected in Canada's *Manual of Consular Instructions* which, as cited in *The Law of Consular Access: A Documentary Guide* (2011) (at pages 45-46), stated as follows **[Volume 5/Annex 116.2]**:

"***4.6 Canada***

Department of Foreign Affairs and International Trade, Consular Affairs Bureau, Manual of Consular Instructions, Chapter 2, Protection and Assistance. §2.4.4(6)

...

Access to arrested or detained Canadian with dual nationality. The VCCR is silent on consular access when a dual national is detained or arrested in the country of other citizenship. A number of countries (See Annex C) have entered into bilateral undertakings with Canada which grant some limited protection for Canadian dual nationals while visiting their country of other citizenship. In countries with which we do not have such undertakings, if the arrested or detained Canadian is also a citizen of the country concerned, the local authorities may not recognize a formal right to intervene; consular officers may be limited to making informal representations, which may require consultations with Headquarters. Scope for effective action may be even more limited when a permanent resident (landed immigrant) who has not yet become a Canadian citizen is arrested in the country of nationality".

(emphasis added)

307. Further, the US State Department's Foreign Affairs Manual's treatment of consular access to dual nationals confirms the understanding of the VCCR 1963 **[Volume 6/Annex 136]**:

"*7 FAM 416.3 Dual Nationality*

Providing consular protection to dual nationals sometimes poses complex problems because of the conflicting laws and regulations of the United States and other countries. Consular officers are required to open a case, file an arrest report and update the Department on your efforts to secure access and visitation.

7 FAM 416.3-1 Dual National Arrestees In The Non-Us Country Of Nationality

a. The most complex problems regarding provision of protective services to dual nationals arise when the holder of dual nationality experiences difficulties with the law in his/her other (non-U.S.) country of nationality. While consular officers do not usually have a right to consular access to a dual national present in one of his or her countries of nationality, attempts should still be made to seek consular access on a courtesy basis from the host government.

b. See page fourteen of the Consular Notification and Access Manual for information on dual nationals detained in the United States and Department of State instructions to law enforcement with respect to them.

7 FAM 416.3-2 Dual National Arrestees In A Third Country

A dual national traveling in a third country on a U.S. passport is generally entitled to the full range of consular services related to arrest, unless this is not permitted by the host country". (emphasis added)

308. In South Africa, the 'Arrested Abroad' page under the 'Consular Information' section of the website of the Department of International Relations & Cooperation provides as follows **[Volume 6/Annex 137/page 3]**:

"*Dual nationals arrested/detained in the country of their other nationality will not receive assistance from South African Consular Representatives. If a dual national is arrested/detained in another country, of which he/she is not a national, and he/she did not travel on a South African passport but on the passport of his/her second nationality, the dual national must contact the consular representative of the country on which passport he/she travelled*".

309. The provision of consular access to dual nationals is therefore, in Pakistan's respectful submission, another clear example of a matter that is not expressly regulated by the terms of the VCCR 1963, with the consequence that it is a matter governed by the rules of customary international law.

310. Thus, there are plainly certain matters considered by States to fall outside of the ambit of the consular access obligations contained in the VCCR 1963.

311. In this regard, Pakistan submits that there is no evidence or suggestion in state practice or academic writing that Customary International Law principles support the contention that an individual arrested who evidences from his own conduct and materials in his possession a *prima facie* case of espionage is entitled to consular access pursuant to Article 36(1)(b) VCCR 1963.

312. In 1933, President Roosevelt and the USSR Foreign Affairs Commissar Maxim Litvinov exchanged letters on the subject of consular access in the course of negotiations over the terms on which the United States of America would give diplomatic recognition to the USSR. On 16 November 1933, Commissar Litvinov stated that the USSR would grant a number of rights to US nationals on the most-favoured-nation principle. An agreement between the USSR and Germany signed in 1925 provided for notification to a consul "*as soon as possible*" after the arrest of a national and recited that requests by a consul to visit that national would be granted "*without delay*". By his reply on the same day, President Roosevelt stated: "*We shall expect that the nearest American diplomatic or consular officer shall be notified immediately of any arrest or detention of an American national, and that he shall promptly be afforded the opportunity to communicate and converse with such national*" **[Volume 7/Annex 145]**.

313. Notwithstanding the Roosevelt-Litvinov agreement, it is clear that during the so-called Cold War between the United States of America and the Union of Soviet Socialist

Republics, the two States frequently clashed on the issue of access to detained nationals, including those accused of espionage.

314. It is apparent from numerous historic and modern examples of espionage cases that States often operated on the footing that they were not entitled or were not going to be able to gain access to their espionage agents once they had been captured and/or their cover compromised. Information about espionage agents is often, naturally, zealously guarded by States. In the Cold War era, it was common practice for espionage agents to be despatched abroad as members of diplomatic missions. Espionage agents therefore often had diplomatic immunity and could not be arrested. If they were captured or discovered, such espionage agents were often declared *persona non grata* and ordered to leave the country. On occasion, however, espionage agents operated as so-called "Illegals" (i.e. entering and living in a country illegally and establishing a convincing identity so as not to arouse suspicion whilst carrying out espionage activities). Sometimes captured spies were returned to their home States as part of an exchange.

315. For example:

315.1. On 12 December 1938, Mihail Gorin, a USSR citizen and chief of the Intourist office in Los Angeles, was detained by the FBI on suspicion of espionage. He was held for 8 hours at the offices of the US Justice Department before being formally arrested. Although he was allowed to telephone the Soviet embassy, he was not permitted to speak in Russian during the telephone call (presumably to ensure that no sensitive material gleaned from his espionage activities could be communicated to his sending State representatives). Upon being informed by the US State Department that access to the accused would only be available on the basis of the Roosevelt-Litvinov agreement (of which the USSR representative appeared to be unaware) the USSR requested consular access. Although the Soviet vice-consul was permitted to visit the accused, the US State Department insisted that a US Naval Intelligence officer who spoke Russian should be present in the room during the meeting **[Volume 7/Annex 146]**;

315.2. In 1949, Judith Coplon, a US national, was arrested along with her MGB handler Valentin Gubitchev. Both stood trial together. Valentin Gubitchev was convicted, sentenced and deported. There is no evidence that the USSR ever sought consular access to Valentin Gubitchev **[Volume 7/Annex 147]**;

315.3. In 1957, Colonel Rudolph Ivanovich Abel (alias William Fisher), one of the most well-documented examples of an "Illegal", was confronted by FBI agents in his apartment in New York and arrested by officers of the Immigration and Naturalization Service. Colonel Abel was indicted in the US Federal Court in October 1957. In November 1957, Colonel Abel was sentenced to 30 years' imprisonment on espionage-related charges. There is no suggestion that the USSR ever sought consular access to Colonel Abel – the fact that his defence counsel for

his trial was chosen for him by the Brooklyn Bar Association would point away from such a suggestion. On 10 February 1962, Colonel Abel was exchanged for Gary Powers **[Volume 7/Annex 148]**;

315.4. On 1 May 1960, a U-2 spy plane piloted by US national Gary Powers was shot down over USSR airspace. Gary Powers was captured, convicted of espionage and sentenced to 3 years' imprisonment plus 7 years' hard labour. As explained below, the USSR refused to allow the United States of America access to Gary Powers for the entire 21 months he was held prisoner. As explained above, on 10 February 1962, Gary Powers was exchanged for Colonel Rudolph Abel **[Volume 7/Annex 149]**;

315.5. In 1960, Mark Kaminsky, a US national, was arrested in the Soviet Union and charged with collecting restricted information. The US Department of State had information suggesting that he had been arrested and made inquiries of the Soviet Foreign Ministry, but to no avail. Mark Kaminsky was under arrest, and the case was in the investigation stage. He was then put on trial before a Military Court, convicted of espionage and sentenced to 7 years in prison, but the sentence was immediately commuted and he was released. In an interview dated 18 October 1960, Mark Kaminsky is reported to have said that he was "*very happy to talk to an American again*" – indicating that he had not had access to any US consul at any point during his detention **[Volume 7/Annex 150]**;

Academic commentary

316. The leading academic authority on consular law and relations referred to previously herein is that of Luke T. Lee & John B. Quigley on *Consular Law and Relations*. The first edition was published in 1961 – shortly before the drafting and promulgation of the VCCR 1963 – and is, therefore, an important source for the understanding of what the rules of customary international law were in 1963 that, accordingly, continue to govern matters not expressly regulated in the VCCR 1963 itself.

317. By 1961, the State practice on consular access in espionage cases had led Lee & Quigley to the clear conclusion (at page 125) **[Volume 5/Annex 112.1]** that:

"*A frequent exception to the consular right to protect nationals and visit them in prison is the case of spies*".

318. Indeed, it seems that the same understanding was also, at the same time, held by a senior adviser to the Government of India, as can be seen from the following statement by Biswanath Sen (Honorary Legal Adviser to India's Ministry of External Affairs from 1954 to 1964) in his *A Diplomat's Handbook of International Law and Practice* (published in 1965) (at page 233) **[Volume 5/Annex 117]**:

"*A frequent exception to the consular rights to protect nationals and visit them in prison is the case of persons who are held on charge of espionage as evidenced by the practice of states*".

319. Lee & Quigley went on to describe (at page 125) **[Volume 5/Annex 112.1]** how States, in the time before the VCCR 1963, were typically extremely reticent to provide consular access to espionage agents or, if it were granted, very strict limits were imposed upon the grant of consular access:

"*When Robert A. Vogeler, Israel Jacobson and Edgar Sanders allegedly confessed to espionage activities charged by the Hungarian authorities, they were held in prison incommunicado. In the case of the Associated Press Correspondent, William N. Oatis, who was also charged with spying, the Czechoslovak authorities did not permit any United States officials to visit him until after he had spent twelve months in prison*".

320. In the footnotes on page 125 **[Volume 5/Annex 112.1]**, Lee & Quigley described how, in the case of William N. Oatis, the US Vice-Consul was permitted to observe the trial proceedings but only from a distance of 100 feet.

321. Again, in the footnotes on page 125 **[Volume 5/Annex 112.1]**, Lee & Quigley described how, in some of the most well publicised espionage cases of the Cold War era, concerning the U-2 and RB-47 incidents, the USA "*repeatedly sought permission to interview the pilots who allegedly confessed to aerial reconnaissance over the Soviet territory ... Permission was not granted, despite the 1933 Soviet assurance concerning the consular right to be notified of the arrest of a national within 3 days in large centres and 7 days in remote areas as well as the right to visit such national "without delay"*".

322. Subsequently, the reluctance of States to provide consular access to espionage agents has been maintained, up to and beyond the entry into force of the VCCR 1963:

322.1. In 1963, Professor Frederick C. Barghoorn, a US national and a professor at Yale University, was arrested on charges of espionage in Moscow and taken to Lubyanka prison where he was held incommunicado for 16 days. It is reported that US diplomats protested once they learned of Professor Barghoorn's detention. Professor Barghoorn was released after the personal intervention of President Kennedy with the government of the USSR **[Volume 7/Annex 151]**. At a hearing of the US Senate on 16 March 1967, US Senator Clifford P. Hansen placed before the US Senate a letter sent to him from the US State Department on 9 March 1967, which contained the following **[Volume 7/Annex 151/page 7041]**:

> "*Soviet practice in dealing with American citizens has varied. We were never permitted access to Professor Barghoorn prior to his expulsion from the Soviet Union. Likewise we were never granted access to Gary Powers in the 21 months he was held in jail or to Lieutenants McKone and Olmstead after their RB-47 was shot down over international waters. On the other hand,*

since this Convention was signed in 1964 we have been granted access to each American who has been held more than a few days. Thus Soviet practice appears to have improved since the Consular Convention was negotiated, but in none of these cases has the notification or access been as prompt and as frequent as the treaty provides";

322.2. In January 1982, Hanson Huang, a Chinese-American lawyer, was detained in Beijing and was sentenced to 15 years' imprisonment on charges of espionage. US Embassy officials apparently had "*great difficulty in gaining consular access*" to Mr. Huang **[Volume 7/Annex 152]**;

322.3. In 1995, Harry Wu, a naturalised US citizen, was arrested in China on charges of espionage. The arrest and the "*Chinese refusal to allow access to him by U.S. consular officials*" sparked protests in the United States of America. In August 1995, a closed trial was held in central China whereupon he was convicted and sentenced to 14 years' imprisonment before being expelled from China **[Volume 7/Annex 153]**;

322.4. On 5 July 2010, it was reported that an American geologist known as Xue Feng had been convicted in China and given an eight year prison sentence on charges of illegally obtaining state secrets related to the Chinese oil industry. It is apparent from the report that Mr. Xue's case was discussed at a meeting between President Obama and the Chinese Government and that the Chinese Government had "months earlier" denied US officials permission to attend Mr. Xue's court proceedings. Despite the presence of a bilateral consular access convention providing for a 4-day notification period, consular access it seems was not provided for "*several weeks*"/"*thirty-two days*" **[Volume 7/Annex 154]**;

322.5. On 26 January 2015, Yevgeny Buryakov, a Russian national, was arrested by US federal authorities. It was subsequently reported that US federal prosecutors had charged three Russian nationals with spying on the United States of America on behalf of the Russian Government. Mr. Buryakov, alleged to have posed as an employee of a Russian bank in New York and to have collected intelligence on US sanctions against Russian banks, was apparently held without bail. Igor Sporyshev and Victor Podobnyy, alleged to be Mr. Buryakov's handlers, held diplomatic immunity and they left the country without being arrested. A spokesperson for the Russian Foreign Ministry was quoted as saying: "*We insist on ... immediate consular access to Yevgeny Buryakov, the rigorous observance of the rights of this Russian citizen and his release*". However, there is no indication that consular access was in fact provided **[Volume 7/Annex 155]**;

322.6. In March 2015, Phan Phan-Gillis, a US national, was arrested at the Macau-China border and charged in mainland China with having tried to recruit spies in the 1990s. Reports indicate that consular access was not provided to Ms. Phan-Gillis until the July of 2015 following her arrest **[Volume 7/Annex 156]**.

323. Pakistan submits that there is no evidence, let alone conclusive evidence, or any suggestion in either the *travaux préparatoires* of the VCCR 1963 or in state practice, that customary international law principles support the contention that an individual arrested who evidences from his own conduct and materials in his possession a *prima facie* case of espionage is entitled to consular access pursuant to Article 36(1)(b) VCCR 1963.

324. Indeed, the fact that the activity of espionage is considered by States to be particularly pernicious is reflected in the context of spies/saboteurs captured in wartime. Article 5 of Part I (General Provisions) of the Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) provides as follows **[Volume 5/Annex 100]**:

"*Art. 5 Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.*

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be".

325. Pakistan respectfully invites the Court to dismiss India's claim as advanced in its Application and its Memorial, on the basis that the VCCR 1963 was not intended to be engaged in cases such as those of Commander Jadhav, namely in the case of an individual who from his conduct and materials in his possession revealed a *prima facie* case of State-sponsored espionage.

VI. FURTHER, OR IN THE ALTERNATIVE, IN THE EVENT THAT THE VIENNA CONVENTION ON CONSULAR RELATIONS 1963 IS ENGAGED, PAKISTAN HAS COMMITTED NO BREACH IN THE INSTANT CASE

326. Further, or in the alternative, in the event that the Court considers that the VCCR 1963 was engaged, then Pakistan respectfully submits that no breach was committed in the instant case.

327. The principle that consular functions must only be exercised in a manner or utilised for a purpose that is not contrary to the domestic laws of the receiving State is fundamental for the proper working of the whole scheme of consular relations.

328. This was apparent long before the VCCR 1963 was drafted and promulgated. In 1916, Baron Heyking stated (at page 1) in his discussion of consular duties in general **[Volume 5/Annex 114.1]**:

> "*Russian Consuls must conform, in the exercise of their official functions, to the laws of the Russian Empire, to the Circulars of the Ministry of Foreign Affairs, to the instructions of the Legations, Embassies, or Consulates to which they are subordinate and to those of the Ministries of Finance, Trade and Commerce, and Marine.*
>
> *On the other hand, Consular Officers must also be guided by the law and usage of the district in which they exercise their office. If the local government has not granted the Consul special rights and privileges by agreement between itself and the State whose agent the Consul is, he is subject, in all his official actions, to the laws of the country in which he resides, and may not, therefore, place himself in conflict with them*".

(A) VIENNA CONVENTION ON CONSULAR RELATIONS 1963 – SPECIFIC PROVISIONS

329. Article 5 VCCR 1963 (Consular functions) provides as follows **[Volume 5/Annex 88/page 5-6]**:

"*Consular functions consist in:*

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

...

(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;

...

(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State". (emphasis added)

330. Article 5(a) VCCR 1963 makes expressly clear the fact that consular functions may only be exercised within the limits permitted by international law. Pakistan respectfully submits that it simply cannot be the case that consular access may be used by the sending State in order to undermine the sovereignty and/or the integrity of the receiving State.

331. Article 5(i) VCCR 1963 makes clear that the access to justice aspect of the consular functions under Article 5 VCCR 1963 are subject to the legal practices and legal procedures applicable under the domestic law of the receiving State. Thus, and in any event, in the instant case, the exercise of India's consular function in representing or arranging representation for Commander Jadhav is subject to the applicable legal framework in the domestic law of Pakistan and the practices and procedures of the FGCM.

332. Article 5(m) VCCR 1963 establishes that consular access (or, indeed, any other consular function) cannot involve doing anything that is prohibited by the domestic law of the receiving State, or to which no objection has been made by the receiving State. Thus, it cannot be said under any circumstances that consular access (as a consular function) is an untrammelled and unqualified right in all situations.

333. Article 36 VCCR 1963 provides as follows **[Volume 5/Annex 88/page 17-18]**:

"*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 also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(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". (emphasis added)

334. Pakistan recognises that the three sub-paragraphs of Article 36(1) VCCR 1963 are interrelated (in contrast to India's assertion, at paragraph 96 of its Memorial, that "*The Vienna Convention was intended to be an exhaustive rubric of consular access*").

335. Article 36(1)(a) VCCR 1963 evidences a general freedom of the sending State to communicate with its nationals in the receiving State. It is separate from Article 36(1)(b) VCCR 1963 which specifically relates to custody. Furthermore, Article 36(1)(b) VCCR 1963 begins with the condition "*if he so requests*" (i.e. the national of the sending State in custody in the receiving State).

Immediate access is not required

336. As an insight into its (flawed) approach, India contends that the fact that Commander Jadhav was questioned about his unlawful activities in Pakistan prior to any granting of consular access entails that all steps taken in respect of the investigation into his activities

and his prosecution for those activities are invalidated, with the result that the only appropriate remedy must necessarily be the annulment of all of those steps.

337. However, this is an approach that the Court itself has refused to adopt in previous cases, on the basis that it found no reflection in either in the express terms or in the *travaux préparatoires* of the VCCR 1963.

338. In *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment, I.C.J. Reports 2004, page 12), the Court held (at paragraph 87) **[Volume 3/Annex 67]** as follows:

> "*87. The Court thus finds that "without delay" is not necessarily to be interpreted as "immediately" upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1 (b), that the receiving State authorities "shall inform the person concerned without delay of his rights" cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36*".

339. In light of the above, Pakistan respectfully submits that, to the extent that India seeks to contend that Pakistan's questioning of Commander Jadhav without his having consular access was by itself an act contrary to Article 36(1)(b) VCCR 1963, it is apparent that such an argument is contrary to the Court's previous case law.

340. Furthermore, as Article 36(2) VCCR 1963 makes clear, the rights under Articles 36(1)(a)-(c) VCCR 1963 must be exercised in a manner that is in accordance with the domestic law of the receiving State (i.e. Pakistan in this case).

341. Of course, the domestic law of the receiving State must "*enable full effect to be given to the purposes for which the rights accorded under this Article* [36] *are intended*". To that end, Pakistan and India entered into a bilateral convention on consular access in 2008 (discussed further in Section VI(B) below).

342. Article 55(1) VCCR 1963 (Respect for the laws and regulations of the receiving State) provides as follows **[Volume 5/Annex 88/page 25]**:

> "*1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State*".

343. Sir Arthur Watts QC's authoritative commentary on the ILC's draft of Article 55(1) in *The International Law Commission 1949-1998* (at volume 1, page 298) is provided below in full **[Volume 5/Annex 101]**:

"*(1) Paragraph 1 of this article lays down the fundamental rule that it is the duty of any person who enjoys consular privileges and immunities to respect the laws and regulations of their receiving State, save in so far as he is exempted from their application by an express provision of this draft or of some other relevant international agreement. Thus, for example, the laws imposing a personal contribution, and the social security laws, are not applicable to members of the consulate who are not nationals of the receiving State.*

(2) The clause in the second sentence of paragraph 1 which prohibits interference in the internal affairs of the receiving State should not be interpreted as preventing members of the consulate from making representations, within the scope of their functions, for the purpose of protecting and defending the interests of their country or of its nationals, in conformity with international law".

344. Pakistan reiterates that the authoritative commentary to the ILC's draft of Article 55(1) clearly demonstrates that the sending State's consular function of defending the interests of its nationals in the receiving State must be exercised in a manner that is in conformity with the laws of the receiving State.

345. The text of Article 55(1) VCCR 1963 provides that consular officials must not only have respect for the domestic laws and regulations of the receiving State (i.e. Pakistan) but are also under a separate express duty not to interfere in Pakistan's internal affairs. Pakistan respectfully submits that Article 55(1) VCCR 1963 is cast in terms reflecting the principle established by Article 2(7) of the Charter of the United Nations 1945 **[Volume 5/Annex 102]**. The principle of non-interference in the domestic affairs of a foreign sovereign State is, therefore, in Pakistan's submission, an unsurprising fundamental qualification on the rights stipulated in the VCCR 1963 (including Articles 36(1)(a)-(c) VCCR 1963).

(B) THE 2008 BILATERAL AGREEMENT BETWEEN INDIA AND PAKISTAN

Background

346. As mentioned above, on 21 May 2008, India and Pakistan entered into a Bilateral Agreement on Consular Access ("the 2008 Agreement") **[Volume 7/Annex 161]**. India seems to have accepted this was highly relevant and engaged in this context (as at 14 April 2017) but since then has sought to extricate itself therefrom by stating the 2008 Agreement was not "*rel[ied] upon*" **[Volume 1/Annex 5.1/page 34/para 66(a)]**, "*irrelevant*" **[Volume 1/Annex 5.1/page 17/para 15 and page 34/para 66]** – of late, India asserts (as it must) that its own detailed and extensive work leading to the 2008 Agreement should simply be ignored – none of this will do.

347. However, before considering the specific provisions of the 2008 Agreement, in order to understand the operation of this Agreement and its interplay with the VCCR 1963, it is necessary to consider the background to both the 2008 Agreement and the VCCR 1963 so far as it relates to national security and espionage.

348. As to the VCCR 1963, state practice reveals that espionage was an exception to the provisions on consular access reflected in the VCCR 1963, albeit a sensitive exception that was not referred to openly. As discussed earlier, in the Cold War era, it was common practice for espionage agents to be despatched abroad as members of diplomatic missions, and therefore if they were suspected or caught by the host state, such individuals would be clothed with a cloak of diplomatic protection and therefore would not face criminal proceedings. Rather, if they were captured or discovered, such agents were often declared *persona non grata* and ordered to leave the country. States were acutely conscious of the exposure to criminal proceedings and serious penalties faced by nationals engaged in espionage, along with the inconsistency of such conduct with the principle of friendly relations. Hence elaborate subterfuge (and/or the blanket of diplomatic immunity) were (and are) deployed in this context.

349. Examples, both pre- and post- the VCCR 1963, include:

349.1. In January 1953, Yuri Vasilyevich Novikov, a former Red Army officer and USSR diplomat, was suspected of conspiring to run an espionage ring with US nationals in Austria, was declared *persona non grata* and expelled **[Volume 7/Annex 157]**;

349.2. In 1999, Stanislav Borisovic Gusev, a secretary at the Russian Embassy in the United States of America was arrested by the FBI on suspicion of having placed a listening device inside the US State Department. The US Undersecretary of State declared Mr. Gusev to be *persona non grata* and ordered him to leave the country within 10 days **[Volume 7/Annex 158]**;

349.3. In May 2013, Ryan Fogle, a US diplomat, was arrested in Moscow on the grounds that he was attempting to carry out recruitment activities on behalf of the CIA. He was declared *persona non grata* and expelled **[Volume 7/Annex 159]**.

The unique India-Pakistan context

350. Historically, the relationship between India and Pakistan has been one of the most tense globally. Since Pakistan obtained independence in 1947, there have been at least four international armed conflicts between the two countries, and numerous incidents – both reported and unreported – of mutual allegations concerning terrorism and espionage.

351. It is against this background that India itself proposed the conclusion of a bilateral treaty on consular access between the two countries. India has nevertheless regrettably avoided explaining the context, purpose and meaning of the 2008 Agreement.

352. The paragraphs of the Counter Memorial below are based on contemporaneous communications between India and Pakistan which provide powerful explanation for the 2008 Agreement.

353. The Draft Agreement on Consular Access was proposed by the Indian side during a visit of the Indian External Affairs Minister to Pakistan (2-5 October 2005), with India suggesting amendments to the existing agreement on consular access (dated 1982). As can be seen, this draft was very brief and contained no reference to "*arrest, detention or sentence made on political or security grounds*" **[Volume 7/Annex 160/pages 1-2]**. The full text of the proposed draft agreement was:

"*DRAFT AGREEMENT ON CONSULAR ACCESS*

The Government of India and the Government of Pakistan, desirous of furthering the objective of human treatment to nationals of either country arrested, detained or imprisoned in the other, have agreed to reciprocal consular facilities as follows:

i) Each Government will maintain a comprehensive list of the nationals of the other country under its arrest, detention or imprisonment. The lists shall be exchanged as soon as possible on 1st January and 1st July every year.

ii) Immediate notification of any arrest/detention/imprisonment of any person of the other country shall be provided to the respective High Commission.

iii) Each Government shall give consular access to all nationals of the other country under arrest, detention or imprisonment within three months of the date of arrest/detention/sentence.

iv) Both the Governments agree to release and repatriate persons who are under their arrest, detention or imprisonment except those who have either been convicted or are under trial or have not yet completed their sentences after conviction. Such persons will be released and repatriated by the respective Governments within one month of confirmation of their National status. Others will be repatriated after similar confirmation of nationality and completion of their sentences."

354. With this draft agreement, India also provided a mark-up of the original agreement dated 2 November 1982. This draft agreement had previously contained a reference to "*political or security reasons/offences*", which was struck out and replaced as set out below **[Volume 7/Annex 160/page 3-4]**:

"iii) ~~Each Government shall given consular access on a reciprocal basis to nationals of one country under arrest, detention or imprisonment in the other country, provided they are not apprehended for political or security reasons/offences. Request for such access and the terms thereof shall be considered on the merits of each case by the Government arresting the person or holding the detenues/prisoners and the decision on such requests shall be conveyed to the other Government within four weeks from the date of receipt of the request.~~ ***Each Government shall give consular access to all nationals of the other country under arrest, detention or imprisonment within three months of the date of arrest/detention/sentence.***"

355. The approach of India to this specific issue clearly manifests acute recognition and understanding of the significance of the language being suggested and its practical implications.

356. Thus for India, through its Counsel, Harish Salve, to have asserted, *inter alia*, that the 2008 Agreement was irrelevant/not relied on, albeit "*Some of the provisions of this Agreement reinforce the obligations of the Vienna Convention*" **[Volume 1/Annex 5.1/page 34/para. 66(a)]** is disingenuous cherry-picking (at best).

357. The draft agreement was forwarded to Pakistan's Ministry of the Interior on 6 October 2005 for views and comments **[Volume 7/Annex 160/page 1]**, which were provided on 15 April 2006 **[Volume 7/Annex 160/pages 5-6]** and subsequently forwarded to the Pakistani High Commission in New Delhi on 2 May 2006 before forwarding to India **[Volume 7/Annex 160/page 7]**.

358. On 21 June 2006, the Pakistani High Commission in New Delhi stated that the Draft Agreement on Consular Affairs had been forwarded to India's Ministry of External Affairs **[Volume 7/Annex 160/pages 8-11]**.

359. On 3 July 2007, the draft agreement was again forwarded by Pakistan's Ministry of Foreign Affairs to Pakistan's High Commission in New Delhi on their request **[Volume 7/Annex 160/pages 18-19]**. The draft agreement was to be discussed during the Interior

Secretary Level Talks which took place in New Delhi on 3-4 July 2007. Minutes of the meeting (which were recorded by Riffat Masood (Counsellor (Political)), and sent by the High Commission for Pakistan, New Delhi, to the Director General (SA), Ministry of Foreign Affairs, Islamabad, on 10 July 2007) state that progress was made on the text of the draft agreement **[Volume 7/Annex 160/pages 25-30]**, and a Joint Statement released to the media indicated that the text of the draft agreement was finalized by separate working groups **[Volume 7/Annex 160/pages 20-22]**.

360. That Joint Statement provided, at relevant part:

"*3. Both sides strongly condemned all acts of terrorism and underlined the imperative need for effective and sustained measures against terrorist activities.*

4. The two sides recognized that terrorists and criminals in either country need to be given swift and effective punishment.

...

9. Separate working groups discussed in detail the drafts of the revised Visa and Consular Access Agreements aimed at liberalizing and making existing provisions more effective. The text of the Agreement on Consular Access has been finalised".

[Volume 7/Annex 160/pages 20-22]

361. As to the 2008 Agreement, the relevant section of the minutes states:

"*7. The Indian Home Secretary suggested that three sub-groups be formed to discuss the following issue threadbare:-*

...

ii) The agreements on consular access and visas. The release of fishermen and civilian prisoners.

...

10. The three sub-groups worked throughout the rest of the day on the above topics. While there was considerable progress in the first and last sub-groups dealing with fisherman/prisoner issues, visa and consular access agreements and CBI-FIA cooperation, there was no forward movement in the MoU on drugs trafficking, which was not signed during this meeting."

[Volume 7/Annex 160/pages 29-30]

362. On 4 July 2007, the then Director General (South Asia) of Pakistan's Ministry of Foreign Affairs, Mr Aizaz Ahmad Chaudhry, communicated to Pakistan's Ministry of Interior that negotiations on the draft agreement were led by him on the Pakistan side and the finalised text of the draft agreement was forwarded to the Ministry of Interior **[Volume 7/Annex 160/pages 23-24]**. On 20 July 2007, the Ministry of Interior approved the draft agreement **[Volume 7/Annex 160/page 31]**.

363. On 10 August 2007, Pakistan's Ministry of Foreign Affairs issued a *Note Verbale* to the Indian High Commission in Islamabad conveying the readiness of Pakistan to sign the finalised draft **[Volume 7/Annex 160/pages 32-33]**.

364. On 3 March 2008, the Indian High Commission in Islamabad conveyed concurrence to the approved draft **[Volume 7/Annex 160/page 34]**. On 19 May 2008, Pakistan's Ministry of Law & Justice conveyed their acceptance of the draft agreement **[Volume 7/Annex 160/page 35]**.

365. The 2008 Agreement was signed on 21 May 2008 after the Foreign Minister level review meeting held in Islamabad **[Volume 7/Annex 160/pages 36-37]**.

366. The full text of the 2008 Agreement provides:

"Agreement on Consular Access

The Government of India and the Government of Pakistan, desirous of furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country, have agreed to reciprocal consular facilities as follows:

(i) Each Government shall maintain a comprehensive list of the nationals of the other country under its arrest, detention or imprisonment. The lists shall be exchanged on 1st January and 1st July each year.

(ii) Immediate notification of any arrest, detention or imprisonment of any person of the other country shall be provided to the respective High Commission.

(iii) Each Government undertakes to expeditiously inform the other of the sentences awarded to the convicted nationals of the other country.

(iv) Each Government shall provide consular access within three months to nationals of one country under arrest, detention or imprisonment in the other country.

(v) Both Governments agree to release and repatriate persons within one month of confirmation of their national status and completion of sentences.

(vi) In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits.

(vii) In special cases, which call for or require compassionate or humanitarian considerations, each side may exercise its discretion subject to its laws and regulation to allow early release and repatriation of persons.

This agreement shall come into force on the date of its signing."

[Volume 7/Annex 161]

Interplay between the VCCR 1963 and the 2008 Agreement

367. Article 73 of the VCCR 1963 expressly contemplates that States may have already entered into, or may at some point in future enter into, other bilateral or multilateral agreements dealing with the issue of consular access, providing **[Volume 5/Annex 88/page 31]**:

"*1. The provisions of the present Convention shall not affect other international agreements in force as between States Parties to them.*

2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof".

368. Article 73 VCCR 1963 provides that the VCCR 1963 does not affect other agreements in force as between States.

369. Pakistan submits that the 2008 Agreement when properly viewed can be seen as "*supplementing*" or "*amplifying*" the provisions of the VCCR 1963 as described in Article 73.

370. The meanings of "*supplement*" and "*amplify*" as commonly understood (see the Oxford English Dictionary) are: "*A thing added to something else in order to complete or enhance it*", and "*add detail*" respectively.

371. Pakistan observes that the 2008 Agreement, whether taken in its entirety or only with reference to Article (vi), amply fulfils such requirements.

372. It is respectfully submitted that India and Pakistan plainly intended the 2008 Agreement to address consular access. They negotiated its terms over a period of nearly two years. India has simply failed to explain how any aspect of the 2008 Agreement is inconsistent with Article 73 VCCR 1963, let alone Article (vi) thereof.

373. Furthermore, the 2008 Agreement clearly gives effect to the intended purposes of Article 36 VCCR 1963, as it manifestly seeks to facilitate "*humane treatment of nationals of either country arrested, detained or imprisoned in the other country*". It expressly provides for "*reciprocal consular facilities*" **[Volume 7/Annex 161]**.

374. As the 2008 Agreement was negotiated and signed expressly to deal with the issue of consular access between India and Pakistan within their specific (at times) somewhat fraught context, the "national security" considerations relating to consular access contained in Article (vi) of the 2008 Agreement must be interpreted in the specific context of the relationship between these two States. Put another way, Article (vi) must be given some meaning as it was plainly intended to have effect and the 2008 Agreement appears to have operated for nearly a decade.

The drafting of the 2008 Agreement

375. The revised draft of the 2008 Agreement was finalised during the meeting of the Pakistan-India Secretary-level talks on Terrorism & Drug Trafficking under the Fourth round of the Composite dialogue, held in New Delhi on 3-4 July 2007 **[Volume 7/Annex 160/pages 25-30]**.

376. The context in which final negotiations on the agreement took place is significant, demonstrating that it was tied significantly to terrorism issues (the top two items on the list of topics discussed at that meeting being "Terrorist attacks in each other's countries" and "Infiltration and Cross-border terrorism").

377. Furthermore, the 2008 Agreement must also be read in the context of Articles 30, 31 and 41 of the Vienna Convention on the Law of Treaties 1969 ("VCLT 1969"), which provide **[Volume 5/Annex 103]**:

"*Article 30. APPLICATION OF SUCCESSIVE TREATIES RELATING TO THE SAME SUBJECT-MATTER*

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:
(a) As between States parties to both treaties the same rule applies as in paragraph 3;
(b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31. GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

...

Article 41. AGREEMENTS TO MODIFY MULTILATERAL TREATIES BETWEEN CERTAIN OF THE PARTIES ONLY

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
(a) The possibility of such a modification is provided for by the treaty; or
(b) The modification in question is not prohibited by the treaty and:
(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph l(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides".

378. In *Judge Shigeru Oda: Liber Amicorum* (edited by Nisuke Andåo, Edward McWhinney and Rüdiger Wolfrum) (2002 edition), Chusei Yamada[10] states (at page 770), as to Article 73 of VCCR 1963, at relevant part **[Volume 5/Annex 118]**:

"*...The commentary on then Article 26 (now Article 30) adopted by the ILC cites an example from paragraph 2 of Article 73 of the Vienna Convention of 1963 on Consular Relations.*

"Article 73(2)
Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof".

The commentary explains that this provision, which recognizes the right to supplement its provisions by bilateral agreements, merely confirms the legitimacy of bilateral agreements which do not derogate from the obligations of the general Convention. However, the text of Article 30(2) goes far beyond the mere confirmation of the legitimacy of such bilateral agreements. If applied to this case, Article 30(2) stipulates that such bilateral consular agreements prevail over the Vienna Consular Convention".

Registration of the 2008 Agreement

379. On 17 May 2017, the 2008 Agreement was registered with the UN Secretariat in accordance with Article 102(1) of the Charter of the United Nations **[Volume 7/Annex 161]**.

380. Article 102 of the Charter of the United Nations provides as follows **[Volume 5/Annex 104]**:

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

2 No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations".

381. Previously, India contended (in submissions before the Court on its Request for Provisional Measures) that the fact that the 2008 Agreement was not, at that time, registered with the UN Secretariat meant that Pakistan could not invoke the 2008 Agreement before the Court in accordance with Article 102(2) of the Charter of the United Nations. India has also stated (in the oral hearing on 15 May 2017) that the 2008 Agreement was "*irrelevant*":

[10] Former member of the International Law Commission (1992-2009)

381.1. Dr V. D. Sharma, Joint Secretary, Ministry of External Affairs: "*…the Bilateral Agreement is irrelevant to the present proceedings since, it can only supplement the Vienna Convention*" **[Volume 1/Annex 5.1/page 17/para 15]**;

381.2. Mr Harish Salve, Counsel for India: "*The Agreement on Consular Access between India and Pakistan is irrelevant for the present proceedings*" **[Volume 1/Annex 5.1/page 34/para 66]**. He further stated that India did not "*rely*" upon the 2008 Agreement. He did nevertheless observe that "*Some of the provisions of this Agreement reinforce the obligations of the Vienna Convention*" **[Volume 1/Annex 5.1/page 34/para 66(a)]**. Pakistan invites India to explain why Article (vi) is not relevant.

382. Insofar as India may (unfortunately) seek to rely upon bare technicalities now to row back from an agreement with Pakistan that has operated to govern very sensitive factual circumstances such as those of the instant case for almost 10 years, Pakistan respectfully submits that India's arguments in respect of the non-registration of the 2008 Agreement are misconceived.

383. As to the registration element, the analysis of Professor Kolb in *The International Court of Justice* (2013) accurately demonstrates the approach previously taken by the Court in this regard (at pages 543-544) **[Volume 5/Annex 119]**:

"*Certainly, registration is possible at any time, even if it is late, so that a failure to register can be cured in the course of proceedings before the ICJ, that is, even after the Court has been seised. The Court has not been very formalistic in this respect. In the Corfu Channel case (1949), it accepted jurisdiction on the basis of a special agreement that had not been registered. In the 1978 Aegean Sea case (cited above), the Court accepted the possibility that a joint communiqué could constitute an agreement giving it jurisdiction, without mentioning the matter of registration. In Qatar and Bahrain (1994), cited above, Bahrain argued that non-registration for several months showed that Qatar did not consider the Minutes to be a legally binding agreement, since otherwise it would have moved immediately to have them registered. Faced with that argument, the Court could not duck the issue. It reaffirmed that such agreements must indeed be registered, but also that late registration did not have consequences for their validity:*

> *The Court would observe that an agreement or treaty that has not been registered with the Secretariat of the United Nations may not, according to the provisions of Article 102 of the Charter, be invoked before any organ of the United Nations. Non-registration or late registration, on the other hand, does not have any consequences for the actual validity of the agreement, which remains no less binding on the parties. The Court therefore cannot infer from the fact that Qatar did not apply for registration of the 1990 Minutes until six months after they were signed, that Qatar considered, in December 1990, that those Minutes did not constitute an international agreement.*

The Court's reasoning must be taken in its context, that of an argument raised by one party. The Court reaffirmed the obligation to register (arising from a practice which is now generally followed as regards special agreements), declined to see in late registration evidence that a State did not consider the instrument to be a legally binding one, and emphasised that registration can be effected even though it is out of time. If the registration needed to be effected pendente lite, the Court would doubtless apply the 'Mavrommatis rule' on defects of form: there would be little point in ruling that the proceedings were invalid and forcing a party to start a new case after registering the agreement. In short, the requirement of registration is not a very onerous condition".

Concluding Observations

384. Pakistan respectfully submits that any attempt by India to exclude the 2008 Agreement altogether and/or to downplay to the Court the significance of the 2008 Agreement is misconceived:

384.1. The 2008 Agreement was adopted at India's instigation. Ultimately, the 2008 Agreement (as adopted) was based on a draft created and proposed by India to govern consular access between India and Pakistan;

384.2. The 2008 Agreement has now been in operation governing consular access between India and Pakistan for almost a decade. It therefore does not lie in the mouth of India to state to the Court now that the 2008 Agreement has no bearing upon questions of consular access between these two countries.

385. Therefore, Pakistan respectfully submits:

385.1. that the 2008 Agreement is fully consistent with Article 73 VCCR 1963, and Articles 31 and 41 VCLT 1969, providing a supplement and/or amplification of Article 36 VCCR 1963;

385.2. that the 2008 Agreement was intended to govern consular access in cases as between India and Pakistan;

385.3. that the nature and circumstances of Commander Jadhav's espionage/terrorism criminal activities brought his arrest squarely within the national security qualification contained in Article (vi) of the 2008 Agreement;

385.4. accordingly, Pakistan was entitled to consider consular access to Commander Jadhav "on the merits" and to consider the question of consular access in the particular circumstances of this case.

VII. THE RELIEF SOUGHT BY INDIA FROM THE COURT IS UNAVAILABLE AND/OR INAPPROPRIATE

Introduction

386. Without prejudice to any of Pakistan's submissions above, in any event, the relief sought by India is not available from this Court and/or it would be inappropriate for the relief sought by India to be granted by the Court.

387. In its Memorial, India (at paragraph 214) seeks (on behalf of itself) the following in terms of relief:

"*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".

388. The key question for the Court in its consideration is, even assuming a breach, what is the appropriate remedy?

389. As the Court's previous case law makes abundantly clear, the appropriate remedy has never been considered to be reparations as India asserts. This is because reparations will not operate so as to make good any harm that the sending State (whose rights are being ventilated) has suffered.

390. When the Court considers what is the appropriate remedy for the sending State, Pakistan respectfully submits that it is (at most) "*review and reconsideration*", in accordance with the Court's previous case law.

391. In its consideration of remedies, the Court will note that if the Court were to grant the relief sought by India then the Court will be acting as a criminal appellate court – a role it has emphatically eschewed many times in its previous case law.

India wrongly simplifies the nature and scope of reparation

392. In Pakistan's respectful submission, India wrongly simplifies the nature and scope of reparations flowing to a State, and an individual. In seeking to present the principle enunciated by the Permanent Court of International Justice in *Factory at Chorzów (Claim for Indemnity) (Merits)* (1928) PCIJ (Series A) (No. 17), Judgment of 13 September 1928 (at page 47) (set out below) as the complete foundation for the Court's consideration of reparations in the instant case, India fundamentally mischaracterises the nature of the instant dispute:

"*The essential principle contained in the actual notion of an illegal act…is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law*".

[Volume 3/Annex 68]

393. As edited by Judge Crawford, *Brownlie's Principles of Public International Law* (8th ed., 2012) explains clearly (at page 568) that the *Chorzów Factory (Claim for Indemnity) (Merits)* case:

"*was a claim for breach of a bilateral treaty having as its aim the protection of the interests of the claimant state. It is to be distinguished from the type of case in which the individual state is seeking to establish locus standi in order to protect legal interests not identifiable with itself alone or possibly with any state in particular. In standard cases, a state protects its own legal interests in seeking reparation for damage – material or otherwise – suffered by itself or its citizens. As put by ITLOS in M/V Saiga (No 2):*

> *It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.'"* (emphasis added)

[Volume 5/Annex 120]

394. The principle that a State exercising diplomatic protection in respect of alleged injury suffered by one of its nationals is in fact exercising its own rights, and not the rights of the national, is further explained by the late Professor Brownlie QC (at pages 568-569) as follows:

"*This is complemented, in the case of injury suffered by nationals, by the rule, enunciated by the Permanent Court in Mavrommatis, that '[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law'*".

[Volume 5/Annex 120]

395. Pakistan respectfully submits that, in light of the above, it is clear that the Court must, to the extent that any relief at all is available in the instant case, consider the relief that is available to repair an injury to the sending State's own legal interests. This provides in part the explanation for the approach of the Court in this context when it has refused to grant relief as now sought by India.

The ICJ is not an appellate criminal court

396. Pakistan respectfully submits that such relief as sought (if not demanded) by India (the annulment of a domestic criminal conviction, the annulment of a domestic criminal sentence, the release of a convicted prisoner) is relief that would only ever be capable of being granted by an appellate criminal court.

397. The Court has repeatedly taken a very clear position – it is not a function of the Court to serve as an appellate court against domestic court decisions imposing criminal convictions/sentences upon individuals. Such is the importance placed by the Court on

the correctness of that position that it is now clearly stated on the website of the Court under its 'Practical Information' section **[Volume 6/Annex 138/page 1]**:

"*Lastly, the Court is not a supreme court to which national courts can turn; it does not act as a court of last resort for individuals. Nor is it an appeal court for any international tribunal*".

398. The Court has repeatedly adopted this position throughout its case law as demonstrated below, and reiterated in its Provisional Measures Order of 18 May 2017 in the present case **[Volume 1/Annex 6/page 13]**:

"*56. The Court notes that the issues brought before it in this case do not concern the question whether a State is entitled to resort to the death penalty. As it has observed in the past, "the function of this Court is to resolve international legal disputes between States, inter alia when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal" (LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I), p.15, para. 25; Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, p.89, para. 48)*". (emphasis added)

399. In *Vienna Convention on Consular Relations (Paraguay v United States of America), Provisional Measures, Order of 9 April 1998, ICJ Reports 1998*, p. 248, by an application dated 3 April 1998, Paraguay commenced proceedings against the United States of America concerning alleged violations of the VCCR 1963 in respect of a Paraguayan national sentenced to death in the United States of America without being informed of his rights under Article 36(1)(b) VCCR 1963. Paraguay asked the Court to adjudge and declare that it was entitled to "*restitutio in integrum*" **[Volume 3/Annex 69/para 25]**. Paraguay also filed a Request for the Indication of Provisional Measures on 3 April 1998.

400. In its Order of 9 April 1998 on the Request for the Indication of Provisional Measures, the Court held (at paragraph 38) **[Volume 3/Annex 70]**:

"*Whereas the issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and whereas, further, the function of this Court is to resolve international legal disputes between States, inter alia when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal*". (emphasis added)

401. Ultimately, the case was discontinued and removed from the Court's list on 10 November 1998 **[Volume 3/Annex 71]**.

402. In *LaGrand (Germany v United States of America), Provisional Measures, Order of 3 March 1999, ICJ Reports 1999*, p. 9, by an application dated 2 March 1999, Germany

commenced proceedings against the United States of America concerning alleged violations of the VCCR 1963 in respect of two German nationals (the brothers Karl and Walter LaGrand) sentenced to death in the United States of America without being informed of their rights under Article 36(1)(b) VCCR 1963. Karl LaGrand had already been executed on 24 February 1999 and the date for Walter LaGrand's execution had been set for 3 March 1999 **[Volume 4/Annex 78/para 8]**.

403. On 2 March 1999, alongside its application instituting proceedings, Germany also filed a Request for the Indication of Provisional Measures.

404. In its Order of 3 March 1999 on the Request for the Indication of Provisional Measures, the Court granted provisional measures (at paragraph 29) requiring the United States of America, *inter alia*, to: "*take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings*" **[Volume 3/Annex 72]**.

405. The Court reiterated the stance it had adopted in the *Paraguay v United States of America* case (above) and held (at paragraph 25) **[Volume 3/Annex 72]**:

"*Whereas the issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and whereas, further, the function of this Court is to resolve international legal disputes between States, inter alia when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal*". (emphasis added)

406. Contrary to the Court's Order of 3 March 1999 on the Request for the Indication of Provisional Measures, however, Walter LaGrand was executed by the United States of America **[Volume 3/Annex 73/para 34]**.

407. In its Judgment of 27 June 2001 in *LaGrand (Germany v United States of America), Judgment, ICJ Reports 2001*, p. 466, the Court held (at paragraphs 50-52) **[Volume 3/Annex 73]**:

"*50. ... The United States maintains that many of Germany's arguments, in particular those regarding the rule of "procedural default", ask the Court "to address and correct ... asserted violations of US law and errors of judgment by US judges" in criminal proceedings in national courts.*

51. Germany denies that it requests the Court to act as an appellate criminal court, or that Germany's requests are in any way aimed at interfering with the administration of justice within the United States judicial system. It maintains that it is merely asking the Court to adjudge and declare that the conduct of the United States was inconsistent with its international legal obligations towards Germany under the Vienna Convention, and to

draw from this failure certain legal consequences provided for in the international law of State responsibility.

52. The Court does not agree with these arguments of the United States ... Although Germany deals extensively with the practice of American courts as it bears on the application of the Convention, all three submissions seek to require the Court to do no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case. The exercise of this function, expressly mandated by Article 38 of its Statute, does not convert this Court into a court of appeal of national criminal proceedings". (emphasis added)

408. By contrast, India's request is the most ambitious ever advanced in respect of an alleged denial of consular access. India requests the Court to annul domestic criminal convictions and sentences, and order the release and transfer of a convicted spy/terrorist back to the sending State. What was said about Germany's requests of the Court in paragraph 52 of the Court's Judgment in *LaGrand* certainly cannot be said of India's requests of the Court in the instant case – the functions India seeks the Court to perform certainly do transform the Court into a court of appeal of national criminal proceedings. This is wholly impermissible.

409. In *Avena and Other Mexican Nationals (Mexico v United States of America)*, by an application dated 9 January 2003, Mexico commenced proceedings against the United States of America concerning alleged violations of Articles 5 and 36 VCCR 1963 in respect of (originally) 54 individuals who had been sentenced to death in certain states within the United States of America.

410. On 9 January 2003, in addition to its application instituting proceedings, Mexico also submitted a Request for the Indication of Provisional Measures. In *Avena and Other Mexican Nationals (Mexico v United States of America), Provisional Measures, Order of 5 February 2003, ICJ Reports 2003*, p. 77, the Court held (at paragraph 48) **[Volume 4/Annex 75]**:

"*48. ... whereas "the function of this Court is to resolve international legal disputes between States, inter alia when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal"; (LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I), p. 15, para. 25)*" (emphasis added)

411. The Court has repeatedly and consistently affirmed the principle that it does not have the function of a criminal appellate court. Why the Court has adopted this position is not hard to see: there are limits to what the Court can do when it comes to the ordering of relief, and parties considering invoking the Court's jurisdiction are taken to be well aware of that fact. Moreover, to open the door to nullity of domestic criminal process would require the Court to engage in very intensive fact review. Factors to be considered might include at what stage/what point in time should "nullity" be the legal consequence?

Why a status quo remedy does not exist for Article 36 VCCR 1963 breaches

412. India appears to contend that failure to give consular access in respect of Commander Jadhav invalidated all steps taken in respect of the investigation into his activities and his prosecution for those activities, with the result that there should be a remedy that has the effect of returning Commander Jadhav to the *status quo ante*. However, for reasons that have been put before the Court on previous occasions, there is no legal basis to contend that such a remedy is available.

413. In *Vienna Convention on Consular Relations (Paraguay v United States of America)*, in oral submissions at a hearing on Provisional Measures, Counsel for the United States of America stated of the relevant state practice, in the context of discussion on Paraguay's submission that a lack of consular notification was a legal breach requiring the vacation of a criminal conviction in order to return the injured national to the *status quo ante*, as follows (verbatim transcript, Tuesday 7 April 1998 at 10am, paragraph 2.18) **[Volume 4/Annex 76]**:

> "*2.18. It is not difficult to imagine why such remedies do not exist. As noted, consular assistance, unlike legal assistance, is not regarded as a predicate to a criminal proceeding. Moreover, if a failure to advise a detainee of the right of consular notification automatically required undoing a criminal procedure, the result would be absurd. In particular, it would be inconsistent with the wide variation that exists in the level of consular services provided by different countries. But it would be equally problematic to have a rule that a failure of consular notification required a return to the status quo ante only if notification would have led to a different outcome. It would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference. Doing so would require access to normally inviolable consular archives and testimony from consular officials notwithstanding their usual privileges and immunities. In this case, for example, one might wish to examine Paraguay's consular instructions and practices as of the time when Mr. Breard was arrested and inquire into the resources then available to Paraguay's consular officers. Surely governments did not intend that such questions become a matter of inquiry in the courts*".

414. As discussed above, the *Paraguay v United States of America* case was discontinued before any judgment concerning remedies was given. However, Pakistan respectfully observes that these submissions are informative regarding the unavailability and/or inappropriateness of a *status quo ante* remedy against any breach of Article 36 VCCR 1963.

415. The reasons for this are many. For example, in the instant case, (and, indeed, in any other case of an alleged violation of Article 36 VCCR 1963), the Court is unlikely to be able to determine properly or reliably on the facts whether consular notification would have had any impact or made any difference in a given case.

416. On that basis, Pakistan respectfully submits, it is clear that the appropriate remedy to be issued by the Court in respect of any determined breach of Article 36 VCCR 1963 does not involve any remedy requiring the returning of the national to the *status quo ante*.

India's reliance upon the Chorzów Factory principle is inappropriate

417. India puts forward the decision in the *Chorzów Factory (Claim for Indemnity) (Merits)* case as the complete foundation for the consideration of reparations in the instant case – arguing that it gives rise to a requirement to provide full restitution in kind.

418. Professor Attila Tanzi (Professor of International Law at the University of Bologna), publishing in the *Max Planck Encyclopaedia of Public International Law* in 2013 on 'Restitution' **[Volume 5/Annex 121]**, explains the origins of restitution (at paragraph 4) as follows:

> "*Restitution goes back to Roman law under which it constituted the redress which the praetor granted in order to re-establish the situation prior to the occurrence of a wrongful harm, such as the rescission of a contract produced through fraud or force*".

419. The Court has previously explained the concept and development of reparations in international law as arising out of private civil law concepts *damnum emergens* (actual loss) and *lucrum cessans* (loss of profits) – concepts that have no reflection in the circumstances of the instant case.

420. For example, in *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)*, Judgement of 30 November 2010, Judge Cançado Trindade, in a Separate Opinion, stated (at paragraph 52) **[Volume 4/Annex 77]**:

> "*The juridical categories crystallized in time and which came to be utilized – in a context distinct from the ambit of the international law of human rights – to govern the determination of reparations were strongly marked by analogies with solutions of private law, and, in particular, of civil law (droit civil), in the ambit of national legal systems : such is the case, e.g., of the concept of material damage and moral or immaterial damage, and of the elements of damnum emergens and lucrum cessans*".

421. Furthermore, it is clear in public international law that "restitution" is not appropriate in all cases. Article 35 ARSIWA 2001 **[Volume 6/Annex 134/page 96]** provides that:

> "*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".

422. In the instant case, Pakistan submits that India's reliance upon the principle enunciated in the *Chorzów Factory (Claim for Indemnity) (Merits)* case to lend support to India's view that a full restitution in kind remedy is available and/or appropriate is misconceived. India fails to provide any explanation of the specific context of the *Chorzów Factory (Claim for Indemnity) (Merits)* case, which, in Pakistan's respectful submission, points to the conclusion that it is an inappropriate starting point for the consideration of reparations in the instant case.

423. The *Chorzów Factory (Claim for Indemnity) (Merits)* case concerned the taking over by the Polish Government of a nitrate factory situated at Chorzów in a part of Upper Silesia allotted to Poland. The factory had been built during wartime under contract between Germany and private German enterprises. Germany contended that, since the factory was privately owned, the Polish law pursuant to which it had been taken over constituted an unlawful liquidation of the property contrary to the Geneva Convention of 1922 on the partition of Upper Silesia. Poland claimed that the factory was (as the property of the German Reich) could be lawfully expropriated under the Treaty of Versailles.

424. Professor Brownlie QC succinctly explains (at pages 569-570) the circumstances of the decision in *Chorzów Factory (Claim for Indemnity) (Merits)* as follows **[Volume 5/Annex 120]**:

"*To achieve the object of reparation tribunals may give 'legal restitution', in the form of a declaration that an offending act of the executive, legislature or judicature is unlawful and without international effect. Such action can be classified either as a genuine application of the principle of restitutio in integrum or as an aspect of satisfaction. Restitution in kind is a logical means of repairing an injury. Customary law or treaty may create obligations to which is annexed a power to demand specific restitution. Thus in Chorzów Factory the Permanent Court took the view that, the purpose of the Geneva Convention on 1922 being to maintain the economic status quo in Polish Upper Silesia, restitution was the 'natural redress' for violation of or failure to observe the treaty provisions. In imposing obligations on aggressor states to make reparation for the results of illegal occupation, the victims may be justified in requiring restitution of 'objects of artistic, historical or archaeological value belonging to the cultural heritage of the [retro]ceded territory'. It would seem that territorial disputes may also be settled by specific restitution, although the declaratory form of judgments of the International Court often masks the element of restitution*". (emphasis added)

425. Thus, it is apparent that the reasons as to why restitution (i.e. return to *status quo*) was considered "*natural redress*" for the violations in *Chorzów Factory (Claim for Indemnity) (Merits)* were directly linked to the very specific purpose of the relevant treaty (in that

case, the 1922 Geneva Convention) which was the maintenance of an economic *status quo*. But, such a position finds no reflection in the facts or treaty obligations or treaty purposes in the instant case.

426. Furthermore, the principle enunciated by the Permanent Court of International Justice was arrived at on the basis of the facts before it – a finding of an unlawful expropriation of property – where it was relatively straightforward for the Court to determine both actual loss suffered (reflected in the Roman law principle of *damnum emergens*) and loss of profits (reflected in the Roman law principle of *lucrum cessans*).

427. By contrast, in the instant case, the Court's task (if and to the extent the Court finds that any breach of an international law obligation giving rise to a right to make reparations has occurred) would be to determine the appropriate reparations for past breaches of the VCCR 1963 in circumstances where the Court has, on numerous occasions (as discussed below) determined, in the context of breaches of Article 36 VCCR 1963 specifically, that the appropriate remedy is something very far removed from full restitution in kind.

428. *Chorzów Factory (Claim for Indemnity) (Merits)*, and the conclusions reached by the Permanent Court of International Justice, were thus concerned with a particular set of facts and treaty obligations that are not reflected in the facts or treaty obligations or treaty purposes in the instant case. Pakistan respectfully submits that the principle in *Chorzów Factory (Claim for Indemnity) (Merits)* is inappropriate as the definitive starting point for the consideration of any relief for breaches of the treaty obligations relevant to the instant case.

"Review and Reconsideration"

429. Moreover, it is clear from the previous death penalty/consular access cases before the Court concerning the United States of America that the Court has given careful, repeated and consistent consideration to the appropriate remedies in cases of alleged violations of Article 36 VCCR 1963: the appropriate remedy is "*review and reconsideration*".

430. In *LaGrand*, in its Application (paragraph 15) **[Volume 4/Annex 78]**, Germany asked the Court to adjudge and declare:

"*(1) that the United States, in arresting, detaining, trying, convicting and sentencing Karl and Walter LaGrand, as described in the preceding statement of facts, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention,*

(2) that Germany is therefore entitled to reparation,

(3) that the United States is under an international legal obligation not to apply the doctrine of "procedural default" or any other doctrine of national law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against any other German national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) the criminal liability imposed on Karl and Walter LaGrand in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should provide reparation, in the form of compensation and satisfaction, for the execution of Karl LaGrand on 24 February 1999;

(3) the United States should restore the status quo ante in the case of Walter LaGrand, that is re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of that German national in violation of the United States' international legal obligation took place; and

(4) the United States should provide Germany a guarantee of the non-repetition of the illegal acts".

431. Contrary to the Court's Order of 3 March 1999 on the Request for the Indication of Provisional Measures, however, Walter LaGrand was executed by the United States of America **[Volume 3/Annex 73/para 34]**.

432. In its Memorial (at paragraph 7.02) **[Volume 4/Annex 79]**, Germany asked the Court to adjudge and declare:

"*(1) that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36 subparagraph 1 (b) of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36 paragraph 1 of the said Convention;*

(2) that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36 paragraph 2 of the

Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended;

(3) that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on Provisional Measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending;

and, pursuant to the foregoing international legal obligations,

(4) that the United States shall provide Germany a guarantee that it will not repeat its illegal acts and ensure that, in any future cases of detention of or criminal proceedings against German nationals, United States domestic law and practice will not constitute a bar to the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations".

433. In its Judgment of 27 June 2001 in *LaGrand (Germany v United States of America), Judgment, ICJ Reports 2001*, p. 466, the Court (at paragraph 128) granted the following relief **[Volume 3/Annex 73]**:

"*128. For these reasons,*

THE COURT,

...

(6) Unanimously,

Takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), of the Convention; and finds that this commitment must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition;

(7) By fourteen votes to one,

Finds that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention".

434. Accordingly, even in the extreme circumstances of the *LaGrand* case where the accused national in respect of whom Germany exercised diplomatic protection had been executed in breach of the Court's provisional measures order, the Court went no further in its granting of remedies than to order "*review and reconsideration*" by the United States

of America "*by means of its own choosing*" "*taking account of the violations set forth in [the VCCR 1963]*".

435. In *Avena*, in its Memorial, Mexico (at paragraph 407) applied for wide ranging relief when it asked the Court to adjudge and declare **[Volume 3/Annex 74/pages 174-176]**:

"*(1) that the United States of America, in arresting, detaining, trying, convicting, and sentencing the fifty-four Mexican nationals on death row described in Mexico's Application and this Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention;*

(2) that the obligation in Article 36(1) of the Vienna Convention requires notification before the competent authorities of the receiving State interrogate the foreign national or take any action potentially detrimental to his or her rights;

(3) that the United States, in applying the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise and review of the rights afforded by Article 36 of the Vienna Convention, violated its international obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the fifty-four Mexican nationals on death row and any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;

and that, pursuant to the foregoing international legal obligations,

(1) Mexico is entitled to restitutio in integrum, and the United States therefore is under an obligation to restore the status quo ante, that is, reestablish the situation that existed at the time of the detention and prior to the interrogation of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations, specifically by, among other things,

(a) vacating the convictions of the fifty-four Mexican nationals;

(b) vacating the sentences of the fifty-four Mexican nationals;

(c) excluding any subsequent proceedings against the fifty-four Mexican nationals any statements and confessions obtained from them prior to notification of their rights to consular notification and access;

(d) preventing the application of any procedural penalty for a Mexican national's failure timely to raise a claim or defense based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his rights under the Convention;

(e) preventing the application of any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and

(f) preventing the application of any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the violations of Article 36;

(2) the United States, in light of the regular and continuous violations set forth in Mexico's Application and Memorial, is under an obligation to take all legislative, executive, and judicial steps necessary to:

(a) ensure that the regular and continuing violations of the Article 36 consular notification, access, and assistance rights of Mexico and its nationals cease;

(b) guarantee that its competent authorities, of federal, state, and local jurisdiction, maintain regular and routine compliance with their Article 36 obligations;

(c) ensure that its judicial authorities cease applying, and guarantee that in the future they will not apply:

(i) any procedural penalty for a Mexican national's failure timely to raise a claim or defense based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention;

(ii) any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and

(iii) any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the Vienna Convention violations shown here".

436. In its Judgment of 31 March 2004, the Court (at paragraph 153) **[Volume 3/Annex 67]** granted the following relief:

"*153. For these reasons,*

THE COURT,

...

(9) By fourteen votes to one,

Finds that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment;

(10) Unanimously,

Takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), of the Vienna Convention; and finds that this commitment must be regarded as meeting the request by the United Mexican States for guarantees and assurances of non-repetition;

(11) Unanimously,

Finds that, should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment".

437. In *Avena*, the Court again considered that the appropriate remedy for breaches of Article 36 VCCR 1963 was "*review and reconsideration of the conviction and sentence*" **[Volume 3/Annex 67/para 148]**.

438. The Court has firmly and repeatedly refrained from granting relief above and beyond a direction to the receiving State to ensure "*review and reconsideration*" of the relevant national tribunal's decisions. Even in the extreme circumstances of *LaGrand*, where Walter LaGrand was executed by the United States of America in direct contravention of an express obligation contained in a Provisional Measures Order of the Court, the Court did not go further than to direct that the United States of America ensure "*review and reconsideration*".

439. The Court, with respect to India, should not, in the face of such clear statements of principle, be called upon by India to perform any of the functions or to grant relief such as that which would be exercised by a criminal court of appeal – including the granting of declarations annulling Commander Jadhav's conviction and/or sentence and the giving of directions for Commander Jadhav's release, acquittal and transfer to India.

440. Indeed, India seems unable or unwilling to explain how its requests for relief would do anything other than position the ICJ as an "appellate court" from domestic courts – a wholly impermissible and unsustainable position.

The modalities/requirements of "review and reconsideration"

441. In *Avena and Other Mexican Nationals (Mexico v United States of America), Judgment, I.C.J. Reports 2004*, page 12, the Court held (at paragraphs 121-123) **[Volume 3/Annex 67]**:

"*121. Similarly, in the present case the Court's task is to determine what would be adequate reparation for the violations of Article 36. It should be clear from what has been observed above that the internationally wrongful acts committed by the United States were the failure of its competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance. It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts, as the Court will explain further in paragraphs 128 to 134 below, with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.*

122. The Court reaffirms that the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing. The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.

123. It is not to be presumed, as Mexico asserts, that partial or total annulment of the conviction or sentence provides the necessary and sole remedy. In this regard, Mexico cites the recent Judgment of this Court in the case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), in which the "Court ordered the cancellation of an arrest warrant issued by a Belgian judicial official in violation of the international immunity of the Congo Minister for Foreign Affairs". However, the present case has clearly to be distinguished from the Arrest Warrant case. In that case, the question of the legality under international law of the act of issuing the arrest warrant against the Congolese Minister for Foreign Affairs by the Belgian judicial authorities was itself the subject-matter of the dispute. Since the Court found that act to be in violation of international law relating to immunity, the proper legal consequence was for the Court to order the cancellation of the arrest warrant in question (I.C.J. Reports 2002, p. 33). By contrast, in the present case it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them". (emphasis added)

442. India attempts to deflect from these principles by attacking the military justice system in Pakistan through which Commander Jadhav was tried, convicted and sentenced.

443. India's attack is wholly unjustified and, with respect, self-defeating.

The Military Law experts: the Paphiti/Garraway Report

444. Pre-eminent UK military experts (Brigadier (Rtd) Anthony Paphiti and Professor Colonel (Rtd) Charles Garraway CBE) have conducted a review of a representative example of the laws and procedures of UN Member States to address questions including State practice regarding the jurisdictional basis, process and procedure for military courts **[Volume 7/Annex 142]**. Their review of ten States, including India, Pakistan, the US and the United Kingdom, leads to conclusions wherein they state, *inter alia*:

444.1. The military courts of Pakistan are "*soundly based in statute which provides the substantive legal basis for their jurisdiction, practice and procedure*" **[Volume 7/Annex 142/page vi/para 3(b)]**;

444.2. They do not consider "*that the "espionage" jurisdiction of the Military Courts of Pakistan (finding its source in a statute law of 1923 during the British India period) is per se unfair or otherwise improper*" **[Volume 7/Annex 142/page vii/para 3(c)]**;

444.3. The "*"judicial review" function of the Civilian Courts [of Pakistan]... appears to provide a potential effective safeguard against manifest failings in due process*" **[Volume 7/Annex 142/page vii/para 3(d)]**.

445. The report and conclusions of these experts are, with respect, clear, cogent and convincing.

446. India's criticisms of Pakistan's military justice system are (with respect) misconceived and misplaced and cannot serve as a distraction (if so intended), let alone buttress the use of the Court's process for pejorative point scoring in this regard.

447. Returning to the principles consistently reaffirmed by the Court, in *Avena*, the Court went on to state (at paragraph 128) **[Volume 3/Annex 67]**:

"*128. ... As has already been observed in paragraph 120, the Court in the LaGrand Judgment stated the general principle to be applied in such cases by way of a remedy to redress an injury of this kind (I.C.J. Reports 2001, pp. 513-514, para. 125)*".

448. That general principle as stated by the Court in *LaGrand (Germany v United States of America, Judgment, ICJ Reports 2001*, p. 466 (at paragraph 125) **[Volume 3/Annex 73]** is as follows:

"*125... The Court considers in this respect that if the United States, notwithstanding its commitment referred to in paragraph 124 above, should fail in its obligation of consular*

notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States". (emphasis added)

449. It is thus for the receiving State to choose the means through which any "*review and reconsideration*" of the conviction and sentence of the accused is carried out.

450. In *Avena*, the Court continued in its explanation of "*review and reconsideration*" (at paragraph 131) **[Volume 3/Annex 67]**:

"*131. In stating in its Judgment in the LaGrand case that "the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence" (I.C.J. Reports 2001, p. 516, para. 128 (7); emphasis added), the Court acknowledged that the concrete modalities for such review and reconsideration should be left primarily to the United States. It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification: as the passage of the Judgment quoted above makes abundantly clear, such review and reconsideration has to be carried out "by taking account of the violation of the rights set forth in the Convention" (I.C.J. Reports 2001, p. 514, para. 125), including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation*". (emphasis original)

451. The Court went on to state (at paragraphs 138-140) **[Volume 3/Annex 67]**:

"*138. The Court would emphasize that the "review and reconsideration" prescribed by it in the LaGrand case should be effective. Thus it should "tak[e] account of the violation of the rights set forth in [the] Convention" (I.C.J. Reports 2001, p. 516, para. 128 (7)) and guarantee that the violation and possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process. Lastly, review and reconsideration should be both of the sentence and of the conviction.*

139. ...In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

140. As has been explained in paragraphs 128 to 134 above, the Court is of the view that, in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 (b), of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to

be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task". (emphasis added)

452. As explained below, Pakistan's judicial process is capable of undertaking the "*review and reconsideration*" task.

453. Moreover, notwithstanding that the Domestic Court judiciary are best suited to the "*review and reconsideration*" task, there is still a role for clemency procedures to play. The Court went on to state (at paragraph 143) **[Volume 3/Annex 67]**:

"*143. ... The Court considers nevertheless that appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention, as has occurred in the case of the three Mexican nationals referred to in paragraph 114 above*".

454. As discussed previously (and as has already been explained to India on several previous occasions, including (at the latest) by the then Adviser to the Prime Minister of Pakistan for Foreign Affairs on 14 April 2017 **[Volume 2/Annex 23]**), Commander Jadhav is plainly aware of the clemency procedures available to him in Pakistan's legal system, as those procedures have already been invoked by him **[Volume 2/Annex 35/pages 1-2]**.

455. In *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America) (Mexico v United States of America), Judgment, I.C.J. Reports 2009*, page 3, the Court gave some further explanation of "*review and reconsideration*" and held (at paragraph 47) **[Volume 4/Annex 80]**:

"*47. Before proceeding to the additional requests of Mexico, the Court observes that considerations of domestic law which have so far hindered the implementation of the obligation incumbent upon the United States, cannot relieve it of its obligation. A choice of means was allowed to the United States in the implementation of its obligation and, failing success within a reasonable period of time through the means chosen, it must rapidly turn to alternative and effective means of attaining that result*".

456. In that case, one Mr. Medellín had been executed by the State of Texas in breach of a provisional measures order granted by the Court on 16 July 2008. Mexico contended that Mr. Medellín had not been afforded "*review and reconsideration*", in the terms specified in the Court's *Avena* Judgment of 31 March 2004. The Court discussed the significance of that development (at paragraph 52) **[Volume 4/Annex 80]**:

"*52. Mr. Medellín was executed in the State of Texas on 5 August 2008 after having unsuccessfully filed an application for a writ of habeas corpus and applications for stay of execution and after having been refused a stay of execution through the clemency process. Mr. Medellín was executed without being afforded the review and*

VII

reconsideration provided for by paragraphs 138 to 141 of the Avena Judgment, contrary to what was directed by the Court in its Order indicating provisional measures of 16 July 2008".

457. Yet, even in those extreme circumstances, the Court did not accede to Mexico's request for the Court to order guarantees of non-repetition (on jurisdictional grounds) and instead (at paragraph 60) **[Volume 4/Annex 80]** simply stated:

"*60. The Court finds it sufficient to reiterate that its Avena Judgment remains binding and that the United States continues to be under an obligation fully to implement it*".

458. On the basis of the above, Pakistan respectfully submits:

458.1. that the Court has consistently rejected assuming the role of an appellate court against convictions and sentences issued by domestic criminal tribunals (precisely the role that India seeks the Court to perform in this case);

458.2. that the Court has repeatedly made it clear that the appropriate remedy for a breach of Article 36 VCCR 1963 is a direction for the receiving State to carry out a "*review and reconsideration*" that fully takes into account the effect of the violation and that that exercise is best carried out not by the executive but by the judiciary:

Avena Judgment (paragraph 131): "*131. In stating in its Judgment in the LaGrand case that "the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence" (I.C.J. Reports 2001, p. 516, para. 128 (7); emphasis added), the Court acknowledged that the concrete modalities for such review and reconsideration should be left primarily to the United States. It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification : as the passage of the Judgment quoted above makes abundantly clear, such review and reconsideration has to be carried out "by taking account of the violation of the rights set forth in the Convention" (I.C.J. Reports 2001, p. 514, para. 125); including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation*" **[Volume 3/Annex 67]**.

Avena Judgment (paragraph 138): "*138. The Court would emphasize that the "review and reconsideration" prescribed by it in the LaGrand case should be effective. Thus it should "tak[e] account of the violation of the rights set forth in [the] Convention" (I.C.J. Reports 2001, p. 516, para. 128 (7)) and guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process. Lastly, review and reconsideration should be both of the sentence and of the conviction*" **[Volume 3/Annex 67]**.

458.3. that, notwithstanding the above, the Court is also clear that appropriate clemency procedures can act as a supplement to the judiciary's "*review and reconsideration*" process.

Clemency procedures in Pakistan available to and being utilised by Commander Jadhav

459. On 14 April 2017, in the course of his Press Statement, the Adviser stated that Commander Jadhav had the right to lodge an appeal with an appellate court against his conviction and sentence within 40 days. The Adviser then made express reference to the fact that Commander Jadhav was free to "*lodge a mercy petition to the COAS within 60 days of the decision by the appellate court*". Thereafter, Commander Jadhav was free to "*lodge a mercy petition to the President of Pakistan within 90 days after the decision of COAS on the mercy petition*" **[Volume 2/Annex 23/pages 2-3]**.

460. By virtue of Section 133B of the Pakistan Army Act 1952 **[Volume 5/Annex 105]**:

"*(1) Any person to whom a court-martial has awarded a sentence of death, imprisonment for life, imprisonment exceeding three months, or dismissal from the service after the commencement of the Pakistan Army (Amendment) Act, 1992, may, within forty days from the date of announcement of finding or sentence or promulgation thereof, whichever is earlier, prefer an appeal against the finding or sentence to a Court of Appeals consisting of the Chief of the Army Staff or one or more officers designated by him in this behalf, presided by an officer not below the rank of Brigadier in the case of General Court-Martial or Field General Court-Martial convened or confirmed or counter-signed by an officer of the rank of Brigadier or below as the case may be, and one or more officer, presided by an officer not below the rank of Major General in other cases, hereinafter referred to as the Court of Appeals.*

Provided that where the sentence is awarded by the court-martial under an Islamic law, the officer or officer so designated shall be Muslims:–

Provided further that every Court of Appeals may be attended by a judge advocate who shall be an officer belonging to the Judge Advocate General's Department, Pakistan Army, or if no such officer is available, a person appointed by the Chief of Army Staff.

(2) A Court of Appeals shall have power to,–

(a) accept or reject the appeal in whole or in part; or

(b) substitute a valid finding or sentence for an invalid finding or sentence or

(c) call any witness, in its discretion for the purpose of recording additional evidence in the presence of the parties, who shall be afforded an opportunity to put any question to the witness; or

(d) annul the proceedings of the court-martial on the ground that they are illegal or unjust; or

(e) order retrial of the accused by a fresh court; or

(f) remit the whole or any part of the punishment or reduce or enhance the punishment or commute the punishment for any less punishment or punishments mentioned in this Act.

(3) The decision of a Court of Appeals shall be final and shall not be called in question before any court or other authority whatsoever".

461. By virtue of Section 143 of the Pakistan Army Act 1952 **[Volume 5/Annex 106]**:

"*(1) When any person subject to this Act has been convicted by a court-martial of any offence, the Federal Government or the Chief of the Army Staff or any officer not below the rank of Brigadier empowered in this behalf by the Chief of the Army Staff may–*

(i) either without conditions or upon any conditions which the person sentenced accepts, pardon the person or remit the whole or any part of the punishment awarded; or

(ii) mitigate the punishment awarded or commute such punishment for any less punishment or punishment mentioned in this Act:

Provided that a sentence of rigorous imprisonment shall not be commuted for a sentence of detention for a term exceeding the term of rigorous imprisonment awarded by the Court:

Provided further that a person to whom a sentence has been awarded as hadd under an Islamic law shall not be pardoned, and no such sentence shall be mitigated, remitted or commuted to any less punishment or punishments, otherwise than in accordance with such law.

(2) If any condition on which a person has been pardoned or a punishment has been remitted is, in the opinion of the authority which granted the pardon or remitted the punishment, not fulfilled, such authority may cancel the pardon or remission, and thereupon the sentence of the Court shall be carried into effect as if such pardon had not been granted or such punishment had not been remitted:

Provided that, in the case of a person sentenced to imprisonment for life, rigorous imprisonment, or detention, such person shall undergo only the unexpired portion of his sentence.

(3) When under the provisions of sub-section (5) of section 62 a non-commissioned officer is deemed to be reduced to the ranks, such reduction shall, for the purposes of this section, be treated as a punishment awarded by sentence of a Court martial".

462. By virtue of Article 45 of the 1973 Constitution of Pakistan **[Volume 5/Annex 107]**:

"*The President shall have the power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority*".

463. In light of the above, Pakistan respectfully submits that its legal and constitutional framework provides for clemency procedures that appropriately supplement the judicial procedures for "*review and reconsideration*" discussed further below.

"Review and reconsideration" by the judiciary in Pakistan

464. As established by the Court in its Judgment in *Avena* (as set out above) appropriate clemency procedures can be a "*supplement*" to judicial review and reconsideration.

465. Pakistan submits that there is an established and defined process in the domestic law of Pakistan, whereby the civil courts have jurisdiction to carry out an effective review of decisions made by the tribunals comprising Pakistan's military justice system.

466. In *District Bar Association, Rawalpindi & ors v Federation of Pakistan & ors* (PLD 2015 SC 401), the Supreme Court of Pakistan undertook an extensive review of Pakistani case law concerning the civil courts' judicial review jurisdiction under Article 199 of the 1973 Constitution of Pakistan as regards trials by FGCM under the Pakistan Army Act 1952 as amended by the Pakistan Army (Amendment) Act 2015 and convictions and sentences handed down thereunder. Following that review, the Supreme Court held (at paragraph 171) (as quoted in the *Zaman* case **[Volume 4/Annex 81/page 37]**):

"*171. In view of the above, there can be no manner of doubt that it is a settled law that any order passed or sentence awarded by a Court Martial or other Forums under the Pakistan Army Act, 1952, included as amended by the Pakistan Army (Amendment) Act, 2015, is subject to the Judicial Review both by the High Courts and this Court, inter alia, on the ground of coram-non-judice, without jurisdiction or suffering from mala fides including malice in law. This would also hold true for any decision selecting or transferring a case for trial before a Court Martial...*".

467. The highest court in Pakistan's civil justice system thus considers it unarguable that the civil courts have jurisdiction to review decisions emanating from Pakistan's military court system. Furthermore, the case law from Pakistan clearly sets out the grounds upon which decisions may be challenged: (i) *coram non judice*; (ii) without jurisdiction; (iii) *mala fides*; and (iv) malice in law.

468. Each of the above grounds was considered by the Supreme Court of Pakistan at paragraphs 90-93 in its more recent decision in *Said Zaman Khan v Federation of Pakistan through Secretary Ministry of Defence, Government of Pakistan* (Civil Petition No. 842 of 2016) in the course of the Supreme Court's consideration of "*the extent and contours of the jurisdiction of Judicial Review available with the learned High Courts under Article 199 of the Constitution in such like matters*" (paragraph 72) **[Volume 4/Annex 81/page 31]**. In that case, 16 petitions for judicial review of convictions/sentences handed down by military tribunals were brought before the Supreme Court.

469. The Court held (at paragraph 93) **[Volume 4/Annex 81/pages 51-52]**:

"*93. ... It is by now a well settled proposition of law, as is obvious from the judgments of this Court, referred to and reproduced hereinabove, that the powers of Judicial Review under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, against the sentences and convictions of the FGCM is not legally identical to the powers of an Appellate Court. The evidence produced cannot be analyzed in detail to displace any reasonable or probable conclusion drawn by the FGCM nor can the High Court venture into the realm of the "merits" of the case. However, the learned High Court can always satisfy itself that it is not a case of no evidence or insufficient evidence or the absence of jurisdiction*".

470. Furthermore, the Supreme Court in the *Zaman* case stated as follows:

"*103. The nature and extent of the power of Judicial Review in matters arising from an action taken under the Pakistan Army Act, 1952, has by and large been settled by this Court through its various judgments, referred to above. It now stands clarified that neither the High Court nor this Court can sit in appeal over the findings of the FGCM or undertake an exercise of analyzing the evidence produced before it or dwell into the "merits" of the case. However, we have scanned the evidence produced and proceedings conducted by the FGCM. The Convict pleaded guilty to the charges, which were altered to not guilty by operation of the law. There was a judicial confession of the Convict before a learned Judicial Magistrate, which was proved in evidence by the said Judicial Magistrate, who appeared as a witness. Such confession was never retracted by the Convict. Other relevant evidence, including eye witnesses of the occurrence was also produced. The prosecution witnesses made their statements on Oath and were cross-examined by the Defending Officer. Opportunity to produce evidence in defence was given, which was declined. The Convict was permitted to address the Court and made a statement, wherein he again admitted his guilt. In the above circumstances, it is not possible for us to conclude that it was a case of no evidence or insufficient evidence nor is it possible to hold that the conclusions drawn by the FGCM are blatantly unreasonable or wholly improbable.*

104. A perusal of the record of the FGCM reveals that in order to ensure a fair trial and to protect the rights of the Convict, the relevant Rules were complied with. The Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. An Interpreter was appointed with the consent of the Convict in terms of Rule 91 of the Pakistan Army Act Rules, 1954. The nature of the offence for the commission whereof, the Convict was charged, was explained to him as too the possible sentence that would be awarded, as required by Rule 95. He was given an opportunity to prepare his defence and engage Civil Defence Counsel, if he so desired, in terms of Rules 23 and 24. On his exercising the option not to do so, a Defending Officer was appointed in terms of Rule 81. He was given an opportunity to object to the constitution of the FGCM and to the Prosecutor as well as the Defending Officer, in terms of Section 104 and Rule 35 also. No objection, in this behalf, was raised. The

Members of the FGCM, the Prosecutor, the Defending Officer and the Interpreter were duly sworn in, as required by Rules 36 and 37. The charge was formally framed to which incidentally, the Convict pleaded guilty. The evidence was recorded on Oath. An opportunity to cross-examine was granted, which was availed off and an opportunity was also given to produce evidence in defence in terms of Rule 142, which was declined. He was also allowed to record his own statement and to address the Court in terms of Rule 143 wherein he admitted his guilt. The sentence was passed, which has been confirmed in accordance with Section 130 and the Appeal therefrom was dismissed by the Competent Authority. It appears that the provisions of the Pakistan Army Act and the Rules framed thereunder, applicable to the trial at hand have not been violated. Even otherwise, the procedural defects, if any, would not vitiate the trial in view of Rule 132 of the Pakistan Army Act Rules, 1954 nor did the High Court have the jurisdiction to enter into the domain of the procedural irregularities in view of the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others (supra), especially as no prejudice appears to have been caused to the Convict nor any such prejudice has been pointed out by the learned counsel or specifically pleaded before the High Court". (emphasis in original)

[Volume 4/Annex 81/pages 59-62]

471. Accordingly, Pakistan respectfully submits that, in light of the fact that Pakistan's domestic legal system provides for an established and defined process whereby the civil courts can undertake a substantive review of the decisions of military tribunals in Pakistan in order to ensure procedural fairness has been afforded to the accused, that the Pakistani courts are, as the Court required in *Avena*, well suited to carrying out a "*review and reconsideration*" that gives full weight to the effect of any violation of Article 36 VCCR 1963 that the Court may find against Pakistan in this case.

472. Furthermore, Pakistan's legal system allows for appropriate clemency procedures (that are already being utilised by Commander Jadhav **[Volume 2/Annex 35/pages 1-2]**).

473. Pakistan further respectfully submits that, without prejudice to any of its other submissions, should the Court consider that India is due any relief in the instant case, then, consistent with its previous decisions in the death penalty/consular access cases, the appropriate remedy would be effective "*review and reconsideration*", taking into account the potential effects of any violation of Article 36 VCCR 1963. As stated at paragraph 467 above, the case law from Pakistan clearly sets out the grounds upon which decisions may be challenged: (i) *coram non judice*; (ii) without jurisdiction; (iii) *mala fides*; and (iv) malice in law.

474. To go further would be, with respect, beyond the legitimate functions of the Court – as the Court has itself consistently held throughout its case law.

VIII. CONCLUDING OBSERVATIONS

475. For the reasons set out in this Counter-Memorial, Pakistan requests the Court to adjudge and declare that the claims of India, as advanced through its Application and its Memorial, are rejected.

476. Pakistan reserves the right to supplement or amend the present submissions.

KHAWAR QURESHI QC

Counsel for the Islamic Republic of Pakistan

13 December 2017

SUBMISSION

I have the honour to submit this Counter-Memorial and the documents exhibited hereto on behalf of the Islamic Republic of Pakistan.

ASHTAR AUSAF ALI

Agent of the Islamic Republic of Pakistan

CERTIFICATION

I have the honour to certify that this Counter-Memorial and the documents exhibited hereto are true copies and conform to the original documents.

DR. MOHAMMAD FAISAL

Co-Agent of the Islamic Republic of Pakistan

ANNEX: LIST OF EXHIBITS

(1) VOLUME 1 (ANNEXURES 1 – 10)

ANNEX	DESCRIPTION
COMMENCEMENT OF PROCEEDINGS	
1	08/05/2017 – India letter to Court filing application
2	08/05/2017 – Letter from Court to Pakistan
PROVISIONAL MEASURES PHASE	
3	09/05/2017 – President's letter to Prime Minister of Pakistan
4	15/05/2017 – Pakistan's written submissions to the Court at the Provisional Measures Hearing
5.1	15/05/2017 – verbatim transcripts of the Provisional Measures Hearing (India's oral submissions)
5.2	15/05/2017 – verbatim transcripts of the Provisional Measures Hearing (Pakistan's oral submissions)
6	Order on the Request for the Indication of Provisional Measures dated 18 May 2017
7	Order on the Request for the Indication of Provisional Measures dated 18 May 2017, Separate Opinion of Judge Cançado Trindade
8	Order on the Request for the Indication of Provisional Measures dated 18 May 2017, Declaration of Judge Bhandari
9	08/06/2017 – Pakistan Ministry of Foreign Affairs ("MoFA") letter to the Court responding to the Provisional Measures Order
ICJ PROCEDURAL ORDER	
10	13/06/2017 – Court order fixing time limits for the filing of pleadings

(2) VOLUME 2 (ANNEXURES 11 – 44)

FACTUAL BACKGROUND	
NOTIFICATION BY PAKISTAN	
11	25/03/2016 – Foreign Secretary of Pakistan summons the Indian High Commissioner in Islamabad
12	25/03/2016 – MoFA notifies P5, press release
INDIAN CONSULAR ACCESS REQUESTS	
13.1	25/03/2016 – Consular Access Request
13.2	30/03/2016 – Consular Access Request
13.3	06/05/2016 – Consular Access Request
13.4	10/06/2016 – Consular Access Request
13.5	11/07/2016 – Consular Access Request
13.6	26/07/2016 – Consular Access Request
13.7	22/08/2016 – Consular Access Request
13.8	03/11/2016 – Consular Access Request
13.9	19/12/2016 – Consular Access Request
13.10	03/02/2017 – Consular Access Request
13.11	03/03/2017 – Consular Access Request
13.12	31/03/2017 – Consular Access Request
13.13	10/04/2017 – Consular Access Request
13.14	14/04/2017 – Consular Access Request
13.15	19/04/2017 – Consular Access Request
13.16	26/04/2017 – Consular Access Request
13.17	24/07/2017 – Consular Access Request
13.18	20/09/2017 – Consular Access Request
13.19	09/10/2017 – Consular Access Request
FURTHER NOTIFICATION AND RESPONSE FROM PAKISTAN	
14	21/03/2017 – MoFA Note Verbale
15	02/01/2017 – H.E. Sartaj Aziz letter to the UN Secretary-General
16	15/04/2016 – MoFA notifies the envoys of Arab League/ASEAN countries of the arrest of Commander Jadhav
CRIMINAL INVESTIGATION / PROCEEDINGS	
17	23/01/2017 – MLA Request – passport issue flagged
18	Commonwealth Human Rights Initiative booklet on First Information Reports [N.B. this is a report from an Indian institute explaining Indian FIRs. The regimes concerning FIRs in India and Pakistan we understand are broadly similar]

CONVICTION / SENTENCE	
19	10/04/2017 – MoFA Note Verbale
20	10/04/2017 – Inter Services Public Relations ("ISPR") press release
21	11/04/2017 – H.E. Sushma Swaraj says in Rajya Sabha that India will regard execution as "pre-meditated murder"
22	13/04/2017 – India's Ministry of External Affairs ("MEA") official weekly media briefing
23	14/04/2017 – H.E. Sartaj Aziz press statement
24	17/04/2017 – Translation provided by India of a report carried by a newspaper called Jehan
25	17/04/2017 – Official record of statement of Major-General Ghafoor on the date referred to in the translation of the Jehan newspaper report
26	18/04/2017 – H.E. Sushma Swaraj reported to have said that Jadhav could not have been a spy because he had a valid Indian visa
27	20/04/2017 – MoFA Spokesperson press briefing
28	21/04/2017 – *Indian Express* article written by Mr. Karan Thapar
29	Wikipedia page of Mr. Karan Thapar
30	Website of Indian Institute of Peace and Conflict Studies with biography of Mr. Amarjit Singh Dulat
31	27/04/2017 – H.E. Sushma Swaraj letter to H.E. Sartaj Aziz
32	27/04/2017 – *New Indian Express* article concerning Indian "defence experts" Seghal and Agha asserting Commander Jadhav is "already dead"
33	19/06/2017 – MEA Letter to MoFA purporting to return the MLA Request
34	20/06/2017 – Pakistan High Commissioner in New Delhi interview: Commander Jadhav able to appeal for clemency
35	22/06/2017 – ISPR press release
36	17/07/2017 – *Indian Express* article concerning Indian "defence experts" accusing Pakistan of "trying to hoodwink" the Court
37	Biographical details of Indian "defence expert" Praful Bakshi
38	11/10/2017 – Pakistan letter to Court nominating Justice Jillani
39	06/11/2017 – Registrar letter to Pakistan conveying that India has no objections to Justice Jillani sitting as judge *ad hoc*
40	10/11/2017 – MoFA Note Verbale concerning the potential visit by the wife of Commander Jadhav
41	13/11/2017 – MEA Letter to MoFA concerning the potential visit by the wife of Commander Jadhav
LETTERS FROM PAKISTAN'S MINISTRY OF FOREIGN AFFAIRS TO INDIA'S MINISTRY OF EXTERNAL AFFAIRS ON THE PASSPORT ISSUE	
42	31/05/2017 – MoFA letter to MEA
43	30/08/2017 – MoFA letter to MEA
44	26/10/2017 – MoFA letter to MEA

(3) VOLUME 3 (ANNEXURES 45 – 74)

AUTHORITIES	
CASE LAW	
45	*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America) (Mexico v United States of America)*, verbatim transcript, 19/06/2008 at 3pm, page 47, paragraph 7
46	*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, verbatim transcript, Thursday 10 March 2016 at 10am, page 21, paragraph 9
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48	*Certain Norwegian Loans (France v Norway)*, Separate Opinion of Judge Lauterpacht, 6 July 1957, page 53
49	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, verbatim transcript, 01/05/1996 at 10am, page 70
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51	*Free Zones of Upper Savoy and the District of Gex (second phase)*, PCIJ, Series A, No. 24, Order dated 6 December 1930, page 12
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53	*Electricity Company of Sofia and Bulgaria*, PCIJ, Series A/B, No. 77, Judgment of 4 April 1939, Separate Opinion of Judge Anzilotti, pages 97-98
54	*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, advisory opinion of 28 May 1948, Individual Opinion of Judge Azevedo, page 80
55	*Nottebohm (Liechtenstein v Guatemala)*, Dissenting Opinion of Judge Klaestad, 6 April 1955, pages 31-32
56	*Nottebohm (Liechtenstein v Guatemala)*, Dissenting Opinion of Judge Read, 6 April 1955, pages 37-38
57	*Aerial Herbicide Spraying (Ecuador v Colombia)*, Reply of Ecuador dated 31 January 2011, paragraph 7.51
58	*Factory at Chorzow (Jurisdiction)*, PCIJ, Series A, No. 9, Judgment dated 26 July 1927, page 31

59	*Legal Status of Eastern Greenland*, PCIJ, Series A/B, No. 53, Judgment dated 5 April 1933, Dissenting Opinion of Judge Anzilotti, page 95
60	*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Dissenting Opinion of Judge Schwebel, 27 June 1986, paragraphs 268-272
61	*Legality of the Use of Force (Serbia and Montenegro v Canada)* – verbatim transcript, 10/05/1999 at 4.15pm, paragraph 5
62	*Legality of the Use of Force (Serbia and Montenegro v Canada)* – verbatim transcript, 12/05/1999 at 3.20pm, page 6
63	*Legality of the Use of Force (Serbia and Montenegro v United Kingdom)* – verbatim transcript, 11/05/1999 at 3.00pm, paragraph 24
64	*Legality of the Use of Force (Yugoslavia v United States of America)* – verbatim transcript, 11/05/1999 at 4.30pm, paragraphs 3.17-3.18
65	*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, Separate Opinion of Judge Elaraby, paragraph 3.1
66	*Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment of 6 November 2003, paragraphs 27-30
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68	*Factory at Chorzow (Claim for Indemnity) (Merits)*, PCIJ, Series A, No. 17, Judgment of 13 September 1928, page 47
69	*Vienna Convention on Consular Relations (Paraguay v United States of America)*, Application dated 3 April 1998
70	*Vienna Convention on Consular Relations (Paraguay v United States of America)*, Order on the Request for the Indication of Provisional Measures dated 9 April 1998
71	*Vienna Convention on Consular Relations (Paraguay v United States of America)*, Order Discontinuing Proceedings dated 10 November 1998
72	*LaGrand (Germany v United States of America)*, Order on the Request for the Indication of Provisional Measures dated 3 March 1999
73	*LaGrand (Germany v United States of America)*, Judgment of 27 June 2001
74	*Avena and Other Mexican Nationals (Mexico v United States of America)*, Memorial dated 20 June 2003

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75	*Avena and Other Mexican Nationals (Mexico v United States of America)*, Order on the Request for the Indication of Provisional Measures dated 5 February 2003
76	*Vienna Convention on Consular Relations (Paraguay v United States of America)*, verbatim transcript, 07/04/1998 at 10am, paragraph 2.18
77	*Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)*, Judgment of 19 June 2012, Separate Opinion of Judge Cançado Trindade, paragraph 52
78	*LaGrand (Germany v United States of America)*, Application dated 2 March 1999, paragraph 15
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81	*Said Zaman Khan v Pakistan* (Civil Petition No. 842 of 2016), Decision of the Supreme Court of Pakistan handed down on 29 August 2016

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82	Sections 154 and 164 of Pakistan's Code of Criminal Procedure 1898
83	Section 59 of the Pakistan Army Act 1952
84	Section 3 of the Official Secrets Act 1923 (as applied in Pakistan)
85	India's Passports Act 1967
86	India's Passport Rules 1980
87	Optional Protocol to the Vienna Convention on Consular Relations 1963
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89	UN Security Council Resolution 1373 (2001)
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96	ILC Yearbook 1961, volume 2, page 141, column 2
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98	UK's Police and Criminal Evidence Act 1984, Code C, paragraph 7
99	Ireland's Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987, regulation 14(4)
100	Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) (the Fourth Geneva Convention), Article 5
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122	31/08/2015 – Indian Law Commission Report No. 262
123	First Optional Protocol to the ICCPR Recognising the Jurisdiction of the Human Rights Committee (entered into force on 23/03/1976)
124	List of signatories to the First Optional Protocol to the ICCPR Recognising the Jurisdiction of the Human Rights Committee (as at November 2017)
125	Second Optional Protocol to the ICCPR Toward the Abolition of the Death Penalty (entered into force on 11/07/1991)
126	List of signatories to the Second Optional Protocol to the ICCPR Toward the Abolition of the Death Penalty (as at November 2017)
127	Resolution adopted by the Human Rights Council on 29 September 2017 on the question of the death penalty (A/HRC/RES/36/17)
128	UN General Assembly Resolution 62/149 adopted on 18 December 2007 (moratorium on the use of the death penalty) and Voting Record
129	UN General Assembly Resolution 63/168 adopted on 18 December 2008 (moratorium on the use of the death penalty) and Voting Record
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137	Extract from the 'Consular Information' section of the website of South Africa's Department of International Relations & Cooperation
138	'Practical Information' section of the International Court of Justice's website
139	Google Earth map marking, *inter alia*, the areas where Commander Jadhav was based and where he was arrested (not to scale)

140	Extract from the website of India's 7th Central Pay Commission concerning the retirement ages of officers of the Indian Armed Forces

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142	Joint Expert Report of Brigadier Anthony Paphiti and Professor Colonel Charles Garraway CBE dated 29 November 2017
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143	Report in the Indian newspaper *Economic Times* of a speech made by Mr. Ajit Doval at SASTRA University in India on 21 February 2014
144	Report of an interview given by Mr. Subramanian Swamy (30 September 2017)
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