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

EXHIBIT

VOLUME 1: ANNEXURES 1 – 10

Jadhav Case (India v Pakistan)

Counter-Memorial on behalf of the Islamic Republic of Pakistan

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13th December 2017

Annex 1

Dr. Deepak Mittal
Joint Secretary

सत्यमेव जयते

MINISTRY OF EXTERNAL AFFAIRS
NEW DELHI

FILING OF APPLICATION AGAINST THE ISLAMIC REPUBLIC OF PAKISTAN ALONGWITH APPLICATION FOR PROVISIONAL MEASURES

Upon instructions of my Government, I have the honour to submit herewith an application of the Republic of India as well as an urgent request for provisional measures pursuant to Articles 40 & 41 of the Statute of the Court and Articles 73, 74 & 75 of the Rules of Court against the Islamic Republic of Pakistan for violations of Vienna Convention on Consular Relations, 1963.

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.

The contact details for further communication are as follows:

1. Dr. Deepak Mittal, Joint Secretary, C/o Embassy of India, Buitenrustweg 2, 2517 KD, The Hague, The Netherlands

2. Dr. Deepak Mittal, Joint Secretary, Ministry of External Affairs, Room 149 B, South Block, New Delhi – 110001, Email: jspai@mea.gov.in, Tel: 2301 5060, Fax: 2301 2139, Mobile: +91-7042130882.

(Dr. Deepak Mittal)
May 8, 2017

To,

Mr. Philippe Couvreur
The Registrar
International Court of Justice
The Hague, Netherlands

Annex 2

COUR INTERNATIONALE DE JUSTICE INTERNATIONAL COURT OF JUSTICE

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8 May 2017

148661

Madam,

I have the honour to inform Your Excellency that the Government of the Republic of India has today filed in the Registry of the Court an Application, dated 8 May 2017, instituting proceedings against the Islamic Republic of Pakistan concerning alleged violations of the Vienna Convention on Consular Relations "in the matter of the detention and trial of an Indian national" sentenced to death in Pakistan.

Please find enclosed herewith, in accordance with Article 38, paragraph 4, of the Rules of Court, a signed copy of the Application. The Registry will in due course be providing you with copies of the printed bilingual version (English and French) of the Application which it will be responsible for preparing.

India has appointed Dr. Deepak Mittal, Joint Secretary, Ministry of External Affairs, as Agent.

I take this opportunity to draw your attention to Article 40 of the Rules of Court, paragraph 2 of which provides that, upon receipt of the Application, or as soon as possible thereafter, the Respondent shall inform the Court of the name of its Agent. Paragraph 1 of the same Article provides that Agents shall have an address for service at the seat of the Court to which all communications concerning the case are to be sent.

./.

Her Excellency Ms Iffat Imran Gardezi
Ambassador of the Islamic Republic of Pakistan
Embassy of the Islamic Republic of Pakistan
The Hague

I further have the honour to inform you that the Government of the Republic of India, referring to Article 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court, filed today in the Registry a Request for the indication of provisional measures, dated 8 May 2017. The Request also contained a prayer that the President exercise his power under Article 74, paragraph 4, of the Rules of Court.

A signed copy of that Request is enclosed herewith, in accordance with Article 73, paragraph 2, of the Rules of Court.

Finally, I have the honour to transmit to you copies of the following three letters, received in the Registry today, together with the above-mentioned Application and Request for the indication of provisional measures:

— two letters, respectively dated 6 May 2017 and 8 May 2017, from H.E. Ms Sushma Swaraj, Minister of External Affairs of India, the first authorizing Dr. Deepak Mittal to file the Application and the Request for the indication of provisional measures, and the second appointing him as Agent for the Republic of India;

— a letter dated 8 May 2017 from Dr. Deepak Mittal, under cover of which the Application and the Request for the indication of provisional measures were filed.

Accept, Madam, the assurances of my highest consideration.

Philippe Couvreur
Registrar

Annex 3

COUR INTERNATIONALE DE JUSTICE INTERNATIONAL COURT OF JUSTICE

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LE PRÉSIDENT

THE PRESIDENT

148672

9 May 2017

Excellency,

I have the honour to refer to the Application filed on 8 May 2017 by the Republic of India instituting proceedings against the Islamic Republic of Pakistan, and to the Request for the indication of provisional measures submitted by the Applicant on the same date. In that Request, the Republic of India in particular asks the International Court of Justice to order the Respondent to take all measures necessary to ensure that the death sentence said to have been handed down to an Indian national, Mr. Kulbhushan Sudhir Jadhav, is not carried out pending the final decision of the Court.

In my capacity as President of the Court, and exercising the powers conferred upon me under Article 74, paragraph 4, of the Rules of Court, I call upon Your Excellency's Government, pending the Court's decision on the 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.

A copy of this communication is being addressed to the Government of the Republic of India.

Accept, Excellency, the assurances of my highest consideration.

Ronny Abraham

H.E. Mr. Nawaz Sharif
Prime Minister of the Islamic Republic of Pakistan
The Prime Minister's Secretariat
Islamabad
Pakistan

Annex 4

INTERNATIONAL COURT OF JUSTICE

PROCEEDINGS INSTITUTED BY THE REPUBLIC OF INDIA AGAINST THE ISLAMIC REPUBLIC OF PAKISTAN ON 8TH MAY 2017

(INDIA v. PAKISTAN)

RE: Commander (Naval) Kulbhushan Sudhir Jadhav (alias Hussein Mubarak Patel) ("Commander Jadhav") (holder of Indian passport number L9630722)

OUTLINE SUBMISSIONS ON BEHALF OF THE ISLAMIC REPUBLIC OF PAKISTAN

15th May 2017

I. SUMMARY SUBMISSIONS

1. On behalf of the Islamic Republic of Pakistan ("Pakistan" or "the Respondent"), I have the honour to place these submissions before the Court.

2. This is a case concerning crimes of the most grievous nature, namely terrorism and espionage, conducted against Pakistan in order to undermine the peace and security of its territory, regrettably conducted by an agent of the Republic of India ("India" or "the Applicant"). Such acts strike at the very foundation of the principles upon which the UN Charter was established.

3. The Applicant needs to establish the following before the International Court of Justice ("ICJ" or "Court"):
   3.1. urgency/imminent risk of;
   3.2. irreparable prejudice;
   3.3. prima facie jurisdiction; and
   3.4. plausible argument of breach by the Respondent.

   The most recent consideration of the approach to provisional measures was provided by the Court in *Ukraine v Russian Federation*, Order for the Request of Provisional Measures dated 19th April 2017.

4. For the reasons given below, Pakistan respectfully submits that none of the above requirements are satisfied by the Applicant in its Application dated 8th May 2017 ("the Application") or its Request for the Indication of Provisional Measures dated 8th May 2017 ("the Request").

II. NO URGENCY/IMMINENT RISK OF IRREPARABLE PREJUDICE

5. India brings the Application and the Request on the basis of (on her view) the extremely urgent nature of this case. India (wrongly) seeks to suggest that the carrying out of the

sentence of execution for the crimes committed by Commander Jadhav is imminent. It seems to be suggested that this could occur "any day". This is simply not the case. Indeed, it is the manner in which this Application has been brought that creates the impression of extreme urgency but not the underlying facts themselves.

6. India, on her own case (Application, paragraph 5), has been aware of the arrest of Commander Jadhav since 25th March 2016 when India was informed of the arrest by the Foreign Secretary of Pakistan.

7. Whilst the Government of Pakistan ("GOP") is mindful of the fact that the ICJ is not evaluating the merits of the underlying issues on an application for provisional measures, the facts in this case and the conduct of the Government of India are relevant to the exercise of the discretion which India seeks to engage.

8. Notwithstanding the fact that India has been aware of the arrest of Commander Jadhav since 25th March 2016, India did not initiate the instant application until 8th May 2017. In the interim India chose to ignore a request for international mutual legal assistance dated 23rd January 2017 based upon UNSC 1373 seeking assistance in the investigation of the crimes Commander Jadhav had confessed to. The request for mutual legal assistance is at Annex 1 to this written submission.

9. It is after a period of around 14 months had elapsed since India had been notified of Commander Jadhav's arrest that it chose to make this Request. At paragraph 21, by way of justification for invoking early provisional measures, India asserted as follows:

> *"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".*

10. If (as appears to be the case) the foundation for the Application rests upon an assertion that a sentence of execution may be carried out in a few days, the evidence served in support of India's own Application demonstrates how wrong this contention is. Put simply, India has known since 14th April 2017 (if not before) (Application, Annex 6, top of third page) that Commander Jadhav is entitled as of right to petition firstly the Chief of Army Staff for clemency and, thereafter, the President of the Islamic Republic of Pakistan. The prescribed time period within which these petitions could be made is potentially 150 days.

11. As the Agent for the Islamic Republic of Pakistan has explained, notwithstanding the misconceived basis upon which an attempt has been made to engage this Court's jurisdiction, an expedited hearing of India's substantive Application which would dispel any suggestion of the need for provisional measures is an approach that Pakistan would invite the Court to adopt.

12. Accordingly, Pakistan respectfully submits that India's approach in seeking to invoke provisional measures and failing to draw the Court's attention to the existence of processes which are available to Commander Jadhav should lead to the dismissal of India's Application. There was no good reason for India to have launched the Application as it has done or to suggest that an execution could take place within days.

The US death penalty provisional measures cases

13. Further still, India has sought to characterise its urgent Request for provisional measures as urgent on the basis of the only three cases previously brought before the ICJ concerning the application of the death penalty under US national law. Those three cases are: (1) *LaGrand (Germany v United States of America)* ("*LaGrand 1*"); (2) *Vienna Convention on Consular Relations (Paraguay v United States of America)*; (3) *Avena and Other Mexican Nationals (Mexico v United States of America)*. (Summary schedule at Annex 2 hereto).

14. Pakistan respectfully submits that India's reliance on each of the aforementioned three cases is misplaced as each case is readily and materially distinguishable from the instant case both in terms of urgency and the nature of the crime involved.

LaGrand, Provisional Measures Order, Order of 3rd March 1999, ICJ Reports 1999, p.9

15. In *LaGrand*, two brothers, Karl and Walter LaGrand (who, although they had lived in the United States since childhood, were German nationals) unsuccessfully attempted to commit an armed bank robbery in Arizona, US in January 1982. In the course of the attempted armed robbery, the manager of the bank was killed and another woman was severely injured. The LaGrand brothers were arrested and subsequently were both convicted of murder in the first degree and were given death sentences by an Arizona court. Karl LaGrand was executed on 24th February 1999. A date was set for Walter LaGrand to be executed on 3rd March 1999 and it was in respect of Walter LaGrand that provisional measures were sought on 2nd March 1999. The Court granted the measure without any hearing on 3rd March 1999.

16. As the Court is aware, the United States authorities executed the remaining LaGrand brother, which led to an application by Germany for relief which included the following orders:

> *(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.

17. It is to be observed that the relief sought in this case by Germany at the substantive hearing is in many respects similar to that which India is seeking. The facts in that case were stark – all the more so given that the United States in fact, in violation of the order for provisional measures, executed Walter LaGrand – in doing so the United States of America further accepted it was in breach of the provisional measures order and had breached the Vienna Convention on Consular Relations 1963. In the face of such extreme circumstances, the order that the Court in fact made on the application of Germany was as follows:

(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.

18. This order makes it abundantly clear that it is not the function of the ICJ "to act as a court of criminal appeal" (*LaGrand 1*, Provisional Measures Order, Order of 3 March 1999, paragraph 25).

19. Accordingly, as will be developed in Section IV below, the provisional measures sought by India are based upon "bootstraps arguments" – the substantive relief in the prayer to the Application (Application, page 31/paragraph 60) is entirely and manifestly outwith the jurisdiction of the Court. India itself has referred to all of the previous decisions of the Court where substantive relief of the sort it has been seeking has not been granted.

20. India must be taken to be aware of this. Accordingly, it is difficult to avoid the inference that India's real and only goal (before the Court) is a provisional measures order/"stay order". Whilst "stay orders" may be seen as providing substantive relief in certain jurisdictions where delay is tantamount to negation of court process, such a context finds no reflection in the ICJ. Indeed, it is respectfully submitted that the Court should exercise considerable caution in circumstances where there is no apparent and/or realistic legal nexus between the request for provisional measures and the rights/relief which the said measures are intended to ensure the preservation of.

Paraguay v United States of America, Provisional Measures, Order of 9th April 1998, ICJ Reports 1998, p.248

21. In *Paraguay v United States of America*, Mr. Angel Francisco Breard, a Paraguayan national, was arrested in 1992 by the authorities of the Commonwealth of Virginia. Mr. Breard was subsequently convicted in a Virginia court of culpable homicide and was sentenced to death. It was alleged that the authorities of the Commonwealth of Virginia did not comply with the consular access rights contained in Article 36 of the VCCR 1963. A date was set for Mr. Breard to be executed on 14th April 1988. An application for provisional measures was made on 3rd April 1988 and was granted on 9th April 1988.

22. Paraguay requested the ICJ to adjudge and declare as follows:

> *(1) that the United States, in arresting, detaining, trying, convicting, and sentencing [Mr. Breard], as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention;*
>
> *(2) that Paraguay is therefore entitle to restitution in integrum;*
>
> *(3) that the United States is under an international legal obligation not to apply the doctrine of 'procedural default', or any other doctrine of its internal 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 legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against [Mr. Breard] or any other Paraguayan 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 of an international or internal character;*
>
> *and that, pursuant to the foregoing international obligations,*
>
> *(1) any criminal liability imposed on [Mr. Breard] 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 restore the status quo ante, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and*
>
> *(3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts.*

23. Paraguay asked the Court to, pending final judgment indicate by way of provisional measures:

> *(a) that the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;*
>
> *(b) that the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph (a) immediately above and the results of those actions; and*
>
> *(c) that the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case.*

24. By its Order on Provisional Measures dated 9th April 1998, the Court indicated by way of provisional measures that:

> *The United States should take all measures at its disposal to ensure that [Mr. Breard] is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order.*

25. However, despite this order, Mr. Breard was executed on 14th April 1998. Although the Paraguayan authorities expressed a desire to pursue the ICJ proceedings through to final judgment, following an official apology from the United States of America and a guarantee of a better future compliance with the VCCR 1963, the case was removed from the Court's list as the request of Paraguay.

26. Once again, the Court was at pains to make clear that it was not within its function "to act as a court of criminal appeal" (*Paraguay v United States of America*, Provisional Measures Order, paragraph 38).

<u>*Mexico v United States of America*, Provisional Measures Order, Order of 5th February 2003, ICJ Reports 2003, p.77</u>

27. In *Mexico v United States of America*, an application was filed by Mexico stating that 54 Mexican nationals were held on death row in the United States of America in respect of whom, it was alleged, the United States of America had failed to provide consular access Mexico's application drew attention to the Court's judgment in *LaGrand* as set out above and alleged that aspects of US municipal law rendered ineffective all actions brought before state or federal US courts on behalf of the 54 Mexican nationals. Further, Mexico stated that the US authorities had carried out executions in spite of diplomatic protests and the only response ever received by Mexico from the US authorities had consisted of formal apologies post-execution.

28. In respect of the above facts, Mexico asked the Court to adjudge and declare:

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row described in this Application, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention;

(2) that Mexico is therefore entitled to restitution in integrum;

(3) that the United States is under an international legal obligation not to apply the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise of the rights afforded by Article 36 of the Vienna Convention;

(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 54 Mexican nationals on death row or 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;

(5) that the right to consular notification under the Vienna Convention is a human right,

and that, pursuant to the foregoing international legal obligations,

(1) the United States must restore the status quo ante, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States international legal obligations;

(2) the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended;

(3) the United States must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the Vienna Convention, including by barring the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defence 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; and

(4) the United States, in light of the pattern and practice of violations set forth in this Application, must provide Mexico a full guarantee of the non-repetition of the illegal acts.

29. In respect of the above, the Court was asked to grant the following by way of provisional measures:

> *(a) that the Government of the United States take all measures necessary to ensure that no Mexican national can be executed;*
>
> *(b) that the Government of the United States take all measures necessary to ensure that no execution dates be set for any Mexican national;*
>
> *(c) that the Government of the United States report to the Court the actions it has taken in pursuance of subparagraphs (a) and (b); and*
>
> *(4) that the Government of the United States ensure that no action is taken that might prejudice the rights of the United Mexican States or its nationals with respect to any decision this Court may render on the merits of the case.*

30. Mexico insisted that its request was urgent because, unless provisional measures were indicated by the Court, three of the Mexican nationals at issue ("the 3 Mexican nationals") were at risk of execution "in the new few months", one of whom was liable for execution within a month of the application for provisional measures and many others were at risk of execution before the Court would consider the substantive merits. The United States rejected this contention on the basis that none of the Mexican nationals at issue were scheduled to be executed, there had been no breach of the consular access rights in the VCCR 1963 in respect of some of the cases, in others there would be an opportunity for Mexico to raise any alleged failure to notify at a later stage of the domestic legal proceedings and that the review and reconsideration procedures (adopted post-*LaGrand*) remained available in all of the underlying cases. Mexico stated that in order for the condition of urgency to be met, it was sufficient that there was a "likely" threat of irreparable prejudice and that, since an execution date could be set at any time, those Mexican nationals could be executed "at very short notice".

31. The United States contended that for the Court to grant the provisional measures sought by Mexico would "transform the Court into a "general criminal court of appeal", which the Court has already indicated in the past is not its function".

32. The Court held (again) (at paragraph 48) that it could not act as a court of criminal appeal. The Court indicated the following provisional measures:

> *(a) The United States shall take all measures necessary to ensure that [the 3 Mexican nationals] are not executed pending final judgment in these proceedings;*
>
> *(b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.*

33. In its judgment on the merits dated 31st March 2004, the Court found, inter alia, that the US was in breach of the consular access provisions of the VCCR 1963 and:

(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.

34. Therefore, it is apparent that, notwithstanding a finding that the respondent State had committed a breach of Article 36 of the VCCR 1963, the ICJ considered that the appropriate remedy was merely to oblige the respondent State to provide reconsideration of the criminal convictions and sentence by means of its own choosing and not to grant a declaration declaring the same convictions and sentence illegal or otherwise void.

35. With reference to the instant case, where India seeks by way of final relief a declaration, inter alia, to the effect that Commander Jadhav's death sentence is illegal and directing Pakistan to release Commander Jadhav forthwith, the *Mexico v United States of America* case clearly establishes that such relief cannot and will not be granted by the ICJ. It is respectfully submitted that the Court has made abundantly clear from the previous cases relating to death sentences that the substantive relief/reparations sought by India would not be available. As such the Application can only be seen as a vehicle for the pursuit of provisional measures.

36. Accordingly, Pakistan respectfully submits that this is (regrettably) an inappropriate invocation of the ICJ's provisional measures jurisdiction.

III. NO IRREPARABLE PREJUDICE

37. For the reasons given above, Pakistan submits that if there is no urgency such as to justify the granting of provisional measures (let alone provisional measures without an opportunity for Pakistan to be heard – as was applied for by India on 8th May 2017), then the requirement of irreparable prejudice cannot be satisfied.

IV. NO BASIS FOR SUBSTANTIVE RELIEF SOUGHT IN THE APPLICATION

38. The ICJ's Order for Provisional Measures in *LaGrand 1* (at paragraph 25) demonstrates that the ICJ was at pains to point out that it could not perform the function or could not exercise the jurisdiction of a criminal review court (still less the jurisdiction of a criminal appellate court). In this regard, the Court in the *Avena* case (2004) reiterated the limited scope of the reparation available (see paragraphs 122-124 of the Judgment).

39. Indeed, the ICJ now makes this expressly clear on its website under its 'Practical Information' section: "*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".

40. However, it is precisely such a function that India wishes the ICJ to adopt in the relief it seeks (i.e. to suspend the carrying out of a decision of a Pakistani domestic court and to declare that decision illegal/"release…forthwith").

41. Lest there be any doubt as to India's aspirational approach, India submits (Application, paragraph 59) that the ICJ:

> *"has the power and the jurisdiction to mould the relief, to the facts of the present case, to ensure that this death sentence which has been awarded by a military court ... [is] set at nought".*

42. India's Application and Request ostensibly are premised upon urgency and, in a manner familiar to lawyers from certain jurisdictions, directed towards a "stay order". Indeed, the Letter from the President of the ICJ to the Prime Minister of Pakistan dated 9th May 2017 pursuant to Article 74(4) of the Rules of the ICJ calling upon the parties "to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects" was widely reported as a "stay order" by the Indian press.

43. The bare nature of India's Application and Request is manifest upon considering the relief sought on both the Application and the Request.

44. In its Application, India alleged six violations against Pakistan:
    44.1. that Pakistan did not inform India of the fact that Commander Jadhav had been detained until 25th March 2016 – long after he had been arrested on 3rd March 2016;
    44.2. that Pakistan failed to inform Commander Jadhav of his rights;
    44.3. that, in violation of the VCCR 1963, the Pakistani authorities are denying Indian consular access to Commander Jadhav despite the fact that India has made repeated requests for such consular access since 25th March 2016 when Commander Jadhav was arrested;
    44.4. that Pakistan did not inform India about the fact that Commander Jadhav had been sentenced to death but instead India learned that fact from a press release;
    44.5. that Commander Jadhav was kidnapped from Iran, where he was carrying on business following his retirement from the Indian Navy, and was then arrested in Balochistan Province of Pakistan;
    44.6. that Pakistan, in violation of the VCCR 1963, linked the provision of consular access to Commander Jadhav to India's co-operation in an investigation concerning Commander Jadhav's alleged involvement in espionage and terrorist activities on Pakistani territory.

45. India seeks the following by way of final relief:
    45.1. the immediate suspension of Commander Jadhav's death sentence;

45.2. a declaration:

45.2.1. that the death sentence was a violation of Article 36(1) of the VCCR 1963 and elementary fundamental human rights guaranteed under Article 14 of the International Covenant on Civil and Political Rights 1966 ("the ICCPR 1966"); and

45.2.2. restraining Pakistan from giving effect to the death sentence and directing Pakistan to take steps under domestic Pakistani criminal law or other domestic Pakistani law to annul the decision of the military court;

45.3. if Pakistan is not able to annul the decision of the military court, a declaration:

45.3.1. that the decision of the military court imposing the death sentence was in violation of international law and treaty rights;

45.3.2. to restrain Pakistan from acting contrary to the VCCR 1963 and international law by giving effect to the death sentence or Commander Jadhav's conviction in any manner; and

45.3.3. directing Pakistan to release Commander Jadhav forthwith.

46. India seeks the following by way of provisional measures:

46.1. that the GOP take all measures necessary to ensure that Commander Jadhav is not executed;

46.2. that the GOP report to the ICJ the action taken in pursuance of the above; and

46.3. that the GOP ensure that no action is taken that might prejudice the rights of India or Commander Jadhav regarding any decision the ICJ may render on the merits.

47. As explained above, none of the substantive relief (if it can be characterised as such) is available from any judicial authority apart from one exercising an appellate criminal function. The ICJ is not such a body.

48. Furthermore, none of the (substantive) relief sought would be available pursuant to the any finding of breach of Article 36 of the VCCR 1963 by the Court.

49. India is not seeking consular access. India is not seeking a review and reconsideration of the conviction and sentence of Commander Jadhav. India is demanding annulment of his conviction and sentence and the release of Commander Jadhav "forthwith" (Application, paragraph 60). This is manifestly unsustainable.

V. NO PRIMA FACIE JURISDICTION / RESERVATIONS MILITATE AGAINST PROVISIONAL MEASURES

50. Pakistan accepts that the Court will only satisfy itself as to the existence of prima facie jurisdiction for the purposes of a provisional measures application. The observations hereinbelow are made by way of submission that there is no jurisdiction, let alone prima facie jurisdiction. The existence, scope and intent of the reservations identified herein, it

is respectfully submitted, ought to be relevant factors in the exercise of the Court's discretion when considering an application for provisional measures.

(A) Article 36 of the ICJ Statute

51. India invokes Article 36 of the Statute of the ICJ ("the ICJ Statute"). Article 36 of the Statute of the ICJ ("the ICJ Statute") provides as follows:

> "*1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.*
>
> *2. The states parties to the present Statute may at any time declare that the recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:*
>
> *a. the interpretation of a treaty;*
>
> *b. any question of international law;*
>
> *c. the existence of any fact which, if established, would constitute a breach of an international obligation;*
>
> *d. the nature or extent of the reparation to be made for the breach of an international obligation.*"

52. Pakistan makes four observations as regards India's reliance on Article 36 of the ICJ Statute.

(i) India's Reservation to Compulsory Jurisdiction

53. India itself has entered a reservation to the compulsory jurisdiction of the ICJ. On 18th September 1974, the then Indian Minister of External Affairs deposited a declaration ("the 1974 Declaration") qualifying India's acceptance of the compulsory jurisdiction of the ICJ in the following terms:

> "*I have the honour to declare, on behalf of the Government of the Republic of India, that they accept, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate such acceptance, as compulsory ipso facto and without special agreement, and on the basis and condition of reciprocity, the jurisdiction of the International Court of Justice over all disputes other than:*
>
> *(1) disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or method of settlement;*
>
> *(2) disputes with the government of any State which is or has been a Member of the Commonwealth of Nations.*

...

(7) disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction."

54. In the context of an application seeking an order without a hearing, it was incumbent upon India to draw to the Court's attention the reservations at Paragraphs (2) and (7) of India's 1974 Declaration.

55. However, in its Application dated 8th May 2017, India failed to make any reference to the *Aerial Incident of 10th August 1999 (Pakistan v India)* case. In that case, commenced on 21st September 1999, Pakistan filed an Application instituting proceedings against India in respect of a dispute relating to the destruction, on 10th August 1999, of a Pakistani aircraft. Pakistan stated that the ICJ had jurisdiction based on Article 36, paragraphs 1 and 2, of the Statute and the declarations whereby India and Pakistan recognised the compulsory jurisdiction of the Court.

56. India invoked paragraphs (2) and (7) of its 1974 Declaration to bar Pakistan's invoking of ICJ jurisdiction on the grounds that Pakistan was a Commonwealth country. In addition, India observed that:

"the reference to the UN Charter, which is a multilateral treaty, in the Application of Pakistan as a basis for its claim would clearly fall within the ambit of [sub-paragraph (7) reservation]. India further asserts that it has not provided any consent or concluded any special agreement with Pakistan which waives this requirement".

57. In its letter of 2nd November 1999, the Agent of India, inter alia, notified the Court that his Government "wish[ed] to indicate its preliminary objections to the assumption of jurisdiction by the . . . Court . . . on the basis of Pakistan's Application". A note appended to that letter stated the following in relation to the "Commonwealth reservation":

(ii) That Pakistan's Application fails to take into consideration the reservations to the Declaration of India dated 15 September, 1974 filed under Article 36 (2) of its Statute. In particular, Pakistan, being a Commonwealth country, is not entitled to invoke the jurisdiction of the Court as sub-paragraph 2 of paragraph 1 of that Declaration excludes all disputes involving India from the jurisdiction of this Court in respect of any State which 'is or has been a Member of the Commonwealth of Nations'.

58. In a judgment dated 21st June 2000 on the jurisdiction of the Court, the Court declared, by fourteen to two, that it had no jurisdiction over the dispute.

59. As to the "Commonwealth reservation", the Court held (at paragraph 46) as follows:

"*In the Court's view, it follows from the foregoing that the Commonwealth reservation contained in subparagraph (2) of the first paragraph of India's declaration of 18 September 1974 may validly be invoked in the present case. Since Pakistan "is . . . a member of the Commonwealth of Nations", the Court finds that it has no jurisdiction to entertain the Application under Article 36, paragraph 2, of the Statute. Hence the Court considers it unnecessary to examine India's objection based on the reservation concerning multilateral treaties contained in subparagraph (7) of the first paragraph of its declaration*". (emphasis added).

60. This "Commonwealth reservation" was clearly intended by India, as evidenced from the reliance upon it in *Aerial Incident* to exclude all disputes between India and Pakistan from the jurisdiction of the ICJ.

61. Indeed, sub-paragraph (7) of the 1974 Declaration is expressed in even broader terms.

(ii) Pakistan's Reservations to Compulsory Jurisdiction

62. Pakistan entered reservations to the compulsory jurisdiction of the ICJ in 1960 ("the 1960 Reservation") and again on 29th March 2017 ("the 2017 Reservation"). The 2017 Reservation expressly provides at paragraph (e) that "*all matters related to the national security of the Islamic Republic of Pakistan*" are excluded from the compulsory jurisdiction of the ICJ.

63. Furthermore, Pakistan respectfully submits that even if the respective reservations of India and Pakistan are not effective to preclude the exercise of jurisdiction by the ICJ, nevertheless the content and the intention of those reservations provides a strong indicator against the exercise of the provisional measures jurisdiction.

64. India was at pains to seek to exclude jurisdiction wherever possible so far as it concerned Pakistan. Pakistan has been at pains to seek to exclude jurisdiction wherever possible so far as matters of national security are concerned.

65. In Pakistan's submission, this is a relevant factor in the consideration of the appropriateness of provisional measures in this case.

(iii) Vienna Convention on Consular Relations 1963 – Customary International Law

66. The Vienna Convention on Consular Relations of 1963 ("the VCCR 1963") itself expressly states (in the Preamble) that the States Parties to the VCCR 1963 were:

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

67. In this regard, the conduct which was alleged against Commander Jadhav and to which he voluntarily entered a lengthy and detailed confession constitute crimes of the gravest possible nature – amounting to terrorism and a concerted campaign carried out by an

agent of a Sending State (i.e. India) to damage and destroy the peace and security of the Islamic Republic of Pakistan.

68. It is respectfully submitted that there can be no question of an individual who has committed such acts being entitled under Customary International Law to consular access in the manner provided for in the VCCR 1963.

(iv) Vienna Convention on Consular Relations 1963 – Specific provisions

69. In order to ascertain the scope of the application of the VCCR 1963, it is necessary to examine its specific provisions.

Article 5 of the VCCR 1963

70. Article 5 of the VCCR 1963 (Consular functions) provides as follows:

> "*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)

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

72. Article 5(i) of the VCCR 1963 makes clear that the access to justice aspect of the consular functions under Article 5 are subject to the legal practices and legal procedures adopted

under the domestic law of the receiving State. Thus, in this 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 criminal law of Pakistan and the practices and procedures of the Field General Court Martial.

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

Article 36 of the VCCR 1963

74. Article 36 of the VCCR 1963 (Communication and contact with nationals of the sending State) provides as follows:

> "*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 them and access to consular officers of the sending State;*
> >
> > *(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;*
> >
> > *(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.*
>
> *2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.*"
>
> (emphasis added)

75. Pakistan recognises that the three sub-paragraphs of Article 36(1) provide for an interrelated regime. Article 36(1)(a) 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) which specifically relates to custody. Article 36(1)(b) begins with the condition "if he so requests" (i.e. the national of the sending State in custody in the receiving State).

76. Furthermore, Pakistan respectfully submits that Article 36(1)(c) does not provide an unqualified and untrammelled right. As discussed above, Article 36(1)(c) is, by virtue of Article 5(m), subject to the requirements and provisions of the applicable domestic Pakistani law. Furthermore, Article 36(1)(c) itself contains a qualification – that 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.

77. As Article 36(2) makes clear, the rights under Article 36(1)(a)-(c) must be exercised in a manner that is in accordance with the domestic law of the receiving State (i.e. Pakistan). Of course, the domestic law of the receiving State must make full effect to be given to the intended purpose of Article 36. To that end, an Agreement on Consular Access was signed between Pakistan and India on 21 May 2008 ("the 2008 Agreement").

78. The 2008 Agreement is aimed at giving effect to the intended purposes of Article 36, as it manifestly seeks to facilitate "the humane treatment of nationals of either country arrested, detained or imprisoned in the other country" (Application, Annex 10). It expressly provides for "reciprocal consular facilities" (Application, Annex 10). Accordingly, Pakistan respectfully submits that the 2008 Agreement is a part of the regulations of Pakistan, and/or can be seen as "supplementing" or "amplifying" the provisions of the VCCR 1963 (as described in Article 73 of the VCCR 1963). As explained further at paragraph 92, the 2008 Agreement was expressly intended to deal with the issue of consular access as between these two States.

Article 55 of the VCCR 1963

79. Article 55 of the VCCR 1963 (Respect for the laws and regulations of the receiving State) provides as follows:

> "*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 the State.*"
>
> (emphasis added)

80. Article 55(1) of the VCCR 1963 therefore makes expressly clear 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) is cast in terms reflecting

the principle established by Article 2(7) of the Charter of the United Nations 1945. 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 Article 36(1)(a)-(c) therein).

Article 73 of the VCCR 1963

81. Article 73 of the VCCR 1963 (Relationship between the present Convention and other international agreements):

> "*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.*"
>
> (emphasis added)

82. Article 73 of the VCCR 1963 thus makes clear that the VCCR 1963 does not affect other agreements in force as between States. Therefore, the provisions of the VCCR 1963 cannot affect the applicability and relevance of the requirements of the 2008 Agreement, which, as stated above, can be seen as "supplementing" or "amplifying" the provisions of the VCCR 1963 for the purposes of Article 73.

(B) Article 36 of the VCCR 1963 – cannot possibly apply in cases of espionage/terrorism

83. The *travaux preparatoires* for the VCCR 1963 (constituting the Official Records of the United Nations Conference on Consular Relations which happened in Vienna from 4th March 1963 to 22nd April 1963) contains no material reference as to the application of the VCCR 1963 in cases of nationals accused or convicted of espionage/terrorism. Pakistan notes that the United Nations Conference on Consular Relations occurred at the height of the Cold War era and, thus, it is readily understandable that this subject was not encompassed in this context.

84. Indeed, the concept of "sending State" must presuppose that the individual in question is not dispatched to carry out purposes which are inconsistent with non-interference with the internal affairs of the receiving State. Moreover, "national" must require some level of enquiry and confirmation as to the exact nature of the link of nationality between a sending State and a "national". In this case, Commander Jadhav was in possession of a passport which appears to be a false passport (carrying a Muslim name). As evidence of his nationality, a false document should not be sufficient. It is incumbent upon the "sending State" to provide explanation as to the nationality of the individual in question.

85. Furthermore, Pakistan respectfully submits that the Contracting Parties to the VCCR 1963 when considering Article 36(1)(a) (providing freedom to communicate) and Article

36(1)(c) (providing for visits to nationals in custody) cannot possibly have intended for these provisions to apply in circumstances where criminality of the most extreme and grave nature (as in this case) (being an attack upon the State itself "at the behest of the sending State") is involved.

86. It is problematic at best to suggest that a sending State which has sent a national into the territory of the receiving State in order to carry out activities constituting espionage and terrorism against the receiving State can be entitled to untrammelled and unqualified rights of access to its operative in those circumstances.

87. The damage that could potentially be caused if the sending State were to be allowed such untrammelled and unqualified access is too obvious to state.

88. Lest there be any doubt in this regard, Article 55(1) of the VCCR 1963 states expressly that consular officials of the sending State cannot interfere in the internal affairs of the receiving State. Therefore, at the very least, an attempt to obtain access under Article 36 would prima facie constitute a breach of Article 55(1) in such circumstances.

89. Furthermore, Article 36(2) of the VCCR 1963 expressly qualifies the consular officials' freedom to communicate (under Article 36(1)(a)) and converse and correspond (under Article 36(1)(c)) in such a way as to ensure that these rights are exercised in conformity with the domestic law of the receiving State (i.e. Pakistan).

90. For the reasons explained above, consular officials could not have been intended to be provided with an untrammelled and unqualified right of access in such circumstances, where to do so would carry or give rise to a risk of damage to the national security interests of the receiving State that constitute a grave and dangerous threat.

91. In this regard, the Court's attention is respectfully drawn to India's failure to provide any response or otherwise constructively engage with the request for mutual legal assistance sent to India on 23rd January 2017. The request sought India's assistance in the criminal investigation prompted by Commander Jadhav's capture and confession. Whilst it is wrong for India to assert that Pakistan was making consular access (even if available) conditional upon providing assistance pursuant to the said request, India's obligation to assist is beyond doubt (see, for example, UNSC 1373). It would be curious if a State is entitled to disregard its obligation to provide assistance in the context of a terrorism investigation involving its national and potentially the State itself and yet demand access to the said individual. This cannot have been intended pursuant to the VCCR 1963.

92. Finally, Article 73 of the VCCR 1963, which concerns the relationship between the VCCR 1963 and other international agreements states that the provisions of the VCCR 1963 shall not affect other international agreements in force as between States Parties to them. India itself has confirmed, in its Application (page 25/paragraph 45), the existence and operation of the 2008 Agreement between these two States. The 2008 Agreement was

plainly considered necessary by the parties to it in light of their relationship which has, at times, regrettably, been fractious. The 2008 Agreement has been in operation for a number of years. At the very least, the 2008 Agreement supplements and/or amplifies the provisions of the VCCR 1963 insofar as those provisions apply as between these States.

93. Article (vi) of the 2008 Agreement provides that: "*In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits*". In Pakistan's submission, this is completely consistent with the VCCR 1963 as reviewed above.

VI. CONCLUSION

94. Accordingly, for the reasons stated above, it is respectfully submitted that India's Request, and its Application, must be rejected.

KHAWAR QURESHI QC

15TH MAY 2017

Annex 1 – Pakistan's request for mutual legal assistance dated 23rd January 2017

Annex 2 – Summary Schedule of Cases referred to at paragraph 13 above

Annex 5

Corrigé
Corrected

CR 2017/5

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2017

Public sitting

held on Monday 15 May 2017, at 10 a.m., at the Peace Palace,

President Abraham presiding,

***in the* Jadhav Case**
(India *v.* Pakistan)

VERBATIM RECORD

ANNÉE 2017

Audience publique

tenue le lundi 15 mai 2017, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

***en l'affaire* Jadhav**
(Inde c. Pakistan)

COMPTE RENDU

Present: President Abraham

Judges Owada
Cançado Trindade
Xue
Donoghue
Gaja
Sebutinde
Bhandari
Robinson
Crawford
Gevorgian

Registrar Couvreur

Présents :	M.	Abraham, président
	MM.	Owada
		Cançado Trindade
	Mmes	Xue
		Donoghue
	M.	Gaja
	Mme	Sebutinde
	MM.	Bhandari
		Robinson
		Crawford
		Gevorgian, juges
	M.	Couvreur, greffier

The Government of the Republic of India is represented by:

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as Agent;

Dr. V. D. Sharma, Joint Secretary, Ministry of External Affairs,

as Co-Agent;

Mr. Harish Salve,

As Counsel;

Ms Kajal Bhat, First Secretary, Embassy of the Republic of India in the Kingdom of the Netherlands,

As Adviser;

Ms Chetna N. Rai,

As Junior Counsel.

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comme agent ;

M. V. D. Sharma, *Joint Secretary*, ministère des affaires étrangères,

comme coagent ;

M. Harish Salve,

comme conseil ;

Mme Kajal Bhat, premier secrétaire, ambassade de la République de l'Inde au Royaume des Pays-Bas,

comme conseiller ;

Mme Chetna N. Rai,

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Dr. Mohammad Faisal, Director-General (South Asia & SAARC),

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Mr. Asad Rahim Khan,

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Mr. Joseph Dyke,

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Le Gouvernment de la République islamique du Pakistan est représenté par :

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M. Mohammad Faisal, directeur général (Asie du Sud et Association sud-asiatique pour la coopération régionale),

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M. Syed Faraz Hussain Zaidi, conseiller à l'ambassade de la République islamique du Pakistan aux Pays-Bas,

comme conseiller ;

M. Khawar Qureshi, Q.C.,

comme conseil ;

M Asad Rahim Khan,

comme conseil auxiliaire ;

M. Joseph Dyke,

comme assistant juridique.

The PRESIDENT: Veuillez vous asseoir. L'audience est ouverte. The Court meets today under Article 74, paragraph 3, of the Rules of Court, to hear the observations of the Parties on the Request for the indication of provisional measures submitted by the Republic of India in the *Jadhav Case (India* v. *Pakistan).*

For reasons which they have duly conveyed to me, the Vice-President and Judges Tomka, Bennouna and Greenwood are unable to be present on the Bench today.

India's Application, dated 8 May 2017, instituting proceedings against the Islamic Republic of Pakistan, concerns alleged violations of the Vienna Convention on Consular Relations "in the matter of the detention and trial of an Indian national" sentenced to death in Pakistan, Mr. Kulbhushan Jadhav. To found the jurisdiction of the Court, India relies on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention.

I shall now ask the Registrar to read out the decision requested of the Court, as formulated in the Application of India.

The REGISTRAR:

"In the circumstances, India seeks the following reliefs:

(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) [r]estraining 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) [i]f 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."

The PRESIDENT: On the same day as the filing of the Application, India submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court. In that Request, India states that the alleged violation of the Vienna Convention by Pakistan has prevented India from exercising its rights under the Convention and has deprived Mr. Jadhav from the protection accorded under the Convention. The Applicant also submits that Mr. Jadhav "will be subjected to execution unless the Court indicates provisional measures directing the Government of Pakistan to take all measures necessary to ensure that he is not executed until th[e] Court's decision on the merits" of the case. India points out that Mr. Jadhav's execution would cause irreparable prejudice to the rights it claims. India further indicates that the protection of its rights is a matter of urgency as "[w]ithout the provisional measures requested, Pakistan will execute Mr. Kulbhushan Sudhir Jadhav before th[e] Court can consider the merits of India's claims and India will forever be deprived of the opportunity to vindicate its rights".

I shall now ask the Registrar to read out the passage from the Request specifying the provisional measures which the Government of India is asking the Court to indicate.

The REGISTRAR:

> "[India] respectfully request[s] that, pending final judgment in this case, the Court indicate:
>
> *(a)* [t]hat the Government of the Islamic Republic of Pakistan take all measures necessary to ensure that Mr. Kulbhushan Sudhir Jadhav is not executed;
>
> *(b)* [t]hat 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)* [t]hat 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 of any decision th[e] Court may render on the merits of the case".

The PRESIDENT: On 8 May 2017, immediately after the filing of the Application and Request for the indication of provisional measures, the Registrar, in accordance with Article 40, paragraph 2, of the Statute and Articles 38, paragraph 4, and 73, paragraph 2, of the Rules of Court,

transmitted certified copies thereof to the Government of the Islamic Republic of Pakistan. He also notified the Secretary-General of the United Nations of the filing of these documents by India.

By a letter dated 9 May 2017, referring to Article 74, paragraph 4, of the Rules of Court, in my capacity as President of the Court, I called upon the Islamic Republic of Pakistan "to act in such a way as will enable any Order the Court may make on th[e] Request [for the indication of provisional measures] to have its appropriate effects".

According to Article 74 of the Rules of Court, a Request for the indication of provisional measures shall have priority over all other cases. Referring to "the extreme gravity and immediacy of the threat", India asked the Court to render an Order on its Request without a hearing. The Court decided to hold a hearing in order to allow both Parties to present their arguments. Given the circumstances, the Court decided that the oral proceedings contemplated in Article 74, paragraph 3, of the Rules of Court should be brief and held on rather short notice, on 15 May 2017, today.

I note the presence before the Court of the Agents and Counsel of the two Parties. The Court will hear India, which has submitted the Request, this morning until 11.30 a.m. It will hear Pakistan this afternoon from 3 to 4.30 p.m. The hearings on India's Request for the indication ***of*** provisional measures will be closed at the conclusion of this afternoon's session.

For the purposes of these oral arguments, each of the Parties will have available to it a full ninety minute sitting. India may, if required, avail itself of a short extension beyond 11.30 a.m. this morning, in view of the time taken up by the opening part of these oral proceedings. The Parties are of course not required to use the full amount of time allotted to them.

Before giving the floor to the Agent of the Republic of India, Dr. Deepak Mittal, I wish to draw attention to Practice Direction XI, which states, *inter alia*, that Parties should

> "[i]n their oral pleadings on requests for provisional measures . . . limit themselves to what is relevant to the criteria for the indication of provisional measures as stipulated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose."

I now call upon Dr. Deepak Mittal, Agent of the Republic of India.

Mr. MITTAL:

Introductory Statement with brief facts of the case

Introduction

1. Mr. President, and Honourable Members of the Court, it is indeed a great honour for me to appear today before this august Court on behalf of the Republic of India as India's Agent, at the oral hearing on India's request for the indication of provisional measures in the proceedings instituted by India against the Islamic Republic of Pakistan on 8 May 2017. This case concerns an Indian national, Mr. Kulbhushan Sudhir Jadhav (hereinafter "Mr. Jadhav"), who has been awarded death sentence by a military court in Pakistan in egregious violation of the rights of consular access guaranteed by Article 36, paragraph 1, of the Vienna Convention on Consular Relations of 1963 (hereinafter "Vienna Convention").

2. At the outset, I would like to thank the Court and the President for the timely decision and action to exercise the powers conferred upon him under Article 74, paragraph 4, of the Rules of Court and send an urgent communication on 9 May 2017 to the Prime Minister of the Islamic Republic of Pakistan calling upon the Government of Pakistan to act in such a way as will enable any order the Court may make on India's request for the indication of provisional measures to have its appropriate effects.

3. Mr. President, Members of the Court, the fact that the hearing is taking place today, within seven days of the institution of proceedings by India, is testament to the recognition of the urgency by the Court in the case of an innocent Indian national Mr. Jadhav who, incarcerated in Pakistan for more than a year on concocted charges, deprived of his rights and protection accorded under the Vienna Convention, being held incommunicado without contact with his family and the home State, is facing imminent execution. All notions of human rights now considered by the global community as basic to behaviour in civilized nations, have been thrown to the winds.

4. By this timely action by the President and the Court, this institution has provided succour not just to India and to its beleaguered national and his family, but also has given hope to 1.25 billion people of India and hope to the old mother and father of the innocent Indian national

that justice would be meted out to their innocent son by this highest seat of justice and a precious life will be saved.

5. Today, accompanied by my colleagues, I appear before the Court, on behalf of the Republic of India, with the hope that the Court would indicate provisional measures so that the death sentence, which has been awarded to Mr. Jadhav through a farcical trial in a Pakistan military court, in violation of the rights guaranteed to Mr. Jadhav and India under Article 36, paragraph 1, of the Vienna Convention, would be set aside and not carried out pending final decision of the Court on India's Application.

6. I take this opportunity to introduce the Members of my delegation. They are:

(i) Dr. V.D. Sharma, Co-Agent for the Republic of India;

(ii) Mr. Harish Salve, Counsel;

(iii) Ms Kajal Bhat, Adviser;

(iv) Ms Chetna N. Rai, Junior Counsel.

Brief facts

7. I would now present brief facts of the case, which would be further elaborated upon during the hearing.

8. India was informed on 25 March 2016 that an Indian national was allegedly arrested on 3 March 2016. India, on that very day, sought consular access to the said individual. The request did not evoke any response. On 30 March 2016 India sent a reminder reiterating the request for consular access at the earliest. Despite a number of such reminders[1] for consular access sent by India, there has been no response and all these requests fell on deaf ears.

9. Meanwhile, on 23 January 2017, India received from Pakistan a request for assistance[2] in the investigation process. Subsequently, on 21 March 2017, almost a year after India's first request for consular access, Pakistan formally communicated[3] to India that consular access to Mr. Jadhav "shall be considered in the light of Indian side's response to Pakistan's request for assistance in

[1]Annex 1 to India's Application, tab 1 of judges' folder (Notes Verbale issued by India).

[2]Annex 2 to India's Application, tab 2 of judges' folder.

[3]Annex 3 to India's Application, tab 3 of judges' folder.

investigation process . . .". India responded[4] that consular access would be an essential prerequisite in order to verify the facts and understand the circumstances of Mr. Jadhav's presence in Pakistan.

10. On 10 April 2017, India learnt from press reports[5] that Pakistan proceeded to have a military trial against Mr. Jadhav and he was sentenced to death purportedly on the basis of a confessional statement and that this sentence was confirmed by the Chief of the Army Staff of Pakistan. Ironically, later in the day (10 April 2017), after the death sentence had been awarded and confirmed, India received a Note Verbale[6] from Pakistan reiterating the condition for considering consular access in return for India providing assistance in the investigation process. India responded[7] the same day highlighting that the offer of conditional grant of consular access after the award and confirmation of death sentence reflected the farcical nature of the proceedings and so called trial by a Pakistan military court against Mr. Jadhav.

11. Despite request[8] by India, Pakistan has not provided any information or documents, including the charge-sheet, proceedings of the Court of Inquiry, the summary of evidence, the judgment. Request for appointment of a defence lawyer for Mr. Jadhav has also not elicited any response.

12. The mother of Mr. Jadhav, even in the absence of any document, submitted an appeal to the Court of Appeal and a petition to the Federal Government of Pakistan. This appeal was filed even though it was unable to address any of the issues that may have been put against Mr. Jadhav in the judgment and order of conviction. It was an act of desperation by grieving parents.

13. The parents of Mr. Jadhav applied for visa on 25 April 2017 to travel to Pakistan. There has been no response.

14. The Minister of External Affairs of India has written[9] to the Advisor to the Prime Minister of Pakistan on Foreign Affairs on 27 April 2017 for his personal intervention in the matter, but there has been no response.

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[4]Annex 1 to India's Application, tab 1 of judges' folder (Note Verbale dated 31 March 2017).

[5]Annex 4 to India's Application, tab 4 of judges' folder.

[6]Annex 5 to India's Application, tab 5 of judges' folder.

[7]Annex 1 to India's Application, tab 1 of judges' folder (Note Verbale dated 10 April 2017).

[8]Annex 1 to India's Application, tab 1 of judges' folder (Note Verbale dated 19 April 2017).

[9]Annex 8 to India's Application, tab 8 of judges' folder.

15. All that we know is what we have seen in the media in Pakistan. The Pakistan officials have been reported as having said clearly that Mr. Jadhav would not be provided consular access.

16. Mr. President, Members of the Court, India believes that the farcical nature of the proceedings and unjust trial by a Pakistan military court, in egregious violation of the rights of consular access under the Vienna Convention, has led to serious miscarriage of justice. It is clear that Mr. Jadhav has been denied the right to be defended by a legal counsel of his choice. He has not been informed of his right to seek consular access. His conviction and death sentence appears to be based upon "confession" taken in captivity, without proper legal representation and in the absence of consular access sought by India.

17. If we closely follow the reports in the media in Pakistan, we can get the sense that an increasing number of death sentences awarded by the military courts in Pakistan have been carried out after 10 April 2017, that is when the death sentence to Mr. Jadhav was confirmed. In fact, over the past one month, 18 such executions have been reported through press releases[10] issued by Inter Services Public Relations — the military spokesman — of Pakistan. In such circumstances, including where there is no response to the requests made through diplomatic channels, there is an immediate threat that the death sentence against Mr. Jadhav may be carried out even before India has the opportunity to be heard and the Court has the chance to consider the merits of the case, and thus, causing irreparable prejudice to the rights of India and Mr. Jadhav.

Request

18. Mr. President and Members of the Court, the Republic of India has invoked the jurisdiction of the Court and sought provisional measures.

19. My colleagues will elaborate further on this.

20. I would now request the Court to invite Dr. V.D. Sharma, Co-Agent for the Republic of India to make his submissions.

Thank you.

[10]Tab 13 of judges' folder.

Le PRESIDENT: Merci, Monsieur. Avant de donner la parole au coagent de la République de l'Inde, M. Sharma, je demanderai aux plaideurs de bien vouloir ne pas parler trop vite, de manière à permettre aux interprètes de faire leur travail de traduction dans l'autre langue officielle de la Cour. Je les en remercie d'avance. Monsieur Sharma, coagent de la République de l'Inde, vous avez la parole.

Mr. SHARMA:

1. Mr. President, esteemed Members of the Court, it is a great honour for me to appear before this Court as Co-Agent of the Republic of India in the case concerning the violation by the Islamic Republic of Pakistan of the Vienna Convention on Consular Relations, 1963.

2. I propose to devote my observations to the key issues which would be addressed in elaboration by my colleague Mr. Harish Salve concerning violation by Pakistan of the rules of international law, which led to the dispute at hand; justification for the grant of urgent provisional measures; and this Court's jurisdiction.

3. Now, Mr. President, I draw your attention to paragraph 4 of my statement in front of you.

4. Mr. President, Members of the Court, the Convention sets up, among other things, standards of conduct concerning consular relations between States, with the view to contribute to the development of friendly relations among them. The provisions under Article 36 of the Convention specifically confer rights of consular access and communication upon the sending States and their nationals, who may be arrested, detained or put in prison in the receiving State.

5. These provisions were interpreted by this Court in the *LaGrand* case *(Germany* v. *United States) (Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*), and reiterated in the *Avena* case by this Court; what this Court said in *LaGrand* and described Article 36, paragraph 1, as "an interrelated regime designed to facilitate the implementation of the system of consular protection" and set out again the scheme of Article 36.

6. Mr. President, Members of the Court, Article 36, which has been recognized as a right of the national of a State and also the right of the State itself, is a vital safeguard that ensures a modicum of fairness in the administration of the justice system of a State in its application to

nationals of another State. Its provisions are sacrosanct, and its violation entails serious consequences.

7. Mr. President, Members of the Court, Pakistan failed to comply with all its obligations under Article 36. It denied India its right to consular access to its national. India has been seeking consular access incessantly since March 2016 when India was informed of the detention of Mr. Kulbhushan Sudhir Jadhav by Pakistan.

Jurisdiction of the Court

8. Touching upon the jurisdiction of this Court in the present case, the attention is drawn to Article 36 (1) of the Statute of the Court which confers upon the Court the jurisdiction to decide "all matters specially provided for . . . in treaties and conventions in force". Therefore, India relies upon the jurisdiction of this Court under paragraph 1 of Article 36 of the Statute of this Court. India asserts that the declarations of Pakistan and India made under paragraph 2 of Article 36 of the Statute have no relevance to this case.

9. India and Pakistan are members of the United Nations and thus *ipso facto* parties to the Statute of the International Court of Justice. They are also a party to the Vienna Convention and its Optional Protocol concerning Compulsory Settlement of Disputes.

10. Article I of the Optional Protocol provides that "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".

11. I now Mr. President and Members of the Court draw your attention to paragraph 12 of my statement.

12. India and Pakistan are both Parties to the Consular Convention and the Optional Protocol and thus this dispute lies within the jurisdiction of this Court and has been brought accordingly before the Court by India.

2008 Bilateral Agreement on Consular Access

13. Now, Mr. President, I draw your kind attention to paragraph 14 of my statement.

14. There is a bilateral agreement between India and Pakistan that seeks to supplement in some respects Article 36 of the Vienna Convention. India does not seek to rely upon this Bilateral Agreement.

15. In any event, Mr. President, Members of the Court, the Bilateral Agreement is irrelevant to the present proceedings since, it can only supplement the Vienna Convention. It cannot modify the Vienna Convention, nor does its text or content suggest that purports to dilute Article 36 of the Vienna Convention. I mention this only because in one of their press communiqués, Pakistan alluded to this Bilateral Agreement.

16. Moreover, this 2008 Agreement, Mr. President, is not registered with the United Nations under Article 102 of the Charter, and therefore under paragraph 2 of Article 102 this Agreement cannot be invoked before any organ of the United Nations. Therefore Pakistan cannot invoke this Agreement before this Court, undoubtedly, this Court being the principal judicial organ of the United Nations.

17. Thank you Mr. President. May I now request you to invite Mr. Harish Salve, who will present India's observations in detail.

Le PRESIDENT: Merci, je donne la parole à M. Harish Salve, conseil pour la République de l'Inde.

Mr. SALVE:

1. Honourable President, esteemed Members of this Court, it is once again an honour for me to appear before this Court to represent my country as its counsel. I express, on behalf of my country, gratitude for having fixed this hearing at such a short notice. I want to commence by assuring this Court that the situation in which we find ourselves is grave, it is urgent, and it is for that reason that we have sought the indulgence of this Court for a hearing for the indication of provisional measures.

2. I shall, Mr. President and esteemed Members of the Court, first give you a brief overview of the facts, and then address you on the following four issues:

(i) the jurisprudence of this Court as to the principles for indication of provisional measures;

(ii) the prima facie case as to the jurisdiction of this Court to entertain India's Application;

(iii) the prima facie case of violation of the Vienna Convention on Consular Relations 1963; and, finally, I would state,

(iv) the nature of the provisional measures that India seeks.

Overview

3. The Republic of India — I shall be referring to it as "India" — has moved this Application under Article 40 of the Statute of this Court seeking reliefs from this Court to remedy the egregious violations of the Vienna Convention on Consular Relations, 1963 — I shall be referring to it as the "Vienna Convention". It is against the Islamic Republic of Pakistan, who I shall be referring to as "Pakistan".

4. An Indian national, Mr. Kulbhushan Sudhir Jadhav — whom I shall refer to as "Jadhav" — was allegedly "arrested"[11] on 3 March 2016 and has been in custody. He was tried by a military court in Pakistan, and has been convicted and sentenced to death, which sentence was confirmed on 10 April 2017.

5. It is not in dispute that India has made innumerable requests since March 2016 for consular access. Pakistan, admittedly, did not provide consular access. India claims that the rights of the individual and the rights of India, under Article 36 of the Vienna Convention have been violated all along from the time of the alleged "arrest" of Jadhav.

6. Pakistan did not inform the consular post of India about the arrest of Jadhav at the time of the alleged arrest, and India received information of this arrest only on 25 March 2016. Despite India's requests, Pakistan has denied consular officers the right to visit Jadhav. They have refused to communicate, to the consular officers, the charges against Jadhav and the evidence and other material adduced against him in the so-called trial so as to enable them to arrange for his legal representation. The denial of access to Jadhav has resulted in consular officers of India being unable to arrange for the legal representation of Jadhav, and to assure themselves also of his safety and his well-being in custody.

7. In a press briefing of 17 April 2017, the Director General of Inter Services Public Relations allegedly asserted that Jadhav was not entitled to consular access. We have a copy of the

[11] India's position is that he was kidnapped from Iran.

press report which we annexed to the Application as Annex 7[12], which refers to this briefing but not to this assertion. We have now another press report in a vernacular newspaper "Jehan Pakistan"[13] of 18 April 2017 which evidences this assertion.

8. India, Mr. President and esteemed Members of the Court, has applied to this Court for redress of its grievances relating to these violations of the Vienna Convention, and by way of relief has sought measures that would constitute adequate *restitutio in integrum*.

9. Until such time as the Application filed by India can be adjudicated upon by this Court, India has also sought indication of provisional measures that would ensure that the sentence is not executed. If the provisional measures are not granted, the Application would be rendered infructuous, and it would bring about a situation that the Court may find itself unable to grant effective relief as sought by India.

Principles for the grant of provisional measures

10. I now address you, ***Mr. President and esteemed Members of the Court***, on the principles ***for*** the grant of provisional measures. Article 41 (1) of the Statute of this Court vests the Court with the "power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party" pending a final judgment in the case. In its Judgment in a case commonly referred to as the *LaGrand* case, this Court clarified that orders of provisional measures pursuant to Article 41 establish binding obligations[14].

11. The Court formulated the threshold for provisional measures in *Costa Rica* v. *Nicaragua* in terms of ~~***what I call***~~ the *plausibility* standard. This Court said that provisional measures would be granted "if it is satisfied that the rights asserted by a party are at least plausible"[15]. Finding that the rights claimed by Costa Rica were plausible, this Court went on to observe:

> "Whereas, at this stage of the proceedings, the Court cannot settle the Parties' claims to sovereignty over the disputed territory and is not called upon to determine once and for all whether the rights which Costa Rica wishes to see respected exist, or whether those which Nicaragua considers itself to possess exist; whereas, for the

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[12]Application of India, Ann. 7 and judges' folder, tab 7.

[13]Judges' folder, tab 14.

[14]*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109.

[15]*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 6, para. 53.

purposes of considering the Request for the indication of provisional measures, the Court needs only to decide whether the rights claimed by the Applicant on the merits, and for which it is seeking protection, are plausible"[16].

12. The standard of plausibility was reiterated in *Belgium* v. *Senegal* where the Court observed that:

"Whereas at this stage of the proceedings the Court does not need to establish definitely the existence of the rights claimed by Belgium or to consider Belgium's capacity to assert such rights before the Court; and whereas the rights asserted by Belgium, being grounded in a possible interpretation of the Convention against Torture, therefore appear to be plausible"[17].

13. There have been three instances in which this Court has entertained applications arising from allegations of breach of Article 36 of the Vienna Convention.

14. The case of *Paraguay* v. *United States of America*, which is the first of the cases relating to the violation of the Vienna Convention, the request of Paraguay for indication of provisional measures was decided by this Court on 9 April 1998. Paraguay instituted proceedings against the United States of America on 3 April 1998[18] on allegations of violations of the Vienna Convention, and sought indication of provisional measures by way of an order by the Court, that the Government of the United States take measures necessary to ensure that the Paraguay national in relation to whom the proceedings were brought be not executed.

15. This Court enunciated the standards by which such a request for provisional measures would be decided. It observed that

"on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but whereas it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded."[19]

This Court further indicated that the purpose of the power to indicate provisional measures is

"to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the

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[16] *Ibid.*, para. 57.

[17] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 152, para. 60.

[18] Case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 251, para. 6.

[19] *Ibid*, para. 23.

> Court to belong either to the Applicant, or to the Respondent, and whereas such measures are only justified if there is urgency"[20].

The Court found that the circumstances of the case required it to indicate as a matter of urgency, provisional measures as provided for by Article 41 of its Statute.

16. The second case relating to violation of the Vienna Convention was brought by Germany against the United States of America (known and cited as the *LaGrand* case). On 3 March 1999, this Court indicated provisional measures pursuant to an Application filed by Germany. This Court reiterated the principle that generally interim measures would not be ordered in the absence of "irreparable prejudice . . . to rights which are the *subject of dispute* . . ."[21]. The Court held that the execution of the German National Mr. Walter LaGrand "would cause irreparable harm to the rights claimed by Germany in this particular case"[22]. This Court also observed that "measures indicated by the Court for a stay of execution would necessarily be provisional in nature and would not in any way pre-judge findings the Court might make on the merits"[23]. The Court indicated that United States of America should take all measures to ensure that Mr. Walter LaGrand is not executed pending the final decision in the proceedings before the Court.

17. And the third case relating to violation of the Vienna Convention was brought by Mexico against the United States of America — known as the *Avena* case. Mexico sought relief in relation to 54 Mexican nationals who were on death row in the United States, and in respect of whom Mexico asserted that they were arrested, detained, tried, convicted and sentenced to death by competent authorities of the United States in proceedings which did not comply with Article 36 of the Vienna Convention. The relief that was sought by Mexico was in the nature of *restitutio in integrum*.

18. The application was filed by Mexico on 9 January 2003, for indication of provisional measures, and the apprehension on which these measures were sought was that the three nationals

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[20] *Ibid.*, para. 35.

[21] *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 23.

[22] *Ibid.*, para 24.

[23] *Ibid.*, para 27.

could be executed *within the next six months*, and many others before the end of 2003, and one of them by 14 February 2003[24].

19. This Court said that it "'must be concerned to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent' . . . without being obliged at this stage of the proceedings to rule on those rights"[25].

20. The Court added that its power to indicate provisional measures is "intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings" (*ibid.*, pp.14-15, para. 22)"[26], and that provisional measures are indicated "'pending the final decision' of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given". The Court cited its earlier order in *Finland* v. *Denmark*[27].

21. This Court reiterated that for indication of provisional measures, the Court did not need to satisfy itself, before deciding whether to indicate such measures, that it had jurisdiction on the merits of the case. The test applied by the Court was the existence of a prima facie basis on which the jurisdiction might be founded. The Court noted the position of both parties, and observed that

> "whereas there is thus a dispute between the Parties concerning the rights of Mexico and of its nationals regarding the remedies that must be provided in the event of a failure by the United States to comply with its obligations under Article 36, paragraph 1, of the Vienna Convention; whereas that dispute belongs to the merits and cannot be settled at this stage of the proceedings . . ."[28].

22. The Court reiterated

> "whereas the Court, when considering a request for the indication of provisional measures, 'must be concerned to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent' (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria),*

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[24] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 81, para. 11.

[25] *Ibid.*, para. 48

[26] *Ibid.*, para. 49

[27] *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 17, para. 23.

[28] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 88, para. 46.

> *Provisional Measures, Order of 15 March 1996, ICJ Reports 1996 (I)*, p. 22, para. 35) without being obliged at this stage of the proceedings to rule on those rights"[29].

23. Rejecting the suggestion that there was no urgency, as contended for by the United States, for no dates of execution had been set, and that there were rules and time-limits governing the granting of clemency, this Court found that "the fact that no such dates have been fixed in any of these cases before the Court is not per se a circumstance that should preclude the Court from indicating provisional measures"[30]. The Court found that three of the nationals were

> "at risk of execution in the coming months, or possibly even weeks; whereas the execution would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico; and whereas the Court accordingly concludes that the circumstances require that it indicate provisional measures to preserve those rights . . ."[31].

In respect of the others who were on death row but not in the same position as the three persons identified in paragraph 55 quoted above, this Court said that "The Court may, if appropriate, indicate provisional measures under Article 41 of the Statute in respect of those individuals before it renders final judgement in this case"[32] and the Court said that it would decide the case with expedition.

24. This Court in paragraph 55 of the *Avena* used the expression "coming months" which suggests to me that the Court felt that an impending execution in the next six months, which was the period indicated by Mexico[33], created a situation of sufficient urgency that justifies indication of provisional measures.

Urgency

25. And now I move to, ***Mr. President and esteemed Members of the Court***, urgency in the present case. It is incontrovertible that considering the state of affairs in relation to Jadhav's arrest and trial, and in the face of the communication by Pakistan to this Court on 12 May 2017[34], it is

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[29] *Ibid*., para. 48.

[30] *Ibid*., para. 54.

[31] *Ibid*., para. 55.

[32] *Ibid*., para. 56.

[33] Noticed in paragraph 11 of the Judgment.

[34] Judges' folder, tab 12.

imperative that to prevent irreparable prejudice being caused to India and Jadhav, provisional measures would need to be indicated by the Court.

26. The communication of 12 May purports to suggest that there are multiple legal avenues available to Jadhav, and presumably the sentence will not be executed during this period. Implicit in this**,** is the acceptance of the reality that in case of a death sentence, the execution of the sentence cannot obviously be allowed during such time that this Court is seised of an application for redress of violations of the Vienna Convention. The communication, while suggesting the availability of "remedies", fails to provide a clear assurance that until this Court is in seisin of this Application, the sentence will not be executed. This ambivalence is, Mr. President and esteemed Members of the Court, without more, a good reason for indication of provisional measures.

27. The communication aforementioned refers to the criminal appeal. It does not clarify whether Jadhav has indeed filed such an appeal. Jadhav's mother has filed an appeal that was transmitted through diplomatic channels on 26 April 2017[35]. The appeal has been filed as a measure of desperation, without knowing the charges against Jadhav, the evidence against him which has been relied upon to convict him, and without having access even to the judgment and order of conviction and sentence. Visa applications filed by his parents on 25 April 2017 are still pending. The information placed in public domain by Pakistan suggests that the Court of Appeal had already been constituted. It is imminent that the mother's appeal, for whatever it is worth, would be disposed of shortly. The communication of 12 May 2017 does not indicate any timeline in relation to the disposal of the appeal.

28. The Communication then goes on to mention the existence of provisions under which Jadhav may seek clemency, first from the Chief of Army Staff of Pakistan and then from the President of the Islamic Republic of Pakistan. It is not known if Jadhav will seek clemency. Even if he does, its result is, it can fairly be assumed a foregone conclusion. It is, I submit ~~***Mr. Chairman***~~, Mr. President and esteemed Members of the Court, I submit with all seriousness, it is facetious, on the one hand to allege in public pronouncements including at the level of the Advisor to the Prime

[35]Application of India, Annex 1 and judges' folder, tab 1.

Minister, that Jadhav has been convicted for serious offences against the State, and on the other hand to point out remedies by way of seeking clemency, in its communication to this Court.

29. In its communication of 12 May 2017, Pakistan has not suggested that there is any inaccuracy in Annex 6 filed by India. The statement of the Advisor to the Prime Minister refers to Jadhav's right to file "a mercy petition"[36], as he calls it but in the same breath makes observations that merit reproduction verbatim:

> "let me re-emphasise two points: first, all political parties are unanimous that the award of death penalty after due process and overwhelming evidence to a foreign spy, who was not only carrying out subversive activities in Pakistan but actually promoting terrorism, is the correct decision. Second, the whole nation is solidly united against any threat to Pakistan's security"[37].

30. India has also annexed a press report of 18 April 2017 setting out an interview given by the Director General of Inter Services Public Relations — referred to as a military spokesman. As per this press report, the military spokesman said that the case was moving towards the appeal process, and would be heard by a two-star general, and further that "[h]e, however, did not see any chance of the verdict being overturned. 'The verdict is based on incontrovertible evidence and the Army will fully defend it,' he said, recalling the decision at the corps commanders' conference, that there could be no compromise on anti-state acts."[38]

31. India has also enclosed, by way of Annex 9, the record of press briefing by the spokesperson of the Ministry of Foreign Affairs, on 20 April 2017. Responding to a question, the spokesperson made baseless, contrived and propaganda driven allegations against Jadhav and India. He said,

> "Commander Jadhav, who is responsible for espionage, sabotage and terrorism in Pakistan, was tried according to the law of the land, in a fully transparent manner while preserving his rights, as per the Constitution of Pakistan. 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."[39]

32. India refutes these allegations. India's position has been and continues to be that Jadhav was kidnapped from Iran and appears to have been framed based upon a confession extracted from

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[36]The expression used in the communiqué at Annex 6 of the Application of India and judges' folder, tab 6.

[37]Application of India, Annex 6 and judges' folder tab 6.

[38]Application of India, Annex 7 and judges' folder, tab 7.

[39]Application of India, Annex 9 and judges' folder, tab 9.

him when he was in military custody. The allegations of Pakistan lack credibility, particularly in the absence of consular access being provided by which India would have been able to understand the circumstances of Jadhav's presence in Pakistan, secure first-hand information about Jadhav while in military custody, and secure information about the charges against him, the evidence against him, the order of conviction and sentence. India could also have taken measures to ensure appropriate legal representation for him.

33. In any event, in a case of egregious violations of the Vienna Convention, the possibility of filing applications for clemency do not present a sufficient means of review and reconsideration.

34. However, the allegations being made by Pakistan establish that the suggestion in the communication of 12 May 2017 about the availability of a remedy by way of "clemency" is not worthy of credence for the reason that any such process would be a chimera.

35. Finally, it cannot be assumed that Jadhav will wait until the 60th day to seek clemency from the Chief of Army Staff, and then up to the 90th day after the decision on the prior petition, to seek clemency from the President of the Islamic Republic of Pakistan. It is not known whether Jadhav will at all seek clemency, in the prevailing circumstances. Secondly, if he is so minded to seek clemency, it cannot be assumed that he will wait until the last day available. Thus, even if Jadhav does decide to go this route, the period could be much lesser than 90 days plus 60 days as is sought to be suggested in the communication.

36. It bears emphasis that Pakistan does not suggest in the communication of 12 May 2017 that there is any judicial remedy available to Jadhav once ***the*** appeal is decided. India's case and its Application — as I will explain later — is that throughout the period of his incarceration in Pakistan and in the course of his trial, Jadhav has been denied consular access. India seeks restitution by way of annulment of the verdict, in addition to other reliefs. After the appeal there is no judicial remedy available for Jadhav in which he could assail the findings and the conclusions of the military court. In those circumstances, for the indication of provisional measures, what is relevant to assess the urgency, is the potential lapse of time inevitable in pursuing steps in the criminal justice process ***system***. The availability of a right to seek ***a*** clemency is not relevant. This is particularly so in the facts and circumstances of the case, where any right to a petition for clemency is illusory.

37. It is, therefore, absolutely imperative that in order to prevent irreparable prejudice, this Court would indicate provisional measures to be in place until such time as India's Application can be heard and decided by this Court.

Prima facie case — jurisdiction of the Court

38. I will now briefly address you, ***Mr. President and esteemed Members of the Court***, on the prima facie case on the jurisdiction of this Court. The standard enounced by the Court in relation to arriving at a prima facie satisfaction as to the existence of jurisdiction, at the stage of deciding upon a request for indication of provisional measures, is that the Court "need not finally satisfy itself, before deciding whether or not to indicate such measures, that it has jurisdiction on the merits of the case, yet it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford the basis on which the jurisdiction ***of the Court might be*** . . . ~~***[is]***~~ founded"[40].

39. The principles are succinctly summarized in the commentary in the leading treatise on *The Statute of the International Court of Justice* edited by Zimmermann[41]. It states that,

> "Since the Icelandic Fisheries cases, the Court's jurisprudence has been constant in requiring that the instrument(s) invoked by the parties conferring jurisdiction 'appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded".[42]

40. The Application filed by India is based on Article 36 of the Vienna Convention[43]. India bases its assertion of the existence of jurisdiction on Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes 1963, which accompanies the Vienna Convention — I shall refer to it as the "Optional Protocol".

41. Article I of the Optional Protocol reads thus:

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[40]*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 87, para. 38; *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 13, para. 13; case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 255, para. 23.

[41]*The Statute Of The International Court of Justice — A Commentary, Second Edition, edited by Zimmerman, Tomuschat, Oellers — Frahm and Tams.*

[42]*The Statute Of The International Court of Justice — A Commentary, Second Edition, edited by Zimmerman, Tomuschat, Oellers — Frahm and Tams*, p. 1039.

[43]The prima facie case on violation of Article 36 of the Vienna Convention is in the next section.

> "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".

42. The language of Article I of the Optional Protocol admits of no ambiguity. The binary requirements for the existence of jurisdiction are:

(a) The existence of disputes that arise out of the interpretation, or the application of the Convention; and

(b) The party that brings an application before the Court raising such a dispute, should be a party to the Optional Protocol.

43. Indisputably, on 8 May 2017 (when India presented its Application) India and Pakistan were, and continue to be, parties to the Vienna Convention on Consular Relations as well as to the Optional Protocol. On 12 May 2017, communication by Pakistan does not suggest to the contrary.

44. India asserts in its Application that Pakistan has not provided consular access to Jadhav all along from the time of his alleged arrest until the present despite repeated entreaties by India. Pakistan offered no explanation in its exchanges with India, as to the reason why it has not provided consular access. Whatever may be the reasons that Pakistan may proffer in defence of its acts and omissions, disputes have arisen between India and Pakistan, when India asserts, and Pakistan presumably would deny, violations of the Vienna Convention. These disputes would relate, if not entirely, substantially to the interpretation of the Vienna Convention and to its application to the facts of the case.

45. India asserts that the Vienna Convention admits of no exceptions. India has not been given a copy of the charges or the verdict, and is therefore unable to comment on the allegations levelled against Jadhav. From the information in public domain, such as the public statements in Annex 6 and Annex 7[44] to India's Application, it appears that the charges were grave and suggestive of acts of terrorism. India refutes these charges. But the merits of the case, Mr. President and esteemed Members of the Court, I remind myself, are not material for these proceedings. What is relevant as a principle of law, is that need for a wholesome compliance with procedural

[44] Judges' folder, tabs 6 and 7.

safeguards is greater where the charges are serious, and the sanction upon conviction is as severe as capital punishment.

46. As this Court said in *Paraguay* v. *United States of America*,

> "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;"[45]

This principle was also reiterated in *Avena* and *LaGrand*[46].

47. It bears repetition that, where the national of another State is accused of acts of terrorism, and which if established carry the sanction of capital punishment, and the trial is by a military court, the need for consular access and the opportunity to arrange for legal representation in the course of the trial, as covenanted in the Vienna Convention, is all the more greater. An Indian national was in military custody, he was made to confess, and then he was tried for offences and awarded death penalty. The prejudice caused by the egregious breach of the Vienna Convention assurances provided for in Article 36 is writ large and does not merit any further elaboration.

48. India asserts that the breach of the Vienna Convention in the facts of the present case, is fatal to the trial of Jadhav. In its communication of 12 May 2017, Pakistan states that it "rejects the contents of the Request and [of] the Application as providing any basis for [this] Court to exercise jurisdiction whether by way of preliminary measures relief, or otherwise"[47].

49. India bases its Application on the jurisdiction of the Court conferred by Article 36, paragraph 1, of the Statute of the Court, and Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes, 1963.

50. The binary conditions required by the Optional Protocol are satisfied. That being so, this Court would have jurisdiction under Article 36, paragraph 1, of the Statute of this Court. India has

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[45]Case Concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248, para. 38.

[46]*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 77, para. 48; *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 9, para. 25.

[47]Judges' folder, tab 12.

thus provided, I submit, sufficient basis for this Court to come to the conclusion, definitely prima facie that it has jurisdiction.

Jurisdiction under Article 36, paragraph 1

51. I now move, ***Mr. President and esteemed Members of the Court***, to addressing you on the jurisdiction of this Court, under Article 36 (1). The compulsory jurisdiction of this Court under Article 36 (1) has three dimensions. Jurisdiction exists:

(a) in respect of all cases which parties refer to it,

(b) in respect of all matters specially provided for in the Charter of the United Nations, or

(c) in respect of all matters specially provided for in treaties and conventions in force.

52. The Optional Protocol specially provides for resolution of disputes relating to the Vienna Convention — its language is mandatory. It provides that all disputes arising out of the interpretation or application of the Convention "*shall lie within the compulsory jurisdiction* of the International Court of Justice".

53. Article 36, paragraph 2, of the Statute of the Court deals with a declaration by party states, of the recognition "as compulsory *ipso facto* and *without special agreement*, in relation to any other state accepting the same obligation". India does not seek to assert jurisdiction for its Application in paragraph 2 of Article 36 of the Statute. Any reservations made in the declaration made under Article 36, paragraph 2, are irrelevant for the present case.

54. The construction of Article 36 is no longer *res integra*. The fact that this Court may have more than one jurisdictional basis is now well recognized, and where there is a multiplicity of agreements, it evidences that "contracting Parties intended to open up new ways of access to the Court rather than to close old ways or allow them to cancel each other . . ."[48].

55. The general principle, where the Court has jurisdiction based on both optional declarations and compulsory jurisdiction clauses in treaties, is that each title is autonomous and ranks equally with the others. The commentary in Robert Kolb's book is illuminating. It says "Where there are several concurrent titles of jurisdiction, they do not cramp or limit each other's

[48] *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, 76, cited in *The Law And Procedure of the International Court of Justice, Fifty Years of Jurisprudence, Vol. II, Hugh Thirlway*, p. 1684.

effects: on the contrary, they complement and reinforce each other on a cumulative basis."[49] It says that the reservations in one title of jurisdiction cannot be transposed into the other. The argument that the "title of jurisdiction resulting from optional declarations has a higher value in the hierarchy than one deriving from a treaty, must be rejected"[50]. The commentary tells us that titles of jurisdiction remain in existence until either modified or terminated, and it cannot be argued that "a more restrictive subsequent optional declaration is evidence of the State's will to submit to the Court's jurisdiction in a more limited way, so that a prior and a more widely-worded compromissory clause must be considered to have undergone a kind of derogation (or vice versa)"[51]. It is for the "parties themselves to choose the titles of jurisdiction they intend to rely on"[52]. Mr. President, and esteemed Members of the Court, India relies on the Vienna Convention, the Optional Protocol, and Article 36 (1).

56. The jurisprudence of this Court also concludes this issue. In *Electricity Company of Sofia and Bulgaria* case, the Belgian Government relied on declarations of Belgium and Bulgaria accepting the compulsory jurisdiction of the Court, as also on the ***Treaty*** of conciliation, arbitration and judicial settlement entered into between Belgium and Bulgaria on 23 June 1931. The Bulgarian Government challenged the jurisdiction of the Court. It was in this case that the Court held that,

> "multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain"[53].

57. In *Nicaragua* v. *Honduras,* Nicaragua instituted proceedings in respect of a dispute concerning the alleged activities of armed bands, said to be operating from Honduras. It founded the jurisdiction of the Court on the American Treaty on Pacific Settlement — known as the "Pact of Bogotá", and also the declarations of the two parties. Honduras resisted jurisdiction on the ground that the dispute was excluded by terms of the Honduran Declaration of 22 May 1986 and claimed that the declaration would apply to the Pact of Bogotá.

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[49]*The International Court of Justice, Robert Kolb, 2013,* p. 583.

[50]*Ibid.,* p. 585.

[51]*Ibid.,* p. 586

[52]*Ibid.,* p. 589

[53]*Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77,* 76.

58. Honduras relied on the language of Article XXXI of the Pact which opened with the words, and I quote, because they are important, "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice . . ."[54] Mr. President and esteemed Members of the Court you will find that no such words are to be found in the Optional Protocol. In the *Honduras* case, on the basis of those words, Honduras argued that the declaration made by it under Article 36, paragraph 2, of the Statute delineated the extent of jurisdiction even under Article XXXI of the Pact. This argument was rejected by the Court finding that the language of Article XXXI made it clear that it did not subject itself to the making of any new declaration to be deposited under Article 36, paragraphs 2 and 4, of the Statute. The Court observed — in paragraph 33 — turning to the Honduran interpretation,

> "the Court may observe at the outset that two possible readings of the relationship between Article XXXI and the Statute have been proposed by the Parties. That Article has been seen either as a treaty provision conferring jurisdiction upon the Court in accordance with Article 36, paragraph 1, of the Statute, or as a collective declaration of acceptance of compulsory jurisdiction under paragraph 2 of that same Article."[55]

59. In that case, the argument by Honduras was based on Article XXXI of the Pact which expressly referred to Article 36 (2). Significantly, the Court recognized that there could be a treaty provision, in which event it confers jurisdiction upon the Court in accordance with Article 36, paragraph 1, of the Statute also. However, while dealing with Article XXXII, the Court noticed that this Article referred to the jurisdiction of the Court under Article 36, paragraph 1 of the Statute.

60. This issue arose once again in *Nicaragua* v. *Columbia*. The Court upheld a challenge to its jurisdiction under the Pact of Bogotá, in respect of disputes settled by the Pact. Nicaragua sought to sustain its complaint in relation to these very disputes under Article 36, paragraph 2 of the Statute. This was rejected by the Court and a challenge to its jurisdiction upheld, on the ground that to the extent that territories were settled under the Pact, there was no legal dispute between the parties.

61. Judge Abraham — as the Honourable President then was — in a separate opinion expressed his view that he found the argument of exclusivity of the Pact convincing. The judgment

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[54]Case Concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p. 69, para. 20.

[55] *Ibid.,* para. 33.

explained that the observations in the judgment of *Electricity Company of Sofia and Bulgaria* were undoubtedly correct as a general rule, but recognized that the general rule, in the words of the judgment "fails to take account of any of the distinctive characteristics of the Pact of Bogota . . ."[56].

62. Thus, there may be distinctive Pacts, and those would be governed by their own terms, and where they recognize the jurisdiction of this Court as a mechanism for dispute resolution, this Court would have the jurisdiction to entertain applications in relation to all such disputes as fall within such Pacts. And this jurisdiction, Mr. President and esteemed Members of the Court I submit, would be found in Article 36, paragraph 1, of the Statute.

63. In the *ICAO Council* case, India moved an application relying upon Article 84 of the Convention on International Civil Aviation, and Article II of the International Air Services Transit Agreement. The jurisdictional clauses of the treaties allowed an appeal to the Court from a decision of the Council. One of the defences raised by Pakistan was that the effect of one of India's reservations to her acceptance of the Court's compulsory jurisdiction under Article 36, paragraph 2, rendered this Court incompetent to entertain this appeal. The Court rejected this objection holding that,

> "the various objections made to the competence of the Court cannot be sustained, whether they are based on the alleged inapplicability of the Treaties as such, or of their jurisdictional clauses. Since therefore the Court is invested with jurisdiction under those clauses and, in consequence (see paragraphs 14-16 above), under Article 36, paragraph 1, and under Article 37, of its Statute, it becomes irrelevant to consider the objections to other possible bases of jurisdiction."[57]

64. The ~~***jurisdiction of the Court in***~~ three cases cited earlier, relating to violations of the Vienna Convention were also entertained as disputes ~~***in the jurisdiction***~~, the jurisdiction in relation to which was founded in Article 36, paragraph 1. In *LaGrand*, the Court proceeded on the footing that the Application filed by the Federal Republic of Germany for violation of the Vienna Convention was based on the jurisdiction of the Court under Article 36, paragraph 1 of the Statute of the Court read with Article 1 of the Optional Protocol. In fact, this position was not challenged by America.

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[56] Case Concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 832, Separate Opinion of Judge Abraham, para. 54.

[57] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 46, para. 25.

65. In *Avena*, this Court noted that Mexico asserted jurisdiction of the Court under Article 36 paragraph 1 of the Statute and Article 1 of the Optional Protocol.

66. The Agreement on Consular Access[58] between India and Pakistan is irrelevant for the present proceedings. Mr. President and esteemed Members of the Court, I say it is irrelevant for ***four*** reasons:

(a) India does not rely upon the Bilateral Agreement on Consular Access [which it entered into with Pakistan on ***21*** May 2008]. This Agreement, as recognized by Article 73 of the Vienna Convention, was with the object of, and I quote the language of the agreement itself, "furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country". Some of the provisions of this Agreement reinforce the obligations of the Vienna Convention. These are the obligations to immediately notify "any arrest, detention or imprisonment of any person of the other country . . ." to the High Commission, and "to expeditiously inform the other of the sentences awarded to the convicted nationals of the other country . . .". India does not rely, and does not need to rely on this Agreement. It bases its claim solely upon the Vienna Convention. India's claim in its Application is *de hors* this Bilateral Agreement.

(b) Article 102 (2) of the United Nations Charter 1945 proscribes invocation of any Agreement, unless it is registered. This Agreement is admittedly not registered[59].

(c) Article 73 of the Vienna Convention recognizes that the Vienna Convention does not affect other international agreements in force. It also, however, expressly does not "preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof".

(d) Article 41 of the Vienna Convention on the Law of Treaties recognizes and ex-postulates the established principle of international law that two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty between themselves, if the possibility of such a modification is provided for by the treaty, or the modification in question is not prohibited by the treaty, and does not relate to a provision, the derogation from which is incompatible with

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[58]Application of India, Ann. 10 and judges' folder, tab 10.

[59]Under Article 92 of the Charter, this Court is the principal judicial organ of the United Nations.

the effective execution of the object and purpose of the treaty as a whole. Mr. President and esteemed Members of the Court, I submit that Article 73 of the Vienna Convention recognizes that there is scope for parties to supplement and amplify the provisions of the Vienna Convention — it does not, certainly does not, countenance a dilution of the principles embodied in the Vienna Convention. But I repeat, we do not rely on this bilateral agreement.

Prima facie case of violation of Vienna Convention

67. I now move onto, ***Mr. President and esteemed Members of the Court***, the next segment of my submission, which is a prima facie case of violation of the Vienna Convention. The facts set out in the Application, and which are supported by the exchanges between India and Pakistan, establish more than just a prima facie violation of the Vienna Convention.

68. On 25 March 2016, India was informed that Jadhav was allegedly arrested on 3 March, when the Foreign Secretary of Pakistan raised the matter with the Indian High Commissioner in Islamabad. On that very day, India sought consular access to Jadhav[60]. On obtaining no response from Pakistan, India sent a reminder on 30 March reiterating its request for consular access.[61] Innumerable requests through formal Notes Verbale and Verbal Demarches, were made to Pakistan between March 2016 and April 2017 for consular access to Jadhav[62]. The requests, however, elicited no response from Pakistan.

69. On 23 January 2017, which was almost a year after India's first request for consular access, India received from Pakistan a request for assistance in investigation of what was described as "FIR No. 6 of 2016."[63] Under the Pakistan Code of Criminal Procedure, the expression "FIR" is used as an acronym for a "First Information Report" which is registered after the police first gets information as to the commission of a crime. This was registered against the Indian national apparently on 8 April 2016. What is significant is that the letter acknowledged that this "FIR" had been registered against *"an Indian national"*. The nationality of Jadhav has never been in doubt.

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[60]Application of India, Annex 1 and judges' folder, tab 1.

[61]Application of India, Annex 1 and judges' folder, tab 1.

[62]Application of India, Annex 1 and judges' folder, tab 1.

[63]Application of India, Annex 2 and judges' folder, tab 2.

70. Thus, the international obligation to allow consular access under Article 36 of the Vienna Convention has admittedly been breached by Pakistan. It is obvious that even the right of Jadhav to seek and obtain consular access had been breached by Pakistan.

71. On 3 February 2017 India protested through a *demarche* against the continued denial of consular access to Jadhav. The letter from Pakistan seeking assistance also established that there was a purported confession by him which was the basis or at least a significant part of the case against him. India raised concerns as to his safety, pointing out that "questions about his treatment in Pakistan's custody continue to mount, given especially his coerced purported confession, and the circumstances of his presence in Pakistan remain unexplained"[64].

72. On 3 March 2017[65], India reminded Pakistan of the various requests.

73. India received another Note Verbale on 21 March 2017 from Pakistan. In this, Pakistan stated that, "the case for the consular access to the Indian national . . . shall be considered, in the light of [the] Indian side's response to Pakistan's request for assistance in investigation process and early dispensation of justice"[66].

74. The foregoing facts of the case including the Note Verbale of 21 March 2017 establishes that Pakistan had been acting in brazen violation of its obligations under the Vienna Convention, as the Convention does not include any exceptions in respect of consular access recognized in Article 36. The linking of assistance in the investigation to the grant of consular access was by itself a serious violation of the Vienna Convention.

75. India responded to this Note Verbale on 31 March 2017 pointing out that, "[c]onsular access to Mr. Jadhav would be an essential pre-requisite in order to verify the facts and understand the circumstances of his presence in Pakistan"[67]. India had information that he had been kidnapped from Iran, where he was carrying out business after retiring from the Indian Navy, and was shown to have been arrested in Baluchistan. These matters required verification, the first step ***for which*** would be consular access.

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[64]Application of India, Annex 1 and judges' folder, tab 1.

[65]Application of India, Annex 1 and judges' folder, tab 1.

[66]Application of India, Annex 3 and judges' folder, tab 3.

[67]Application of India, Annex 1 and judges' folder, tab 1.

76. A press release was then issued by Inter Services Public Relations, a government agency of Pakistan, on 10 April 2017, regarding Jadhav. This said that, "[t]he 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."[68]

77. India received on 10 April 2017[69] another Note Verbale from the Ministry of Foreign Affairs, Islamabad conveying that consular access shall be considered in the light of India's response to Pakistan's assistance in the investigation.

78. India responded to this on 10 April 2017 itself pointing out that the offer was being iterated after the death sentence had been confirmed and the information of which confirmation was given in a press release by Pakistan. India expressed its anguish by saying that this offer "underlines the farcical nature of the proceedings and so-called trial by a Pakistan military court martial"[70]. India reminded Pakistan that despite its repeated requests consular access had not been allowed.

79. A press statement was made by the Adviser to the Prime Minister of Pakistan on Foreign Affairs[71]. The press statement establishes the following facts:

(i) After his alleged arrest, a "confessional video" was recorded on 25 March ***2016***. The FIR was***, however,*** registered on 8 April ***2016***.

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

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

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

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[68]Application of India, Annex 4 and judges' folder, tab 4.

[69]Application of India, Annex 5 and judges' folder, tab 5.

[70]Application of India, Annex 1 and judges' folder, tab 1.

[71]Application of India, Annex 6 and judges' folder, tab 6.

80. The last proceeding in the case, as per this statement, was on 12 February. The conditional consular access offered by Pakistan on 21 March 2017 had in any event become meaningless as the trial was possibly over by then.

81. These facts establish beyond a shadow of a doubt that the trial was conducted without informing the accused of his rights under the Vienna Convention, without granting consular access to India and denying the accused and India to arrange for legal representation. Pakistan, thus, conducted itself in a manner that constitutes an egregious violation of the Vienna Convention.

82. In a briefing on 17 April 2017, on behalf of the Government of Pakistan, the authorized spokesperson said that the Indian national is not eligible to consular access[72].

Le PRESIDENT: Excusez-moi, Monsieur, puis-je vous demander de ralentir un peu le débit pour les interprètes ? Merci.

Mr. SALVE: The provisions of the Vienna Convention were thus violated, and the ongoing conduct of Pakistan continues to be in defiance of the provisions of the Convention.

83. On 19 April 2017[73], India yet again handed over a Note Verbale to Pakistan — through its High Commission in New Delhi — seeking copies of the charge sheet, proceedings of the Court of Inquiry, the summary of evidence and the judgment. The right of this State and the right of the accused, for the consular post to assist in legal representation, would in order to be meaningful, include the right to obtain this information.

84. I say, Sir, Mr. President and esteemed Members of the Court, India does not invite this Court to sit in appeal over the conduct of the Pakistani courts. But I make these points to underscore the consequences that have followed from the violation of the Vienna Convention.

85. The rights, I submit, Mr. President and esteemed Members of the Court, the rights of Article 36 are sacrosanct. They are enforceable rights.

86. The rights of consular access are a significant step in the evolution and recognition of the human rights in international law. The International Covenant on Civil and Political Rights, the ICCPR, notes that "the principles proclaimed in the Charter of the United Nations, recognition

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[72]Paragraph 7 above.

[73]Application of India, Annex 1 and judges' folder, tab 1.

of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". Article 6 of ICCPR recognizes that no one shall be arbitrarily deprived of his life. Article 9 recognizes the right to liberty and security of person, and prohibits arbitrary arrests and detention. Article 14 of the ICCPR provides that "in the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The subsets of this right, in paragraph 3 of Article 14, include the right "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require".

87. In order to make these salutary principles a living reality, where a national of one country is being tried in another country, adherence in letter and spirit to the Vienna Convention becomes a vital step. Mr. President and esteemed Members of the Court, I say with all the emphasis at my command, the graver the charges, the greater the need for punctilious adherence to the Convention. Although the Vienna Convention predates the ICCPR, international law and its jurisprudence specially in the dimensions of human rights have evolved with time, and the interpretation of the Vienna Convention and the implications of the rights guaranteed must be informed by current standards of conduct expected from sovereign States.

88. The Vienna Convention embodies a vital code of conduct that would give life and meaning to the right to fair trial to a national of one State arrested in another State. The content of Article 36 of the Vienna Convention in the present times must be informed by international jurisprudence which includes the salubrious principles recognized by ***the*** ICCPR.

89. As held by this Court in *Avena*, "violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual"[74]. Where the rights of an individual are violated, consequences must follow. The Vienna Convention recognizes the right of

[74] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I),* p. 36, para. 40.

a State to seek redress on behalf of its national in this Court, where the rights of its national, and concomitantly its own rights under the Vienna Convention are violated by another State.

90. The facts set out in our Application, alluded to only briefly, establish egregious violation of the Vienna Convention. The events that have transpired since March 2016 establish the farcical nature of the trial and leave no manner of doubt that**,** in the present case**,** the violation of ***the right of*** consular access in the Vienna Convention ***has been destroyed, and this*** has destroyed any credibility and sanctity that the verdict of the military court in Pakistan may have in international law.

91. India invites the attention of this Court, to Pakistan's conduct that violates the Vienna Convention, and I shall focus on one or two issues.

(a) In its letter of 21 March 2017, Pakistan responded to the request for consular access stating that "the case for consular access to the Indian national… shall be considered in the light of Indian side's response to Pakistan's request for assistance in investigation process and early dispensation of justice"[75]. This is a completely untenable position, I submit, Mr. President and esteemed Members of the Court. This is a completely untenable position and it is a clear violation of the Vienna Convention. Article 36 confers the right upon the individual and upon the State. Firstly, the right of an individual to consular access cannot be made hostage to demands for assistance in investigation and the response of the State whose national is being deprived consular access. Secondly, the Vienna Convention does not countenance any such exceptions. Thirdly, I repeat, the more serious the charge, the greater the need for the procedural safeguards to ensure that the accused gets a fair trial. In the circumstances of this case, where the accused has been, by March 2017, for a year in military custody, incommunicado from his family and from his home State, the suggestion that there has been a fair trial without allowing consular access is patently untenable. The trial stands vitiated in international law, for egregious violations of the Vienna Convention.

(b) The press release of 10 April 2017[76], announcing the award of the death sentence and its confirmation by the Chief of Army Staff, stated that Jadhav confessed before a magistrate —

[75]Application of India, Annex 3 and judges' folder, tab 3.

[76]Application of India, Annex 4 and judges' folder, tab 4.

and his confession was that he had been tasked to coordinate and organise espionage and sabotage activities et cetera. In the absence of any information as to the evidence led against him other than his confession, it can fairly be assumed that his confession played a significant part in his conviction. This confession was extracted when he was in military custody, incommunicado and continuously denied consular access. The repeated assertions that he was afforded a fair trial, when his basic rights, under the Vienna Convention were thrown to the winds, ring hollow.

92. India seeks the intervention of this Court to address the injury caused by the violation of the Vienna Convention, and Mr. President and esteemed Members of the Court, I respectfully submit the existence of any ~~***another***~~ remedy, even assuming such remedy does exist in domestic law of Pakistan, does not bar invocation of the jurisdiction of this Court.

93. The assertions by Pakistan in its communication of 12th May 2017 that there are remedies available to Jadhav have to be viewed in the backdrop of the circumstances of the case and ***few*** of the ***important*** circumstances are ~~***important***~~:

(a) at the appellate stage Pakistan steadfastly refuses to allow consular access – not that access at this stage would cure the fatal defect in the process which led to his conviction. It only shows that the illegality arising out of violation of the Vienna Convention continues unabated;

(b) The information in public domain suggests that the appeal will be heard by a tribunal presided over by a two star general. The death sentence stands confirmed by the Chief of Army Staff of Pakistan – a four-star general. It strains credulity to believe that the Court of Appeal will have the degree of impartiality and independence, and decide the matter uninfluenced by these events.

(c) The appeal will be heard when Jadhav continues to be incommunicado and deprived of consular access. The military spokesman candidly, in his press briefing, admitted that he did not see any chance of the verdict being overturned[77];

(d) From the information in public domain, Jadhav would not have access to legal representation of his choice. It was reported[78] (and it has not been denied) that the Lahore High Court Bar

[77] Application of India, Annex 7 and judges' folder, tab 7.

[78] Application of India, Annex 11 and judges' folder, tab 11.

Association has threatened to cancel the membership against any lawyer pursuing appeal of Jadhav against his conviction. Thus, Jadhav has neither consular access, nor prospects of finding proper legal representation even at this stage.

(e) In any event, Mr. President, esteemed Members of the Court, I respectfully submit that there is no legal remedy that would be able to redress the injury caused by the violation of the Vienna Convention. Spokespersons of Pakistan have already clarified their stance that the consular access under the Convention would not be allowed to Jadhav, which comments are consistent with Pakistan's communications to India.

94. Pakistan continues to make allegations suggesting that Jadhav was a commander in the Indian Navy and an Indian spy. India refutes these allegations as being baseless and being part of a propaganda war relentlessly waged by Pakistan. India asserts that Jadhav retired from the Indian Navy and has been pursuing business in Iran from where he was kidnapped. But Mr. President and esteemed Members of the Court, the merits of these allegations and counter allegations between the two countries are irrelevant for the case which you are going to decide. The seriousness of the allegations only underscores the need for strict adherence to the procedural rights and safeguards available to an accused not merely under domestic law, but in the case of Jadhav, also under the Vienna Convention.

95. India submits therefore, Mr. President and esteemed Members of the Court, that it has a strong prima facie case as to the jurisdiction of the Court and on merits, sufficient to justify seeking provisional measures. India in its reliefs seeks *restitutio in integrum* — which would, in the least, finally require annulment of the verdict.

96. In the circumstances, I submit that India has a strong case ***seeking by of*** for provisional measures ~~***as***~~ an indication that the death sentence be not executed until such time as this Court has adjudicated upon India's Application.

Provisional Measures

97. And therefore**,** on behalf of the Republic of India, Mr. President and esteemed Members of the Court, I request that pending final judgment in this case, the Court indicate 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 this 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 India's application.

Thank you Mr. President and esteemed Members of the Court.

The PRESIDENT: I now give the floor to Dr. Deepak Mittal, the Agent of the Republic of India.

Mr. MITTAL: Thank you, Mr. President and esteemed Members of the Court. I thank the Court for their patient hearing. As the Counsel for the Republic of India has already read out the request, I formally, once again, reiterate the request on behalf of the Government of India that, pending final judgment in the case, the Court indicate:

(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 the Court may render on the merits of the case.

Thank you.

The PRESIDENT: Thank you. That ends the oral observations of the Republic of India. The Court will meet again this afternoon at 3 p.m. to hear the oral observations of the Islamic Republic of Pakistan. The sitting is closed.

The Court rose at 11.40 a.m.

Non corrigé
Uncorrected

CR 2017/6

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2017

Public sitting

held on Monday 15 May 2017, at 3 p.m., at the Peace Palace,

President Abraham presiding,

***in the* Jadhav Case**
(India *v.* Pakistan)

VERBATIM RECORD

ANNÉE 2017

Audience publique

tenue le lundi 15 mai 2017, à 15 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

***en l'affaire* Jadhav**
(Inde c. Pakistan)

COMPTE RENDU

Present: President Abraham

Judges Owada
Cançado Trindade
Xue
Donoghue
Gaja
Sebutinde
Bhandari
Robinson
Crawford
Gevorgian

Registrar Couvreur

Présents : M. Abraham, président
MM. Owada
Cançado Trindade
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford
Gevorgian, juges

M. Couvreur, greffier

The Government of the Republic of India is represented by:

Dr. Deepak Mittal, Joint Secretary, Ministry of External Affairs,

as Agent;

Dr. V. D. Sharma, Joint Secretary, Ministry of External Affairs,

as Co-Agent;

Mr. Harish Salve,

As Counsel;

Ms Kajal Bhat, First Secretary, Embassy of the Republic of India in the Kingdom of the Netherlands,

As Adviser;

Ms Chetna N. Rai,

As Junior Counsel.

Le Gouvernement de la République de l'Inde est représenté par :

M. Deepak Mittal, *Joint Secretary*, ministère des affaires étrangères,

comme agent ;

M. V. D. Sharma, *Joint Secretary*, ministère des affaires étrangères,

comme coagent ;

M. Harish Salve,

comme conseil ;

Mme Kajal Bhat, premier secrétaire, ambassade de la République de l'Inde au Royaume des Pays-Bas,

comme conseiller ;

Mme Chetna N. Rai,

comme conseil auxiliaire.

The Government of the Islamic Republic of Pakistan is represented by:

H.E. Mr. Moazzam Ahmad Khan, Ambassador of the Islamic Republic of Pakistan to the United Arab Emirates,

Dr. Mohammad Faisal, Director-General (South Asia & SAARC),

as Agents;

Mr. Syed Faraz Hussain Zaidi, Counsellor of the Embassy of the Islamic Republic of Pakistan in the Netherlands,

as Adviser;

Mr. Khawar Qureshi, Q.C.,

as Counsel;

Mr. Asad Rahim Khan,

as Junior Counsel;

Mr. Joseph Dyke,

as Legal Assistant.

Le Gouvernment de la République islamique du Pakistan est représenté par :

S. Exc. M. Moazzam Ahmad Khan, ambassadeur de la République islamique du Pakistan auprès des Emirats arabes unis**,**

M. Mohammad Faisal, directeur général (Asie du Sud et Association sud-asiatique pour la coopération régionale),

comme agents ;

M. Syed Faraz Hussain Zaidi, conseiller à l'ambassade de la République islamique du Pakistan aux Pays-Bas,

comme conseiller ;

M. Khawar Qureshi, Q.C.,

comme conseil ;

M Asad Rahim Khan,

comme conseil auxiliaire ;

M. Joseph Dyke,

comme assistant juridique.

The PRESIDENT: Veillez vous asseoir. L'audience est ouverte. The Court meets this afternoon to hear the oral observations of Pakistan on the Request for the indication of provisional measures submitted by the Republic of India.

I now call upon Dr. Mohammad Faisal, Representative of the Islamic Republic of Pakistan. You have the floor.

Mr. FAISAL:

Re: Commander (Naval) Kulbhushan Sudhir Jadhav (alias Hussein Mubarak Patel) ("Commander Jadhav") (holder of Indian passport number L9630722)

1. Your Excellency the President of the International Court of Justice, Honourable Judges of the Court, Excellencies, ladies and gentlemen, I am honoured to appear before this Court as Pakistan's Agent and to make the following remarks. The delegation from Pakistan includes Ambassdor Moazzam Ahmed Khan, the Agent, myself, Mr. Khawar Qureshi, our Counsel, barrister Asad Rahim, Deputy Counsel, Mr. Joseph Dyke, the Assistant Legal Counsel and Mr. Faraz Zaidi, Counsellor.

2. Mr. President, I will provide a brief overview of the response of Pakistan to this Application and then invite our Counsel Mr. Qureshi to develop the submissions, as to why this Application is unnecessary and misconceived.

3. Mr. President, I am compelled to observe that, whilst we share so much with the applicant State, we are on very different sides today. For our part, we wish that were not so. Moreover, for our part, we wish to make it absolutely clear that we remain committed to the path of peaceful resolution of all disputes, whatever the provocation.

4. Having faced the evil of terrorism on a daily basis, with deadly attacks only last Friday, killing 26 people and another killing 11 people on this Saturday in the area where Commander Jadhav was operating before his capture, we know only too well how the poison of hatred is used to achieve political ends by others.

5. That is why, despite being ambushed into appearing before the Court on a few days' notice, we are here. We are here because we will not be cowed by terrorism, nor will we allow any attempt to malign or misrepresent our position or legal processes to go unchecked. We will use all

legitimate means to protect our people, our territory and our reputation from attack. Robustly and resoundingly, Insha'Allah, always.

6. Unfortunately, India has seen it fit to use the International Court of Justice as a stage for political theatre. We regret that this has been done. We will not respond in kind.

7. Our Counsel Mr. Qureshi will explain why it was wrong for India to invoke the exceptional provisional measures jurisdiction of this Court, the judicial organ of the United Nations. He will touch upon the reasons why the Court should not otherwise exercise any jurisdiction or entertain any aspect of India's engagement of its jurisdiction.

8. Indeed, it is somewhat ironic but perhaps consistent, that India complains that it is not being given access to Commander Jadhav, who has confessed to having been sent by India to wage terror on the innocent civilians and infrastructure of Pakistan, and, in the same breath, has urged this Court to make an order without giving Pakistan any opportunity to be heard.

9. We are disappointed that India did not take the opportunity to be transparent, soon after 25 March 2016, when the Foreign Secretary of Pakistan protested in the strongest terms to the Indian High Commissioner regarding Commander Jadhav's criminal acts. India has been provided with a copy of the passport that was in the possession of Commander Jadhav when he was apprehended. You can see the copy of the passport on the screen there.

[Passport slides]

10. Mr. President, as the Court can see, the passport bears a Muslim name which plainly is not the name of Commander Jadhav. India has been unable — or, perhaps more accurately, unwilling — to provide an explanation for this passport, which is the most obvious indication of covert and illegal activity. India could simply have denied that the passport was genuine. We submit that India's silence is telling.

11. Indeed, India could and should have responded to a Letter of Request dated 23 January 2017 seeking India's assistance to investigate the criminal activity and links with people in India, which Commander Jadhav has revealed. Instead, India appears to have been in hyperdrive mode to brief its press that Commander Jadhav, a 47-year-old man took early retirement and was kidnapped in Iran from where he was brought to Pakistan — to give a false confession presumably.

12. We fully understand that this Court is not concerned at this stage with an evaluation of the "merits". We are not sure what merit there is in a State which sends a spy and terrorist seeking entitlement to untrammelled access to its tool for terror. However, we consider that it is important for this Court to hear the extracts of the confession which were made public on 25 March 2016.

13. On the same day, the P5 and the EU were also informed of Pakistan's grave concerns in this regard. Indeed, later that day, extracts of a video of the confession of Commander Jadhav were made public. I intended to share the extract of just around six minutes of the video with you now. I understand that the Court has viewed the video, but would prefer it not to be shown here. I should make it clear that the video is publicly and readily available for anyone who wishes to see it. The viewers can decide for themselves whether Commander Jadhav is confessing voluntarily and comprehensively.

14. India will no doubt say that the candid and contrite confession was extracted by foul means. That would, of course, be very wrong in every respect.

15. Mr. President, India has sought to persuade this Court that we intend to execute Commander Jadhav within days. Despite India having selectively quoted from the contents of Annex 8 to its Application, the Court can see for itself that this is totally false, simply by reference to the clemency process available as a right to Commander Jadhav.

16. A period of 150 days is provided for in this regard, which even if it started on 10 April 2017 — which is the date of conviction at first instance — could extend to well beyond August 2017. There is also of course the potential for the writ petition of the High Court to be invoked, as we believe India must be well aware. Pursuant to Article 184-3 and Article 199 of the Constitution of Pakistan, individuals have successfully obtained relief from the Courts. India and Pakistan have a common source for the vast bulk of our legal processes and procedures.

17. More importantly, if the Court will forgive my language, we simply have no reason to stop the canary from singing. Others might wish that — we do not.

18. Just to make the point absolutely clear, an expedited hearing which would dispel any suggestion of the need for provisional measures is an approach that Pakistan would invite the Court to adopt. On this basis Pakistan would be content for the Court to list the Application of India for hearing within six weeks.

19. We have no desire to waste the Court's valuable time and resources in trying to score political points. Indeed, Mr. President it is noteworthy that the Indian media widely reported your letter to the Parties dated 9 May 2017 as a "victory" by means of it being a "stay order", which plainly it was not. This surely is a valuable insight into what really lies behind this manoeuvring.

20. I conclude, Sir, where I started. Whilst we were bounced into appearing before the Court, it is always an honour to do so. The Islamic Republic of Pakistan cherishes the freedom which was gained 70 years ago. It wishes to live in peace with its neighbours and hopes they will soon appreciate the virtue of such an approach.

Le PRESIDENT : Je remercie l'agent de la République islamique du Pakistan et je donne à présent la parole à M. Qureshi, conseil pour le Pakistan.

Mr. QURESHI:

Mr. President, Members of the Court, it's an honour for me to appear before you on behalf of the Islamic Republic of Pakistan. On a previous occasion when I appeared before this Court it was in the context of a situation of real urgency. Exceptionality was plainly involved. That was in the context of the Genocide Convention being invoked by Bosnia and Herzegovina to seek and eventually obtain provisional measures from this Court to try to stem the flow of blood that was all too clear. In this case I will invite this Court to dismiss the Application that has been brought before this Court.

On three bases: firstly, there is no urgency; second, the relief that is sought is manifestly unavailable; and third, so far as jurisdiction is concerned, the jurisdiction under the Vienna Convention of 1963 is not as unchannelled as my learned friend has suggested. It is limited and indeed it is further limited and qualified or supplemented by the 2008 agreement which as the Applicant State has been at pains to disavow, an agreement that has been in place for 10 years, and it is now being suggested it is not relevant, it is also being suggested that because it did not comply with the requirements of Article 102 (2), it cannot be placed before this Court. It is rather unfortunate that having brought the Respondent State before this Court the Applicant State seeks to reply upon what can be best described as a technicality.

However, I begin by referencing the conduct of the Applicant. The Applicant has sought to invoke and obtain the most exceptional relief from this Court, and it has done so, as paragraph 23 of its Request makes clear, by urging this Court not to permit an oral hearing. If an applicant seeks to invoke such an extreme jurisdiction, to deny the other side a hearing, it is incumbent upon such an applicant to ensure that it provides a Court with full and frank disclosure, that it ensures that the documentation and information placed before the Court is accurate and that it ensures that all material facts are placed before the Court. As I will demonstrate there are, unfortunately, flaws in the approach of the Applicant in every respect so far as these three fundamental elements are concerned.

Firstly, paragraph 20 stressed that without provisional measures Commander Jadhav would be executed before the Court could consider the merits. Indeed, paragraph 21 stressed that there was such immense urgency that this might happen any day and therefore it is not surprising that when one seeks to invoke the jurisdiction of the highest judicial organ of the United Nations, indeed, the highest judicial organ that all members of civilized nations turn to, that the President issued the letter on 10 May as he did in the terms that he did.

It was said in the Application, furthermore, that the trial was rushed through and that Commander Jadhav could be executed summarily. The papers before the Court within the Application itself demonstrate at Annex 6 the detailed public statement made by the Advisor to the Prime Minister on 14 April, His Excellency Sartaj Aziz, that none of that is, with respect, true.

There were four stages of the trial, 21 September to 12 February 2017. The clemency process was identified clearly, the timeline: 90 days plus 60 days.

What is also said to this Court in the Application, paragraph 9, is that the Pakistani authorities had made it clear that Commander Jadhav was not eligible for consular access, nor would he be granted consular access. The Court was referred to Annex 7. Regrettably, Annex 7 says no such thing.

What the Applicant has sought to do is to introduce as Annex 11 an article from a newspaper, which whatever else it may be, is not a newspaper of the record in Pakistan. But what is important to note is that there was plainly a material misrepresentation in the Application that was placed before the Court as to the position of the authorities of the Islamic Republic of Pakistan

because, in fact, Annex 9 to the very same Application provided a draft transcript of a three-page press briefing provided by the spokesperson to the foreign office. And, the Court will see at page 3, that in answer to a direct question from a journalist, the foreign office official spokesman made it very clear that pursuant to the Bilateral Agreement between India and Pakistan of 2008, which India is anxious to avoid any reference to, the question of access to Commander Jadhav would be decided on the merits.

The Court has been given an indication moreover that there was some request for evidence made by the Pakistani authorities, but all that the Court was given was the cover letter in the annexures. Unfortunately, the Court was not provided with the substantive material which was given to India on 23 January 2017, but it has now.

In the judges' folder at Annex 1, the Court will see that the material comprised a cover letter which identified 13 names, names that Commander Jadhav had provided to the Pakistani authorities. The cover letter sought the assistance of the Indian authorities to the phone records of Commander Jadhav. It sought the assistance of the Indian authorities to bank account details. These are all perfectly reasonable, legitimate requests. The Indian authorities were provided with a copy of the first information request, the details of the allegation, Annex 1. Annex 2 was a copy of the passport.

Now, interestingly, at no stage has India made any comment about the possession of a passport by an individual whose nationality, as an Indian national has been assumed we say *de bene esse*, but has not actually been established by the Indian authorities. The passport plainly requires explanation.

There is the confession, which is in the bundle that was given to the Indian authorities, together with, significantly, the United Nations Security Council resolution 1373, one of the most important Security Council resolutions ever promulgated in the aftermath of the horrors of the attack on 11 September. India no doubt would have been fully familiar with the principles identified in that resolution, but incumbent upon all Member States of the United Nations is the obligation to assist not only in preventing terrorism, but the provision of evidence. What happened? Deafening silence. No response.

What is said in the Application at page 24, paragraph 50, is that the confession of Commander Jadhav was obtained after India had sought access. Somewhat ironic because, as you have seen and as the written submissions that are before the Court will make clear, the chronology is as follows: Commander Jadhav was arrested in the southern province of Pakistan, Baluchistan, which is mineral-rich and unfortunately has seen violence all too often. He crossed in from Iran bearing that false passport.

The position so far as the video is concerned is that that video was aired, that was a confession video aired on 25 March 2016. So it is plainly incorrect, if it is being suggested that that video was obtained after consular access was sought, because the chronology simply doesn't bear it out.

What is said in addition is that Pakistan, at the Application paragraph 28, made it a condition of consular access that the mutual legal assistance request was complied with. Now, pausing there, I respectfully submit to this Court that the obligation to prevent and to enable the punishment of terrorism is one of the highest obligations that all Member States of the United Nations are subject to. Indeed I would go much further and say it is an obligation *erga omnes*.

It was not a condition on consular access, it was a fundamental requirement that India was to comply with, and it is yet to give an explanation to this Court as to why it has not. And in fact, it is simply inaccurate, if not, with respect, misleading, to suggest that the Government of Pakistan and its officials had attached conditionality. What they had said, and again this is in the annexes before the Court, Annex 3, the letter of 21 March 2017, before judgment was handed down on 10 April 2017, is that the consular access request would be considered in light of the response to the mutual legal assistance request so as to enable early dispensation of justice, so that the evidence could be provided to enable the legal process to take its course in Pakistan.

In so far as it has been suggested that the process that Commander Jadhav is subjected to is some form of kangaroo court, it is rather bizarre that a court exists in a State which is seeking to do justice and is asking for evidence in that regard and is sharing evidence in that regard. So, the position that is advanced before this Court is, with respect, a sham.

But what does this all get to? We saw in the Request at paragraph 20 that the Court, the President was urged to act on the Request for provisional measures because Commander Jadhav

might lose his life any day. India generated a sense of urgency, not Pakistan. India invoked the jurisdiction of this Court improperly and, as a result, has now interestingly shifted its position as to what urgency is. We began with "any day", but my friend, when he addressed the Court with reference to the *Avena* case, suggested that it was appropriate for this Court to grant provisional measures where, in the *Avena* Mexico case, the death sentence prospect was some six months away. Firstly, that is not correct. And second, it is not acceptable to invoke the jurisdiction of this Court on the basis of imminence, any day, about to be committed, and then come to the Court and say it may be six months. That is enough for you. Because when one looks at the cases themselves, the three death sentences cases, they all relate to the use of capital punishment in the United States of America.

In the Paraguay case there was a period of 11 days before the death sentence would be imposed. In *LaGrand*, it was the next day. And in *Avena*, the earliest that any one of those 54 Mexicans might be exposed to the death sentence was four weeks. Not six months, four weeks.

And when one looks at the drafting history of Article 41, which this Court in the *LaGrand* provisional measures case helpfully provided an insight to, at paragraph 105, Article 41 relates to certain situations in which irreparable harm is about to be committed, about to be committed. There is plainly in that language a sense of immediacy, imminence, urgency, and six months plainly in nobody's book is imminent, or urgent, or immediate.

The Application conveniently glossed over the existence and availability of clemency which was articulated in the Advisor to the Prime Minister's public statement on 14 April, which was before the Court, but was not drawn to the attention of the Court.

In the oral phase this morning, my friend indicated that action was likely to be taken before final decision is likely to be given. An elastication, at best, of the position that was placed before the Court in writing. That simply will not do. This Court has on its docket some of the most important issues engaging the States. This Court exists to ensure that States engage in peaceful resolution of disputes. This Court does not exist for time-wasting and political grandstanding.

The second point is that the relief that is being sought is palpably unavailable. In the oral submissions, what my friend said is that in the least, the least position, at the very least, what is required is annulment. At the highest, forthwith release. The Court will see this from paragraph 60

of the Application. There is no realistic, plausible prospect of obtaining such relief from this Court. This is not aspirational, this is beyond aspiration.

The Court is well aware that in the Paraguay case, despite the order of this Court being handed down on 9 April, the execution was to take place on 14 April, the reparation provided by the United States of America was an apology. A similar relief was sought by Paraguay.

In the *LaGrand* case, despite one of the two brothers, Walter LaGrand, being executed on 3 March 2009 in the face of this Court's Order, the Order that was ultimately granted by the Court in 2000 was for the United States in respect of other German nationals subjected to similar treatment to be made, for the position in their regard to be such that review and reconsideration of their position was available. By means, that it was to be chosen by the United States of America. Indeed, in the *Avena* case, at paragraphs 121 to 124, the Court stressed, this Court stressed, as had been said in the *LaGrand* case at paragraph 225, that this Court is not a criminal Court of Appeal, this Court does not exercise criminal appellate jurisdiction.

Paragraphs 121 to 124 of the *Avena* Judgment dated 31 March 2004 stressed this point. In the present case, paragraph 121, this Court stated very clearly the Court's task is to determine what would be adequate reparation for the violations of Article 36. It should be clear that that was referring to what needs to be done to make good the violations, and what was stated by the Court was that it follows that the remedy to make good of these violations should consist in an obligation on the United States to permit a review and reconsideration of these national cases, the 54 by United States courts. The Court also made it clear at paragraph 122, "the Court reaffirms that the case before it concerns Article 36 of the Convention and not the correctness of the death penalty" forgive me, "of any such conviction or sentencing".

There was a suggestion on the part of Mexico that the reparations entitled them to seek, the reparations Request entitled Mexico to seek partial or total annulment of conviction or sentence and that was the necessary and so remedy. We see parallels of that in the position that India has adopted.

The case that was relied upon was the Congo and Belgium case, and of course this Court explained that Congo and Belgium was dealing with different facts. There was immunity available, so the individual who had immunity should never have been subjected to the criminal process.

What is therefore the objective of this Application? The Agent for Pakistan referred to Pakistan having been bounced before this Court. What is the objective? If this Court cannot exercise a criminal appellate jurisdiction and if the only relief that India is seeking is not available, what is the objective?

The provisional measures, we respectfully submit in our written submissions, at paragraphs 19 and 20, are sought by India on "bootstraps arguments". If there is no availability of the substantive relief, provisional measures cannot and should not flow. A bootstraps arguments is a term familiar to English lawyers, and I apologize for using it, but I hope one can visualize how someone trying to pull themselves up from their boots.

India itself has referred to all of the previous decisions of the Court that I have just alluded to where a substantive relief of the sort that it was seeking was not granted. India must be taken to be aware of this. Accordingly, with respect, it is difficult to avoid the inference that India's real and only goal before this Court, that is, is a provisional measures order, stay order. Whilst stay orders, as they are referred to in some places, may be seen as providing substantive relief in certain jurisdictions, where delay is tantamount to negation of Court process, such a context finds no reflection before this Court where time is precious, the Court's time at least, and it ought to be seen as such.

Indeed, it is respectfully submitted that the Court should exercise considerable caution in circumstances where there is no apparent and/or realistic nexus between the request for provisional measures and the rights relief which the measures are intended to ensure the preservation of.

My third and final point relates to jurisdiction. In this regard there are four sub-points that I wish to make. The Court has before it my written submissions and paragraphs 50 to 93 addressed the question of jurisdiction.

I fully accept that at this stage the Court is not engaging with the substance of jurisdiction and the test is whether or not its arguable prima facie. We submit that at the very least the Court ought to have regard to the following four factors.

Firstly, paragraphs 53 to 61 of my written submissions elaborate this. On 8 September 1974 India deposited a reservation which had two elements to it. The first was to exclude from the jurisdiction of this Court any dispute with a Government of a State which has been a member of the

Commonwealth. And secondly, to exclude disputes, paragraph 7 — that was paragraph 2 of the reservation — paragraph 7 of the reservation was intended to exclude the jurisdiction of this Court in respect of disputes concerning the interpretation and application of multilateral treaties, which the Vienna Convention plainly is, unless all the Parties to the treaty are also Parties to the case before the Court, which they are not, or the Government of India specially agrees to jurisdiction, which it has not.

India invoked these provisions in the *Aerial Incident* case, a decision of this Court that was handed down on 21 June 2000. Rather awful circumstances on 10 August 1999, a Pakistani plane was shot down over Pakistan airspace by Indian forces leading to the loss of many lives. The claim was brought before this Court, *inter alia*, with reference to the United Nations Charter and India invoked these reservations. The claim was brought on the basis of Articles 36 (1) and 36 (2) of the Statute of this Court. The Court, this Court, decided that it needed not consider paragraph 7 of the reservation because paragraph 2 sufficed. As Pakistan was a Commonwealth State, the reservation was effective. But, of course paragraph 7 was intended to apply to multilateral treaties.

The Pakistani reservation is the second point. There was a Pakistani reservation to this Court's jurisdiction entered on in 1960 and another on 29 March 2017. And what was the ambit of this reservation, all matters relating to the national security of the Islamic Republic of Pakistan are excluded from the jurisdiction of the Court. This is not on its face an objectionable reservation, it is not an unsurprising reservation. And I pause there to observe regrettably that the relationship between these two States has often been fractious, and that is relevant when we consider the 2008 agreement on consular access.

But so far as my observations on these two reservations are concerned, even if the Court considers that it is not able to determine at this stage whether the reservations are fully engaged so as to preclude the exercise of the Court's jurisdiction, they are nevertheless relevant in the exercise of the Court's consideration as to whether to grant exceptional relief.

For two reasons: firstly, India's intention as is evident from its reservation is to exclude any case appearing before this Court, which involves the Government of Pakistan.

Pakistan's intention is to exclude from determination by this Court any issue that involves national security.

Thirdly, the Vienna Convention. Now, here we can agree with the Applicant, and one ventures to suggest as a result there is always hope, because the Applicant in Application page 16, paragraph 34, observed as follows: "The Vienna Convention Article 36 was adopted to set up standards of conduct, particularly concerning communications and contact with nationals of the sending State, which would contribute to the development of friendly relations among nations" and the observation we make immediately is that this is unlikely to apply in the context of a spy/terrorist sent by a State to engage in acts of terror.

Indeed, it is clear from the Vienna Convention itself that there are provisions beyond Article 36 that need to be considered before coming to the Court with the bald assertion that the Vienna Convention is an inter-related régime. Indeed it is. There are 73 Articles, but the only one that has been brought before this Court is Article 36. The preamble makes it very clear that the rules of customary international law continue to govern matters that are not expressly regulated by the provisions of the convention. That is an important point.

Article 5 identifies the scope of consular functions. Article 5 *(a)*, within the limits permitted by International Law. Article 5 *(i)*, subject to the practices and procedures obtaining in the receiving State. Article (5) *(m)*, functions not prohibited by the laws and regulations of the receiving State, all to which no objection is taken by the receiving State, or which are referred to in international agreements, in force between the sending State and the receiving State the 2008 agreement being such an agreement.

It suggested to this Court that there is provided for, by Article 36, untrammeled, immediate access. What is said is that Article 36 was violated by the Pakistani authorities from the time of arrest of Commander Jadhav. This is plainly wrong.

In the *Avena* decision of this Court of 31 March 2004, paragraphs 80 to 87, consideration was given to the time period within which access was to be given, and the Court concluded that this was not required before commencement of an investigation. So India, with respect, is obviously wrong.

And one then tests the proposition as to the expansive nature of the Vienna Convention with reference to 36 (1) *(c)*. "Consular officers shall have the right to visit, converse and correspond with the national."

Now, if we read this again, "Consular officials [of a State that is sending somebody to spy] shall have the right to visit, converse, and communicate, correspond with the national [the man or woman who is sent to spy]."

And when one reads the provision in that way, it is immediately obvious that 36 (1) *(c)* could never have been intended to apply in this context.

We further elaborate upon this in our written submissions. And one has to have regard as to the circumstances within which the Vienna Convention was considered and ultimately adopted.

There is no reference to espionage, spying, let alone terrorism, in the *travaux* and then makes it abundantly clear that none of the Parties that were engaged in this process was even considering the Application of this convention to terrorists or spies.

And it is not surprising. It was not that long ago that the Soviet Union and the United States of America were engaged in what is known as the Cold War, and we all accepted the fiction that there were no spies. But, of course, what we have in front of us in this case is a passport that has yet to be explained.

Commander Jadhav, it is said, is an Indian national. What has India done to establish that? In the *Avena* case, the decision of the Court of 31 March 2004, paragraphs 55 to 57, this Court made it clear that a State that wishes to engage consular official access to an individual has the onus of establishing that the individual is a national.

Here, with respect by sleight of hand, we have India maintaining the position that this gentleman is an Indian national. He is in possession of a palpable false passport. Forget about providing assistance to the Request for assistance of 23 January 2017, which gave India the false passport. It would have been open to India to say, well, actually, he has this passport which has his name on it. Of course one can immediately see how that might present problems.

India could also have provided a copy of this birth certificate as the Mexican authorities did in *Avena*. None of those happened, so we respectfully observe that it is rather unfortunate that India is coming to this Court adamant that this Commander Jadhav is an Indian national but has done nothing to prove that or establish that, at all. And it may not be surprising why that is the case.

There are plainly qualifications within the Vienna Convention itself which point to the exclusion of the operation of the convention with respect to acts of this nature. Article 55 makes it

clear that there must be no interference in the internal affairs of the receiving State. That itself makes it plain that if an individual is accused of espionage, terrorism, consular access which may involve compromising evidence which may involve exacerbating the threat for the receiving State because of coded communication, cannot possibly be anything other than a breach of Article 55.

I turn, finally, to the 2008 Agreement, which my friend has been at pains to distance himself from. We have been told it is not relevant, it is not relied on, it is not on the register. And as I said before, it is unfortunate that a technical argument, which is, itself misconceived, is being brought before this Court to try to persuade this Court nevertheless to grant exceptional provisional measures against a member State of the United Nations. In pursuit of peace. I venture to suggest not.

Serious allegations are being made against a Member State of the United Nations. Not one jot of evidence has been advanced by India to rebut the clear manifest position that this individual is a terrorist.

The Court has seen the video. The Agent has invited the world at large to watch it, and the world at large can decide for itself whether this gentleman was kidnapped from Iran, brought to Pakistan for the sole purpose of confession to criminal act. There is a long border between India and Pakistan and there are hundreds of millions of people to choose from. So to kidnap him from Iran and bring him to Pakistan for the sole purpose of extracting a confession seems, at best, farfetched.

The 2008 Agreement, it is interesting to note, it is not suggested by India that it is ever been breached by Pakistan. And we say it informs the Parties' understanding with regards to the Vienna Convention. It amplifies or supplements their understanding and the operation of the Convention. And given the fractious nature of the relationship between these two States, it provides a helpful, if not, vital medium for that relationship to be as free from friction as possible; therefore, it is perfectly consistent with the objectives of the Vienna Convention. Indeed, it, I would suggest, is essential.

So, to minimize its operation and existence by saying it is irrelevant is perhaps convenient, but it simply will not do.

Annex 10 of the Application includes the Agreement but, of course, the Court was told, on an Application which was made for provisional measures within a day or two without any hearing,

that it was irrelevant. An applicant making such an application before the Court at least ought to have explained why it was not relevant. It is operated for nearly a decade. There is no complaint that the Government of Pakistan has breached this Agreement.

I will come to how the Government of Pakistan's position has been mischaracterized, but the Agreement, which I will read, is very short and very clear. And perhaps that is why it is operated successfully. It consists of seven paragraphs and is headed "Agreement on Consular Access", the very subject that this Court's jurisdiction is being engaged upon now on an urgent basis. And it says as follows,

> "The Government of India and the Government of Pakistan desires to furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in either country have agreed to reciprocal consular facilities as follows:
>
> (1) each government shall maintain a comprehensive list of the nationals of the other country under its arrest, detention or imprisonment. The list shall be exchanged on 1st January or 1st July each year." It is quite precise.
>
> "2) immediate notification of any arrest, detention or imprisonment of any person of the other country shall be provided to the respective High Commission."

So we have flesh to the bones of Article 36 (1) in terms of the time period.

"(3) Each Government undertakes to expeditiously inform the other of the sentences awarded to the conflicted nationals of the other country." One is not sure whether the word "award" is appropriate for a sentence, but in any event that is the choice that the drafters made.

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

And this Court is being told that by failing to provide — that there is an objection to the approach that the Government of Pakistan engaged in. And this Court has not been told about Article 6, which I turn to after I read Article 5, which says,

> "Both governments agree to release and repatriate persons within one month of confirmation of their national sentence, status and completion of sentences.
>
> (6) In case of arrest, detention or sentence made on political or security grounds. Each side may examine the case on its merits.
>
> (7) In special cases, which call for or require compassionate and humanitarian consideration, each side may exercise its discretion subject to its laws and regulations to allow early release and repatriation of persons. This Agreement shall come into force on the date of its signing, 21st May 2008."

With respect, not only is this a binding Agreement between the two States, it provides helpful, if not vital, amplification of the understanding and operation of the Vienna Convention between two States that have been at war on more than two occasions.

What was said to this Court was that the Government of Pakistan was denying consular access. Nothing can be further from the truth. The Court will see that the Foreign Office's formal position, at Annex 9, as stated by the Foreign Office spokesperson, page 3 of the extract, at Annex 9, was that consular access would be provided with reference to the 2008 Agreement.

That is far removed from the way in which the Government of Pakistan is being presented before this Court. Making reference to an Agreement that is in place between two States genuinely, honestly, sincerely is not an illustration of bad faith, making reference to such an Agreement negates any suggestion of an egregious violation, a deliberate flouting of obligations. Making reference to such an Agreement evidences a genuine position, a genuine position which, I might add, seems to have operated, more or less satisfactorily, because it is not being suggested, certainly by India at least, that the Government of Pakistan has breached this convention, this Agreement for nearly ten years.

And therefore, one turns to the conclusion to be drawn from the approach regrettably that has been adopted by the Government of India to try and persuade this Court to grant provisional measures without the Government of Pakistan being present. It was wholly inappropriate to invoke the exceptional jurisdiction of this Court.

Insofar as it is even remotely suggested that there may be some concerns as to the fate of Commander Jadhav, those concerns, in so far as it is being suggested, and we maintain those are not well-founded, the Agent has made it clear that the Government of Pakistan will be happy to assuage those concerns in the manner that he has suggested, i.e., proceed to an expedited hearing as he has suggested.

There is no real risk of irreparable harm taking place within a day or two as was suggested by the Government of India and now elasticated to six months.

This is a hearing that I have had the honour to appear before this Court on, but a hearing that was not necessary. Thank you.

MR. PRESIDENT: Merci, Monsieur le conseiller du Pakistan. So this brings the oral proceedings on India's Request for the indication of provisional measures to an end.

It remains for me to thank the Representatives of the two Parties for the assistance they have given to the Court by their oral observations.

In accordance with practice, I would ask the Agents of both Parties to remain at the Court's disposal.

The Court will render its order on the Request for the indication of provisional measures as soon as possible. The date on which this order will be delivered at a public sitting will be duly communicated to the Parties.

As the Court has no other business before it today, the sitting is closed.

The hearing ends at 3.55 p.m.

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Annex 6

18 MAY 2017

ORDER

JADHAV CASE

(INDIA *v.* PAKISTAN)

_____

AFFAIRE JADHAV

(INDE c. PAKISTAN)

18 MAI 2017

ORDONNANCE

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JADHAV CASE

(INDIA *v.* PAKISTAN)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* ABRAHAM; *Judges* OWADA, CANÇADO TRINDADE, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

Whereas:

1. On 8 May 2017, the Government of the Republic of India (hereinafter "India") filed in the Registry of the Court an Application instituting proceedings against the Islamic Republic of Pakistan (hereinafter "Pakistan") alleging violations of the Vienna Convention on Consular Relations of 24 April 1963 "in the matter of the detention and trial of an Indian National, Mr. Kulbhushan Sudhir Jadhav", sentenced to death in Pakistan.

2. At the end of its Application, India requests:

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

(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."

3. In its Application, India seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations.

4. On 8 May 2017, accompanying its Application, India also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court.

5. In that Request, India asked that the Court indicate:

"*(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 th[e] Court may render on the merits of the case."

6. The Request also contained the following plea:

"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. The President is requested [to] exercis[e] his power under Article 74, paragraph 4, of the Rules of Court, pending the meeting of the Court, to direct the Parties to act in such a way as will enable any order the Court may make on the Request for provisional measures to have its appropriate effects."

7. The Registrar immediately communicated to the Government of Pakistan the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court, and the Request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing of the Application and of the Request.

8. By a letter dated 9 May 2017 addressed to the Prime Minister of Pakistan, the President of the Court, exercising the powers conferred upon him under Article 74, paragraph 4, of the Rules of Court, called upon the Pakistani Government, pending the Court's decision on the 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". A copy of that letter was transmitted to the Agent of India.

9. By letters dated 10 May 2017, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of the Rules, the Court had fixed 15 May 2017 as the date for the oral proceedings on the Request for the indication of provisional measures.

10. At the public hearings held on 15 May 2017, oral observations on the Request for the indication of provisional measures were presented by:

On behalf of India:	Dr. Deepak Mittal, Dr. Vishnu Dutt Sharma, Mr. Harish Salve.
On behalf of Pakistan:	Dr. Mohammad Faisal, Mr. Khawar Qureshi, Q.C.

11. At the end of its oral observations, India asked 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 the Court may render on the merits of the case".

12. For its part, Pakistan asked the Court to reject India's Request for the indication of provisional measures.

*

* *

13. The context in which the present case has been brought before the Court can be summarized as follows. Mr. Jadhav has been in the custody of Pakistani authorities since 3 March 2016, although the circumstances of his arrest remain in dispute between the Parties. India maintains that Mr. Jadhav is an Indian national, which Pakistan recognized in its Notes Verbales of 23 January 2017, 21 March 2017 and 10 April 2017 (see Annexes 2, 3 and 5 to the Application). The Applicant claims to have been informed of this arrest on 25 March 2016, when the Foreign Secretary of Pakistan raised the matter with the Indian High Commissioner in Pakistan. As of that date, India requested consular access to Mr. Jadhav. India reiterated its request on numerous occasions, to no avail. On 23 January 2017, Pakistan sent a Letter of Request seeking India's assistance in the investigation process concerning Mr. Jadhav and his alleged accomplices. On 21 March and 10 April 2017 Pakistan informed India that consular access to Mr. Jadhav would be considered "in the light of" India's response to the said request for assistance.

14. According to a press statement issued on 14 April 2017 by an adviser on foreign affairs to the Prime Minister of Pakistan, Mr. Jadhav was sentenced to death on 10 April 2017 by a Court Martial due to activities of "espionage, sabotage and terrorism". India submits that it protested and continued to press for consular access and information concerning the proceedings against Mr. Jadhav. It appears that, under Pakistani law, Mr. Jadhav would have 40 days to lodge an appeal against his conviction and sentence (i.e., until 19 May 2017), but it is not known whether he has done so. India states however that, on 26 April 2017, Mr. Jadhav's mother filed "an appeal" under Section 133 (B) and "a petition" to the Federal Government of Pakistan under Section 131 of the Pakistan Army Act 1952, both of which were handed over by the Indian High Commissioner to Pakistan's Foreign Secretary on the same day.

I. PRIMA FACIE JURISDICTION

15. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures*, Order of 19 April 2017, para. 17).

16. In the present case, India seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations (hereinafter the "Optional Protocol" and the "Vienna Convention", respectively). The Court must therefore first seek to determine whether Article I of the Optional Protocol prima facie confers upon it jurisdiction to rule on the merits, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

17. India and Pakistan have been parties to the Vienna Convention since 28 December 1977 and 14 May 1969, respectively, and to the Optional Protocol since 28 December 1977 and 29 April 1976, respectively. Neither of them has made reservations to those instruments.

18. Article I of the Optional Protocol provides as follows:

> "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."

19. India claims that a dispute exists between the Parties regarding the interpretation and application of Article 36, paragraph 1, of the Vienna Convention, which provides as follows:

> "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."

* *

20. India contends that Pakistan has breached its obligations under the above-mentioned provisions in the matter of the arrest, detention and trial of Mr. Jadhav. The Applicant asserts that Mr. Jadhav has been arrested, detained, tried and sentenced to death by Pakistan and that, despite several attempts, it could neither communicate with nor have access to him, in violation of Article 36, sub-paragraphs (1) *(a)* and (1) *(c)* of the Vienna Convention, and that Mr. Jadhav has neither been informed of his rights nor been allowed to exercise them, in violation of sub-paragraph (1) *(b)* of the same provision. India asserts that Article 36, paragraph 1, of the Vienna Convention "admits of no exceptions" and is applicable irrespective of the charges against the individual concerned.

21. India acknowledges that the Parties have signed an Agreement on Consular Access on 21 May 2008 (hereinafter the "2008 Agreement"), but it maintains that this instrument does not

limit the Parties' rights and obligations pursuant to Article 36, paragraph 1, of the Vienna Convention. According to India, while Article 73 of the Vienna Convention recognizes that agreements between parties may supplement and amplify its provisions, it does not provide a basis for diluting the obligations contained therein. India therefore considers that this Agreement does not have any effect on the Court's jurisdiction in the present case.

22. India also emphasizes that it only seeks to found the Court's jurisdiction on Article I of the Optional Protocol, and not on the declarations made by the Parties under Article 36, paragraph 2, of the Statute. India is of the view that where treaties or conventions especially provide for the jurisdiction of the Court, such declarations, including any reservations they may contain, are not applicable.

*

23. Pakistan claims that the Court has no prima facie jurisdiction to entertain India's Request for the indication of provisional measures. It first submits that the jurisdiction of the Court is excluded by a number of reservations in the Parties' declarations under Article 36, paragraph 2, of the Statute. Pakistan refers to two of India's reservations to its declaration of 18 September 1974, i.e., first, that preventing the Court from entertaining cases involving two members of the Commonwealth and, second, its multilateral treaty reservation. Pakistan also refers to a reservation contained in its own amended declaration of 29 March 2017, according to which "all matters relating to the national security of the Islamic Republic of Pakistan" are excluded from the compulsory jurisdiction of the Court. For Pakistan, this reservation is applicable in the present case because Mr. Jadhav was arrested, detained, tried and sentenced for espionage, sabotage and terrorism.

24. Secondly, Pakistan also contends that Article 36, paragraph 1, of the Vienna Convention could not have been intended to apply to persons suspected of espionage or terrorism, and that there can therefore be no dispute relating to the interpretation or application of that instrument in the present case.

25. Finally, Pakistan avers that the facts alleged in the Application fall within the scope of the 2008 Agreement, which "limit[s] and qualif[ies] or supplement[s]" the Vienna Convention. It refers to Article 73, paragraph 2, of the Vienna Convention, which provides that "[n]othing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof". Pakistan considers that the 2008 Agreement "amplifies or supplements [the Parties'] understanding and the operation of the Convention". In this regard, Pakistan calls attention to sub-paragraph (vi) of the 2008 Agreement, which provides that "[i]n case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits". Pakistan argues that this provision applies to Mr. Jadhav and that the Court therefore lacks prima facie jurisdiction under Article I of the Optional Protocol.

* *

26. The Court recalls that the Applicant seeks to ground its jurisdiction in Article 36, paragraph 1, of the Statute and Article I of the Optional Protocol; it does not seek to rely on the Parties' declarations under Article 36, paragraph 2, of the Statute. When the jurisdiction of the Court is founded on particular "treaties and conventions in force" pursuant to Article 36, paragraph 1, of its Statute, "it becomes irrelevant to consider the objections to other possible bases of jurisdiction" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 60, para. 25; *see also Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 872, para. 132). Therefore, any reservations contained in the declarations made by the Parties under Article 36, paragraph 2, of the Statute cannot impede the Court's jurisdiction specially provided for in the Optional Protocol. Thus, the Court need not examine these reservations further.

27. Article I of the Optional Protocol provides that the Court has jurisdiction over "[d]isputes arising out of the interpretation or application of the [Vienna] Convention" (see paragraph 18 above).

28. The Court will accordingly ascertain whether, on the date the Application was filed, such a dispute appeared to exist between the Parties.

29. In this regard, the Court notes that the Parties do indeed appear to have differed, and still differ today, on the question of India's consular assistance to Mr. Jadhav under the Vienna Convention. While India has maintained at various times that Mr. Jadhav should have been (and should still be) afforded consular assistance under the Vienna Convention (see for instance Notes Verbales dated 19 and 26 April 2017 annexed to the Application), Pakistan has stated that such an assistance would be considered "in the light of India's response to [its] request for assistance" in the investigation process concerning him in Pakistan (see the Notes Verbales of Pakistan dated 21 March and 10 April 2017 annexed to the Application). These elements are sufficient at this stage to establish prima facie that, on the date the Application was filed, a dispute existed between the Parties as to the question of consular assistance under the Vienna Convention with regard to the arrest, detention, trial and sentencing of Mr. Jadhav.

30. In order to determine whether it has jurisdiction — even prima facie — the Court must also ascertain whether such a dispute is one over which it might have jurisdiction *ratione materiae* on the basis of Article I of the Optional Protocol. In this regard, the Court notes that the acts alleged by India are capable of falling within the scope of Article 36, paragraph 1, of the Vienna Convention, which, *inter alia*, guarantees the right of the sending State to communicate with and have access to its nationals in the custody of the receiving State (sub-paragraphs *(a)* and *(c)*), as well as the right of its nationals to be informed of their rights (sub-paragraph *(b)*). The Court considers that the alleged failure by Pakistan to provide the requisite consular notifications with regard to the arrest and detention of Mr. Jadhav, as well as the alleged failure to allow communication and provide access to him, appear to be capable of falling within the scope of the Vienna Convention *ratione materiae*.

31. In the view of the Court, the aforementioned elements sufficiently establish, at this stage, the existence between the Parties of a dispute that is capable of falling within the provisions of the Vienna Convention and that concerns the interpretation or application of Article 36, paragraph 1, thereof.

32. The Court also notes that the Vienna Convention does not contain express provisions excluding from its scope persons suspected of espionage or terrorism. At this stage, it cannot be concluded that Article 36 of the Vienna Convention cannot apply in the case of Mr. Jadhav so as to exclude on a prima facie basis the Court's jurisdiction under the Optional Protocol.

33. In respect of the 2008 Agreement, the Court does not need to decide at this stage of the proceedings whether Article 73 of the Vienna Convention would permit a bilateral agreement to limit the rights contained in Article 36 of the Vienna Convention. It is sufficient at this point to note that the provisions of the 2008 Agreement do not impose expressly such a limitation. Therefore, the Court considers that there is no sufficient basis to conclude at this stage that the 2008 Agreement prevents it from exercising its jurisdiction under Article I of the Optional Protocol over disputes relating to the interpretation or the application of Article 36 of the Vienna Convention.

34. Consequently, the Court considers that it has prima facie jurisdiction under Article I of the Optional Protocol to entertain the dispute between the Parties.

II. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE MEASURES REQUESTED

35. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures*, Order of 19 April 2017, para. 63).

36. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*ibid.*, para. 64).

37. In its Application, India asserts that the rights it is seeking to protect are those provided by paragraph 1 of Article 36 of the Vienna Convention (quoted above at paragraph 19).

38. As the Court stated in its Judgment in the *LaGrand* case,

> "Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection. It begins with the basic principle governing consular protection: the right of communication and access (Art. 36, para. 1 *(a)*). This clause is followed by the provision which spells out the modalities of consular notification (Art. 36, para. 1 *(b)*). Finally Article 36, paragraph 1 *(c)*, sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State." (*I.C.J. Reports 2001*, p. 492, para. 74.)

39. It follows from Article 36, paragraph 1, that all States Parties to the Vienna Convention have a right to provide consular assistance to their nationals who are in prison, custody or detention in another State Party. They are also entitled to respect for their nationals' rights contained therein.

* *

40. In the present case, the Applicant claims that Mr. Jadhav, who is an Indian national, was arrested, detained, tried and sentenced to death by Pakistan and that, despite several attempts, India was given no access to him and no possibility to communicate with him. In this regard, India states that it requested consular access to the individual on numerous occasions between 25 March 2016 and 19 April 2017, without success. India points out that on 21 March 2017, at the end of the trial of Mr. Jadhav, Pakistan stated that "the case for the consular access to the Indian national Kulbushan Jadhav shall be considered in the light of India['s] response to Pakistan's request for assistance" in the investigation process concerning him; Pakistan reiterated its position on 10 April 2017 — apparently the day when Mr. Jadhav was convicted and sentenced to death (see paragraphs 13-14 above). India argues in this connection that the conditioning of consular access on assistance in an investigation is itself a serious violation of the Vienna Convention. It adds that Mr. Jadhav has not been informed of his rights with regard to consular assistance. The Applicant concludes from the foregoing that Pakistan failed to provide the requisite notifications without delay, and that India and its national have been prevented for all practical purposes from exercising their rights under Article 36, paragraph 1, of the Vienna Convention.

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41. Pakistan, for its part, contests that it has conditioned consular assistance as alleged by India. Furthermore, it avers that the rights invoked by India are not plausible because Article 36 of the Vienna Convention does not apply to persons suspected of espionage or terrorism, and because the situation of Mr. Jadhav is governed by the 2008 Agreement.

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42. At this stage of the proceedings, the Court is not called upon to determine definitively whether the rights which India wishes to see protected exist; it need only decide whether these rights are plausible (see above paragraph 35 and *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures*, Order of 19 April 2017, para. 64).

43. The rights to consular notification and access between a State and its nationals, as well as the obligations of the detaining State to inform without delay the person concerned of his rights with regard to consular assistance and to allow their exercise, are recognized in Article 36, paragraph 1, of the Vienna Convention. Regarding Pakistan's arguments that, first, Article 36 of the Vienna Convention does not apply to persons suspected of espionage or terrorism, and that, second, the rules applicable to the case at hand are provided in the 2008 Agreement, the Court considers that at this stage of the proceedings, where no legal analysis on these questions has been advanced by the Parties, these arguments do not provide a sufficient basis to exclude the plausibility of the rights claimed by India, for the same reasons provided above (see paragraphs 32-33).

44. India submits that one of its nationals has been arrested, detained, tried and sentenced to death in Pakistan without having been notified by the same State or afforded access to him. The Applicant also asserts that Mr. Jadhav has not been informed without delay of his rights with regard to consular assistance or allowed to exercise them. Pakistan does not challenge these assertions.

45. In the view of the Court, taking into account the legal arguments and evidence presented, it appears that the rights invoked by India in the present case on the basis of Article 36, paragraph 1, of the Vienna Convention are plausible.

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46. The Court now turns to the issue of the link between the rights claimed and the provisional measures requested.

47. The Court notes that the provisional measures sought by India consist in ensuring that the Government of Pakistan will take no action that might prejudice its alleged rights, in particular that it will take all measures necessary to prevent Mr. Jadhav from being executed before the Court renders its final decision.

48. The Court considers that these measures are aimed at preserving the rights of India and of Mr. Jadhav under Article 36, paragraph 1, of the Vienna Convention. Therefore, a link exists between the rights claimed by India and the provisional measures being sought.

III. RISK OF IRREPARABLE PREJUDICE AND URGENCY

49. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings (see, for example, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures*, Order of 19 April 2017, para. 88).

50. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision (*ibid.*, para. 89). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

* *

51. India contends that the execution of Mr. Jadhav would cause irreparable prejudice to the rights it claims and that this execution may occur at any moment before the Court decides on the merits of its case, as any appeal proceedings in Pakistan could be concluded very quickly and it is unlikely that the conviction and sentence would be reversed. In this regard, India explains that the only judicial remedy available to Mr. Jadhav was the filing of an appeal within 40 days of the sentence rendered on 10 April 2017. It points out that, although Mr. Jadhav may seek clemency, first from the Chief of Army Staff of Pakistan and secondly from the President of Pakistan, these are not judicial remedies.

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52. Pakistan claims that there is no urgency because Mr. Jadhav can still apply for clemency and that a period of 150 days is provided for in this regard. According to Pakistan, even if this period started on 10 April 2017 (the date of conviction at first instance), it would extend beyond August 2017. The Agent for Pakistan stated that there would be no urgent need to indicate provisional measures if the Parties agreed to an expedited hearing and suggested that Pakistan would be content for the Court to list the Application for hearing within six weeks.

* *

53. Without prejudging the result of any appeal or petition against the decision to sentence Mr. Jadhav to death, the Court considers that, as far as the risk of irreparable prejudice to the rights claimed by India is concerned, the mere fact that Mr. Jadhav is under such a sentence and might therefore be executed is sufficient to demonstrate the existence of such a risk.

54. There is considerable uncertainty as to when a decision on any appeal or petition could be rendered and, if the sentence is maintained, as to when Mr. Jadhav could be executed. Pakistan has indicated that any execution of Mr. Jadhav would probably not take place before the end of August 2017. This suggests that an execution could take place at any moment thereafter, before the Court has given its final decision in the case. The Court also notes that Pakistan has given no assurance that Mr. Jadhav will not be executed before the Court has rendered its final decision. In those circumstances, the Court is satisfied that there is urgency in the present case.

55. The Court adds, with respect to the criteria of irreparable prejudice and urgency, that the fact that Mr. Jadhav could eventually petition Pakistani authorities for clemency, or that the date of his execution has not yet been fixed, are not per se circumstances that should preclude the Court from indicating provisional measures (see, e.g., *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 91, para. 54).

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).

IV. CONCLUSION AND MEASURES TO BE ADOPTED

57. The Court concludes from all the above considerations that the conditions required by its Statute for it to indicate provisional measures are met and that certain measures must be indicated in order to protect the rights claimed by India pending its final decision.

58. Under the present circumstances, it is appropriate for the Court to order that 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.

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59. The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

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60. The decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of India and Pakistan to submit arguments in respect of those questions.

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61. For these reasons,

THE COURT,

I. Unanimously,

Indicates the following provisional measures:

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.

II. Unanimously,

Decides that, until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighteenth day of May two thousand and seventeen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of India and the Government of the Islamic Republic of Pakistan.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court; Judge BHANDARI appends a declaration to the Order of the Court.

(Initialled) R. A.

(Initialled) Ph. C.

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Annex 7

CONCURRING OPINION OF JUDGE CANÇADO TRINDADE

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I. *Prolegomena*

1. I have voted in support of the adoption today, 18.05.2017, of the present Order of the International Court of Justice (ICJ) in the case *Jadhav (*India *versus* Pakistan*)*, — shortly after the holding of the public hearings before the Court of 15.05.2017, — indicating provisional measures of protection. Given the great importance that I attach to certain aspects pertaining to the matter dealt with in the present Order, I feel obliged to append this Concurring Opinion thereto, under the merciless pressure of time (*ars longa, vita brevis*, anyway), so as to leave on the records the foundations of my own personal position thereon.

2. I shall thus consider, in the sequence next, the following points: *(a)* rights of States and of individuals as subjects of international law; *(b)* presence of rights of States and of individuals together; *(c)* the right to information on consular assistance in the framework of the guarantees of the due process of law; *(d)* the fundamental (rather than "plausible") human right to be protected: provisional measures as jurisdictional guarantees of a preventive character; *(e)* the autonomous legal regime of provisional measures of protection; and *(f)* the humanization of international law as manifested in the domain of consular law.

II. Rights of States and of Individuals as Subjects of International Law

3. The present *Jadhav* case concerns alleged violations of the 1963 Vienna Convention on Consular Relations with regard to the detention and trial of an Indian national (Mr. K.S. Jadhav), sentenced to death (on 10.04.2017) by a Court Martial in Pakistan. It is not my intention in the present Concurring Opinion to dwell upon the arguments advanced by the contending parties themselves, India and Pakistan, during the public hearings before the Court of 15.05.2017, as this has already been done in the Court´s Order itself, of today, 18.05.2017[1]. I have carefully taken note of such arguments, advancing distinct views of the interrelated issues of *prima facie* jurisdiction,

[1] Cf. paragraphs 19-25, 29, 37, 40-41, 43-44 and 51-52 of the present Order.

the grounds for provisional measures of protection, the requirements of urgency and imminence of irreparable harm[2].

4. On one sole point their respective views initially appeared not being so distinct, when Pakistan, referring at first to a point raised originally by India in its *Application Instituting Proceedings* (of 08.05.2017), — whereby Article 36 of the 1963 Vienna Convention on Consular Relations (henceforth, the "1963 Vienna Convention") was adopted to set up "standards of conduct", particularly concerning "communication and contact with nationals of the sending State, which would contribute to the development of friendly relations amongst nations" (p. 16, para. 34), — then added that "this is unlikely to apply in the context of a spy/terrorist sent by a State to engage in acts of terror"[3]. This is a point, however, that could be considered by the Court only at a subsequent stage of the proceedings in the *cas d´espèce* (preliminary objections, or merits), — as the ICJ itself has rightly pointed out in its Order just adopted today[4]. At the present stage of provisional measures of protection, the distinct views of the contending parties are thus found all over their respective arguments.

5. In the present Concurring Opinion, I purport to concentrate attention on the aforementioned points (part I, *supra*) bringing them into the realm of juridical epistemology. May I begin by observing that, in my perception, the present case *Jadhav* (India *versus* Pakistan) brings to the fore rights of States and of individuals emanating directly from international law. In effect, in its *Application Instituting Proceedings* as well as in its *Request for Provisional Measures of Protection*, both of 8 May 2017, India has deemed it fit to single out that the 1963 Vienna Convention confers rights upon States (under Article 36 (1) *(a)* and *(c)*) as well as individuals (nationals of States arrested or detained or put on trial in other States, under Article 36 (1) *(b)*)[5].

6. As subjects of international law, individuals and States are, in the circumstances of the *cas d´espèce*, *titulaires* of the rights of seeking and of having, respectively, consular access and assistance[6]. The *Request for Provisional Measures of Protection* further invokes, in addition to the aforementioned 1963 Vienna Convention (Article 36), the 1966 U.N. Covenant on Civil and

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[2]Cf. ICJ, doc. CR 2017/5, of 15.05.2017, pp. 11-43 (India); and ICJ, doc. CR 2017/6, of 15.05.2017, pp. 8-23 (Pakistan).

[3]ICJ, doc. CR 2017/6, of 15.05.2017, p. 19.

[4]Paragraph 43, and cf. also paragraphs 32-33, of the present Order.

[5]Cf. *Application Instituting Proceedings*, of 08.05.2017, p. 17, para. 34, and cf. also p. 3, para. 1*; Request for the Indication of Provisional Measures of Protection*, of 08.05.2017, pp. 3-4, paras. 5 and 9.

[6]Article 36 of the 1963 Vienna Convention concerns "Communication and contact with nationals of the sending State", and paragraph 1 provides that:

> "With a view to facilitating the exercise of consular functions relating to nationals of the sending State: *(a)* consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; *(b)* if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph; *(c)* consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action".

Political Rights (right to a fair trial, Article 14), so as to safeguard ultimately the inherent fundamental right to life (Article 6), as "[i]nternational law recognizes the sanctity of human life"[7]. In effect, Public International law has, in this context as well, benefited from the impact of the emergence and consolidation of the International Law of Human Rights (ILHR).

7. In contemporary international law, rights of States and of individuals are indeed to be considered altogether, they cannot be dissociated from each other. Before the turn of the century, the Inter-American Court of Human Rights [IACtHR] delivered its pioneering Advisory Opinion n^0 16 on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 01.10.1999), advancing the proper hermeneutics of Article 36(1)(b) of the 1963 Vienna Convention, reflecting the impact thereon of the *corpus juris* of the ILHR.

8. I drew attention to this important point in my Concurring Opinion (para. 1) appended to that Advisory Opinion n^o 16, wherein I pointed out that:

> "The profound transformations undergone by international law, in the last five decades, under the impact of the recognition of universal human rights, are widely known and acknowledged. The old monopoly of the State of the condition of being subject of rights is no longer sustainable, nor are the excesses of a degenerated legal positivism, which excluded from the international legal order the final addressee of juridical norms: the human being. (…) [T]his occurred with the indulgence of legal positivism, in its typical subservience to State authoritarianism.
>
> The dynamics of contemporary international life has cared to disauthorize the traditional understanding that the international relations are governed by rules derived entirely from the free will of the States themselves. [Contemporary international law] (…) has for years withdrawn support to the idea, proper of an already distant past, that the formation of the norms of international law would emanate only from the free will of each State.
>
> With the demystification of the postulates of voluntarist positivism, it became evident that one can only find an answer to the problem of the foundations and the validity of general international law in the *universal juridical conscience*, starting with the assertion of the idea of an objective justice. As a manifestation of this latter, the rights of the human being have been affirmed, emanating directly from international law, and not subjected, thereby, to the vicissitudes of domestic law" (paras. 12-14).

9. I added that the constraints of legal positivism had wrongly been indifferent to other areas of human knowledge, as well as to the existential time of human beings, reducing this latter to an external factor in the framework of which one was to apply positive law (para. 3). The positivist-voluntarist trend, with its obsession with the autonomy of the "will" of the States, came to the extreme of conceiving (positive) law *independently of time*. It so happens that the very emergence and consolidation of the *corpus juris* of the ILHR are due to the reaction of the universal juridical conscience to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law came to the encounter of human beings, the ultimate *titulaires* of their inherent rights protected by its norms (para. 4).

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[7] *Request for Provisional Measures of Protection, cit. supra* n^o. (5), p. 8, para. 17.

10. In the framework of this new *corpus juris*, one cannot remain indifferent to the contribution of other areas of human knowledge, nor to the existential time of human beings. And I added that the right to information on consular assistance (to refer to one example), "cannot nowadays be appreciated in the framework of exclusively inter-State relations", as contemporary legal science has come to admit that "the contents and effectiveness of juridical norms accompany the evolution of time, not being independent of this latter" (para. 5). I then recalled, in the same Concurring Opinion, that, despite of the fact that the 1963 Vienna Convention had been celebrated three years before the adoption of the two Covenants on Human Rights (Civil and Political Rights, and Economic, Social and Cultural Rights) of the United Nations, the IACtHR was aware that its *travaux préparatoires* already disclosed "the attention dispensed to the central position occupied by the individual" in the elaboration and adoption of its Article 36 (para. 16).

11. Thus, — I proceeded, — Article 36(1)(b) of the aforementioned 1963 Vienna Convention, in spite of having preceded in time the provisions of the two U.N. Covenants on Human Rights (of 1966), could no longer be dissociated from the international norms of protection of human rights concerning the guarantees of the due process of law and their evolutive interpretation (para. 15). The action of protection thereunder, "in the ambit of the International Law of Human Rights, does not seek to govern the relations between equals, but rather to protect those ostensibly weaker and more vulnerable"; it is this "condition of particular vulnerability" that the right to information on consular assistance "seeks to remedy" (para. 23).

III. Presence of Rights of States and of Individuals Together

12. States and individuals are subjects of contemporary international law[8]; the crystallization of the subjective individual right to information on consular assistance bears witness of such evolution. Still in my aforementioned Concurring Opinion in the IACtHR´s Advisory Opinion n^{o} 16 on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), I recalled (para. 25) that the ICJ itself, in the case of *Hostages in Tehran* (United States *versus* Iran, Provisional Measures, Order of 15.12.1979), had pondered that the proper conduction of consular relations, established since ancient times *"between peoples"*, is no less important in the context of contemporary international law, "in promoting the development of friendly relations *among nations*, and *ensuring protection and assistance for aliens resident in the territories of other States*"; this being so, — the Court added, — no State can fail to recognize "the imperative obligations" codified in the 1961 and 1963 Vienna Conventions[9] on Diplomatic and Consular Relations, respectively.

13. Shortly afterwards, in the same case of *Hostages in Tehran* (merits, Judgment of 24.05.1980), the ICJ, in referring again to the provisions of the Vienna Conventions on Diplomatic Relations (of 1961) and on Consular Relations (of 1963), pointed out the great importance and the

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[8]Cf., in this sense, e.g., A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law - Part I", 316 *Recueil des Cours de l´Académie de Droit International de La Haye* (2005) chs., XII and IX-X, pp. 203-219 and 252-317; A.A. Cançado Trindade, *Le Droit international pour la personne humaine*, Paris, Pédone, 2012, pp. 45-368; A.A. Cançado Trindade, "The Human Person and International Justice" (W. Friedmann Memorial Award Lecture 2008), 47 *Columbia Journal of Transnational Law* (2008) pp. 16-30; A.A. Cançado Trindade, "La Persona Humana como Sujeto del Derecho Internacional: Consolidación de Su Posición al Inicio del Siglo XXI", in *Democracia y Libertades en el Derecho Internacional Contemporáneo* (Libro Conmemorativo de la XXXIII Sesión del Programa Externo de la Academia de Derecho Internacional de La Haya, Lima, 2005), Lima, The Hague Academy of International Law/IDEI (PUC/Peru), 2006, pp. 27-76; A.A. Cançado Trindade, "A Consolidação da Personalidade e da Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", in 16 *Anuario del Instituto Hispano-Luso-Americano de Derecho Internacional* - Madrid (2003) pp. 237-288; A.A. Cançado Trindade, "A Personalidade e Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", in *Jornadas de Derecho Internacional* (Mexico, Dec. 2001), Washington D.C., OAS Subsecretariat of Legal Affairs, pp. 311-347.

[9]Paras. 40-41 of the ICJ´s Order of 15.12.1979.

imperative character of their obligations, and invoked expressly, in relation to them, the contents of the 1948 Universal Declaration of Human Rights[10] (para. 26).

14. The presence of rights of States and of individuals together was, subsequently, acknowledged in express terms by ICJ in the case of *Avena and Other Mexican Nationals* (Mexico *versus* United States, Judgment of 31.03.2004), where it stated that "violations of the rights of the individual under Article 36 [of the 1963 Vienna Convention] may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual" (para. 40).

15. In the present *Jadhav* case, in its oral arguments in the very recent public hearings before the Court of 15.05.2017, India referred to this *dictum*, and added that "[w]here the rights of an individual are violated, consequences must follow. The [1963] Vienna Convention recognizes the right of a State to seek redress on behalf of its national in this Court, where the rights of its national, and concomitantly its own rights under the Vienna Convention, are violated by another State"[11]. And it further pointed out that "[t]he rights of consular access are a significant step in the evolution and recognition of the human rights in international law", specifically referring to provisions of the U.N. Covenant on Civil and Political Rights (Articles 6, 9 and 14)[12].

IV. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law

16. The insertion of the matter under examination into the domain of the international protection of human rights, thus counted early on judicial recognition (cf. part III, *supra*), "there being no longer any ground at all for any doubts to subsist as to an opinio juris to this effect"; in effect, — as I further pondered in my aforementioned Concurring Opinion in the IACtHR´s Advisory Opinion no 16 of 1999, — the subjective element of international custom is the opinion juris communis, and "in no way the voluntas of each State individually13 " (para. 27); "it is no longer possible to consider the right to information on consular assistance (under Article 36(1)(b) of the 1963 Vienna Convention on Consular Relations) without directly linking it to the corpus juris of the ILHR" (para. 29).

17. In the framework of this latter, the international juridical personality of the human being, emancipated from the domination of the State, — as foreseen by the so-called "founding fathers" of international law (the *droit des gens*), — has been established nowadays. (…) A "normative" Convention, of codification of international law, such as the 1963 Vienna Convention, acquires a life of its own, being clearly independent from the "will" of individual States Parties. That Convention represents much more than the sum of the individual "wills" of the States Parties, and fosters the progressive development of international law (paras. 30-31).

18. The intermingling between Public International Law and the International Law of Human Rights gives testimony of the recognition of "the centrality, in this new *corpus juris*, of the universal human rights, — what corresponds to a new *ethos* of our times" (para. 34). It has thus

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[10]Paras. 62, 88, and 91-92 of the Court´s Judgment of 24.05.1980.

[11]ICJ, doc. CR 2017/5, of 15.05.2017, p. 39, para. 89.

[12]Pertaining to the right to life, the right to liberty and security of person, and the right to a fair trial, respectively; ibid., pp. 38-39, para. 86.

[13]A.A. Cançado Trindade, "Contemporary International Law-Making: Customary International Law and the Systematization of the Practice of States", *Thesaurus Acroasium - Sources of International Law* (XVI Session, 1988), Thessaloniki/Greece, Institute of Public International Law and International Relations, 1992, pp. 77-79.

become indispensable to link, for the purpose of protection, "the right to information on consular assistance with the guarantees of the due process of law set forth in the instruments of international protection of human rights" (para. 34). This, in turn, bears witness of "the process of *humanization* of international law" (para. 35), as manifested in particular also in the domain of consular law nowadays (cf. part VII, *infra*).

V. The Fundamental (rather than "Plausible") Human Right to be Protected: Provisional Measures as Jurisdictional Guarantees of a Preventive Character

19. The right to information on consular assistance is, in the circumstances of the *cas d´espèce*, inextricably linked to the right to life itself, a fundamental and non-derogable right, rather than a simply "plausible" one. This is true not only for the stage of the merits of the case at issue, but also for the stage of provisional measures of protection, endowed with a juridical autonomy of their own (cf. *infra*). Fundamental rights are duly safeguarded by provisional measures of protection endowed with a conventional basis (such as those of the ICJ and of the IACtHR, as truly fundamental (not only "plausible") rights are at risk[14] .

20. In this respect, in my book of personal memories of the IACtHR I recalled, in connection with the importance of compliance with provisional measures of protection, *inter alia*, the case of *James and Others versus Trinidad and Tobago* (1998-2000), pertaining to the guarantees of the due process of law and the suspension of execution of death penalty:

> "[T]eníamos conciencia de que trabajábamos contra el reloj, y no podríamos retardar nuestra decisión, pues estaba amenazado, además del derecho a las garantías judiciales, el propio derecho fundamental a la vida. Nuestra acción eficaz [decisión de la suspensión de la ejecución de pena de muerte], acatada por el Estado, llevó a que las vidas de los condenados a la muerte en Trinidad y Tobago fueran salvadas, y las sentencias condenatorias de los tribunales nacionales fueran conmutadas". / "We were conscious that we worked against the clock, and could not delay our decisión, as the right to judicial guarantees, in addition to the fundamental right to life itself, were threatened. Our effective action [decision of suspension of the execution of death penalty], complied with by the State, saved the lives of those condemned to death in Trinidad and Tobago, and the condemnatory sentences of the national tribunals were commuted" [my own translation][15].

21. The IACtHR extended the protection afforded by successive provisional measures (adopted in 1998-1999) to a growing number of individuals that had been condemned to death (so-called "mandatory" death penalty). To the Order of 25.05.1999 in the *James and Others* case, e.g., I appended a Concurring Opinion wherein I observed that, also in relation to provisional measures of protection, the international Court (be it the IACtHR or the ICJ) has the inherent power to determine the extent of its own competence *(compétence de la compétence / Kompetenz-Kompetenz)*, it is the guardian and master of its own jurisdiction (*jurisdictio, jus dicere*, to say what the Law is), as its jurisdiction cannot be at the mercy of facts (either at domestic or international level) other than its own actions (paras. 7-8).

22. In cases of the kind, involving the fundamental human right to life, — I proceeded, — the Court, by means of provisional measures of protection, goes well beyond the simple search for a balance of the interests of the contending parties (which used to suffice in traditional international

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[14] Article 41 of the ICJ Statute, and Article 63(2) of the American Convention on Human Rights, respectively.

[15] A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, 4th. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2017, pp. 48.

law); one is here safeguarding a fundamental human right, and this shows — I concluded — that "provisional measures cannot be restrictively interpreted", and they impose themselves, to the benefit of the persons concerned, as *"true jurisdictional guarantees of a preventive character* that they are*"* (paras. 13-14, 16 and 18).

23. I also pondered that they are transformed into such jurisdictional guarantees by the proper consideration of their constitutive elements of extreme gravity and urgency, and prevention of irreparable damage to persons (para. 10), — even more cogently when the fundamental right to life is at stake. Provisional measures of protection have an important role to play when the rights of the human person are also at stake; developed mainly in contemporary international case-law, they have, however, been insufficiently studied in international legal doctrine to date.

VI. The Autonomous Legal Regime of Provisional Measures of Protection

24. May I now reiterate, in the present Concurring Opinion, my understanding that provisional measures of protection are endowed with a juridical autonomy of their own. I have sustained it in my Individual Opinions in successive cases within the ICJ[16] (and, earlier on, within the IACtHR), thus contributing to its conceptual elaboration in the jurisprudential construction on the matter. I soon identified the component elements of such autonomous legal regime, namely: the rights to be protected, the obligations proper to provisional measures of protection; the prompt determination of responsibility (in case of non-compliance), with its legal consequences; the presence of the victim (or potential victim, already at this stage), and the duty of reparations for damages.

25.The present ICJ Order of today, 18.05.2017, in the *Jadhav* case (India *versus* Pakistan), affords yet another illustration to the same effect, contributing to that jurisprudential construction. In the present Concurring Opinion, I have already drawn attention to the presence of rights of States and of individuals together (part III, *supra*). In effect, as to the ICJ, even though the proceedings in contentious case keeps on being a strictly inter-State one (by attachment to an outdated dogma of the past), this in no way impedes that the beneficiaries of protection in given circumstances are the human beings themselves, individually or in groups, — as I pointed out, e.g., in my Dissenting Opinion in the case concerning *Questions Relating to the Obligation to Prosecute or to Extradite* (Order of 28.05.2009), and in my Separate Opinion in the case of *Application of the International Convention for the Suppression of the Financing of Terrorism [ICSFT] and of the*

[16]Such as: in my Dissenting Opinion in the case concerning *Questions Relating to the Obligation to Prosecute or to Extradite (*Belgium *versus Senegal*, Order of 28.05.2009); in my Separate Opinion in the case of the *Temple of Préah Vihéar* (Cambodia *versus* Thailand, Order of 18.07.2011); in my Dissenting Opinion in the cases of *Construction of a Road in Costa Rica along the San Juan River and of Certain Activities Carried out by Nicaragua in the Border Area* (Nicaragua *versus* Costa Rica, and Costa Rica *versus* Nicaragua, Order of 16.07.2013); in my Separate Opinion in the case of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua, Order of 22.11.2013); in my Separate Opinion in the joined cases of *Certain Activities Carried out by Nicaragua in the Border Area and of Construction of a Road in Costa Rica along the San Juan River* (Costa Rica *versus* Nicaragua, and Nicaragua *versus* Costa Rica, Judgment of 16.12.2015); in my Separate Opinion in the case of *Application of the International Convention for the Suppression of the Financing of Terrorism [ICSFT] and of the International Convention on the Elimination of All Forms of Racial Discrimination [CERD]* (Ukraine *versus* Russian Federation, Provisional Measures, Order of 19.04.2017). With the exception of this last one, all other Individual Opinions of mine, referred to in the present Separate Opinion (which I have presented within both within the ICJ and, earlier on, the IACtHR), are reproduced in the three-volume collection (Series *"The Judges"): Judge A.A. Cançado Trindade - The Construction of a Humanized International Law - A Collection of Individual Opinions* (1991-2013), vol. I (Inter-American Court of Human Rights), Leiden, Brill/Nijhoff, 2014, pp. 9-852; vol. II (International Court of Justice), Leiden, Brill/Nijhoff, 2014, pp. 853-1876; vol. III (International Court of Justice, 2013-2016), Leiden, Brill/Nijhoff, 2017, pp. 9-764.

International Convention on the Elimination of All Forms of Racial Discrimination [CERD] (Order of 19.04.2017)[17] .

VII. Final Considerations: The Humanization of International Law as Manifested in the Domain of Consular Law

26. Last but not least, I could not conclude the present Concurring Opinion without addressing a point which has been grabbing my attention since the nineties, successively in two international jurisdictions (IACtHR and ICJ): I refer to the ongoing historical process of the *humanization* of international law, manifesting itself, as in the present *Jadhav* case, in particular also in the domain of consular law. In the present Concurring Opinion, in focusing attention on the rights of States and of individuals as subjects of international law, I recalled the reflections I made in my Concurring Opinion in the IACtHR´s Advisory Opinion n° 16 on *the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 01.10.1999).

27. I pondered therein that, in spite of the fact that the 1963 Vienna Convention on Consular Relations precedes chronologically the two 1966 U.N. Covenants on Human Rights, Article 36(1) of the former was soon to be interpreted under the impact of the ILHR (cf. part II, *supra*). One could no longer dissociate the rights enshrined in that provision from the evolutive interpretation of the relevant norms of protection of human rights. States and individuals, as subjects of international law, and their corresponding rights, came to be taken together, as they should have been, in the new humanized *jus gentium*.

28. Shortly afterwards, in my following Concurring Opinion in the IACtHR´s complementary Advisory Opinion n°. 18 on the *Juridical Condition and Rights of Undocumented Migrants* (of 17.09.2003), I retook the point that, by the turn of the century, the humanization of international law was manifested, with judicial recognition, in new developments in the domain of consular law (paras. 1-2). I singled out the relevance, in this evolution, of fundamental principles, laying on the foundations themselves of the law of nations (*le droit des gens*, as foreseen by the "founding fathers" of the discipline), as well as of the emergence of *jus cogens* and the corresponding obligations *erga omnes* of protection, in their horizontal and vertical dimensions (paras. 3 and 44-85).

29. Among general principles of law (in both comparative domestic law and international law), those which are endowed with a true fundamental character, — I went on, — do indeed form the *substratum* of the legal order itself, revealing the *right to the Law (droit au Droit)*, of which are *titulaires* all human beings, irrespective of their statute of citizenship or any other circumstance (para. 55). Without such principles, — which are truly *prima principia*, — wherefrom norms and rules emanate and wherein they find their meaning, the "legal order" simply "is not accomplished, and ceases to exist as such" (para. 46).

30. I further made a point of underlying, in the same Concurring Opinion, that the "great legacy of the juridical thinking of the second half of the XXth century, in my view, has been, by

[17] Cf. also, on the same jurisprudential construction, my Separate Opinion in the case *A.S. Diallo* (Guinea *versus* D.R. Congo, merits, Judgment of 30.11.2010); and cf. also my reflections in, *inter alia*: A.A. Cançado Trindade, "La Expansión y la Consolidación de las Medidas Provisionales de Protección en la Jurisdicción Internacional Contemporánea", in *Retos de la Jurisdicción Internacional* (eds. S. Sanz Caballero and R. Abril Stoffels), Cizur Menor/Navarra, Cedri/CEU/Thomson Reuters, 2012, pp. 99-117; A.A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", in *Mesures conservatoires et droits fondamentaux* (eds. G. Cohen Jonathan and J.-F. Flauss), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163.

means of the emergence and evolution of the ILHR, the rescue of the human being as subject" of the law of nations, endowed with international legal personality and capacity (para. 10). This was due to the awakening of the *universal juridical conscience* (paras. 25 and 28), — the *recta ratio* inherent to humanity, — as the ultimate *material source* of the law of nations[18] , standing well above the "will" of individual States. It was necessary, in our days, — I added, — "to stimulate this awakening of the *universal juridical conscience* to intensify the process of humanization of contemporary international law" (para. 25)[19] .

31. This outlook was to have prompt repercussions in the region of the world I originally come from, though it in effect looked well beyond it: in acknowledging the expansion of international legal personality and capacity of individuals (along with of States), this development kept in mind the *universality* of the law of nations, as originally propounded by its "founding fathers" *(totus orbis and civitas maxima gentium)*, and re-emerged in our times.

32. That outlook has decisively contributed to the formation, *inter alia* and in particular, of an *opinio juris communis* as to the right of individuals, under Article 36(1)(b) of the 1963 Vienna Convention, reflecting the ongoing process of humanization of international law, encompassing relevant aspects of consular relations[20]. Always faithful to this humanist universal outlook, I deem it fit to advance it, once again, in the present Concurring Opinion in the Order that the ICJ has just adopted today, 18.05.2017, in the *Jadhav* case.

33. The ICJ has, after all, shown awareness that the provisional measures of protection rightly indicated by it in the present Order (resolutory point I of the *dispositif*) are aimed at preserving the rights of *both* the State and the individual concerned (para. 48) under Article 36(1) of the 1963 Vienna Convention. The jurisprudential construction to this effect, thus, to my satisfaction, keeps on moving forward. Contemporary international tribunals have a key role to play in their common mission of realization of justice.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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[18]Cf., in this respect, A.A. Cançado Trindade, "International Law for Humankind…", *op. cit. supra* n. (8), ch. VI, pp. 177-202.

[19]As I had earlier asserted also, e.g., in my Concurring Opinion (para. 12) in the IACtHR´s Order on provisional measures of protection in the case of *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (of 18.08.2000).

[20]A.A. Cançado Trindade, "The Humanization of Consular Law: The Impact of Advisory Opinion n. 16 (1999) of the Inter-American Court of Human Rights on International Case-Law and Practice", in 6 *Chinese Journal of International Law* (2007) n. 1, p. 1-3, 5 and 15. I further pointed out the impact of that outlook was also acknowledged in expert writing, as from the IACtHR´s Advisory Opinion n. 19, of 01.10.1999, followed by the subsequent decision of the ICJ of 27.06.2001 in the *LaGrand* case (Germany *versus* United States); I further recalled that the then U.N. Subcommission on the Promotion and Protection of Human Rights, in a statement issued on 08.08.2002 (and made public in a press release of the U.N. High Commissioner for Human Rights of the same date), urged the respondent State in the *LaGrand* case to stay the execution of a Mexican national (Mr. J.S. Medina), "on the basis of the Advisory Opinion no. 16 of the IACtHR and the subsequent Judgment of the ICJ in the *LaGrand* case (27.06.2001)"; *ibid*., p. 10. And, on the pioneering character of the aforementioned IACtHR´s Advisory Opinion no. 16 of 1999, - in addition to that of its case-law of that time asserting the binding character of provisional measures of protection, - cf. also G. Cohen-Jonathan, "Cour Européenne des Droits de l'Homme et droit international général (2000)", 46 *Annuaire français de Droit international* (2000) p. p. 642.

Annex 8

DECLARATION OF JUDGE BHANDARI

1. I am in agreement with the Court's decision to indicate provisional measures in the present case. However, I wish to place on record my views concerning India's request for provisional measures in more detail.

THE FACTS

2. On 8 May 2017, India filed with the Court a case against Pakistan concerning the alleged violation of India's rights under the 1963 Vienna Convention on Consular Relations ("VCCR")[1]. India argued that "Pakistan arrested, detained, 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 [VCCR]"[2]. According to India, Mr. Jadhav was kidnapped from Iran, where he was carrying out business following his retirement from the Indian Navy, and transported into Pakistani territory[3]. However, a Pakistani press release submitted by India stated that Mr. Jadhav was arrested in Balochistan[4], on Pakistani soil, on 3 March 2016[5].

3. India was made aware of Mr. Jadhav's arrest on 25 March 2016. Starting on 30 March 2016, India sent 13 Notes Verbales to Pakistan[6]. By way of such Notes Verbales, India requested Pakistan to allow consular access in accordance with paragraph 1 of Article 36 of the VCCR. Under that provision:

> "With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> *(a)* consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> *(b)* if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
>
> *(c)* consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to

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[1] *United Nations Treaty Series (UNTS)*, Vol. 596, p. 261.

[2] Request for provisional measures, para. 3. See also CR 2017/5, p. 11, para. 1 (Mittal).

[3] Application instituting proceedings, para. 13. See also CR 2017/5, p. 12, para. 8 (Mittal).

[4] *Ibid.*, Ann. 4.

[5] *Ibid.*, para. 4.

[6] Request for provisional measures, para. 4. See Application instituting proceedings, Annex 1: Note Verbale no. ISL/103/1/2016 (25 March 2016); Note Verbale no. ISL/103/14/2016 (30 March 2016); Note Verbale no. ISL/103/14/2016 (6 May 2016); Note Verbale no. ISL/103/14/2016 (10 June 2016); Note Verbale no ISL/103/14/2016 (11 July 2016); Note Verbale no. ISL/103/14/2016 (26 July 2016); Note Verbale no. ISL/103/14/2016 (22 August 2016); Note Verbale no. ISL/103/14/2016 (3 November 2016); Note Verbale no. ISL/103/14/2016 (19 December 2016); Note Verbale no. J/411/08/2016 (3 February 2017); Note Verbale no. ISL/103/14/2016 (3 March 2017); Note Verbale no. ISL/103/14/2016 (31 March 2016); Note Verbale no. J/411/8/2016 (10 April 2017).

> 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".

4. However, Pakistan allegedly did not reply to any such Note Verbale[7]. According to India, Pakistan has "refused to communicate, to the consular officers, the charges against Jadhav and the evidence and other material adduced against him in the so-called trial so as to enable them to arrange for his legal representation"[8]. Instead, on 23 January 2017 Pakistan requested India's co-operation in investigating Mr. Jadhav's alleged violations of Pakistani law[9]. India never responded. Pakistan stated that "India could and should have responded to [the letter] seeking India's assistance to investigate [Mr. Jadhav's] criminal activity and links with people in India"[10]. On 10 April 2017, India received a Note Verbale from Pakistan's Ministry of Foreign Affairs stating that "consular access . . . shall be considered, in the light of India's response to Pakistan's request for assistance in the investigation process"[11].

5. During his detention in Pakistan, Mr. Jadhav was put on trial before a Field General Court Martial, in accordance with the Pakistan Army Act 1952[12]. According to the 1952 Act, "[t]he decision of the court martial, under Section 105, is by an absolute majority of votes, and in the event death sentence is to be awarded it has to be unanimous"[13]. A death sentence must subsequently be confirmed by a convening officer designated by the Federal Government or by the Chief of Army Staff[14]. As explained above, Mr. Jadhav was sentenced to death by the court martial, and his sentence was confirmed by the Chief of Army Staff. However, against such a sentence the 1952 Act allows for a petition to the Federal Government under Section 131[15]. In addition to such a petition, an appeal could be filed in a court of law under Section 133 (B) of the 1952 Act. Under that provision:

> "the Court of Appeal is to consist, in cases of award of death sentence after 1992, of the Chief of Army Staff or one or more of the officers designated by him [on his] behalf and presided by an officer not below the rank of Brigadier in the case of a Field General Court Martial as in this case. The decision of the Court of Appeal is final and cannot be called in question before any court or other authority."[16]

6. Mr. Jadhav's mother filed both a petition under Section 131, and an appeal pursuant to Section 133 (B) of the 1952 Act.[17] However, Mr. Harish Salve, counsel for India, argued that

> "[t]he appeal has been filed [by Mr. Jadhav's mother] as a measure of desperation, without knowing the charges against Jadhav, the evidence against him which has been

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[7]Request for provisional measures, para. 4.

[8]CR 2017/5, p. 18, para. 6 (Salve).

[9]*Ibid.*, para. 5.

[10]CR 2017/6, p. 9, para. 11 (Faisal).

[11]Application instituting proceedings, Annex 4.

[12]*Ibid.*, para. 53.

[13]*Ibid.*

[14]*Ibid.*, para. 54.

[15]*Ibid.*, para. 55.

[16]*Ibid.*

[17]*Ibid.*, para. 56.

relied upon to convict him, and without having access even to the judgment and order of conviction and sentence"[18].

7. Mr. Salve submitted that "the more serious the charge [against Mr. Jadhav], the greater the need for the procedural safeguards to ensure that the accused gets a fair trial"[19]. Hence, in India's view, any remedy against Mr. Jadhav's death sentence available in Pakistan are "illusory"[20]. First, the death sentence was confirmed by the Chief of Army Staff, which entails that an appeal filed with a court presided by the Chief of Army Staff "would be an appeal *from Caesar to Caesar*"[21]. Second, Pakistan's Government made it clear that they agree with the death sentence issued against Mr. Jadhav[22]. Third, India argued that the Court of Appeal could be seen not to be independent in a case like Mr. Jadhav's[23]. Fourth, given the stance of the Pakistani Government on Mr. Jadhav's criminal responsibility, India took the position that the Court of Appeal constituted under Section 133 (B) of the 1952 Act would not be "free from pressures so as to constitute a real and effective remedy"[24]. Fifth, "[e]ven in the course of the appeal, Pakistan has clearly refused consular access"[25]. Sixth, the Lahore Bar Association passed a resolution on 14 April 2017 by which it decided "to cancel the membership of the lawyer(s) found pursuing an appeal on behalf of [Mr. Jadhav]", which entails that Mr. Jadhav would not be able to have proper legal assistance in the appeal against his death sentence[26].

8. India stated that "Pakistan continues to deny consular access and to provide any information regarding the proceedings against the Indian national including whether an appeal has been filed in the matter"[27]. On 27 April 2017:

> "[t]he External Affairs Minister of India wrote a letter to the Advisor to the Pakistan Prime Minister on Foreign Affairs . . . in which she reiterated the requests for certified copies of the charge-sheet against Mr. . . . Jadhav, proceedings of the Court of Inquiry, the summary of evidence in the case, the judgement, appointment of a defence lawyer and his contact details and certified copy of medical report of Mr. Jadhav. She also reiterated the requested [*sic*] for the visa for the parents of Mr. Jadhav. She sought the personal intervention of the Advisor on the matter. No response has been received to this missive"[28].

Dr. Deepak Mittal, Agent of India before the Court, stated that:

> "Mr. Jadhav [was] incarcerated in Pakistan for more than a year on concocted charges, deprived of his rights and protection accorded under the [VCCR], being held incommunicado without contact with his family and the home State, [and] is facing imminent execution. All notions of human rights now considered by the global

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[18]CR 2017/5, p. 24, para. 27 (Salve).

[19]*Ibid.*, p. 40, para. 91 (Salve).

[20]Application instituting proceedings, para. 57.

[21]*Ibid.*, para. 57 *(a)*.

[22]*Ibid.*, para. 57 *(b)*.

[23]*Ibid.*, para. 57 *(c)*.

[24]*Ibid.*, para. 57 (d).

[25]*Ibid.*, para. 57 (e).

[26]*Ibid.*, para. 57 (f).

[27]Request for provisional measures, para. 10.

[28]Application instituting proceedings, para. 23.

> community as basic to behaviour in civilized nations, have been thrown to the winds."[29]

Moreover, Mr. Mittal also submitted to the Court that:

> "Pakistan has not provided any information or documents, including the charge-sheet, proceedings of the Court of Inquiry, the summary of evidence, the judgment. Request for appointment of a defence lawyer for Mr. Jadhav has also not elicited any response."[30]

9. The core of India's argument is that "Pakistan failed to comply with all its obligations under Article 36. It denied India its right to consular access to its national. India has been seeking consular access incessantly since March 2016 when India was informed of the detention of Mr. . . . Jadhav by Pakistan."[31] India submitted that it "has a strong prima facie case as to the jurisdiction of the Court and on merits, sufficient to justify seeking provisional measures"[32]. For its part, Pakistan considers India's Application a means to have Mr. Jadhav's death sentence reviewed by the Court, which, as Pakistan stated, "cannot exercise a criminal appellate jurisdiction"[33]. In its prayer for relief, India requests the Court to exercise its power under Article 41 of the Statute and indicate the following provisional measures:

(a) that Pakistan take all measures necessary to ensure that Mr. Jadhav is not executed;

(b) that Pakistan report to the Court the action it has taken in pursuance of such measures necessary to ensure that Mr. Jadhav is not executed;

(c) that Pakistan ensure that no action is taken that might prejudice the rights of India or Mr. Jadhav with respect to any decision the Court may render on the merits of the case.[34]

THE LAW

The test for indicating provisional measures

10. According to established jurisprudence, the Court indicates provisional measures provided that four requirements are met: (i) the Court has prima facie jurisdiction over the merits of the case; (ii) the rights asserted by the Applicant State on the merits are plausible; (iii) there is a real and imminent risk of irreparable prejudice to the rights of the applicant State pending the settlement of the dispute by the Court; and (iv) there is a link between the measures requested and the rights claimed by the applicant State on the merits[35]. Each requirement is analysed in turn.

The 2008 Agreement on Consular Access

11. Preliminarily, it should be noted that on 21 May 2008 India and Pakistan concluded the Agreement on Consular Access, whose provisions touch on issues relating to, at the title suggests, consular access, such as the immediate notification to the other State of the arrest, detention or

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[29]CR 2017/5, p. 11, para. 3 (Mittal).

[30]*Ibid.*, p. 13, para. 11 (Mittal). See also Mr. Mittal's submissions at *Ibid.*, p. 14, para. 16 (Sharma).

[31]*Ibid.*, p. 16, para. 7 (Sharma).

[32]*Ibid.*, p. 42, para. 95 (Salve).

[33]CR 2017/6, p. 17 (Qureshi).

[34]Request for provisional measures, para. 22.

[35]*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures*, Order on of 7 December 2016, paras. 31, 71-72 and 82-83.

imprisonment of one of its nationals[36]. Primarily, India stated that the claim brought by it exclusively relates to the VCCR, and does not concern the rights and obligations of the Parties arising under the 2008 Agreement[37]. In addition, India argued that the "2008 Agreement . . . is not registered with the United Nations under Article 102 of the Charter, and therefore under paragraph 2 of Article 102 this Agreement cannot be invoked before any organ of the United Nations"[38].

12. According to India, the argument that the 2008 Agreement exhaustively regulates the matter of consular access between the Parties "lacks merit both because of the express provisions of the [VCCR], as well as the plain language of the [2008 Agreement]"[39]. India pointed out that:

> "[i]n the [2008] Agreement, . . . the two signatory States . . . agreed to certain measures. They included release and repatriation of persons within one month of confirmation of their national status and completion of sentences. The Agreement recognised that in case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its own merits, and that in special cases which call for or require compassionate and humanitarian considerations, each side may exercise its discretion subject to its laws and regulations to allow early release and repatriation of persons."[40]

13. India more specifically argued that the 2008 Agreement was irrelevant for four reasons:

> "*(a)* India does not rely upon the [2008] Agreement . . . It bases its claim solely upon the [VCCR] . India's claim in its Application is *de hors* this Bilateral Agreement.
>
> *(b)* Article 102(2) of the United Nations Charter 1945 proscribes invocation of any Agreement, unless it is registered. This Agreement is admittedly not registered.
>
> *(c)* Article 73 of the [VCCR] recognizes that the [VCCR] does not affect other international agreements in force. It also, however, expressly does not "preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof".
>
> *(d)* Article 41 of the Vienna Convention on the Law of Treaties recognizes and ex-postulates the established principle of international law that two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty between themselves, if the possibility of such a modification is provided for by the treaty, or the modification in question is not prohibited by the treaty, and does not relate to a provision, the derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole . . . Article 73 of the [VCCR] recognizes that there is scope for parties to supplement and amplify the provisions of the [VCCR] — it does not, certainly does not, countenance a dilution of the principles embodied in the [VCCR]."[41]

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[36] Application instituting proceedings, Ann. 10, para. (ii).

[37] *Ibid.*

[38] CR 2017/5, p. 17, para. 16 (Sharma).

[39] Application instituting proceedings, para 44.

[40] *Ibid.*, para. 45.

[41] CR 2017/5, p. 34-35, para. 66 (Salve).

14. The Court correctly noted that:

> "In respect of the 2008 Agreement, . . . the Court considers that there is no sufficient basis to conclude at this stage that the 2008 Agreement prevents it from exercising its jurisdiction under Article I of the Optional Protocol over disputes relating to the interpretation of the application of Article 36 of the [VCCR]."[42]

Prima facie jurisdiction

15. The Court may indicate provisional measures only if it satisfies itself that it has prima facie jurisdiction over the merits of the dispute.[43] India's Co-Agent, Mr. V.D. Sharma, stated that "India relies upon the jurisdiction of this Court under paragraph 1 of Article 36 of the Statute of this Court"[44]. This was reiterated by Mr. Salve, who submitted that "India does not seek to assert jurisdiction for its Application in paragraph 2 of Article 36 of the Statute"[45], but on "the jurisdiction of the Court conferred by Article 36, paragraph 1, of the Statute of the Court, and Article I of the Optional Protocol Concerning Compulsory Settlement of Disputes"[46]. Article I states that:

> "[d]isputes 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".

16. In its order, the Court upheld India's position, insofar as it stated that "the Applicant seeks to ground [the Court's] jurisdiction in Article 36, paragraph 1, of the Statute, and Article I of the Optional Protocol [to the VCCR]; it does not seek to rely on the Parties' declarations under Article 36, paragraph 2, of the Statute"[47].

17. In *LaGrand*, Germany based the Court's jurisdiction on the same legal instrument as India in the present case. Similarly to the present case, neither Germany nor the US had made any reservation to the Optional Protocol to the VCCR. The Court found that it was satisfied "that, prima facie, it has jurisdiction under Article I of the aforesaid Optional Protocol to decide the dispute between Germany and the United States of America"[48]. The facts of this case, which concern the arrest, detention and sentencing to death of Mr. Jadhav, are similar to those in *LaGrand*. In addition, the jurisdictional basis invoked by India in the present case and by Germany in *LaGrand* are identical. In both cases, neither State made reservations to Article I of the Optional Protocol to the VCCR. Consistency with the Court's earlier prima facie jurisdiction jurisprudence requires the Court to reach in the present case the same conclusion it reached in *LaGrand*.

18. Moreover, India showed that a dispute prima facie exists between the Parties. In its order on provisional measures in the present case, the Court endorsed the necessity to enquire into whether a dispute prima facie exists between the Parties[49], as previously held in *Equatorial*

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[42]Order on provisional measures, para. 33.

[43]*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor Leste* v. *Australia) Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 151, para 18.

[44]CR 2017/5, p. 16, para. 8 (Sharma).

[45]*Ibid.*, p. 30, para. 53 (Salve).

[46]*Ibid.*, p. 29, para. 49 (Salve).

[47]Order on provisional measures, para. 26.

[48]*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Report 1999 (I)*, p. 14, para. 18.

[49]Order on provisional measures, para. 28.

Guinea v. *France*[50]. The existence of a dispute is clearly evidenced by the 13 Notes Verbales sent by the High Commission of India and the Ministry of Foreign Affairs of India to Pakistan's Ministry of Foreign Affairs, annexed to India's Application instituting proceedings. Such Notes Verbales show that the Parties hold opposing views concerning the interpretation and application of Article 36, paragraph 1, of the VCCR in respect of Mr. Jadhav. India's case could be regarded as being even stronger than *LaGrand* from the perspective of the prima facie existence of a dispute, owing to India's thirteen requests to have consular access to Mr. Jadhav since his arrest. In addition, while India argued for an unfettered right to consular access under the VCCR, Pakistan seemed to contend that it can be subjected to certain conditions, such as, in this case, India's response to Pakistan's request for mutual judicial assistance. On the prima facie existence of a dispute between the Parties, the Court stated, in the order on provisional measures, that "the Parties do indeed appear to have differed, and still differ today, on the question of India's consular assistance to Mr. Jadhav under the [VCCR]"[51]. At this stage, this is enough evidence to conclude that a dispute prima facie exists between the Parties.

19. In *Equatorial Guinea* v. *France*, the Court went further, and found that "[i]n order to determine whether it has jurisdiction — even prima facie — the Court must also ascertain whether . . . a dispute is one over which it might have jurisdiction *ratione materiae* . . ."[52]. This entails that the Court should satisfy itself that the facts, as presented by India, prima facie give rise to a dispute falling within the scope of Article I of the Optional Protocol to the VCCR. The Court emphasized this point in its order on provisional measures, as it found that "[in] order to determine whether it has jurisdiction — even prima facie — the Court must also ascertain whether such a dispute is one over which it might have jurisdiction *ratione materiae* on the basis of Article I of the Optional Protocol"[53]. The Court rightly found that:

> "the acts alleged by India appear capable of falling within the scope of Article 36, paragraph 1, of the [VCCR], which, *inter alia*, guarantees the right of the sending State to communicate with and have access to its nationals in the custody of the receiving State . . . as well as the right of its nationals to be informed of their rights . . ."[54].

The Court's assessment is correct. Pakistan's actions, of which India complains, prima facie fall within the scope of the rights conferred on India by Article 36, paragraph 1, of the VCCR. India alleged that Pakistan breached its international obligations to grant consular access in accordance with the VCCR, especially by denying Mr. Jadhav the chance to communicate with the Indian consular authorities, as well as by preventing such authorities from entering into contact with Mr. Jadhav. Therefore, the dispute which India brought before the Court is one which prima facie falls within the scope *ratione materiae* of the VCCR.

20. The facts presented by India concern the arrest, detention and conviction of an Indian national, who was allegedly deprived of consular assistance to which he was entitled under Article 36, paragraph 1, of the VCCR. Mr. Khawar Qureshi, counsel for Pakistan, contended that persons suspected of espionage or terrorism are excluded from the scope of the VCCR, since "there must be no interference in the internal affairs of the receiving State"[55], as required under Article 55

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[50] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016*, para. 37.

[51] Order on provisional measures, para. 29.

[52] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016*, para. 67.

[53] Order on provisional measures, para. 30.

[54] *Ibid.*

[55] CR 2017/6, pp. 20-21 (Qureshi).

of the VCCR[56]. In this perspective, allowing consular access to a person suspected of espionage would be tantamount to interfering with the internal affairs of a State, and thus a breach of the VCCR. The Court rightly noted that the VCCR "does not contain express provisions excluding from its scope persons suspected of espionage or terrorism"[57]. Yet, this argument wades into the merits of the case and it is premature to examine it at this stage of the proceedings. The Court showed awareness of this, as it stated that "[a]t this stage, it cannot be concluded that Article 36 of the [VCCR] cannot apply in the case of Mr. Jadhav so as to exclude on a prima facie basis the Court's jurisdiction under the Optional Protocol"[58].

21. The title of jurisdiction invoked by India is Article I of the Optional Protocol to the VCCR, and not the Parties' declarations under Article 36, paragraph 2, of the Court's Statute. India explained that, even assuming that the Parties' Optional Clause declarations were relevant, "where the Court has jurisdiction based on both optional declarations and compulsory jurisdiction clauses in treaties, . . . each title is autonomous and ranks equally with the others"[59]. This principle is borne out by the Court's jurisprudence, especially *Electricity Company of Sofia and Bulgaria*[60], *Border and Transborder Armed Actions*[61], *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*[62], as well as *Appeal Relating to the Jurisdiction of the ICAO Council*[63]. Therefore, even if the Parties' declarations under Article 36, paragraph 2, of the Statute were relevant, and even assuming that Pakistan's declaration effectively excluded the Court's jurisdiction in the present case on a prima facie level, the Court could still assert prima facie jurisdiction on the basis of the Optional Protocol to the VCCR, in full accordance with its established jurisprudence.

Plausibility

22. In order to indicate provisional measures, the Court should also satisfy itself that the rights claimed by India on the merits are plausible[64]. In *Certain Activities*, the Court stated that it "may exercise [the] power [to indicate provisional measures] only if it is satisfied that the rights asserted by a party are at least plausible"[65]. In its most recent order on provisional measures in *Ukraine* v. *Russia*, the Court found that it "need only decide whether the rights claimed by [the applicant State] on the merits, and for which it is seeking protection, are plausible"[66]. Furthermore, the Court also found that, in order for the rights claimed by the applicant State on the merits to be

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[56]Article 55, paragraph 1, of the VCCR states that "[w]ithout 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 the State".

[57]Order on provisional measures, para. 32.

[58]*Ibid.*

[59]CR 2017/5, p. 30, para. 55 (Salve).

[60]*Electricity Company of Sofia and Bulgaria Judgment*, 1939, P.C.I.J. Rep Series A/B, No. 77, p. 76.

[61]*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 1988*, p. 78, para. 20.

[62]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, ICJ Reports 2007*, p. 918, para. 54 (Separate Opinion Abraham).

[63]*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, ICJ Reports 1972*, p. 60, para. 25.

[64]*Ibid*., p. 19, para. 11 (Salve).

[65]*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures), I.C.J. Reports 2011*, p. 18, para. 53.

[66]*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017*, para. 64.

plausible, the acts alleged by the applicant State itself must fall within the scope *ratione materiae* of the treaty whose violation is alleged[67].

23. In this instance, India alleged that Pakistan violated Article 36, paragraph 1, of the VCCR. Specifically, India argued that in cases in which a foreign national is being prosecuted for actions which "carry the sanction of capital punishment, and the trial is by a military court, the need for consular access and the opportunity to arrange for legal representation in the course of the trial, as covenanted in the [VCCR], is all the more greater"[68].

24. The 1961 ILC Commentary to the Draft Articles that became the VCCR states, with respect to the predecessor of Article 36, that "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"[69]. The ILC Commentary specifies that this also applies in "cases where the judgment convicting the national has become final"[70]. Based on the material provided by the Parties, it is currently unclear whether an appeal against Mr. Jadhav's death sentence is still pending. In any event, Article 36, paragraph 1, of the VCCR applies irrespective of whether proceedings against a foreign national are still pending.

25. India alleged that it was denied access to Mr. Jadhav after having been made aware of its arrest and of the judicial proceedings against him. The facts alleged by India plausibly fall within the scope of Article 36, paragraph 1, of the VCCR, insofar as they concern the denial of consular assistance to a person entitled to it under the Convention. As evidenced from the record, the Indian authorities repeatedly contacted the Pakistani authorities in order to obtain consular access to Mr. Jadhav. Questions of consular access fall squarely within the scope of the VCCR, and specifically of Article 36, paragraph 1. It follows that the rights claimed by India on the merits are plausible.

Real and imminent risk of irreparable prejudice

26. The Court may indicate provisional measures only if there is a real and imminent risk of irreparable prejudice to the rights of the applicant State. According to recent orders on provisional measures, prejudice to a State's rights is "irreparable" if, without indicating provisional measures, it would be impossible to restore the *status quo ante* once the dispute is finally settled[71]. Furthermore, there is a real and imminent risk of irreparable prejudice if "action prejudicial to the rights of either party is likely to be taken before [a] final decision is given"[72].

27. The facts of the present case are similar to those in *Breard*, *LaGrand* and *Avena*, as they all dealt with the scheduled execution of a foreign national. In *Breard*, a Paraguayan national, Mr. Angel Francisco Breard, had been sentenced to death in Virginia, and his execution was scheduled to take place on 14 April 1998[73]. On 3 April 1998, Paraguay filed a case with the Court

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[67] *Ibid.*, para. 75. In *Ukraine* v. *Russia*, the issue concerned whether the acts alleged by Ukraine were plausibly acts of terrorism in the sense of Article 2 of the International Convention for the Suppression of the Financing of Terrorism, and thus plausibly fell within the scope of that treaty.

[68] CR 2017/5, p. 29, para. 47 (Salve).

[69] *Yearbook of the International Law Commission (1961)*, vol. II, 112, para. 4 *(c)*.

[70] *Ibid.*, 113, para. 4 *(c)*.

[71] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016*, para 90; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor Leste* v. *Australia), Provisional Measures, I.C.J. Reports 2014*, p. 154, para 32.

[72] *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, I.C.J. Reports 1991*, p. 17, para. 23.

[73] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, I.C.J. Reports 1998*, p. 249, para. 3.

against the United States of America on the grounds that Mr. Breard had not been given consular access after his arrest and during the pendency of the criminal proceedings against him[74]. Paraguay also requested the Court to indicate, as provisional measures under Article 41 of the Statute, that the United States of America "take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case"[75]. On the issue of irreparable prejudice, the Court found that, since Mr. Breard's execution was already scheduled, the carrying out of such an execution "would render it impossible for the Court to order the relief that Paraguay seeks [on the merits] and thus cause irreparable harm to the rights it claims"[76].

28. In *LaGrand*, two German brothers, Karl and Walter LaGrand, had been sentenced to death in Arizona[77]. Similarly to *Breard*, the two brothers had not been given consular access to the German authorities[78]. Karl LaGrand was executed on 24 February 1999[79], and Walter LaGrand was scheduled to be executed on 3 March 1999[80]. On 2 March 1999, Germany sought to stop Walter LaGrand's execution by filing a case with the Court and requesting urgent provisional measures under Article 41 of the Statute. The Court held no hearings owing to the extreme urgency of the matter[81], and indicated, as provisional measures, that the United States of America shall take all measures to ensure a stay of the execution of Walter LaGrand[82]. From the point of view of irreparable prejudice, the Court found that the "execution [of Walter LaGrand] would cause irreparable harm to the rights claimed by Germany"[83].

29. *Avena* is comparable to *Breard* and *LaGrand*. In *Avena*, Mexico filed with the Court an application against the United States of America, as well as a request for provisional measures seeking to protect the rights of a number of Mexican nationals on death row in the United States of America[84]. Mexico grounded its claim in the alleged violation by the United States of America of Article 36, paragraph 1, of the VCCR[85], since the United States of America had not given consular access to the individuals Mexico was seeking to protect. A number of such individuals had had their execution dates fixed, while others had not[86]. The Court indicated provisional measures only in respect of those individuals whose execution had been scheduled, and decided that the United States of America shall take all measures to ensure that the executions of these individuals not be carried out pending the final judgment in the case[87]. Concerning irreparable prejudice, the Court found, in respect of the Mexican nationals scheduled to be executed in the United States of

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[74] *Ibid.*

[75] *Ibid.*, 251, para. 9.

[76] *Ibid.*, 257, para. 37.

[77] *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, 15, para. 24.

[78] *Ibid.*, 10, para. 2.

[79] *Ibid.*, 12, para. 8.

[80] *Ibid.*

[81] *Ibid.*, 14, para. 21.

[82] *Ibid.*, 16, para. 29.

[83] *Ibid.*, 15, para. 24.

[84] *Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, I.C.J. Reports 2003*, p. 78, para. 2.

[85] *Ibid.*

[86] *Ibid.*, 81, para. 11.

[87] *Ibid.*, 91-92, para. 59.

America, that "their execution would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico"[88].

30. In the present case, the facts as presented by India closely resemble those in *Breard*, *LaGrand* and *Avena*. Mr. Jadhav, an Indian national, has similarly been sentenced to death by a Pakistani military tribunal. Should this sentence be carried out, as it would be likely to occur if Mr. Jadhav's appeal were to fail, the harm would be irreparable to India's underlying case, as no relief could return India to the *status quo ante*.

31. In addition to finding that there exists a risk of irreparable prejudice to the rights claimed, the risk must be imminent, or, in the Court's language, there must be urgency in the circumstances[89]. This has previously been described by the Court as situations that are "unstable and could rapidly change"[90]. In the present case, the exact date of Mr. Jadhav's execution is unknown. In *Avena*, the Court decided not to award provisional measures to protect those Mexican nationals whose date of execution had not been set[91], while indicating provisional measures with respect to those Mexican nationals whose execution was already scheduled. The Court did not comment on whether a time scale of days, weeks or months would be determinative of a finding of urgency, as Pakistan suggested[92].

32. However, the facts and circumstances of this case are vastly different. In the United States of America, execution dates are communicated to the public, generally with several weeks of notice, if not longer. This seemed to have a significant bearing on whether Mexico's request for provisional measures was urgent. However, in the case of Pakistan, it is unclear both whether his date of execution would be communicated in advance to the public and the Indian authorities, and by which means. India has argued that a panel to consider the appeal against Mr. Jadhav's death sentence has already been constituted, and that the decision on such an appeal could be handed down at any moment. In the oral proceedings, India stated that Pakistan, "while suggesting the availability of 'remedies', fails to provide a clear assurance that until this Court is in seisin of this Application, the sentence will not be executed"[93]. According to counsel for Pakistan, Mr. Jadhav may have recourse to the clemency process under Pakistani law, which "[t]he Application conveniently glossed over"[94]. In this regard, Pakistan stated that "[a] period of 150 days is provided for . . ., which even if it started on 10 April 2017 — which is the date of conviction at first instance — could extend to well beyond August 2017"[95].

33. Pakistan's argument is not convincing. Urgency is not assessed based on the number of weeks or months likely to elapse before Mr. Jadhav is executed. Urgency is assessed based on whether it is likely that the rights claimed by India on the merits would be irreparably prejudice during the pendency of the proceedings before the Court. So long as there is a real risk that Mr. Jadhav could be executed before the Court finally disposes of this dispute, it does not matter whether his execution would take place in two days, two weeks, two months or two years. If the

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[88] *Ibid.*, 91, para. 55. This paragraph of the order on provisional measures in *Avena* was quoted by Mr. Salve at CR 2017/5, p. 23, para. 23 (Salve).

[89] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 392, para. 129.

[90] *Ibid.*, 396, para 143.

[91] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 91-92, para. 59.

[92] CR 2017/6, p. 15 (Qureshi).

[93] CR 2017/5, p. 24, para. 26 (Salve).

[94] CR 2017/6, p. 15 (Qureshi).

[95] *Ibid.*, p. 10, para. 16 (Faisal).

Court handed down the final judgment in this case within a two-year timeframe, there would be urgent need for provisional measures if it were likely that Mr. Jadhav could be executed within that same timeframe.

34. However, the issue is not only the fact that Mr. Jadhav faces execution that may be imminent, but, more specifically, that Pakistan continues to deny the Indian authorities consular access to Mr. Jadhav, violating Article 36 of the VCCR on a prima facie level. The continued denial of consular access already constitutes an on-going breach of the VCCR. Therefore, India's rights under Article 36, paragraph 1, of the VCCR could be seen to be already prejudiced. Should Mr. Jadhav be executed, such prejudice would become irreparable. Even if Mr. Jadhav's execution were stayed pending proceedings before the Court, the protracted denial of consular access would irreparably prejudice India's rights. Without consular access, India could not adequately assess and contribute to Mr. Jadhav's defence in the current court proceedings in Pakistan, and similarly could not ensure that Mr. Jadhav is humanely treated while in custody. The facts alleged by India show that there is a real and imminent risk of irreparable prejudice to the rights it asserts on the merits.

Link between the rights invoked and the provisional measures requested

35. In *Certain Activities*, the Court stated that "a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought"[96]. Similarly, in *Belgium* v. *Senegal* the Court held that "a link must . . . be established between the provisional measures requested and the rights which are the subject of the proceedings before the Court as to the merits of the case"[97]. India is requesting the Court to indicate the following provisional measures:

(a) that Pakistan take all measures necessary to ensure that Mr. Kulbhushan Sudhir Jadhav is not executed;

(b) that Pakistan report to the Court the action it has taken in pursuance of such measures necessary to ensure that Mr. Kulbhushan Sudhir Jadhav is not executed;

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

36. On their face, such measures appear to be linked to the rights claimed by India on the merits, namely the rights arising under Article 36 of the VCCR. This is similarly supported by the provisional measures ordered in *Avena*, *LaGrand*, and *Breard*. In each of these three cases, the Court indicated that the United States of America take all measures necessary to ensure that the foreign nationals concerned were not executed pending the final judgment[98]. India requested the Court to indicate this very same provisional measure in respect of Mr. Jadhav[99]. In addition, in *Avena* the Court also indicated that the United States of America "shall inform the Court of all measures taken in implementation of [the] Order"[100]. India also requested the Court to indicate this

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[96] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 54.

[97] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 56.

[98] *Application of the International Convention for the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russia), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 258, para. 51; *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 16, para. 29.

[99] Request for provisional measures, para. 22 *(a)*.

[100] *Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 92, para. 59.

provisional measure[101], which previous jurisprudence suggests to be linked to the rights India claims on the merits.

CONCLUSION

37. In its request for provisional measures, India stated that "[i]nternational law recognises the sanctity of human life"[102]. In cases in which a foreign national is arrested, convicted and sentenced to death, the right to consular access, and to seek the assistance of their home country "fulfills the aspiration of a fair trial in a foreign state"[103]. I agree with this statement.

38. A clear case has been made out for the indication of provisional measures in accordance with Article 41 of the Court's Statute. Consequently, Mr. Kulbhushan Sudhir Jadhav shall not be executed during the pendency of these proceedings before the Court.

(Signed) Dalveer BHANDARI.

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[101]Request for provisional measures, para. 22 *(b)*.

[102]Request for provisional measures, para. 17.

[103]*Ibid.*

Annex 9

(F)

MINISTRY OF FOREIGN AFFAIRS
ISLAMABAD

F

No. India-III-5/20/2017

8 June 2017

I have the honour to acknowledge the receipt of the communication of the International Court of Justice (the "Court") numbered 148791 dated 2 June 2017 and have the honour to state that the Attorney General for Pakistan, ex-officio, would be the Agent for Pakistan for the case henceforth and that I, Dr. Mohammad Faisal, Director General, Ministry of Foreign Affairs, shall continue to act as Co-Agent.

2. Furthermore, pursuant to Paragraph 61 of the Order of the Court dated 18 May 2017, the Islamic Republic of Pakistan has the honour to state the following:

> 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.

3. Please accept, Excellency, the assurances of the government of Pakistan's highest considerations.

Dr. Mohammad Faisal
Director General
Co-Agent for Pakistan

- The Registrar
International Court of Justice
Peace Palace
2517 KJ The Hague
Netherlands

Annex 10

INTERNATIONAL COURT OF JUSTICE

YEAR 2017

2017
13 June
General List
No. 168

13 June 2017

JADHAV CASE

(INDIA *v.* PAKISTAN)

ORDER

The President of the International Court of Justice,

Having regard to Article 48 of the Statute of the Court and to Articles 44 and 45, paragraph 1, of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 8 May 2017, whereby the Republic of India instituted proceedings against the Islamic Republic of Pakistan, concerning alleged violations of the Vienna Convention on Consular Relations of 24 April 1963 "in the matter of the detention and trial of an Indian National, Mr. Kulbhushan Sudhir Jadhav", sentenced to death in Pakistan,

Having regard to the request for the indication of provisional measures submitted by India on 8 May 2017 and to the Order by which the Court indicated provisional measures on 18 May 2017;

Whereas, at a meeting held by the President of the Court with the Agents of the Parties on 8 June 2017, pursuant to Article 31 of the Rules of Court, the Agent of India requested that each Party be granted a period of four months for the preparation of its pleading; and whereas the Agent of Pakistan indicated that periods of two months would be sufficient;

Taking into account the views of the Parties,

Fixes the following time-limits for the filing of the written pleadings:

13 September 2017 for the Memorial of India;

13 December 2017 for the Counter-Memorial of Pakistan; and

Reserves the subsequent procedure for further decision.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this thirteenth day of June, two thousand and seventeen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of India and the Government of the Islamic Republic of Pakistan, respectively.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.