DISSENTING OPINION OF JUDGE *AD HOC* JILLANI

India's Application is inadmissible because its conduct amounts to an abuse of rights — The 2008 Agreement between India and Pakistan governs specifically questions of consular access and assistance in cases of arrest and detention on national security grounds — Pakistan lawfully withheld consular access and assistance while examining the case of Mr. Jadhav on its merits — Even if the Vienna Convention is applicable in the present case, Pakistan has committed no breach of Article 36 thereof — Pakistan has already in place the procedures necessary for ensuring the effective review and reconsideration of the conviction and sentence of Mr. Jadhav.

1. Much to my regret and with greatest respect, I could not endorse several parts of the Judgment and some fundamental points. First, I consider that the Court should have found India's Application to be inadmissible in light of its conduct in the present case, which amounts to an abuse of rights. In my view, India's reliance on the Vienna Convention on Consular Relations (hereinafter "Vienna Convention" or "VCCR") in the present case is misplaced and subverts the very object and purpose of that instrument. Second, the Court has misconstrued and rendered meaningless Article 73, paragraph 2, of the Vienna Convention, which does not preclude States parties from entering into subsequent bilateral agreements. Notwithstanding that, the Court has ignored the legal effect of the 2008 Agreement on Consular Access between India and Pakistan (hereinafter "2008 Agreement") and specifically its point (vi). In my view, by concluding the 2008 Agreement, the Parties (India and Pakistan) aimed to clarify the application of certain provisions of the Vienna Convention to the extent of their bilateral relations, namely by recognizing that each contracting State may consider on the merits whether to allow access and consular assistance to nationals of the other contracting State arrested or detained on "political or security grounds". Third, even if the Vienna Convention is applicable to the case of Mr. Jadhav, Pakistan's conduct does not constitute a breach of its obligations under paragraph 1 of Article 36 thereof. Fourth, while the Court has taken note of the existing legal framework in Pakistan, it has failed to recognize that the existing judicial review in Pakistan already substantially responds to the relief ordered by the Court. Finally, the Court's Judgment appears to set a dangerous precedent at the times when States are increasingly confronted with transnational terrorist activities and impending threats to national security. Terrorism has become a systemic weapon of war and nations would ignore it at their own peril. Such threats may legitimately justify certain

limits to be imposed on the scope of application of Article 36 of the Vienna Convention on Consular Relations, in the bilateral relations between any two States at any given time.

I. India's Application Should Have Been Declared Inadmissible as It Amounts to an Abuse of Rights

2. The present case is distinguishable from the Court's *Avena* and *LaGrand* jurisprudence on which the Court has heavily relied. Among various distinguishing factors, the most important one is that the Court was faced here with special circumstances of an individual arrested, detained, tried and convicted for espionage and terrorism offences. The Vienna Convention, having been concluded with the view to contributing "to the development of friendly relations among nations", it can hardly be the case that the drafters of that Convention intended for its rights and obligations to apply to spies and nationals of the sending State (India) on secret missions to threaten and undermine the national security of the receiving State (Pakistan).

3. In these proceedings, Pakistan rightly submitted that India committed an abuse of rights: *(a)* by providing Mr. Jadhav with an authentic passport under a false Muslim identity, Hussein Mubarak Patel; *(b)* by seeking to exercise its consular rights in order to have access to Mr. Jadhav, an espionage agent; and *(c)* by invoking the Court's provisional measures jurisdiction with an exaggerated characterization of the urgency of the situation and a lack of candour regarding the facts (Counter-Memorial of Pakistan (hereinafter "CMP"), para. 151 ff.; CR 2019/2, p. 25, para. 40 (Qureshi)). Pakistan further argued that India acted in bad faith by refusing to accede to Pakistan's requests for information concerning the authenticity of Mr. Jadhav's passport and to otherwise assist Pakistan in the criminal investigation, while making persistent demands of consular access to Mr. Jadhav (CMP, paras. 171-185; CR 2019/2, p. 25, para. 40 (Qureshi)). The Judgment of the Court rather laconically ignores the extensive evidence presented by Pakistan as to the authenticity of Mr. Jadhav's passport, namely the experts' report on the subject, as well as the lack of India's co-operation in the investigation of the most serious offences committed by Mr. Jadhav in Pakistan.

4. In my view, the question of the abuse of rights is closely intertwined with the fundamental principle of good faith. Article 26 of the Vienna Convention on the Law of Treaties is unequivocal when it provides that

"[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". The rights and obligations stipulated in an international treaty are to be exercised and performed in accordance with the object and purpose for which those rights were created. The Vienna Convention on Consular Relations, in its very preamble, reiterates "the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations" and that "an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems". Thus, the very object and purpose of this Convention was to promote international peace and security and friendly relations amongst nations. That object and purpose informed the scope of application of certain fundamental rights set out in the Convention, such as Article 36 thereof.

5. India's conduct and invocation of paragraph 1 of Article 36 cannot be reconciled with the object and purpose of the Vienna Convention. The Applicant has clearly abused its right when claiming consular access to its national who had been instructed to commit serious crimes of terrorism and espionage in Pakistan. India has provided no rebuttal throughout the proceedings as to the circumstances in which it had provided an authentic Indian passport, with false identity, to Mr. Jadhav and the particulars of Mr. Jadhav's mission in Pakistan, despite the serious nature of the crimes he has committed. The Court should have drawn the necessary inferences therefrom. At the very least, the Court should have taken India's conduct into account when determining whether Pakistan has actually breached its obligations under Article 36 of the Vienna Convention, and ultimately the nature of any relief. The Court has decided not to do so considering that "there is no basis under the Vienna Convention for a State to condition the fulfilment of its obligations under Article 36 on the other State's compliance with other international law obligations" (see Judgment, paragraph 123). With all due respect that I owe to the Court, I believe the Vienna Convention cannot and should not be read in such clinical isolation from general international law.

6. Moreover, the rights and obligations as set out in paragraph 1 of Article 36 of the Vienna Convention cannot be construed independently from its paragraph 2, which expressly qualifies the exercise of those rights by the sending State and its national when it provides that these "shall be exercised in conformity with the laws and regulations of the receiving State [Pakistan], 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".

7. Since 31 May 2017, Pakistan has sent six requests to India for necessary co-operation in the investigation of the criminal case and about the

passport issue, but these were of no avail (Rejoinder of Pakistan (hereinafter "RP"), para. 49). Pakistan even offered to extradite Mr. Jadhav to India, if India was prepared to indict him under the Indian laws. In its Note Verbale to India's Ministry of Foreign Affairs dated 26 October 2017, the Ministry of Foreign Affairs of Pakistan — reiterating its request for assistance in the investigation in the criminal case registered against Mr. Jadhav in compliance with the United Nations Security Council resolution 1373 (2001) — offered that "the Government of Pakistan is prepared to consider any request for extradition that the Government of India may make in the event that Commander Jadhav is considered to be a criminal under the law of India" (CMP, Vol. 2, Ann. 44). But India persisted in its non co-operation. Through the same Note Verbale, Pakistan specifically asked six questions to India regarding the authenticity of the Indian passport (Passport No. L9630722) recovered from Mr. Jadhav:

"(1) [Is] Commander Jadhav . . . indeed Commander Jadhav or 'Hussein Mubarak Patel'[?]
(2) If he is not 'Hussein Mubarak Patel', does such a person exist?

(3) If 'Hussein Mubarak Patel' does exist or does not exist, what attempts has the Government of India made at the very latest since 23rd January 2017 to investigate how Commander Jadhav was able to obtain what appears to be an authentic Indian passport issued by the competent authorities in India?
(4) In the alternative, is it the Government of India's position that Commander Jadhav was in possession of a false and inaccurate document [such that] either:

(a) . . . his name is not 'Hussein Mubarak Patel'; or
(b) . . . it is not a passport from the competent Indian authorities?

(5) If that is the case, does the Government of India consider that Commander Jadhav has committed a crime or crimes under Indian law? If so, what is/are the crimes?
(6) What is the actual authentic passport for Commander Kulbhushan Sudhir Jadhav (assuming he was issued with a passport)? Please provide full particulars of the date of issue, date of expiry, passport number, place of issue, name and photograph in the actual (presently valid) passport issued to Commander Jadhav if such a document exists . . . [T]he Islamic Republic of Pakistan has already put the Republic of India on notice that it has failed to establish the Indian nationality of Commander Jadhav." (CMP, p. 60, para. 208 and Ann. 44, pp. 2-3.)

8. Subsequent investigation appears to suggest that Mr. Jadhav was in possession of two Indian passports, one with passport No. E6934766 and

another one No. L9630722. The accounts of three respected Indian journalists, Mr. Karan Thapar, Mr. Praveen Swami and Mr. Chandan Nandy, based on interviews conducted with Indian officials, confirm that Mr. Jadhav was a Research and Analysis Wing (RAW) agent (CMP, Vol. 2, Anns. 27 and 28; CR 2019/2, pp. 20-22, paras. 29-33 (Qureshi)). The least India could have done in the circumstances was to perform searches in its passport databases to check the authenticity of Mr. Jadhav's passport and to furnish that information to the Pakistani authorities so as to facilitate further investigation.

9. After persistent refusal by India to co-operate in the criminal investigation, Pakistan got the passport examined by an independent forensic expert who had served in India and Pakistan. His report concluded that the passport was authentic and genuine and India did not challenge the veracity of the said report either in its written or oral submissions. In his report, Mr. Westgate candidly stated as follows:

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

10. The issuance of such a document and the persistent refusal to co-operate in the investigation of the same are further contrary to the United Nations Security Council resolution 1373, which, *inter alia*, mandates that all United Nations Member States shall

> "*(f)* [a]fford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
>
> *(g)* [p]revent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers

> and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents".

11. India refused to extend assistance to Pakistan on the grounds that there was no mutual legal assistance treaty (MLAT) between the two States. India's reasoning is not tenable because the absence of such a treaty would not absolve India of its obligations under the United Nations Security Council resolutions adopted pursuant to Chapter VII of the United Nations Charter. India also misrepresents the factual position in as much as there is a mutual legal agreement, i.e., the 2008 Agreement which was negotiated over a period of three years and replaced the earlier agreement which had operated at that time since 1982. It is interesting to note that point (iii) of the 1982 Agreement contained a provision analogous to point (vi) of the 2008 Agreement, which stipulated as follows:

> "Each Government shall give consular access on reciprocal basis to nationals of one country under arrest, detention or imprisonment in the other country, provided they are not apprehended for political or security reasons/offences. Request for such access and the terms thereof shall be considered on the merits of each case by the Government arresting the person or holding the detenus/prisoners and the decision on such requests shall be conveyed to the other Government within four weeks from the date of receipt of the request." (Reproduced in CMP, Vol. 7, Ann. 160.)

Moreover, as further pointed out by Pakistan in their oral submissions, at the conclusion of the 2008 Agreement, a joint statement was issued by both States that they were working together to combat terrorism. Point (vi) of the 2008 Agreement has to be given a purposive interpretation in the light of the intent of both countries. This provision has to be interpreted in good faith in accordance with its ordinary meaning.

12. Although the Court's jurisdiction only extends to disputes concerning the interpretation or application of the Vienna Convention on Consular Relations, it cannot ignore the surrounding legal environment when considering whether Pakistan has complied with its obligations under paragraph 1 of Article 36 of that Convention, nor can it be examined outside the context of strenuous relations and escalating tensions between the Parties, which pose an imminent threat to peace and security in the region.

13. According to Pakistan, Mr. Jadhav was apprehended by security agencies when he entered Balochistan from Iran (Saravan border). During his interrogation as well as in his judicial confession (before a magis-

trate), he admitted that he was working for RAW (Research and Analysis Wing) and that he had planned and executed acts of terror causing loss of life and destruction of property in two major areas/cities of Pakistan (Balochistan and Karachi) with a view to destabilizing Pakistan. He also named 15 individuals, mostly residing in India, who were his accomplices and handlers. The extract from his confession is revealing as to the abuse of rights on the part of India in now bringing these proceedings before the Court:

"1. I am Commander Kulbhushan Jadhev Number 41558Z. I am a serving officer of the Indian Navy. I am from the cadre of engineering department in the Indian Navy and my cover name was Hussain Mubarak Patel, which I had adopted for carrying out intelligence gathering for the Indian agencies.
2. I joined National Defence Academy in 1987 and subsequently joined the Indian Navy in 1991 and was commissioned in the Indian Navy. I served in the Indian Navy till around December 2001 when Indian Parliament attacks occurred. That was when I started contributing my services towards the gathering of information and intelligence within India. I lived in the city of Mumbai in India.
3. I am still a serving officer in the Indian Navy and will be due for retirement by 2022 as a commissioned officer in the Indian Navy. After having completed 14 years of service by 2002, I commenced intelligence operations in 2003 and established a small business in Chabhahar in Iran. As I was able to achieve undetected existence and visited Karachi in 2003 and 2004 and having done some basic assignments within India for RAW, I was picked up by RAW in end of 2013. Ever since, I have been directing various activities in Baluchistan and Karachi at the behest of RAW. I was basically the man of Mr. Anil Kumar Gupta who is the Joint Secretary RAW and his contacts in Pakistan especially in the Baloch student organization.

4. My purpose was to hold meetings with Baloch insurgents and carry out activities with their collaboration. These activities have been of criminal nature. These also include anti-national and terrorist activities leading to the killing or maiming of the Pakistani citizens. I realized during this process that RAW is involved in activities related to the Baloch Liberation Movement within Pakistan and the region around it. Finances are fed into the Baloch movement through various contacts and ways and means into the Baloch liberation. The activities of these Baloch liberation and RAW handlers are criminal and anti-Pakistan. Mostly these activities are centred around Ports of Gwadar, Pasni, Jeevani and various other installations which are around the coast aims to damage the vari-

ous installations which are in Balochistan. The activities are revolving around trying to create a criminal mindset within the Baloch people and lead to instability within Pakistan.

5. In my pursuit towards achieving the set targets by my handler in RAW, I was trying to cross over into Pakistan from the Saravan border in Iran on 3rd March 2016 and was apprehended by the Pakistani authorities on the Pakistani side. The main aim of this crossing over into Pakistan was to hold meetings with the BSN personnel in Balochistan for carrying out various activities, which they were supposed to undertake. I also planned to carry their messages to the Indian agencies. The main issues regarding this were that they were planning to conduct some operations within the immediate future. So that was to be discussed mainly and that was the main aim of coming to Pakistan.
6. So the moment I realized that my intelligence operations ha[d] been compromised on my being detained in Pakistan, I revealed that I am an Indian Naval officer and it is on mentioning that I am Indian Naval officer [that] the total perception of the establishment of Pakistan changed and they treated me very honourably and with utmost respect and due regards, and have handled me subsequently on [sic] a more professional and courteous way. They have handled me in a way that befits that of an officer. Once I realized that I have been compromised in my process of intelligence operations I decided to just end the mess I have landed myself in and wanted to subsequently move on and co-operate with the authorities in removing the complications which I have landed myself and my family members into. Whatever I am stating now is the truth and is not under any duress or pressure. I am doing it totally out of my own desire to come clean out of this entire process which I have gone through for the last 14 years." (CMP, Vol. 2, Ann. 17; see also CMP, pp. 10-12, par. 25.)

14. Two cases have been initiated against Mr. Jadhav, one for espionage and the other one under anti-terrorism laws. With regard to the espionage case, Pakistan had enough evidence to try and convict Mr. Jadhav which it did in accordance with the laws of Pakistan. He was tried by a special military court (Field General Court Martial), where he was provided with an independent competent legal attorney and was explained the various routes of appeal that were available to him. However, with regard to the terrorism offences, Mr. Jadhav mentioned various accomplices, who India did not deny to be residing in India. Thus, Pakistan requested India's assistance regarding its investigation into the authenticity of the passport which Mr. Jadhav was carrying, access to his bank and cell phone records and interrogating the accomplices and handlers named by him. Due to the fact that India has not co-operated, Mr. Jadhav's trial

under the terrorism offences has not proceeded. If Pakistan was concocting false charges and arbitrarily punishing and sentencing Mr. Jadhav, the Pakistani courts would have found Mr. Jadhav guilty of the various terrorism offences he had himself confessed of being involved in. This highlights the bona fide intention of Pakistan to uphold the truth and dispense justice while the silence and lack of co-operation from India lend credence to the confession made by Mr. Jadhav, which clearly exposes India's involvement. According to Pakistan, Mr. Jadhav's conduct of perpetrating acts of terror is part of a chain of acts carried out by India to destabilize Pakistan. Agent for Pakistan and Pakistan's Attorney General, Mr. Anwar Mansoor Khan, stated in his oral submissions:

> "Pakistan, as a consequence of the Indian intervention along with others, is a major victim of terrorism where the country and its innocent citizens continue to fight this menace both inside and on the borders. Pakistan has consequentially suffered more than 74,000 casualties and fatalities due to terrorism caused mainly by the interference of our neighbour India. It is in this context that Commander Kulbhushan Jadhav, a serving officer of the Indian Navy, working for India's Research and Analysis Wing (commonly called RAW, India's brutal primary foreign intelligence agency) entered Pakistan, with a predetermined aim, on the instructions of the Government of India, to assist, plan and cause terrorism in Balochistan and the Sindh provinces and other places in the country. This much he has admitted before an independent judicial magistrate sitting in a court of competent jurisdiction with the benefit of stringent safeguards to protect him against any form of pressure or coercion when making such a confession." (CR 2019/2, pp. 10-11, para. 5 (Khan).)

15. India claims that Mr. Jadhav is a retired naval officer who was kidnapped from Iran where he was doing business. However, neither in its Memorial nor in its Reply has India given his date of retirement from the Indian Navy. It has not placed any document on record either to indicate the kind of business he was carrying in Iran or when and how he was kidnapped. If Mr. Jadhav was in fact kidnapped, as contended by India, India could have lodged a complaint with the Government of Iran, but it failed do so (Memorial of India (hereinafter "MI"), para. 41; Reply of India (hereinafter "RI"), para. 31 *(e)*; cf. CR 2019/2, para. 35 (Qureshi)). India also neither denied nor affirmed that the passport recovered from Mr. Jadhav was validly issued; however, it affirms in its pleadings that his name is "Kulbhushan Sudhir Jadhav" and not "Hussein Mubarak Patel". Facilitating or sanctioning a serving naval

officer to penetrate into the social fabric of a sovereign State to undertake terrorist activities and to conspire destabilization of an entire province in Pakistan — actions that have led to numerous deaths and destruction of property — should not have been lightly ignored by the Court.

16. The issuance of a valid passport with a false Muslim identity and Mr. Jadhav's confession demonstrate India's involvement, its abuse of process and unlawful conduct. Robert Kolb has described the principle of "abuse of process" in public international law as a principle that "consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established" (R. Kolb, "General Principles of Procedural Law", in A. Zimmermann, K. Oellers-Frahm, C. Tomuschat and C. J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary* (2012), Oxford University Press, p. 904). As Judge Anzilotti observed in his dissenting opinion to the Judgment of the Permanent Court of International Justice in *Legal Status of Eastern Greenland*, "an unlawful act cannot serve as the basis of an action at law" (*Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J. Series A/B, No. 53*, p. 95). Likewise, to borrow the words of Judge Schwebel in his dissenting opinion in *Military and Paramilitary Activities in and against Nicaragua*, India's conduct in the present proceedings, as was that of Nicaragua in the above-mentioned case,

> "should have been reason enough for the Court to hold that [the Applicant] had deprived itself of the necessary *locus standi* to complain of corresponding illegalities on the part of the [Respondent], especially because, if these were illegalities, they were consequential on or were embarked upon in order to counter the [Applicant's] own illegality" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, dissenting opinion of Judge Schwebel, p. 394, para. 272).

II. The 2008 Agreement Governs the Consular Relations between India and Pakistan and the Question of Arrest and Detention on National Security Grounds

17. In paragraphs 94-97 of the Judgment, the Court dismissed altogether the relevance of the 2008 Agreement between India and Pakistan to the present case on two grounds. First, the Court found that "point (vi) of the Agreement cannot be read as denying consular access in the case of an arrest, detention or sentence made on political or security grounds" (Judgment, para. 94). Second, the Court held that "point (vi) of [the] Agreement does not, as Pakistan contends, displace the obligations under Article 36 of the Vienna Convention" (*ibid.*, para. 97).

18. The Court's interpretation of the 2008 Agreement is based on a presumption and not on two States' intent as reflected in the Agreement. Moreover, it has misconstrued Article 73 of the Convention. In my view, the Court has embraced an interpretation of Article 73, paragraph 2, of the Vienna Convention which is incorrect from the perspective of the law of treaties and has not paid due regard to the difficulties that this provision has posed at the time it was being negotiated. As I will show below, the result of the Court's interpretation would be tantamount to rendering Article 73, paragraph 2, redundant and to depriving the States of their inherent capacity to conclude bilateral treaties *inter se* in the same subject-matter as that of a multilateral treaty to which they are both parties.

19. It may be useful at the outset to recall the gist of the Parties' pleadings on this point. Pakistan submitted that the provisions of the 2008 Agreement give effect to, supplement and amplify the Vienna Convention within the meaning of its Article 73 (CMP, paras. 369 and 385.1). According to Pakistan, the confession made by Mr. Jadhav and the nature of charges against him placed the case in the category of "national security"; Pakistan was thus entitled to consider consular access of Mr. Jadhav "on its merits" as stipulated in point (vi) of the 2008 Agreement (CMP, para. 385.3-385.4). India maintained, on the other hand, that States parties to the Vienna Convention may conclude bilateral agreements covering the same subject-matter only to the extent that these confirm, supplement, extend or amplify the provisions of the Vienna Convention. It also argued that the 2008 Agreement, which was concluded for "furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country", is not relevant to the question of the right to consular assistance under the Vienna Convention. Specifically, India contended that point (vi) must be read in light of the surrounding provisions, namely points (v) and (vii) of the 2008 Agreement, which deal with the question of early release or repatriation, on compassionate or humanitarian considerations, which is not what is in dispute in the present case (MI, paras. 90-92; RI, paras. 139, 143-146; CR 2019/1, para. 106 (Salve)). Counsel for India, Mr. Harish Salve, in his oral submissions, contended that

> "[c]onsidering that India and Pakistan are neighbours both on land and sea, where people who live in the border areas frequently stray into the other country and end up in custody, it was found necessary to have a bilateral agreement that could supplement the Vienna Convention. Thus, the matters covered in (sub)paragraphs (i) (iii) (iv) and (v) were agreed to and these are not matters covered by the Vienna Convention; they supplement and extend the provisions of the Vienna Convention." (CR 2019/1, pp. 31-32, para. 110 (Salve).)

20. Counsel for India thus admits that matters which fall within the ambit of points (i), (iii), (iv) and (v) of the 2008 Agreement are not matters covered by the Vienna Convention; they supplement and extend the provisions thereof. He regrettably does not mention point (vi) ("In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits."). The case of Mr. Jadhav, who was accused of organizing and executing acts of terror, squarely fell within the scope of point (vi) of the 2008 Agreement. With regard to the intent of the parties to the Agreement, it is important to bear in mind two things; firstly, that both sides were party to the Vienna Convention on Consular Relations and were very well aware of its Article 36, but despite that they executed the said Agreement, and secondly, the very title of the 2008 Agreement is reflective of their intent, i.e. Agreement on Consular Access.

21. When considering the context of the 2008 Agreement, it is important to recall the background that explains why these two States entered into this arrangement notwithstanding the fact that they are both parties to the Vienna Convention. There appear to be two reasons for that. Firstly, since both countries share long borders (both land and sea), their nationals accidentally cross the border and get arrested. It was for their "humane treatment" and repatriation that the countries thought of entering into some kind of an accord. Secondly, and as pointed out by Pakistan, this Agreement (paragraph 11 above) replaced an earlier 1982 Agreement which operated until the execution of the 2008 Agreement and contained a provision similar to point (vi) of the 2008 Agreement. Both countries have had turbulent relations for the last several decades and wanted to combat cross-border terrorism. One factor in this context has been the festering Kashmir dispute between the two countries on account of which they have had several armed conflicts, trading of allegations and counter-allegations in the midst of a proxy war. India itself in its Memorial has referred to a press briefing by a spokesperson of Pakistan dated 20 April 2017, which is reflective of how the Kashmir dispute has partly defined the diplomatic relations between India and Pakistan:

> "Will of Kashmiris in Indian-occupied Jammu and Kashmir was clearly visible in their outright rejection of sham elections there. Our Prime Minister, while calling upon Int[ernationa]l Community to stop Indian atrocities in IOK, rightly said that 'use of brute force against innocent Kashmiris, who refused to participate in the sham elections, cannot suppress their human urge of freedom.' Harrowing stories

> from Indian occupied Kashmir continue to raise concerns in Pakistan." (MI, Ann. 9.)

Although Kashmir is not an issue in this case, India's reference to the above-quoted briefing prompts a comment. The underlying issue which regrettably has led to increasing public unrest in Kashmir and marred the relations between the two neighbouring countries is the non-implementation of United Nations Security Council resolution 47 (adopted on 21 April 1948). Through the said resolution, the Security Council established a commission to help the Government of India and the Government of Pakistan to restore peace and order in the region and prepare for a plebiscite to decide the fate of Kashmir.

22. The grave situation in Kashmir has been graphically explained by the latest report on Kashmir prepared by the United Nations High Commissioner for Human Rights (Office of the United Nations High Commissioner for Human Rights, "Report on the Situation of Human Rights in Kashmir", dated 14 June 2018). On account of such fractious relations, both countries have exchanged allegations of interference, as sometimes nationals of either country and non-State actors are arrested and detained on security grounds. Such incidents need to be investigated and each country may be sensitive about providing either immediate consular access or release. As the Vienna Convention on Consular Relations does not specifically deal with arrest and detention on "political" and "security" grounds (point (vi) of the 2008 Agreement), India and Pakistan negotiated and entered into an agreement within the meaning of Article 73, paragraph 2, of the Vienna Convention with a view to "supplement" and "amplify" its provisions. The case in hand is a classic example of the kind of situations/cases both countries had in mind when inserting point (vi) in the 2008 Agreement. The Court, I may add with respect, regrettably did not keep this aspect in mind while construing the said Agreement.

23. Such bilateral agreements are not unusual in the practice of States. It appears that

> "[a]t least fifty post-VCCR bilateral consular treaties contain explicit notification or access timelines. The treaties were signed between 1964 and 2008 and involve thirty-nine parties, representing nations on every continent and employing a wide range of political and judicial systems. No single formula for consular notification and access prevails within this diverse body of bilateral instruments, even among

> those that use the 'without delay' language of the VCCR. The shortest maximum time frame for consular *notification* is within forty-eight hours of the detention, while the longest is within ten days. The shortest maximum time frame for consular *access* is within three days of a detention and the longest is within fifteen days. A clear majority of the fifty treaties require notification of the consulate within three days of a detention and nearly 90 per cent of the reviewed agreements require notification within no more than five days. Similarly, a majority of the treaties require consular access within five days or less, while 82 per cent of the treaties stipulate access within no more than one week of the detention." (M. Warren, "Rendered Meaningless? Security Detentions and the Erosion of Consular Access", *Southern Illinois University Law Journal*, Vol. 38 (1) (Fall 2013), pp. 37-38.)

24. In my view, the 2008 Agreement is fully in line with the requirements of Article 73, paragraph 2, of the Vienna Convention on Consular Relations, 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". The expressions "confirming or supplementing or extending or amplifying" are disjunctive. *The Chambers Dictionary* defines "supplement" as "[t]hat which supplies a deficiency or fills a need; that which completes or brings closer to completion; an extra part added to a publication". Similarly, it defines "amplify" as "to make more copious; to add, to enlarge, etc.". *Black Law's Dictionary* defines "supplement" as "supplying something additional, adding what is lacking". India itself has asserted that "bilateral treaties covering the same subject-matter can be accommodated as long as they are [t]reaties 'confirming, or supplementing or extending or amplifying the provisions . . .' of the Vienna Convention" (MI, para. 91). In any event, Article 73, paragraph 2, is substantially a without prejudice clause. Nothing under the general law of treaties precludes two States, which are parties to a multilateral instrument, from concluding a subsequent agreement that could govern differently their relations *inter se*. This is also what directly transpires from the *travaux préparatoires* of Article 73, paragraph 2, the text of which was proposed at the time by India. The statements made immediately preceding the adoption of this provision are revealing:

> "Mr. EVANS (United Kingdom) asked whether the delegate of India could say whether his text left undisturbed the rule of international law which permitted any two or more parties to a multilateral convention to agree to a departure from the terms of such a convention as between themselves, provided that the departure did not infringe the rights of the other parties to the convention. If that could be confirmed, he would vote for the text submitted by India.
>
> Mr. KRISHNA RAO (India) said it was hard to answer that question, for the answer would have a bearing on the convention being prepared and also on conventions or agreements which might be concluded in the future." (*Official Records of the United Nations Conference on Consular Relations, Vienna, 4 March-22 April 1963, Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees*, doc. A/CONF.25/16, Vol. I, Twenty-eighth meeting of the First Committee, 25 March 1963, p. 240, paras. 9-10.)

25. During the negotiations of this provision in Vienna, several States expressed strong reservations about its legal effect, suggesting for example that "States should be free to decide whether or not they wished to enter into agreements of their own choice on consular relations" but eventually there was a broad consensus to insert Article 73, paragraph 2, in the Convention (*ibid.*, p. 235: Twenty-seventh meeting of the First Committee, 25 March 1963, para. 28).

26. Various provisions of the 2008 Agreement have filled in some of the gaps in the Vienna Convention and have clarified the application of that instrument in the bilateral relations between India and Pakistan. The Parties agreed that they could examine any request of consular access and assistance in respect of persons detained or sentenced on political or security grounds "on its merits". As rightly observed by Mark Warren, "the provisions of bilateral consular treaties offer an important but often overlooked source of authority on the contemporary understanding of consular notification and access obligations" (M. Warren, "Rendered Meaningless? Security Detentions and the Erosion of Consular Access", *Southern Illinois University Law Journal*, Vol. 38 (1) (Fall 2013), p. 28). Regrettably, the Court has ignored this key provision, by holding that "[it] cannot be read as denying consular access in the case of an arrest, detention or sentence made on political or security grounds" (Judgment, para. 94).

27. As already pointed out above, the Parties negotiated the terms of the 2008 Agreement over a period of almost three years and India failed

to explain in its pleadings how any aspect of that Agreement is inconsistent with Article 73 of the Vienna Convention and why should it not be looked at to inform the application and interpretation of Article 36 thereof. While reiterating their resolve to provide "consular access" and to ensure the release and repatriation of nationals of the other contracting party within one month "of confirmation of their national status and completion of sentences", the Parties agreed to an exception in point (vi) in providing "[i]n case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits". This exception applies exclusively in the relations between the two countries.

28. The 2008 Agreement does not affect the enjoyment by the other parties to the Vienna Convention of their rights or performance of their obligations, nor does it affect the effective execution of the object and purpose of the Vienna Convention as a whole (see Art. 41 (1) *(b)* of the Vienna Convention on the Law of Treaties). The 2008 Agreement simply qualifies the performance by India and Pakistan of their rights and obligations under Article 36 of the Vienna Convention in the relations *inter se* and in the specific cases of arrest and detention on political or security grounds. It does not affect the continuing enjoyment of those rights and obligations by other parties to the Vienna Convention. In this context, a distinction may be drawn between "reciprocal" and "absolute" treaties, as far as the conditions for modification of a treaty are concerned, as these are set out in Article 41 (1) *(b)* of the Vienna Convention on the Law of Treaties. According to the authoritative commentary of that provision:

> "Reciprocal treaties are those in which States parties engage in a reciprocal way, where they grant each other advantages and subscribe to obligations between one another, in a quasi-bilateral fashion. This is typically the case for conventions on consular relations, diplomatic relations, or even on the law of treaties. In this type of treaty, States engage vis-à-vis others, but a derogation between two or several of them will not necessarily entail a restriction of rights granted to other States and will not affect the realization of the object and purpose of the treaty. Compatibility with the object and purpose of the treaty or conformity with the rights and obligations of other States parties will thus, in this scenario, only rarely be an obstacle to the conclusion of *inter se* agreements." (A. Rigaux et al., "Art. 41 of the 1969 Vienna Convention", in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties* (2011), pp. 1003-1004, para. 36.)

29. Finally, as I have already mentioned before, the interpretation of the relationship between the 2008 Agreement and the Vienna Convention on Consular Relations should not lose sight of the object and purpose of the latter instrument. Although the Convention stipulates no express exception for spies or persons involved in cases which have a political or national security dimension, its very preamble affirmed that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention". Reaffirmation of the rules of customary international law is significant because certain matters were deliberately left out of the scope of application of the Convention. In his oral submissions, counsel for Pakistan dilated upon this aspect and submitted that

> "State practice did not provide for consular access prior to the VCCR and the Vienna Convention expressly preserved the position of customary international law in 1963. [. . .] [E]ven if the Vienna Convention was engaged, consular access to a prima facie case of espionage suspect would violate Articles 5 *(a)* and 55, the principle of upholding international law, not violating it and not interfering in the internal affairs of the State" (CR 2019/2, p. 18, para. 21 (Qureshi)).

30. This dimension of the Vienna Convention is important because Mr. Jadhav was arrested on charges of espionage and terrorism, a class of cases treated differently under customary international law so far as the question of consular access and assistance is concerned. In its submissions, Pakistan has rightly referred to various examples from State practice and *travaux préparatoires,* showing that consular access and assistance were either withheld or restricted in cases of espionage agents, dual nationals or asylum seekers (see CMP, paras. 291-315.5). The States negotiating the Vienna Convention did not intend for the Convention to apply to these select categories of persons. These matters were to be governed by customary international law and any existing or future bilateral treaties. Doctrine contemporaneous with the adoption of the Vienna Convention also shows that the practice of States confirmed "a frequent exception to the consular right to protect nationals and visit them in prison is the case of spies" (L. T. Lee, *Consular Law and Practice* (1961), reproduced in RP, para. 116 and CMP, Vol. 5, Ann 112.1, p. 125). Similarly, Biswanath Sen, who was the Honorary Legal Adviser to India's Ministry of External Affairs, noted that "[a] frequent exception to the consular rights to protect nationals and visit them in prison is the case of persons who are held on charge of espionage as evidenced by the practice of states" (B. Sen, *A Diplomat's Handbook to International Law and Prac-*

tice (1965), reproduced in RP, para. 117 and CMP, Vol. 5, Ann. 117). Pakistan's argument that neither the text of Article 36 nor the International Law Commission's (hereinafter "ILC") Commentary on the draft of Article 36 demonstrates that it was intended to embrace individuals arrested for purported espionage, is well-founded. In fact, through the ILC's Commentary on the draft Articles, it has managed to demonstrate to the Court that at the time of drafting of the Convention, the application of the Vienna Convention to espionage cases was brought up in discussion but was not definitively decided upon due to its sensitive nature. On the contrary, the Commentary recognized that there would be circumstances where States would be entitled to hold persons incommunicado for a certain time period for the purposes of criminal investigations. As noted in the Commentary, "[t]he expression 'without undue delay' used in paragraph (1) *(b)* allows for cases where it is necessary to hold a person incommunicado for a certain period for the purposes of the criminal investigation". (A. Watts (ed.), *The International Law Commission 1949-1998, Volume One: The Treaties, Part 1* (OUP, 2000), p. 274, para. 6; reproduced in CMP, Vol. 5, Ann. 92.) There has been no evidence presented by India to the Court which sufficiently demonstrates that customary international law and State practice provide for obligatory granting of consular access to individuals accused of espionage. However, as argued by Pakistan, State practice from the Cold War demonstrates that requests for consular access between the United States of America and the Union of Soviet Socialist Republics for individuals accused of espionage activities were either denied or were granted on severely restricted terms. In light of the text of Article 36, its drafting history, and customary international law, it is tenable to conclude that there is no absolute right of consular access under Article 36.

31. Espionage and terrorism are illegal acts in international law and the Vienna Convention cannot be used to protect a State indulging in espionage and terrorist missions. The Court's disregard of the legal effect and content of the 2008 Agreement is highly damaging not only to the integrity and sacredness of that Agreement, but also raises a question mark as to the legal effect of other bilateral agreements concluded after the entry into force of the Vienna Convention on Consular Relations. In fact, it would put in doubt every bilateral agreement signed

between India and Pakistan, or between any two countries, which have faced hostilities and threats of terrorism. It was thus imperative, in my humble view, for the Court to carefully consider the object and purpose of the 2008 Agreement, which in my opinion was meant to qualify within the meaning of Article 73, paragraph 2, certain provisions of the Vienna Convention on Consular Relations in the context of special circumstances faced by the two countries.

32. Notwithstanding the serious charges levelled against Mr. Jadhav and the exception of not providing consular access in cases of espionage, as reflected in customary international law, Pakistan was still prepared to grant consular access subject to India co-operating in the investigation into the crimes committed by Mr. Jadhav.

33. There is no denial by India that the allegations levelled against Mr. Jadhav and the confession made by him, if found to be credible, constitute serious criminal offences under the Anti-Terrorism Act 1997 and Pakistan Army Act 1952. Similarly, India has not denied that if the allegations are found to be true, the acts also constitute offences under the Indian Passport Act 1967 and/or Passport Rules 1980. It was on account of such laws in the Indian legal system that Pakistan had offered to extradite Jadhav if India was prepared to prosecute him under its law. However, there was no positive response. There is nothing on record to suggest that there was a plain refusal by Pakistan to provide consular access. Rather, Pakistan conveyed to India that its request for consular access would be considered in the light of India's assistance in the pending investigation against Mr. Jadhav. India in fact acknowledged "the willingness of Pakistan side to provide consular access" (CMP, Vol. 2, Ann. 13.12). It appears from Pakistan's conduct that it was of the view that — on account of Mr. Jadhav's confession and the fact that potential evidence regarding which it had requested India for assistance had yet to be collected — the investigation was at a sensitive stage. If Mr. Jadhav had been provided immediate consular access, he could have resiled from his confession and any potential evidence sought to be collected from India could have been compromised (see CMP, paras. 60-61). Article 36 of the Vienna Convention itself does not evince immediate consular access prior to investigation. As the Court observed in the *Avena* case:

> "As for the object and purpose of the Convention, the Court observes that Article 36 provides for consular officers to be free to

> communicate with nationals of the sending State, to have access to them, to visit and speak with them and to arrange for their legal representation. It is not envisaged, either in Article 36, paragraph 1, or elsewhere in the Convention, that consular functions entail a consular officer himself or herself acting as the legal representative or more directly engaging in the criminal justice process. Indeed, this is confirmed by the wording of Article 36, paragraph 2, of the Convention. Thus, neither the terms of the Convention as normally understood, nor its object and purpose, suggest that 'without delay' is to be understood as 'immediately upon arrest and before interrogation'." (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 48, para. 85.)

III. Pakistan Has not Breached Article 36 of the Vienna Convention

34. I disagree with the Court's finding that Pakistan has breached the rights set out in paragraph 1 of Article 36 of the Vienna Convention on Consular Relations. The rights set out in that provision must be exercised in accordance with the domestic law of the receiving State (CMP, para. 340). In this respect, paragraph 2 of Article 36 of the Vienna Convention provides that

> "[t]he rights referred to in paragraph 1 of this article [Article 36 of the Vienna Convention] 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."

35. As the Court noted in both *LaGrand* and *Avena* cases, Article 36 (1) is "an interrelated régime designed to facilitate the implementation of the system of consular protection" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 492, para. 74; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 39, para. 50). Further, as the Court stressed in the *Avena* Judgment:

> "Article 36, paragraph 1 *(b)*, contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1 *(b)*; the right of the consular post to be notified without delay of the individual's detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular

post by the detained person." (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 43, para. 61.)

36. There was a delay of three weeks in notifying the Indian consular authorities about the arrest of Mr. Jadhav. Such a delay is understandable in a sensitive case where Mr. Jadhav made disclosure of his involvement in espionage and of organizing and executing terrorist acts in two cities of Pakistan. He named several accomplices. The investigation of a sensitive case like that must have spread over a few days, besides requiring confidentiality. This Court has already had the occasion to clarify the meaning of "without delay" in Article 36 (1) *(b)*, of the Vienna Convention:

> "The Court thus finds that 'without delay' is not necessarily to be interpreted as 'immediately' upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1 *(b)*, that the receiving State authorities 'shall inform the person concerned without delay of his rights' cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.
>
> Although, by application of the usual rules of interpretation, 'without delay' as regards the duty to inform an individual under Article 36, paragraph 1 *(b)*, is not to be understood as necessarily meaning 'immediately upon arrest', there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national." (*Ibid.*, p. 49, paras. 87-88.)

37. In the peculiar circumstances of this case and having regard to the seriousness of offences committed by Mr. Jadhav, the threat these have posed to the national security of Pakistan and the fact that several of his named accomplices were still to be investigated, I consider that a period of three weeks between the arrest and notification is reasonable and thus does not amount to a breach of Article 36 (1) *(b)* of the Vienna Convention.

38. As for paragraph 1 *(a)* and *(c)* of Article 36 of the Vienna Convention, and the lack of consular access and assistance to Mr. Jadhav, the present case is further distinguishable from *Avena* and *LaGrand* for the following reasons.

39. Firstly, in both *Avena* and *LaGrand*, the nationals of the sending States and the sending States were not accused of espionage or of orga-

nizing and perpetuating terrorist acts, whereas in the case of Mr. Jadhav, a serving officer of the Indian Navy, he was apprehended from within Pakistan. He confessed to having been dispatched by RAW and Indian intelligence agencies and to have engaged in espionage and of organizing and executing terrorist acts with a view to destabilize Pakistan. India, unlike Mexico and Germany (sending States in *Avena* and *LaGrand*, respectively) in dispatching its national, for a mission of the kind he was involved in, betrays a blatant disregard of international law and its obligations as Member of the United Nations.

40. Secondly, unlike the United States in *Avena* and *LaGrand*, Pakistan did not withhold information regarding the arrest of Mr. Jadhav. Pakistan informed India of the circumstances in which Mr. Jadhav was apprehended, how he confessed and his confession led to the conviction and a criminal case under the laws of Pakistan. Pakistan requested India for co-operation in the investigation in the case registered against Mr. Jadhav. There was no request from the United States to Mexico and Germany (sending States in *Avena* and *LaGrand* respectively) for co-operation in investigation.

41. Thirdly, in *Avena* and *LaGrand*, there was no bilateral agreement between the sending States (Mexico and Germany) and the receiving State (United States) governing the issue of consular access to individuals apprehended in the receiving State. In the case in hand, India (sending State) and Pakistan (receiving State) have a bilateral agreement in force which governs consular access in the event a national of either contracting State is arrested in the territory of the other contracting State. In fact, it governs specifically the cases of consular access and assistance to a national arrested or detained on political or security-related grounds and thus aims to clarify and inform the general régime as set out in Article 36 of the Vienna Convention.

42. Finally, contrary to the *Avena* and *LaGrand* cases, where both the sending States were not accused of any wrongdoing or illegal conduct, the conduct of the sending State (India) in the present case has a direct bearing on the Court's analysis of Article 36 rights and obligations. The illegal conduct of India, according to Pakistan, is "the provision to [Mr.] Jadhav of an authentic Indian passport clothing him with a false Muslim identity in the name of 'Hussein Mubarak Patel'" (CMP, paras. 188, 210-216). In my view, there are several instances that taint India's hands when bringing this case before the Court and show that India has abused its right to benefit from consular access to its national under the Vienna Convention:

— India has failed to co-operate with Pakistan, in relation to the latter's request for assistance in respect of the investigation into the crimes

allegedly committed by Mr. Jadhav, including espionage and terrorism (CMP, para. 206 and Vol. 2, Ann. 33);

— India has failed to provide assistance pursuant to Pakistan's MLA Request in obtaining statements of 13 identified individuals and access to records and materials (CMP, para. 206); and

— India has failed to register an offence, under the laws of India, against Mr. Jadhav for possession of a false passport and identity, contrary to its domestic law (CMP, para. 122).

43. Moreover, the Court in its observations and findings has totally ignored the fact that, even if the Vienna Convention was applicable, the conduct of India in sending Commander Jadhav on a mission to engage in acts of espionage constituted a blatant violation of Article 5 *(a)* and Article 55, paragraph 1, of the Vienna Convention which provide as follows:

"*Article 5*

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

. . . . . .

Article 55

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

44. In light of the foregoing, I strongly disagree with the Court's conclusion that "Pakistan has breached the obligations incumbent on it under Article 36, paragraph 1 *(a)* and *(c)*, of the Vienna Convention" (Judgment, para. 119).

IV. The Relief Ordered by the Court Ignores the Existing Legal Framework in Pakistan

45. In paragraph 147 of the Judgment, the Court concluded that "Pakistan is under an obligation to provide, by means of its own choosing, effective review and reconsideration of the conviction and sentence of Mr. Jadhav". However, the reasoning employed by the Court is rather inconsistent with this conclusion. The Court reached this conclusion on the basis of two manifestly erroneous assumptions. First, in paragraph 141 of the Judgment, the Court found that "it is not clear whether judicial review of a decision of a military court is available on the ground that

there has been a violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention". Second, in paragraph 146 of the Judgment, the Court held that "Pakistan shall take all measures to provide for effective review and reconsideration, including, if necessary, by enacting appropriate legislation".

46. In my view, these assumptions are highly problematic for at least three reasons. First, if the Court was unclear about the existing legal framework of judicial review in Pakistan, it could have requested the Parties, pursuant to Article 62 of its Rules, "to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue".

47. Second, and more fundamentally, as provided in Article 199, paragraph 3, of the Constitution of Pakistan, the High Courts and the Supreme Court (Article 184 (3) of the Constitution) have the power of judicial review. There are several domestic judgments in which this provision has been invoked and commented upon. The High Courts and the Supreme Court have exercised judicial review over a decision of the Field General Court Martial on "the grounds of *coram non judice*, without jurisdiction or suffering from *mala fides*, including malice in law only" (see, for example, *Said Zaman Khan et al.* v. *Federation of Pakistan*, Supreme Court of Pakistan, Civil Petition No. 842 of 2016, 29 August 2016, para. 73, CMP, Vol. 4, Ann. 81). For example, in a 2018 judgment, the Peshawar High Court acquitted 72 convicts of military courts, *inter alia* on grounds of malice in law, cases of no evidence. The Peshawar High Court held that it had the power to review the decisions of military courts, "[i]f the case of the prosecution was based, *firstly*, on no evidence, *secondly*, insufficient evidence, *thirdly*, absence of jurisdiction, finally malice of facts and law" (*Abdur Rashid et al.* v. *Federation of Pakistan*, High Court of Peshawar, Writ Petition 536-P of 2018, 18 October 2018, pp. 147-148, PLD 2019 Peshawar 17). There is no evidence of any misconduct or abuse of the military courts of Pakistan in exercising their jurisdiction over the crimes of terrorism and offences affecting national security. Pakistan has an effective system in place providing for review jurisdiction, and Mr. Jadhav has not yet exhausted the local remedies available to him to challenge his conviction and sentence. Pakistan has referred the Court to ample evidence of the civil courts of Pakistan exercising their review jurisdiction in respect of death sentences issued by its military courts (RP, paras. 40-44; CMP, Vol. 1, Anns. 33-37), evidence that the Court has regrettably discarded.

48. Third and finally, the Court's conclusion in paragraph 146 of its Judgment to the effect that Pakistan should, if necessary, adopt appropriate legislation for effective review and reconsideration, is ill-founded. Not only is such legislation already in place in Pakistan, but it is also not the Court's role to dictate to the State the means by which it has to comply with its obligation to ensure effective review and reconsideration. The only precedent relied upon by the Court is that from its 2009 Judgment in the *Avena (Request for Interpretation)* case (*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Judgment, I.C.J. Reports 2009*, p. 17, para. 44). That precedent however is distinguishable. First, in that case, Mexico seised the Court after the United States had not complied with the Court's ruling requesting the United States to provide for review and reconsideration. Second, while the issue before the Court in the present case relates to the existence of a judicial procedure for the review and reconsideration of a judgment of a military court in Pakistan, in *Avena* the question was one relating to a specific domestic law, namely the procedural default rule in the United States (a rule of the United States federal law that forbids federal courts to review State judgments if the State court rejected the proposed claim on procedural grounds). Third, the 2009 *Avena (Request for Interpretation)* Judgment followed the United States Presidential Memorandum of 28 February 2005 determining that the State courts were to give effect to the 2004 *Avena* Judgment, as well as the proceedings before the United States Supreme Court in *Medellin* v. *Texas* (*Supreme Court Reporter*, Vol. 128, 2008, p. 1346). In its judgment, the United States Supreme Court found that the ICJ's 2004 *Avena* Judgment was not enforceable by federal courts against Texas, and did not pre-empt the State procedural bar to Medellin's *habeas* claim. It also found that the United States Presidential Memorandum did not create binding law that could be enforced against Texas. By contrast, in the present case, the High Courts and the Supreme Court of Pakistan already exercise the review over the judgments passed by the military courts. Fourth and finally, the Agent for Pakistan in the present proceedings has repeatedly given assurances as to the right of Mr. Jadhav to seek judicial review: "the systems of judicial review in Pakistan are potent and very effective" and "[s]hould [Mr. Jadhav] choose to enter into the domain of judicial review, he will have the right to choose his lawyer to represent him" (CR 2019/4, p. 31, paras. 13-14 (Khan)). The Agent for Pakistan further stressed that "fair trial is an absolute right and cannot be taken away. All trials are conducted in that manner, and if not, the process of judicial review is always available" (*ibid.*, p. 28, para. 4 (Khan)). In its jurisprudence, this Court has consistently refrained from mandating the specific means by which any given State should comply with its obligation to provide for an effective review and reconsideration. It is thus regrettable that the Court now appears to be restricting the liberty of States to choose amongst the most appro-

priate means available to them to comply with their international obligations.

V. General Conclusion

49. In light of the foregoing, I disagree with the Judgment of the Court. First, India's Application should have been declared to be inadmissible. India's conduct of sending an espionage agent to destabilize the sovereignty and security of Pakistan and its subsequent reliance on the Vienna Convention before this Court amount to an abuse of rights. Second, the 2008 Agreement governs the cases of arrest and detention on political and security grounds and provides for the right of Pakistan to examine the case of Mr. Jadhav on the merits, including any question of consular access or assistance to him. Third, the Vienna Convention does not apply to Mr. Jadhav, as the scope of application of Article 36 of the Vienna Convention does not extend to espionage agents. Fourth, even if Article 36 of the Vienna Convention were to apply to Mr. Jadhav, Pakistan has not breached the said provision. Fifth and finally, the relief ordered by the Court is inappropriate, as Pakistan already allows for an effective review and reconsideration of convictions and sentences passed by military courts.

(*Signed*) Tassaduq Hussain Jillani.