17 JULY 2019

JUDGMENT

JADHAV CASE

(INDIA *v.* PAKISTAN)

AFFAIRE JADHAV

(INDE c. PAKISTAN)

17 JUILLET 2019

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JUDGMENT

Present: *President* YUSUF; *Vice-President* XUE; *Judges* TOMKA, ABRAHAM, BENNOUNA, CANÇADO TRINDADE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN, SALAM, IWASAWA; *Judge* ad hoc JILLANI; *Deputy-Registrar* FOMÉTÉ.

In the Jadhav case,

between

the Republic of India,

represented by

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

as Agent;

Mr. Vishnu Dutt Sharma, Additional Secretary, Ministry of External Affairs,

as Co-Agent;

Mr. Harish Salve, Senior Advocate,

as Senior Counsel;

H.E. Mr. Venu Rajamony, Ambassador of the Republic of India to the Kingdom of the Netherlands;

Mr. Luther M. Rangreji, Counsellor, Embassy of India in the Kingdom of the Netherlands,

as Adviser;

Ms Chetna N. Rai, Advocate,

Ms Arundhati Dattaraya Kelkar, Advocate,

as Junior Counsel;

Mr. S. Senthil Kumar, Legal Officer, Ministry of External Affairs,

Mr. Sandeep Kumar, Deputy Secretary, Ministry of External Affairs,

as Advisers,

and

the Islamic Republic of Pakistan,

represented by

Mr. Anwar Mansoor Khan, Attorney General for the Islamic Republic of Pakistan,

as Agent;

Mr. Mohammad Faisal, Director General (South Asia and South Asian Association for Regional Cooperation), Ministry of Foreign Affairs,

as Co-Agent;

H.E. Mr. Shujjat Ali Rathore, Ambassador of the Islamic Republic of Pakistan to the Kingdom of the Netherlands;

Ms Fareha Bugti, Director, Ministry of Foreign Affairs;

Mr. Junaid Sadiq, First Secretary, Embassy of Pakistan in the Kingdom of the Netherlands;

Mr. Kamran Dhangal, Deputy Director, Ministry of Foreign Affairs;

Mr. Ahmad Irfan Aslam, Head of the International Dispute Unit, Office of the Attorney General;

Mr. Mian Shaoor Ahmad, Consultant, Office of the Attorney General;

Mr. Tahmasp Razvi, Office of the Attorney General;

Mr. Khurram Shahzad Mughal, Assistant Consultant, Ministry of Law and Justice;

Mr. Khawar Qureshi, QC, member of the Bar of England and Wales,

as Legal Counsel and Advocate;

Ms Catriona Nicol, Associate, McNair Chambers,

as Junior Counsel;

Mr. Joseph Dyke, Associate, McNair Chambers,

as Legal Assistant;

Brigadier (retired) Anthony Paphiti,

Colonel (retired) Charles Garraway, CBE,

as Legal Experts,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

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 (hereinafter the "Vienna Convention") "in the matter of the detention and trial of an Indian national, Mr. Kulbhushan Sudhir Jadhav", sentenced to death by a military court in Pakistan.

2. 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 to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (hereinafter the "Optional Protocol").

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

4. 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, pursuant to 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 the Request by India.

5. 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.

6. By letter dated 10 May 2017, the Registrar informed all Member States of the United Nations of the filing of the Application and the Request for the indication of provisional measures by India.

7. In conformity with Article 40, paragraph 3, of the Statute of the Court, the Registrar later notified the Members of the United Nations, through the Secretary-General, of the filing of the Application, by transmission of the printed bilingual text.

8. By an Order of 18 May 2017, the Court indicated 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."

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

9. By a letter of 8 June 2017, the Co-Agent of Pakistan informed the Court that "the Government of the Islamic Republic of Pakistan ha[d] instructed the relevant departments of the government to give effect to the Order of the Court dated 18 May 2017".

10. By an Order dated 13 June 2017, the President of the Court fixed 13 September 2017 and 13 December 2017 as the respective time-limits for the filing of a Memorial by India and of a Counter-Memorial by Pakistan. Those pleadings were filed within the time-limits so fixed.

11. Since the Court included upon the Bench no judge of Pakistani nationality, Pakistan proceeded to exercise the right conferred upon it by Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr. Tassaduq Hussain Jillani.

12. Pursuant to the instructions of the Court under Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States parties to the Vienna Convention and to States parties to the Optional Protocol the notifications provided for in Article 63, paragraph 1, of the Statute of the Court.

13. By an Order dated 17 January 2018, the Court authorized the submission of a Reply by India and a Rejoinder by Pakistan and fixed 17 April 2018 and 17 July 2018 as the respective time-limits for the filing of those pleadings. The Reply and the Rejoinder were filed within the time-limits thus fixed.

14. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

15. By letters received in the Registry on 18 February 2019, the first day of hearings, Pakistan informed the Court of its intention to call an expert and to present audio-visual material during the oral proceedings. Further, Pakistan expressed its intention to produce a new document. By letters dated 19 February 2019, the Registrar informed the Parties that the Court, having ascertained the views of India, had decided that it would not be appropriate to grant Pakistan's requests in the circumstances of the case.

16. Public hearings were held from 18 to 21 February 2019, at which the Court heard the oral arguments and replies of:

For India:	Mr. Deepak Mittal, Mr. Harish Salve.
For Pakistan:	Mr. Anwar Mansoor Khan, Mr. Khawar Qureshi.

*

17. In the Application, the following claims were made by India:

"(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."

18. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of India,

in the Memorial:

"For these reasons, the submissions of the Government of India, respectfully request this Court to adjudge and declare that Pakistan acted in egregious breach of Article 36 of the Vienna Convention on Consular Relations, in:

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

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

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

And that pursuant to the foregoing,

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

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

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

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

These submissions were confirmed in the Reply.

On behalf of the Government of Pakistan,

in the Counter-Memorial:

"For the reasons set out in this Counter-Memorial, Pakistan requests the Court to adjudge and declare that the claims of India, as advanced through its Application and its Memorial, are rejected."

in the Rejoinder:

"For the reasons set out in this Rejoinder, as well as those set out in the Counter-Memorial, Pakistan requests the Court to adjudge and declare that the claims of India, as advanced through its Application, its Memorial and its Reply, are rejected."

19. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of India,

"(1) The Government of India requests this Court to adjudge and declare that, Pakistan acted in egregious breach of Article 36 of the Vienna Convention on Consular Relations, 1963 (Vienna Convention) in:

(i) Failing to inform India, without delay, of the detention of Jadhav;

(ii) Failing to inform Jadhav of his rights under Article 36 of the Vienna Convention on Consular Relations, 1963;

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

And that pursuant to the foregoing,

(2) Declare that:

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

(b) India is entitled to *restitutio in integrum*;

(3) Annul the decision of the Military Court and restrain Pakistan from giving effect to the sentence or conviction in any manner; and

(4) Direct it to release the Indian National, Jadhav, forthwith, and to facilitate his safe passage to India;

(5) In the alternative, and if this Court were to find that Jadhav is not to be released, then

(i) annul the decision of the Military Court and restrain Pakistan from giving effect to the sentence awarded by the Military Court,

or in the further alternative,

(ii) direct it to take steps to annul the decision of the military court, as may be available to it under the laws in force in Pakistan,

and in either event,

(iii) direct a trial under the ordinary law before civilian courts, after excluding his confession that was recorded without affording consular access, and in strict conformity with the provisions of the ICCPR, with full consular access and with a right to India to arrange for his legal representation."

On behalf of the Government of Pakistan,

> "The Islamic Republic of Pakistan respectfully requests the Court, for the reasons set out in Pakistan's written pleadings and in its oral submissions made in the course of these hearings, to declare India's claim inadmissible. Further or in the alternative, the Islamic Republic of Pakistan respectfully requests the Court to dismiss India's claim in its entirety."

*

* *

I. FACTUAL BACKGROUND

20. The Court observes that the Parties disagree on several facts relating to the dispute before it. Their points of disagreement will be mentioned where necessary.

21. Since 3 March 2016, an individual named Kulbhushan Sudhir Jadhav (hereinafter "Mr. Jadhav") has been in the custody of Pakistani authorities. The circumstances of his apprehension remain in dispute between the Parties. According to India, Mr. Jadhav was kidnapped from Iran, where he was residing and carrying out business activities after his retirement from the Indian Navy. He was subsequently transferred to Pakistan and detained for interrogation. Pakistan contends that Mr. Jadhav, whom it accuses of performing acts of espionage and terrorism on behalf of India, was arrested in Balochistan near the border with Iran after illegally entering Pakistani territory. Pakistan explains that, at the moment of his arrest, Mr. Jadhav was in possession of an Indian passport bearing the name "Hussein Mubarak Patel". India denies these allegations.

22. On 25 March 2016, Pakistan raised the issue with the High Commissioner of India in Islamabad and released a video in which Mr. Jadhav appears to confess to his involvement in acts of espionage and terrorism in Pakistan at the behest of India's foreign intelligence agency "Research and Analysis Wing" (also referred to by its acronym "RAW"). The circumstances under which the video was recorded are unknown to the Court. On the same day, Pakistan notified the permanent members of the Security Council of the United Nations of the matter.

23. Also on the same day, by means of a Note Verbale from the High Commission of India in Islamabad to the Ministry of Foreign Affairs of Pakistan, India noted the "purported arrest of an Indian" and requested consular access "at the earliest" to "the said individual". Subsequently, and at least until 9 October 2017, India sent more than ten Notes Verbales in which it identified Mr. Jadhav as its national and sought consular access to him.

24. On 8 April 2016, Pakistani police authorities registered a "First Information Report" (hereinafter "FIR"), which is an official document recording information on the alleged commission of criminal offences. Pakistan explains that, once registered, a FIR enables police authorities to initiate an investigation. In this case, the FIR gave details of Mr. Jadhav's alleged involvement in espionage and terrorism activities and stated that he was "under interrogation" by Pakistani military authorities. A supplementary FIR was said to have been registered on 6 September 2016. On 22 July 2016, Mr. Jadhav made a confessional statement, which was allegedly recorded before a magistrate.

25. The trial of Mr. Jadhav started on 21 September 2016 and, according to Pakistan, was conducted before a Field General Court Martial. Various details of the trial were made public by means of a press release and a statement dated 10 and 14 April 2017 respectively. On the basis of this information (from the only source made available to the Court), it appears that Mr. Jadhav was tried under Section 59 of the Pakistan Army Act of 1952 and Section 3 of the Official Secrets Act of 1923. According to Pakistan, after the trial had begun, he was given an additional period of three weeks in order to facilitate the preparation of his defence, for which "a law qualified field officer" was specifically appointed. All witness statements were allegedly recorded under oath in the presence of Mr. Jadhav, who was allowed to put questions to the witnesses. During the trial, a law officer of Pakistan's Judge Advocate General Branch "remained a part of the Court".

26. On 2 January 2017, the Adviser to the Prime Minister of Pakistan on Foreign Affairs sent a letter to the Secretary-General of the United Nations informing him of Mr. Jadhav's arrest and confession, which, in his view, confirmed India's involvement in activities aimed at "destabilizing Pakistan".

27. On 23 January 2017, the Ministry of Foreign Affairs of Pakistan sent a "Letter of Assistance for Criminal Investigation against Indian National Kulbhushan Sudhair Jadhev" to the High Commission of India in Islamabad, seeking, in particular, support in "obtaining evidence, material and record for the criminal investigation" of Mr. Jadhav's activities. The letter referred to India's "earlier assurances of assistance, on a reciprocal basis, in criminal/terrorism matters", as well as resolution 1373 (2001) adopted by the Security Council concerning measures to prevent and suppress threats to international peace and security caused by terrorist acts. Pakistan claims that, despite reiterated reminders, prior to the hearings before the Court, it has received no "substantive response" from India regarding this request. India, for its part, refers to two Notes Verbales dated 19 June and 11 December 2017, respectively, in which it stated that Pakistan's request had no legal basis and was not, in any event, supported by credible evidence.

28. On 21 March 2017, the Ministry of Foreign Affairs of Pakistan sent a Note Verbale to the High Commission of India in Islamabad indicating that India's request for consular access would be considered "in the light of Indian side's response to Pakistan's request for assistance in investigation process and early dispensation of justice". On 31 March 2017, India replied 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". The Parties raised similar arguments in subsequent diplomatic exchanges.

29. On 10 April 2017, Pakistan announced that Mr. Jadhav had been sentenced to death. This was followed by a press statement issued on 14 April 2017 by the Adviser to the Prime Minister on Foreign Affairs. In addition to the above-mentioned details of Mr. Jadhav's trial (see paragraph 25 above), the statement referred to the availability of the following means of redress: an appeal before a Military Appellate Court within 40 days of the sentence; a mercy petition addressed to the Chief of Army Staff within 60 days of the Military Appellate Court's decision; and a similar petition addressed to the President of Pakistan within 90 days of the decision of the Chief of Army Staff.

30. On 26 April 2017, the High Commission of India in Islamabad transmitted to Pakistan, on behalf of Mr. Jadhav's mother, an "appeal" under Section 133 (B) and a petition to the Federal Government of Pakistan under Section 131 of the Pakistan Army Act. India asserts that, because Pakistan denied it access to the case file, both documents had to be prepared on the sole basis of information available in the public domain.

31. On 22 June 2017, the Inter Services Public Relations of Pakistan issued a press release announcing that Mr. Jadhav had made a mercy petition to the Chief of Army Staff after the rejection of his appeal by the Military Appellate Court. India claims that it has received no clear information on the circumstances of this appeal or the status of any appeal or petition concerning Mr. Jadhav's sentence. The above-mentioned press release also referred to another confessional statement by Mr. Jadhav recorded on a date and in circumstances that remain unknown to the Court.

32. On 10 November 2017, Pakistan informed India of its decision to allow Mr. Jadhav's wife to visit him on "humanitarian grounds". The offer was extended to Mr. Jadhav's mother on 13 November 2017. At India's request, Pakistan gave assurances that it would ensure the free movement, safety and well-being of the visitors and allow the presence of a diplomatic representative from India. The visit took place on 25 December 2017; however, the Parties disagree over the extent to which Pakistan gave effect to its assurances.

II. JURISDICTION

33. India and Pakistan have been parties to the Vienna Convention since 28 December 1977 and 14 May 1969 respectively. They also were, at the time of the filing of the Application, parties to the Optional Protocol without any reservations or declarations.

34. India seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute and on Article I of the Optional Protocol, which provides:

> "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."

35. The present dispute concerns the question of consular assistance with regard to the arrest, detention, trial and sentencing of Mr. Jadhav. The Court notes that Pakistan has not contested that the dispute relates to the interpretation and application of the Vienna Convention.

36. The Court also notes that, in its Application, written pleadings and final submissions, India asks the Court to declare that Pakistan has violated Mr. Jadhav's "elementary human rights", "which are also to be given effect as mandated under Article 14 of the 1966 International Covenant on Civil and Political Rights" (hereinafter the "Covenant"). The Covenant entered into force for India on 10 July 1979 and for Pakistan on 23 September 2010. In this respect, the Court observes that its jurisdiction in the present case arises from Article I of the Optional Protocol and therefore does not extend to the determination of breaches of international law obligations other than those under the Vienna Convention (cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, pp. 45-46, para. 85, and p. 68, para. 153).

37. This conclusion does not preclude the Court from taking into account other obligations under international law in so far as they are relevant to the interpretation of the Vienna Convention (cf. *ibid.*, pp. 45-46, para. 85).

38. In light of the above, the Court finds that it has jurisdiction under Article I of the Optional Protocol to entertain India's claims based on alleged violations of the Vienna Convention.

III. ADMISSIBILITY

39. Pakistan has raised three objections to the admissibility of India's Application. These objections are based on India's alleged abuse of process, abuse of rights and unlawful conduct. The Court will now address each of these in turn.

A. First objection: abuse of process

40. In its first objection to the admissibility of India's Application, Pakistan asks the Court to rule that India has abused the Court's procedures. Pakistan advances two main arguments to this end.

41. First, it alleges that when requesting the indication of provisional measures on 8 May 2017, India failed to draw the Court's attention to the existence of what Pakistan regards as "highly material facts". More specifically, it refers to the existence of a constitutional right to

lodge a clemency petition within a period of 150 days after Mr. Jadhav's death sentence, which would have stayed his execution until at least that deadline. According to Pakistan, this possibility was made public by means of a press statement dated 14 April 2017 (see paragraph 29 above).

42. Secondly, Pakistan submits that, before instituting proceedings on 8 May 2017, India had failed to "give consideration" to other dispute settlement mechanisms envisaged in Articles II and III of the Optional Protocol. In this connection, Pakistan claims that, in disregard of these provisions, it was not formally notified of the existence of a dispute concerning the interpretation or application of the Vienna Convention until the institution of proceedings on 8 May 2017.

43. India rejects these allegations. With reference to Pakistan's first argument, it claims that the fact that the Court indicated provisional measures in relation to Mr. Jadhav's situation excludes the possibility of an abuse of process by means of India's request for such measures. With reference to Pakistan's second argument, it asserts that Articles II and III of the Optional Protocol do not contain preconditions to the Court's jurisdiction under Article I.

* *

44. The Court observes, in relation to Pakistan's first argument, that in its Order indicating provisional measures it took into account the possible consequences for Mr. Jadhav's situation of the availability under Pakistani law of any appeal or petition procedure, including the clemency petition to which Pakistan refers in support of its claim (*Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, pp. 244-245, paras. 53-56). In this regard, it concluded *inter alia* that "[t]here [was] 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" (*ibid.*, para. 54). Therefore, there is no basis to conclude that India abused its procedural rights when requesting the Court to indicate provisional measures in this case.

45. In relation to the second argument, the Court notes that none of the provisions of the Optional Protocol relied on by Pakistan contain preconditions to the Court's exercise of its jurisdiction.

46. Article II reads as follows:

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

According to Article III:

> "1. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice.
>
> 2. The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application."

47. The Court interpreted these provisions in the case concerning *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*, where it ruled that Articles II and III of the Optional Protocols to the Vienna Convention on Diplomatic Relations and to the Vienna Convention on Consular Relations do not lay down a

> "precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention in question. Articles II and III provide only that, as a substitute for recourse to the Court, the parties *may agree* upon resort either to arbitration or to conciliation." (*Judgment, I.C.J. Reports 1980*, pp. 25-26, para. 48; emphasis in the original.)

48. It follows that India was under no obligation in the present case to consider other dispute settlement mechanisms prior to instituting proceedings before the Court on 8 May 2017. Thus, Pakistan's objection based on the alleged non-compliance by India with Articles II and III of the Optional Protocol cannot be upheld.

49. The Court recalls that "only in exceptional circumstances should [it] reject a claim based on a valid title of jurisdiction on the ground of abuse of process. In this regard, there has to be clear evidence that the applicant's conduct amounts to an abuse of process" (*Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment of 13 February 2019*, para. 113, citing *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 336, para. 150). The Court does not consider that in the present case there are such exceptional circumstances that would warrant rejecting India's claims on the ground of abuse of process.

50. Accordingly, the Court finds that Pakistan's first objection to the admissibility of India's Application must be rejected.

B. Second objection: abuse of rights

51. In its second objection to the admissibility of India's Application, Pakistan requests the Court to rule that India has abused various rights it has under international law.

52. In its pleadings, Pakistan has based this objection on three main arguments. First, it refers to India's refusal to "provide evidence" of Mr. Jadhav's Indian nationality by means of his "actual passport in his real name", even though it has a duty to do so. Secondly, Pakistan mentions India's failure to engage with its request for assistance in relation to the criminal investigations into Mr. Jadhav's activities. Thirdly, Pakistan alleges that India authorized Mr. Jadhav to cross the Indian border with a "false cover name authentic passport" in order to conduct espionage and terrorist activities. In relation to these arguments, Pakistan invokes various counter-terrorism obligations set out in Security Council resolution 1373 (2001).

53. India refers to what it views as contradictions between Pakistan's arguments before the Court regarding the question of Mr. Jadhav's nationality, on the one hand, and the Respondent's own behaviour after his arrest, on the other. It relies *inter alia* on the allusion made in Pakistan's diplomatic exchanges to Mr. Jadhav's membership of India's "Research and Analysis Wing" and, more specifically, to his Indian nationality. India also cites the absence of a mutual legal assistance treaty, from which it concludes that it has no obligation to co-operate with Pakistan's criminal investigations, and explains that, in any event, the right of consular assistance under Article 36 of the Vienna Convention is not dependent on a party's compliance with any obligation of this kind. Lastly, India considers Pakistan's allegations concerning Mr. Jadhav's unlawful activities to be unfounded.

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54. In its Judgment on the preliminary objections in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, the Court ruled that "abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits" (*Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 337, para. 151).

55. The Court notes, however, that by raising the argument that India has not provided the Court with his "actual passport in his real name", Pakistan appears to suggest that India has failed to prove Mr. Jadhav's nationality. This argument is relevant to the claims based on Article 36 of the Vienna Convention in relation to Mr. Jadhav, and therefore, must be addressed at this stage.

56. In this respect, the Court observes that the evidence before it shows that both Parties have considered Mr. Jadhav to be an Indian national. Indeed, Pakistan has so described Mr. Jadhav on various occasions, including in its "Letter of Assistance for Criminal Investigation against Indian National Kulbhushan Sudhair Jadhev". Consequently, the Court is satisfied that the evidence before it leaves no room for doubt that Mr. Jadhav is of Indian nationality.

57. As indicated above, the second and third arguments advanced by Pakistan in support of its second objection to the admissibility of the Application are based on various alleged breaches of India's obligations under Security Council resolution 1373 (2001). In particular, Pakistan refers to India's failure to respond to Pakistan's request for mutual legal assistance with its criminal investigations into Mr. Jadhav's espionage and terrorism activities, as well as the issuance of what Pakistan describes as a "false cover name authentic passport". The Court observes that, in essence, Pakistan seems to argue that India cannot request consular assistance with respect to Mr. Jadhav, while at the same time it has violated other obligations under international law as a result of the above-mentioned acts. While Pakistan has not clearly explained the link between these allegations and the rights invoked by India on the merits, in the Court's view, such allegations are properly a matter for the merits and therefore cannot be invoked as a ground of inadmissibility.

58. For these reasons, the Court finds that Pakistan's second objection to the admissibility of India's Application must be rejected. The second and third arguments advanced by Pakistan will be addressed when dealing with the merits (see paragraphs 121-124 below).

C. Third objection: India's alleged unlawful conduct

59. In its third objection to the admissibility of India's Application, Pakistan asks the Court to dismiss the Application on the basis of India's alleged unlawful conduct. Relying on the doctrine of "clean hands" and the principles of *"ex turpi causa [non oritur actio]"* and *"ex injuria jus non oritur"*, Pakistan contends that India has failed to respond to its request for assistance with the investigation into Mr. Jadhav's activities, that it has provided him with a "false cover name authentic passport" and, more generally, that it is responsible for Mr. Jadhav's espionage and terrorism activities in Pakistan.

60. India considers that Pakistan's allegations lack merit and contends that, in any event, a receiving State's duty to comply with Article 36 of the Vienna Convention is not conditional on its allegations against an arrested individual.

* *

61. The Court does not consider that an objection based on the "clean hands" doctrine may by itself render an application based on a valid title of jurisdiction inadmissible. It recalls that in the case concerning *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*, it ruled that "even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the 'clean hands' doctrine" (*Preliminary Objections, Judgment of 13 February 2019*, para. 122). The Court therefore concludes that Pakistan's objection based on the said doctrine must be rejected.

62. The Court further notes that Pakistan has relied on the Judgment of the Permanent Court of International Justice (hereinafter "PCIJ") in the *Factory at Chorzów* case in order to advance an argument based on a principle to which it refers as *"ex turpi causa [non oritur actio]"*. However, in that case the PCIJ referred to a principle

> "generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation . . . if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question" (*Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 31; see also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 67, para. 110).

63. With regard to this principle, the Court is of the view that Pakistan has not explained how any of the wrongful acts allegedly committed by India may have prevented Pakistan from fulfilling its obligation in respect of the provision of consular assistance to Mr. Jadhav. The Court therefore finds that Pakistan's objection based on the principle of *"ex turpi causa non oritur actio"* cannot be upheld.

64. The above finding leads the Court to a similar conclusion with regard to the principle of *ex injuria jus non oritur*, which stands for the proposition that unlawful conduct cannot modify the law applicable in the relations between the parties (see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 76, para. 133). In the view of the Court, this principle is inapposite to the circumstances of the present case.

65. Accordingly, the Court finds that Pakistan's third objection to the admissibility of India's Application must be rejected.

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66. In light of the foregoing, the Court concludes that the three objections to the admissibility of the Application raised by Pakistan must be rejected and that India's Application is admissible.

IV. THE ALLEGED VIOLATIONS OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

67. The Court recalls that Pakistan does not expressly raise any objection to the jurisdiction of the Court. It notes, however, that Pakistan does advance several contentions concerning the applicability of certain provisions of the Vienna Convention to the case of Mr. Jadhav. The Court considers it appropriate to address these arguments first.

A. Applicability of Article 36 of the Vienna Convention on Consular Relations

68. The Court notes that Pakistan's contentions regarding the applicability of the Vienna Convention are threefold. First, Pakistan argues that Article 36 of the Vienna Convention does not apply in "prima facie cases of espionage". Secondly, it contends that customary international law governs cases of espionage in consular relations and allows States to make exceptions to the provisions on consular access contained in Article 36 of the Vienna Convention. Thirdly, Pakistan maintains that it is the 2008 Agreement on Consular Access between India and Pakistan (hereinafter the "2008 Agreement"), rather than Article 36 of the Vienna Convention, which regulates consular access in the present case. The Court will examine each of these arguments in turn.

1. Alleged exception to Article 36 of the Vienna Convention based on charges of espionage

69. Pakistan argues that the Vienna Convention does not apply in cases of individuals "who manifest from their own conduct and the materials in their possession a *prima facie* case of espionage activity". In its view, the *travaux préparatoires* of the Vienna Convention demonstrate that cases of espionage were not considered to fall within the scope of that instrument, and that matters of espionage and national security were considered capable of constituting a "justifiable limitation" to a sending State's "freedom to communicate" with its arrested nationals in the receiving State. Pakistan maintains that the drafters of the Vienna Convention understood that there would be matters pertaining to consular relations that would not be regulated by the Convention.

70. India considers that Article 36 of the Vienna Convention does not admit of any exceptions. In its view, the *travaux préparatoires* show that no exception was made to the Convention with regard to cases of espionage, even though the question of espionage was discussed during the drafting process. According to India, the *travaux préparatoires* establish that the Convention's drafters considered espionage to be covered by the principles governing consular access. India argues that if the reasoning espoused by Pakistan were to be carried to its logical conclusion, a receiving State could justify the denial of the rights provided for by the Vienna Convention by alleging acts of espionage.

* *

71. The Court notes that India is not a party to the 1969 Vienna Convention on the Law of Treaties and that, while Pakistan signed that Convention on 29 April 1970, it has not ratified it. The Court will interpret the Vienna Convention on Consular Relations according to the customary rules of treaty interpretation which, as it has stated on many occasions, are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (see, for example, *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 48, para. 83; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 232, para. 153). Under these rules of customary international law,

the provisions of the Vienna Convention on Consular Relations must be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in the light of the object and purpose of the Convention. To confirm the meaning resulting from that process, or to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result, recourse may be had to supplementary means of interpretation, which include the preparatory work of the Convention and the circumstances of its conclusion.

(a) ***Interpretation of Article 36 in accordance with the ordinary meaning of its terms***

72. Article 36 of the Vienna Convention on Consular Relations provides as follows:

"*Article 36*

Communication and contact with nationals of the sending State

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

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

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall 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 judgment. 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."

73. The Court observes that neither Article 36 nor any other provision of the Vienna Convention contains a reference to cases of espionage. Nor does Article 36 exclude from its scope, when read in its context and in light of the object and purpose of the Convention, certain categories of persons, such as those suspected of espionage.

74. The object and purpose of the Vienna Convention as stated in its preamble is to "contribute to the development of friendly relations among nations". The purpose of Article 36, paragraph 1, of the Convention as indicated in its introductory sentence is to "facilitat[e] the exercise of consular functions relating to nationals of the sending State". Consequently, consular officers may in all cases exercise the rights relating to consular access set out in that provision for the nationals of the sending State. It would run counter to the purpose of that provision if the rights it provides could be disregarded when the receiving State alleges that a foreign national in its custody was involved in acts of espionage.

75. The Court thus concludes that, when interpreted in accordance with the ordinary meaning to be given to the terms of the Vienna Convention in their context and in the light of its object and purpose, Article 36 of the Convention does not exclude from its scope certain categories of persons, such as those suspected of espionage.

(b) *The* travaux préparatoires *of Article 36*

76. In view of the conclusion above, the Court need not, in principle, resort to supplementary means of interpretation, such as the *travaux préparatoires* of the Vienna Convention and the circumstances of its conclusion, to determine the meaning of Article 36 of the Convention. However, as in other cases (see, for example, *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment. I.C.J. Reports 2018 (I)*, p. 322, para. 96; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 653, para. 53), the Court may have recourse to the *travaux préparatoires* in order to confirm its interpretation of Article 36 of the Vienna Convention.

(i) International Law Commission (1960)

77. During the discussions of the International Law Commission on the topic of "consular intercourse and immunities", there was no suggestion that Article 36 would not apply to certain categories of persons, such as those suspected of espionage.

78. Draft Article 30 A, which served as a basis for Article 36 of the Convention, was discussed by the Commission in 1960. It provided, in the relevant part, that "[t]he local authorities shall inform the consul of the sending State without delay when any national of that State is detained in custody within his district" (*Yearbook of the International Law Commission*, 1960, Vol. I, p. 42, para. 1). Among the issues discussed in relation to this provision was the question whether and to what extent it was conceivable for consular notification to be made "without delay" in countries which had a system of detention incommunicado, whereby the person might be held isolated from the outside world for a certain period at the beginning of a criminal investigation.

79. It was in the context of this debate regarding the phrase "without delay" that Mr. Tunkin, a member of the Commission, referred to "espionage cases":

> "Mr. TUNKIN felt it might be best to delete the words 'without delay'. There were cases in which it was impossible to inform the consul immediately of the arrest or detention of a national. Sometimes — for instance in espionage cases, where there might be accomplices at large — it might be desirable that the local authorities should not be obliged to inform the consul." (*Ibid.*, p. 58, para. 47.)

80. With regard to cases of espionage, the Chairman of the Commission made the following remark:

> "The CHAIRMAN remarked that a statement of a general principle of law could not possibly cover all conceivable cases. If the Commission went into the question of whether cases of espionage should be made an exception the whole principle of consular protection and communication with nationals would have to be re-opened." (*Ibid.*, p. 58, para. 48.)

81. The Court notes that the Commission did not go into the question of espionage at its subsequent meetings and that the "principle of consular protection and communication with nationals" was not reopened.

82. The Court further notes that cases of espionage were also mentioned in the context of the Commission's discussions on the possible inclusion of a reference to security zones in the proposed provision. However, there was no suggestion of consular access not being granted in cases of espionage because of national security concerns.

83. During its 1961 session, the Commission decided to change the words "without delay" to "without undue delay" (*Yearbook of the International Law Commission*, 1961, Vol. I, pp. 242-245). The Court observes that this decision had no implication for the scope of draft Article 36. The Commission's commentary to draft Article 36, paragraph 1 *(b)*, merely states that "[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" (*Official Records of the United Nations Conference on Consular Relations, Vienna, 4 March-22 April 1963* (United Nations, doc. A/CONF.25/16/Add.1), Vol. II, p. 24, para. 6).

(ii) The Vienna Conference (1963)

84. During the United Nations Conference on Consular Relations held in Vienna from 4 March to 22 April 1963, the question of espionage was raised in relation to the words "without undue delay" in draft Article 36:

> "The CHAIRMAN invited Mr. Žourek [the former Special Rapporteur of the International Law Commission on this topic] to explain why the International Law Commission had included the words 'without undue delay' in its draft . . .
>
> Mr. ŽOUREK (Expert) said that . . . [t]hey were intended to allow for cases in which the receiving State's police might wish to held *[sic]* a criminal in custody for a time. For example, if a smuggler was suspected of controlling a network, the police might wish to keep his arrest secret until they had been able to find his contacts. Similar measures might be adopted in case of espionage." (*Ibid.*, Vol. I, p. 338, paras. 8-9.)

85. The explanation given by Mr. Žourek suggests that while the charge of espionage was thought to be relevant in determining the appropriate period of time within which notification to the sending State should be made by the receiving State, cases of espionage were not excluded from the scope of the Vienna Convention. The Court further notes that in the course of the discussion on proposed amendments to draft Article 36, including a proposal by the United Kingdom to delete the word "undue" from the phrase "without undue delay" which was eventually adopted (*ibid.*, Vol. I, p. 348), it was not suggested that certain categories of persons, such as those suspected of espionage, were to be excluded from the protection of the Convention.

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86. The *travaux préparatoires* thus confirm the interpretation that Article 36 does not exclude from its scope certain categories of persons, such as those suspected of espionage.

2. Alleged espionage exception under customary international law

87. According to Pakistan, State practice establishes that at the time of the adoption of the Vienna Convention in 1963, there was no rule of customary international law which made consular access obligatory in the case of individuals accused of espionage. Pakistan argues that there was a rule of customary international law in 1963 that prima facie cases of espionage constituted an exception to the right of consular access. It cites the preamble of the Vienna Convention, which affirms that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention", in support of its conclusion that the rule of customary international law was unaffected by the Convention and continues to prevail over it.

88. India maintains that the instances referred to by Pakistan, wherein States have denied consular access to individuals suspected of espionage or have granted them access after a

considerable delay, cannot affect the interpretation of Article 36 of the Vienna Convention. In its view, these instances are "random examples" and do not constitute an established practice. According to India, Pakistan is wrong to suggest that customary international law prevails over the plain language of Article 36 of the Convention and that an exclusion is created for allegations of espionage.

* *

89. The Court notes that the preamble of the Vienna Convention states that "the rules of customary international law continue to govern matters *not expressly regulated by the provisions of the present Convention*" (emphasis added). Article 36 of the Convention expressly regulates the question of consular access to, and communication with, nationals of the sending State and makes no exception with regard to cases of espionage. The Court recalls that India and Pakistan have been parties to the Vienna Convention since 1977 and 1969 respectively (see paragraph 33 above) and that neither Party attached any reservation or declaration to the provisions of the Convention. The Court therefore considers that Article 36 of the Convention, and not customary international law, governs the matter at hand in the relations between the Parties.

90. Having reached this conclusion, the Court does not find it necessary to determine whether, when the Vienna Convention was adopted in 1963, there existed the rule of customary international law that Pakistan advances.

3. Relevance of the 2008 Agreement on Consular Access between India and Pakistan

91. The 2008 Agreement provides, in its relevant parts, as follows:

> "*Agreement on Consular Access*
>
> The Government of India and the Government of Pakistan, desirous of furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country, have agreed to reciprocal consular facilities as follows:
>
> . . . . . .
>
> (ii) Immediate notification of any arrest, detention or imprisonment of any person of the other country shall be provided to the respective High Commission.
>
> . . . . . .
>
> (iv) Each Government shall provide consular access within three months to nationals of one country, under arrest, detention or imprisonment in the other country.

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

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

*

92. Pakistan maintains that it is the 2008 Agreement rather than the Vienna Convention on Consular Relations that governs the question of consular access between India and Pakistan, including in the present case. In Pakistan's view, the nature and circumstances of Mr. Jadhav's alleged espionage and terrorist activities bring his arrest squarely within the national security qualification contained in point (vi) of the Agreement. Pakistan thus argues that it was entitled to consider the question of consular access to Mr. Jadhav "on its merits" in the particular circumstances of this case. It disputes the interpretation put forward by India, according to which point (vi) should be read in conjunction with point (v) concerning the early release and repatriation of persons (see paragraph 93 below). In Pakistan's view, point (vi) of the 2008 Agreement is fully consistent with Article 73 of the Vienna Convention on Consular Relations and with Article 41 of the Vienna Convention on the Law of Treaties, because the 2008 Agreement can properly be seen as "supplementing" or "amplifying" the provisions of the Vienna Convention on Consular Relations.

93. India emphasizes that its claims are based solely on the Vienna Convention and maintains that the existence of a bilateral agreement is irrelevant to the assertion of the right to consular access under the Convention. It contends that bilateral treaties cannot modify the rights and corresponding obligations which are set out in Article 36 of the Convention. India argues that there is nothing in the language of the 2008 Agreement which would suggest that India or Pakistan ever intended to derogate from Article 36 of the Vienna Convention. India maintains that Pakistan's interpretation would be contrary to Article 73 of the Vienna Convention. As for point (vi) of the 2008 Agreement, India takes the view that the phrase "examine the case on its merits" applies to the agreement to release and repatriate persons within one month of the confirmation of their national status and completion of sentences as provided for in point (v), and that, as an exception to this, India and Pakistan reserve the right to examine on the merits the case for the release and repatriation of persons upon the completion of their sentences when their arrest, detention or sentence was made on political or security grounds.

* *

94. The Court recalls that point (vi) of the 2008 Agreement 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". It also recalls that, in the preamble of the Agreement, the Parties declared that they were "desirous of furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country". The Court is of the view 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. Given the importance of the rights concerned in guaranteeing the "humane treatment of nationals of either country arrested, detained or imprisoned in the other country", if the Parties had intended to restrict in some way the rights guaranteed by Article 36, one would expect such an intention to be unequivocally reflected in the provisions of the Agreement. That is not the case.

95. Moreover, as noted in paragraph 74 above, with reference to the alleged exception of espionage in the Vienna Convention, any derogation from Article 36 of the Vienna Convention for political or security grounds may render the right related to consular access meaningless as it would give the receiving State the possibility of denying such access.

96. Account should also be taken of Article 73, paragraph 2, of the Vienna Convention for the purpose of interpreting the 2008 Agreement. This paragraph 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 language of this paragraph indicates that it refers to subsequent agreements to be concluded by parties to the Vienna Convention. The Court notes that the Vienna Convention was drafted with a view to establishing, to the extent possible, uniform standards for consular relations. The ordinary meaning of Article 73, paragraph 2, suggests that it is consistent with the Vienna Convention to conclude only subsequent agreements which confirm, supplement, extend or amplify the provisions of that instrument, such as agreements which regulate matters not covered by the Convention.

97. The Parties have negotiated the 2008 Agreement in full awareness of Article 73, paragraph 2, of the Vienna Convention. Having examined that Agreement and in light of the conditions set out in Article 73, paragraph 2, the Court is of the view that the 2008 Agreement is a subsequent agreement intended to "confirm, supplement, extend or amplify" the Vienna Convention. Consequently, the Court considers that point (vi) of that Agreement does not, as Pakistan contends, displace the obligations under Article 36 of the Vienna Convention.

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98. For these reasons, the Court finds that none of the arguments raised by Pakistan concerning the applicability of Article 36 of the Vienna Convention to the case of Mr. Jadhav can be upheld. The Court thus concludes that the Vienna Convention is applicable in the present case, regardless of the allegations that Mr. Jadhav was engaged in espionage activities.

B. Alleged violations of Article 36 of the Vienna Convention on Consular Relations

99. Having concluded that the Vienna Convention is applicable in the present case, the Court will examine the alleged violations by Pakistan of its obligations under Article 36 thereof. India contends in its final submissions that Pakistan acted in breach of its obligations under Article 36 of the Vienna Convention (i) by not informing India, without delay, of the detention of Mr. Jadhav; (ii) by not informing Mr. Jadhav of his rights under Article 36; and (iii) by denying consular officers of India access to Mr. Jadhav, contrary to their right to visit him, to converse and correspond with him, and to arrange for his legal representation. The Court will consider the alleged violations in chronological order.

1. Alleged failure to inform Mr. Jadhav of his rights under Article 36, paragraph 1 *(b)*

100. India states that it is not known whether Pakistan informed Mr. Jadhav of his rights under Article 36, paragraph 1 *(b)*. Nonetheless, the Applicant contends that the conduct of Pakistan, which at one point suggested in public statements that the detainee was not entitled to consular access, strongly indicates that it did not inform Mr. Jadhav of his right to communicate with the Indian consular post.

101. Pakistan has not asserted that it informed Mr. Jadhav of his rights under Article 36, paragraph 1 *(b)*.

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102. Article 36, paragraph 1 *(b)*, of the Vienna Convention provides that the competent authorities of the receiving State must inform a foreign national in detention of his rights under that provision. The Court therefore needs to determine whether the competent Pakistani authorities informed Mr. Jadhav of his rights in accordance with this provision. In this respect, the Court observes that Pakistan has not contested India's contention that Mr. Jadhav was not informed of his rights under Article 36, paragraph 1 *(b)*, of the Convention. To the contrary, in the written and oral proceedings, Pakistan consistently maintained that the Convention does not apply to an individual suspected of espionage. The Court infers from this position of Pakistan that it did not inform Mr. Jadhav of his rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention, and thus concludes that Pakistan breached its obligation to inform Mr. Jadhav of his rights under that provision.

2. Alleged failure to inform India, without delay, of the arrest and detention of Mr. Jadhav

103. India states that Mr. Jadhav was arrested on 3 March 2016 and that it was informed of his arrest only when the Foreign Secretary of Pakistan raised the matter with the Indian High Commissioner in Islamabad on 25 March 2016. It maintains that Pakistan has offered no explanation as to why it took over three weeks to inform the Indian High Commissioner of Mr. Jadhav's arrest. According to the Applicant, Pakistan acknowledged as early as 30 March 2016 that India had requested consular access on 25 March 2016. The Applicant contends that Pakistan had no difficulty at that time in recognizing that the request related to Mr. Jadhav and that for that reason Pakistan did not seek clarification as to the identity of the individual concerned.

104. Pakistan confirms that Mr. Jadhav was arrested on 3 March 2016 and that it informed the Indian High Commissioner of the arrest on 25 March 2016. Nor does Pakistan contest that on 25 March 2016 the Indian High Commission in Islamabad sent a Note Verbale to the Ministry of Foreign Affairs of Pakistan referring to "the purported arrest of an Indian in Baluchistan" and requesting consular access to that individual. It stresses, however, that India did not identify the individual by name and maintains that it was not until 10 June 2016 that India actually identified the individual in question as Mr. Jadhav.

105. Citing the Judgment in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, in which the Court stated that "'without delay' is not necessarily to be interpreted as 'immediately' upon arrest" (*I.C.J. Reports 2004 (I)*, p. 49, para. 87), Pakistan contends that immediate consular access is not required by Article 36, paragraph 1 *(b)*, of the Vienna Convention. In the Respondent's view, Article 36, paragraph 2, of the Vienna Convention makes it clear that the rights under Article 36, paragraph 1 *(a)* to *(c)*, must be exercised in a manner that is in accordance with the domestic law of the receiving State. Pakistan argues that the principle of non-interference in the domestic affairs of a sovereign State applies to the rights set out in the Vienna Convention.

* *

106. Article 36, paragraph 1 *(b)*, of the Vienna Convention provides that if a national of the sending State is arrested or detained, and "if he so requests", the competent authorities of the receiving State must, "without delay", inform the consular post of the sending State. To examine India's claim that Pakistan breached its obligation under this provision, the Court will consider, first, whether Mr. Jadhav made such a request and, secondly, whether Pakistan informed India's consular post of the arrest and detention of Mr. Jadhav. Finally, if the Court finds that notification was provided by Pakistan, it will examine whether it was made "without delay".

107. Interpreting Article 36, paragraph 1 *(b)*, in accordance with the ordinary meaning of the terms used, the Court notes that there is an inherent connection between the obligation of the receiving State to inform a detained person of his rights under Article 36, paragraph 1 *(b)*, and his ability to request that the consular post of the sending State be informed of his detention. Unless the receiving State has fulfilled its obligation to inform a detained person of his rights under Article 36, paragraph 1 *(b)*, he may not be aware of his rights and consequently may not be in a position to make a request that the competent authorities of the receiving State inform the sending State's consular post of his arrest.

108. The *travaux préparatoires* confirm the connection between the obligation of the receiving State to inform a detained person of his rights and his ability to request that the consular post of the sending State be informed of his detention. The original text of Article 36, paragraph 1 *(b)*, prepared by the International Law Commission, did not contain wording equivalent to "if he so requests" (*Official Records of the United Nations Conference on Consular Relations, Vienna, 4 March-22 April 1963* (United Nations, doc. A/CONF.25/16/Add.1), Vol. II, p. 24). This phrase was added at the Vienna Conference in 1963. The United Kingdom expressed concern about "abuses and misunderstanding" which could be caused by the addition of this new phrase, which, in its view, "could well make the provisions of article 36 ineffective because the person arrested might not be aware of his rights" (*ibid.*, Vol. I, pp. 83-84, para. 73). For these reasons, the United Kingdom considered it essential to introduce the following new sentence at the end of subparagraph *(b)*: "The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph" (*ibid.*, Vol. II, p. 171). The proposal to add the phrase "if he so requests" was adopted together with that of the United Kingdom to add the new sentence (*ibid.*, Vol. I, p. 87, paras. 108-112).

109. Article 36, paragraph 1 *(b)*, of the Convention provides that if a detained person "so requests", the competent authorities of the receiving State must inform the consular post of the sending State. In light of what is set out in paragraphs 107 and 108 above, the phrase "if he so requests" must be read in conjunction with the obligation of the receiving State to inform the detained person of his rights under Article 36, paragraph 1 *(b)*. The Court has already found that Pakistan failed to inform Mr. Jadhav of his rights (see paragraph 102 above). Consequently, the Court is of the view that Pakistan was under an obligation to inform India's consular post of the arrest and detention of Mr. Jadhav in accordance with Article 36, paragraph 1 *(b)*, of the Convention.

110. Moreover, the Court observes that, when a national of the sending State is in prison, custody or detention, an obligation of the authorities of the receiving State to inform the consular post of the sending State is implied by the rights of the consular officers under Article 36, paragraph 1 *(c)*, to visit the national, "to converse and correspond with him and to arrange for his legal representation".

111. The Court now proceeds to the second question, that of whether Pakistan informed India of the arrest and detention of Mr. Jadhav. On 25 March 2016, the Foreign Secretary of Pakistan summoned the Indian High Commissioner in Islamabad to raise the matter of the arrest and issued a démarche protesting the illegal entry into Pakistan of "a RAW officer" (see

paragraph 22 above). The Court observes that Article 36, paragraph 1 *(b)*, does not specify the manner in which the receiving State should inform the consular post of the sending State of the detention of one of its nationals. What is important is that the information contained in the notification is sufficient to facilitate the exercise by the sending State of the consular rights envisaged by Article 36, paragraph 1, of the Vienna Convention. Pakistan's action on 25 March 2016 enabled India to make a request for consular access on the same day (see paragraph 103 above). Under the circumstances, the Court considers that Pakistan notified India on 25 March 2016 of the arrest and detention of Mr. Jadhav, as required by Article 36, paragraph 1 *(b)*, of the Vienna Convention.

112. The Court now turns to the final question, that of whether the notification was given "without delay". Pakistan claims that at the time of his arrest on 3 March 2016, Mr. Jadhav was in possession of an Indian passport bearing the name "Hussein Mubarak Patel". In the circumstances of the present case, the Court considers that there were sufficient grounds at the time of the arrest on 3 March 2016 or shortly thereafter for Pakistan to conclude that the person was, or was likely to be, an Indian national, thus triggering its obligation to inform India of his arrest in accordance with Article 36, paragraph 1 *(b)*, of the Vienna Convention (see *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 43, para. 63).

113. There was a delay of some three weeks between Mr. Jadhav's arrest on 3 March 2016 and the notification made to India on 25 March 2016. The Court recalls that "neither the terms of the [Vienna] 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). It also recalls that "there is no suggestion in the *travaux* that the phrase 'without delay' might have different meanings in each of the three sets of circumstances in which it is used in Article 36, paragraph 1 *(b)*" (*ibid.*, p. 49, para. 86). In the *Avena* case, the Court's determination whether notification had been given "without delay" was made on the basis of each individual's circumstances. It found that there had been a violation of the obligation to inform under Article 36, paragraph 1 *(b)*, with regard to a delay of just 40 hours when the foreign nationality of the detained person was apparent from the outset of his detention (*ibid.*, p. 50, para. 89). However, the Court found no violation in respect of a delay of five days when the foreign nationality was less obvious at the time of arrest (*ibid.*, p. 52, para. 97). Taking account of the particular circumstances of the present case, the Court considers that the fact that the notification was made some three weeks after the arrest in this case constitutes a breach of the obligation to inform "without delay", as required by Article 36, paragraph 1 *(b)*, of the Vienna Convention.

3. Alleged failure to provide consular access

114. India notes that Pakistan stated in its Note Verbale of 21 March 2017 that India's request for consular access would be considered "in the light of India's response to Pakistan's request for assistance in the investigation process". The Applicant argues that by denying its request for consular access despite repeated reminders, Pakistan has violated, and continues to

violate, its obligations under Article 36 of the Vienna Convention. India maintains that the obligations of the receiving State under Article 36 of the Convention are not conditional on the sending State complying with requests for co-operation in the investigation of crimes, and argues that Article 36 provides for no exception and thus creates obligations that are absolute in nature.

115. Pakistan maintains that the sending State's consular function of defending the interests of its nationals in the receiving State must be exercised in a manner that is in conformity with the laws of the receiving State. In relation to the alleged violation of Article 36, paragraph 1 *(c)*, it argues that Mr. Jadhav was allowed to choose a lawyer for himself, but that he opted to be represented by an in-house defending officer qualified for legal representation.

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116. Article 36, paragraph 1 *(a)*, of the Vienna Convention provides that

> "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".

Paragraph 1 *(c)* provides, *inter alia*, that "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". The Court recalls that "Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 494, para. 77).

117. In the present case, it is undisputed that Pakistan has not granted any Indian consular officer access to Mr. Jadhav. India has made a number of requests for consular access since 25 March 2016 (see paragraphs 22 and 23 above). Pakistan responded to India's request for consular access for the first time in its Note Verbale dated 21 March 2017, in which it stated that "the case for the consular access to the Indian national, Kulbushan Jadhev 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" (see paragraph 28 above). The Court is of the view that the alleged failure by India to co-operate in the investigation process in Pakistan does not relieve Pakistan of its obligation to grant consular access under Article 36, paragraph 1, of the Convention, and does not justify Pakistan's denial of access to Mr. Jadhav by consular officers of India.

118. Article 36, paragraph 1 *(c)*, provides that consular officers have the right to arrange legal representation for a detained national of the sending State. The provision presupposes that consular officers can arrange legal representation based on conversation and correspondence with

the detained person. In the view of the Court, Pakistan's contention that Mr. Jadhav was allowed to choose a lawyer for himself, but that he opted to be represented by a defending officer qualified for legal representation, even if it is established, does not dispense with the consular officers' right to arrange for his legal representation.

119. The Court therefore concludes that Pakistan has breached the obligations incumbent on it under Article 36, paragraph 1 *(a)* and *(c)*, of the Vienna Convention, by denying consular officers of India access to Mr. Jadhav, contrary to their right to visit him, to converse and correspond with him, and to arrange for his legal representation.

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120. Having concluded that Pakistan acted in breach of its obligations under Article 36, paragraph 1 *(a)*, *(b)* and *(c)*, of the Vienna Convention, the Court will now examine Pakistan's contentions based on abuse of rights.

C. Abuse of rights

121. In light of the above, the Court will determine whether India's alleged violations of international law invoked by Pakistan in support of its contentions based on abuse of rights may constitute a defence on the merits (see paragraphs 57 and 58 above).

122. The Parties' arguments regarding such allegations have already been set out above (see paragraphs 51-53 above). In essence, Pakistan argues that India cannot request consular assistance with respect to Mr. Jadhav, while at the same time it has failed to comply with other obligations under international law.

123. In this respect, the Court recalls that the Vienna Convention "lays down certain standards to be observed by all States parties, with a view to the 'unimpeded conduct of consular relations'", and that Article 36 on consular assistance to and communication with nationals undergoing criminal proceedings sets forth rights both for the State and the individual which are interdependent (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 36, para. 40 and p. 38, para. 47, citing respectively *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 494, para. 77; and *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, pp. 19-20, para. 40). In the Court's view, 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. Otherwise, the whole system of consular assistance would be severely undermined.

124. For these reasons, the Court concludes that none of Pakistan's allegations relating to abuse of rights by India justifies breaches by Pakistan of its obligations under Article 36 of the Vienna Convention. Pakistan's arguments in this respect must therefore be rejected.

V. REMEDIES

125. The remedies requested by India in its final submissions have already been set out (see paragraph 19 above). In summary, India requests the Court to adjudge and declare that Pakistan acted in breach of Article 36 of the Vienna Convention on Consular Relations. Pursuant to the foregoing, India asks the Court to declare that the sentence of Pakistan's military court is violative of international law and the provisions of the Vienna Convention, and that India is entitled to *restitutio in integrum*. It also requests the Court to annul the decision of the military court and restrain Pakistan from giving effect to the sentence or conviction, to direct Pakistan to release Mr. Jadhav and to facilitate his safe passage to India. In the alternative, and if the Court were to find that Mr. Jadhav is not to be released, India requests the Court to annul the decision of the military court and restrain Pakistan from giving effect to the sentence awarded by that court. In the further alternative, India asks the Court to direct Pakistan to take steps to annul the decision of the military court. In either event, it requests the Court to direct a trial under ordinary law before civilian courts, after excluding Mr. Jadhav's confession and in strict conformity with the provisions of the International Covenant on Civil and Political Rights, with full consular access and with a right for India to arrange for Mr. Jadhav's legal representation.

126. India argues that, in order to fashion an appropriate remedy that would meet the high standards of international human rights law, "of which Article 36 is . . . a significant element", the Court should take into account the nature and extent of the violations, the degree of injury suffered, and the extent to which the trial did not follow the norms of due process. It maintains that where the breach of Article 36 of the Vienna Convention has resulted in the violation of the right under Article 14 of the Covenant, the principles of State responsibility must recognize the "synergy" between Article 14 and Article 36 and must therefore address the serious consequences of the breach of Article 36 which results in the violation of the right under Article 14 of the Covenant.

127. India seeks to distinguish the present case from the *LaGrand* and *Avena* cases, in which, according to India, the Court granted only review and reconsideration of the conviction and sentence, because it accepted the assertion of the United States that its criminal justice system was fully compliant with due process. India argues that Pakistan's criminal justice system by way of trial in the military courts does not satisfy the minimum standards of due process in its application to civilians. It contends that "relief by way of review and reconsideration" is "highly inadequate" as a remedy in the case of Mr. Jadhav. Referring to a judgment rendered by the Pakistan Supreme Court in 2016 in *Said Zaman Khan* et al. v. *Federation of Pakistan* (see paragraph 141 below), it contends that the remit of judicial review in Pakistan is narrow, because convictions by the military courts "can only be assailed on the ground of *coram non judice*, absence of jurisdiction, *mala fide*

and malice in law". While acknowledging that a judgment rendered by the Peshawar High Court in 2018 appears to have taken "a broader view", India stresses that the Government of Pakistan has filed an appeal against that judgment and that the Supreme Court has suspended the operation of the judgment pending the appeal.

128. In support of its argument on an appropriate remedy, India refers to reports of certain international and non-governmental organizations on the military justice system in Pakistan.

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129. Pakistan, for its part, contends that the relief sought by India (the annulment of a domestic criminal conviction, the annulment of a domestic criminal sentence, the release of a convicted prisoner) could only be granted by an appellate criminal court. According to Pakistan, granting such relief would transform the Court into a court of appeal of national criminal proceedings. It submits that the Court has repeatedly and consistently affirmed the principle that it does not have the function of a criminal appellate court and maintains that restitution to the *status quo ante* is not an appropriate remedy for a breach of Article 36 of the Vienna Convention, because, unlike legal assistance, consular assistance is not regarded as a predicate to a criminal proceeding.

130. Pakistan maintains that the appropriate remedy in this case would be, at most, effective review and reconsideration of the conviction and sentence of the accused, taking into account the potential effects of any violation of Article 36 of the Vienna Convention. It refers to the decision rendered by the Peshawar High Court in 2018, which set aside more than 70 convictions and sentences handed down by military courts. It contends that its domestic legal system provides for an established and defined process whereby the civil courts can undertake a substantive review of the decisions of military tribunals, in order to ensure procedural fairness has been afforded to the accused, and that its courts are well suited to carrying out a review and reconsideration that gives full weight to the effect of any violation of Article 36 of the Vienna Convention.

131. Pakistan further notes that clemency procedures can act as an appropriate supplement to judicial procedures for review and reconsideration, and points out that, at all material times, both judicial review and clemency procedures have been available to Mr. Jadhav and his family.

132. Pakistan adds that the conduct of India and Mr. Jadhav must be taken into account in any consideration of relief the Court undertakes, including whether the conduct is of such grave illegality that it militates against the granting of any relief at all.

* *

133. The Court has already found that Pakistan acted in breach of its obligations under Article 36 of the Vienna Convention,

(i) by not informing Mr. Jadhav of his rights under Article 36, paragraph 1 *(b)*;

(ii) by not informing India, without delay, of the arrest and detention of Mr. Jadhav; and

(iii) by denying access to Mr. Jadhav by consular officers of India, contrary to their right, *inter alia*, to arrange for his legal representation (see paragraphs 99-119 above).

134. The Court considers that the breaches by Pakistan set out in (i) and (iii) in the paragraph above constitute internationally wrongful acts of a continuing character. Accordingly, the Court is of the view that Pakistan is under an obligation to cease those acts and to comply fully with its obligations under Article 36 of the Vienna Convention. Consequently, Pakistan must inform Mr. Jadhav without further delay of his rights under Article 36, paragraph 1 *(b)*, and allow Indian consular officers to have access to him and to arrange for his legal representation, as provided by Article 36, paragraph 1 *(a)* and *(c)*.

135. With regard to India's submission that the Court declare that the sentence handed down by Pakistan's military court is violative of international law and the provisions of the Vienna Convention, the Court recalls that its jurisdiction has its basis in Article I of the Optional Protocol. This jurisdiction is limited to the interpretation or application of the Vienna Convention and does not extend to India's claims based on any other rules of international law (see paragraph 36 above). India refers to Article 14 of the International Covenant on Civil and Political Rights to support its requests for remedies. In accordance with the rule reflected in Article 31, paragraph 3 *(c)*, of the Vienna Convention on the Law of Treaties, the Covenant may be taken into account, together with the context, for the interpretation of the Vienna Convention on Consular Relations. The Court notes, however, that the remedy to be ordered in this case has the purpose of providing reparation only for the injury caused by the internationally wrongful act of Pakistan that falls within the Court's jurisdiction, namely its breach of obligations under Article 36 of the Vienna Convention on Consular Relations, and not of the Covenant.

136. As regards India's claim based on the Vienna Convention, the Court considers that it is not the conviction and sentence of Mr. Jadhav which are to be regarded as a violation of the provisions of the Vienna Convention. In the *Avena* case, the Court confirmed that "the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing", and that "it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations [on consular access] which preceded them" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 60, paras. 122-123).

137. With regard to India's contention that it is entitled to *restitutio in integrum* and its request to annul the decision of the military court and to restrain Pakistan from giving effect to the sentence or conviction, and its further request to direct Pakistan to take steps to annul the decision of the military court, to release Mr. Jadhav and to facilitate his safe passage to India, the Court reiterates that it is not the conviction and sentence of Mr. Jadhav which are to be regarded as a violation of Article 36 of the Vienna Convention. The Court also recalls that "[i]t is not to be presumed . . . that partial or total annulment of conviction or sentence provides the necessary and sole remedy" in cases of violations of Article 36 of the Vienna Convention (*ibid.*, p. 60, para. 123). Thus, the Court finds that these submissions made by India cannot be upheld.

138. The Court reaffirms that "it is a principle of international law . . . that any breach of an engagement involves an obligation to make reparation" and that "reparation must, as far as possible, wipe out all the consequences of the illegal act" (*Factory at Chorzów (Claim for Indemnity), Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, pp. 29, 47). The Court considers the appropriate remedy in this case to be effective review and reconsideration of the conviction and sentence of Mr. Jadhav. This is consistent with the approach that the Court has taken in cases of violations of Article 36 of the Convention (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 514, para. 125; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, pp. 65-66, paras. 138-140 and p. 73, para. 153). It is also in line with what the Applicant asks the Court to adjudge and declare in the present case. In the Court's view, India ultimately requests effective remedies for the breaches of the Convention by Pakistan. The Court notes that Pakistan acknowledges that the appropriate remedy in the present case would be effective review and reconsideration of the conviction and sentence.

139. The Court considers that a special emphasis must be placed on the need for the review and reconsideration to be effective. The review and reconsideration of the conviction and sentence of Mr. Jadhav, in order to be effective, must ensure that full weight is given to the effect of the violation of the rights set forth in Article 36, paragraph 1, of the Convention and guarantee that the violation and the possible prejudice caused by the violation are fully examined. It presupposes the existence of a procedure which is suitable for this purpose. The Court observes that it is normally the judicial process which is suited to the task of review and reconsideration (see *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, pp. 65-66, paras. 138-140).

140. In the present case, the death sentence imposed on Mr. Jadhav by the Field General Court Martial of Pakistan was confirmed by the Chief of Army Staff on 10 April 2017. The evidence suggests that Mr. Jadhav appealed to the Military Appellate Court under Section 133 (B) of the Pakistan Army Act of 1952, but that the appeal was rejected. With regard to the petition procedure, the evidence suggests that Mr. Jadhav has made a mercy petition to the Chief of Army Staff, and that the mother of Mr. Jadhav has sought to file a petition with the Federal Government of Pakistan under Section 131 and an appeal under Section 133 (B) of the Act. There is no evidence before the Court to indicate the outcome of those petitions or that appeal.

141. The Court notes that, according to Pakistan, the High Courts of Pakistan can exercise review jurisdiction. The Court observes, however, that Article 199, paragraph 3, of the Constitution of Pakistan has been interpreted by the Supreme Court of Pakistan as limiting the availability of such review for a person who is subject to any law relating to the Armed Forces of Pakistan, including the Pakistan Army Act of 1952. The Supreme Court has stated that the High Courts and the Supreme Court may exercise 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" (*Said Zaman Khan* et al. v. *Federation of Pakistan*, Supreme Court of Pakistan, Civil Petition No. 842 of 2016, 29 August 2016, para. 73). Article 8, paragraph 1, of the Constitution provides that any law which is inconsistent with fundamental rights guaranteed under the Constitution is void, but this provision does not apply to the Pakistan Army Act of 1952 by virtue of a constitutional amendment (*ibid.*, para. 125). Thus, 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.

142. The Court takes note of the decision of the Peshawar High Court in 2018. The High Court held that it had the legal mandate positively to interfere with 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 & 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). The Government of Pakistan has appealed the decision and the case was still pending at the close of the oral proceedings in the present case.

143. The Court confirms that the clemency process is not sufficient in itself to serve as an appropriate means of review and reconsideration but that

> "appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 66, para. 143).

The evidence before the Court suggests that two clemency procedures are available to Mr. Jadhav: a mercy petition to the Chief of Army Staff within 60 days of the decision by the Appellate Court and a mercy petition to the President of Pakistan within 90 days of the decision of the Chief of Army Staff on the mercy petition (see paragraph 29 above). The outcome of the petition submitted by Mr. Jadhav to the Chief of Army Staff (see paragraph 140 above) has not, however, been made known to the Court. No evidence has been submitted to the Court regarding the presidential clemency procedure.

144. In light of these circumstances, the Court considers it imperative to re-emphasize that the review and reconsideration of the conviction and sentence of Mr. Jadhav must be effective.

145. In this regard, the Court takes full cognizance of the representations made by Pakistan. During the oral proceedings, the Agent of Pakistan declared that the Constitution of Pakistan guarantees, as a fundamental right, the right to a fair trial; that the right to a fair trial is "absolute" and "cannot be taken away"; and that all trials are conducted accordingly and, if not, "the process of judicial review is always available". Counsel for Pakistan assured the Court that the High Courts of Pakistan exercise "effective review jurisdiction", giving as an example the decision of the Peshawar High Court in 2018 (see paragraph 142 above). The Court points out that respect for the principles of a fair trial is of cardinal importance in any review and reconsideration, and that, in the circumstances of the present case, it is essential for the review and reconsideration of the conviction and sentence of Mr. Jadhav to be effective. The Court considers that the violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention, and its implications for the principles of a fair trial, should be fully examined and properly addressed during the review and reconsideration process. In particular, any potential prejudice and the implications for the evidence and the right of defence of the accused should receive close scrutiny during the review and reconsideration.

146. The Court notes that the obligation to provide effective review and reconsideration can be carried out in various ways. The choice of means is left to Pakistan (cf. *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 514, para. 125). Nevertheless, freedom in the choice of means is not without qualification (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 62, para. 131). The obligation to provide effective review and reconsideration is "an obligation of result" which "must be performed unconditionally" (*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). Consequently, Pakistan shall take all measures to provide for effective review and reconsideration, including, if necessary, by enacting appropriate legislation.

147. To conclude, the Court finds 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, so as to ensure that full weight is given to the effect of the violation of the rights set forth in Article 36 of the Vienna Convention, taking account of paragraphs 139, 145 and 146 of this Judgment.

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148. The Court recalls that it indicated a provisional measure directing Pakistan to take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in the present proceedings (*Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 246, para. 61 (I)). The Court considers that a continued stay of execution constitutes an indispensable condition for the effective review and reconsideration of the conviction and sentence of Mr. Jadhav.

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149. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction, on the basis of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations of 24 April 1963, to entertain the Application filed by the Republic of India on 8 May 2017;

(2) By fifteen votes to one,

Rejects the objections by the Islamic Republic of Pakistan to the admissibility of the Application of the Republic of India and *finds* that the Application of the Republic of India is admissible;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

AGAINST: *Judge* ad hoc Jillani;

(3) By fifteen votes to one,

Finds that, by not informing Mr. Kulbhushan Sudhir Jadhav without delay of his rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations, the Islamic Republic of Pakistan breached the obligations incumbent upon it under that provision;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

AGAINST: *Judge* ad hoc Jillani;

(4) By fifteen votes to one,

Finds that, by not notifying the appropriate consular post of the Republic of India in the Islamic Republic of Pakistan without delay of the detention of Mr. Kulbhushan Sudhir Jadhav and thereby depriving the Republic of India of the right to render the assistance provided for by the Vienna Convention to the individual concerned, the Islamic Republic of Pakistan breached the obligations incumbent upon it under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

AGAINST: *Judge* ad hoc Jillani;

(5) By fifteen votes to one,

Finds that the Islamic Republic of Pakistan deprived the Republic of India of the right to communicate with and have access to Mr. Kulbhushan Sudhir Jadhav, to visit him in detention and to arrange for his legal representation, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 *(a)* and *(c)*, of the Vienna Convention on Consular Relations;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

AGAINST: *Judge* ad hoc Jillani;

(6) By fifteen votes to one,

Finds that the Islamic Republic of Pakistan is under an obligation to inform Mr. Kulbhushan Sudhir Jadhav without further delay of his rights and to provide Indian consular officers access to him in accordance with Article 36 of the Vienna Convention on Consular Relations;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

AGAINST: *Judge* ad hoc Jillani;

(7) By fifteen votes to one,

Finds that the appropriate reparation in this case consists in the obligation of the Islamic Republic of Pakistan to provide, by the means of its own choosing, effective review and reconsideration of the conviction and sentence of Mr. Kulbhushan Sudhir Jadhav, so as to ensure that full weight is given to the effect of the violation of the rights set forth in Article 36 of the Convention, taking account of paragraphs 139, 145 and 146 of this Judgment;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

AGAINST: *Judge* ad hoc Jillani;

(8) By fifteen votes to one,

Declares that a continued stay of execution constitutes an indispensable condition for the effective review and reconsideration of the conviction and sentence of Mr. Kulbhushan Sudhir Jadhav.

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

AGAINST: *Judge* ad hoc Jillani.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this seventeenth day of July, two thousand and nineteen, 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) Abdulqawi Ahmed YUSUF,
President.

(Signed) Jean-Pelé FOMÉTÉ,
Deputy-Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judges SEBUTINDE, ROBINSON and IWASAWA append declarations to the Judgment of the Court; Judge *ad hoc* JILLANI appends a dissenting opinion to the Judgment of the Court.

(Initialled) A.A.Y.

(Initialled) J-P.F.

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SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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Paragraphs

I. *PROLEGOMENA*.

1. I have voted in support of the adoption today, 17.07.2019, of the present Judgment of the International Court of Justice (ICJ) in the case of *Jadhav* (India *versus* Pakistan). I arrive at the conclusions of the ICJ set forth in the *dispositif* of the present Judgment on the basis of a reasoning encompassing some points which, in my understanding, deserve more attention. Resolutory points ns. (7) and (8) of the *dispositif*, for example, appear insufficient to me. And, in respect of such key points in the *cas d'espèce*, examined in detail herein, my reasoning goes well beyond that of the Court. I thus feel obliged, in the present Separate Opinion, to dwell upon them, — under the usual and unwise pressure of time, — so as to lay on the records the foundations of my own personal position thereon.

2. To that end, I begin by addressing a point once again brought to the attention of the ICJ in the course of the present proceedings in the case of *Jadhav* (paras. 24-25, India; and para. 26, Pakistan, — *infra*), namely, the jurisprudential construction with the legacy of the pioneering Advisory Opinion n. 16 (1999) of the Inter-American Court of Human Rights (IACtHR) on the matter at issue, followed by the Advisory Opinion n. 18 (2003) of the IACtHR. In logical sequence, I then dwell upon the case-law of the ICJ itself (2001-2004), subsequent to the Advisory Opinion n. 16 (1999) of the IACtHR.

3. Following that, I identify the insufficiencies of the ICJ's reasoning in the cases of *LaGrand* (2001) and of *Avena* (2004). Next, I turn attention to the interrelationship between the right to information on consular assistance, and human rights to due process of law and fair trial. I then address the trend towards the abolition of death penalty, as seen nowadays in the *corpus juris gentium* acknowledging the wrongfulness in death penalty as a breach of human rights, as well as in initiatives and endeavours in the United Nations in condemnation of death penalty at world level. This is followed by my observations on the large extent of the harm done to human rights by death penalty.

4. The way is then paved for my consideration of long-standing humanist thinking, in its denunciation of the cruelty of death penalty as a breach of human rights. In logical sequence, I then address the importance of providing redress. Last but not least, I proceed, in an epilogue, to a recapitulation of the points of my position sustained in my present Separate Opinion. I thus purport herein to make it quite clear that my own understanding goes beyond the ICJ's reasoning, in that I focus on the needed transcending the strictly inter-State outlook, and, moreover, on the right to information on consular assistance in the framework of the guarantees of the due process of law transcending the nature of an individual right, as a true human right, with all legal consequences ensuing therefrom.

II. Jurisprudential Construction: The Legacy of the Pioneering Advisory Opinion n. 16 (1999) of the IACtHR.

5. To start with, it should not pass unnoticed that we are completing two decades since international jurisprudence started being constructed for the proper interpretation and application of Article 36(1)(b) of the 1963 Vienna Convention on Consular Relations (VCCR), with the adoption of the pioneering Advisory Opinion n. 16 of the IACtHR on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 01.10.1999). In advancing, for the first time, the proper hermeneutics of the key provision of Article 36(1)(b) of the VCCR, the IACtHR underlined the impact thereon of the *corpus juris* of the International Law of Human Rights (ILHR).

6. The IACtHR singled out therein that the rights under Article 36(1)(b) of the VCCR had as a characteristic the fact that their *titulaire* is the individual, — being thus "a notable advance over international law's traditional conceptions of this subject" (paras. 81-82); the rights accorded thereunder are "rights of individuals" (para. 83), being the

> "the counterpart to the host State's correlative duties. This interpretation is supported by the Article 's legislative history. [T]here was no reason why that instrument should not confer rights upon individuals. (...)

> Therefore, the consular communication to which Article 36 of the Vienna Convention on Consular Relations refers, does indeed concern the protection of the rights of the national of the sending State (…). This is the proper interpretation of the functions of 'protecting the interests' of that national and the possibility of his receiving 'help and assistance', particularly with arranging appropriate 'representation before the tribunals'. (...)" (paras. 84 and 87).

7. In this ground-breaking Advisory Opinion n. 16 (1999), the IACtHR held that Article 36 of the 1963 VCCR recognizes to the foreigner under detention individual rights, — among which the right to information on consular assistance, — as true human rights to which correspond duties incumbent upon the receiving State (irrespective of its federal or unitary structure) (paras. 84 and 140).

8. The IACtHR further pointed out that the evolutive interpretation and application of the *corpus juris* of the ILHR have had "a positive impact on international law in affirming and developing the aptitude of this latter to regulate the relations between States and human beings under their respective jurisdictions" (paras. 114-115). The IACtHR expressed the view that the individual right to information under Article 36(1)(b) of the VCCR renders effective the right to the due process of law (para. 124).

9. The IACHR in this way linked the right at issue to the evolving guarantees of due process of law, and added that its non-observance in cases of imposition and execution of death penalty amounts to an arbitrary deprivation of the right to life itself (in the terms of Article 4 of the American Convention on Human Rights and Article 6 of the U.N. Covenant on Civil and Political Rights — CCPR), with all the juridical consequences inherent to a violation of the kind, that is, those pertaining to the international responsibility of the State and to the duty of reparation (para. 137). This historical Advisory Opinion n. 16 (1999) of the IACtHR, truly pioneering, has served as inspiration for the emerging international case-law, *in statu nascendi*, on the matter, and promptly had a sensible impact on the practice of the States of the region on the matter.

III. THE EVOLUTION WITH THE ADVISORY OPINION N. 18 (2003) OF THE IACTHR.

10. This Advisory Opinion n. 16 (1999) was succeeded by the likewise relevant Advisory Opinion n. 18 of the IACtHR on the *Juridical Condition and Rights of Undocumented Migrants* (2003), wherein the IACtHR held that States ought to respect and ensure respect for human rights in the light of the general and basic principle of equality and non-discrimination, and that any discriminatory treatment with regard to the protection and exercise of human rights generates the international responsibility of the States. In the view of the IACtHR, the fundamental principle of equality and non-discrimination has entered into the domain of *jus cogens*.

11. The IACtHR added that States cannot discriminate or tolerate discriminatory situations to the detriment of migrants, and ought to guarantee the due process of law to any person, irrespective of her migratory status. This latter cannot be a justification for depriving a person of the enjoyment and exercise of her human rights, including labour rights. Undocumented migrant workers have the same labour rights as other workers of the State of employment, and this latter ought to ensure respect for those rights in practice. States cannot subordinate or condition the observance of the principle of equality before the law and non-discrimination to the aims of their migratory or other policies.

12. The Advisory Opinion n. 18 (2003) of the IACtHR promptly had, for all its implications, a considerable impact in the American continent, and its influence was to irradiate elsewhere as well, given the importance of the matter. It propounded the same dynamic or evolutive interpretation of the ILHR heralded by the IACtHR, four years earlier, in its historical Advisory Opinion n. 16 (1999)[1].

13. Furthermore, Advisory Opinion n. 18 (2003) was constructed on the basis of the evolving concepts of *jus cogens* and obligations *erga omnes* of protection. The repercussions of the Advisory Opinions n. 16 and 18 of the IACtHR drew attention to the necessity and relevance of securing the protection of those in great need of it, in situations of vulnerability and defenselessness, — as illustrated by the pitiless world nowadays, marked by a profound crisis of values, appearing to be marked by a social blindness.

14. In both Advisory Opinions ns. 16 and 18, of utmost importance, the IACtHR clarified that, in its interpretation of the norms of the American Convention on Human Rights, it should extend protection in new situations (such as those concerning the observance of the right to information on consular assistance, and the rights of undocumented migrants, respectively) on the basis of preexisting rights. Advisory Opinion n. 18 (2003) was constructed on the basis of the evolving concepts of *jus cogens* and obligations *erga omnes* of protection.

IV. THE CASE-LAW OF THE ICJ (2001-2004) SUBSEQUENT TO THE ADVISORY OPINION N. 16 (1999) OF THE IACTHR.

15. As already pointed out, the IACtHR, by means of its historical Advisory Opinion n. 16 (1999), became the first international tribunal to warn that non-compliance with Article 36(1)(b) of the VCCR would be to the detriment not only of a State Party but also of the human beings concerned, as well as to affirm the existence of an individual right to information on consular assistance in the framework of the guarantees of the due process of law (paras. 1-141).

16. As I explained in detail in my Separate Opinion (paras. 75, 81, 87, 158-162, and 169) appended to the ICJ's Judgment (of 30.11.2010) in the case of *A.S. Diallo* (Guinea *versus* D.R. Congo, merits), the Advisory Opinion n. 16 (1999) of the IACtHR paved the way for the subsequent case-law of the ICJ on the matter (in the cases, e.g., of *LaGrand* (2001) and *Avena* (2004)). In the aforementioned Separate Opinion of 2010 in the case of *A.S. Diallo*, furthermore, I examined the advanced and irreversible *humanization* of consular law (paras. 163-172), and I recalled, in this respect, relevant passages of the *travaux préparatoires* of the VCCR (paras. 176-181) from the *Official Records* of the U.N. Conference on Consular Relations (Vienna, 04.03-22.04.1963).

17. The strict inter-State outlook was transcended already on that occasion, as, in respect of Article 36(1)(b) of the Draft VCCR, several Delegates drew attention to the incidence thereon of the rights of individuals, even three years before the adoption of the two U.N. Covenants on Human Rights of 1966. I do not find it necessary to reiterate here all statements made, in support of fundamental rights of the individual, in the course of the *travaux préparatoires* of Article 36(1)(b)

[1] Cf. 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", 6 *Chinese Journal of International Law* (2007) n. 1, pp. 1-16; A.A. Cançado Trindade, "Le déracinement et la protection des migrants dans le Droit international des droits de l'homme", 19 *Revue trimestrielle des droits de l'homme* — Bruxelles (2008) n. 74, pp. 289-328.

of the VCCR, which I examined at length in my aforementioned Separate Opinion (paras. 33-34, 82-92 and 158-188) in the case of *A.S. Diallo* (merits, Judgment of 30.11.2010).

18. May I further recall that, throughout the contentious proceedings in the ICJ in the case of *LaGrand* (Germany *versus* United States), the earlier advisory proceedings conducive to the Advisory Opinion n. 16 (1999) of the IACtHR as well as its Advisory Opinion itself, were constantly brought to the attention of the ICJ, in both the written and oral phases. Thus, in the written phase of the proceedings in the *LaGrand* case, Germany, in its *Memorial* (of 16.09.1999), expressly referred to the request by Mexico for an Advisory Opinion pending before the IACtHR[2].

19. Likewise, in its *Counter-Memorial* (of 27.03.2000) in the *LaGrand* case, the United States expressly referred to the Advisory Opinion n. 16 of the IACtHR[3]. This latter was extensively referred to, also in the oral arguments before the ICJ[4]. In its Judgment of 27.06.2001 in the *LaGrand* case, the ICJ found that the United States breached its obligations to Germany and to the LaGrand brothers under Article 36(1) and (2) of the 1963 VCCR[5]. Yet, the ICJ, in so deciding, did not refer to the pioneering contribution of the IACtHR's Advisory Opinion n. 16 (1999), continuously brought to its attention by the contending parties. This attitude of the ICJ of apparent indifference promptly generated strong criticism in expert writing[6].

20. Subsequently, in the case of *Avena and Other Mexican Nationals* (2004), once again the complainant State before the ICJ, this time Mexico, referred in its *Memorial* (of 20.06.2003) extensively to the Advisory Opinion n. 16 (of 1999) of the IACtHR, quoting excerpts of it reiteratedly[7]. The ICJ, once again, established a breach by the respondent State, the United States, of the obligations, this time to Mexico, under Article 36(1)(b) and (c) of the 1963 VCCR, again failing to refer to the relevant precedent of the IACtHR's Advisory Opinion n. 16 (1999).

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[2] ICJ, *Memorial* of F.R. Germany (*LaGrand* case), vol. I, 16.09.1999, p. 69, para. 4.13.

[3] ICJ, *Counter-Memorial* of the United States (*LaGrand* case), 27.03.2000, pp. 85-86, para. 102 n. 110.

[4] Cf., in particular, pleadings of the co-agent and counsel for Germany (B. Simma), *in*: ICJ, public sitting of 13.11.2000, doc. 2000/26, pp. 60-62; and doc. 2000/27, pp. 9-11, 32 and 36.

[5] *ICJ Reports* (2001) pp. 515-516 (resolutory points 3 and 4).

[6] On the "diffident" attitude of the ICJ, which "failed to mention" the judicial precedent of the Advisory Opinion n. 16 (1999) of the IACtHR holding that Article 36 of the 1963 VCCR was among the minimum guarantees essential for a fair trial of foreign nationals, cf. J. Fitzpatrick, "Consular Rights and the Death Penalty after *LaGrand*", *in* American Society of International Law, *Proceedings of the 96th Annual Meeting* (2002) p. 309; and cf. J. Fitzpatrick, "The Unreality of International Law in the United States and the *LaGrand* Case", 27 *Yale Journal of International Law* (2002) pp. 429-430 and 432. Cf. also, on the "lamentable" and "narrower" outlook of the ICJ: M. Mennecke and C.J. Tams, "[Decisions of International Tribunals: The International Court of Justice-] *LaGrand* Case (Germany versus United States of America)", 51 *International and Comparative Law Quarterly* (2002) pp. 454-455. And cf. also, Ph. Weckel, M.S.E. Helali and M. Sastre, "Chronique de jurisprudence internationale", 105 *Revue générale de Droit international public* (2000) pp. 770, 791 and 794; Ph. Weckel, "Chronique de jurisprudence internationale", 105 *Revue générale de Droit international public* (2001) pp. 764-765 and 770.

[7] ICJ, case of *Avena and Other Mexican Nationals* (Mexico *versus* United States), *Memorial* of Mexico, 20.06.2003, pp. 80-81, 136-137, 140-141 and 144, and cf. p. 65. — It further referred expressly to other decisions of the IACtHR, also in contentious cases (cf. *ibid*., pp. 119-121, 151, 153 and 155-157, and cf. p. 55), pertinent to the matter at issue before the ICJ, in sum, to the relevant *jurisprudence constante* of the IACtHR on the subject.

21. In the meantime, expert writing continued to reproach the ICJ's failing to refer to the initial contribution of the IACtHR's Advisory Opinion n. 16 (1999)[8], and to emphasize that it should have done so. This criticism stressed the points I made in my own Concurring Opinion appended to Advisory Opinion n. 16 (1999)[9], among which the ponderation I made, 36 years after the adoption of the 1963 VCCR, then at the end of the XXth. century, that

> "one can no longer pretend to dissociate the (…) right to information on consular assistance from the *corpus juris* of human rights" (para. 1).

22. By then, a gradually larger understanding was being formed that the right to consular assistance accorded to the detained foreign national a human rights safeguard, there being interrelationship between consular law and human rights[10]. By the time the ICJ's Judgment in *LaGrand* case (2001) was delivered, there was a strong criticism of the overlooking of "the best, and most comprehensive, judicial opinion regarding the enforcement of the Vienna Convention in death penalty cases", namely, the IACtHR's Advisory Opinion n. 16 (1999), which "concluded that the execution of a foreign national violates international law, if that person was not afforded the right to consular notification and assistance"[11]. It then quoted a paragraph of my own Concurring Opinion appended to Advisory Opinion n. 16 (1999), wherein I observed that

> "The action of protection, 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. Such action of protection assumes growing importance in a world torn by distinctions between nationals and foreigners (including *de jure* discriminations, notably *vis-à-vis* migrants), in a 'globalized' world in which the frontiers open themselves to capitals, inversions and services but not necessarily to the human beings. Foreigners under detention, in a social and juridical *milieu* and in an idiom different from their own and that they do not know sufficiently, experiment often a condition of particular vulnerability, which the right to information on consular assistance, inserted into the conceptual universe of human rights, seeks to remedy" (para. 23).

23. Along the last decade, the strong criticism of the ICJ's reasoning in the cases of *LaGrand* (2001) and of *Avena* (2004) for not having expressly acknowledged its debt to the pioneering contribution of the IACtHR's ground-breaking Advisory Opinion n. 16 (1999) persisted[12]. The perception was that those two ICJ decisions were "strongly influenced" by the IACtHR's Advisory

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[8] Cf. criticism to this effect in: M. Mennecke, "Towards the Humanization of the Vienna Convention of Consular Rights — The *LaGrand* Case before the International Court of Justice", 44 *German Yearbook of International Law/Jahrbuch für internationales Recht* (2001) pp. 431-432, 451-455, 459-460 and 467-468.

[9] Cf. *ibid*., pp. 451, 453 and 467.

[10] V.S. Mani, "The Right to Consular Assistance as a Basic Human Right of Aliens — A Review of the ICJ Order Dated 3 March 1999", 39 *Indian Journal of International Law* (1999) pp. 438-439; and cf. also E. Decaux, "La protection consulaire et les droits de l'homme", *in*: Société Française pour le Droit International, *La Protection Consulaire* (Journée d'Études de Lyon), Paris, Éd. Pedone, 2006, pp. 57 and 71-72. Subsequently, it was stated that the right of consular assistance under Article 36 of the VCCR is generally recognized nowadays as "a customary right in the law of human rights", and the ICJ has been "too restrained, in particular on the issue of remedies for a consular access violation"; J.B. Quigley, "Vienna Convention on Consular Relations: In Retrospect and into the Future", 38 *Southern Illinois University Law Journal* (2013) p. 25, and cf. pp. 12-13 and 16-17.

[11] S.L. Babcock, "The Vienna Convention on Consular Relations (VCCR): Litigation Strategies", *in*: www.capdefnet.org/fdprc/contents/ relevant_reading /101001-01, of 2001, pp. 2 and 9, and cf. p. 7.

[12] Cf. C.M. Cerna, "Impact on the Right to Consular Notification", *in The Impact of Human Rights Law on General International Law* (eds. M.T. Kamminga and M. Scheinin), Oxford, Oxford University Press, 2009, pp. 171, 173, 175, 180, 182-183 and 186; C.M. Cerna, "The Right to Consular Notification as a Human Right", 31 *Suffolk Transnational Law Review* (2008) pp. 420, 422-423, 425, 430-435, 437-439, 449 and 451-455.

Opinion n. 16, which considered the "right to consular notification" as part of the "minimum guarantees of due process required for a fair trial", without which there would be "a violation of the alien's human rights" incurring the State's duty to provide reparations[13]. A quotation was again made of another paragraph of my own Concurring Opinion appended to the IACtHR's Advisory Opinion n. 16, wherein I sustained that

> "At this end of century, we have the privilege to witness the process of *humanization* of international law, which today encompasses also this aspect of consular relations. In the confluence of these latter with human rights, the subjective individual right[14] to information on consular assistance, of which are *titulaires* all human beings who are in the need to exercise it, has crystallized: such individual right, inserted into the conceptual universe of human rights, is nowadays supported by conventional international law as well as by customary international law" (para. 35).

24. In the proceedings of the present case of *Jadhav* (India *versus* Pakistan) before the ICJ, references have been made to the aforementioned pioneering contribution of the IACtHR by India, but not so by Pakistan. Thus, the *Memorial* of India contains a section (paras. 151-163) carefully devoted to the jurisprudence of the IACtHR. India focuses on the interpretation and application of Article 36 of the VCCR by the IACtHR, finding them instructive for the interpretation and application by the ICJ of the same provision of the VCCR in the present case of *Jadhav* (para. 151).

25. India highlights several key points in the IACtHR's Advisory Opinion n. 16 (1999), including the notion that a treaty can serve to protect human rights, even if its principal or central purpose is not concerned with human rights (para. 154)[15]. Still in its *Memorial*, India stresses the IACtHR's finding that the evolving *corpus juris* of the ILHR enshrining due process standards ought to guide the interpretation of Article 36 of the 1963 VCCR (paras. 157-159)[16]. Furthermore, India again singles out the significance and contribution of the IACtHR's Advisory Opinion n. 16 (1999) also in its oral arguments presented in the public hearing of 18.02.2019 before the ICJ[17].

26. Pakistan, for its part, in the oral proceedings (public hearing of 19.02.2019 before the ICJ), taking issue with India's arguments and invocation of the IACtHR's Advisory Opinion, contends that it would not be appropriate to raise them before the ICJ, — making reference to decisions of the Inter-American Commission (not Court) of Human Rights, — and finding India's quotation of such decisions incomplete[18]. This divergence between the two contending Parties in the *cas d'espèce*, in my perception, calls for a careful consideration of the matter by the ICJ, — not given by it, — to which I now proceed in the present Separate Opinion.

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[13] Cf. C.M. Cerna, "Impact on the Right to Consular Notification", *op. cit. supra* n. (12), pp. 173 and 175.

[14] Already by the middle of the century one warned as to the impossibility of evolution of Law without the subjective individual right, expression of a true "human right"; J. Dabin, *El Derecho Subjetivo*, Madrid, Ed. Rev. de Derecho Privado, 1955, p. 64.

[15] Referring to para. 76 of the IACtHR's Advisory Opinion n. 16 (1999).

[16] Referring to paras. 113-122 of the IACtHR's Advisory Opinion n. 16 (1999).

[17] Cf. ICJ, doc. CR 2019/1, of 18.02.2019, pp. 39-42, paras. 145-153.

[18] Cf. ICJ, doc. CR 2019/2, of 19.02.2019, pp. 47-49, paras. 101-104; Pakistan also criticizes India's arguments relating to "minimum due process" (para. 104).

V. INSUFFICIENCIES OF THE ICJ'S REASONING IN THE CASES OF *LAGRAND* (2001) AND OF *AVENA* (2004).

27. In its Judgment in the case of *LaGrand* (2001), the ICJ acknowledged that Article 36(1)(b) and (c) of the VCCR creates "individual rights", which may be invoked by the national State of the detained person (para. 77). Subsequently, in its Judgment in the case of *Avena* (2004), the ICJ reiterated its finding that Article 36(1)(b) and (c) sets forth "individual rights" (para. 40), coexisting with rights of the sending State. However, the ICJ avoided to consider that the individual's right under Article 36 of the VCCR has the character of a human right.

28. Earlier on, in its aforementioned pioneering Advisory Opinion n. 16 (1999), the IACtHR held that a provision of a treaty "can *concern* the protection of human rights" (like Article 36 of the VCCR), irrespective of what the main purpose of the treaty at issue might be (paras. 76 and 85). It added that the individual rights guaranteed by Article 36 of the VCCR help to guarantee that the individual concerned enjoys the guarantees of a fair trial and the due process of law (paras. 121-123). And it further added that:

> "the individual's right to information, conferred in Article 36(1)(b) of the Vienna Convention on Consular Relations, makes it possible for the right to the due process of law upheld in Article 14 of the International Covenant on Civil and Political Rights, to have practical effects in tangible cases; the minimum guarantees established in Article 14 of the International Covenant can be amplified in the light of other international instruments like the Vienna Convention on Consular Relations, which broadens the scope of the protection afforded to those accused. (…)
>
> (…) Because the right to information is an element of Article 36(1)(b) of the Vienna Convention on Consular Relations, the detained foreign national must have the opportunity to avail himself of this right in his own defense. Non-observance or impairment of the detainee's right to information is prejudicial to the judicial guarantees" (paras. 124 and 129).

29. May I reiteratedly recall, in the present Separate Opinion, now that we approach the twentieth anniversary of the historical Advisory Opinion n. 16 (1999) of the IACtHR, that this latter considered therein that the individual rights guaranteed by Article 36 of the VCCR are directly related to the human rights to due process of law and a fair trial. The IACtHR stressed that the observance of the right of a detained individual to be informed of his rights guaranteed by Article 36(1)(b) becomes "all the more imperative" in face of a sentence to death (paras. 135-137).

30. The ICJ, for its part, in the case of *LaGrand* (2001), after establishing a breach of the individual rights under Article 36(1) of the VCCR, found it unnecessary further to consider Germany's argument that the right of the individual to be informed without delay guaranteed by Article 36(1) of the VCCR "has today assumed the character of a human right" (para. 78). And, subsequently, in the case of *Avena* (2004), the ICJ dismissed Mexico's argument that "the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings" (para. 124). The ICJ did not examine the issue whether the VCCR (Article 36) established human rights; it noted that "[w]hether or not the Vienna Convention rights are human rights is not a matter that this Court need decide" (para. 124).

31. There was, in my perception, no reason for the ICJ to have adopted such an insufficient approach to the matter dealt with in its Judgments in the two aforementioned cases of *LaGrand* and *Avena*, which were both followed by non-compliance on the part of the respondent State. The factual context of the present case of *Jadhav* (2019) provides yet another occasion to examine the individual rights under Article 36 of the VCCR as directly related to the human rights to due process of law and a fair trial. In my understanding, it is necessary to do so, but, once again, the ICJ followed its own insufficient approach.

VI. Interrelationship between Right to Information on Consular Assistance, and Human Rights to Due Process of Law and Fair Trial, in the 20th Anniversary of a Ground-Breaking Advisory Opinion.

32. As, by the turn of the century, two decades ago, the ground-breaking IACtHR's Advisory Opinion n. 16 (1999) on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, inspiring the emerging case-law, *in statu nascendi*, on the matter, correctly determined the interrelationship between the individual rights under Article 36 of the VCCR and the human rights to due process of law and fair trial under the CCPR (Article 14) and general international law, it appears necessary to me to consider this issue in the framework of the *hermeneutics* of the breach of the rights under Article 36 of the VCCR established by the ICJ in the present case of *Jadhav*.

33. After all, consular assistance is essential to the effectiveness of the human rights to due process of law and fair trial. In its Advisory Opinion n. 16 (1999), the IACtHR, in its hermeneutics, did not hesitate to interrelate Article 36(1)(b) of the VCCR and Article 14 of the CCPR (paras. 117 and 124). In the present case of *Jadhav*, the ICJ now has had the proper occasion to perfect its own restrained case-law on the matter, provided to it by the factual context of the *cas d'espèce*.

34. The contemporary international legal order counts on, and is benefited by, the coexistence of international tribunals. This could not have been foreseen some decades ago, and has been contributing to advances achieved in the new *jus gentium*. International tribunals have identified the need of, and have become used to, taking into account the relevant case-law of each other; in this way, they have been contributing to a harmoniously progressive development of international law.

35. Although their jurisdictions are distinct, they have a common mission of realization of justice. In the accomplishment of this common mission, they foster the prevalence of a universal law of nations, and a growing compliance with the *rule of law* (*état de Droit*), — a key item inserted and continuously present in the agenda of the U.N. General Assembly since 2006 until presently.

36. The right to consular notification under Article 36 of the VCCR is, in my understanding, closely interrelated with the fundamental rights of due process of law and fair trial. Not only did the IACtHR established this in its Advisory Opinion n. 16, of 01.10.1999 (paras. 124 and 129), but also, subsequently to it, several countries, in their practice, equated the right of notification to

consular assistance with the *corpus juris* of human rights, given its close relationship with the rights of due process of law and to a fair trial[19].

37. There is reason to proceed in this constructive hermeneutics (without the need to establish an additional violation of the CCPR in the *cas d'espèce*), as we are here in the realm not only of the VCCR (Article 36) but also of human rights in general or customary international law. In my understanding, the right to information on consular assistance under the VCCR (Article 36) is an individual right, is undoubtedly interrelated with human rights.

38. It is beyond doubt that a foreign national facing criminal proceedings abroad will only be able to obtain full procedural equality if granted access to consular assistance. Therefore, a breach of a foreign national's right to consular notification set forth in Article 36 of the VCCR necessarily entails a breach of the human rights to due process of law and a fair trial in general or customary international law. It is clear that we are here in the domain of human rights, and this is to be duly acknowledged.

39. In the absence of consular assistance, there are no guarantees of due process of law and fair trial, and the execution of a death penalty ensuing therefrom is a breach of general and basic principles of international law, — such as that of equality and non-discrimination, — and of human rights themselves, entailing the international responsibility of the State concerned[20]. Two decades ago, the IACtHR's Advisory Opinion n. 16 gave the initial contribution and paved the way for the process — advanced today — of humanization of consular law[21].

40. In Advisory Opinion n. 16 (1999), the IACtHR, besides referring to its own ongoing case-law, had no difficulty to refer also to the pertinent case-law of the ICJ: it recalled (para. 113), e.g., the ICJ's Advisory Opinion on *Namibia* (1971), wherein the ICJ acknowledged its own duty to

> "take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law.
>
> (…) Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. (…) [T]he *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore" (para. 53).

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[19] Cf. 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", *op. cit. supra* n. (1), pp. 7-8, and cf. pp. 1-16; S. Veneziano, "The Right to Consular Notification: The Cultural Bridge to a Foreign National's Due Process Rights", 49 *Georgetown Journal of International Law* (2017) p. 533.

[20] Cf. A.A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, 2nd. rev. ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2013, p. 508, and cf. pp. 499 and 504; L. Ortiz Ahlf, *Derecho Internacional Público*, 4th. ed., Mexico/Oxford, OUP, 2015, pp. 553-557.

[21] Cf. 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", *op. cit. supra* n. (1), pp. 1-16.

41. The IACtHR's Advisory Opinion n. 16 further recalled (para. 75), *inter alia*, that, in the ICJ's proceedings in the case of *Hostages in Tehran* (United States *versus* Iran, Judgment of 24.05.1980), the applicant State linked Article 36 of the VCCR to "the rights of nationals of the sending State"; and the IACtHR added (para. 75) that, for its part, the ICJ cited (para. 91) the Universal Declaration of Human Rights in its Judgment of 24.05.1980)[22].

42. The two international tribunals, and others, have been sensitive to the progressive development of international law, in the framework of the historical process of humanization of the law of nations[23]. With all the more reason, in the present case of *Jadhav* (2019), the ICJ has before itself the ineluctable interrelationship — which it should have acknowledged — between the right to information on consular assistance, and the human rights to due process of law and fair trial, with all legal consequences ensuing therefrom.

VII. *CORPUS JURIS GENTIUM*: WRONGFULNESS IN DEATH PENALTY AS A BREACH OF HUMAN RIGHTS.

43. A person condemned to death abroad without having had consular assistance has had his individual right under Article 36(1)(b) of the VCCR, interrelated with his human rights, breached. His condemnation, in such circumstance, is by itself a breach of the ILHR, entailing the international responsibility of the State concerned. Death penalty is thereby outlawed, thus going beyond simple "review and reconsideration" of an unlawful conviction. A *corpus juris gentium* has been formed, in line with the trend towards the abolition of death penalty in contemporary international law.

44. This is an important point which deserves closer attention. In my understanding, a decision of condemnation to death accompanying a violation of Article 36(1)(b) of the VCCR, — as in the present case of *Jadhav*, — cannot serve as basis for "review and reconsideration" simply: it is an unlawful decision which does not generate any effects. An unlawful condemnation to death is clearly discarded, and cannot be restated or reformulated at all. In such circumstances, death penalty itself is entirely discarded, not at all only opened simply to "review and reconsideration".

45. And there is another relevant aspect to consider, namely, the cruelty of death penalty has been widely acknowledged: it goes beyond execution itself, the time spent by the convicted person contemplating his own death while waiting for his own execution. Persons convicted to death are treated as persons without a future; they keep waiting for their execution in special cells, "death rows". Besides the right to life, other rights are affected and breached, also of other persons.

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[22] The ICJ stated therein that: — "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights" (para. 91).

[23] On the contribution of contemporary international tribunals to this historical process of humanization of the *droit des gens*, cf. A.A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, 2nd. rev. ed., *op. cit. supra* n. (20), pp. 531-591; A.A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, 3rd. rev. ed., Belo Horizonte, Edit. Del Rey, 2019, pp. 1-507; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185; A.A. Cançado Trindade, *La Humanización del Derecho Internacional Contemporáneo*, Mexico, Edit. Porrúa/IMDPC, 2014, pp. 1-324; A.A. Cançado Trindade, "Les tribunaux internationaux et leur mission commune de réalisation de la justice : développements, état actuel et perspectives", 391 *Recueil des Cours de l´Académie de Droit International de La Haye* (2017) pp. 19-101; and, on the presence of natural law influence, cf. also A. Peters, *Beyond Human Rights — The Legal Status of the Individual in International Law*, Cambridge, CUP, 2018 (reprint), pp. 23-25, 38, 48, 65 and 395-396.

46. The cruelty of death penalty, — generally condemned by law, — extends to relatives and friends of the convicted persons. The suffering generated does not lessen the loss to the close relatives of the executed person, nor does it put an end to their prolonged pain and anguish. They are simply not taken into account[24]. The execution of death penalty is a violation of human rights. One cannot simply overlook the widespread reaction to the cruelty of death penalty.

47. Such acknowledgement by human conscience finds nowadays expression in general international law, as well as in several international treaties along the last decades. Among these, there are Conventions which strictly limit the death penalty, aiming to put an end to it, namely: the 1966 U.N. Covenant on Civil and Political Rights, Article 6(2) and (4); the 1969 American Convention on Human Rights, Article 4 (2) to (5); the 2004 Arab Charter on Human Rights, Articles 10 to 12.

48. Furthermore, there are significantly international instruments which expressly prohibit, or seek abolition of, death penalty, namely: the Protocol n. 6 (1983) to the European Convention of Human Rights, Article 1[25]; the Protocol n. 13 (2002) to the European Convention of Human Rights, Article 1[26]; the 1989 Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Article 1[27]; the Second Optional Protocol (1989) to the U.N. Covenant on Civil and Political Rights, Article 1[28].

49. Such prohibition has, furthermore, found expression in international case-law. For example, with its landmark Judgment (merits and reparations, of 21.06.2002) in the case of *Hilaire, Constantine and Benjamin versus Trinidad and Tobago*, the IACtHR became the international tribunal which for the first time established the incompatibility with a human right treaty (the American Convention on Human Rights) of the "mandatory" death penalty (for the delict of murder).

50. The IACtHR held therein that the right to life was violated by the automatic application of the death penalty, without individualization and without the guarantees of the due process of law, and it ordered, as one of the measures of reparation, the suspension of the execution of such penalty. Among those measures of reparation, was also the duty of the respondent State to modify its penal legislation so as to harmonize it with the norms of international human rights protection, and to abstain itself, in any case, from executing the condemned person(s).

51. In my Concurring Opinion appended thereto, I pondered, *inter alia*, that in effect, the legal order which applies the death penalty resorts itself to the extreme violence which it intends to fight; by means of the application of the millennial *lex talionis*, the public power itself resorts to

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[24] Council of Europe, *The Death Penalty — Abolition in Europe*, Strasbourg, Council of Europe Publ., 1999, p. 18; Amnesty International, *When the State Kills... — The Death Penalty vs. Human Rights*, London, Amnesty International Publ., 1989, pp. 61 and 68-70, and cf. p. 54.

[25] Article 1: The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

[26] Article 1: The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

[27] Article 1: The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.

[28] Article 1: 1. No one within the jurisdiction of a State Party to the present Protocol shall be executed. 2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

violence, disposing of the life of a person, in the same way that this latter deprived another person of his or her life, — and all this "despite the historical evolution, likewise millennial, of justice to overcome revenge (public and private)" (para. 4).

52. Still in that Concurring Opinion, I further recalled, in this respect, that, e.g., the Human Rights Committee (under the U.N. Covenant on Civil and Political Rights — CCPR) has consistently sustained that the imposition of the death penalty, at the end of a trial without the guarantees of the due process of law, and without the possibility of an appeal for revision of the respective judgment, constitutes *per se* a violation of the right to life (in breach of Article 6 of the CCPR)[29]. Such violation, — I added, — takes place irrespectively of the execution or not of the death penalty, "*even if those condemned to death are still alive*"; there is need "to avoid an additional harm" (para. 18)[30].

VIII. Condemnation of Death Penalty at World Level: Initiatives and Endeavours in the United Nations.

53. In effect, there is an important aspect which cannot be overlooked in the *cas d'espèce*, namely, the condemnation of death penalty at world level, as shown by initiatives and endeavours in the United Nations along the years. The present case of *Jadhav* is focused on the established breach of Article 36 of the VCCR, but one cannot make abstraction of the factual context of the subject-matter. At United Nations level, attention can be drawn to conventional supervisory organs (such as the Human Rights Committee under the CCPR), as well as other United Nations organs (such as the former U.N. Commission on Human Rights, and presently the U.N. Council on Human Rights).

1. Human Rights Committee under the CCPR.

54. In effect, under the CCPR, the Human Rights Committee has sustained its condemnation of death penalty in numerous decisions. Besides those rendered in the last decade of the XXth. century[31], in the last two decades it has likewise sustained that the imposition of a death sentence upon conclusion of a trial wherein the provisions of the CCPR have not been respected

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[29] Cf., e.g., its earlier decisions in the cases *L. Simmonds versus Jamaica* (23.10.1992, para. 8.5), *C. Wright versus Jamaica* (27.07.1992, para. 8.7), *A. Little versus Jamaica* (01.11.1991, para. 8.6), and *R. Henry versus Jamaica* (01.11.1991, para. 8.5). — Other decisions, to the same effect, were rendered by the Human Rights Committee, in the course of the last decade of the XXth. century, namely: cases *Brown versus Jamaica*, of 23.03.1999, para. 6.15; *Marshall versus Jamaica*, 03.11.1998, para. 6.6; *Morrison versus Jamaica*, 03.11.1998, para. 8.7; *Levy versus Jamaica*, 03.11.1998, para. 7.3; *Daley versus Jamaica*, 31.07.1998, para. 7.7; *Domukovsky et alii versus Georgia*, 06.04.1998, para. 18.10; *Shaw versus Jamaica*, 06.06.1996, para. 7.7; *Taylor versus Jamaica*, 02.04.1998, para. 7.5; *McLeod versus Jamaica*, 31.03.1998, para. 6.5; *Peart and Peart versus Jamaica*, 19.07.1995, para. 11.8; *Currie versus Jamaica*, 29.03.1994, para. 13.6; *Smith versus Jamaica*, 31.03.1993, para. 10.6; and *G. Campbell versus Jamaica*, 30.03.1992, para. 6.9.

[30] My Concurring Opinion appended to the aforementioned Judgment (of 2002) in the case of *Hilaire, Constantine and Benjamin versus Trinidad and Tobago*, is reproduced *in*: *Judge A.A. Cançado Trindade, The Construction of a Humanized International Law — A Collection of Individual Opinions (1991-2013)*, vol. I (IACtHR), Leiden/The Hague, Brill/Nijhoff, 2014, pp. 740-760; and *in*: A.A. Cançado Trindade, *Esencia y Transcendencia del Derecho Internacional de los Derechos Humanos (Votos en la Corte Interamericana de Derechos Humanos, 1991-2008)*, vol. I, 2nd. rev. ed., Mexico D.F., Ed. Cam. Dips., 2015, pp. 447-467.

[31] Cf. n. (29), *supra*.

constitutes a violation of Article 6 (right to life) of the CCPR. It so upheld, along the first decade of the XXIst. century, in its decisions in 22 cases[32].

55. Among those decisions, in the case of *Kodirov versus Uzbekistan* (2009), the death sentence was commuted to life imprisonment, so that there was no violation of Article 6; and, likewise, in the case of *Dunaev versus Tajikistan* (2009), the death sentence was commuted by the Supreme Court of Tajikistan, so that there was no violation of Article 6 of the CCPR. More recently, along the present decade, the Human Rights Committee has, in new decisions in eight cases, recalled that the imposition of a death sentence upon conclusion of a trial wherein the provisions of the CCPR have not been respected constitutes a violation of Article 6 (right to life) of the CCPR[33].

56. Along three decades of work, the Human Rights Committee has upheld that the imposition of a death sentence upon conclusion of a trial by a military court without the guarantees of a fair trial amounts to a violation of Articles 6 and 14 of the CCPR (as stated, e.g., in its decisions in the cases of *S. Kurbanova versus Tajikistan*, of 06.11.2003, paras. 7.6-7 and 8; and of *K. Turaeva versus Uzbekistan*, of 20.10.2009, para. 9.4). The Committee has furthermore found that the seeking by the condemned person of clemency or pardon "does not secure adequate protection to the right to life" under Article 6 of the CCPR: such as "discretionary measures by the executive", in comparison with "appropriate judicial review of all aspects of a criminal case" (decision in the case of *E. Thompson versus St. Vincent and Grenadines*, of 18.10.2000, para. 8.2).

57. In its relatively recent decision in the case of *P Selyun versus Belarus*, of 06.11.2015, the Human Rights Committee, in reiterating its position that a death penalty imposed at the end of a trial without the guarantees of due process under Article 14 of the CCPR is a breach of it as well as of the right to life under Article 6 of the CCPR (para. 7.7). The Committee deemed it fit to refer to its own General Comment n. 6 (of 1982) on the right to life, comprising also procedural guarantees.

58. May I here recall some significant ponderations of the Committee's very early General Comment n. 6 (of 30.04.1982), namely:

> "The protection against arbitrary deprivation of life which is explicitly required by the third sentence of Article 6(1) [of the CCPR] is of paramount importance. (...) The deprivation of life by the authorities of the State is a matter of the utmost gravity. (…)

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[32] Namely: cases *Kodirov versus Uzbekistan*, of 20.10.2009, para. 9.4; *Tolipkhuzhaev versus Uzbekistan*, of 22.07.2009, para. 8.5; *Dunaev versus Tajikistan*, of 30.03.2009, para. 7.4; *Uteeva versus Uzbekistan*, of 26.10.2007, para. 7.4; *Tulyaganova versus Uzbekistan*, of 30.07.2007, para. 8.3; *Strakhov and Fayzullaev versus Uzbekistan*, of 20.07.2007, para. 8.4; *Chikunova versus Uzbekistan*, of 16.03.2007, para. 7.5; *Gunan versus Kyrgystan*, of 29.01.2007, para. 6.5; *Sultanova versus Uzbekistan*, of 30.03.2006, para. 7.6; *Shukurova versus Tajikistan*, of 17.03.2006, para. 8.6; *Sigareva versus Uzbekistan*, of 01.11.2005, para. 6.4; *Chan versus Guyana*, of 31.10.2005, para. 6.4; *Aliboeva versus Tajikistan*, of 18.10.2005, para. 6.6; *Deolall versus Guyana*, of 01.11.2004, para. 5.3; *Khodimova versus Tajikistan*, of 29.07.2004, para. 6.6; *Mulai versus Guyana*, of 20.07.2004, para. 6.3; *Saidova versus Tajikistan*, of 08.07.2004, para. 6.9; *Smartt versus Guyana*, of 06.07.2004, para. 6.4; *Arutyunyan versus Uzbekistan*, of 29.03.2004, para. 6.4; *Kurbanova versus Tajikistan*, of 12.11.2003, para. 7.7; *Aliev versus Ukraine*, of 07.08.2003, para. 7.4; *Hendricks versus Guyana*, of 28.10.2002, paras. 6.4 and 7; *E. Thompson versus St. Vincent and Grenadines*, of 18.10.2000, para. 8.2.

[33] Namely: cases *P. Selyun versus Belarus*, of 06.11.2015, para 7.7; *Burdyko versus Belarus*, of 15.07.2015, para. 8.6; *Grishkovtsov versus Belarus*, of 01.04.2015, para. 8.6; *Yuzepchuk versus Belarus*, of 24.10.2014, para. 8.6; *S. Zhuk versus Belarus*, of 30.10.2013, para. 8.7; *Kovaleva and Kozyar versus Belarus*, of 29.10.2012, para. 11.8; *Kamoyo versus Zambia*, of 23.03.2012, para. 6.4; *Mwamba versus Zambia*, of 10.03.2010, para. 6.7.

(…) The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. (…)

(…) The procedural guarantees (…) prescribed [in Article 6 of the CCPR] must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. (…)" (paras. 3, 5 and 7).

59. The international treaties prohibiting, or seeking abolition of, death penalty, which I have already listed (in para. 48, *supra*), have furthermore had repercussion in international institutions (at global — U.N. — and regional levels), in the world-wide condemnation of death penalty. Within the United Nations, for example, the Second Optional Protocol to the CCPR has kept on attracting attention for the realization of its mission of prohibition of death penalty[34]. Parallel to the conventional supervisory organs, such as the Human Rights Committee, the United Nations human rights organs have kept on encouraging member States to ratify or accede to that Protocol, among other instruments, bearing in mind the cruel and irreversible nature of death penalty.

2. Former U.N. Commission on Human Rights.

60. As already pointed out, attention is here, in this respect, to focus also on the initiatives and endeavours of United Nations human rights organs along the years. The former U.N. Commission on Human Rights, for instance, from 1997 to 2005, adopted successive resolutions calling for the abolition of death penalty, and invoking to that effect the Second Optional Protocol to the CCPR, namely: resolution 1997/12, of 03.04.1997 (preamble and para. 1); resolution 1998/54, of 03.04.1998 (preamble and para. 2); resolution 1999/61, of 28.04.1999 (preamble and para. 2); resolution 2000/65, of 26.04.2000 (preamble and para. 2); resolution 2001/68, of 25.04.2001 (preamble and para. 3); resolution 2002/77, of 25.04.2002 (preamble and para. 3); resolution 2003/67, of 24.04.2003 (preamble and para. 3); resolution 2004/67, of 21.04.2004 (preamble and para. 3); and resolution 2005/59, of 20.04.2005 (preamble and para. 6).

61. In the sequence of those resolutions, the former U.N. Commission on Human Rights expressed, in their preambles, its belief that the abolition of the death penalty contributes to the "enhancement of human dignity" and to the "progressive development of human rights". From 2001 onwards, it made, in its own resolutions, references to a pertinent resolution (of 2000) of its former Sub-Commission on the Promotion and Protection of Human Rights (resolution 2001/68, para. 2; resolution 2002/77, para. 2; resolution 2003/67, para. 2; resolution 2004/67, para. 2; and resolution 2005/59, preamble).

62. From 2003 onwards, the former U.N. Commission on Human Rights enhanced its expression of concern, in calling upon all States that still maintained the death penalty to abolish it "completely and, in the meantime, to establish a moratorium on executions" (resolution 2003/67, para. 5(a); resolution 2004/67, para. 5(a); and resolution 2005/59, para.5(a)). And from 1999 to 2005, the former Commission significantly and correctly interrelated the obligations attached to certain rights protected under the CCPR — such as the right to life in Article 6, and procedural guarantees in Article 14 — with those in respect of the rights under Article 36 of the VCCR (resolution 1999/61, para. 3(d); resolution 2000/65, para. 3(d); resolution 2001/68, para. 4(d); resolution 2002/77, para. 4(e); resolution 2003/67, para. 4(f); resolution 2004/67, para. 4(h); and resolution 2005/59, para. 6(h)).

[34] It contains no provisions for denunciation or withdrawal.

3. U.N. Council on Human Rights.

63. Subsequently to the former U.N. Commission on Human Rights, in the current new era (2006 onwards) of the U.N. Council on Human Rights, this latter recalled all resolutions of the former U.N. Commission on Human Rights (*supra*) in its more recent endeavours to the same effect. After doing so, e.g., in the preamble of its resolution 36/17, of 29.09.2017, the U.N. Council on Human Rights recognized also the role of regional and subregional instruments and initiatives towards the abolition of the death penalty, and drew attention, *inter alia*, to the importance of access to consular assistance for foreign nationals provided for in the VCCR.

64. In its operative part, the same resolution 36/17 of 2017, stressing the need of fully abolishing the death penalty, called upon all States that have not yet done so to accede to, or ratify, the Second Optional Protocol to the CCPR (para. 2); it also called upon States to comply with their obligations under Article 36 of the VCCR (para. 7). The U.N. Council on Human Rights thus considered those international instruments in their interrelated way.

65. Its resolution has been followed by the very recent Report of the U.N. Secretary-General on the "Question of the Death Penalty", submitted to the U.N. Council on Human Rights[35], at the request of this latter, to update previous reports on the matter. The Report, *inter alia*, records that, until then, 85 States have ratified the Second Optional Protocol to the CCPR[36]; it concludes with recommendations "towards the universal abolition of the death penalty"[37].

66. This factual context, in my perception, cannot simply be overlooked in the handling by the ICJ of the present case of *Jadhav*. One cannot at all dissociate the violation of the individual human right under Article 36(1)(b) of the VCCR rightly established by the ICJ in the present Judgment[38] from its effects on the human rights under Articles 6 and 14 (right to life and procedural guarantees) of the CCPR. It is, in my view, a duty to consider these effects, so as to render possible the proper and necessary consideration of *redress* (part XI, *infra*).

IX. Death Penalty and the Large Extent of the Harm Done to Human Rights.

67. In the present case of *Jadhav*, however, the ICJ has pursued a very restrictive reasoning in light of its finding of jurisdiction (para. 38) under Article I of the Optional Protocol to the VCCR. The Court is used to being much attentive in particular to the "will" of States. In my understanding, the fact that its jurisdiction is grounded thereon, does not mean that it can only consider the breaches of rights under Article 36 of the VCCR, in isolation. Not at all; in my understanding, the Court should have considered the interrelationship of the violation it established of Article 36(1)(b) of the VCCR with human rights affected under the CCPR as well. They are all interrelated.

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[35] Cf. U.N., doc. A/HRC/39/19, of 14.09.2018, pp. 1-17.

[36] *Ibid.*, pp. 5-6, para. 10.

[37] *Ibid.*, p. 16, para. 48.

[38] In the present Judgment, the ICJ establishes the breach by the respondent State of the individual's right under Article 36(1)(b) of the VCCR (para. 102), as well the breach of its obligations to the consular officers of the applicant State under Article 36(1)(a) and (c) of the VCCR (para. 119).

68. In its present Judgment in the case of *Jadhav*, the ICJ makes brief and rather restrictive references to related human rights under the CCPR (paras. 36, 125-126 and 135), observing that it is beyond its jurisdiction to consider them in the *cas d'espèce*, as its jurisdiction "is limited to the interpretation and application" of the VCCR. I do not at all share such a strict outlook. One cannot simply make abstraction of the effects of the breach of Article 36(1)(b) of the VCCR on interrelated human rights of the victim under the CCPR, which are also part of customary human rights law. Such a restrictive view overlooks the interrelationship between law and justice.

69. Law and justice come indeed together, and one cannot simply close one's eyes to affected rights, which have in effect been addressed in the course of the present proceedings. After all, in the present case of *Jadhav*, both contending parties (India and Pakistan) are States Parties to the CCPR[39], and some of the rights thereunder (e.g., Articles 14 and 6) have been affected. As their corresponding provisions are also part of general international law, the ICJ could and should have considered and examined them. This being so, one cannot make abstraction of the rights under the CCPR affected by the established violation in the *cas d'espèce* of Article 36(1)(b) of the VCCR.

70. In this understanding, moreover, it should not pass unnoticed that, in their written and oral arguments presented to the ICJ in the present case of *Jadhav*, both contending parties have made references also to affected human rights under the CCPR. India has done so to a much greater extent, in its *Memorial*[40], its *Reply*[41], and its oral arguments[42]; and Pakistan has also referred to them in its *Counter-Memorial*[43], and its oral arguments[44]. A consideration of those rights is essential for an assessment of the effects of the breach of the right under Article 36(1)(b), as well as of the importance of providing redress (cf. part XI, *infra*).

X. LONGSTANDING HUMANIST THINKING: CRUELTY OF DEATH PENALTY AS A BREACH OF HUMAN RIGHTS.

71. Underlying the *corpus juris gentium* condemning the wrongfulness in death penalty as a breach of human rights (*supra*), there are the foundations of humanist thinking, which in my view cannot be overlooked: for a long time such precious thinking has been warning against the cruelty of death penalty, and calling for its abolition all over the world. After all, an arbitrary deprivation of life can occur by means of "legal" actions and omissions of organs of the State on the basis of a law which by itself is the source of arbitrariness.

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[39] India became Party to the CCPR in 1979, and Pakistan in 2010, but neither of them are Parties to the Second Optional Protocol to the CCPR.

[40] *Memorial* of India, pp. 4-5, paras. 18-25; p. 10, para. 39; p. 19, para. 78; p. 38, paras. 130-131; pp. 40-42, paras. 140-143; pp. 47-48, paras. 157-158; pp. 55-57, paras. 164-168; p. 59, para. 173; pp. 60-61, paras. 175-179; p. 79, para. 192; p. 83, para. 204; p. 86, paras. 211-212; p. 88, para. 214.

[41] *Reply* of India, p. 16, para. 47(c).

[42] ICJ, doc. CR 2019/1, of 18.02.2019, p. 26, para. 83; pp. 35-38, paras. 127-139; pp. 41-46, paras. 150-163; p. 57, para. 195; p. 59, para. 204; and ICJ, doc. CR 2019/3, of 20.02.2019, p. 11, para. 21; pp. 34-35, para. 2(a); and p. 35, para. 5(iii).

[43] *Counter-Memorial* of Pakistan, pp. 27-28, para. 91; and pp. 111-112, para. 387.

[44] ICJ, doc. CR 2019/2, of 19.02.2019, p. 47, para. 100.

72. For a long time humanist thinking has emerged against State arbitrariness in this context[45]. Thus, it may be recalled that, e.g., already in the XVIIIth century, in his classic book *Dei Diritti e delle Pene* (1764), Cesare Beccaria warned:

> - "Which right can these [men] confer upon themselves to break into pieces their fellowmen? (...) Who has wished to leave to other men the discretion to make one die? (...) The death penalty is not useful for the example it gives to men of atrocity. (...) [A]ll the more dreadful as legal death is inflicted with a studious and planned formality. It seems an absurd that the laws, that is, the expression of the public will, which detest and punish murder, commit it themselves, and, to separate the citizens from the intention to kill, order a public murder"[46].

73. In sequence, in the first half of the XIXth century, Victor Hugo, along his book *Le dernier jour d'un condamné* (1829), referred himself to, and heavily condemned, judicial executions as "public crimes", which badly affected all members of the "social community"[47]. In upholding his view, Victor Hugo was motivated by his own life experience when he was younger. Three years after the original appearance of his book in 1829, he included a preface in its reedition of 1832 (reproduced from then onwards), making therein quite clear that his book was meant to be a manifesto for the abolition of the death penalty[48]. In his own words, he added:

> "Quand un de ces crimes publics, qu'on nomme exécutions judiciaires, a été commis, sa conscience lui a dit qu'il n'en était plus solidaire; et il n'a plus senti à son front cette goutte de sang qui rejaillit de la Grève sur la tête de tous les membres de la communauté sociale.
>
> Toutefois, cela ne suffit pas. Se laver les mains est bien, empêcher le sang de couler serait mieux.
>
> Aussi ne connaîtrait-il pas de but plus élevé, plus saint, plus auguste que celui-là: concourir à l'abolition de la peine de mort (...), élargir de son mieux l'entaille que Beccaria a faite, il y a soixante-six ans, au vieux gibet dressé depuis tant de siècles sur

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[45] In a more distant past, e.g., the Renaissance humanist philosopher Thomas More (author of *Utopia*, 1516) was himself unjustly condemned to death; he was beheaded on 06.07.1535, facing it naturally, in the belief that one may lose one's head without being spiritually harmed (for an account, cf., e.g., H. Corral Talciani, *El Proceso contra Tomás Moro*, Madrid, Ed. Rialp, 2015, pp. 107-111). — His execution followed the ancient historical example of the influential philosopher Socrates, who was likewise unjustly condemned to death; Socrates preferred to die with injustice (drinking the poison) in 399 b.C., than to commit injustice. Sensitive to this sad occurrence with his mentor and friend, Plato wrote, some years later, his *Apology of Socrates* (*circa* 390-385 b.C.), wherein the philosopher himself rebutted the arguments of his accusers and boldly assumed the unjust sentence. In this classical defense of Socrates, Plato referred to the victim's last address to the court that wrongly condemned him to death, in which Socrates pondered *inter alia* that

> "[n]o one (…) should try to escape death by any means he can devise.
>
> (…) [T]he difficult thing is not to avoid death, more difficult is avoiding viciousness, because viciousness is a faster runner than death" (lines 39a-39b).

[46] C. Beccaria, *De los Delitos y de las Penas* (1764), Madrid, Alianza Ed., 2000 (reed.), ch. 28, pp. 81 and 86-87. In his comment, of 1766, on the aforementioned work of C. Beccaria, Voltaire underlined the deep pain — "much more terrible than that of death" — of the uncertainty and waiting, and pondered that "the refined punishments which human knowledge has invented in order to make death horrible, seem to have been invented by tyranny rather than by justice"; *cit. in ibid*., pp. 129 and 149. — In another essay, *The Price of Justice* (1777), Voltaire again referred to the "deep pain" which prison is, and added that one should not punish murder with another murder, as "death repairs nothing"; Voltaire, *O Preço da Justiça*, São Paulo, Martins Fontes, 2001, pp. 17-19 and 101; to him, the *raison d'État* was nothing but an "expression invented to serve as an excuse to the tyrants"; *ibid*., p. 80.

[47] Cf. Victor Hugo, *Le dernier jour d'un condamné* (1829), *in*: Victor Hugo, *Romans*, vol. I, Paris, Éds. Seuil, 1963 (reed.), pp. 218, 220 and 234.

[48] Cf. *ibid*., p. 205.

> la chrétienté. (…) [L]a peine de mort est une des serpes dont elles dessaisissent le plus malaisément"[49].

74. In his own view, the death penalty was a "pénalité barbare", challenging the "inviolability of human life"; it amounts to "la plus irréparable des peines irréparables", as, in executing a person, — Victor Hugo added, — "vous décapitez toute sa famille. Et ici encore vous frappez des innocents"[50]. Present and future societies, in his perception, call for the end of death penalty given its cruelty. This critical humanist position was pursued by other influential thinkers.

75. Thus, later on, in the second half of the XIXth century, another universal writer, Fyodor Dostoïevski, in his *Souvenirs de la maison des morts* (1862), expressed himself eloquently against the "unlimited power" of certain individuals over others, generator of the brutality and perversion, which contaminated society as a whole; to him, this is the case of the corporal punishments, applied amidst the indifference of the society "already contaminated" and in state of decomposition[51].

76. F. Dostoïevski dwelt further upon the matter, in one of his subsequent books, *The Idiot* (1869). He pondered therein, as to death penalty, — an "outrage on the soul", — that the worst pain is not in the "bodily suffering", but rather in waiting for the execution, the moment when "the soul will leave the body" and one will cease to be a human being; and he added:

> "To kill for murder is punishment incomparably worse than the crime itself. Murder by legal sentence is immeasurably more terrible than murder by brigands. (…) There is the sentence, and the whole awful torture lies in the fact that there is certainly no escape, and there is no torture in the world more terrible"[52].

77. At that time, the jurist Rudolph von Ihering, in his classic monograph *The Struggle for Law* (1872), in referring to capital punishment, observed that "the judicial murder, as our German language perfectly calls it, is the true mortal sin of the law"[53]. In his perception, a legal regime which orders to kill, resorting to the same methods of total elimination that it condemns in the acts of the murderers, is deprived of credibility. One should not lose sight of the fact that, underlying legal norms, there is a whole system of values[54].

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[49] *Ibid*., p. 206.

[50] *Ibid*., pp. 205-208 and 211-213. — Victor Hugo's abolitionist position and plea, to put an end to death penalty, are recalled even nowadays: cf., e.g., R. Badinter, *Contre la peine de mort*, Paris, Fayard, 2006, pp. 272 and 294 ("le voeu de Victor Hugo"). V. Hugo's book has been reedited ever since; cf., recently, e.g., V. Hugo, *Le dernier jour d'un condamné*, Paris, Gallimard, 2017 (reed.), pp. 15-175.

[51] In his same book *Souvenirs de la maison des morts*, he warned that the degree of civilization achieved by any society could be evaluated by entering into its prisons; F. Dostoïevski, *Souvenirs de la maison des morts*, Paris, Gallimard, 1997 (reimpr.), pp. 35-416.

[52] F. Dostoïevski, *The Idiot* (1869), Ware/Hertfordshire, Wordsworth Ed., 2010 (reprint), pp. 19-20.

[53] R. von Ihering, *La Lucha por el Derecho* (1872), Madrid, Ed. Civitas, 1989 (reimpr.), p. 110.

[54] The punishments also reflect the scale of values prevailing in a given social *milieu*; cf. R. von Ihering, *El Fin en el Derecho* (1877), Buenos Aires, Omeba Ed., 1960, p. 236.

78. In the mid-XXth century, Albert Camus warned, in his penetrating *Reflections on the Guillotine* (1957), that "the *talión* is of the order of nature and instinct", and not of law, which, "by definition, cannot obey the same rules than nature. If murder is in the nature of man, the law is not made to imitate or reproduce this nature", but to correct it. Even if one admits the arithmetic compensation of one death (that of the victim) by another (that of the criminal), the execution of capital punishment is not simply the death, as it adds to this latter a regulation, an organization, a "public premeditation", which are "a source of moral sufferings more terrible than death", there being, thus, no equivalence[55].

79. Knowing with much anticipation that he is going to be executed (everything takes place "outside of him"), the condemned person, impotent in face of the public coalition that wants his death, is "maintained in absolute necessity, that of the inert matter, but with a conscience that is his main enemy". The condemned person is, in this way, — A. Camus added, — destroyed by the waiting for the execution of the capital punishment well before dying: "two deaths are inflicted upon him", the first one being "worse than the other. (...) Compared to this deep suffering, the penalty of *talión* appears still as a law of civilization"[56]. Yet, — A. Camus concluded, — given the evil in the world, the right of living is necessary for "moral life", the deprivation of which should be outlawed[57].

80. Still in the mid-XXth century, the jurist Gustav Radbruch, in his last years of teaching in Heidelberg, formulated an eloquent defense of jusnaturalism, with incursions into both international law and penal law[58]. It ought to be asked, G. Radbruch pondered,

> "what does the penalty mean for those in charge of imposing it and executing it, for the whole society, since this latter could also end up debilitated in its values by means of the imposition of inhuman penalties. (...) The death penalty, just like all corporal punishments, (...) is reproachable from the human point of view, as it downgrades man to the category of a purely corporal being.

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[55] A. Camus, "Réflexions sur la guillotine", *in* A. Camus and A. Koestler, *Réflexions sur la peine capitale*, Paris, Calmann-Lévy, 1979 (reimpr. 1997), pp. 140-141.

[56] *Ibid.*, pp. 143 and 146.

[57] In his own words, marked in my view by wisdom, he rightly pondered:

> "Il n'y a pas de justes, mais seulement des cœurs plus ou moins pauvres en justice. Vivre, du moins, nous permet de le savoir et d'ajouter à la somme de nos actions un peu du bien qui compensera, en partie, le mal que nous avons jeté dans le monde.
>
> Ce droit de vivre qui coïncide avec la chance de réparation est le droit naturel de tout homme, même le pire. (..) Sans ce droit, la vie morale est strictement impossible. (…) Ni dans le cœur des individus ni dans les mœurs des sociétés, il n'y aura de paix durable tant que la mort ne sera pas mise hors la loi"; A. Camus, *op. cit. supra* n. (55), pp. 159-160, 164, 166 and 170.

[58] Cf. also, on the matter, e.g., Association Internationale Vitoria-Suárez, *Vitoria et Suárez — Contribution des théologiens au droit international moderne*, Paris, Pedone, 1939, pp. 3-170; L. Le Fur, "La théorie du droit naturel depuis le XVIIe. siècle et la doctrine moderne", 18 *Recueil des Cours de l'Académie de Droit International de La Haye* (1927) pp. 297-399; A.A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, pp. 540-550 and 1048-1109. — On the services rendered by jusnaturalism, G. Radbruch wrote that it "opened the eyes to humanity about its own chains, teaching it thus to shake them. It fought servitude, in the name of the inalienable human right to freedom (...); it undermined the absolutism of governments (...). It safeguarded the personality against the arbitrariness of police abuses and it proclaimed the idea of the rule of law (*Estado de Derecho*); it fundamentally corrected penal law, in fighting justice based upon arbitrariness and establishing certain types of delict; it eliminated, as incompatible with human dignity, the corporal punishments of mutilation, it put an end to torment in penal procedure and persecuted those who persecuted witches"; G. Radbruch, *Introducción a la Filosofia del Derecho*, 3rd. ed., Mexico/Buenos Aires, Fondo de Cultura Económica, 1965, pp. 112-113.

> (...) The changes which become landmarks in the history of Law are determined, more than by any other factor of juridical thinking, by the transformations that the image of man experiences, such as the legislator conceives it. (...) Every legal order has to start necessarily from a general image, of an average type of man. (...) The respect for subjective rights is almost as important for the legal order as the compliance with the legal duties"[59].

81. Shortly afterwards, in the sixties, L. Recaséns Siches confessed his anguish in face of retribution as justification of the penalty (*lex talionis*), warning that one is to be watchful as to the failings of human justice and the irreparable character of judicial error[60]. In his major work, L. Recaséns Siches went further, discarding the "objective idea" of retribution[61], in support of the necessary individualization of the penalty as an inherent faculty of the exercise of the judicial function.

82. Also in the sixties, Marc Ancel identified the tendency, already then discernible, of gradually general abandonment of the so-called "mandatory character" of the death penalty[62] (clearly in Western Europe and Latin America), persisting then only in a very small number of countries. M. Ancel observed that the anguish generated by the retributive punishment of death penalty derived from the ancient *lex talionis*, was being contained, due to its gradual disappearance, under the new influence of the "philosophy of human rights" and "humanist aspirations"[63].

83. As it can be seen, lucid jurists, philosophers and writers, in condemning the wrongfulness in death penalty, have converged in making it clear that law and justice come together, they cannot be separated one from the other. It is necessary to keep this point always in mind, including in our World Court, which is the International Court of *Justice*. Yet, there have been occasions when, at domestic law level, certain tribunals (such as military courts) only focus on methods to render their decisions effective, making abstraction of values.

84. The fact that such methods, when utilized by the public power, seem confirmed by positive law, in my view in no way justifies them. In my perception, legal positivism has always been a subservient servant of established power (irrespective of the orientation of this latter), paving the way for decisions that do not realize justice. This is a distortion that no true jurist can ignore. Law cannot prescind from justice. Law and justice come ineluctably together.

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[59] *Ibid*., p. 156. To the author, the death penalty was, in historical perspective, the "final point" of a series of punishments, above all corporal (including the penalty of mutilation), — and is nowadays a remnant of those punishments, — which "is separated from the other types of penalty by an insurmountable abyss"; G. Radbruch, *Introdução à Ciência do Direito*, São Paulo, Martins Fontes, 1999, pp. 111-112.

[60] L. Recaséns Siches, "La Pena de Muerte, Grave Problema con Múltiples Facetas", *in A Pena de Morte* (International Colloquy of Coimbra of 1967), vol. II, Coimbra, University of Coimbra, 1967, pp. 12, 14-17 and 19-20.

[61] L. Recaséns Siches, *Panorama del Pensamiento Jurídico en el Siglo XX*, vol. II (1st. ed.), Mexico, Edit. Porrúa, 1963, p. 796.

[62] M. Ancel, *Capital Punishment* (1962), N.Y., United Nations / Dept. of Economic and Social Affairs, 1968 (reed.), p. 13.

[63] M. Ancel, "Capital Punishment in the Second Half of the Twentieth Century", 2 *Review of the International Commission of Jurists* (1969) pp. 33 and 39-41, and cf. pp. 37-38.

XI. THE IMPORTANCE OF PROVIDING REDRESS.

85. In order to keep law and justice together, one cannot accept being restrained by legal positivism: one is to transcend its regrettable limitations. In the present Separate Opinion, I find it necessary to address likewise, at this stage, the issue of redress for the unlawful act established by the ICJ in the present case of *Jadhav*, ensuing from the breach of Article 36(1)(b) of the VCCR. The necessary redress is meant to wipe out all consequences of the unlawful act, i.e., in the *cas d'espèce*, the condemnation of Mr. K.S. Jadhav to death by a military court.

86. Redress, in my own understanding, goes well beyond the simple "review and reconsideration", as ordered by the ICJ, of the death sentence of the military court following a breach of consular law. The State's duty of redress encompasses putting an end to the unlawful act as well as preventing any continuing effects ensuing therefrom. It is, in sum, a duty of *restoration* of the situation existing before the occurrence of the unlawful act.

87. In my perception, "review and reconsideration", repeated by the ICJ in the present case of *Jadhav*, in the line of its previous decisions in the cases of *LaGrand* (2001) and of *Avena* (2004), are manifestly insufficient and inadequate, leaving the whole matter in the hands of the respondent States at issue. As I have pointed out from the start of the present Separate Opinion, resolutory points ns. (7) and (8) of the *dispositif* of the present ICJ Judgment are insufficient.

88. As the Court, once again in its case-law, has ordered "review and reconsideration", it should moreover have taken care of overcoming their limitation in the present case of *Jadhav*, so as to make clear that a reiteration of death penalty is discarded. In my understanding, Pakistan's effective "review and reconsideration" of the death sentence at issue against Mr. K.S. Jadhav cannot constitute again a death sentence. There are three compelling reasons for this.

89. *First*, as already clarified, there is evidence that there is an evolving customary international law of prohibition of the death penalty, as sustained by an *opinio juris communis* (cf. *supra*). There are nowadays, as already observed, international treaties on the abolition of the death penalty (para. 48, *supra*). There remain some States, however, that in practice seem to overlook this relevant development, in keeping on applying death penalty; yet, they cannot at all pretend to exclude themselves from the evolving customary international law in prohibition of the death penalty. This would amount to a breach of it, in the present case interrelated with the breach of Article 36(1)(b) of the VCCR.

90. *Secondly*, the ICJ, as "the principal judicial organ of the United Nations" (Article 92 of its Charter), is bound to uphold the progressive development of international law in prohibition of the death penalty. The United Nations itself has endorsed such development (cf. *supra*). Among the aforementioned international instruments, may I here single out that the Second Optional Protocol to the U.N. Covenant on Civil and Political Rights[64], provides for the abolition of the death penalty, recognising that such abolition contributes to the protection of the right to life. The ICJ, as the principal judicial organ of the United Nations, is to render justice in line with the progressive development of international law as applicable in the *cas d'espèce*, determining the abolition of the death penalty.

[64] Of 15.12.1989, having entered into force on 11.07.1991.

91. *Thirdly*, one must also turn attention to the basic principle of good faith (*bona fides*). In effect, in the present case no records have been provided to the ICJ as to Mr. K.S. Jadhav's trial by a military court; there is lack of evidence of due process of law and observance of his fundamental human right to life. Lack of due process and a fair trial ensue from the respondent State's breach of its obligation to provide information on consular assistance (Article 36(1)(b) of the VCCR), established by the ICJ (paras. 140-141 and 143). The prosecution, conviction and sentencing of Mr. K.S. Jadhav in such circumstances disclose a lack of *bona fides*.

92. In the present Judgment in the case of *Jadhav*, the ICJ stated 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(1) of the VCCR (para. 141). It further asserted that there is "no evidence before the Court" as to the outcome of Mr. K.S. Jadhav's petitions or appeals of mercy (para. 140), and added that "[no] evidence has been submitted to the Court regarding the presidential clemency procedure" (para. 143).

93. The ICJ, though overtaken by such uncertainties, nonetheless points to "remedies" essentially at domestic law level (paras. 134-139, 142 and 144-148), limiting itself to "review and reconsideration" of the death penalty. In view of the lack of evidence before it, I find its position on this particular point unsatisfactory, if not untenable. My own position is that the facts of the present case of *Jadhav*, as presented to the Court, bar the execution of the death penalty against Mr. K.S. Jadhav, and call for redress for the violation of Article 36(1) of the VCCR.

XII. EPILOGUE: A RECAPITULATION.

94. From all the preceding considerations, it is crystal clear that my own reasoning goes well beyond that of the ICJ in the present Judgment on the case of *Jadhav*, in respect of the points examined in the present Separate Opinion. This being so, I deem it fit, last but not least, to recapitulate with clarity all the interrelated points that I have examined herein, in my present Separate Opinion. My position, as seen, is grounded above all on issues of principle, to which I attach much importance, in the search for the realization of justice.

95. *Primus*: Along the last two decades a reassuring jurisprudential construction has emerged and developed, as from the pioneering Advisory Opinion n. 16 (1999) of the IACtHR, on the right to information on consular assistance (Article 36 of the VCCR) as directly related to the International Law of Human Rights. *Secundus*: This right under Article 36(1)(b) of the VCCR is related in particular to the right to life and the guarantees of due process of law (Articles 6 and 14 of the CCPR).

96. *Tertius*: In sequence, the Advisory Opinion n. 18 (2003) of the IACtHR constructed on the basis of the evolving concepts of *jus cogens* (encompassing the fundamental principle of equality and non-discrimination) and obligations *erga omnes* of protection. *Quartus*: Subsequent to the Advisory Opinion n. 16 (1999) of the IACtHR, the ICJ, for its part, adjudicated the cases of *LaGrand* (2001), *Avena* (2004), and now *Jadhav* (2019); in the contentious proceedings of these three cases, the applicant States brought to the attention of the ICJ the historical importance of the construction of the pioneering Advisory Opinion n. 16 (1999) of the IACtHR, — not taken into account by the ICJ in its three aforementioned Judgments.

97. *Quintus*: Yet, in its Judgments in the three cases of *LaGrand*, *Avena* and *Jadhav*, the ICJ acknowledged the "individual rights" under Article 36 of the VCCR, but it avoided to consider their character as of human rights. *Sextus*: In effect, the individual rights under Article 36 of the VCCR are directly related to the right to life and to the human rights to due process of law and a fair trial (as under the CCPR, Articles 6 and 14).

98. *Septimus*: There was no reason for the ICJ to have adopted its insufficient approach to the matter in its Judgments in the cases of *LaGrand*, *Avena* and *Jadhav*. *Octavus*: Beyond what the ICJ has held, there is an ineluctable interrelationship between the right to information on consular assistance and the human rights to due process of law and fair trial, with an incidence on the fundamental right to life.

99. *Nonus*: There is need to proceed in this constructive hermeneutics, so as to keep on fostering the current historical process of humanization of consular law, and, ultimately, of international law itself. *Decimus*: There is a *corpus juris gentium* (international treaties and instruments, and general international law) on the wrongfulness in death penalty as a breach of human rights. *Undecimus*: There is likewise the case-law of the IACtHR to this effect.

100. *Duodecimus*: There has been a consistent and strong condemnation of death penalty at world level, expressed in initiatives and endeavours in the United Nations. *Tertius decimus*: In face of death penalty and the large extent of the human harm done to human rights, the ICJ has pursued (as from its own jurisdiction) a very restrictive reasoning. *Quartus decimus*: It is to be kept in mind that law and justice come together, this being essential when human rights are affected.

101. *Quintus decimus*: For a long time humanist thinking has emerged against State arbitrariness in the execution of death penalty. *Sextus decimus*: There is, in effect, a longstanding humanist thinking on the part of lucid jurists, philosophers and writers, condemning the wrongfulness in death penalty, and converging in making it clear that law and justice come together, and cannot be separated one from the other; their interrelationship is ineluctable.

102. *Septimus decimus*: Even when death penalty is executed in conformity with positive law, despite its arbitrariness, this in no way justifies it; after all, legal positivism has always been a subservient servant of established power (irrespective of the orientation of this latter), paving the way for decisions that do not realize justice. *Duodevicesimus*: No such distortions can be acquiesced with, as positive law cannot prescind from justice.

103. *Undevicesimus*: Accordingly, it is necessary to address the issue of redress for the unlawful act established by the ICJ in the present case of *Jadhav*, ensuing from the breach of Article 36(1)(b) of the VCCR. *Vicesimus*: The necessary redress is meant to wipe out all consequences of the unlawful act (the condemnation of Mr. K.S. Jadhav to death by a military court). *Vicesimus primus*: Redress in the *cas d'espèce* goes well beyond the simple "review and reconsideration", as ordered by the ICJ, of the death sentence of the military court following a breach of consular law.

104. *Vicesimus secundus*: The State's duty of redress amounts to *restoration* of the situation existing before the occurrence of the unlawful act, encompassing putting an end to it and preventing any continuing effects ensuing therefrom. *Vicesimus tertius*: "Review and reconsideration", once again repeated by the ICJ in the present case of *Jadhav* (like earlier in the cases of *LaGrand* and of *Avena*), are manifestly insufficient and inadequate, leaving the whole matter in the hands of the respondent State.

105. *Vicesimus quartus*: Resolutory points ns. (7) and (8) of the *dispositif* of the present ICJ Judgment are insufficient. *Vicesimus quintus*: Pakistan's effective "review and reconsideration" of the death sentence against Mr. K.S. Jadhav cannot constitute again a death sentence. *Vicesimus sextus*: There is nowadays an evolving *opinio juris communis* on the prohibition and the abolition of the death penalty. *Vicesimus septimus*: The ICJ, as the principal judicial organ of the United Nations, is to render justice in line with the progressive development of international law on the prohibition and the abolition of the death penalty.

106. *Vicesimus octavus*: The prosecution, conviction and sentencing to death penalty of Mr. K.S. Jadhav, in the circumstances of the *cas d'espèce*, disclose a lack of *bona fides*. *Vicesimus nonus*: In the present Judgment in the case of *Jadhav*, the ICJ has acknowledged the lack of evidence as to the availability of judicial review of a decision of a military court, and the outcome of Mr. K.S. Jadahv's petitions or appeals of mercy or clemency.

107. *Trigesimus*: Given such uncertainties, "remedies" essentially at domestic law level, as contemplated by the ICJ in limiting itself to "review and reconsideration" of the death penalty, disclose an unsatisfactory, if not untenable, position. *Trigesimus primus*: The facts of the present case of *Jadhav*, as presented to the ICJ, bar the execution of the death penalty against Mr. K.S. Jadhav, and call for redress for the violation established of Article 36(1) of the VCCR.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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DECLARATION OF JUDGE SEBUTINDE

The two passports allegedly found in Mr. Jadhav's possession at the time of arrest is a matter that may call his identity or motives in question during criminal proceedings in Pakistan, but this has no bearing on proof of his nationality for purposes of Article 36 of the Vienna Convention on Consular Relations, 1963 ("Vienna Convention") — Each case must be decided on its own merits and in the present case, both Parties accepted his Indian nationality in their diplomatic exchanges — Paragraph (vi) of the Parties' bilateral Agreement of 2008 properly interpreted, relates to the release and repatriation of a certain category of persons, as an exception to paragraph (v) — Accordingly, where a national of a sending State was arrested, detained or sentenced in the receiving State on political or security grounds and has completed his/her sentence, the receiving State may examine the merits of the case in determining the release and repatriation of that person — It does not serve to deprive persons suspected of espionage or terrorism, of consular access rights under Article 36 of the Vienna Convention, nor does it render such rights "discretionary" or "conditional" — While the rights and privileges accorded by Article 36, paragraph 1, of the Vienna Convention are to be exercised in conformity with the domestic laws and regulations of the receiving State, those laws and regulations should not be applied so as to defeat the purposes for which those rights and privileges are intended.

I. INTRODUCTION

1. The present proceedings were brought by the Republic of India ("India") against the Islamic Republic of Pakistan ("Pakistan") on the basis of Article 36, paragraph 1, of the Statute of the Court and of Article 1 of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963 ("Optional Protocol") providing for the compulsory jurisdiction of the Court over "disputes arising out of the interpretation or application" of Vienna Convention on Consular Relations, 1963 ("Vienna Convention"). 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 the Parties has made reservations to those instruments. Article 1 of the Optional Protocol provides 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".

2. India claims that Pakistan has committed breaches of the Vienna Convention in relation to the treatment of Mr. Kulbhushan Sudhir Jadhav, an Indian national who was detained in early March 2016 by Pakistani authorities and tried, convicted and sentenced to death by a Pakistani military court in Islamabad, for espionage and terrorism. India claims that Pakistan as receiving State where the Indian national is being held, has breached the international obligations incumbent upon it under Article 36, paragraphs 1 and 2, of the Vienna Convention towards India as sending State and towards Mr. Jadhav, relating to consular access, contact and communication. Pakistan rejects India's claims in this regard.

3. Article 36 of the Vienna Convention provides in relevant part, as follows:

"*Article 36*
Communication and contact with nationals of the sending State

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

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

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall 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 judgment. 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."

4. The Court in its Judgments in *LaGrand*[1] and *Avena*[2] described the above provisions as

"an interrelated régime designed to facilitate the implementation 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. It follows that when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay . . . the sending State [is] prevented for all practical purposes, from exercising its rights under Article 36, paragraph 1."

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[1] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 492, para. 74.

[2] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 39, para. 50.

5. From the outset I wish to clarify that I have voted with the majority in the operative part *(dispositif)* of the Judgment (paragraph 149). In my opinion however, there are a number of aspects in the reasoning of the Court where more light could have been shed in order to assist the reader to understand why the Court decided certain issues the way it did. These include (i) whether the issue of Mr. Jadhav's questionable identity as appears in the two passports found in his possession at the time of arrest, has a bearing on proof of his nationality, for purposes of Article 36 of the Vienna Convention; (ii) whether the provisions of the Parties' bilateral Agreement of 2008 exclude the application of Article 36 of the Vienna Convention, to persons suspected of espionage or terrorism; and (iii) the impact of domestic law on the right of consular access under the Vienna Convention. In this declaration, I attempt to deal with each of those aspects in greater detail.

II. THE IMPACT OF MR. JADHAV'S DUAL IDENTITY ON PROOF OF HIS NATIONALITY

6. Pakistan has argued extensively about the fact that Mr. Jadhav's identity and, consequently, his nationality are in doubt. It claims that, upon his arrest by the Pakistani authorities, Mr. Jadhav was found in possession of an Indian passport No. L9630722 — issued on 12 May 2015 in the "Muslim" names of "Hussein Mubarak Patel" and bearing Mr. Jadhav's photograph — in addition to another Indian passport bearing the "Hindu" names of "Kulbhushan Sudhir Jadhav". According to Pakistan, passport No. L9630722 was authenticated by the Respondent's experts as a "genuine Indian passport". On its part, India discounts passport No. L9630722 as a forgery and describes Pakistan's claim that it was found in Jadhav's possession as "patently false". Pakistan contends that Article 36 of the Vienna Convention is not engaged "until and unless the 'sending state' furnishes evidence of the nationality of the individual concerned"[3] and that, in the present case, India has failed to prove Mr. Jadhav's nationality[4]. Pakistan challenges Mr. Jadhav's nationality on the grounds that the two passports found in his possession at the time of his arrest show a dual or fake identity and therefore cannot be taken as genuine proof of his nationality. According to Pakistan, a valid passport is considered the primary official document that certifies the bearer to be a citizen of the issuing State[5]. Thus, if a passport is found to have been issued in contravention of the law, it is not valid for any purpose in international law[6]. Accordingly, Pakistan raises the objection to Mr. Jadhav's identity not only as a jurisdictional argument, but also on the merits, where it claims that India deliberately issued Mr. Jadhav several passports in order to mask his true identity and in order to facilitate him to commit acts of espionage and terrorism in Pakistan.

7. India, while not commenting upon Mr. Jadhav's identity as such, maintains that he is an Indian national and that Pakistan itself recognized this fact in its Notes Verbales of 23 January 2017[7], 21 March 2017[8] and 10 April 2017[9]. India argues that Mr. Jadhav's Indian nationality has never been in dispute[10] and that Pakistan's jurisdictional objection in this regard is "frivolous"[11]. India observes that Pakistan has in its communications with India and in public fora, characterized

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[3] Counter-Memorial of Pakistan (CMP), para. 11.

[4] CMP, paras. 235, 268; CR 2019/2, p. 40, paras. 82-84 (Qureshi).

[5] CMP, para. 244; CR 2019/2, p. 40, paras. 83-84 (Qureshi).

[6] CMP, para. 249.

[7] Application of India (AI), Ann. 2.

[8] AI, Ann. 3.

[9] AI, Ann. 5.

[10] Reply of India (RI), para. 101; CR 2019/1, p. 14, para. 20 (Salve); CR 2019/3, p. 17, para. 50 (Salve).

[11] RI, para. 100.

Mr. Jadhav as an Indian national who had been sent by India to spy on and promote terrorism in Pakistan[12]. Furthermore, Pakistan refers to Mr. Jadhav as "Commander Jadhav" on the premise that he is a serving officer of the Indian Navy. India states that "in order to be a member of the Armed Forces, he has to be . . . an Indian national"[13].

8. The Judgment says very little on the aspect of Mr. Jadhav's identity in view of the Parties' arguments outlined above (see paragraph 57). Under the Vienna Convention, a State has standing to claim consular access only in relation to its own nationals. It is this bond of nationality that confers upon a sending State the right of consular access to its nationals[14]. Thus, where the claimant State is unable to establish the nationality of an individual, it will have failed to establish its legal interest or standing in relation to that individual[15].

9. In *Avena*, the Court held that a claimant State seeking to enforce rights under Article 36 of the Vienna Convention bears the burden of establishing the nationality of the individual in question[16]. The Court found that Mexico (the claimant State) had discharged its burden of proof and established the nationality of the persons it claimed as its nationals through the production of birth certificates and declarations of nationality[17]. The Court went on to reject the United States' argument that certain of those Mexican nationals held dual United States nationality, finding that the United States had failed to furnish the Court with evidence demonstrating such claimed dual nationality, and had thus failed to discharge its burden of proof[18]. Furthermore, the Court held that the detaining authorities had a duty to comply with the provisions of Article 36, paragraph 1 *(b)*, of the Vienna Convention, "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"[19].

10. It is for each State to determine, in accordance with its laws, who its nationals or citizens are. In the present case, while the issue of Mr. Jadhav having allegedly been found in possession of two passports bearing two different sets of names may have a significant bearing on the criminal proceedings conducted in Pakistan, it is, in my view, a matter that goes to his identity and must not be confused with his nationality. Indeed while a passport may provide evidence that a person has a particular nationality[20], it is not a *precondition* to having such nationality. The determination of an individual's nationality does not turn on whether that individual has the passport of a particular State. Indeed, millions of people around the world do not possess a passport but this does not render them stateless or without a nationality. Each case has to be determined on its own merits.

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[12] RI, para. 100.

[13] *Ibid.*

[14] J. Dugard, "Diplomatic Protection", *Max Planck Encyclopedia of Public International Law*, 2009, p. 118; *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16.

[15] J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed., 2012, p. 702.

[16] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, pp. 41-42, para. 57.

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*, p. 43, para. 63 and p. 49, para. 88 (emphasis added).

[20] See. e.g. *Haber* v. *Iran*, Award No. 437-10159-3 (4 Sept. 1989), Vol. 23, Iran-United States Claims Tribunal, p. 135, paras. 9 and 10 (accepting US passport issued after claim was filed as proof of sole shareholder's US nationality by birth).

11. In all other aspects of its case, Pakistan pursues its arguments on the basis that Mr. Jadhav *is* an Indian national. It only raised the issue of Mr. Jadhav's nationality 19 months after India's first request for consular access, without seriously advancing any arguments or evidence to suggest that he was not an Indian national. While in the present case, India has not produced a birth certificate or explicit declarations of his nationality, there are other facts that support the assertion that Mr. Jadhav *is* of Indian nationality, including the following:

(i) Perhaps the most direct means of ascertaining Mr. Jadhav's nationality would have been for Pakistani authorities to ask him about it, which they probably did. Mr. Jadhav allegedly admitted throughout his "confessional statement" that he is a serving officer of the Indian Navy; that he joined the Indian National Defence Academy in 1987 and that he had been living in Mumbai, India[21]. While the veracity of this confessional statement — and the means by which it was obtained — are in dispute, the fact that Pakistan accepts and relies on its contents as true, is relevant to its obligations as receiving State, under Article 36 of the Vienna Convention.

(ii) India points out that under its domestic law[22], Mr Jadhav's position as an Indian Naval officer requires him to be an Indian national[23]. In any event, because the consular post of India in Islamabad was prevented from accessing Mr. Jadhav at all, Pakistan could not reasonably require India to provide documentary evidence relating to his nationality without communicating with Mr. Jadhav first.

(iii) India has consistently maintained in its communications with Pakistan, and more broadly, that Mr. Jadhav *is* an Indian national. Its diplomatic correspondence with Pakistan[24], including its 19 requests for consular access[25], all refer to Mr. Jadhav as an "Indian national". On 11 April 2017, the Indian Minister of External Affairs issued a statement referring to Mr. Jadhav as an "Indian citizen" in an official weekly media briefing[26].

(iv) Pakistan has also repeatedly asserted Mr. Jadhav's Indian nationality in diplomatic correspondence with India[27]. In its 23 January 2017 request for mutual legal assistance and its cover letter, Pakistan refers to Mr. Jadhav as an "Indian national" and the request is titled "Letter of Assistance for Criminal Investigation against *Indian National* Kulbhushan Sudhair Jadhev"[28] (emphasis added). Pakistan's 21 March 2017 further request for assistance also refers to Mr. Jadhav as an "Indian national"[29].

12. In my view, the above facts were sufficient to alert the Pakistani authorities responsible for Mr. Jadhav's arrest and detention that he was, at the very least, *probably* a foreign national, which is sufficient to invoke the receiving State's obligations under Article 36 of the Vienna Convention[30]. In the circumstances, Mr. Jadhav's Indian nationality should not be cast in doubt

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[21] CMP, para. 25.1-2.

[22] RI, para. 100.

[23] CR 2019/3 p. 16, para. 43 (Salve).

[24] CMP, Ann. 33, pp. 1-2; *ibid.*, Ann. 41 p. 1; RI, Ann. 15.2, p. 1.

[25] CMP, Anns. 13.1–13.19. India's first request dated 25 March 2016 simply refers to Mr. Jadhav as an Indian.

[26] *Ibid.*, Ann. 21. See also *ibid.*, Ann. 22, p. 6.

[27] *Ibid.*, Anns. 14; 17, p. 1; 19, p. 1; and 42, p. 2, para. h.

[28] *Ibid.*, Ann. 17, pp. 1-2 (emphasis added).

[29] CMP, Ann. 14.

[30] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 43, para. 63.

simply because of the two passports found in his possession and Pakistan's objection in this regard should be rejected.

III. THE PARTIES' BILATERAL AGREEMENT OF 2008

13. A second important issue that is mentioned briefly in the Judgment relates to the Parties' bilateral Agreement on Consular Access concluded on 21 May 2008 ("the 2008 Agreement") and whether the provisions of that Agreement render Article 36 of the Vienna Convention inapplicable to persons suspected of espionage or terrorism. Without engaging in a detailed analysis and interpretation of the 2008 Agreement, the Judgment makes a number of "assumptions" and "presumptions" on the basis of which it concludes that

> "the Court is of the view that the 2008 Agreement is a subsequent agreement intended to 'confirm, supplement, extend or amplify' the Vienna Convention. Consequently, the Court considers that point (vi) of that Agreement does not, as Pakistan contends, displace the obligations under Article 36 of the Vienna Convention." (see Judgment, paragraph 97.)

Whilst I agree that the Court does not have jurisdiction to settle disputes regarding the interpretation or application of the 2008 Agreement, per se, I am of the view that the Court is not precluded from interpreting the provisions and scope of that Agreement in order to determine its impact, if any, on the Vienna Convention. This is in fact what the Parties have called on the Court to do through their arguments. In my view, it is not enough that the Court has reached its conclusion based on a set of assumptions. I accordingly interpret the provisions of the 2008 Agreement below with a view to ascertaining its impact if any upon the Vienna Convention.

14. Both Parties agree that they concluded the 2008 Agreement pursuant to the provisions of Article 73, paragraph 2, of the Vienna Convention and that it was intended to supplement the provisions of the Convention, as between themselves. However, the Parties disagree on the interpretation of some of the provisions of that Agreement (in particular paragraph (vi)) and how those provisions impact the application of the Vienna Convention as between India and Pakistan.

15. Pakistan argues that the 2008 Agreement was negotiated and signed expressly to deal with the issue of consular access between the Parties within their specific context of "national security"[31]. It contends that the nature and circumstances of Mr. Jadhav's criminal activities of espionage and/or terrorism brought his arrest squarely within the "national security" qualification stipulated in paragraph (vi) of the 2008 Agreement. Accordingly, Article 36 of the Vienna Convention is inapplicable to Mr. Jadhav's case and Pakistan is entitled to consider his case "on the merits" and to consider the question of consular access in the particular circumstances of his case[32].

16. India disagrees with Pakistan's interpretation of the 2008 Agreement as well as its impact on the Vienna Convention. India argues that under Article 73, paragraph 2, of the Vienna Convention, the 2008 Agreement can only supplement the provisions of that Convention and cannot modify those rights and corresponding obligations that form the object and purpose of

[31] CMP, paras. 374-376.

[32] CMP, para. 385.3-385.4; CR 2019/2, pp. 33-34, paras. 65-68 (Qureshi).

Article 36 thereof[33]. India argues further that there is nothing in the language of the 2008 Agreement that would suggest that India or Pakistan ever intended to derogate from Article 36 of the Vienna Convention and that any provision in the 2008 Agreement that derogates from the rights protected under that Convention would have to yield to the provisions of that Convention[34].

17. Furthermore, India argues that the words "examine the case on its merits" in paragraph (vi) of the 2008 Agreement "makes it apparent that it applies to the agreement to release and repatriate persons within one month of the confirmation of their national status and completion of sentences"[35], as set out in paragraph (v) which directly precedes paragraph (vi). India contends that paragraph (vi) sets out an exception to paragraph (v) and allows for the receiving State to examine on the merits, the release and repatriation to the sending State, of a person where the arrest, detention or sentence of that person was made on political or security grounds[36].

18. Article 73 of the Vienna Convention provides in relevant part, as follows:

> "*Article 73*
> *Relationship between the present Convention and other international agreements*
>
> . . . . . .
>
> 2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof."

19. The Judgment correctly observes that the implication of this provision, is that only agreements confirming, supplementing, extending or amplifying the provisions of the Vienna Convention are permitted (see Judgment, paragraph 97). By virtue of an *a contrario* interpretation, an agreement that purports to negate, limit or derogate from the rights and obligations provided for under Article 36, would be inconsistent with Article 73.

20. The 2008 Agreement provides as follows:

> "*Agreement on Consular Access*
>
> The Government of India and the Government of Pakistan, desirous of furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country, have agreed to reciprocal consular facilities as follows:
>
> (i) Each Government shall maintain a comprehensive list of the nationals of the other country under its arrest, detention or imprisonment. The lists shall be exchanged on 1st January and 1st July each year.

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[33] AI, p. 23, para. 48.

[34] MI, para. 99; CR 2019/1, pp. 30-31, paras. 105-109 (Salve).

[35] RI, para. 144; CR 2019/1, p. 32, para. 114 (Salve).

[36] RI, para. 144.

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

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

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

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

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

(vii) In special cases, which call for or require compassionate and humanitarian considerations, 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.

Done at Islamabad on 21 May, 2008 . . .".

21. In my view, paragraph (vi) of the 2008 Agreement, the meaning of which is in dispute between the Parties, cannot be interpreted or understood in isolation. In accordance with the rules of customary international law, the provisions of the 2008 Agreement must be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in light of the object and purpose of that Agreement[37]. Recourse may be had to the drafting history *(travaux préparatoires)* in order to confirm the meaning of the provisions, or to remove ambiguity of obscurity, or to avoid a manifestly absurd or unreasonable result[38]. I am also of the view that, in accordance with Article 73, paragraph 2, of the Vienna Convention, the 2008 Agreement forms part of the context of the Vienna Convention.

22. First, the object and purpose of the Vienna Convention is to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems", by bestowing upon consular posts certain privileges and immunities in order to enable them to efficiently perform their functions on behalf of their respective States[39]. On the other hand, the object and purpose of the 2008 Agreement is to further the "humane treatment of nationals of either country arrested, detained or imprisoned in the other country"[40]. Clearly the object and purpose of the 2008 Agreement appears to complement that of the Vienna Convention.

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[37] Vienna Convention on the Law of Treaties, 1969, Art. 31.

[38] *Ibid.*, Art. 32.

[39] Preamble to the Vienna Convention.

[40] Preamble to the 2008 Agreement.

23. Paragraph (iv) of the 2008 Agreement is the only provision that explicitly refers to "consular access" and that provision obligates the sending State to provide consular access to its nationals under arrest, detention or imprisonment in the receiving State "within three months" of receiving notification of such arrest, detention or imprisonment. This is followed by paragraph (v), which obligates the receiving State to release and repatriate the nationals of the sending State within one month of confirmation of their national status and completion of their sentence. Paragraph (vi) whose meaning is disputed, provides that "[i]n case of arrest, detention or sentence on political or security grounds, each side may examine the case on its merits". Finally, paragraph (vii) provides that in special cases, which call for compassionate considerations, each side may exercise discretion to allow early release and repatriation of the national. None of the above obligations are stipulated or replicated in the Vienna Convention and can therefore be said to "supplement" or "extend" or "amplify" its provisions.

24. The placement of a provision in a treaty also undoubtedly forms a part of its context. The fact that paragraph (vi) is placed between two provisions that relate to the release and repatriation of nationals, supports the interpretation that it is also a provision that relates to the release and repatriation of nationals. Thus, where a person was arrested, detained or sentenced on political or security grounds, and has completed his/her sentence, the receiving State may examine the merits of the case in determining the release and repatriation of that person. This reading is consistent with the object and purpose of that Agreement, namely, to further the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country. That interpretation also leaves intact the rights and obligations of the Parties under Article 36 of the Vienna Convention and is compatible with the object and purpose of that Convention.

25. The *travaux préparatoires* of the 2008 Agreement confirms the above interpretation. In 1982 India and Pakistan concluded a bilateral Agreement of Consular Access ("1982 Agreement"), which formed the basis of the negotiations for the 2008 Agreement[41]. The 1982 Agreement made clear that a receiving State could, upon examination of the merits of the case, deny requests of the sending State for consular access to its nationals accused of political or security offences. Paragraph (iii) of the 1982 Agreement provided that

> "[e]ach Government shall give consular access on a reciprocal basis to nationals of one country under arrest, detention or imprisonment in the other country, *provided they are not apprehended for political or security reasons/offences. Request for such access and the terms thereof shall be considered on the merits of each case* by the Government arresting, the person or holding the 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."[42] (Emphasis added.)

26. However, during the bilateral negotiations leading up to the 2008 Agreement, paragraph (iii) of the 1982 Agreement was deleted in its entirety and was replaced during negotiations in October 2005 by draft paragraph (iii). That draft paragraph provided as follows: "Each Government shall give consular access to *all* nationals of the other country under arrest, detention or imprisonment within three months of the date of arrest/detention/sentence."[43] (Emphasis added.) The final text of the bilateral Agreement was agreed and the treaty signed on

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[41] CMP, Ann. 160.

[42] CMP, Ann. 160, p. 3, paragraph (iii); emphasis added.

[43] CMP, para. 354, CMP, Ann. 160.

21 May 2008. Paragraph (iii) of the 1982 Agreement as adopted in its final form (now paragraph (iv) of the 2008 Agreement) provides that "[e]ach Government shall provide consular access within three months to nationals of one country, under arrest, detention or imprisonment in the other country"[44].

27. Thus, a clear exception to consular access to individuals charged with political or security offences was consciously and deliberately removed from the text of the 1982 Agreement and replaced with a broad requirement to give consular access to all nationals of the sending State[45]. This suggests that the Parties did *not* intend to exclude a class of individuals, namely, those who are arrested or detained for political or security offences, from the right to consular access.

28. In my view, the best interpretation of paragraph (vi) of the 2008 Agreement is that it relates to the *release and repatriation* of a certain category of persons, as an exception to paragraph (v). Accordingly, where a national of a sending State was arrested, detained or sentenced in the receiving State on political or security grounds, and he or she has completed his/her sentence, the receiving State may examine the merits of the case in determining the *release and repatriation* of that person. The provision does *not* as Pakistan suggests, serve to deprive this category of persons, of consular access rights under Article 36 of the Vienna Convention, nor render such rights "discretionary" or "conditional". In other words, Pakistan may not exercise its discretion to deny consular access to Mr. Jadhav either because he is convicted of espionage and terrorism, or because it views India as being guilty of sending him to spy in Pakistan.

29. Similarly, Pakistan may not lay down preconditions such as requiring India to provide certain information first, before complying with its Article 36 obligations. This interpretation is consistent not only with the object and purpose of the 2008 Agreement, but is also consistent with the Article 36 of the Vienna Convention and the overall object and purpose of that Convention.

30. Accordingly, the provisions of Article 36 of the Vienna Convention remain applicable and binding in cases where a national of the sending State has been arrested, detained or sentenced on political or security grounds in the receiving State.

IV. THE IMPACT OF DOMESTIC LAW ON THE RIGHT OF CONSULAR ACCESS

31. Pakistan argues that India seeks to use the Vienna Convention to undermine its sovereignty and territorial integrity in a manner inconsistent with its functions under Article 5 of that Convention. Pakistan claims that according to Articles 5 *(i)* and *(m)* and 36 (2) of the Vienna Convention, consular access is not an unqualified right, and cannot involve any act that is prohibited by Pakistan's domestic law. It must be exercised in a manner that accords with Pakistan's domestic law[46]. This is an issue that the Judgment briefly touches upon in paragraph 115.

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[44] MI, Ann. 10.

[45] While, notably, draft paragraph (iii) had referred to "all nationals", the word "all" was removed from the final text of paragraph (iii).

[46] CMP, para. 344.

32. Article 5 of the Vienna Convention provides in relevant part that "[c]onsular functions consist in:

. . . . . .

(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."

33. Article 36, paragraph 2, provides as follows:

"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.)

34. Article 55, paragraph 1 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 that State." (Emphasis added.)

35. Pakistan overlooks the importance of the final clause of Article 36, paragraph 2, which requires that domestic laws "must enable full effect to be given to the purposes" for which the rights accorded under Article 36 are intended. This clause implicates the well-settled principle that the breach of international law cannot be justified by reference to domestic law. This principle was also at issue in *LaGrand* where the Court held that the United States was in breach of the Vienna Convention because its procedural default rule, as applied, did not enable full effect to be given to Article 36 of that Convention[47]. Pakistan's approach would directly contradict "the purposes for which the rights accorded under [Article 36] are intended"[48]. Similarly, the opening phrase in Article 55 preserves the consular rights and privileges accorded by the Vienna Convention, regardless of the domestic law of the receiving State.

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[47] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 498, para. 91.

[48] Vienna Convention, Art. 36 (2).

36. It appears that — right from the arrest of Mr. Jadhav and without waiting for his trial — Pakistan determined that he was a spy who under Pakistani law was not entitled to consular access and, similarly, that India having "interfered in the internal affairs of Pakistan" had also forfeited its right to consular access, under Article 36 of the Vienna Convention. Based on that presumption, Pakistan went ahead to deny Mr. Jadhav of his right to be informed without delay of his consular rights, and to deny officials of the Indian consular post in Islamabad access to its national. Pakistan's conduct and attitude in this regard flies in the face of Article 36 and of the object and purpose of the Vienna Convention. Under Article 36, paragraph 1 *(b)*, India's consular officers had a right to be informed without delay of Mr. Jadhav's arrest; a right under Article 36 (1) *(a)*, to freely access and communicate with Mr. Jadhav; a right under Article 36 (1) *(c)*, to visit Mr. Jadhav in prison, custody or detention (with his permission) to converse and correspond with him to arrange for his legal representation. India has established and Pakistan does not deny the fact that apart from informing India of Mr. Jadhav's arrest 22 days later, at no stage after Mr. Jadhav's arrest, detention, trial and conviction, were India's consular officers permitted to access, communicate with or visit Mr. Jadhav, notwithstanding numerous requests. Pakistan is clearly in violation of its obligations under Article 36 (1) *(a)*, *(b)* and *(c)* of the Vienna Convention.

(Signed) Julia SEBUTINDE.

DECLARATION OF JUDGE ROBINSON

Jurisdiction of the Court — Relationship between Article 14 of the International Covenant on Civil and Political Rights and Article 36 (1) (c) *of the Vienna Convention on Consular Relations — Systemic Integration and Article 31 (3)* (c) *of the Vienna Convention on the Law of Treaties — Interpretation of Subsequent Agreements under Article 73 (2) of the Vienna Convention on Consular Relations — Relationship between Article 73 (2) of the Vienna Convention on Consular Relations and the 2008 Agreement between India and Pakistan on Consular Access.*

A. THE HUMAN RIGHTS CHARACTER OF THE RIGHTS AND OBLIGATIONS UNDER ARTICLE 36 OF THE VIENNA CONVENTION

1. The question of the relationship between the Vienna Convention on Consular Relations ("the Vienna Convention") and the International Covenant on Civil and Political Rights ("the Covenant") was addressed three times by the Court in its Judgment. First, in response to India's submission that the Court declare Pakistan to be in breach of Mr. Jadhav's "elementary human rights" as reflected in Article 14 of the Covenant, the Court held that its jurisdiction was based on Article I of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes and "[did] not extend to the determination of breaches of international law obligations other than those under the Vienna Convention" (see paragraph 36 of the Judgment). Second, in response to India's submission that the Court should declare that the sentence [of death] handed down by Pakistan's military courts violated international law, including Article 14 of the Covenant, the Court stressed that the remedies to be ordered can only provide reparation for breaches of obligations under the Vienna Convention, which is the basis of its jurisdiction in the case brought by India (see paragraph 135 of the Judgment). In that regard, it is to be noted that the relief sought by India was the annulment of Mr. Jadhav's conviction and sentence as well as his release. Third, the Court acknowledged that the Covenant could, however, play a role in the interpretation of the Vienna Convention through Article 31 (3) *(c)* of the Vienna Convention on the Law of Treaties (see paragraph 135 of the Judgment).

2. Against the background of these findings the following propositions are advanced concerning the relationship between the Vienna Convention and the Covenant:

(i) There is a strong and meaningful legal connection between Article 36 of the Vienna Convention and Article 14 of the Covenant that might impact on the question of the Court's jurisdiction.

(ii) The Covenant is, as its name implies, a human rights treaty. The greatest development in international law following the Second World War has been the growth of a body of law, reflected in international declarations and treaties, designed to protect the inalienable rights of the individual. This development is a response to the atrocities committed in the war, against individuals. The Covenant is the leading conventional instrument for the protection of the rights of the individual.

(iii) The rights set out in Article 14 of the Covenant apply to "everyone" (see, in particular, paragraphs 1, 2 and 3 of Article 14); as such, they apply as much to persons in a foreign country as they do to persons in their own country; they also apply "in full equality",

meaning that a national in a foreign country is entitled to the same protection through the rights set out in Article 14 as a national of his own country or a national in the receiving State. The right of equal access to a court means that States parties to the Covenant have a positive international legal obligation to ensure that there exist independent and impartial courts which enable them to conduct a fair trial in criminal proceedings which grant to accused persons the minimum rights that are set out in Article 14 (2) to 14 (7) of the Covenant.

(iv) The bundle of rights in Article 14 (3) of the Covenant is not an exhaustive list of those rights; it comprises "minimum guarantees" to which "everyone" is entitled "in full equality". Thus other rights may be added to the list, provided they share the essential characteristics of the seven rights in the bundle, that is, they are rights designed to ensure that an individual has the right to a fair hearing guaranteed by Article 14 (1) of the Covenant.

(v) A human right is a right that applies to all persons without distinction of any kind, such as race, colour, national or social origin and sex. The essence of human rights is that, as the preamble to the Covenant indicates, they "derive from the inherent dignity of the human person" and are "the foundation of freedom, *justice* and peace in the world" (emphasis added). Notice that justice is one of the ends served by the enjoyment of a human right. The right to a fair trial in Article 14 of the Covenant and the notion of equality before the law means that persons must be granted an equal access to the Court without any distinction based on the factors in Article 2 (1) of the Covenant including national or social origin. Where a foreign national, who may not even speak the language of the receiving State, is prevented from communicating with his consul to arrange his legal representation it is questionable whether he has been granted access to the Court in full equality with the nationals of the receiving State.

(vi) It follows from the fifth proposition that the rights to consular access and protection under Article 36 of the Vienna Convention are as much human rights as any of the seven rights in Article 14 (3) of the Covenant. This is so because they offer to a person facing a criminal charge in a foreign country protection that may be taken for granted or, at any rate, may be much easier to access by a national of the sending State facing a criminal charge in that State or by a national of the receiving State facing a criminal charge in that State. Absent the rights set out in Article 36 of the Vienna Convention, the universality of the protection guaranteed by Article 14 for "everyone" "in full equality" may prove to be illusory. The condition of being a foreigner in a country facing a criminal charge calls for heightened scrutiny, because such a person may be less able to cope with the intricacies of a foreign criminal justice system than a national of the sending State facing a criminal charge in that State or a national of the receiving State facing a criminal charge in that State. The inherent dignity of the foreign national requires that he be given the same access to justice as a national of the sending State facing a criminal charge in that State or as a national of the receiving State facing a criminal charge in that State, and in any event that he be given no less than a fair trial as required by the peremptory norm set out in Article 14 (3) of the Covenant.

(vii) Article 36 of the Vienna Convention therefore should be seen as providing a kind of foreign parity with the rights enjoyed by a person facing a criminal charge in the receiving State. That is why so many modern day treaties require that the right to consular access be observed in relation to a person facing a criminal charge in a foreign country. For example, Article 6 (3) of the United Nations Convention against Torture mandates that a person in custody "shall be assisted in communicating immediately with the nearest

appropriate representative of the State of which he is a national"[1]. This is as much a substantive obligation as any of the obligations set out in the other paragraphs of this Article, including paragraph 1 requiring a State party to take into custody a person in its territory who is alleged to have committed an act of torture. If, for example, as a result of a person in custody being denied the right to communicate with his consular representative, that person was not represented at his trial by a lawyer and was convicted, in most systems of law that trial would be null and void. By the same token, the obligation to provide consular access under Article 36 (1) of the Vienna Convention, which also applies to a person who, *inter alia*, is in custody, has a substantive character in view of its importance in securing the rights under that Article.

(viii) The right to consular access and the corresponding obligation to grant it, whether under Article 36 of the Vienna Convention or under any of the above-mentioned treaties, have passed into customary international law.

(ix) The right of a person under Article 36 (1) *(b)* of the Vienna Convention to have his consular post informed of his arrest or detention and to be informed of this right is of fundamental importance in securing the universality and equality of treatment guaranteed by Article 14 of the Covenant. But of even greater significance is the right of a consular officer under Article 36 (1) *(c)* of the Vienna Convention to visit, converse and correspond with, and arrange for the legal representation of a national of the sending State who is in prison, custody or detention. This right enures for the benefit of the foreign national in prison, custody or detention who may be in need of legal representation in a forthcoming trial. The fact that the foreign national is the beneficiary of this provision is clearly indicated by the statement in the last sentence that the consular officer cannot provide assistance "if [the national] expressly opposes such action". Without a foreign national's consular officer being able to arrange for his legal representation, it is very likely that none of the seven rights set out in Article 14 of the Covenant would be given effect. In that bundle, the right that is most at peril in relation to a person in a foreign country facing a criminal charge is the right under Article 14 (3) *(b)* "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing"; it is also a right that is closely connected to the right of the foreign national to have that national's consular officer arrange for his legal representation. Absent arrangements for legal representation, there is a strong possibility that the foreigner in custody will not be able to prepare his defence adequately by selecting and communicating with a lawyer of his choice.

(x) In light of the foregoing, it is difficult to accept the submission that "unlike legal assistance, consular assistance is not regarded as a predicate to a criminal proceeding" (paragraph 129 of the Judgment). This submission was made by Pakistan in this case in response to the claim by India that breach of Article 36 (1) *(b)* of the Vienna Convention resulting from failure to notify the consul should lead to an annulment of the trial proceedings. The right to consular access can have a significant relationship with a criminal trial even if it does not result in an annulment of the trial. But in my view there are situations in which the failure to notify the consul that his national is in custody facing

[1] See also Article 13 (3) of the Convention on Offences and Certain Other Acts on Board Aircraft, 1963; Article 6 (3) of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; Article 6 (2) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1973; Article 6 (3) of the Convention against the Taking of Hostages, 1979; Article 17 (2) of the Convention on the Safety of United Nations and Associated Personnel, 1994; Article 9 (3) of the Convention for the Suppression of the Financing of Terrorism, 1999; Article 17 of the Convention on Enforced Disappearances, 2006. All of these conventions provide for the right of a person in custody to be assisted in communicating immediately with a representative of the State of which he is a national. These provisions are to be found in articles which undoubtedly create substantive legal obligations. There is nothing to suggest that they create anything other than a substantive legal obligation on the part of the country where the person is in custody.

a criminal charge can, and should, lead to an annulment of the trial procedures. I hasten to add that such action would be taken by a domestic court and not by the Court, which should content itself with adverting in its Judgment to the fundamental breach and requiring that full weight is given to the effect of the violation of the rights by the domestic court in carrying out any review that it may order. An example of such a fundamental breach requiring an annulment would be a case in which, as a result of the failure to notify the consul that its national is in custody, that national has no legal representation in his trial, and this failure was a substantial factor in the national's conviction. In any event, the assistance given by a consul in making arrangements for his national's legal defence when that national is in a foreign country facing a criminal charge is an integral part of a sequence that involves choosing his lawyer, consulting with that lawyer in the preparation of his defence, and being represented in his trial by a lawyer of his choice. In the peculiar circumstances in which that foreign national finds himself this assistance is very much an indispensable and foundational step leading up to the trial proceedings. Thus it is incorrect to treat the consul's assistance under Article 36 (1) *(c)* of the Convention as though it does not have a fundamentally important relationship with trial proceedings, and this is particularly the case because the Vienna Convention provides that one of the functions of a consul is to arrange "representation for nationals of the sending State before the tribunals . . . of the receiving State" (see Article 5 (i) of the Vienna Convention).

(xi) In the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, the Court declined to characterize consular access as a human right. In doing so the Court took the position that such a conclusion was neither supported by the text, object and purpose nor the *travaux préparatoires* of the Vienna Convention[2]. While it is true that the preamble speaks in general of the development of friendly relations among States as one of the purposes of the Vienna Convention, and has no explicit reference to the human rights of nationals of the sending State, the Convention must be interpreted in light of that grand development of international law following the Second World War which focused on the rights of individuals in their relations with States. Support for such an interpretation that views the Convention through a global lens comes from what McLachlan calls the "general principle of treaty interpretation, namely that of *systemic integration* within the international legal system"[3], reflected in Article 31 (3) *(c)* of the Vienna Convention on the Law of Treaties; it also comes from the Court's Advisory Opinion in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* case[4], in which it held: "Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[5] The text of Article 36 (1) of the Vienna Convention, and in particular subparagraph *(c)*, does in fact portray the kind of concern with the rights of an individual, based on the inherent dignity and worth of the human person, that one finds in human rights treaties such as the United Nations Convention against Torture. Given that Article 36 (1) *(c)* of the Vienna Convention is so closely connected to the right of an accused person under Article 14 (3) *(b)* of the Covenant "to have adequate time and

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[2] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 61, para. 124.

[3] McLachlan, Campbell, "The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention" *International and Comparative Law Quarterly*, Vol. 54, Issue 2, April 2005, p. 280.

[4] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.

[5] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53.

facilities for the preparation of his defence", it is submitted that it may be seen as a fair trial right that could be added to the bundle of rights in Article 14 (3) of the Covenant.

(xii) It follows therefore that a breach of the obligations under Article 36 (1) of the Vienna Convention and, in particular, of Article 36 (1) *(c)* is a breach of a human right closely connected to a breach of the fair trial rights of an accused person under Article 14 (3) of the Covenant, and in particular, a breach of the right set out in Article 14 (3) *(b)*. If the right under Article 36 (1) *(c)* has the status of a fair trial right so that it is incorporated in the bundle of rights under Article 14 (3) of the Covenant, may it not be argued that a breach of Article 14 (3) *(b)* of the Covenant resulting from a failure on the part of the receiving State to allow the consular officer to arrange for the legal representation of the foreign national in custody is also a breach of Article 36 (1) *(c)* of the Vienna Convention; and that this would be sufficient to give the Court jurisdiction on the basis of Article I of the Optional Protocol to the Vienna Convention and in respect of a breach of Article 14 (3) of the Covenant?

B. THE 2008 AGREEMENT

3. Article 73 (2) of the Vienna Convention provides: "Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof."

4. In 2008 India and Pakistan concluded the Agreement on Consular Access ("the Agreement"). The Court had to consider whether this Agreement falls within the provisions of Article 73 (2). If the Agreement was one that did not confirm, supplement, extend or amplify the provisions of the Vienna Convention, it would not have been authorized by Article 73 (2). It would be *ultra vires* the enabling provision of Article 73 (2).

5. There is a clear difference between the Parties concerning the interpretation of the Agreement. According to Pakistan, and as the Court has noted in paragraph 97, the Agreement displaces Article 36 of the Vienna Convention as between India and itself. Point (vi) of the Agreement 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 paragraph displaces the obligations under Article 36 of the Vienna Convention in relation to espionage cases. On the other hand India contends that point (vi) must be read with point (v) which provides: "Both Governments agree to release and repatriate persons within one month of confirmation of their national status and completion of sentences." India therefore contends that Pakistan and India have agreed that they may examine on the merits of each case the release and repatriation of persons within one (1) month of confirmation of their national status and completion of their sentence where their arrest, detention and sentence was made on political or security grounds.

6. In interpreting the words "each side may examine the case on its merits" stress should be placed on the word "may". The Parties have agreed to afford each side a discretionary power in considering arrests made on political or security grounds. These cases would include arrests for espionage activities. The words mean that each side, having examined each case of an arrest for espionage activities on its merits, may then decide whether to grant consular access to the person arrested. The Agreement and in particular point (vi) cannot therefore be considered as confirming, supplementing, extending or amplifying the provisions of the Vienna Convention, which mandates the grant of consular access in the circumstances set out in Article 36. For this reason the Agreement cannot be considered as having been authorized by Article 73 (2) of the Vienna Convention. The Agreement is *ultra vires* Article 73 (2) and cannot have any application in relation

to the provisions of the Convention. The Parties therefore remain bound by Article 36 of the Vienna Convention.

7. The Court has adopted an approach to the Agreement that is entirely different from the analysis above. In paragraph 97 of the Judgment, it finds that the Parties have negotiated the Agreement in full awareness of Article 73 (2) of the Vienna Convention. That statement is not merely descriptive of a factual situation; if it were, it would not be problematic. However, it is clear from what follows in the paragraph that the Court is using the Parties' awareness of Article 73 (2) as a pivotal basis for its conclusion that point (vi) does not "as Pakistan contends, displace the obligations under Article 36". The finding is important more for what it implies than for what it actually states. The implication is that, since the Parties negotiated the Agreement fully aware of Article 73 (2), it is appropriate to presume that in concluding the Agreement they acted in accordance with that provision. Any such presumption would have to be rebuttable and is in fact rebutted by the analysis above showing that the discretionary powers to grant consular access in respect of arrests on political or security grounds (including in espionage cases) under point (vi) are in direct conflict with the mandatory obligation under Article 36 to grant consular access in respect of all cases of arrests, including those relating to espionage activities.

8. In the second sentence of paragraph 97 the Court concludes:

> "Having examined that Agreement and in light of the conditions set out in Article 73, paragraph 2, the Court is of the view that the 2008 Agreement is a subsequent agreement intended to 'confirm, supplement, extend or amplify' the Vienna Convention. Consequently, point (vi) of that Agreement does not, as Pakistan contends, displace the obligations under Article 36 of the Vienna Convention."

But even if that conclusion is correct, that intention cannot be relied on by itself to support the conclusion that there was no breach of the obligation in Article 73 (2) of the Vienna Convention to confine the adoption of a subsequent agreement to one that confirms, supplements, extends or amplifies the Vienna Convention. In other words, if as a matter of law the Agreement does not confirm the provisions of the Vienna Convention there is no basis for the contention that it confirms the provisions of the Vienna Convention merely by reason of a presumption that the Agreement was intended to confirm the Vienna Convention. For there must be a reasonable basis for a presumption if it is to function as a useful interpretative tool.

9. The question whether the Agreement is consistent with Article 73 (2) is not resolved simply by presuming that the Parties must have intended it to be consistent on the ground that they were aware of the provisions of Article 73 (2). There is no reasonable basis for such a presumption. Parties to a treaty frequently take action that breaches a treaty even though they are aware of its provisions. The Court's reasoning is further developed in paragraph 94 of the Judgment where, after recalling the preambular provision of "furthering the objective of humane treatment of nationals . . .", it finds that point (vi) cannot be interpreted as denying consular access in the case of an arrest on political or security grounds. The Court concludes that in light of the importance of the rights involved in relation to the humane treatment of nationals, had the Parties intended to restrict in some way the rights guaranteed by Article 36, "one would expect such an intention to be unequivocally reflected in the provisions of the Agreement". In my view this is not a reasonable conclusion, particularly in light of the clarity of point (vi).

10. It is, of course, acknowledged that Article 26 of the Vienna Convention on the Law of Treaties requires that treaties must be performed in good faith by the parties thereto. As the Court held in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the good faith obligation requires parties to apply a treaty "in a reasonable way and in such a manner that its purpose can be realized"

(*Judgment, I.C.J. Reports 1997*, p. 79, para. 142). There is nothing in this obligation that generates a presumption that parties to a particular treaty intend to act or have acted consistently with their obligations under the treaty. Whether parties have so acted requires a careful examination of all the relevant circumstances including the treaty in question and their conduct.

11. The danger in paragraph 97 of the Judgment, and in particular its second sentence, is that it may be construed as meaning that when a treaty sets out specific criteria for subsequent conduct by parties, as is the case here with the requirement that a subsequent agreement must "confirm, supplement, extend or amplify" the provisions of the Vienna Convention, the Court is thereby enabled to presume an intention on the part of the parties to act consistently with those criteria, and this presumption more readily arises when the treaty has a noble objective such as furthering humane treatment.

(Signed) Patrick L. ROBINSON.

DECLARATION OF JUDGE IWASAWA

Applicability of the clean hands doctrine to the present case — Anti-terrorism conventions also require consular access to be granted without delay — Relationship between the Vienna Convention and subsequent agreements — If the 2008 Agreement was intended to allow limitation of consular access in cases of espionage, Article 36 of the Vienna Convention would prevail over the 2008 Agreement.

1. I have voted in favour of all the Court's findings in the operative paragraph (Judgment, paragraph 149) and agree for the most part with the reasoning set out in the Judgment. I offer here additional explanations for my support for the findings and set forth my views on some issues not dealt with by the Court in the Judgment.

I. THE CLEAN HANDS DOCTRINE

2. The Court rejected an objection based on the clean hands doctrine five months ago in *Certain Iranian Assets*. In that case, the Court noted that "the United States has not argued that Iran, through its alleged conduct, has violated the Treaty of Amity, upon which its Application is based", and then declared that

> "[w]ithout having to take a position on the 'clean hands' doctrine, the Court considers that, even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the 'clean hands' doctrine" (*Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment of 13 February 2019*, para. 122; see also *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J Reports 2004 (I)*, p. 38, para. 47; *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 52, para. 142).

3. In the present case, Pakistan gives three grounds for its objection based on the clean hands doctrine: the fact that India provided Mr. Jadhav with an authentic Indian passport bearing a false identity; India's failure to provide any substantive response to Pakistan's request for mutual legal assistance; and the fact that India sent Mr. Jadhav into the territory of Pakistan to conduct espionage and terrorist activities. These allegations do not relate to the Vienna Convention on Consular Relations (VCCR) upon which India's Application is based. In the circumstances of the present case, as in *Certain Iranian Assets*, I agree that Pakistan's objection based on the clean hands doctrine does not by itself render India's Application inadmissible (see Judgment, paragraph 61). An objection based on the clean hands doctrine may make an application inadmissible only in exceptional circumstances.

II. THE RIGHT TO CONSULAR ACCESS

4. Subsequent to the conclusion of the VCCR in 1963, States have concluded a number of anti-terrorism conventions in which they have included the right of a person suspected of terrorism to have access without delay to the representative of the State of which he is a national. For example, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation

of 1971 provides that "[a]ny person in custody [for the purpose of prosecution or extradition for an offence under the Convention] shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national" (Art. 6, para. 3). Comparable provisions are also found in the Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963 (Art. 13, para. 3), the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 1973 (Art. 6, para. 2), the International Convention against the Taking of Hostages of 1979 (Art. 6, para. 3), the Convention on the Safety of United Nations and Associated Personnel of 1994 (Art. 17, para. 2), the International Convention for the Suppression of Terrorist Bombings of 1997 (Art. 7, para. 3), the International Convention for the Suppression of the Financing of Terrorism of 1999 (Art. 9, para. 3) and the International Convention for the Suppression of Acts of Nuclear Terrorism of 2005 (Art. 10, para. 3). In the present case, Mr. Jadhav was charged with espionage and terrorism. Although they are different crimes, they have in common that the receiving State may be inclined to delay consular access in both cases. The aforementioned conventions nevertheless require that consular access be granted without delay in cases of terrorism. According to the rules of treaty interpretation reflected in the Vienna Convention on the Law of Treaties (VCLT), together with the context, subsequent practice in the application of the treaty (Art. 31 (3) *(b)*) and any relevant rules of international law (Art. 31 (3) *(c)*) should be taken into account, and recourse may be had to supplementary means of interpretation (Art. 32). In my view, the anti-terrorism conventions offer helpful guidance on the practice of the parties to the VCCR in respect of consular access, thus providing additional support for the interpretation that Article 36 of the VCCR requires consular access without delay also for persons suspected of espionage.

III. ARTICLE 73, PARAGRAPH 2, OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

5. Article 73 of the VCCR addresses the relationship between the Convention and agreements concluded between certain of its parties. It deals with *prior* agreements in paragraph 1 and *subsequent* agreements in paragraph 2.

6. Paragraph 1 provides: "The provisions of the present Convention shall not affect other international agreements in force as between States parties to them." Until 1963, when the VCCR was adopted, consular issues were mostly regulated by a network of bilateral agreements whose content varied. The drafters of Article 73, paragraph 1, intended prior international agreements to remain intact. It is clear from this provision that if the VCCR conflicts with a prior agreement, the prior agreement prevails.

7. Paragraph 2 relates to subsequent agreements. Given that consular matters were regulated by bilateral agreements in various ways, the purpose of the VCCR was to set, to the extent possible, uniform and minimum standards on consular relations, especially on the privileges and immunities of consular officers. It is in this context that Article 73, paragraph 2, provides: "Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof." This provision authorizes the parties to the VCCR to conclude subsequent agreements "confirming or supplementing or extending or amplifying" the provisions of the VCCR. Thus, States may conclude agreements which would regulate matters not dealt with by the VCCR or facilitate the application of the VCCR, such as those stipulating the location of consular posts and the number of consular staff. States may also conclude agreements which would raise the standards between them, for example by conferring more extensive privileges and immunities.

8. Article 73, paragraph 2, sets out conditions to be fulfilled by subsequent agreements in order for them to be legitimate under the VCCR. They must only confirm, supplement, extend or amplify the provisions of the VCCR. Subsequent agreements not meeting these conditions are "preclude[d]" by Article 73, paragraph 2. Thus, in accordance with the ordinary meaning to be given to the terms in their context and in the light of the object and purpose of the VCCR, Article 73, paragraph 2, should be interpreted as not allowing the parties to the VCCR to conclude subsequent agreements which would derogate from the obligations of the VCCR.

9. This interpretation of Article 73, paragraph 2, is confirmed by the *travaux préparatoires* of the VCCR. Paragraph 2 has its origin in an amendment to Article 73 proposed by India at the Vienna Conference in 1963. During the discussion, the amendment was understood as limiting "the scope of future agreements to provisions which confirmed, supplemented, extended or amplified those of the multilateral convention" (*Official Records of the United Nations Conference on Consular Relations, Vienna, 4 March-22 April 1963* (United Nations, doc. A/CONF.25/16), Vol. I, p. 235, para. 26 (Chile)). India itself explained that "[a] new convention could supplement, extend or amplify the provisions of the multilateral convention, but it must not reverse those provisions", because "[i]t was undesirable to leave States free to contract out of the basic rules of international law laid down in order to rationalize and harmonize consular law" (*ibid.*, p. 234, paras. 11-12 (India)).

10. Moreover, the interpretation indicated above is in line with the account given by the International Law Commission (ILC) in 1966, three years after the adoption of the VCCR, in its commentary to draft Article 30 of the VCLT. The ILC stated that some clauses inserted in treaties for the purpose of determining the relation of their provisions to those of other treaties entered into by the contracting States, such as "paragraph 2 of article 73 of the Vienna Convention of 1963 on Consular Relations, which recognizes the right to *supplement* its provisions by bilateral agreements, merely confirm the legitimacy of bilateral agreements which do not derogate from the obligations of the general Convention" (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 214, para. 4, emphasis in the original).

11. The VCLT contains Article 30 on the "Application of successive treaties relating to the same subject-matter" and Article 41 on "Agreements to modify multilateral treaties between certain of the parties only". These provisions set forth rules on the relationship between successive treaties relating to the same subject-matter. Article 41, in particular, sheds light on the relationship between a prior multilateral treaty and a subsequent agreement concluded between certain of its parties and on the role that Article 73, paragraph 2, of the VCCR may play in this regard. Thus, Articles 30 and 41 of the VCLT are relevant to the examination of the relationship between the VCCR and the 2008 Agreement. In fact, both Parties in this case referred to Article 41 of the VCLT in their arguments. However, as neither India nor Pakistan is a party to the VCLT, I only mention Articles 30 and 41 of the VCLT in passing and refrain from discussing them in detail in this declaration.

12. A subsequent agreement which derogates from the obligations of the VCCR would not be invalidated because it does not meet the conditions set forth in Article 73, paragraph 2. In the discussion held by the ILC on the effects of subsequent agreements not meeting the conditions stipulated in Article 41 of the VCLT, it was generally agreed that such agreements would not be invalidated. While they are not invalidated, they are inapplicable between the parties concerned. Article 73, paragraph 2, of the VCCR allows only subsequent agreements meeting certain

conditions. A subsequent agreement not meeting those conditions should not prevail over the VCCR. Otherwise, the purpose of limiting the scope of subsequent agreements to those meeting certain conditions would be defeated. Thus, if a subsequent agreement derogates from the obligations of the VCCR, the VCCR prevails over the agreement and is applied to the relations between the parties concerned. These conclusions would also find support in the rules set forth in Article 41 of the VCLT.

13. Accordingly, in my view, even assuming *arguendo* that the 2008 Agreement was intended to allow limitation of consular access in cases of espionage, Article 36 of the VCCR would prevail over the 2008 Agreement and would apply in the relations between India and Pakistan.

(Signed) Yuji IWASAWA.

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 bilateral Agreement on Consular Access (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, 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, 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 a 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 issues by the competent authorities in India?
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> 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?
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> 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?
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> 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 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 up on such a database. Thus I would observe that the frequency with which the individual presented the passport at the immigration counter in India for entry and for exit [Mr. Westgate having earlier observed that it had been used on at least 17 occasions] is very strong supportive evidence of the authentic nature of the passport. In addition, if there were issues concerning the holder of an authentic passport, such as an Interpol I24/7 notice, and Indian central watch-list entry, criminal proceedings, issues relating to identity, these would be very likely to be spotted at the point of encounter with the immigration authorities when the passport was scrutinised by the officials in India. Such officials would be examining hundreds of passports on a daily basis, and would thus have considerably more experience in respect of such documents" (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 magistrate), 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 Gawadar, Pasni, Jeevani and various other installations which are around the coast aims to damage the various 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 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 cooperate 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, p. 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 & 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, p. 10, 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), 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 [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, paragraph 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" (Judgment, paragraph 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 & 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 Pakistan 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 timeframe for consular *notification* is within forty-eight hours of the detention, while the longest is within ten days. The shortest maximum timeframe 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% 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% 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. 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 Treaties '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, p. 240: Twenty-eighth meeting of the First Committee, 25 March 1963, 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 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, paragraph 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.)

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 rights 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 Advisor 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 Practice* (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 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 grant 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" (*ibid.*, 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." (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, 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 organizing 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, paragraph 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 (Art. 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 & 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 the 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, para. 13 (Khan)), paras. 13-14). 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 appropriate 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.