

## 234. JADHAV CASE (INDIA v. PAKISTAN)

### Summary of the Judgment of 17 July 2019

On 19 July 2019, the International Court of Justice delivered its Judgment in the *Jadhav case (India v. Pakistan)*.

The Court was composed as follows: 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.

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#### *Procedural background* (paras. 1-19)

The Court recalls that, on 8 May 2017, the Government of the Republic of India (hereinafter “India”) filed 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 in April 2017. On the same day, India submitted a Request for the indication of provisional measures.

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”.

#### *I. Factual Background* (paras. 20-32)

The Court begins by setting out the factual background of the case. It recalls that 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 and 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.

The Court notes that, 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.

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.

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.

On 23 January 2017, the Ministry of Foreign Affairs of Pakistan sent a “Letter of Assistance for Criminal Investigation against Indian National Kulbhushan Sudhair Jadhav” 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.

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.

On 10 April 2017, Pakistan announced that Mr. Jadhav had been sentenced to death.

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. 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.

## *II. Jurisdiction (paras. 33-38)*

The Court begins by observing that India and Pakistan have been parties to the Vienna Convention since 28 December 1977 and 14 May 1969 respectively and were, at the time of the filing of the Application, parties to the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (hereinafter the "Optional Protocol") without any reservations or declarations. 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."

In the Court's view, the dispute between the Parties 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.

With regard to India's submissions asking 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", 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.

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.

In light of the foregoing, 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 (paras. 39-66)*

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 addresses each of these in turn.

*A. First objection: abuse of process (paras. 40-50)*

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. 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 a constitutional right to lodge a clemency petition. Secondly, Pakistan submits that, prior to 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.

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. 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". Therefore, there is no basis to conclude that India abused its procedural rights when requesting the Court to indicate provisional measures in this case.

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. 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.

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 (paras. 51-58)*

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. 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).

The Court recalls that 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. 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.

In this respect, the Court observes that the evidence before it shows that both Parties have considered Mr. Jadhav to be an Indian national. Consequently, the Court is satisfied that the evidence before it leaves no room for doubt that Mr. Jadhav is of Indian nationality.

Pakistan further refers to various alleged breaches of India's obligations under Security Council resolution 1373 (2001), contending, in particular, that India failed to respond to Pakistan's request for mutual legal assistance with its criminal investigations into Mr. Jadhav's espionage and terrorism activities. 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 aforementioned 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.

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 are addressed when dealing with the merits.

*C. Third objection: India's alleged unlawful conduct (paras. 59-65)*

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*". In particular, 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.

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. The Court therefore concludes that Pakistan's objection based on the said doctrine must be rejected.

With regard to the argument based on a principle to which it refers as "*ex turpi causa [non oritur actio]*", 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.

This 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. In the view of the Court, this principle is inapposite to the circumstances of the present case.

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

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 (paras. 67-124)*

The Court notes that Pakistan advances several contentions concerning the applicability of certain provisions of the Vienna Convention to the case of Mr. Jadhav.

*A. Applicability of Article 36 of the Vienna Convention on Consular Relations (paras. 68-98)*

The Court observes 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 examines each of these arguments in turn.

*(a) Alleged exception to Article 36 of the Vienna Convention based on charges of espionage (paras. 69-86)*

*(i) Interpretation of Article 36 of the Vienna Convention in accordance with the ordinary meaning of its terms (paras. 72-75)*

With regard to Pakistan's first contention, 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.

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.

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.

*(ii) The travaux préparatoires of Article 36 (paras. 76-86)*

In the Court’s view, the *travaux préparatoires* (in particular, the discussions of the International Law Commission in 1960 on the topic of “consular intercourse and immunities” and the discussions at the United Nations Conference on Consular Relations held in Vienna from 4 March to 22 April 1963) serve to confirm the interpretation that Article 36 does not exclude from its scope certain categories of persons, such as those suspected of espionage.

*(b) Alleged espionage exception under customary international law (paras. 87-90)*

Turning to Pakistan’s second argument, 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”. 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 therefore considers that Article 36 of the Convention, and not customary international law, governs the matter at hand in the relations between the Parties.

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.

*(c) Relevance of the 2008 Agreement on Consular Access between India and Pakistan (paras. 91-97)*

The Court next turns to Pakistan’s third contention that the 2008 Agreement governs consular access in the present case.

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. The Court considers that this is not the case.

Moreover, 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.

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.

The Court notes that 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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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 (paras. 99-120)*

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.

- (a) *Alleged failure to inform Mr. Jadhav of his rights under Article 36, paragraph 1 (b)* (paras. 100-102)

With respect to India's first submission, the Court recalls that 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.

- (b) *Alleged failure to inform India, without delay, of the arrest and detention of Mr. Jadhav* (paras. 103-113)

Turning to India's second submission, the Court recalls that 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 considers, 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".

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.

The Court observes that 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. 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.

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.

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.

The Court then proceeds to the second question, that of whether Pakistan informed India of the arrest and detention of Mr. Jadhav. 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. 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.

The Court 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.

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". 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). 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.

*(c) Alleged failure to provide consular access (paras. 114-119)*

The Court then addresses India's third submission concerning the alleged failure of Pakistan to provide consular access to Mr. Jadhav. 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.

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. 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". 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.

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.

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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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 turns to examine Pakistan's contentions based on abuse of rights.

*C. Abuse of rights (paras. 121-124)*

In light of the foregoing, the Court addresses the question 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. 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.

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. 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.

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* (paras. 125-148)

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.

The Court notes that it has already found that Pakistan acted in breach of its obligations under Article 36 of the Vienna Convention: first, by not informing Mr. Jadhav of his rights under Article 36, paragraph 1 (b); secondly, by not informing India, without delay, of the arrest and detention of Mr. Jadhav; and thirdly, by denying access to Mr. Jadhav by consular officers of India, contrary to their right, *inter alia*, to arrange for his legal representation.

The Court considers that the first and third breaches by Pakistan, as just set out, 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).

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. 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.

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 it 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. Thus, the Court finds that these submissions made by India cannot be upheld.

The Court considers the appropriate remedy in this case to be effective review and reconsideration of the conviction and sentence of Mr. Jadhav. The Court notes that Pakistan acknowledges that this is the appropriate remedy in the present case. 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.

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". 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. 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.

The Court considers 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.

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 a decision of the Peshawar High Court in 2018. 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.

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. Nevertheless, freedom in the choice of means is not without qualification. The obligation to provide effective review and reconsideration is an obligation of result which must be performed unconditionally. Consequently, Pakistan shall take all measures to provide for effective review and reconsideration, including, if necessary, by enacting appropriate legislation.

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 the Court’s Judgment.

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Finally, 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. 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.

*OPERATIVE CLAUSE* (para. 149)

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 Jilani.

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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.

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### **Separate opinion of Judge Cançado Trindade**

1. In his separate opinion, composed of 12 parts, Judge Cançado Trindade begins by pointing out that, though he supports the adoption of the present Judgment (of 17.07.2019) of the International Court of Justice (ICJ) in the case of *Jadhav* (India *versus* Pakistan), he follows a reasoning at times clearly distinct from that of the Court. There are some points — he adds — which have not been sufficiently dealt with by the ICJ, or which deserve more attention, and there are even relevant points which have not been considered by the Court. He thus dwells upon them, develops his own reasoning and presents the foundations of his own personal position thereon, grounded above all on issues of principle, to which he attaches much importance, in the search for the realization of justice.

2. He starts by addressing a point that was brought to the attention of the ICJ by the contending Parties, in the course of the present proceedings in the case of *Jadhav*, 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. The Advisory Opinion n. 16 (1999) of the IACtHR upholds the right to information on consular assistance (Article 36 (1) (b) of the Vienna Convention on Consular Relations VCCR) as directly related to the International Law of Human Rights, and in particular to the right to life and the guarantees of due process of law (Articles 6 and 14 of the United Nations Covenant on Civil and Political Rights CCPR).

3. Judge Cançado Trindade then ponders that the IAtCHR thus linked the

right to information on consular assistance to the evolving guarantees of due process of law, and adds that

“its non-observance in cases of imposition and execution of death penalty amounts to an arbitrary deprivation of the right to life itself (...), 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 (...). 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 (...)” (para. 9).

4. The following Advisory Opinion n. 18 (2003) of the IACtHR was 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. Judge Cançado Trindade adds that the IACtHR, as from its earlier and 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” (para. 15).

5. Turning then to the case law of the ICJ itself (cases *LaGrand*, 2001; *Avena*, 2004; and *Jadhav*, 2019), subsequent to the Advisory Opinion n. 16 (1999) of the IACtHR, Judge Cançado Trindade recalls in detail that 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 which, however, has not been taken into account by the ICJ in its three aforementioned Judgments.

6. In these three cases of *LaGrand*, *Avena* and *Jadhav* (paras. 24-26, as to this latter), Judge Cançado Trindade further recalls that the ICJ acknowledged the “individual rights” under Article 36 of the VCCR, but it avoided to consider their character as human rights despite the fact that 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 (CCPR, Articles 6 and 14). Ever since the ICJ’s decisions in the cases of *LaGrand* (2001) and of *Avena* (2004), its attitude of apparent indifference to the legacy of the pioneering contribution of the IACtHR’s Advisory Opinion n. 16 (1999), continuously brought to its attention by the contending Parties, promptly generated strong and reiterated criticism in expert writing (paras. 19, 21 and 23).

7. Judge Cançado Trindade further points out that, ever since the first years of the last decade, “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” (para. 22). Drawing attention to the limitations of the ICJ’s reasoning in the cases of *LaGrand* (2001) and of *Avena* (2004), Judge Cançado Trindade sustains that there is no reason for the ICJ to have adopted its insufficient approach to the matter at issue (also in the present case of *Jadhav*); 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 (paras. 27-31).

8. In Judge Cançado Trindade's understanding, 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. After all, one is here "in the realm not only of the VCCR (Article 36) but also of human rights in general or customary international law"; in his view, "the right to information on consular assistance under the VCCR (Article 36) is an individual right, is undoubtedly interrelated with human rights" (para. 37). In the present case of *Jadhav* (2019) he adds the ICJ should have acknowledged that it has before itself the "ineluctable interrelationship" 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" (para. 42).

9. Judge Cançado Trindade then addresses in detail the trend towards the abolition of the death penalty, as seen nowadays in the *corpus juris gentium* (international treaties and instruments, and general international law) on the wrongfulness in death penalty as a breach of human rights; there is likewise the case law of the IACtHR to this effect (part VII). In logical sequence, he examines in detail (part VIII) the initiatives and endeavours in the United Nations in condemnation of death penalty at world level (e.g. the operation of the Human Rights Committee under the CCPR, of the former United Nations Commission on Human Rights, and of the United Nations Council on Human Rights). And he adds:

"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 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*." (Para. 66.)

10. The following observations by Judge Cançado Trindade focus on the large extent of the harm done to human rights by death penalty; he points out that, in face of this, the ICJ has pursued (as from its own jurisdiction) a very restrictive reasoning. He then warns that it is to be kept in mind that law and justice come together, this being essential when human rights are affected (part IX). The way is then paved for his careful consideration of longstanding humanist thinking, in its denunciation of the cruelty of death penalty as a breach of human rights (part X).

11. Judge Cançado Trindade observes that, underlying the aforementioned *corpus juris gentium* condemning the wrongfulness in death penalty as a breach of human rights,

"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." (Para. 71.)

12. For a long time he continues — humanist thinking has emerged against State arbitrariness in the execution of death penalty, with lucid jurists, philosophers and writers condemning the wrongfulness in death penalty, and converging in making it clear that “law and justice come together, they cannot be separated one from the other”, their interrelationship being ineluctable. It is “necessary to keep this point always in mind, including in our World Court, which is the International Court of Justice” (para. 83).

13. Judge Cançado Trindade then addresses the importance of providing *redress* (part XI). He begins by warning that in order “to keep law and justice together, one cannot accept being restrained by legal positivism: one is to transcend its regrettable limitations” (para. 85). Thus, 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. He adds that no such distortions can be acquiesced with, as positive law cannot prescind from justice.

14. Accordingly — he proceeds — 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. 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). 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 (paras. 86-88).

15. According to Judge Cançado Trindade, 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. “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.

16. Judge Cançado Trindade expresses his concern that the ICJ, though overtaken by uncertainties, nonetheless points to “remedies” essentially at domestic law level, limiting itself to “review and reconsideration” of the death penalty. In Judge Cançado Trindade’s assessment,

“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.” (Para. 93.)

17. Thus, to him, the respondent State’s effective “review and reconsideration” of the death sentence against Mr. K.S. Jadhav cannot constitute again a death sentence. In the understanding of Judge Cançado Trindade, 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. Last but not least, he proceeds, in an epilogue (part XII), to a recapitulation of the points of his personal position sustained in my present separate opinion.

18. In so doing, he underlines that he thus purports herein to make it quite clear that his own understanding goes beyond the ICJ's reasoning. Judge Cançado Trindade adds that, in this understanding (his own), he focuses on the need of 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.

### **Declaration of Judge Sebutinde**

Judge Sebutinde voted with the majority in the operative part (*dispositif*) of the Judgment but is of the view that several aspects in the reasoning of the Court deserved more in-depth explanations to provide the reader with a better understanding of the decision of the Court. The first aspect relates to whether the two passports allegedly found in the possession of Mr. Jadhav upon his arrest, have any bearing on proof of his nationality, for purposes of Article 36 of the Vienna Convention on Consular Relations, 1963 ("Vienna Convention"). Judge Sebutinde concludes that the issue of Mr. Jadhav's nationality for purposes of consular access under Article 36 of the Vienna Convention should not be confused with his identity.

The second aspect relates to the applicability of Article 36 of the Vienna Convention to persons suspected of espionage or terrorism, in light of the provisions of the bilateral Agreement on Consular Access concluded by India and Pakistan on 21 May 2008 ("the 2008 Agreement"). Applying the customary rules of international law applicable to the interpretation of treaties and analysing the context and *travaux préparatoires* of the 2008 Agreement, Judge Sebutinde reaches the conclusion that the Parties did not intend to exclude persons accused of espionage or terrorism, from the right to consular access. Paragraph (vi) of the 2008 Agreement permits the receiving State to examine, when determining the release and repatriation of a person "arrested, detained or sentenced on political or security grounds", to examine each case on its own merits. The paragraph does not displace or derogate from the rights and privileges envisaged in Article 36 of the Vienna Convention.

The third aspect relates to the impact of domestic law on the right of consular access under the Vienna Convention. While she agrees that the exercise of the right to consular access should be done in accordance with the domestic laws of the receiving State, as provided for in Article 5 (*i*) and (*m*) and Article 36 (2) of the Vienna Convention, Judge Sebutinde underlines the proviso to Article 36 (2), which enjoins the receiving State to ensure that its domestic laws and regulations, in turn, enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

### **Declaration of Judge Robinson**

1. In his declaration, Judge Robinson examines two areas. First, the relationship between the Vienna Convention on Consular Relations (“the Vienna Convention”) and the International Covenant on Civil and Political Rights (“the Covenant”) and second, the 2008 Agreement on Consular Access between India and Pakistan in light of Article 73 (2) of the Vienna Convention.

2. In respect of the first, he advances several propositions regarding the relationship between the Vienna Convention and the Covenant, arguing that there is a strong and meaningful legal connection between Article 36 of the Vienna Convention and Article 14 of the Covenant. Those propositions may be summarized as follows:

- (1) There is a legal connection between Article 36 of the Vienna Convention and Article 14 of the Covenant that may impact the issue of the Court’s jurisdiction.
- (2) The Covenant, being a human rights treaty, is a leading conventional instrument for the protection of the rights of the individual.
- (3) The rights in Article 14 of the Covenant apply to “everyone” including persons in a foreign country and apply in full equality so 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.
- (4) The bundle of rights in Article 14 (3) of the Covenant comprises “minimum guarantees” and is not an exhaustive list of those rights.
- (5) 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.
- (6) The rights to consular access and protection under Article 36 of the Vienna Convention is as much a human right as any of the seven rights in Article 14 (3) of the Covenant.
- (7) 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.
- (8) 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 other mentioned treaties therein have passed into customary international law.
- (9) 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, ensures for the benefit of the foreign national in prison, custody or detention who may be in need of legal representation in a forthcoming trial. 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.

- (10) It is difficult to accept the submission that "unlike legal assistance, consular assistance is not regarded as a predicate to a criminal proceeding".
- (11) 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", reflected in Article 31 (3) (c) of the Vienna Convention on the Law of Treaties; and
- (12) 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).

3. In respect of the second, Judge Robinson examines the 2008 Agreement and argues that the issue as to whether the 2008 Agreement is consistent with Article 73 (2) of the Vienna Convention is not resolved by presuming that the Parties must have intended the 2008 Agreement to be consistent on the ground that they were aware of the provisions of the 2008 Agreement. At most, any such presumption would be rebuttable and is rebutted by point (vi) of the Agreement.

### **Declaration of Judge Iwasawa**

1. While Judge Iwasawa agrees with the findings of the Court, he wishes to offer additional explanations for his support of the findings and set forth his views on some issues not dealt with by the Court in the Judgment.

2. In the circumstances of the present case, Judge Iwasawa agrees that Pakistan's objection based on the clean hands doctrine does not by itself render India's Application inadmissible. In his view, an objection based on the clean hands doctrine may make an Application inadmissible only in exceptional circumstances.

3. With respect to the right to consular access, Judge Iwasawa points out that subsequent to the conclusion of the Vienna Convention on Consular Relations in 1963 ("Vienna Convention"), States have concluded a number of anti-terrorism conventions in which they have included the right of a person suspected of terrorism to have consular access without delay. In his view, while terrorism and espionage are

different crimes, these anti-terrorism conventions provide additional support for the interpretation that Article 36 of the Convention requires consular access without delay also for persons suspected of espionage.

4. As regards the relationship between the Vienna Convention and the 2008 Agreement, Judge Iwasawa recalls that the purpose of the Vienna Convention was to set, to the extent possible, uniform and minimum standards on consular relations. He considers that Article 73, paragraph 2, of the Vienna Convention does not allow the parties to the Convention to conclude agreements which would derogate from the obligations of the Convention. If a subsequent agreement derogates from the obligations of the Convention, that agreement is inapplicable and the Convention applies to the relations between the parties concerned. Accordingly, in his view, even if the 2008 Agreement was intended to allow limitation of consular access in case of espionage, Article 36 of the Vienna Convention would prevail over the 2008 Agreement and would apply in the relations between India and Pakistan.

#### **Dissenting opinion of Judge *ad hoc* Jillani**

Judge *ad hoc* Jillani considers 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 his view, India's reliance on the Vienna Convention on Consular Relations ("Vienna Convention") in the present case is misplaced and subverts the very object and purpose of that instrument. 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 its drafters 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). Mr. Jadhav was in possession of an authentic Indian passport with a false Muslim identity, namely Hussein Mubarak Patel. Even the three renowned Indian journalists, namely Mr. Karan Thapar, Mr. Praveen Swami and Mr. Chandan Nandy, debunked the Government's defence on the passport issue. Mr. Jadhav made a confession before a magistrate in which he admitted to have organized and executed acts of terror causing loss of lives and property, at the behest of RAW. By ignoring this aspect, the Court's Judgment sets a dangerous precedent in a time in which States are increasingly confronted with transnational terrorist activities and impending threats to national security. Terrorism has become a systemic weapon of war and nations that ignore it, do so 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, in the bilateral relations between any two States at any given time.

Despite Pakistan's several requests, India did not assist with the investigation of the case, which is in violation of the United Nations Security Council resolution 1373 that enjoins Member States to provide assistance in connection with any criminal investigation relating to the financing or suppression of terrorist acts.

According to Judge *ad hoc* Jillani, 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 ignored the legal effect of the 2008 Agreement and specifically its point (vi), which provides that “[i]n case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits”. In his view, by concluding the 2008 Agreement, the Parties 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”. This provision is further consistent with customary international law, which provides for an exception to consular access and assistance in respect of the nationals of the sending States that have engaged in espionage and terrorist activities in the receiving State.

Judge *ad hoc* Jilani also regrets that the Court did not take into account the rather strained historical and political context which has defined the diplomatic relations between the two countries and despite which they executed the 2008 Agreement. In its Memorial, India itself referred to a press briefing by a Pakistani spokesman on human rights violations in Kashmir. The underlying cause of the increasing public unrest in Kashmir, which has also marred the relations between the two neighbouring countries, is the non-implementation of United Nations Security Council resolution 47 of 1948, which, *inter alia*, mandated the holding of a plebiscite in order to decide the future of Kashmir. The situation was further confounded by acts of terror perpetrated by non-State actors and led to the exchange of allegations and counter-allegations of interference. Sometimes nationals of either country cross borders inadvertently and sometimes they are arrested in cases which have a “political” or a “security” dimension. Such incidents need to be investigated and each State may be sensitive about providing either immediate consular access or release. As the Vienna Convention 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[ing]” and “amplify[ing]” its provisions. The case of Mr. Jadhav is a classic example of the kind of situations/cases both countries had in mind when inserting point (vi) in the 2008 Agreement.

Even if the Vienna Convention is applicable to the case of Mr. Jadhav, Judge *ad hoc* Jilani is of the view that Pakistan’s conduct does not constitute a breach of its obligations under paragraph 1 of Article 36 thereof. Having regard to the seriousness of the 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, as well as India’s consistent non-co-operation in the investigation, Judge *ad hoc* Jilani is of the view that Pakistan’s conduct does not constitute a breach of Article 36, paragraph 1, of the Vienna Convention.

Finally, Judge *ad hoc* Jilani considers that the existing judicial review procedures in Pakistan already substantially respond to the relief ordered by the Court. In his view, noting that Pakistan should, if necessary, adopt appropriate legislation for effective review and reconsideration, is uncalled for and the Court’s reasoning deviates from its existing jurisprudence. It sets a dangerous precedent of dictating to the States the ways in which they must perform their obligations.

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