Non corrigé
Uncorrected

CR 2019/1

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Monday 18 February 2019, at 10 a.m., at the Peace Palace,

President Yusuf presiding,

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

VERBATIM RECORD

ANNÉE 2019

Audience publique

tenue le lundi 18 février 2019, à 10 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

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

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Bennouna
		Cançado Trindade
		Donoghue
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Crawford
		Gevorgian
		Salam
		Iwasawa
	Registrar	Couvreur

Présents : M. Yusuf, président
Mme Xue, vice-présidente
MM. Tomka
Abraham
Bennouna
Cançado Trindade
Mme Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford
Gevorgian
Salam
Iwasawa, juges

M. Couvreur, greffier

The Government of the Republic of India is represented by:

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

as Agent;

Mr. V. D. Sharma, Additional Secretary, Ministry of External Affairs,

as Co-Agent;

Mr. Harish Salve, Senior Advocate,

as 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 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.

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

Mr. Anwar Mansoor Khan, Attorney General for 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 Netherlands;

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

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

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

comme agent ;

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

comme coagent ;

M. Harish Salve, avocat principal,

comme conseil ;

S. Exc. M. Venu Rajamony, ambassadeur de la République de l'Inde auprès du Royaume des Pays-Bas ;

M. Luther M. Rangreji, conseiller à l'ambassade de l'Inde aux Pays-Bas,

comme conseiller ;

Mme Chetna N. Rai, avocate,

Mme Arundhati Dattaraya Kelkar, avocate,

comme conseils auxiliaires ;

M. S. Senthil Kumar, conseiller juridique au ministère des affaires étrangères,

M. Sandeep Kumar, *Deputy Secretary* au ministère des affaires étrangères,

comme conseillers.

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

M. Anwar Mansoor Khan, *Attorney General* du Pakistan,

comme agent ;

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

comme coagent ;

S. Exc. M. Shujjat Ali Rathore, ambassadeur de la République du Pakistan auprès du Royaume des Pays-Bas ;

Mme Fareha Bugti, directrice au ministère des affaires étrangères ;

M. Junaid Sadiq, premier secrétaire à l'ambassade du Pakistan aux Pays-Bas ;

M. Kamran Dhangal, directeur adjoint au ministère des affaires étrangères ;

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

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 English Bar,

as Legal Counsel and Advocate;

Ms Catriona Nicol, Associate, McNair Chambers,

as Junior Counsel;

Mr. Joseph Dyke, Associate, McNair Chambers,

as Legal Assistant;

Brigadier (rtd.) Anthony Paphiti,

Colonel (rtd.) Charles Garraway, CBE,

as Legal Experts.

M. Ahmad Irfan Aslam, chef du service chargé des différends internationaux au bureau de l'*Attorney General* ;

Mian Shaoor Ahmad, consultant auprès du bureau de l'Attorney General ;

M. Tahmasp Razvi, bureau de l'*Attorney General* ;

M. Khurram Shahzad Mughal, consultant adjoint auprès du ministère de la justice ;

M. Khawar Qureshi, QC, membre du barreau d'Angleterre,

comme conseil juridique et avocat ;

Mme Catriona Nicol, avocate, McNair Chambers,

comme conseil juridique auxiliaire ;

M. Joseph Dyke, avocat, McNair Chambers,

comme assistant juridique ;

le général de brigade Anthony Paphiti (e.r.),

le colonel Charles Garraway (e.r.) (CBE),

comme experts juridiques.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the oral arguments of the Parties in the *Jadhav* case *(India* v. *Pakistan)*. For reasons duly made known to me, the *ad hoc* Judge, designated by Pakistan to sit in the case, Mr. Tassaduq Hussain Jillani, is unable to sit with us during this session.

I will now recall the principal steps of the procedure in this case.

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

In its Application, India sought 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.

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.

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."

The Court 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".

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.

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.

*

After ascertaining the views of the Parties, the Court decided this morning, pursuant to Article 53, paragraph 2, of its Rules, that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings. Further, in accordance with the Court's practice, the pleadings and documents annexed will be put on the Court's website from today.

*

I note the presence at the hearing of the Agents, counsel and advocates of both Parties. In accordance with the arrangements for the organization of the proceedings which have been decided by the Court, the hearing will comprise a first and a second round of oral argument. The first round of oral argument will begin this morning, with the statement of the Republic of India, and will close tomorrow, Tuesday 19 February 2019, following Pakistan's first round of oral pleading. Each Party has been allocated a period of three hours for the first round. The second round of oral argument will begin on the afternoon of Wednesday 20 February and come to a close on the following day, Thursday 21 February 2019. Each Party will have a maximum of one and a half hours to present its reply.

I will now give the floor to the Agent of India, Dr. Deepak Mittal. You have the floor, Sir.

Mr. MITTAL: Thank you very much, Mr. President.

1. Mr. President and honourable Members of the Court, it is a great honour for me to once again appear today before this august Court on behalf of the Republic of India as India's Agent, at the oral proceedings of the *Jadhav* case.

2. This case concerns an Indian national, Mr. Kulbhushan Sudhir Jadhav (hereinafter "Mr. Jadhav"), who has been awarded death sentence through a farcical trial by a military court in Pakistan in egregious violation of the rights of consular access guaranteed under the Vienna Convention on Consular Relations, 1963 (hereinafter "Vienna Convention").

3. I express India's gratitude to the Court for its kindness in convening at short notice for deciding the Application for indication of provisional measures requested by India vide its Order of 18 May 2017 in this case. The Court's Order saved imminent threat to the life of an innocent Indian

national. It provided succour to India, its beleaguered national, his family. It has also given hope for justice to 1.3 billion people of India.

4. India has brought the case against Pakistan before this Court for violation of the Vienna Convention, based on the jurisdiction of this Court under Article 40, paragraph 1, of the Statute of the Court**,** read with Article 38 of the Rules of the Court, and Article 1 of the Optional Protocol to the Vienna Convention.

5. First, I take this opportunity to introduce the members of the Indian delegation. They are:

(i) Mr. Vishnu Dutt Sharma, Co-Agent for the Republic of India;

(ii) Mr. Harish Salve, Senior Counsel;

(iii) H. E. Mr. Venu Rajamony, Ambassador of India to the Netherlands;

(iv) Mr. Luther Rangreji, Counsellor, Embassy of India, The Hague, Adviser;

(v) Ms Chetna N. Rai, Junior Counsel;

(vi) Ms Arundhati D. Kelkar, Junior Counsel;

(vii) Mr. S. Senthil Kumar, Adviser;

(viii) Mr. Sandeep Kumar, Adviser.

6. Mr. President and honourable Members, India has in the written pleadings, comprising of the Memorial and the Reply, fully narrated the facts of the case. The issues of jurisdiction; the points of international law; the opaqueness of Pakistan's military court system; and other related matters have been presented in detail in our written submissions to this Court. These would be elaborated upon by the Counsel of India.

7. I take this opportunity to once again raise the issue of the conduct of Pakistan during the course of this case. This includes the breach of the letter and spirit of the decision of the Court and the violation of the confidentiality clause under Article 53, paragraph 2, of the Rules of Court that were brought out in my letter to the Court on 15 February 2019. I am confident that the Court would not allow Pakistan to put aside the seriousness of the matter where the life of an innocent Indian national is at stake and continue to indulge in its false and malicious propaganda.

8. I would now request the Court to invite the Counsel of India, Mr. Harish Salve, to elaborate on India's case and arguments.

Thank you.

The PRESIDENT:

I thank the Agent of India for his statement and I now invite Mr. Salve to take the floor. You have the floor.

Mr. SALVE:

OVERVIEW

1. Honourable Mr. President and honourable Members and Judges of this Court, I am grateful for the privilege of appearing in this Court once again and consider myself deeply honoured at this opportunity to present India's case before you in this unfortunate matter relating to the life of an innocent Indian. This case arises out of an Application filed by India under Article 40, paragraph 1, of the Statute of the Court and Article 38 of the Rules read along with Article 1 of the Optional Protocol concerning the Compulsory Settlement of Disputes (Optional Protocol) done at Vienna on 24 April 1963.

2. The basis for the Application — and on which India is pursuing the reliefs which are articulated in its Memorial — is an egregious violation of the Vienna Convention on Consular Relations, 1963 which I shall be referring to as the Vienna Convention.

3. The case is simple. Shorn of the irrelevancies sought to be injected, there are two broad issues that arise in this case.

4. The first issue relates to the construction of the Vienna Convention, and particularly Article 36 of the Convention, and its application to the facts of the case. On this, the admitted position being that consular access was not granted, if Pakistan's strange defence of exclusion of such cases is not accepted, then it has to be found that Pakistan is in egregious breach of the Vienna Convention.

5. The second relevant issue then is the relief to be granted in this case. The *Chorzów Factory*[1] principle of *restitutio in integrum* is now the settled basis for relief. The only issue is whether the past precedents of this Court relating to a violation of the Vienna Convention, which granted relief by way of review and reconsideration have laid down an inflexible rule that has to be

[1] Case concerning *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17.*

followed in all situations. India says that this Court would have to decide whether this rule can apply to military courts like the Pakistani military courts, and whether courts that do not rise to the standards of due process can be the repository of faith of the kind that this Court reposed in the American criminal justice system in *Avena*[2] and *LaGrand*[3].

6. Finding itself bereft of any substantive defence, Pakistan has raised a host of issues which do not have any real relevance to these proceedings.

7. On the issue of construction, Pakistan seeks to run one and only one defence. For diverse reasons, it suggests that despite the plain language of Article 36, it stands jettisoned when the host State alleges espionage and national security. Its submissions run counter even to the authorities it chooses to cite.

8. Pakistan runs unmeritorious defences under the chapeau of *abuse of process, abuse of rights* and of *ex turpi causa*. It misstates the law, it misreads commentaries. It relies on material that is not recognized as having any precedential value.

9. Finally, having failed in its propaganda against India as a feeble attempt to counter global criticism of its role in cross-border terrorism, Pakistan seeks to raise issues such as India's refusal to allow it to indulge in a freewheeling enquiry into high functionaries without even disclosing the fundamental elements of the alleged offences that are to be investigated, and of passports that it allegedly has seized. It is India's case that none of these issues call for resolution and decision by this Court.

10. In the structure of my speech I will first focus on the relevant issues. The relevant issues are, first, the construction of the Vienna Convention. The second is applying its language, to the conduct of Pakistan which leads us to the step of deciding the appropriate relief to be granted.

11. I will also make submissions on the evolving jurisprudence in this area of the law, and of the role of Article 36 in the rubric of due process.

12. I will then deal with the defences run by Pakistan . . .

The PRESIDENT: There appears to be a problem with the microphone.

---

[2] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I),* p. 12.

[3] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 466.

Mr. SALVE: It has gone off. Now it has come on.

The PRESIDENT: Okay. Go ahead.

Mr. SALVE: I will resist the temptation to engage with the allegations being made as to the passport issue and the legal assistance issue beyond saying that it would really be for this Court to decide in the first instance to what extent Pakistan should be allowed to use these hearings as a platform for propaganda, without establishing the legal relevance of these wanton allegations.

13. Pakistan is obviously embarrassed to disclose the judgment given in Mr. Jadhav's case and the specific charges and the evidence against him, while the statement of the Adviser on Foreign Affairs to the Prime Minister's Office of Pakistan makes a slew of allegations against Mr. Jadhav in relation to incidents that date back to 2014-2015. The Pakistan story has always been strong on rhetoric and blurry on facts.

14. India therefore seeks relief by way of declaring that the trial by the military court in Pakistan, in the facts and circumstances, hopelessly fails to satisfy even minimum standards of due process and being violative of Article 36 of the Vienna Convention, it should be declared unlawful. Mr. Jadhav's continued custody without consular access should be declared unlawful. And, amongst other things, considering the trauma to which he has been subjected for over three years, it would be in the interest of justice, of making human rights a reality, to direct his release.

JURISDICTION

15. India invokes the jurisdiction of the Court based on Article 36, paragraph 1, of the Statute of the Court and Article 1 of the Optional Protocol. India and Pakistan have accepted the Vienna Convention and the Optional Protocol without any reservations.

16. At the hearing on the Request for provisional measures, Pakistan maintained that the jurisdiction of the Court is excluded by a number of reservations in the Parties' declarations under Article 36, paragraph 2, of the Statute. It does not pursue this in the Counter-Memorial.

17. The Optional Protocol, read with Article 36, paragraph 1, confers jurisdiction upon the Court to remedy the violations of the Vienna Convention.

18. One of the defences raised by Pakistan is that India's failure to explore the remedy of arbitration and conciliation under Article II and Article III of the Optional Protocol constitutes an abuse of process. India disagrees. This Court in the *Tehran*[4] case has held that Article II and Article III are not preconditions for the applicability of Article 1. On the facts of this case, this defence is facially farcical.

FACTUAL BACKGROUND

19. I shall first set out the facts on which India claims that a violation has been established, and indicate the areas of differences in their context.

20. Pakistan asserts that an Indian national, Mr. Kulbhushan Sudhir Jadhav (Mr. Jadhav) was "arrested" on 3 March 2016. This is the publicly stated position taken by Pakistan.

21. India claims that there is evidence to suggest that he was abducted and found himself in the custody of Pakistan Security Forces from at least 3 March 2016. A statement made by the Honourable Minister for External Affairs in Parliament in India sets out India's position on this matter, and I shall refer to it in the chronology. For maintaining simplicity in the narrative, I shall use the word "arrest" without accepting the lawfulness of his detention.

22. On 25 March 2016[5], India was informed of this so-called "arrest", when the Foreign Secretary raised the matter with the Indian High Commissioner in Islamabad. Pakistan issued a *demarche* making allegations of an illegal entry of a RAW officer and his alleged involvement in subversive activities.

23. On that very day, 25 March 2016[6], India sought consular access to Mr. Jadhav.

24. Pakistan notified the P5 States of his arrest on that very day[7] and created a 12-page document making allegations against India. It publicly aired a video that purported to be a recording of his so-called confession by Mr. Jadhav. Some significant facts emerge from this document produced by Pakistan:

---

[4] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, paras. 48-49.

[5] Counter-Memorial of Pakistan (CMP), Ann. 11.

[6] Memorial of India (MI), Ann. 1.1.

[7] CMP, Ann. 12.

(a) It states that security forces apprehended Mr. Jadhav. It is a fair assumption that he has continued since his detention in the custody of Pakistan's security forces.

(b) The document does not indicate the date of his apprehension — it mentions "first week of March 2016".

(c) It states that: "The Agent has confessed." It is obvious that soon after his arrest and in the custody of security forces, a confession was extracted. Information subsequently made available by Pakistan establishes that a First Information Report — the acronym for which in India and Pakistan is "FIR" — under the Pakistan Code of Criminal Procedure, 1898 was registered as late as 8 April 2016, and that, under the Code, the FIR marks the commencement of an investigation into a crime. But, the confession obtained on 25 March 2016 before the FIR was used as a propaganda measure and its paraphrase finds place in the document circulated to the P5 countries.

(d) The document notes that this gentleman had been "operating . . . as a businessman in Chahbahar".

(e) It alleges Mr. Jadhav crossed over from Iran to Balochistan.

(f) The document alleges that he is a commander in the Indian Navy. It concludes by making serious allegations against India of "State Sponsored Terrorism" and of repeating its efforts of 1971 in Balochistan. You will be surprised to find, despite all of this, towards the end of their Counter-Memorial, one of the defences that India has not established is his nationality.

25. There is no manner of doubt that Pakistan was using this as a propaganda tool.

26. Pakistan was bound to grant consular access, without delay. India's request for access did not evoke any response. In paragraph 9 of its Memorial India asserts that Pakistan's conduct suggests that even Mr. Jadhav was not informed of his right to consular access, and this is not contradicted in the Counter-Memorial.

27. On 30 March 2016[8] India reminded Pakistan of its request for consular access and received no reply to this communication. Thirteen reminders were sent by India on various dates, and I will deal with them in my narrative.

[8] MI, Ann. 1.2.

28. Pakistan acknowledges that as early as 30 March 2016, the Indian High Commission in Islamabad sent a Note Verbale to Pakistan's Minister for Foreign Affairs requesting consular access. Pakistan obviously had no difficulty in recognizing that the request related to Mr. Jadhav.

29. India has no papers or authentic information of what happened in Pakistan. The information in public domain in relation to Mr. Jadhav's alleged arrest and trial was first found in the statement of Mr. Sartaj Aziz made on 14 April 2017[9]. The public announcement by the Adviser to the Prime Minister sets out the steps that led to Mr. Jadhav's conviction and the award of a death sentence.

30. Assuming them to be correct, my narrative will set out the course of events which follow.

31. On 8 April 2016[10], as I said, an FIR was allegedly registered.

32. On 15 April 2016[11] Pakistan notified envoys of members of the Arab League and of the Association of South East Asian Nations (ASEAN), who were also "briefed".

33. After the registration of the FIR, Mr. Jadhav was supposedly interrogated on 2 May 2016, and then again on 22 May 2016[12].

34. India sent a reminder (the first reminder) for consular access on 6 May 2016[13]. The second reminder was on 10 June 2016[14] and the third reminder on 11 July 2016[15].

35. Proceedings appear to have continued in the meanwhile in Pakistan, and on 12 July 2016[16], a "joint investigation team" was allegedly constituted. The steps taken by this so-called joint investigation team including any further interrogation of Mr. Jadhav is not known.

36. The press statement states that a "confessional statement" was recorded under Section 164 of the Pakistan Code of Criminal Procedure[17].

---

[9] MI, Ann. 6.

[10] CMP, Ann. 17, p. 7.

[11] CMP, Ann. 16.

[12] MI, Ann. 6.

[13] MI, Ann. 1.3.

[14] MI, Ann. 1.4.

[15] MI, Ann. 1.5.

[16] MI, Ann. 6.

[17] MI, Ann. 6.

37. In the meanwhile, India continued to remind Pakistan of its request for consular access and sent a fourth reminder on 26 July 2016[18] and a fifth reminder on 22 August 2016[19].

38. On 6 September 2016[20], it appears that a supplementary FIR was registered. Purportedly basing itself on the alleged confessional statement, the supplementary FIR named high functionaries in India, along with other persons connected to smuggling syndicates on the allegation that these were Mr. Jadhav's "handlers' organisation/person/accomplices and facilitators".

39. On 21 September 2016[21] it appears that the first hearing of the field general court martial (FGCM) was held. On 24 September[22] the summary of evidence was recorded.

40. India sent Pakistan a *sixth* reminder for consular access on 3 November 2016[23]. Even this received no reply.

41. The next FGCM proceedings appear to have been held on 29 November 2016[24].

42. On 19 December 2016[25], India sent a *seventh* reminder to Pakistan for consular access, but there was again no response.

43. On 2 January 2017[26], the Adviser to the Prime Minister, Mr. Sartaj Aziz, wrote to the Secretary-General of the United Nations stating that the law enforcement agencies had "apprehended an agent of the Indian intelligence", and that Mr. Jadhav had made a confessional statement admitting his involvement in "activities aimed at destabilising Pakistan". It went on to add that "the arrest of Kulbhushan Jadhav and his confessional statement has vindicated Pakistan's long-standing position that India is involved in activities at destabilising Pakistan". It invited the United Nations and its bodies to "play their role in restraining India from these activities".

---

[18] MI, Ann. 1.6

[19] MI, Ann. 1.7.

[20] CMP, Ann. 17, p. 11.

[21] MI, Ann. 6.

[22] MI, Ann. 6.

[23] MI, Ann. 1.8.

[24] MI, Ann. 6.

[25] MI, Ann. 1.9.

[26] CMP, Ann. 15.

44. On 23 January 2017[27] Pakistan sent a Note Verbale without seeking assistance in what they call "the investigation of case registered vide FIR numbers 06/2016 dated 8 April 2016 and 22/2016 dated 6 September 2016, in police station CTD Balochistan against an Indian national". The letter of assistance that was attached stated that during the process of investigation and interrogation, Mr. Jadhav had revealed the names of his so-called handlers and it sought India's assistance in obtaining statements of high functionaries and other named officials of the Indian Naval service. Surprisingly, it also sought assistance in obtaining the evidence of Mr. Jadhav's wife. It sought assistance in coercive steps such as searching Mr. Jadhav's house, a certified record of his cell phone for the last 10 years and certified copies of his bank accounts in his and his family's name. It attached a number of documents such as the FIRs et cetera[28].

45. On 3 February 2017[29], India by its Note Verbale reminded Pakistan for the eighth time, of its request to provide immediate consular access to Mr. Jadhav. It expressed deep concern over the continued denial of consular access and about Mr. Jadhav's treatment in Pakistan's custody "especially his coerced purported confession and the circumstances of his presence in Pakistan [which] remain unexplained".

46. It appears that the trial was concluded on 12 February 2017[30].

47. India sent a ninth reminder on 3 March 2017[31] for consular access.

48. On 21 March 2017[32], Pakistan replied to the communication of 3 March stating that "the case for the consular access to the Indian national Kulbhushan Jadhav shall be considered in the light of Indian sides response to Pakistan's request for assistance in investigation process and early dispensation of justice". The Court would have noticed that the trial already had concluded on 12 February 2017.

---

[27] MI, Ann. 2.

[28] CMP, Ann. 17.

[29] MI, Ann. 1.10.

[30] MI, Ann. 6.

[31] MI, Ann. 1.11.

[32] MI, Ann. 3.

49. On 31 March 2017[33], India replied to Pakistan's communication of 21 March 2017 pointing out that consular access would be an essential prerequisite to verify the facts and understand the circumstances of Mr. Jadhav's presence in Pakistan and for the tenth time, requested immediate consular access.

50. A press release was issued by the "Inter-Services Public Relations Pakistan" on 10 April 2017[34] which announced that Mr. Jadhav had been tried by the FGCM under the Pakistan Army Act and awarded the death sentence, and that on that day the Chief of Army Staff had confirmed the death sentence awarded to him. It stated that "The accused was provided with defending officer as per legal provisions". No lawyer.

51. Pakistan by its communication of 10 April 2017[35], responded to India's Note Verbale of 31 March 2017, repeating that the case for consular access "shall be considered" in the light of India's response to Pakistan's request for assistance in the investigation process which was pending with the Indian side.

52. India responded by its Note Verbale[36] of the same date protesting that despite repeated requests access had not been permitted and pointed out that in any event the offer of consular access after his death sentence had been awarded and confirmed, appeared farcical.

53. A statement was made in the Indian Parliament by the Honourable Minister of External Affairs on 11 April 2017[37] setting out the position of the Government of India. The statement described him as a "kidnapped Indian" and a "victim of a plan that seeks to cast aspersions on India to deflect international attention from Pakistan's well-known record of sponsoring and supporting terrorism".

54. On 14 April 2017[38], the Adviser to Pakistan's Prime Minister on Foreign Affairs, Mr. Sartaz Aziz, issued his press statement. The statements of significance to the present case are as follows:

---

[33] MI, Ann. 1.12.

[34] MI, Ann. 4.

[35] MI, Ann. 5.

[36] MI, Ann. 1.13.

[37] CMP, Ann. 21.

[38] MI, Ann. 6.

(a) Mr. Jadhav, "a serving Commander of Indian Navy, and working with the Indian Intelligence Agency/RAW" was apprehended on 3 March 2016 after he illegally crossed over into Pakistan from the Saravan border in Iran.

(b) He said that he was tried by Field General Court Martial (FGCM) under Section 59 of Pakistan Army Act (PAA) 1952 and Section 3 of Official Secret Act of 1923.

(c) Mr. Jadhav was "provided with a legal counsel in accordance with [our] provisions of law", he said.

(d) He said Mr. Jadhav "confessed before a Magistrate and the Court that he was tasked by the Indian Intelligence Agency, RAW, to plan, coordinate and organise espionage and sabotage activities aimed at destabilising and waging war against Pakistan".

(e) Unsurprisingly, the court found Mr. Jadhav guilty, as it has found many others. The espionage case against Mr. Jadhav was tried by the FGCM and concluded under the Pakistan Army Act and the Official Secret Act.

(f) His sentence for espionage was endorsed on 10 April 2017.

(g) The steps (which as per this press statement) were taken to ensure transparency were:

(i) his confessional statement was recorded before a Magistrate under Section 164 of the CrPC. This was of course much later after his first confession had already been aired to the world.

(ii) A law qualified field officer was provided to defend him throughout the court proceedings.

(iii) All statements of witnesses were recorded under oath, in the presence of the accused, and in the court Mr. Jadhav was allowed to ask questions from the witnesses.

(iv) During the trial, a fully qualified law officer of the Judge Advocate General (JAG) Branch remained a part of the court.

(h) It went on to assert, and something which will be relevant for the final relief, that all political parties are unanimous that the award of the death penalty awarded to a foreign spy is the correct decision. The whole nation is solidly united against any threat to Pakistan's security.

55. On 14 April 2017[39] India sought consular access for the fourteenth time, and also sought certified copies of charge sheet and the judgment of the Military Court. These have not ever been furnished by Pakistan.

56. On 19 April 2017[40], the Government of India again requested the Government of Pakistan for handing over certified copies of the charge sheet, proceedings of the court of enquiry. They were requested to share the procedure for appeal to the relevant court, to facilitate the appointment of a defence lawyer, to facilitate the contact with the High Commission of India in Islamabad and to issue appropriate visas to family members to travel to Pakistan. For the thirteenth time, Pakistan was again requested to provide consular access.

57. On 20 April 2017[41] a spokesperson for Pakistan held a press briefing in which he mentioned that "regarding consular access we have said this earlier also that we have a bilateral agreement on consular access and according to Article IV, in all such cases as the one of Commander Kulbhushan the request of this nature would be decided on the basis of merits". This statement by the spokesperson is not reflected in any of the communications sent by Pakistan to India.

58. On 26 April 2017 India handed over an appeal and a petition on behalf of the mother of Mr. Jadhav, for being filed with the concerned authorities in Pakistan[42].

59. On 27 April 2017[43], the Honourable Minister of External Affairs of India wrote a letter to the Adviser to the Prime Minister of Pakistan requesting him for certified copies of the charge sheet, proceedings of the court of enquiry, the summary of evidence in the case, the judgment etc. No reply was received to this letter.

60. It was in these circumstances that India made its Application on 8 May making a Request for indication of provisional measures. On 18 May[44] this Court made the Order indicating the provisional measures.

---

[39] MI, Ann. 1.14.

[40] MI, Ann. 1.15.

[41] MI, Ann. 9.

[42] MI, Ann. 1.16.

[43] MI, Ann. 8.

[44] CMP, Anns. 6-8.

61. On 19 June 2017[45], India responded to the request for assistance in investigation. It pointed out that not only had Mr. Jadhav been denied consular access, but no credible evidence had been provided by Pakistan to show his involvement in any act of terrorism and his purported confession clearly appeared to be coerced. There were no details of the so-called trial being made available to India. India reminded Pakistan that it is the Government of Pakistan which had not ratified the SAARC Convention on Legal Assistance in Criminal Matters, 2008 and had not responded to initiatives in the past to conclude a bilateral Mutual Legal Assistance Treaty. India accordingly returned the letter of 23 January 2017.

62. On 22 June 2017[46] a press release by the Pakistan Inter Services Public Relations stated that the Military Appellate Court had rejected Mr. Jadhav's appeal, and that Mr. Jadhav had made a mercy petition to the Chief of Army Staff, and if rejected he could appeal to the Pakistan President for clemency. Yet another confessional video (purportedly made in April 2017) was also made public.

63. On 30 August 2017[47], Pakistan responded to the communication of 19 June by which the request for mutual legal assistance had been declined. Being faced with no mutual legal assistance treaty, Pakistan now claimed that the United Nations Security Council resolution imposed overriding obligations on United Nations Member States to afford one another the greatest measures of assistance in connection with criminal investigations. India continued to request for consular access by its letters of 20 September[48] and 9 October[49].

64. Pakistan's letter however considers India's "regrettable stance" in the International Court of Justice which ignored what they said were "the repeated attempts made by the Government of Pakistan to provide an opportunity for the Government of India to give evidence, either exculpatory or inculpatory of Commander Jadhav". They failed to notice that Pakistan's misadventure in trying to publicly air the confession and raise the issue relating to his passport did not succeed in the Court.

---

[45] CMP, Ann. 33.

[46] MI, Ann. 12.

[47] CMP, Ann. 43.

[48] CMP, Ann. 13.18.

[49] CMP, Ann. 13.19.

65. The Pakistan letter stated that the "request took the form that is internationally recognised". I will show you why this is plainly wrong in due course.

66. The letter stated that "some of the evidence underpinning the allegation" had been made available to India. To be clear, Mr. Jadhav is unlikely to have been convicted and awarded the death sentence merely because he had, as alleged by Pakistan, a passport in a different name which would hide his identity. He was presumably found guilty of serious offences which carried the death penalty as a punishment. Pakistan has steadfastly refused to disclose which specific offences related to which specific events in relation to which Mr. Jadhav now stands convicted.

67. The letter then audaciously states that it was "incumbent upon the Government of India to explain" the passport issue. And it closed by saying that "To facilitate the Republic of India's compliance the request is provided again".

68. On 26 October 2017[50], Pakistan wrote to India reiterating its stand which it had taken in the communication of 30 August 2017 but added that "Without prejudice to the proceedings so far, 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."

69. India responded to Pakistan's offer for extradition. It pointed out by its communication of 11 December[51] that Pakistan's communications of 30 August 2017 and 26 October 2017 were yet again attempted propaganda, and India was not possessed of any material which would give them reason to suspect that Mr. Jadhav had committed any crime for which he could be tried in India.

70. Pakistan offered to allow Mr. Jadhav's family to visit him[52]. The terms were agreed and the meeting was held on 25 December 2017. India was dismayed at the manner in which the meeting was conducted and wrote a letter on 27 December 2017[53] marking its protest at the

[50] CMP, Ann. 44.

[51] Reply of India (RI), Ann. 6.

[52] CMP, Ann. 40.

[53] RI, Ann. 12.

violation of the letter and spirit of the understanding which had been arrived at in relation to the meeting.

71. Pakistan responded to India's communication by its Note Verbale of 19 January 2018[54]. On the same date Pakistan responded to India's communication of 27 December contesting some of the allegations made by India in relation to the meeting.

72. India responded on 11 April 2018[55] to Pakistan's communication of 19 January 2018 pointing out that the passport which was allegedly recovered from Mr. Jadhav was characterized as being patently false, and to investigate any such allegations, India would have to inquire into the circumstances in which the passport was allegedly recovered.

Having finished with the factual narrative, I now move, Sir, to the first issue of relevance: the construction of the Vienna Convention.

CONSTRUCTION OF THE VIENNA CONVENTION

73. Article 36 of the Vienna Convention is in language that admits of no ambiguity. Paragraph 1 *(b)* of Article 36 requires the competent authorities of the receiving State, if requested by the national of a sending State, to inform the consular post of the sending State that a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. In addition to this right conferred upon the arrested national, paragraph 1 *(c)* confers upon the sending State the right to have its consular officers 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.

74. Paragraph 2 of the Treaty places it, as it were, above national laws for it mandates that while the rights to consular access shall be recognized in conformity with the laws and regulations of the receiving State, this is subject to the proviso that the "laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended".

75. Article 31 of the Vienna Convention on the Law of Treaties, 1969 — which I shall be referring to as the VCLT — requires that a treaty be interpreted in good faith "in accordance with

---

[54] RI, Ann. 14.2.

[55] RI, Ann. 15.2.

the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The expression "context" is defined in Article 31, paragraph 2. In relation to the Vienna Convention, it is India's case that it is the text that would govern its construction.

76. The first approach, based on a literal interpretation of the language is the objective approach as against a subjective approach which searches for the elusive intent of the parties. The teleological approach is a wider perspective and emphasizes the object and purpose of the treaty as the backcloth against which the treaty should be construed. These conflicting principles, the objective approach, the subjective approach and the object and purpose approach have been codified in Articles 31 to 33 of the VCLT[56].

77. I need labour this no more because the construction of Article 36 of the Vienna Convention is no longer *res integra.*

78. In the *LaGrand* case, this Court construed Article 36 and held that

> "Article 36, paragraph 1 *(b)*, spells out the obligations the receiving State *has towards the detained person* and the sending State . . . *The clarity of these provisions, viewed in their context, admits of no doubt*. It follows, as has been held on a number of occasions, that the Court must apply these as they stand"[57].

79. In the 2004 *Avena* Judgment, this Court held:

> "The Court would recall that it is in any event essential to have in mind the nature of the Vienna Convention. *It lays down certain standards to be observed by all State parties*, with a view to the 'unimpeded conduct of consular relations', which, as the Court observed in 1979, is important in present-day international law 'in promoting the development of friendly relations among nations, and *ensuring protection and assistance for aliens resident in the territories of other States*'."[58]

80. Recognizing the duality of the protection afforded by Article 36, this Court, in paragraph 40 of the *Avena* Judgment said that "[i]t would further observe that violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual"[59].

---

[56] Malcolm N. Shaw, *International Law*, 7th ed., p. 676.

[57] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 494, para. 77.

[58] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 38, para. 47.

[59] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 35, para. 40.

81. Eirik Bjorge, in his book *The Evolutionary Interpretation of Treaties* cites Bermans' *Community Law and International Law* which argues that the VCLT and the rules, when they were adopted in 1969 "swept away at the same time all the supposed special tenets of interpretation that had enveloped the subject like cobwebs" and goes on to say that "one is today most unlikely to see an international tribunal of repute deciding a disputed point of interpretation by reference to special styles of interpretation, such as a "restrictive" doctrine of interpretation, or any other supposed special doctrine thought to be specially applicable to particular types of cases"[60].

82. The jurisprudence of Article 36 of the Vienna Convention has evolved with the march of human rights jurisprudence at various levels.

83. At the international level, the International Covenant on Civil and Political Rights (ICCPR) is a major milestone in the articulation of principles that govern the basic civil and political rights of mankind. The interpretation of Article 36 of the Vienna Convention must therefore be informed by the contemporaneous state of the law in relation to human rights and protection of the rights of those accused of serious crimes.

84. In the *Iron Rhine Arbitration*[61], the Tribunal interpreted Article 31, paragraph 3 *(c)* of the VCLT as not requiring an interpretation oblivious to "all later legal developments". The Tribunal went on to note that there is "a general support among the leading writers today for evolutive interpretation of treaties". It cites the ninth edition of Oppenheim that "notwithstanding the inter temporal rule, 'in some respects the interpretation of a treaty's provisions cannot be divorced from developments in the law subsequent to its adoption . . . The concepts embodied in a treaty may not be static but evolutionary.'"

85. Much of Pakistan's interpretation, based on the overarching right of a sovereign nation to protect itself against internal and external disruption is a restatement, ultimately, of the principle of sovereignty and is reminiscent of the "restrictive" rule. The Tribunal in *Iron Rhine* cites from the *Free Zones* and *SS Wimbledon* cases and extracts from the latter the following passage in which the Permanent Court cautioned that it would nonetheless "feel obliged to stop at the point where the

---

[60] Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (2014), 1st ed., p. 54.

[61] *The Iron Rhine Arbitration (Belgium* v. *Netherlands)*, Award, ICJG 373 (PCA 2005), paras. 52, 53, 79 and 81.

so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted". The Iron Rhine Tribunal goes on to hold:

> "Restrictive interpretation thus has particularly little role to play in certain categories of treaties — such as, for example, human rights treaties. Indeed, some authors note that the principle had not been relied upon in any recent jurisprudence of international courts and tribunals and that its contemporary relevance is in fact doubted".

86. Article 36 does not admit of any exceptions. Besides it would erode significantly the reach of the provision if an exception is made as is sought for by Pakistan. Article 36 requires consular access to be given without delay, upon arrest. Such access has to be given before the case is brought to trial. At the stage of arrest, there would merely be allegations of wrongdoing which are under investigation. If at this stage, on allegations levelled by the host State, it is relieved of the obligations under Article 36 and if consular access is jettisoned, it would render Article 36 a dead letter.

87. The more serious the allegations, the greater the need for ensuring that an accused has a full and meaningful right to defend himself against charges brought against him. To exclude the operation of Article 36 in matters of serious charges of terrorism would fly in the face of criminal jurisprudence.

88. There can be no doubt that Article 36 was engaged in the present case. An Indian was detained, purportedly arrested, a confession extracted, then he was tried and convicted by a military court and awarded the death sentence. And all along requests for consular access were rejected. This, quite plainly, is an egregious breach of Article 36.

VIENNA CONVENTION NOT ENGAGED IN ESPIONAGE CASES

89. Pakistan's fundamental approach, where it says that the Vienna Convention is not engaged in such cases, is erroneous, for it looks outside the Treaty for State practice to support consular access, which we say is an irrelevant exercise. It fails to engage with the consequence of its statement that the issue of espionage was present to the minds of those who negotiated the Vienna Convention, and yet no exception was made to the Vienna Convention to deal with cases of espionage.

90. India does not base its case on customary international law or on State practice, but on the plain language of Article 36.

91. Pakistan asserts that the effect of the Cold War on the exercise of codification of international law "cannot be overstated" but again fails to acknowledge that if despite this, no express reservation was made in Article 36 of the Vienna Convention for charges of espionage, it establishes that (unsurprisingly) States did not want a vital safeguard recognized in Article 36 to be a hostage to allegations of espionage made by the host State.

92. The absence of such exception in the Vienna Convention is unsurprising, because the fundamental principles of due process recognize that the more serious the charge, the greater the need for procedural safeguards. Besides, there are some basic rules that must prevail between civilized nations, and cannot be displaced by unilateral allegations levelled by the receiving State.

93. Recognizing that the needs of security and efficacy of investigation may require the receiving State to withhold the notification of arrest by a few days, the draftsmen of the Treaty built in some "play in the joints" by using the phrase "without undue delay". A State may be able to explain a few days' gap between the arrest and the notification if time is spent bona fide in investigating matters relating to espionage, before the sending State of the national is notified. It is one thing to explain the lapse of time between the arrest and the notification to the home State, and quite another to suggest that charges of espionage jettison Article 36.

94. Pakistan quotes Sir Arthur Watts QC[62], in his authoritative commentary explaining the International Law Commission Draft Convention. In his commentary, Sir Watts explains the manner in which the interests of a State in a criminal investigation were balanced with the right to consular access. In paragraph 6 which is extracted, he states "the expression without undue delay used in paragraph 1 *(b)* allows for cases where it is necessary to hold a person incommunicado for a certain period for the purposes of the criminal investigation". The commentary explains how paragraph 6 accommodates the need of a State to conduct investigations during which it may hold a person incommunicado. This would perhaps be unnecessary if serious allegations of espionage and terrorism would jettison Article 36.

---

[62] CMP, Ann. 92.

95. Pakistan draws attention to comments made by Mr. Tunkin, the Chairman of the ILC[63]. While he was mentioning espionage cases, he suggested that it may be desirable that local authorities should not be obliged to inform the Consul, but the Chairman remarked that 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 reopened. The extracts suggest that the problem of espionage was very much on the table and yet no exception was made to such allegations in the language to Article 36.

96. Pakistan brings up the issue of problems confronted in implementing the provisions of the Vienna Convention in the context of pleas for asylum and in situations of dual nationality. Both these also establish that the Vienna Convention is indeed the exhaustive rubric of consular access. It is invariably the provisions of the Vienna Convention that provide the basis for resolving the situation, finding solutions consistent with the Convention.

97. One of the matters brought up by Pakistan is an application of Article 36 to a person of dual nationality, which presents legal challenges, no doubt, which are *sui generis*, but they need not be explored in this case.

98. Pakistan gives a series of examples which, in its assertion, are "historic and modern examples of espionage cases that States often operated on the footing that they were not entitled to or were not going to be able to gain access to their espionage agents once they had been captured". India submits that the material relied upon for what happened in those cases is hardly reliable for it is wanting in relevant detail.

99. The plain language of a treaty, if it is contrary to the conduct of States, cannot be whittled down by reference to "State practice". A treaty, in fact, is set about at times to bring about uniformity in State practice. So even assuming that the conduct of States, evincing a consistent conduct which is sufficiently clearly documented so as to satisfy the rigorous standards of what constitutes "State practice", it cannot alter the plain language of a treaty.

100. The random examples given by Pakistan in any case do not assist the Court in coming to any such conclusion of State practice. On the contrary, recent instances of arrest by China[64] and

---

[63] CMP, Ann. 93.

[64] Judges' folders, tab 1.

Russia[65], facts in public domain, of persons on allegations of espionage, based on information in public domain, show that the conduct of the receiving State was compliant with Article 36. These, the Court would find in the judges' folders at tabs 1 and 2.

101. Pakistan, in this misadventure, does not push it to the point of suggesting that there is an established practice to show that consular access is invariably denied in such cases. Individual incidents can then at best establish that Pakistan may not be the only State which has violated Article 36 of the Vienna Convention or similar provisions in bilateral treaties that preceded the Vienna Convention.

102. There is no material placed that would establish that giving consular access prior to extracting a confession would have so imperilled its national security or so hampered the investigation, that consular access was denied. There is no explanation for not giving consular access after that also.

2008 BILATERAL AGREEMENT

103. I now move, Sir, to a discrete issue, the 2008 bilateral Agreement.

104. In no official communique to the Government of India has Pakistan ever suggested that consular access to Mr. Jadhav was circumscribed by the 2008 Agreement. Apart from a reference in a press briefing by a spokesperson of the Pakistan Government on 20 April 2017[66], the bilateral Agreement of 2008 was never referred to, and rightly so.

105. The question of consular access provided for under Article 36 being circumscribed on account of the provisions of a bilateral treaty does not arise. Article 36 is the provision of a multilateral treaty, and 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. This is the clear language of Article 73 of the Vienna Convention.

106. The 2008 Agreement was entered into for "furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country", and by which the two signatory States, India and Pakistan, agreed to certain measures. These included the release

---

[65] Judges' folders, tab 2.

[66] MI, Ann. 9.

and repatriation of persons within one month of confirmation of their national status and the completion of their sentences. The Agreement recognized that in the case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its own merits, and that in special cases which call for or require compassionate or humanitarian considerations, each side may exercise discretion subject to its laws and regulations to allow early release and repatriation of persons. India does not seek any early release or repatriation of Mr. Jadhav, as contemplated by the 2008 Agreement.

107. The existence of a bilateral agreement and some of the provisions of which may appear to supplement or amplify the provisions of the Vienna Convention, is thus irrelevant to the assertion of rights to consular access under Article 36 of the Vienna Convention. This is also consistent with Article 41 of the VCLT which recognizes the principle that two or more parties could modify the terms of the Treaty, as long as the Treaty permits such modification, or at least does not prohibit such modification, and that any such modification cannot relate to a provision, the derogation of which is incompatible with the effective execution of the object and purpose of the Treaty as a whole.

108. The Vienna Convention creates specific rights in favour of the States *and* in favour of nationals of sending States in relation to consular access — and creates corresponding obligations upon receiving States that they arrest, detain or try and sentence nationals of other member States in a particular way. Bilateral treaties which create obligations can only supplement the provisions of the Vienna Convention; bilateral treaties cannot modify these rights and the corresponding obligations which form the object and purpose of Article 36.

109. There is nothing in the language of the 2008 Treaty which would suggest that India or Pakistan ever intended to derogate from Article 36 of the Vienna Convention. But even if there were such language, it would have to yield to the provisions of the Vienna Convention.

110. Considering 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.

111. Pakistan appears to rely on paragraphs (iv) and (vi). Neither of them suggest that they detract from the general provisions and the overarching protection of Article 36.

112. The requirement that each government shall provide consular access within three months does not give an *excuse* to delay consular access, but, even if it does apply as supplementing and amplifying, at the best it only fixes an outer limit of three months in which consular access must be provided. It is not necessary to decide the issue; consular access has never been provided.

113. Even if paragraph (iv) of the 2008 Agreement was to apply, Pakistan should have provided a substantial explanation for why it needed three months for providing consular access, and upon which it could have claimed that it has complied with treaty obligations. Even on the erroneous premise that paragraph (iv) applies, Pakistan has not complied with the treaty obligations.

114. Worse is the case of reliance on paragraph (vi) of the bilateral Agreement. The phrase "examine the case on its merits" makes apparent that it applies to the agreement to release and repatriate persons within one month of the confirmation of their national status and on completion of sentences. As an exception to this, India and Pakistan reserve the rights to examine on merits the release and repatriation of persons upon completion of their sentence, where their arrest, detention or sentence was made on political or security grounds.

115. Paragraph (vi) of the 2008 Agreement also calls for compassionate humanitarian considerations in which each side may exercise its discretion to allow early release and repatriation of persons.

116. The focus of the 2008 bilateral Agreement, in these paragraphs, was upon the return of those arrested, tried and convicted in the receiving State, being nationals of the other State. As I said, India and Pakistan have shared land and sea borders, and there are frequent occasions when nomads or fishermen stray across borders and are arrested. This Agreement primarily sought to address problems arising out of these kinds of situations.

117. Judge Shigeru Oda's treatise[67], as relied upon by Pakistan, deals with the contrast between what is now Article 30 of the VCLT and the Vienna Convention. Article 73 (2) of the Vienna Convention is cited as a provision which recognizes the right to supplement its provisions by bilateral treaties "which do not derogate from the obligations of the general convention". The text of Article 30 (2) of the VCLT, according to the author of the treatise, goes far beyond mere confirmation of the legitimacy of bilateral agreements, and he argues that if Article 30 (2) were applied to the bilateral consular agreements, they would prevail over the Vienna Convention. This analysis of Article 73 is directly contrary to what Pakistan invites this Court to hold in the present case.

118. Clearly, it is Article 73 (2) which is a part of the Vienna Convention that would apply and not the general provisions of Article 30. India is not a party to the VCLT. While India accepts that a number of the principles incorporated in the VCLT are codification of the general principles of international law and, for that reason, of relevance, a suggestion that Article 30 of the VCLT would override Article 73 (2) of the Vienna Convention has only to be stated to be rejected.

119. Pakistan states the point, I must confess, with a degree of ambivalence — it does not seem to gather the courage to suggest that Article 30 of the VCLT would override Article 73 (2) of the Vienna Convention. Instead, Pakistan claims that the bilateral Agreement is a — and I quote two words they use "supplement and/or amplification" of Article 36. India generally agrees with this assertion but points out that the premise is destructive of Pakistan's case on the interpretation it seeks to place on paragraph (vi) of the bilateral treaty. Paragraph (vi) cannot destroy Article 36. The point is as simple as that.

120. The phrases "political" and "national security" in paragraph (vi) are amorphous and indefinite in their import. If both countries can unilaterally decide upon and police the application of Article 36 to individual cases, Article 36 would have lost its meaning. Arrests on trumped up charges are frequently made by Pakistan — the present case is a text book case of such conduct. All that Pakistan would then have to do to wriggle out of Article 36 is to add a ground that can provide a hook to later claim that "political" considerations in the arrest, even if it does not show

[67] CMP, Ann. 118.

up in the final charges and conviction, was the basis for denying consular access. Pakistan may then well denounce Article 36 itself.

Having finished my submission, Sir, therefore on the construction of Article 36 and the irrelevance of the 2008 bilateral Agreement, I move now to an important point: Article 36 as a facet of due process.

ARTICLE 36 AS A FACET OF DUE PROCESS

121. The obligations of States towards aliens features as a recurrent theme of international law, in the evolution of the jurisprudence of international law.

122. In *Barcelona Traction, Light and Power Company*, this Court expostulated the principle that created obligations *erga omnes* upon the States. The Court held:

> "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, *as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.* Some of the corresponding rights of protection have entered into the body of general international law *(Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23*); others are conferred by international instruments of a universal or quasi-universal character*."[68]

These words would perfectly apply to the Vienna Convention.

123. The protection of human rights generally, and specifically in the context of aliens has been a significant strand in the evolving jurisprudence of international law.

124. The Universal Declaration of Human Rights (UDHR) proclaimed and adopted in 1948, in the words of the Secretary-General Ban Ki-moon,

> "has become a yardstick by which we measure right and wrong. It provides a foundation for a just and decent future for all, and has given people everywhere a powerful tool in the fight against oppression, impunity and affronts to human dignity."[69]

125. The principles incorporated, which recognize the universality of human rights reflect contemporary understanding of what constitutes due process. The principles of recognition of

---

[68] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 33, para. 34.

[69] UNDHR Booklet, published by the United Nations (2015).

human rights have also evolved into principles of international law binding on all States *erga omnes*.

126. The observations of this Court in the *Tehran* case, bear repetition:

> "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."[70]

Powerful words. This general principle would apply not merely to members of the diplomatic corps, but to all human beings, and in the present context, to nationals of sending States.

127. The International Covenant on Civil and Political Rights (ICCPR) which came into force on 23 March 1976 in the preamble states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . Recognizing that these rights derive from the inherent dignity of the human person". It goes on to state that "[c]onsidering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms . . . Agree upon the following articles".

128. Article 14 sets out what is recognized as the rights of a person in relation to determination of criminal charges.

129. Honourable President and honourable Members of the Court, I strongly submit that the Vienna Convention is a powerful tool that ensures, at the multilateral level, almost at a universal level, the facility of consular access to foreign nationals who have been put on trial in a foreign country. This is based on the recognition of the rights of a national of the sending State to put up a fair defence at the determination of criminal charges in the host State, and this becomes meaningful when he has the benefit of consular access in its various dimensions recognized in Article 36.

130. One of the vital areas of human rights is the treatment of those accused of crimes. The principles of due process, expressly recognized in the ICCPR, must jurisprudentially be considered to be a universal obligation binding upon all States *erga omnes*.

131. Consular access to a national of a sending State charged with a crime in a sending State evolved as a practice, and found codification in Article 36 at a time when human rights

---

[70] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 42, para. 91.

jurisprudence was in its incunabulum. It was recognized by those who wrote the Treaty to be a right without exceptions. They went further, and wrote the right not just in favour of the sending State and its consulate, but also in favour of the nationals of the sending State. With the universal acceptance of the right to a fair and an impartial trial and of the right to defend oneself against criminal charges — including the right to engage a lawyer of one's own choice in a foreign country — as a rudimentary rule of due process, Article 36 becomes a vital cog in the wheel of justice.

132. As was said of the Geneva Convention by this Court[71], so can it be said about the Vienna Convention, that in some respects the principles enshrined were a development, and in other respects no more than an expression of the fundamental principles of humanitarian law and diplomacy. These measures were designed to put in place "an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means"[72].

133. In a judgment delivered in 2010 in the *Diallo* case[73], this Court considered a challenge to the actions of the Democratic Republic of Congo in respect of the detention and expulsion of the national of the Republic of Guinea, in the backdrop of the rights and the obligations under the ICCPR and the African Charter. This Court also considered allegations of the violation of Article 36, paragraph 1 *(b)*, of the Vienna Convention.

134. In the context of Article 36, this Court held that "[t]hese provisions, as is clear from their very wording, are applicable to *any* deprivation of liberty *of whatever kind, even outside the context of pursuing perpetrators of criminal offences*"[74]. This is consistent with the absolute nature of the obligation, as also the fundamental principle of due process, that the greater the severity of a

---

[71] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 113, para. 218.

[72] *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*, p. 19, para. 39.

[73] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 639.

[74] *Ibid.*, para. 91; emphasis added.

charge, the greater the need for punctilious compliance with the procedural safeguards. This is recognized as the elements of due process.

135. This Court, in the *Diallo* case, went on to say:

> "It is true, as the DRC has pointed out, that *Article 13 of the Covenant provides for an exception* to the right of an alien to submit his reasons where 'compelling reasons of national security' require otherwise. The Respondent maintains that this was precisely the case here. However, it has not provided the Court with any tangible information that might establish the existence of such 'compelling reasons'. In principle, it is doubtless for the national authorities to consider the reasons of public order that may justify the adoption of one police measure or another. But when this involves setting aside an important procedural guarantee provided for by an international treaty, *it cannot simply be left in the hands of the State in question to determine the circumstances which, exceptionally, allow that guarantee to be set aside.*"[75]

136. The expulsion of a national of a foreign State has serious consequences on his rights. The trial of a national of a foreign State and that too for serious offences that result in the award of capital punishment have far greater consequences on the rights of the person. In the context of expulsion, the ICCPR recognized an express exception, yet this Court held that the State cannot self-certify the compelling reasons of national security.

137. The approach that the seriousness of the allegations justify the violation of procedural safeguards by which an accused can secure a fair trial betrays a fundamental failure to understand the very basics of due process principles.

138. Even where in relation to Article 13 of the ICCPR and Article 12 of the African Charter (both of which deal with expulsion of a national of another State), "[c]ompliance with international law is to some extent dependent here on compliance with internal law", and this Court read two safeguards. It held

> "First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; *second, an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case*."[76]

The overlay of human rights was sharply brought out.

---

[75] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 666-667, para. 74; emphasis added.

[76] *Ibid.*, p. 663, para. 65; emphasis added.

139. This Court cited the jurisprudence of the Human Rights Committee established by the ICCPR and the interpretation of the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACtHR). This is a recognition of the degree of cross-fertilization of jurisprudence and a testimony to a growing fabric of the law that has drawn strands from these diverse treaties, from the decisions of fora which administer those treaties, and from the basic principles of human rights jurisprudence.

140. One very important strand of this fabric is the Universal Declaration of Human Rights. Its nomenclature itself establishes that it should be considered a principle *erga omnes.*

141. The inalienable rights recognized in Articles 5, 9 and 10 are non-derogable. Article 5 provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 9 provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile". Article 10 provides that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

142. The Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment adopted by the General Assembly resolution 43/173 of 9 December 1988[77] recognizes consular access in Principle 16. Paragraph 2 of Principle 16 provides that

> "if a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national of which is otherwise entitled to receive such communication [please mark the words] *in accordance with international law*".

It considers consular access communication to be in accordance with international law. I submit, this resolution establishes that by 1988, Article 36 was assumed to have the stature of a principle of "international law".

143. The 1985 Declaration on the Human Rights of Individuals Who Are Not Nationals of The Country in Which They Live[78] recognizes in Article 10 that "any alien shall be free at any time

---

[77] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UNGA on 9 December 1988, A/RES/43/173.

[78] Declaration on the Human Rights of Individuals Who are not Nationals on the Country in Which they Live, adopted by the UNGA on 13 December 1985, A/RES/40/144.

to communicate with the consulate or diplomatic mission of the State of which he or she is a national".

144. Article 36 has been interpreted and applied by the IACtHR.

The PRESIDENT: Mr. Salve, before you turn to the next aspects of your presentation, the time might have come for you to have some rest — first of all, because you deserve it — and for the Court to observe a 10-minute coffee break.

Mr. SALVE: Thank you, Sir.

The PRESIDENT: The sitting is adjourned.

The Court adjourned from 11.30 to 11.45 a.m.

The PRESIDENT: Please be seated. The sitting is resumed and I give the floor to Mr. Salve to continue his presentation. You have the floor.

Mr. SALVE: Honourable President and honourable Judges of the Court. I resume, picking up the thread where I was, citing some of the literature which has come out, some of the decisions which have come out from the IACtHR.

145. On 1 October 1999, the IACtHR rendered an advisory opinion on "several treaties concerning the protection of human rights in the American States". As noted by the Court:

> "According to the requesting State, the application concerned the issue of minimum judicial guarantees and the requirement of the due process when a court sentences to death foreign nationals whom the host State has not informed of their right to communicate with and seek assistance from the consular authorities of the State of which they are nationals."[79]

146. The IACtHR analysed the Vienna Convention, and held:

> "The Court observes, on the other hand, that in the Case concerning United States Diplomatic and Consular Staff in Tehran, the United States linked Article 36 of the Vienna Convention on Consular Relations with the rights of the nationals of the sending State. The International Court of Justice, for its part, cited the Universal Declaration in the respective judgment"[80].

---

[79] IACtHR, Advisory Opinion OC-16/99 of 1 Oct. 1999, "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law", para. 1.

[80] *Ibid.*, para. 75.

147. The IACtHR also held that

> "Mexico, . . . is asking whether one provision of that Convention concerns the protection of human rights. *This is an important point, given the advisory jurisprudence of this Court, which has held that a treaty can concern the protection of human rights, regardless of what the principal purpose of that treaty might be.* Therefore, while some of the comments made to the Court concerning the principal object of the Vienna Convention on Consular Relations to the effect that the treaty is one intended to 'strike a balance among States' are accurate, this does require that the Treaty be dismissed outright as one that may indeed concern the protection of an individual's fundamental rights in the American hemisphere."[81]

148. Going into those questions, the IACtHR held that the

> "provision recognizing consular communication serves a dual purpose: that of recognising a State's right to assist its nationals through the consular officer's actions and, correspondingly, that of recognizing the co-relative right of the national of the sending State to contact the consular officer to obtain that assistance"[82].

In paragraph 82, it noted:

> "The bearer of the rights mentioned in the preceding paragraph, which the international community has recognized in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, is the individual. In effect, this article is unequivocal in stating that rights to consular information and notification are 'accorded' to the interested person. *In this respect, Article 36 is a notable exception to what are essentially States' rights and obligations accorded elsewhere in the Vienna Convention on Consular Relations. As interpreted by this Court in the present Advisory Opinion, Article 36 is a notable advance over international law's traditional conceptions of this subject.*"[83]

149. The conclusions arrived at by the IACtHR on this issue were as follows:

> "The Court therefore concludes that Article 36 of the Vienna Convention on Consular Relations endows a detained foreign national with individual rights that are the counterpart to the host State's correlative duties. This interpretation is supported by the article's legislative history. There, although in principle some States believed that it was inappropriate to include clauses regarding the rights of nationals of the sending State, in the end the view was that there was no reason why that instrument should not confer rights upon individuals"[84]

and that "The Court must now consider whether the obligations and rights recognized in Article 36 of the Vienna Convention on Consular Relations concern the protection of human rights"[85].

---

[81] IACtHR, Advisory Opinion OC-16/99 of 1 Oct. 1999, "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law", para. 76; emphasis added.

[82] *Ibid.*, para. 80.

[83] *Ibid.*, para. 82; emphasis added.

[84] *Ibid.*, para. 84.

[85] *Ibid.*, para. 85.

150. The IACtHR then proceeded to examine the question whether non-observance of the right of information violates the rights under Article 14 of the ICCPR; Article 3 of the Charter of the Organization of American States (OAS); and Article II of the American Declaration of the Rights and Duties of Man. It cited the Advisory Opinion of this Court in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* on the principles of construction of treaties where this Court held that

> "the Court must 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. In the domain to which the present proceedings relate, the last fifty years . . . have brought important developments . . . In this domain, as elsewhere, the *corpus juris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore."[86]

151. The IACtHR traced the genesis of the ICCPR, in so far as it recognizes the right to due process of law "from the inherent dignity of the human person". It held that

> "In the opinion of this Court, for 'the due process of law' a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants"[87].

152. In words that resonate in the present case, the Court held:

> "In the case to which this Advisory Opinion refers, the real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance. In such circumstances, it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of defending oneself and the proceedings conducted in the respective cases."[88]

It further held that

> "the individual rights under analysis in this Advisory Opinion must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defence and receive a fair trial"[89].

---

[86] *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*, pp. 31-32, para. 53; emphasis added.

[87] *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, para. 117.

[88] IACtHR, Advisory Opinion OC-16/99 of 1 Oct. 1999, "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law", para. 121.

[89] *Ibid.*, para. 122.

153. Citing the approach taken in a number of cases involving the death penalty, by the United Nations Human Rights Committee, the IACtHR noticed that the view of the Committee was that, I quote — because this is extremely important — "if the guarantees of the due process established in Article 14 of the ICCPR were violated, then so, too, were those of Article 6.2 of the Covenant if sentence was carried out"[90]. Consistent with this approach, the IACtHR held in paragraphs 135 to 137:

> "135. This tendency, evident in other inter-American and universal instruments, translates into the internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases. It is obvious that the obligation to observe the right to information becomes all the more imperative here, given the exceptionally grave and irreparable nature of the penalty that one sentenced to death could receive. If the due process of law, with all its rights and guarantees, must be respected *regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life.*
>
> 136. Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result.
>
> 137. For the foregoing reasons, the Court concludes that non observance of a detained foreign national's right to information, recognized in Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be 'arbitrarily' deprived of one's life, in the terms of the relevant provisions of the human rights treaties (e.g. the American Convention on Human Rights, Article 4; the International Covenant on Civil and Political Rights, Article 6) with the juridical consequences inherent in a violation of this nature, i.e., those pertaining to the international responsibility of the State and the duty to make reparations."[91]

154. Adopting a similar approach, the Inter-American Commission on Human Rights (IACHR) has treated any violation of Article 36 (1) *(b)* of the Vienna Convention as a failure of due process. Illustratively, in *Ramon Martinez Villareal* v. *United States*, it says:

> "81. The Commission therefore concludes that the State failed to inform Mr. Martinez Villareal of his rights under Article 36(1) *(b)* of the Vienna Convention on Consular Relations and likewise failed to inform the Mexican consulates of Mr. Martinez Villareal's arrest and subsequent prosecution as required under that provision.
>
> . . . . . .

[90] IACtHR, Advisory Opinion OC-16/99 of 1 Oct. 1999, "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law", para. 130.

[91] *Ibid.*, paras. 135 to 137.

83. *These circumstances strongly suggest that the quality of due process afforded to Mr. Martinez Villareal suffered as a consequence of his status as a foreign national, a circumstance that compliance with the notification requirements under Article 36 (1) (b) of the Vienna Convention on Consular Relations may well have mitigated.* The Commission also cannot find that the standard of due process owing to Mr. Martinez Villareal under the American Declaration and under general principles of international law was satisfied based upon the State's contentions in this matter as to the possible state of knowledge or involvement of Mexican consular officials.

. . . . . .

97. As to the Commission's competence in relation to the Vienna Convention on Consular Relations, it was clearly determined in the merits decision in this matter that the Commission may properly consider the extent to which a state party to the Vienna Convention on Consular Relations has given effect to the requirements of Article 36 of that treaty, insofar as these requirements constitute part of the *corpus juris gentium* of international legal rules applicable in evaluating that state's respect for the rights under the American Declaration. As the Commission concluded in the circumstances of Mr. Martinez Villareal's complaint, *non-compliance with the obligation under Article 36 can have a direct and deleterious effect on the quality of due process afforded to a defendant* and thereby call into question compliance with the requirements of Articles XVIII and XXVI of the American Declaration as well as similar provisions of other international human rights instruments."[92]

And in *Cesar Fierro* v. *United States*[93], the passage says:

"30. The claim raised by the Petitioners before this Commission is the contention that the United States failed to inform Mr. Fierro upon his arrest of his right to consular notification as provided for under Article 36 of the Vienna Convention on Consular Relations, as well as correspondent customary international law and U.S. domestic law, and is thereby responsible for violations of Mr. Fierro's rights under Articles II, XVIII and XXVI of the American Declaration. As described above, the Petitioners argue that Mr. Fierro was precluded by the August 4 and October 12, 1994 decisions of the Texas Court of Criminal Appeals from pursuing this claim before the Texas State courts by limiting his proceedings to issues that did not include the consular notification allegation and that the U.S. Federal Courts precluded Mr. Fierro from raising any claims based upon limitations in the Anti-Terrorism and Effective Death Penalty Act of 1996. The judicial decisions on the record before the Commission support the Petitioners' contentions in this regard. On this basis, the Petitioners argue that Mr. Fierro should be considered to have exhausted the domestic remedies available to him concerning his consular notification issue, or alternatively that he has been precluded from pursuing that claim before the domestic courts.

. . . . . .

40. Based upon the foregoing, the Commission concludes that Mr. Fierro's right to information under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations constituted a fundamental component of the due process standards to which he was entitled under Articles XVIII and XXVI of the American Declaration, and that the State's failure to respect and ensure this obligation constituted serious violations of

---

[92] *Ramon Martinez Villareal* v. *United States*, case 11.753, report No. 52/02, IACtHR, doc. 5, rev. 1, p. 821 (2002), paras. 81, 83, 97; emphasis added.

[93] *Cesar Fierro* v. *United States*, case 11.331, report No. 99/03, IACtHR, OEA/Ser./L/V/II.114, doc. 70 rev. 1, p. 769 (2003).

Mr. Fierro's rights to due process and to a fair trial under these provisions of the Declaration.

41. Accordingly, should the State execute Mr. Fierro based upon the criminal proceedings for which he is presently convicted and sentenced, the Commission finds that this will constitute an arbitrary deprivation of Mr. Fierro's life contrary to Article I of the Declaration.

. . . . . .

66. Upon considering the State's observations concerning the Commission's conclusions and recommendations, the Commission wishes to state that it is encouraged by the measures taken by the United States to enhance compliance with its obligations under the Vienna Convention on Consular Relations regarding consular notification and access. To this extent, the State appears to have taken some measures to implement the Commission's second recommendation, as reproduced below. At the same time, the Commission cannot accept the State's contention that compliance with a foreign national's right to consular notification and assistance is irrelevant to the due process and fair trial protections under international human rights instruments, including the American Declaration. As the Commission has previously held, fundamental due process protections, such as the right to prior notification in detail of the charges against a defendant and the right to effective counsel, are of such a nature that, in the absence of access to consular assistance, a foreign national could be placed at a considerable disadvantage in the context of a criminal proceeding taken against him or her by a state. Each case must be evaluated on its individual circumstances. Once a failure to inform a foreign national of his right to consular notification and assistance has been proven, however, a formidable presumption of unfairness will arise unless it is established that the proceedings were fair notwithstanding the failure of notification. While the State contends in the present case that the protections provided for in its legal system are among the strongest and most expansive in the world, this does not foreclose situations in which access to consular assistance may have an impact on the fairness of a foreign national's criminal proceedings in the United States. This could arise, for example, in relation to a defendant's ability to gather mitigating evidence or other relevant information from his or her home country."[94]

155. The history of the *Medellin* case[95] presents an important example of the significance of Article 36 vis-à-vis due process standards. In that case, the United States argued that the domestic law provides stringent due process protections not dependent on consular notification, access or assistance, and that the guarantees under domestic law are amongst the strongest and most expansive in the world. *Medellin* had also moved the US Supreme Court, and by its judgment of 25 March 2008, the US Supreme Court, although recognizing that the *Avena* Judgment creates an international obligation on the part of the United States, held it does not constitute binding domestic law in the absence of implementing legislation, and on that basis declared

[94] *Cesar Fierro* v. *United States*, case 11.331, report No. 99/03, IACtHR, OEA/Ser./L/V/II.114, doc. 70 rev. 1, p. 769 (2003), paras. 30, 40, 41, 66.

[95] Report No. 90/09, case 12.644, Admissibility and Merits (Publication) Medellin, Ramirez Cardenas and Leal Garcia, United States, 7 Aug. 2009.

unconstitutional the President's memorandum seeking to enforce the *Avena* Judgment. The IACHR, nonetheless, held that:

> "Based upon the foregoing, the Commission concludes that the State's obligation under Article 36.1 of the Vienna Convention on Consular Relations to inform Messrs. Medellin, Ramírez Cardenas and Leal García of their right to consular notification and assistance *constituted a fundamental component of the due process standards to which they were entitled under Articles XVIII and XXVI of the American Declaration*, and that the State's failure to respect and ensure this obligation deprived them of a criminal process that satisfied the minimum standards of due process and a fair trial required under Articles XVIII and XXVI of the Declaration."[96]

156. The Commission held that there had been a violation of Article 36, paragraph 1 *(b)*, of the Vienna Convention and on that basis came to the conclusion that "the imposition of the death penalty in the instant case involves an arbitrary deprivation of life, prohibited by Article I of the Declaration."[97] The IACHR issued a declaration that they "vacate the death sentences imposed and provide the victims with an effective remedy, which includes a new trial in accordance with the equality, due process and fair trial protections, prescribed under Articles I, XVIII and XXVI of the American Declaration, including the right to competent legal representation"[98]. This is extremely important.

157. The evolution of jurisprudence of international law in this Court has had the underpinnings of human rights in their broader dimension, for in the ultimate analysis, good relationships between the States, which make for conditions of peace and harmony, are conditions in which the human right to life, to live with dignity and to enjoy those privileges so inherent to mankind, are considered inviolable.

158. Article 36 which crystallized into a multilateral treaty, a practice of the consular posts, is *concerned* with human rights. In *Avena* this Court held "Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide."[99] But the decisions of the other

---

[96] Report No. 90/09, case 12.644, Admissibility and Merits (Publication) Medellin, Ramirez Cardenas and Leal Garcia, United States, 7 Aug. 2009, para. 132.

[97] Report No. 90/09, case 12.644, Admissibility and Merits (Publication) Medellin, Ramirez Cardenas and Leal Garcia, United States, 7 Aug. 2009, para. 155.

[98] Report No. 90/09, case 12.644, Admissibility and Merits (Publication) Medellin, Ramirez Cardenas and Leal Garcia, United States, 7 Aug. 2009, para. 160.1.

[99] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 61, para. 24.

fora, often relied upon as an authoritative expostulation of the law, has identified, in current times, Article 36 as a part of the rubric of human rights.

159. After the Convention in 1963, the principles of human rights were articulated in the ICCPR and the States which have signed and ratified the Treaty should be judged by the standards of the covenants of that multilateral treaty.

160. India acceded to the ICCPR on 10 April 1979. Pakistan signed the ICCPR on 17 April 2008 and ratified it on 23 June 2010.

161. The principles of the Vienna Convention can, in view of their widespread acceptance, now be characterized as obligations *erga omnes*. Where States have signed and ratified both the Vienna Convention along with the Optional Protocol and the ICCPR, the rights under Article 14 of the ICCPR become inextricably interwoven. A breach of Article 36 would entail also a violation of Article 14 of the ICCPR.

162. Although the violation of Article 14 may not be amenable to a remedy by itself in all cases, where the violation of Article 36 has resulted in the violation of, or the aggravation of the violation of, the rights under Article 14 of the ICCPR, the principles of State Responsibility, as applied to the violation of Article 36 of the Vienna Convention must recognize this synergy between Article 14 and Article 36 and must therefore address the serious consequences of the violation of Article 36, which results in the violation of, or an aggravation of the violation of, the right under Article 14 of the ICCPR.

163. Thus, the interplay between Article 36, the guarantees of the ICCPR, as well as the principles of due process, as a minimum guaranteed human right, would have a vital bearing on the fashioning of an appropriate remedy, so as to achieve the desired aim of *restitutio in integrum*.

164. Human rights, and measures in diverse treaties that were fashioned to fulfil the fundamental promise of human dignity have to be considered in their confluent effect, and where the conduct of a State results in violating a web of principles, some derived from treaties, some founded on principles of international law binding on States *erga omnes*, the principles of State Responsibility would have to be applied keeping in view the egregious nature of the violation of international law by the delinquent State, and not by the violation of individual treaties or obligations *erga omnes*.

I now move to some defences that Pakistan has sought to run.

ABUSE OF PROCESS/RIGHTS AND LACK OF GOOD FAITH

165. Pakistan cites commentaries from certain dissenting opinions or submissions made in certain cases where the word "abuse" or the expression "good faith" can be found. These phrases have been used in different contexts by different jurists, and each of the citations, apart from being non-authoritative, is irrelevant in the context of the present case.

166. The heads on which Pakistan suggests that there has been an abuse, and I paraphrase them as follows:

(a) India's "refusal to engage"[100] with Pakistan on its request for informing, regarding the passport.

(b) India's allegedly furnishing Mr. Jadhav "with a false identity so as to facilitate his travel to Pakistan to commit acts of espionage and terrorism"[101].

(c) India's assertion of treaty-based consular access rights in order to access an espionage agent.

(d) India invoking provisional measures jurisdiction in the manner that it did — India having exercised its right as a tactical political weapon.

167. Honourable President and honourable Judges of the Court, I say none of these grounds bear scrutiny. Pakistan arrogates to itself the right to demand explanations from another sovereign country on wanton allegations made by it from time to time. These allegations have no role to play in the present proceedings and relate solely to a violation of Article 36 of the Vienna Convention by Pakistan.

168. The first and second grounds are rhetoric. The third ground suffers from the fallacy of circumlocution. If Article 36 grants rights of consular access in *all* cases including where allegations of such kind are levelled, then demanding those rights cannot be an abuse of those very rights.

169. Pakistan's challenge to India successfully invoking provisional measures jurisdiction where, after hearing both sides, this Court by a fully reasoned Order put in place such provisional measures, is in my respectful submission a mark of disrespect to this Court.

---

[100] CMP, para. 168.

[101] CMP, para. 170.1.

170. Professor Kolb in his authoritative commentary *The International Court of Justice*, identifies the notion of an "abuse of process" as the principle which is applicable "both in international law and in systems of municipal law"[102]. He described it as "the use by one or more of the parties, of procedural instruments and rights, for reasons that are fraudulent, or designed to cause delay, or simply frivolous; designed to harm the other side or give the abusing party an illegitimate advantage; intended to devalue other pending proceedings or deprive them of their object; intended purely for propaganda purposes; or, generally, for any purpose other than that for which the procedural rights concerned were instituted in the first place"[103].

171. Pakistan's conduct of attempting to play the doctored video in the course of the hearing and its overall conduct in the present case, is using the platform of the present proceedings for propaganda. That, if anything, is an abuse.

172. Professor Kolb goes on to say that "Such abuses cannot simply have presumed to have occurred and nor should they easily be considered to be proven. States are sovereign and accusations that there have been abuses should therefore be made only with great care. *Also, the mere exercise of one's rights should not be considered an abuse.*"[104]

173. This statement of the law shows Pakistan's argument on abuse is hopeless. The tone and tenor of the Counter-Memorial, its disrespectful allegations and accusations against India on matters wholly alien to these proceedings show Pakistan if at all is abusing its right to defend itself in these proceedings.

174. Finally, as Professor Kolb notices, "[t]he ICJ is frequently faced with allegations that procedural abuses have occurred. However, unlike other international tribunals, the Court has not so far ever had actually to conclude that an abuse has been demonstrated. This restrictive approach by the Court is desirable."[105] His words that "[t]he practice shows that arguments to the effect that there has been a procedural abuse are themselves generally motivated by a most unwelcome wish

---

[102] Robert Kolb, *The International Court of Justice* (Hart Publishing, 2013), p. 947.

[103] *Ibid.*

[104] *Ibid.*

[105] *Ibid.*

to prevent the Court from taking cognizance of a case by arguing for its inadmissibility *in limine litis*"[106]. These words have a resonance in the present case.

175. Pakistan rightly understands that the role of this Court is not a court of appeal from domestic criminal proceedings. Elsewhere it invites this Court to examine the veracity of its allegations relating to the purported passport which presumably would have featured in its criminal trial.

176. Pakistan's case that India's refusal to "provide explanations on a range of issues relating to the ongoing investigation"[107] and its refusal to engage with Pakistan's mutual legal assistance request is a failure to act in good faith to the standard required by international law is, I submit, equally baseless.

177. Pakistan does not dispute that there is no existing mutual legal assistance treaty (MLAT) and that despite being repeatedly invited by India to enter into such a treaty it has declined to do so. The reason is not far to seek — there are a number of requests from India for legal assistance in cases of terrorism pending with it.

178. Pakistan is driven to call to aid Article 2 *(f)* of the United Nations Security Council resolution 1373[108]. In this context India submits as under:

(a) It is ironical Pakistan relies on the resolution. The resolution begins by a decision that all States shall prevent and suppress the financing of terrorist acts; refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, and take necessary steps to prevent the commission of terrorist acts; deny safe haven to those who finance, plan, support or commit terrorist acts. Pakistan's own conduct has been in breach of *each* of these elements.

(b) The assistance in connection with criminal investigations of criminal proceedings including those relating to "the financing or support of terrorist acts" is achieved through the entering of mutual legal assistance. I repeat, there is no MLAT between India and Pakistan and it has been

---

[106] Robert Kolb, *The International Court of Justice* (Hart Publishing, 2013), p. 947.

[107] CMP, para. 172.

[108] CMP, Ann. 89.

India's position all throughout that this is because of Pakistan's reluctance to enter into such a treaty.

179. But even if there was such a treaty, the request made by Pakistan would not meet the requirements common to such treaties. It fails to provide any evidence or material that would prima facie establish the commission of an offence and for which investigation is necessary in India. An omnibus investigation into general allegations of espionage is not a serious action within the comports of criminal jurisprudence. A fundamental flaw in its request is it does not even mention the incidents in relation to which the allegations of indulging in subversive activities are being levelled.

180. The premise of Pakistan's submissions is that Mr. Jadhav "has himself voluntarily and repeatedly confessed to financing and supporting terrorist acts"[109]. This, honourable President, honourable Judges, I may remind you is the very confession that was aired *even* before the criminal justice system was set in motion by filing a first Information Report. This was for the ears of the international community.

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

181. Pakistan alleges, as a defence to India's case, the principle of *ex turpi causa* — that is, the principle of illegality/unclean hands — and also the *ex injuria jus non oritur*. These allegations are hopeless. The factual foundation for these is the same as the previous ground of defence of abuse. India reiterates its position.

182. It is well settled that a party who has by some illegal act, prevented another from fulfilling an obligation cannot demand the performance of correlative obligations.

183. Pakistan distorts this principle to suggest that a "prior illegal act has the consequence of negating any correlative obligation"[110]. An established illegal act by a State does not give licence to another State to yet commit an illegality. *A fortiori* far-fetched allegations of illegality as have been made by Pakistan in this case and from time to time does not give it a licence to sidestep and avoid its own international obligations.

---

[109] CMP, para. 176.

[110] CMP, para. 192.

184. In relation to *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 136), Pakistan relies on the separate opinion of Judge Elaraby[111] rendered in an entirely different context. The context was the recognition of a territory — and the learned judge was of the view that illegal occupation of the territory should not be recognized. This is perhaps as irrelevant as most of the other material cited by them.

185. Pakistan seeks to rely on a purported expert report[112] as to the passport which it has unilaterally obtained. India denies all these allegations, but I strongly submit these are also completely irrelevant and alien to the present proceedings.

186. Pakistan's suggestion that the denial of consular access was on account of India's illegal activities seeks to arrogate to States the right to excuse themselves from any treaty obligations by making allegations, a proposition that has to be stated to be rejected. India on its part has always offered consular access to Pakistan even when those arrested have been caught red handed indulging in acts of terrorism. There is another matter that Pakistan has never revealed of it.

I now move to the next step of my submissions, Sir. I submit these facts therefore establish an egregious violation of Article 36 of the Treaty. The three defences with which they run do not hold and should be rejected summarily. If I have established that, as a precursor to my submissions on what would be *restitutio in integrum*, it is necessary for me to show you what Pakistan military courts are all about.

PAKISTAN MILITARY COURTS

187. The military court that "tried" Mr. Jadhav was established under the Pakistan Army Act, 1952. In January 2015 Pakistan empowered military courts to try civilians for terrorism-related offences. The Pakistan Constitution was amended, as also were amendments made to the Army Act, 1952. This honourable tribunal would note that the genesis of Army Acts between the two neighbouring countries is the same in English law, but India has never amended, or thought of amending, its Army Act to allow the army court to try civilians.

---

[111] CMP, para. 204.

[112] CMP, para. 141.

188. The courts martial are in Chapter IX of the 1952 Act. Mr. Jadhav was tried by a field general court martial (FGCM) established under Section 59 of the Army Act, 1952. Section 59 extends the jurisdiction of these army tribunals to civilians.

189. In the present case, the Chief of Army Staff has confirmed the sentence of the FGCM. This was endorsed in a statement by Mr. Sartaj Aziz quoted above, even before Mr. Jadhav could file an appeal.

190. The working of the military courts in Pakistan has been censured by the European Parliament. In a resolution of 15 June 2017, the European Parliament stated "whereas military courts were authorised for two years while the civilian judiciary was supposed to be strengthened; whereas there has been little progress in developing the judiciary, and on 22 March 2017 the military courts were controversially reinstated for a further two-year period"[113]. The resolution states that the European Parliament

> "deplores the use in Pakistan of military courts that hold hearings in secret and have civilian jurisdiction; insists that the Pakistani authorities grant access to international observers and human rights organisations for purposes of monitoring the use of military courts; called also for an immediate and transparent transition to independent civilian courts, in line with international standards on judicial proceedings; underscores *that third country nationals brought to trial must be allowed access to consular services and protections*"[114].

191. This report was submitted by the International Commission of Jurists to the United Nations Human Rights Committee in its 118th session in Geneva. Some of the significant observations in their report are as follows:

> "8. International standards clarify that the Jurisdiction of military tribunals should be restricted solely to specifically military offences committed by military personnel: They should not, in general, be used to try civilians, or to try people for gross human rights violations.
>
> . . . . . .
>
> 10. The Draft Principles Governing the Administration of Justice Through Military Tribunals, which were adopted by the former UN Sub-Commission on the Promotion and Protection of Human Rights in 2006, affirm that the Jurisdiction of military courts should be restricted to military personnel in relation to military offences. The principles also emphasize the right to a fair trial, including the right to

[113] European Parliament resolution of 15 June 2017 on Pakistan, notably the situation of human rights defenders and the death penalty (2017/2723(RSP)), para. F.

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

appeal to civilian courts, and also that civilians accused of a criminal offence of any nature shall be tried by civilian courts.

. . . . . .

12. International standards require that military courts, like all other courts, must be independent, impartial and competent, and must respect minimum guarantees of fairness, including those set out in Article 14 of the ICCPR.

13. Pakistani military courts are not independent and the proceedings before them fall far short of national and international fair trial standards. Judges of military courts are military officers who are a part of the executive branch of the State and do not enjoy independence from the military hierarchy. They are not required to have judicial or legal training, or even a law degree, and do not enjoy any security of tenure, which are prerequisites of Judicial competence and Independence.

. . . . . .

38. The Pakistan Army Act bars civilian courts from exercising their appellate jurisdiction over decisions of military courts. Civilian courts in Pakistan have held they may use their extraordinary writ jurisdiction to hear cases related to military courts where 'any action or order of any authority relating to the Armed Forces of Pakistan is . . . either *coram non judice*, *mala fide*, or without jurisdiction'. Relying on this, Javed Iqbal Ghauri challenged his son's conviction and sentence on grounds of violation of the right to a fair trial. However, on 27 January 2016, the Lahore High Court dismissed his petition. The three-page order of the Court did not address the specific concerns raised by the petitioner, including allegations of enforced disappearance. The case is currently pending before the Supreme Court."[115]

192. A second submission was made in advance of the examination of the initial report, by the Commission to the United Nations Human Rights Committee, in its 120th session in Geneva. Some of the significant observations in this report are as follows:

"5. Pakistan's system of 'military justice' has placed the country in clear violation of its legal obligations and political commitments to respect the right to life, the right to a fair trial, and the independence and impartiality of the judiciary.

6. In the two years since military courts were initially empowered to try civilians in connection with purported terrorism-related offences, they have convicted at least 274 civilians, including, possibly, children, in opaque, secret proceedings. They have sentenced 161 civilians to death and at least 48 civilians have been hanged after trials that are grossly unfair. In all these cases, the government and military authorities have failed to make public information about the time and place of the trials; the specific charges and evidence against the defendants; as well as the judgments of military courts, including the essential findings, legal reasoning, and evidence on which the convictions were based."

[115] International Commission of Jurists, UN Human Rights Committee, 118th session, Geneva, 17 Oct.-4 Nov. 2016, paras. 8, 10, 12, 13, 38.

If I may just pause here for a minute: these words have resonance. We have not seen the evidence against Mr. Jadhav, we have not seen the judgment of the military court. All we see is that doctored confession over and over again, apart from the passport and some expert report that they produced.

> "15. At least 159 out of 168 civilians (95 per cent) whose convictions have been publicly acknowledged by the military have allegedly 'confessed' to the charges. In the absence of adequate safeguards and independent review mechanisms in military proceedings, this very high rate of 'confessions' raises serious questions about their voluntariness, including with respect to the infliction of torture and other ill treatment to extract confessions.
>
> 16. States must ensure that no one is held secretly in detention, whether in officially recognized detention facilities or elsewhere. The Human Rights Committee has made it clear that secret detention under the Covenant is itself prohibited and 'detainees should be held only in facilities officially acknowledged as places of detention'. The UN Committee against Torture has repeatedly stated that people accused of a crime must be detained and interrogated in officially recognized places of detention, and provision should also be made against incommunicado detention where suspects are deprived of communication with the outside world. In its Concluding Observations on Pakistan, the CAT Committee urged Pakistan to 'ensure that no one is held in secret or incommunicado detention anywhere in the territory of the State party, as detaining individuals in such conditions constitutes per se a violation of the Convention'.
>
> 17. However, suspects tried by military courts were often kept in secret detention and family members, lawyers and NGOs did not have access to them; military proceedings were completely secret and closed to the public; and the right to appeal to civilian courts was not available. Without any access to the outside world, the detainees were at high risk of torture and ill treatment.
>
> 18. Family members of some of the people convicted by military courts petitioned the Supreme Court of Pakistan challenging, among other things, the lawfulness and voluntariness of the defendants' 'confessions'. In August 2016, however, the Supreme Court dismissed all petitions without considering the allegations of torture and other ill-treatment in any detail. The Court reiterated the limitations of its review jurisdiction, and noted that since the 'confessions' were recorded by a magistrate and were not retracted, they stood 'proved'.
>
> 19. The ICJ notes that the Supreme Court's treatment of questions regarding the veracity and voluntariness of 'confessions' in military trials is markedly different from its treatment of the same issues in the context of cases [arising] before civilian courts. Pakistani law and jurisprudence spanning decades clarify that in recording confessions, the magistrate has to observe a number of mandatory precautions. The fundamental logic of these precautions, in the words of the Supreme Court, is to shed 'all signs of fear inculcated by the Investigating Agency in the mind of the accused' and provide 'complete assurance' to the accused that in case they are not making a confession voluntarily, they will not be handed over back to the police. The Supreme Court has also held that the confessions will have no legal or evidentiary worth if these directions are not followed.
>
> . . . . . .

> 21. Procedures of 'military justice', however, made a complete mockery of these safeguards. Suspects were at all times in military custody, even after the magistrate recorded their 'confessions'. They also had no access to the outside world, further compounding their vulnerability to external pressure and coercion. And reportedly, some of them were subjected to enforced disappearance by military authorities as far back as 2010 and kept in secret detention in internment centers in the Federally Administered Tribal Areas (FATA) for many years before their military trials. In such circumstances, the 'confessions' of accused before military courts raise serious questions about their voluntariness and over the legitimacy of the manner in which they were obtained, including concerns of torture and other ill treatment.
>
> . . . . . .
>
> 25. It should be noted that under Pakistani law, the scope of judicial review is severely limited. Courts have also interpreted their review jurisdiction narrowly, and have held that 'the High Court in its constitutional jurisdiction is not a Court of Appeal and hence is not empowered to analyse each and every piece of evidence in order to return a verdict' and 'controversial questions of facts . . . cannot be looked into in this limited extraordinary writ jurisdiction'.
>
> . . . . . .
>
> 28. Since January 2017, at least 161 people were given the death penalty after being convicted."[116]

And so the second figures are repeated, I have read these to you already from the earlier report.

193. The United Nations Human Rights Committee considered these reports and adopted concluding observations some of which are of great relevance to us today, and these are as follows:

> "23. The Committee is concerned at the extension of the jurisdiction of military courts to cases transferred from Anti-Terrorism Courts and to persons detained under the Actions (in Aid of Civil Power) Regulation. The Committee is also concerned that the courts have convicted at least 274 civilians, allegedly including children, in secret proceedings and sentenced 161 civilians to death. It is also concerned that about 90 percent of convictions are based on confessions; that the criteria used for the selection of cases to be tried by these courts are not clear; that defendants are not given the right to appoint legal counsel of their own choosing in practice or an effective right to appeal in the civilian courts; and that the charges against the defendants, the nature of evidence, and the written judgments explaining the reasons for conviction are not made public. It is further concerned that the military courts allegedly convicted at least five 'missing persons' whose cases were being investigated by the Commission of Inquiry on Enforced Disappearances (Arts. 2, 6, 7, 9, 14 and 15).
>
> 24. The State party should *(a)* review the legislation relating to the military courts with a view to abrogating their jurisdiction over civilians as well as their authority to impose the death penalty; *(b)* reform the military courts to bring their proceedings into full conformity with Articles 14 and 15 of the Covenant to ensure a fair trial.

[116] International Commission of Jurists, UN Human Rights Committee, 120th Session, Geneva, 3-28 July 2017, paras. 5, 6, 12, 15, 16, 17, 18, 19, 21, 25, 28.

> 25. The Committee is concerned that the domestic legislation fails to provide a definition of torture and to criminalize it in compliance with Article 7 of the Covenant and international standards; that torture is allegedly widely used by the police, military and security forces, and intelligence agencies; and that allegations of torture are not promptly and thoroughly investigated and perpetrators are rarely brought to justice (Arts. 2, 7, 14 and 15).
>
> 26. The State party should *(a)* amend its laws to ensure that all elements of the crime of torture are prohibited in accordance with article 7 of the Covenant and to stipulate sanctions for acts of torture . . . *(b)* ensure prompt, thorough and effective investigations into all allegations of torture . . . *(c)* ensure that coerced confessions are never admissible in legal proceedings; *(d)* take all measures necessary to prevent torture . . .”[117]

194. The Inter-American Court of Human Rights (IACtHR) has also been critical of States which allow civilians to be tried by military courts. In *Petruzzi et al.* v. *Peru*, the Inter-American Court held that,

> “128. The Court notes that several pieces of legislation give the military courts jurisdiction for the purpose of maintaining order and discipline within the ranks of the armed forces. Application of this functional jurisdiction is confined to military personnel who have committed some crime or were derelict in performing their duties, and then only under certain circumstances . . . Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians . . . When a military court takes jurisdiction over a matter that regular courts should hear, the individual’s right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.
>
> 129. A basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create ‘[t]ribunals that do not use the duly established procedures of the legal process . . . to displace the jurisdiction belonging to the ordinary courts or judicial tribunals’.
>
> . . . . . .
>
> 131. This Court has held that the guarantees to which every person brought to trial is entitled must be not only essential but also judicial. ‘Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency.’
>
> 132. In the instant case, the Court considers that the military tribunals that tried the alleged victims for the crimes of treason did not meet the requirements implicit in the guarantees of independence and impartiality that Article 8 (1) of the American Convention recognizes as essentials of due process . . .

---

[117] Human Rights Committee, *Concluding Observations on the Initial Report of Pakistan*, adopted by the Committee on 25 and 26 July 2017.

. . . . . .

161. The Court observes, as it did . . . that proceedings conducted in the military courts against civilians for the crime of treason violate the guarantee of the competent, independent and impartial tribunal previously established by law, recognized in Article 8 (1) of the Convention. The right to appeal the judgment, also recognized in the Convention, is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse . . . It is important to underscore the fact that from the first to the last instance, a criminal proceeding is a single proceeding in various stages. Therefore, the concept of a tribunal previously established by law and the principle of due process apply throughout all those phases and must be observed in all the various procedural instances. If the court of second instance fails to satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal previously established by law, then the phase of the proceedings conducted by that court cannot be deemed to be either lawful or valid. In the instant case, the superior court was part of the military structure and as such did not have the independence necessary to act as or be a tribunal previously established by law with jurisdiction to try civilians. Therefore, whereas remedies, albeit very restrictive ones, did exist of which the accused could avail themselves, there were no real guarantees that the case would be reconsidered by a higher court that combined the qualities of competence, impartiality and independence that the Convention requires."[118]

RELIEF

195. Mr. Honourable President and honourable Judges of the Court, I would invite this Court to keep in mind the relief to be granted in the backdrop of the fact that his trial has been by a military court and, unlike *Avena* and *LaGrand*, any relief review or reconsideration, if it is granted in the same terms as in those cases, would mean going back to the military court.

The protection of human rights has marked a growing presence in modern international law, and international human rights law has inevitably redefined the reserved domain of State sovereignty. "No state can credibly claim that its treatment of those within its territory or jurisdiction is exclusively an internal matter."[119] The law on diplomatic protection like the progenitor of the rights of an accused in a foreign land, has played an important role in setting benchmarks for the protection of individuals. From the international minimum standards to the ICCPR and beyond, international law has increasingly assimilated, within its rubric of fairness and due process, principles and standards that seek to further the cause of protection of human rights.

---

[118] *Castillo Petruzzi et al.* v. *Peru* (1999), Series C, No. 52, paras. 128,129, 131-133, 161.

[119] Remedies in International Human Rights Law, 3rd ed., Dinah Shelton, p. 1.

196. The Commentary on Remedies in International Human Rights Law notes:

> "The atrocities perpetrated during the Second World War brought about a fundamental change in the law. Today, concern for the promotion and protection of human rights is woven throughout the United Nations Charter, beginning with the preamble, which 'reaffirm[s] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'."[120]

197. Pakistan has knowingly, wilfully and brazenly violated the provisions of Article 36 of the Vienna Convention. The rights under Article 36 of the individual Kulbhushan Jadhav and of the sending State, India, have been violated. Honourable President, honourable Judges of this Court, I respectfully submit consequences must follow, and these consequences should be based on the principles of State Responsibility:

> "Of all the breaches of international law that give rise to State Responsibility, those involving injury to aliens are the closest to modern international human rights violations. The considerable jurisprudence developed by Claims Commissions and other Tribunals . . . provides instructive precedent on the theory and practice of remedies for violations of individual rights"[121].

198. The commentary on Article 30 of the Articles for the Responsibility of States for Internationally Wrongful Acts (ARSIWA) states:

> "The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law."[122]

199. There are situations where the "result of cessation may be indistinguishable from that of restitution, for example *where the conduct required by each is the freeing of hostages or the return of objects or premises seized* . . . While the consequences of past acts cannot always be erased, it is always possible to take action in relation to future events."[123]

200. Article 35 of the ARSIWA deals with restitution. It reads thus:

> "A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

---

[120] Remedies in International Human Rights Law, 3rd ed., Dinah Shelton, p. 7.

[121] *Ibid.*, p. 35.

[122] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Art. 30, para. 5. The text was adopted by the ILC at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10).

[123] State Responsibility, The General Part, 1st ed., James Crawford, p. 465.

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

201. The commentary on Article 35 of the ARSIWA discusses the remedy of restitution and states:

> "Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory, the restitution of ships, or other types of property, including documents, works of art, share certificates, etc."[124]

202. The ARSIWA recognizes that restitution is a remedy which is foremost amongst the forms of reparation, because "restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed"[125].

203. The notion of juridical restitution expressly covers the annulment or rescinding of a judicial measure, i.e. if the verdict of a military court is at all capable of elevation to the notion of a judicial measure. Material restitution includes measures such as the release of an arrested individual. Material impossibility is not the same as legal or practical difficulties[126]. "As Article 32 makes clear, a State 'may not rely on the provisions of its internal law as justification for failure to comply with its obligations'."[127]

204. The Human Rights Committee has, in cases where alleged violations of the ICCPR were established, applied principles of State Responsibility by ordering the release, or retrial with all the guarantees, and if not possible then the release of detenus whose rights were violated[128].

205. This Court fashioned the relief in *Avena* based upon the facts that presented themselves. In those cases, the United States argued that even if there was a breach of Article 36, the internal systems and the domestic law were robust and fully protective of the rights of an accused so as to

---

[124] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Art. 35, para. 5. The text was adopted by the ILC at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10).

[125] *Ibid.*, Art. 35, para. 3.

[126] *Ibid.*, Art. 35, paras. 5 and 8.

[127] State Responsibility, The General Part, 1st ed., James Crawford, p. 513.

[128] MI, Ann. 13.

conform to the highest standards of due process. In the circumstances, this Court accepted that review and reconsideration within the American system was sufficient by way of restitution.

206. The follow-up of *Avena*, however, establishes that even in a system which is otherwise committed to due process, review and reconsideration may prove to be an unworkable remedy[129].

PAKISTAN'S CONDUCT DOES NOT INSPIRE CONFIDENCE THAT MR. JADHAV CAN GET JUSTICE IN PAKISTAN

207. Pakistan has in its custody an Indian national who has been publicly portrayed to be a terrorist and an Indian agent creating unrest in Balochistan. It is obvious that the question of Mr. Jadhav receiving justice in a domestic forum in Pakistan simply does not arise. The repeated mention of domestic courts by Pakistan is meaningless as there is no domestic remedy for the breach of Article 36. That is extremely important.

208. On 25 March 2016, Pakistan made public a confessional video extracted from Mr. Jadhav while in custody of the security forces. Without any further verification, Pakistan notified the P5 States[130] of his arrest and made serious allegations against India. Since then, on every possible occasion Pakistan has used Mr. Jadhav to build a narrative against India.

209. Pakistan's requests for assistance — which, for the first time, came ten months after India's request for consular access — in the so-called investigation it proposed to carry out on the basis of alleged "disclosures" in Mr. Jadhav's extracted confessions were a farcical attempt at propaganda. Pakistan has not yet disclosed the acts that would constitute the commission of an offence, in relation to a single incident anywhere.

210. A meeting with Mr. Jadhav's wife and mother was arranged by Pakistan on 25 December 2017 on "humanitarian grounds". Contrary to the understanding between the Parties, the arrangements of the meeting at the venue were made in a way that the Indian diplomat was placed in a separate chamber while the mother and the wife, with two persons from the Pakistani establishment, were in a middle chamber, and Mr. Jadhav was in a third chamber.

211. The dehumanizing treatment of Mr. Jadhav's family members, leaves little faith in the Pakistan administration.

---

[129] Judges' folders, tab 3.

[130] CMP, Ann. 12.

212. Mr. Jadhav's mother sought to file an appeal under Section 133 (B) and a petition to the Federal Government of Pakistan under Section 131 of the Army Act. The appeal and petition were prepared based on information available in public domain, as there were no particulars of the "charges", of the "evidence" or even of the "judgment" formally provided by Pakistan. Without consular access, and access to all relevant information, no effective appellate remedy is capable of being availed, and the right to appeal would be liable to be classified as farcical, as was the "trial" by a military court.

213. The institutional bias against Mr. Jadhav is starkly apparent. The Order of this Court granting provisional measures was criticized as impinging on Pakistan's sovereignty in a reported statement issued by the Lahore High Court Bar Association of Pakistan which condemned the provisional measures Order by this Court stating that "Pakistan's Judiciary possesses all the rights for Jadhav's *execution*". The Bar Association also passed a resolution threatening any lawyer who would dare to appear for Mr. Jadhav.

214. If the decision of the military court is merely annulled without releasing Mr. Jadhav, he will be left at the mercy of the military authorities in Pakistan, for a fresh "trial" by the military authorities. This relief would not provide any restitution whatsoever. But what is far more is that it would defeat the established principles of international law mandating due process for it would be sanctifying the working of a military court prosecuting civilians generally. Relief for review and reconsideration would be sanctifying a process and recognizing as due process compliant, a system that has been criticized by the European Parliament, the International Commission of Jurists and the Human Rights Committee.

215. The military court applies its own codes of procedure, in a court presided over by a military official, and in which no lawyer of choice of the accused is allowed to assist him in his defence, even where the offence with which he was "charged" involved the penalty of a death sentence. The nature of the institution where Mr. Jadhav would be tried if his case is remanded for review and reconsideration, does not satisfy the standards of due process and is not one in which this Court could repose faith.

216. It bears repetition that it is Pakistan who seeks to invite this Court to assume the role of an appellate court, and for which purpose it raises the issue of the passport and the issue of the confession, inviting this Court to endorse its wrongful actions leading to the farcical conviction. India raises the issue of violation of the rights under Article 36 and limits its case to seeking a vindication of its position that Pakistan has acted illegally and in breach of its international obligations. India does not invite the Court to reopen the conviction on merits. This Court has already held that the violation of Article 36 results in the injured State and the injured accused seeking *restitutio in integrum*. In the facts and circumstances of the case, India therefore invites the Court to restrain Pakistan from acting on the conviction on the ground that it was secured by a means which was in brazen violation of Article 36 of the Vienna Convention, and in the present case, the relief of review and reconsideration would be highly inadequate considering the facts and circumstances of this case. This does not amount to seeking an appellate review of the trial or the verdict of conviction.

217. India challenges Pakistan's assertions that going beyond review and reconsideration would, in the facts and circumstances of the case go beyond the legitimate functions of the Court. Honourable President, honourable judges, I very respectfully submit, this Court is the final arbiter of disputes in relation to Article 36 of the Vienna Convention. If in moulding the relief of restitution, this Court is satisfied that, in a fact situation, review and reconsideration is not a feasible option and that, on the balance, releasing a human being who has been in military captivity and used as a pawn by Pakistan for propaganda purposes does not constitute disproportionate relief, then such relief of release can and should be granted. By granting such relief the Court would not be examining the merits of the verdict but would be annulling its legal efficacy by applying principles of State Responsibility to the actions of the different organs of the Islamic Republic of Pakistan.

218. India reiterates its position that any relief by way of review and reconsideration, in the face of the allegations being made by Pakistan even in this Court, and the system which prevails in Pakistan, would not serve any real purpose as a review by a system marked by the absence of due process and in the prevalent situation created by Pakistan's propaganda relating to Mr. Jadhav. It would defy credulity to believe that a review and reconsideration would in any manner be fair and

impartial, and compliant with the object and purpose of Article 36. The relief in the present case should be as sought by India, including a direction to Pakistan to set Mr. Jadhav at liberty.

219. Pakistan has relied on a report of two military experts on the issue of the credibility of its criminal courts and to what extent they fulfil the standards of due process. I submit, Sir, this report is pretty much irrelevant because it is for this Court to decide, and not for experts on these questions of law.

220. Pakistan has by its communications to India and otherwise sought to suggest that India has sought to mislead this Court in the matter of the report of the military experts.

221. The suggestion is as unfortunate as it is meritless. The original report is before the Court and if Pakistan feels that India's comments were based on a wrong portrayal of the report, it is a matter for submissions to this Court.

222. In paragraph 3 *(d)* of the report, the experts state their conclusion that manifest failings in due process can be remedied by judicial review. India relies on this statement as an acknowledgment that there are manifest failings. It does so in paragraph 19 of the Reply. Pakistan does not suggest there is any misquotation in this paragraph.

223. India repeats its criticism in paragraph 154 *(d)* of the Reply where India reiterates that this is an acknowledgment that there are manifest failings of due process. In the reproduction of the report in this paragraph, there appears to be a typographical error by which the word "the" was added before the words "manifest failings". India has commented on two places in the Reply on the report making exactly the same point, and obviously did not derive from the presence of the article "the" in the reproduction of paragraph 154 *(d)*.

224. The second baseless allegation relates to India's inferences at paragraph 154 *(b)* where India notes that the report acknowledges that the jurisdiction is limited to persons already subject to the service, and goes on to quote that "modern state practice in most jurisdictions is that civil authorities of the state will undertake any prosecution of these offences where there is concurrent jurisdiction"[131]. Pakistan finds no flaw in the quotation. I have explained India's reading of the report. No reasonable person reading India's Reply would be misled as to the contents of the

[131] CMP, Ann. 142.

report — the original of which in any case is available to the Court and is copiously relied upon by Pakistan. This is another attempt by Pakistan to create unnecessary controversy to distract from the serious issues that arise in the case.

225. Pakistan alleges that India also seeks to mislead the Court by failing to mention that the report adds a caveat by the experts that they were unable to verify the criticism of the courts in India and Pakistan both — it merely mentions that the experts have a caveat in the report that they are unable to verify the criticisms of the courts. It is obvious to anybody who is familiar with this case that the present proceedings relate to Pakistan and the criticism of its military courts as made by India and that the reference to Indian courts and the criticism, if any, which the experts may have been privy to or are aware of, is of no relevance to this case. This again is an unfortunate attempt by Pakistan to find flaws in India's Reply where there are none.

CONCLUSION

226. India submits, Sir, that it has established that Pakistan's conduct in not allowing consular access to Mr. Jadhav right from the time of his detention to the time of his conviction and thereafter, is a gross violation of Article 36 of the Vienna Convention. None of the defences would avail Pakistan.

227. India submits that the relief of restitution has to be appropriately moulded to deal with the prevalent legal system in Pakistan.

228. India submits that the military courts of Pakistan cannot command the confidence of this Court and should not be sanctified by a direction to them to review and reconsider the case.

229. For the reasons given by India in its Memorial and its Reply, India, honourable President, honourable Judges of the Court, seeks annulment of Mr. Jadhav's conviction and a direction that he be released forthwith.

Thank you, Mr. President and honourable judges, for this opportunity to make this presentation.

The PRESIDENT: I thank Mr. Salve. Your statement brings to an end today's sitting. Oral argument in the case will resume tomorrow at 10 a.m., for Pakistan's first round of pleading.

The sitting is adjourned.

The Court rose at 12.55 p.m.

_____