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INTRODUCTORY NOTE TO JADHAV CASE (INDIA V. PAKISTAN) (I.C.J.)

BY FREYA BAETENS*

[July 17, 2019]

In May 2017, India commenced proceedings before the International Court of Justice (ICJ) against Pakistan, accusing it of "egregious violations of the Vienna Convention on Consular Relations" (VCCR).[1] The dispute concerns the treatment of an Indian national, Kulbhushan Sudhir Jadhav, who was detained, tried, and sentenced to death by a military court in Pakistan. The Court essentially upheld the claim by its judgment of July 17, 2019.

Application Instituting Proceedings

In its Application, India claimed that, on March 3, 2016, Jadhav was "kidnapped from Iran, where he was carrying on business after retiring from the Indian Navy, and was then shown to have been arrested in Baluchistan"[2] on suspicion of espionage and sabotage activities. India stated that it was not informed of Jadhav's detention until twenty-two days after his arrest and that Pakistan failed to inform him of his rights under the VCCR. Allegedly, the Pakistani authorities refused to give India consular access to Jadhav, despite repeated requests.

India further argued that, on January 23, 2017, Pakistan requested assistance in the investigation of Jadhav's involvement in espionage and terrorist activities.[3] Moreover, Pakistan had stated that "consular access [to Jadhav would] be considered in the light of the Indian side's response to Pakistan's request for assistance in [the] investigation process."[4] In this respect, India claimed that "linking assistance to the investigation process to the grant[ing] of consular access was by itself a serious violation of the Vienna Convention."[5]

India accordingly asked the ICJ to:[6]

- find jurisdiction on the basis of the Optional Protocol to the VCCR
- order the immediate suspension of the death sentence of the accused
- declare that the sentence of the military court, arrived at in defiance of the VCCR and "elementary human rights," as incorporated in the International Covenant on Civil and Political Rights, is in violation of international law
- restrain Pakistan from giving effect to the sentence awarded by the military court, and direct it to take steps to annul the decision of the military court
- declare the decision illegal if Pakistan was unable to annul it, as it is in violation of international law and treaty rights, and to restrain Pakistan from further violating international law by giving effect to the sentence or the conviction in any manner, and to direct it to release Jadhav forthwith.

Provisional Measures

India also filed a request for provisional measures on the ground that the alleged violation of the VCCR by Pakistan "has prevented India from exercising its rights under the Convention and has also deprived the Indian national from the protection accorded under the Convention."[7] Pending final judgment, India requested the Court to indicate that:[8]

- Pakistan had to take all measures necessary to ensure that Jadhav was not executed
- Pakistan had to report to the Court the action it had taken in this regard, and
- Pakistan had to ensure that no action would be taken that might prejudice the rights of India or Jadhav with respect of any decision on the merits of the case.

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In its Order of May 18, 2017, the Court decided that Pakistan had to "take all measures at its disposal to ensure that Jadhav is not executed pending the final decision . . . and . . . inform the Court of all the measures taken in implementation of [this] Order."[9] Pakistan complied with this decision.

Judgment on Jurisdiction, Admissibility, and Merits

Jurisdiction and Admissibility (Paragraphs 33–66)

The Court had little or no difficulty upholding its jurisdiction on the basis of the Optional Protocol concerning the Compulsory Settlement of Disputes to the VCCR. India had requested that the Court interpret the VCCR in light of obligations under international law, notably the International Covenant on Civil and Political Rights of 1966. The Court declined to do so because its jurisdiction did not extend beyond deciding claims under the VCCR, although it could take into account other international law instruments "relevant to the interpretation of the Vienna Convention."[10] Jurisdiction under the Optional Protocol is thus comparatively narrow, with the Court confined to breaches of obligations under the VCCR itself, and the remedies granted fell well short of those sought by India.

India's application was also held admissible, with a single dissent. Pakistan's objections relating to an alleged abuse of process (the request for provisional measures was not considered abusive) and an alleged abuse of rights (Jadhav was undoubtedly an Indian national and India had not violated its international obligations under UN Security Council Resolution 1373 on preventing and suppressing the financing of terrorist acts) were rejected, as was the argument based on India's own alleged unlawful conduct (the "clean hands" doctrine).

Judge *ad hoc* Jillani dissented. He thought the claim should have been dismissed as an abuse of rights, given that Jadhav had admitted to being an Indian spy acting unlawfully in Pakistan. He relied on point (vi) of the 2008 Agreement on Consular Access between India and Pakistan, which provides that, "In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits," arguing that this represented an acceptance by both parties that consular access was not required in cases of security or espionage. He criticised the Court's failure to "recognize that the existing judicial review in Pakistan already substantially responds to the relief ordered," and more generally for setting "a dangerous precedent at the times when States are increasingly confronted with transnational terrorist activities and impending threats to national security."[11]

The Court dealt rather summarily with these points in paragraphs 93–95 of the judgment, focusing on point (vi) of the 2008 Agreement as well as its preamble, which states that the Agreement is aimed at "furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country." The Court held that point (vi) could not be read as denying consular assistance in the context of an arrest, detention, or imprisonment on the grounds of policy or national security. Had the intention been otherwise, it would have been made explicit in the 2008 Agreement—especially considering the importance of the rights concerned in guaranteeing humane treatment in such context. The Court also held that any derogations from the protections of Article 36 of the VCCR based on political or security grounds would render the right to consular assistance "meaningless" because it would "give the receiving State the possibility of denying such access."[12] Thus, under the VCCR, consular protection is fundamental. However, it is also a relatively straightforward form of representation, which does not deny the receiving state its normal jurisdiction to try to sentence those suspected of criminal conduct.

Application of Article 36 of the VCCR (Paragraphs 67–124)

The Court then moved to the arguments on the substance of the claim, starting with the finding that persons suspected of espionage were not excluded from the protection offered under Article 36 of the VCCR. Pakistan had claimed that the 2008 Agreement provided for a *lex specialis*, which arguably excluded the application of the VCCR. The Court disagreed, holding that the 2008 Agreement was merely a subsequent agreement on timing and procedure, one that did not displace the obligations under Article 36.

By not informing Jadhav without delay of his rights under Article 36(1)(b) of the VCCR (it was not contested that he had not been informed), Pakistan had breached its obligations under that provision. Likewise, by not notifying the appropriate consular post of India in Pakistan without delay of the detention of Jadhav and thereby depriving India of

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the opportunity to render the assistance provided for, Pakistan had breached its obligations under Article 36(1)(b) of the VCCR.

Finally, Pakistan had deprived India of the right to communicate with and have access to Jadhav, to visit him in detention, and to arrange for his legal representation, and thereby had breached its obligations under Article 36 (1)(a) and (c) of the VCCR. In this context, Pakistan's argument that India's refusal to assist in the investigations formed an abuse of rights was rejected. A receiving State's obligations in terms of allowing for consular access cannot be conditioned on the sending State's "clean hands."

Remedies (Paragraphs 125–148)

Having established these breaches, India sought comprehensive remedies, including the release of Jadhav and his repatriation to India. Here it made much less progress.

Simple issues were Pakistan's obligation to inform Jadhav without further delay of his rights under the VCCR and to provide India with consular access to him. Likewise, Pakistan had the obligation to provide effective review and reconsideration of the conviction and sentence. Pakistan could, however, choose its own means for complying with this obligation. The Court stressed, however, that a continued stay of execution was an indispensable condition for the effective review and reconsideration of the conviction and sentence.

The final three findings, addressing the way forward, arguably form the most interesting aspects of the ruling, but could also result in further disagreements between the parties. In particular, how should one interpret "effective review and reconsideration of the conviction and sentence"? Presumably, this would require a retrial, and this time not by a military court, as that could cast doubts on the impartiality and independence of the review.

This does not mean, however, that Jadhav is "off the hook." It would seem likely that, unless a diplomatic solution is found, he will have to stand trial again in Pakistan, since a trial on a charge of espionage and terrorist activities does not in itself breach the VCCR. As long as Indian consular officers have access to Jadhav and are able to provide assistance, a new court could arrive at the same verdict without acting in violation of international law—depending on the strength of the evidence.

Significance of the Judgment

The *Jadhav* judgment is consistent with, and further reinforces, the ICJ's *LaGrand* and *Avena* judgments: the Court shows its continued willingness to intervene, but largely on procedural grounds. Arguably, the *Jadhav* judgment goes somewhat further than the previous rulings in terms of the extent of the remedies offered, but the protection nonetheless remains essentially formalistic and without prejudice to the difficult range of substantive issues associated with the simultaneous application of various multilateral and bilateral treaties dealing with the same subject matter.

Jadhav reinforces the approach of the Court to consular protection under the VCCR. This is a general right of foreign nationals, without unexpressed exceptions. But it is not a right on the part of the state of nationality to any outcome of the trial, which is to proceed in accordance with the law and the procedure of the receiving state. As such, it is a qualified guarantee of due representation of the accused, and to that extent an assurance of good process.

ENDNOTES

1 Jadhav (India v. Pakistan) Application instituting proceedings (May 8, 2017) p. 4 [hereinafter Application], https://www.icj-cij.org/files/case-related/168/168-20170508-APP-01-00-EN.pdf.

2 *Id.* ¶ 13.

3 *Id.* ¶ 7; Annex 2.

4 *Id.* ¶ 11; Annex 3.

5 *Id.* ¶ 12.

6 *Id.* ¶¶ 28, 60.

7 Jadhav (India v. Pakistan) Request for the indication of provisional measures of protection (May 8, 2017) ¶ 18 [hereinafter

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Request], https://www.icj-cij.org/files/case-related/168/19424.pdf.

8 *Id.* ¶ 22.

9 Jadhav (India v. Pakistan) Order on provisional measures order (May 18, 2017) ¶ 61, https://www.icj-cij.org/files/case-related/168/168-20170518-ORD-01-00-EN.pdf.

10 Jadhav (India v. Pakistan) Judgment (July 17, 2019) ¶¶ 36–37 [hereinafter Judgment], https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf.

11 Jadhav (India v. Pakistan) Dissenting opinion of Judge ad hoc Jillani (July 17, 2019) ¶ 1, https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-05-EN.pdf.

12 Judgment, *supra* note 10, ¶ 95.

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JADHAV CASE (INDIA V. PAKISTAN) (I.C.J.)*

[17 July 2019]

JUDGMENT

JADHAV CASE

(INDIA *v.* PAKISTAN)

AFFAIRE JADHAV

(INDE c. PAKISTAN)

17 JUILLET 2019

ARRÊT

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INTERNATIONAL COURT OF JUSTICE

2019
17 July
General List
No. 168

YEAR 2019

17 July 2019

JADHAV CASE
(INDIA *v.* PAKISTAN)

Factual background — Arrest and detention by Pakistan of an individual named Mr. Kulbhushan Sudhir Jadhav — Mr. Jadhav accused of involvement in espionage and terrorism activities — Criminal proceedings instituted — Mr. Jadhav sentenced to death by military court in Pakistan.

*

Jurisdiction of the Court — Dispute relates to interpretation and application of Vienna Convention on Consular Relations — The Court has jurisdiction under Article I of Optional Protocol to Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes.

*

Admissibility of India's Application.

First objection of Pakistan to admissibility — Alleged abuse of process — No basis to conclude that India abused its procedural rights when it requested indication of provisional measures — Articles II and III of Optional Protocol do not contain preconditions to the Court's exercise of its jurisdiction — First objection to admissibility rejected.

Second objection of Pakistan to admissibility — Alleged abuse of rights — Contention by Pakistan that India failed to prove Mr. Jadhav's nationality — No room for doubt that Mr. Jadhav is of Indian nationality — Other arguments advanced by Pakistan based on alleged breaches of India's international obligations under Security Council resolution 1373 (2001) — Allegations to be examined below as part of the merits — Second objection to admissibility rejected.

Third objection of Pakistan to admissibility — India's alleged unlawful conduct — Pakistan's objection based on "clean hands" doctrine rejected — No explanation how alleged unlawful conduct by India prevented Pakistan from providing consular access — Pakistan's objection based on principle of "ex turpi causa non oritur actio" *cannot be upheld — Principle* "ex injuria jus non oritur" *inapposite in present case — Third objection to admissibility rejected.*

India's Application admissible.

*

Applicability of Article 36 of Vienna Convention.

Alleged exception based on charges of espionage — No reference in Vienna Convention to cases of espionage — Article 36 does not exclude from its scope persons suspected of espionage — Consular access expressly regulated by Article 36, and not by customary international law — Relevance of 2008 Agreement on Consular Access between India and Pakistan — No restriction on rights guaranteed by Article 36 in 2008 Agreement — 2008 Agreement constitutes a subsequent agreement within meaning of Article 73, paragraph 2, of Vienna Convention — Point (vi) of

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2008 Agreement does not displace obligations under Article 36 — None of arguments concerning applicability of Article 36 of Vienna Convention can be upheld — Vienna Convention applicable in present case.

Alleged violations of Article 36 of Vienna Convention.

Alleged failure of Pakistan to inform Mr. Jadhav of his rights under Article 36, paragraph 1 (b) *— Allegation not contested by Pakistan — Mr. Jadhav not informed of his rights — Finding that Pakistan breached its obligation to inform Mr. Jadhav of his rights under Article 36, paragraph 1* (b).

Alleged failure of Pakistan to inform India, without delay, of arrest and detention of Mr. Jadhav — Pakistan under obligation to inform India's consular post of arrest and detention of Mr. Jadhav — Notification some three weeks after his arrest — Finding that Pakistan breached its obligation to inform India "without delay" of Mr. Jadhav's arrest and detention.

Alleged failure of Pakistan to provide consular access — Consular access to Mr. Jadhav not granted by Pakistan — Finding that Pakistan breached its obligations under Article 36, paragraph 1 (a) *and* (c) *by denying consular officers of India access to Mr. Jadhav.*

Abuse of rights.

No basis under Vienna Convention for a receiving State to condition fulfilment of its obligations under Article 36 on the sending State's compliance with other international law obligations — Pakistan's contentions based on abuse of rights rejected.

*

Remedies.

Pakistan under obligation to cease internationally wrongful acts of a continuing character — Mr. Jadhav to be informed without further delay of his rights — Indian consular officers to be given access to him and be allowed to arrange for his legal representation.

Appropriate remedy is effective review and reconsideration of conviction and sentence of Mr. Jadhav — Full weight to be given to the effect of violation of rights set forth in Article 36 — Choice of means left to Pakistan — Pakistan to take all measures to provide for effective review and reconsideration, including, if necessary, by enacting appropriate legislation — Continued stay of execution constitutes condition for effective review and reconsideration of conviction and sentence of Mr. Jadhav.

JUDGMENT

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

In the Jadhav case,

between

the Republic of India,

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represented by

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

as Agent;

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

as Co-Agent;

Mr. Harish Salve, Senior Advocate,

as Senior Counsel;

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

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

as Adviser;

Ms Chetna N. Rai, Advocate,

Ms Arundhati Dattaraya Kelkar, Advocate,

as Junior Counsel;

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

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

as Advisers,

and

the Islamic Republic of Pakistan,

represented by

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

as Agent;

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

as Co-Agent;

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

Ms Fareha Bugti, Director, Ministry of Foreign Affairs;

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

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

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

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

Mr. Tahmasp Razvi, Office of the Attorney General;

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

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

as Legal Counsel and Advocate;

Ms Catriona Nicol, Associate, McNair Chambers,

as Junior Counsel;

Mr. Joseph Dyke, Associate, McNair Chambers,

as Legal Assistant;

Brigadier (retired) Anthony Paphiti,

Colonel (retired) Charles Garraway, CBE,

as Legal Experts,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

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

2. In its Application, India seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and Article I of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (hereinafter the "Optional Protocol").

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

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

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5. By a letter dated 9 May 2017 addressed to the Prime Minister of Pakistan, the President of the Court, exercising the powers conferred upon him under Article 74, paragraph 4, of the Rules of Court, called upon the Pakistani Government, pending the Court's decision on the Request for the indication of provisional measures, "to act in such a way as will enable any order the Court may make on this Request to have its appropriate effects". A copy of that letter was transmitted to the Agent of India.

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

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

8. By an Order of 18 May 2017, the Court indicated the following provisional measures:

> "Pakistan shall take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order."

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

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

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

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

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

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

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

15. By letters received in the Registry on 18 February 2019, the first day of hearings, Pakistan informed the Court of its intention to call an expert and to present audio-visual material during the oral proceedings. Further,

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Pakistan expressed its intention to produce a new document. By letters dated 19 February 2019, the Registrar informed the Parties that the Court, having ascertained the views of India, had decided that it would not be appropriate to grant Pakistan's requests in the circumstances of the case.

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

For India: Mr. Deepak Mittal,
Mr. Harish Salve.

For Pakistan: Mr. Anwar Mansoor Khan,
Mr. Khawar Qureshi.

*

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

(1) A relief by way of immediate suspension of the sentence of death awarded to the accused.

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

(3) Restraining Pakistan from giving effect to the sentence awarded by the military court, and directing it to take steps to annul the decision of the military court as may be available to it under the law in Pakistan.

(4) If Pakistan is unable to annul the decision, then this Court to declare the decision illegal being violative of international law and treaty rights and restrain Pakistan from acting in violation of the Vienna Convention and international law by giving effect to the sentence or the conviction in any manner, and directing it to release the convicted Indian national forthwith."

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

On behalf of the Government of India,

in the Memorial:

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

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

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

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

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And that pursuant to the foregoing,

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

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

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

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

These submissions were confirmed in the Reply.

On behalf of the Government of Pakistan,

in the Counter-Memorial:

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

in the Rejoinder:

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

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

On behalf of the Government of India,

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

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

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

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

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And that pursuant to the foregoing,

(1) Declare that:

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

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

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

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

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

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

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

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

On behalf of the Government of Pakistan,

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

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I. FACTUAL BACKGROUND

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

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

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illegally entering Pakistani territory. Pakistan explains that, at the moment of his arrest, Mr. Jadhav was in possession of an Indian passport bearing the name "Hussein Mubarak Patel". India denies these allegations.

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

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

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

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

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

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

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

> "[c]onsular access to Mr. Jadhav would be an essential pre-requisite in order to verify the facts and understand the circumstances of his presence in Pakistan". The Parties raised similar arguments in subsequent diplomatic exchanges.

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

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

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

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

II. JURISDICTION

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

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

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

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

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

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

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

III. ADMISSIBILITY

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

A. First objection: abuse of process

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

41. First, it alleges that when requesting the indication of provisional measures on 8 May 2017, India failed to draw the Court's attention to the existence of what Pakistan regards as "highly material facts". More specifically, it refers to the existence of a constitutional right to lodge a clemency petition within a period of 150 days after Mr. Jadhav's death sentence, which would have stayed his execution until at least that deadline. According to Pakistan, this possibility was made public by means of a press statement dated 14 April 2017 (see paragraph 29 above).

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

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

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

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

46. Article II reads as follows:

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

According to Article III:

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

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

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

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

49. The Court recalls that "only in exceptional circumstances should [it] reject a claim based on a valid title of jurisdiction on the ground of abuse of process. In this regard, there has to be clear evidence that the applicant's conduct amounts to an abuse of process" (*Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment of 13 February 2019*, para. 113, citing *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports*

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2018 (I), p. 336, para. 150). The Court does not consider that in the present case there are such exceptional circumstances that would warrant rejecting India's claims on the ground of abuse of process.

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

B. Second objection: abuse of rights

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

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

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

* *

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

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

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

57. As indicated above, the second and third arguments advanced by Pakistan in support of its second objection to the admissibility of the Application are based on various alleged breaches of India's obligations under Security Council resolution 1373 (2001). In particular, Pakistan refers to India's failure to respond to

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Pakistan's request for mutual legal assistance with its criminal investigations into Mr. Jadhav's espionage and terrorism activities, as well as the issuance of what Pakistan describes as a "false cover name authentic passport". The Court observes that, in essence, Pakistan seems to argue that India cannot request consular assistance with respect to Mr. Jadhav, while at the same time it has violated other obligations under international law as a result of the above-mentioned acts. While Pakistan has not clearly explained the link between these allegations and the rights invoked by India on the merits, in the Court's view, such allegations are properly a matter for the merits and therefore cannot be invoked as a ground of inadmissibility.

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

C. Third objection: India's alleged unlawful conduct

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

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

* *

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

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

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

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

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

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

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

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

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

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

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

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

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

70. India considers that Article 36 of the Vienna Convention does not admit of any exceptions. In its view, the *travaux préparatoires* show that no exception was made to the Convention with regard to cases of espionage, even though the question of espionage was discussed during the drafting process. According to India, the *travaux préparatoires* establish that the Convention's drafters considered espionage to be covered by the

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principles governing consular access. India argues that if the reasoning espoused by Pakistan were to be carried to its logical conclusion, a receiving State could justify the denial of the rights provided for by the Vienna Convention by alleging acts of espionage.

* *

71. The Court notes that India is not a party to the 1969 Vienna Convention on the Law of Treaties and that, while Pakistan signed that Convention on 29 April 1970, it has not ratified it. The Court will interpret the Vienna Convention on Consular Relations according to the customary rules of treaty interpretation which, as it has stated on many occasions, are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (see, for example, *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 48, para. 83; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 232, para. 153). Under these rules of customary international law, the provisions of the Vienna Convention on Consular Relations must be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in the light of the object and purpose of the Convention. To confirm the meaning resulting from that process, or to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result, recourse may be had to supplementary means of interpretation, which include the preparatory work of the Convention and the circumstances of its conclusion.

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

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

"*Article 36*

Communication and contact with nationals of the sending State

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

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

   (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

   (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

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

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

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

(b) The *travaux préparatoires* of Article 36

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

(i) International Law Commission (1960)

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

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

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

> "Mr. TUNKIN felt it might be best to delete the words 'without delay'. There were cases in which it was impossible to inform the consul immediately of the arrest or detention of a national. Sometimes

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— for instance in espionage cases, where there might be accomplices at large — it might be desirable that the local authorities should not be obliged to inform the consul." (*Ibid.*, p. 58, para. 47.)

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

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

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

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

83. During its 1961 session, the Commission decided to change the words "without delay" to "without undue delay" (*Yearbook of the International Law Commission*, 1961, Vol. I, pp. 242–245). The Court observes that this decision had no implication for the scope of draft Article 36. The Commission's commentary to draft Article 36, paragraph 1 *(b)*, merely states that "[t]he expression 'without undue delay' used in paragraph 1 *(b)* allows for cases where it is necessary to hold a person incommunicado for a certain period for the purposes of the criminal investigation" (*Official Records of the United Nations Conference on Consular Relations, Vienna, 4 March–22 April 1963* (United Nations, doc. A/CONF.25/16/Add.1), Vol. II, p. 24, para. 6).

(ii) The Vienna Conference (1963)

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

"The CHAIRMAN invited Mr. Žourek [the former Special Rapporteur of the International Law Commission on this topic] to explain why the International Law Commission had included the words 'without undue delay' in its draft . . .

Mr. ŽOUREK (Expert) said that . . . [t]hey were intended to allow for cases in which the receiving State's police might wish to held *[sic]* a criminal in custody for a time. For example, if a smuggler was suspected of controlling a network, the police might wish to keep his arrest secret until they had been able to find his contacts. Similar measures might be adopted in case of espionage." (*Ibid.*, Vol. I, p. 338, paras. 8–9.)

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

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

2. Alleged espionage exception under customary international law

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

88. India maintains that the instances referred to by Pakistan, wherein States have denied consular access to individuals suspected of espionage or have granted them access after a considerable delay, cannot affect the interpretation of Article 36 of the Vienna Convention. In its view, these instances are "random examples" and do not constitute an established practice. According to India, Pakistan is wrong to suggest that customary international law prevails over the plain language of Article 36 of the Convention and that an exclusion is created for allegations of espionage.

* *

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

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

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

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

"*Agreement on Consular Access*

The Government of India and the Government of Pakistan, desirous of furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country, have agreed to reciprocal consular facilities as follows:

. . . . . .

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

. . . . . .

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

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

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

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

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

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94. The Court recalls that point (vi) of the 2008 Agreement provides that "[i]n case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits". It also recalls that, in the preamble of the Agreement, the Parties declared that they were "desirous of furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country". The Court is of the view that point (vi) of the Agreement cannot be read as denying consular access in the case of an arrest, detention or sentence made on political or security grounds. Given the importance of the rights concerned in guaranteeing the "humane treatment of nationals of either country arrested, detained or imprisoned in the other country", if the Parties had intended to restrict in some way the rights guaranteed by Article 36,

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one would expect such an intention to be unequivocally reflected in the provisions of the Agreement. That is not the case.

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

96. Account should also be taken of Article 73, paragraph 2, of the Vienna Convention for the purpose of interpreting the 2008 Agreement. This paragraph provides that "[n]othing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof". The language of this paragraph indicates that it refers to subsequent agreements to be concluded by parties to the Vienna Convention. The Court notes that the Vienna Convention was drafted with a view to establishing, to the extent possible, uniform standards for consular relations. The ordinary meaning of Article 73, paragraph 2, suggests that it is consistent with the Vienna Convention to conclude only subsequent agreements which confirm, supplement, extend or amplify the provisions of that instrument, such as agreements which regulate matters not covered by the Convention.

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

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

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

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

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

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

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

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

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

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

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

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

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

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of Mr. Jadhav. Finally, if the Court finds that notification was provided by Pakistan, it will examine whether it was made "without delay".

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

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

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

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

111. The Court now proceeds to the second question, that of whether Pakistan informed India of the arrest and detention of Mr. Jadhav. On 25 March 2016, the Foreign Secretary of Pakistan summoned the Indian High Commissioner in Islamabad to raise the matter of the arrest and issued a démarche protesting the illegal entry into Pakistan of "a RAW officer" (see paragraph 22 above). The Court observes that Article 36, paragraph 1 *(b)*, does not specify the manner in which the receiving State should inform the consular post of the sending State of the detention of one of its nationals. What is important is that the information contained in the notification is sufficient to facilitate the exercise by the sending State of the consular rights envisaged by Article 36, paragraph 1, of the Vienna Convention. Pakistan's action on 25 March 2016 enabled India to make a request for consular access on the same day (see paragraph 103 above). Under the circumstances, the Court considers that Pakistan notified India on 25 March 2016 of the arrest and detention of Mr. Jadhav, as required by Article 36, paragraph 1 *(b)*, of the Vienna Convention.

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

113. There was a delay of some three weeks between Mr. Jadhav's arrest on 3 March 2016 and the notification made to India on 25 March 2016. The Court recalls that "neither the terms of the [Vienna] Convention as normally understood, nor its object and purpose, suggest that 'without delay' is to be understood as 'immediately upon arrest and before interrogation'" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 48, para. 85). It also recalls that "there is no suggestion in the *travaux* that the phrase 'without delay' might have different meanings in each of the three sets of circumstances in which it is used in Article 36, paragraph 1 *(b)*" (*ibid.*, p. 49, para. 86). In the *Avena* case, the Court's determination whether notification had been given "without delay" was made on the basis of each individual's circumstances. It found that there had been a violation of the obligation to inform under Article 36, paragraph 1 *(b)*, with regard to a delay of just 40 hours when the foreign nationality of the detained person was apparent from the outset of his detention (*ibid.*, p. 50, para. 89). However, the Court found no violation in respect of a delay of five days when the foreign nationality was less obvious at the time of arrest (*ibid.*, p. 52, para. 97). Taking account of the particular circumstances of the present case, the Court considers that the fact that the notification was made some three weeks after the arrest in this case constitutes a breach of the obligation to inform "without delay", as required by Article 36, paragraph 1 *(b)*, of the Vienna Convention.

3. Alleged failure to provide consular access

114. India notes that Pakistan stated in its Note Verbale of 21 March 2017 that India's request for consular access would be considered "in the light of India's response to Pakistan's request for assistance in the investigation process". The Applicant argues that by denying its request for consular access despite repeated reminders, Pakistan has violated, and continues to violate, its obligations under Article 36 of the Vienna Convention. India maintains that the obligations of the receiving State under Article 36 of the Convention are not conditional on the sending State complying with requests for co-operation in the investigation of crimes, and argues that Article 36 provides for no exception and thus creates obligations that are absolute in nature.

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

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

> "consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State".

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Paragraph 1 *(c)* provides, *inter alia*, that "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him". The Court recalls that "Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 494, para. 77).

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

118. Article 36, paragraph 1 *(c)*, provides that consular officers have the right to arrange legal representation for a detained national of the sending State. The provision presupposes that consular officers can arrange legal representation based on conversation and correspondence with the detained person. In the view of the Court, Pakistan's contention that Mr. Jadhav was allowed to choose a lawyer for himself, but that he opted to be represented by a defending officer qualified for legal representation, even if it is established, does not dispense with the consular officers' right to arrange for his legal representation.

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

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

C. Abuse of rights

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

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

123. In this respect, the Court recalls that the Vienna Convention "lays down certain standards to be observed by all States parties, with a view to the 'unimpeded conduct of consular relations'", and that Article 36 on consular assistance to and communication with nationals undergoing criminal proceedings sets forth rights both for the State and the individual which are interdependent (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 36, para. 40 and p. 38, para. 47, citing respectively *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*,

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p. 494, para. 77; and *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, pp. 19–20, para. 40). In the Court's view, there is no basis under the Vienna Convention for a State to condition the fulfilment of its obligations under Article 36 on the other State's compliance with other international law obligations. Otherwise, the whole system of consular assistance would be severely undermined.

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

V. Remedies

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

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

127. India seeks to distinguish the present case from the *LaGrand* and *Avena* cases, in which, according to India, the Court granted only review and reconsideration of the conviction and sentence, because it accepted the assertion of the United States that its criminal justice system was fully compliant with due process. India argues that Pakistan's criminal justice system by way of trial in the military courts does not satisfy the minimum standards of due process in its application to civilians. It contends that "relief by way of review and reconsideration" is "highly inadequate" as a remedy in the case of Mr. Jadhav. Referring to a judgment rendered by the Pakistan Supreme Court in 2016 in *Said Zaman Khan* et al. v. *Federation of Pakistan* (see paragraph 141 below), it contends that the remit of judicial review in Pakistan is narrow, because convictions by the military courts "can only be assailed on the ground of *coram non judice*, absence of jurisdiction, *mala fide* and malice in law". While acknowledging that a judgment rendered by the Peshawar High Court in 2018 appears to have taken "a broader view", India stresses that the Government of Pakistan has filed an appeal against that judgment and that the Supreme Court has suspended the operation of the judgment pending the appeal.

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

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

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

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

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

* *

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

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

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

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

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

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

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

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

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

139. The Court considers that a special emphasis must be placed on the need for the review and reconsideration to be effective. The review and reconsideration of the conviction and sentence of Mr. Jadhav, in order to be effective, must ensure that full weight is given to the effect of the violation of the rights set forth in Article 36, paragraph 1, of the Convention and guarantee that the violation and the possible prejudice caused by the violation are fully examined. It presupposes the existence of a procedure which is suitable for this purpose. The

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Court observes that it is normally the judicial process which is suited to the task of review and reconsideration (see *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, pp. 65–66, paras. 138–140).

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

141. The Court notes that, according to Pakistan, the High Courts of Pakistan can exercise review jurisdiction. The Court observes, however, that Article 199, paragraph 3, of the Constitution of Pakistan has been interpreted by the Supreme Court of Pakistan as limiting the availability of such review for a person who is subject to any law relating to the Armed Forces of Pakistan, including the Pakistan Army Act of 1952. The Supreme Court has stated that the High Courts and the Supreme Court may exercise judicial review over a decision of the Field General Court Martial on "the grounds of *coram non judice*, without jurisdiction or suffering from *mala fides*, including malice in law only" (*Said Zaman Khan* et al. v. *Federation of Pakistan*, Supreme Court of Pakistan, Civil Petition No. 842 of 2016, 29 August 2016, para. 73). Article 8, paragraph 1, of the Constitution provides that any law which is inconsistent with fundamental rights guaranteed under the Constitution is void, but this provision does not apply to the Pakistan Army Act of 1952 by virtue of a constitutional amendment (*ibid.*, para. 125). Thus, it is not clear whether judicial review of a decision of a military court is available on the ground that there has been a violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention.

142. The Court takes note of the decision of the Peshawar High Court in 2018. The High Court held that it had the legal mandate positively to interfere with decisions of military courts "[i]f the case of the prosecution was based, *firstly*, on no evidence, *secondly*, insufficient evidence, *thirdly*, absence of jurisdiction, finally malice of facts & law" (*Abdur Rashid* et al. v. *Federation of Pakistan*, High Court of Peshawar, Writ Petition 536-P of 2018, 18 October 2018, pp. 147–148). The Government of Pakistan has appealed the decision and the case was still pending at the close of the oral proceedings in the present case.

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

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

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

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

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

146. The Court notes that the obligation to provide effective review and reconsideration can be carried out in various ways. The choice of means is left to Pakistan (cf. *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 514, para. 125). Nevertheless, freedom in the choice of means is not without qualification (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 62, para. 131). The obligation to provide effective review and reconsideration is "an obligation of result" which "must be performed unconditionally" (*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning*Avena and Other Mexican Nationals (Mexico *v.*United States of America) *(Mexico* v. *United States of America), Judgment, I.C.J. Reports 2009*, p. 17, para. 44). Consequently, Pakistan shall take all measures to provide for effective review and reconsideration, including, if necessary, by enacting appropriate legislation.

147. To conclude, the Court finds that Pakistan is under an obligation to provide, by means of its own choosing, effective review and reconsideration of the conviction and sentence of Mr. Jadhav, so as to ensure that full weight is given to the effect of the violation of the rights set forth in Article 36 of the Vienna Convention, taking account of paragraphs 139, 145 and 146 of this Judgment.

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

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149. For these reasons,

THE COURT,

(1) Unanimously,

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

(2) By fifteen votes to one,

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

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

AGAINST: *Judge* ad hoc Jillani;

(3) By fifteen votes to one,

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

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

AGAINST: *Judge* ad hoc Jillani;

(4) By fifteen votes to one,

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

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

AGAINST: *Judge* ad hoc Jillani;

(5) By fifteen votes to one,

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

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

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AGAINST: *Judge* ad hoc Jillani;

(6) By fifteen votes to one,

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

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

AGAINST: *Judge* ad hoc Jillani;

(7) By fifteen votes to one,

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

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

AGAINST: *Judge* ad hoc Jillani;

(8) By fifteen votes to one,

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

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

AGAINST: *Judge* ad hoc Jillani.

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

(Signed) Abdulqawi Ahmed YUSUF,
President.

(Signed) Jean-Pelé FOMÉTÉ,
DEPUTY-REGISTRAR.

Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judges SEBUTINDE, ROBINSON

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and IWASAWA append declarations to the Judgment of the Court; Judge *ad hoc* JILLANI appends a dissenting opinion to the Judgment of the Court.

(Initialled) A.A.Y.

(Initialled) J-P.F.

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