

CR 2017/5

**International Court
of Justice**

THE HAGUE

**Cour internationale
de Justice**

LA HAYE

YEAR 2017

Public sitting

held on Monday 15 May 2017, at 10 a.m., at the Peace Palace,

President Abraham presiding,

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

VERBATIM RECORD

ANNÉE 2017

Audience publique

tenue le lundi 15 mai 2017, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

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

COMPTE RENDU

Present: President Abraham

 Judges Owada
 Cançado Trindade
 Xue
 Donoghue
 Gaja
 Sebutinde
 Bhandari
 Robinson
 Crawford
 Gevorgian

Registrar Couvreur

Présents : M. Abraham, président
MM. Owada
Cançado Trindade
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford
Gevorgian, juges

M. Couvreur, greffier

The Government of the Republic of India is represented by:

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

as Agent;

Dr. V. D. Sharma, Joint Secretary, Ministry of External Affairs,

as Co-Agent;

Mr. Harish Salve,

As Counsel;

Ms Kajal Bhat, First Secretary, Embassy of the Republic of India in the Kingdom of the Netherlands,

As Adviser;

Ms Chetna N. Rai,

As Junior Counsel.

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

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

comme agent ;

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

comme coagent ;

M. Harish Salve,

comme conseil ;

Mme Kajal Bhat, premier secrétaire, ambassade de la République de l'Inde au Royaume des Pays-Bas,

comme conseiller ;

Mme Chetna N. Rai,

comme conseil auxiliaire.

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

H.E. Mr. Moazzam Ahmad Khan, Ambassador of the Islamic Republic of Pakistan to the Kingdom of the Netherlands,

Dr. Mohammad Faisal, Director-General (South Asia & SAARC),

as Agents;

Mr. Syed Faraz Hussain Zaidi, Counsellor of the Embassy of the Islamic Republic of Pakistan in the Netherlands,

as Adviser;

Mr. Khawar Qureshi, Q.C.,

as Counsel;

Mr. Asad Rahim Khan,

as Junior Counsel;

Mr. Joseph Dyke,

as Legal Assistant.

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

S. Exc. M. Moazzam Ahmad Khan, ambassadeur de la République islamique du Pakistan auprès du Royaume des Pays-Bas,

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

comme agents ;

M. Syed Faraz Hussain Zaidi, conseiller à l'ambassade de la République islamique du Pakistan aux Pays-Bas,

comme conseiller ;

M. Khawar Qureshi, Q.C.,

comme conseil ;

M Asad Rahim Khan,

comme conseil auxiliaire ;

M. Joseph Dyke,

comme assistant juridique.

The PRESIDENT: Veuillez vous asseoir. L'audience est ouverte. The Court meets today under Article 74, paragraph 3, of the Rules of Court, to hear the observations of the Parties on the Request for the indication of provisional measures submitted by the Republic of India in the *Jadhav Case (India v. Pakistan)*.

For reasons which they have duly conveyed to me, the Vice-President and Judges Tomka, Bennouna and Greenwood are unable to be present on the Bench today.

India's Application, dated 8 May 2017, instituting proceedings against the Islamic Republic of Pakistan, concerns alleged violations of the Vienna Convention on Consular Relations "in the matter of the detention and trial of an Indian national" sentenced to death in Pakistan, Mr. Kulbhushan Jadhav. To found the jurisdiction of the Court, India relies on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention.

I shall now ask the Registrar to read out the decision requested of the Court, as formulated in the Application of India.

The REGISTRAR:

"In the circumstances, India seeks the following reliefs:

- (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 interregnum 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) [r]estraining 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) [i]f 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."

The PRESIDENT: On the same day as the filing of the Application, India submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court. In that Request, India states that the alleged violation of the Vienna Convention by Pakistan has prevented India from exercising its rights under the Convention and has deprived Mr. Jadhav from the protection accorded under the Convention. The Applicant also submits that Mr. Jadhav “will be subjected to execution unless the Court indicates provisional measures directing the Government of Pakistan to take all measures necessary to ensure that he is not executed until th[e] Court’s decision on the merits” of the case. India points out that Mr. Jadhav’s execution would cause irreparable prejudice to the rights it claims. India further indicates that the protection of its rights is a matter of urgency as “[w]ithout the provisional measures requested, Pakistan will execute Mr. Kulbhushan Sudhir Jadhav before th[e] Court can consider the merits of India’s claims and India will forever be deprived of the opportunity to vindicate its rights”.

I shall now ask the Registrar to read out the passage from the Request specifying the provisional measures which the Government of India is asking the Court to indicate.

The REGISTRAR:

“[India] respectfully request[s] that, pending final judgment in this case, the Court indicate:

- (a) [t]hat the Government of the Islamic Republic of Pakistan take all measures necessary to ensure that Mr. Kulbhushan Sudhir Jadhav is not executed;
- (b) [t]hat the Government of the Islamic Republic of Pakistan report to the Court the action it has taken in pursuance of sub-paragraph (a); and
- (c) [t]hat the Government of the Islamic Republic of Pakistan ensure that no action is taken that might prejudice the rights of the Republic of India or Mr. Kulbhushan Sudhir Jadhav with respect of any decision th[e] Court may render on the merits of the case”.

The PRESIDENT: On 8 May 2017, immediately after the filing of the Application and Request for the indication of provisional measures, the Registrar, in accordance with Article 40, paragraph 2, of the Statute and Articles 38, paragraph 4, and 73, paragraph 2, of the Rules of Court,

transmitted certified copies thereof to the Government of the Islamic Republic of Pakistan. He also notified the Secretary-General of the United Nations of the filing of these documents by India.

By a letter dated 9 May 2017, referring to Article 74, paragraph 4, of the Rules of Court, in my capacity as President of the Court, I called upon the Islamic Republic of Pakistan “to act in such a way as will enable any Order the Court may make on th[e] Request [for the indication of provisional measures] to have its appropriate effects”.

According to Article 74 of the Rules of Court, a Request for the indication of provisional measures shall have priority over all other cases. Referring to “the extreme gravity and immediacy of the threat”, India asked the Court to render an Order on its Request without a hearing. The Court decided to hold a hearing in order to allow both Parties to present their arguments. Given the circumstances, the Court decided that the oral proceedings contemplated in Article 74, paragraph 3, of the Rules of Court should be brief and held on rather short notice, on 15 May 2017, today.

I note the presence before the Court of the Agents and Counsel of the two Parties. The Court will hear India, which has submitted the Request, this morning until 11.30 a.m. It will hear Pakistan this afternoon from 3 to 4.30 p.m. The hearings on India’s Request for the indication for provisional measures will be closed at the conclusion of this afternoon’s session.

For the purposes of these oral arguments, each of the Parties will have available to it a full ninety minute sitting. India may, if required, avail itself of a short extension beyond 11.30 a.m. this morning, in view of the time taken up by the opening part of these oral proceedings. The Parties are of course not required to use the full amount of time allotted to them.

Before giving the floor to the Agent of the Republic of India, Dr. Deepak Mittal, I wish to draw attention to Practice Direction XI, which states, *inter alia*, that Parties should

“[i]n their oral pleadings on requests for provisional measures . . . limit themselves to what is relevant to the criteria for the indication of provisional measures as stipulated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose.”

I now call upon Dr. Deepak Mittal, Agent of the Republic of India.

Mr. MITTAL:

Introductory Statement with brief facts of the case

Introduction

1. Mr. President, and Honourable Members of the Court, it is indeed a great honour for me to appear today before this august Court on behalf of the Republic of India as India's Agent, at the oral hearing on India's request for the indication of provisional measures in the proceedings instituted by India against the Islamic Republic of Pakistan on 8 May 2017. This case concerns an Indian national, Mr. Kulbhushan Sudhir Jadhav (hereinafter "Mr. Jadhav"), who has been awarded death sentence by a military court in Pakistan in egregious violation of the rights of consular access guaranteed by Article 36, paragraph 1, of the Vienna Convention on Consular Relations of 1963 (hereinafter "Vienna Convention").

2. At the outset, I would like to thank the Court and the President for the timely decision and action to exercise the powers conferred upon him under Article 74, paragraph 4, of the Rules of Court and send an urgent communication on 9 May 2017 to the Prime Minister of the Islamic Republic of Pakistan calling upon the Government of Pakistan to act in such a way as will enable any order the Court may make on India's request for the indication of provisional measures to have its appropriate effects.

3. Mr. President, Members of the Court, the fact that the hearing is taking place today, within seven days of the institution of proceedings by India, is testament to the recognition of the urgency by the Court in the case of an innocent Indian national Mr. Jadhav who, incarcerated in Pakistan for more than a year on concocted charges, deprived of his rights and protection accorded under the Vienna Convention, being held incommunicado without contact with his family and the home State, is facing imminent execution. All notions of human rights now considered by the global community as basic to behaviour in civilized nations, have been thrown to the winds.

4. By this timely action by the President and the Court, this institution has provided succour not just to India and to its beleaguered national and his family, but also has given hope to 1.25 billion people of India and hope to the old mother and father of the innocent Indian national

that justice would be meted out to their innocent son by this highest seat of justice and a precious life will be saved.

5. Today, accompanied by my colleagues, I appear before the Court, on behalf of the Republic of India, with the hope that the Court would indicate provisional measures so that the death sentence, which has been awarded to Mr. Jadhav through a farcical trial in a Pakistan military court, in violation of the rights guaranteed to Mr. Jadhav and India under Article 36, paragraph 1, of the Vienna Convention, would be set aside and not carried out pending final decision of the Court on India's Application.

6. I take this opportunity to introduce the Members of my delegation. They are:

- (i) Dr. V.D. Sharma, Co-Agent for the Republic of India;
- (ii) Mr. Harish Salve, Counsel;
- (iii) Ms Kajal Bhat, Adviser;
- (iv) Ms Chetna N. Rai, Junior Counsel.

Brief facts

7. I would now present brief facts of the case, which would be further elaborated upon during the hearing.

8. India was informed on 25 March 2016 that an Indian national was allegedly arrested on 3 March 2016. India, on that very day, sought consular access to the said individual. The request did not evoke any response. On 30 March 2016 India sent a reminder reiterating the request for consular access at the earliest. Despite a number of such reminders¹ for consular access sent by India, there has been no response and all these requests fell on deaf ears.

9. Meanwhile, on 23 January 2017, India received from Pakistan a request for assistance² in the investigation process. Subsequently, on 21 March 2017, almost a year after India's first request for consular access, Pakistan formally communicated³ to India that consular access to Mr. Jadhav "shall be considered in the light of Indian side's response to Pakistan's request for assistance in

¹Annex 1 to India's Application, tab 1 of judges' folder (Notes Verbale issued by India).

²Annex 2 to India's Application, tab 2 of judges' folder.

³Annex 3 to India's Application, tab 3 of judges' folder.

investigation process . . .”. India responded⁴ that consular access would be an essential prerequisite in order to verify the facts and understand the circumstances of Mr. Jadhav’s presence in Pakistan.

10. On 10 April 2017, India learnt from press reports⁵ that Pakistan proceeded to have a military trial against Mr. Jadhav and he was sentenced to death purportedly on the basis of a confessional statement and that this sentence was confirmed by the Chief of the Army Staff of Pakistan. Ironically, later in the day (10 April 2017), after the death sentence had been awarded and confirmed, India received a Note Verbale⁶ from Pakistan reiterating the condition for considering consular access in return for India providing assistance in the investigation process. India responded⁷ the same day highlighting that the offer of conditional grant of consular access after the award and confirmation of death sentence reflected the farcical nature of the proceedings and so called trial by a Pakistan military court against Mr. Jadhav.

11. Despite request⁸ by India, Pakistan has not provided any information or documents, including the charge-sheet, proceedings of the Court of Inquiry, the summary of evidence, the judgment. Request for appointment of a defence lawyer for Mr. Jadhav has also not elicited any response.

12. The mother of Mr. Jadhav, even in the absence of any document, submitted an appeal to the Court of Appeal and a petition to the Federal Government of Pakistan. This appeal was filed even though it was unable to address any of the issues that may have been put against Mr. Jadhav in the judgment and order of conviction. It was an act of desperation by grieving parents.

13. The parents of Mr. Jadhav applied for visa on 25 April 2017 to travel to Pakistan. There has been no response.

14. The Minister of External Affairs of India has written⁹ to the Advisor to the Prime Minister of Pakistan on Foreign Affairs on 27 April 2017 for his personal intervention in the matter, but there has been no response.

⁴Annex 1 to India’s Application, tab 1 of judges’ folder (Note Verbale dated 31 March 2017).

⁵Annex 4 to India’s Application, tab 4 of judges’ folder.

⁶Annex 5 to India’s Application, tab 5 of judges’ folder.

⁷Annex 1 to India’s Application, tab 1 of judges’ folder (Note Verbale dated 10 April 2017).

⁸Annex 1 to India’s Application, tab 1 of judges’ folder (Note Verbale dated 19 April 2017).

⁹Annex 8 to India’s Application, tab 8 of judges’ folder.

15. All that we know is what we have seen in the media in Pakistan. The Pakistan officials have been reported as having said clearly that Mr. Jadhav would not be provided consular access.

16. Mr. President, Members of the Court, India believes that the farcical nature of the proceedings and unjust trial by a Pakistan military court, in egregious violation of the rights of consular access under the Vienna Convention, has led to serious miscarriage of justice. It is clear that Mr. Jadhav has been denied the right to be defended by a legal counsel of his choice. He has not been informed of his right to seek consular access. His conviction and death sentence appears to be based upon “confession” taken in captivity, without proper legal representation and in the absence of consular access sought by India.

17. If we closely follow the reports in the media in Pakistan, we can get the sense that an increasing number of death sentences awarded by the military courts in Pakistan have been carried out after 10 April 2017, that is when the death sentence to Mr. Jadhav was confirmed. In fact, over the past one month, 18 such executions have been reported through press releases¹⁰ issued by Inter Services Public Relations — the military spokesman — of Pakistan. In such circumstances, including where there is no response to the requests made through diplomatic channels, there is an immediate threat that the death sentence against Mr. Jadhav may be carried out even before India has the opportunity to be heard and the Court has the chance to consider the merits of the case, and thus, causing irreparable prejudice to the rights of India and Mr. Jadhav.

Request

18. Mr. President and Members of the Court, the Republic of India has invoked the jurisdiction of the Court and sought provisional measures.

19. My colleagues will elaborate further on this.

20. I would now request the Court to invite Dr. V.D. Sharma, Co-Agent for the Republic of India to make his submissions.

Thank you.

¹⁰Tab 13 of judges’ folder.

Le PRESIDENT: Merci, Monsieur. Avant de donner la parole au coagent de la République de l'Inde, M. Sharma, je demanderai aux plaideurs de bien vouloir ne pas parler trop vite, de manière à permettre aux interprètes de faire leur travail de traduction dans l'autre langue officielle de la Cour. Je les en remercie d'avance. Monsieur Sharma, coagent de la République de l'Inde, vous avez la parole.

Mr. SHARMA:

1. Mr. President, esteemed Members of the Court, it is a great honour for me to appear before this Court as Co-Agent of the Republic of India in the case concerning the violation by the Islamic Republic of Pakistan of the Vienna Convention on Consular Relations, 1963.

2. I propose to devote my observations to the key issues which would be addressed in elaboration by my colleague Mr. Harish Salve concerning violation by Pakistan of the rules of international law, which led to the dispute at hand; justification for the grant of urgent provisional measures; and this Court's jurisdiction.

3. Now, Mr. President, I draw your attention to paragraph 4 of my statement in front of you.

4. Mr. President, Members of the Court, the Convention sets up, among other things, standards of conduct concerning consular relations between States, with the view to contribute to the development of friendly relations among them. The provisions under Article 36 of the Convention specifically confer rights of consular access and communication upon the sending States and their nationals, who may be arrested, detained or put in prison in the receiving State.

5. These provisions were interpreted by this Court in the *LaGrand* case (*Germany v. United States*) (*Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*), and reiterated in the *Avena* case by this Court; what this Court said in *LaGrand* and described Article 36, paragraph 1, as "an interrelated regime designed to facilitate the implementation of the system of consular protection" and set out again the scheme of Article 36.

6. Mr. President, Members of the Court, Article 36, which has been recognized as a right of the national of a State and also the right of the State itself, is a vital safeguard that ensures a modicum of fairness in the administration of the justice system of a State in its application to

nationals of another State. Its provisions are sacrosanct, and its violation entails serious consequences.

7. Mr. President, Members of the Court, Pakistan failed to comply with all its obligations under Article 36. It denied India its right to consular access to its national. India has been seeking consular access incessantly since March 2016 when India was informed of the detention of Mr. Kulbhushan Sudhir Jadhav by Pakistan.

Jurisdiction of the Court

8. Touching upon the jurisdiction of this Court in the present case, the attention is drawn to Article 36 (1) of the Statute of the Court which confers upon the Court the jurisdiction to decide “all matters specially provided for . . . in treaties and conventions in force”. Therefore, India relies upon the jurisdiction of this Court under paragraph 1 of Article 36 of the Statute of this Court. India asserts that the declarations of Pakistan and India made under paragraph 2 of Article 36 of the Statute have no relevance to this case.

9. India and Pakistan are members of the United Nations and thus *ipso facto* parties to the Statute of the International Court of Justice. They are also a party to the Vienna Convention and its Optional Protocol concerning Compulsory Settlement of Disputes.

10. Article I of the Optional Protocol provides that “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”.

11. I now Mr. President and Members of the Court draw your attention to paragraph 12 of my statement.

12. India and Pakistan are both Parties to the Consular Convention and the Optional Protocol and thus this dispute lies within the jurisdiction of this Court and has been brought accordingly before the Court by India.

2008 Bilateral Agreement on Consular Access

13. Now, Mr. President, I draw your kind attention to paragraph 14 of my statement.

14. There is a bilateral agreement between India and Pakistan that seeks to supplement in some respects Article 36 of the Vienna Convention. India does not seek to rely upon this Bilateral Agreement.

15. In any event, Mr. President, Members of the Court, the Bilateral Agreement is irrelevant to the present proceedings since, it can only supplement the Vienna Convention. It cannot modify the Vienna Convention, nor does its text or content suggest that purports to dilute Article 36 of the Vienna Convention. I mention this only because in one of their press communiqués, Pakistan alluded to this Bilateral Agreement.

16. Moreover, this 2008 Agreement, Mr. President, is not registered with the United Nations under Article 102 of the Charter, and therefore under paragraph 2 of Article 102 this Agreement cannot be invoked before any organ of the United Nations. Therefore Pakistan cannot invoke this Agreement before this Court, undoubtedly, this Court being the principal judicial organ of the United Nations.

17. Thank you Mr. President. May I now request you to invite Mr. Harish Salve, who will present India's observations in detail.

Le PRESIDENT: Merci, je donne la parole à M. Harish Salve, conseil pour la République de l'Inde.

Mr. SALVE:

1. Honourable President, esteemed Members of this Court, it is once again an honour for me to appear before this Court to represent my country as its counsel. I express, on behalf of my country, gratitude for having fixed this hearing at such a short notice. I want to commence by assuring this Court that the situation in which we find ourselves is grave, it is urgent, and it is for that reason that we have sought the indulgence of this Court for a hearing for the indication of provisional measures.

2. I shall, Mr. President and esteemed Members of the Court, first give you a brief overview of the facts, and then address you on the following four issues:

- (i) the jurisprudence of this Court as to the principles for indication of provisional measures;
- (ii) the prima facie case as to the jurisdiction of this Court to entertain India's Application;

- (iii) the prima facie case of violation of the Vienna Convention on Consular Relations 1963; and, finally, I would state,
- (iv) the nature of the provisional measures that India seeks.

Overview

3. The Republic of India — I shall be referring to it as “India” — has moved this Application under Article 40 of the Statute of this Court seeking reliefs from this Court to remedy the egregious violations of the Vienna Convention on Consular Relations, 1963 — I shall be referring to it as the “Vienna Convention”. It is against the Islamic Republic of Pakistan, who I shall be referring to as “Pakistan”.

4. An Indian national, Mr. Kulbhushan Sudhir Jadhav — whom I shall refer to as “Jadhav” — was allegedly “arrested”¹¹ on 3 March 2016 and has been in custody. He was tried by a military court in Pakistan, and has been convicted and sentenced to death, which sentence was confirmed on 10 April 2017.

5. It is not in dispute that India has made innumerable requests since March 2016 for consular access. Pakistan, admittedly, did not provide consular access. India claims that the rights of the individual and the rights of India, under Article 36 of the Vienna Convention have been violated all along from the time of the alleged “arrest” of Jadhav.

6. Pakistan did not inform the consular post of India about the arrest of Jadhav at the time of the alleged arrest, and India received information of this arrest only on 25 March 2016. Despite India’s requests, Pakistan has denied consular officers the right to visit Jadhav. They have refused to communicate, to the consular officers, the charges against Jadhav and the evidence and other material adduced against him in the so-called trial so as to enable them to arrange for his legal representation. The denial of access to Jadhav has resulted in consular officers of India being unable to arrange for the legal representation of Jadhav, and to assure themselves also of his safety and his well-being in custody.

7. In a press briefing of 17 April 2017, the Director General of Inter Services Public Relations allegedly asserted that Jadhav was not entitled to consular access. We have a copy of the

¹¹India’s position is that he was kidnapped from Iran.

press report which we annexed to the Application as Annex 7¹², which refers to this briefing but not to this assertion. We have now another press report in a vernacular newspaper “Jehan Pakistan”¹³ of 18 April 2017 which evidences this assertion.

8. India, Mr. President and esteemed Members of the Court, has applied to this Court for redress of its grievances relating to these violations of the Vienna Convention, and by way of relief has sought measures that would constitute adequate *restitutio in integrum*.

9. Until such time as the Application filed by India can be adjudicated upon by this Court, India has also sought indication of provisional measures that would ensure that the sentence is not executed. If the provisional measures are not granted, the Application would be rendered infructuous, and it would bring about a situation that the Court may find itself unable to grant effective relief as sought by India.

Principles for the grant of provisional measures

10. I now address you, Sir, on the principles of the grant of provisional measures. Article 41 (1) of the Statute of this Court vests the Court with the “power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party” pending a final judgment in the case. In its Judgment in a case commonly referred to as the *LaGrand* case, this Court clarified that orders of provisional measures pursuant to Article 41 establish binding obligations¹⁴.

11. The Court formulated the threshold for provisional measures in *Costa Rica v. Nicaragua* in terms of what I call the *plausibility* standard. This Court said that provisional measures would be granted “if it is satisfied that the rights asserted by a party are at least plausible”¹⁵. Finding that the rights claimed by Costa Rica were plausible, this Court went on to observe:

“Whereas, at this stage of the proceedings, the Court cannot settle the Parties’ claims to sovereignty over the disputed territory and is not called upon to determine once and for all whether the rights which Costa Rica wishes to see respected exist, or whether those which Nicaragua considers itself to possess exist; whereas, for the

¹²Application of India, Ann. 7 and judges’ folder, tab 7.

¹³Judges’ folder, tab 14.

¹⁴*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109.

¹⁵*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 6, para. 53.

purposes of considering the Request for the indication of provisional measures, the Court needs only to decide whether the rights claimed by the Applicant on the merits, and for which it is seeking protection, are plausible”¹⁶.

12. The standard of plausibility was reiterated in *Belgium v. Senegal* where the Court observed that:

“Whereas at this stage of the proceedings the Court does not need to establish definitely the existence of the rights claimed by Belgium or to consider Belgium’s capacity to assert such rights before the Court; and whereas the rights asserted by Belgium, being grounded in a possible interpretation of the Convention against Torture, therefore appear to be plausible”¹⁷.

13. There have been three instances in which this Court has entertained applications arising from allegations of breach of Article 36 of the Vienna Convention.

14. The case of *Paraguay v. United States of America*, which is the first of the cases relating to the violation of the Vienna Convention, the request of Paraguay for indication of provisional measures was decided by this Court on 9 April 1998. Paraguay instituted proceedings against the United States of America on 3 April 1998¹⁸ on allegations of violations of the Vienna Convention, and sought indication of provisional measures by way of an order by the Court, that the Government of the United States take measures necessary to ensure that the Paraguay national in relation to whom the proceedings were brought be not executed.

15. This Court enunciated the standards by which such a request for provisional measures would be decided. It observed that

“on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but whereas it may not indicate them unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded.”¹⁹

This Court further indicated that the purpose of the power to indicate provisional measures is

“to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the

¹⁶*Ibid.*, para. 57.

¹⁷*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 152, para. 60.

¹⁸Case concerning the *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998, p. 251, para. 6.

¹⁹*Ibid.*, para. 23.

Court to belong either to the Applicant, or to the Respondent, and whereas such measures are only justified if there is urgency”²⁰.

The Court found that the circumstances of the case required it to indicate as a matter of urgency, provisional measures as provided for by Article 41 of its Statute.

16. The second case relating to violation of the Vienna Convention was brought by Germany against the United States of America (known and cited as the *LaGrand* case). On 3 March 1999, this Court indicated provisional measures pursuant to an Application filed by Germany. This Court reiterated the principle that generally interim measures would not be ordered in the absence of “irreparable prejudice . . . to rights which are the *subject of dispute* . . .”²¹. The Court held that the execution of the German National Mr. Walter LaGrand “would cause irreparable harm to the rights claimed by Germany in this particular case”²². This Court also observed that “measures indicated by the Court for a stay of execution would necessarily be provisional in nature and would not in any way pre-judge findings the Court might make on the merits”²³. The Court indicated that United States of America should take all measures to ensure that Mr. Walter LaGrand is not executed pending the final decision in the proceedings before the Court.

17. And the third case relating to violation of the Vienna Convention was brought by Mexico against the United States of America — known as the *Avena* case. Mexico sought relief in relation to 54 Mexican nationals who were on death row in the United States, and in respect of whom Mexico asserted that they were arrested, detained, tried, convicted and sentenced to death by competent authorities of the United States in proceedings which did not comply with Article 36 of the Vienna Convention. The relief that was sought by Mexico was in the nature of *restitutio in integrum*.

18. The application was filed by Mexico on 9 January 2003, for indication of provisional measures, and the apprehension on which these measures were sought was that the three nationals

²⁰*Ibid.*, para. 35.

²¹*LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 23.

²²*Ibid.*, para 24.

²³*Ibid.*, para 27.

could be executed *within the next six months*, and many others before the end of 2003, and one of them by 14 February 2003²⁴.

19. This Court said that it “‘must be concerned to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent’ . . . without being obliged at this stage of the proceedings to rule on those rights”²⁵.

20. The Court added that its power to indicate provisional measures is “intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings” (*ibid.*, pp.14-15, para. 22)²⁶, and that provisional measures are indicated “‘pending the final decision’ of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given”. The Court cited its earlier order in *Finland v. Denmark*²⁷.

21. This Court reiterated that for indication of provisional measures, the Court did not need to satisfy itself, before deciding whether to indicate such measures, that it had jurisdiction on the merits of the case. The test applied by the Court was the existence of a *prima facie* basis on which the jurisdiction might be founded. The Court noted the position of both parties, and observed that

“whereas there is thus a dispute between the Parties concerning the rights of Mexico and of its nationals regarding the remedies that must be provided in the event of a failure by the United States to comply with its obligations under Article 36, paragraph 1, of the Vienna Convention; whereas that dispute belongs to the merits and cannot be settled at this stage of the proceedings . . .”²⁸.

22. The Court reiterated

“whereas the Court, when considering a request for the indication of provisional measures, ‘must be concerned to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent’ (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*,

²⁴*Avena and Other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, p. 81, para. 11.

²⁵*Ibid.*, para. 48

²⁶*Ibid.*, para. 49

²⁷*Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 17, para. 23.

²⁸*Avena and Other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, p. 88, para. 46.

Provisional Measures, Order of 15 March 1996, ICJ Reports 1996 (I), p. 22, para. 35) without being obliged at this stage of the proceedings to rule on those rights”²⁹.

23. Rejecting the suggestion that there was no urgency, as contended for by the United States, for no dates of execution had been set, and that there were rules and time-limits governing the granting of clemency, this Court found that “the fact that no such dates have been fixed in any of these cases before the Court is not per se a circumstance that should preclude the Court from indicating provisional measures”³⁰. The Court found that three of the nationals were

“at risk of execution in the coming months, or possibly even weeks; whereas the execution would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico; and whereas the Court accordingly concludes that the circumstances require that it indicate provisional measures to preserve those rights . . .”³¹.

In respect of the others who were on death row but not in the same position as the three persons identified in paragraph 55 quoted above, this Court said that “The Court may, if appropriate, indicate provisional measures under Article 41 of the Statute in respect of those individuals before it renders final judgement in this case”³² and the Court said that it would decide the case with expedition.

24. This Court in paragraph 55 of the *Avena* used the expression “coming months” which suggests to me that the Court felt that an impending execution in the next six months, which was the period indicated by Mexico³³, created a situation of sufficient urgency that justifies indication of provisional measures.

Urgency

25. And now I move to, Sir, urgency in the present case. It is incontrovertible that considering the state of affairs in relation to Jadhav’s arrest and trial, and in the face of the communication by Pakistan to this Court on 12 May 2017³⁴, it is imperative that to prevent

²⁹*Ibid.*, para. 48.

³⁰*Ibid.*, para. 54.

³¹*Ibid.*, para. 55.

³²*Ibid.*, para. 56.

³³Noticed in paragraph 11 of the Judgment.

³⁴Judges’ folder, tab 12.

irreparable prejudice being caused to India and Jadhav, provisional measures would need to be indicated by the Court.

26. The communication of 12 May purports to suggest that there are multiple legal avenues available to Jadhav, and presumably the sentence will not be executed during this period. Implicit in this is the acceptance of the reality that in case of a death sentence, the execution of the sentence cannot obviously be allowed during such time that this Court is seised of an application for redress of violations of the Vienna Convention. The communication, while suggesting the availability of “remedies”, fails to provide a clear assurance that until this Court is in seisin of this Application, the sentence will not be executed. This ambivalence is, Mr. President and esteemed Members of the Court, without more, a good reason for indication of provisional measures.

27. The communication aforementioned refers to the criminal appeal. It does not clarify whether Jadhav has indeed filed such an appeal. Jadhav’s mother has filed an appeal that was transmitted through diplomatic channels on 26 April 2017³⁵. The appeal has been filed as a measure of desperation, without knowing the charges against Jadhav, the evidence against him which has been relied upon to convict him, and without having access even to the judgment and order of conviction and sentence. Visa applications filed by his parents on 25 April 2017 are still pending. The information placed in public domain by Pakistan suggests that the Court of Appeal had already been constituted. It is imminent that the mother’s appeal, for whatever it is worth, would be disposed of shortly. The communication of 12 May 2017 does not indicate any timeline in relation to the disposal of the appeal.

28. The Communication then goes on to mention the existence of provisions under which Jadhav may seek clemency, first from the Chief of Army Staff of Pakistan and then from the President of the Islamic Republic of Pakistan. It is not known if Jadhav will seek clemency. Even if he does, its result is, it can fairly be assumed a foregone conclusion. It is, I submit Mr. Chairman, Mr. President and esteemed Members of the Court, I submit with all seriousness, it is facetious, on the one hand to allege in public pronouncements including at the level of the Advisor to the Prime

³⁵Application of India, Annex 1 and judges’ folder, tab 1.

Minister, that Jadhav has been convicted for serious offences against the State, and on the other hand to point out remedies by way of seeking clemency, in its communication to this Court.

29. In its communication of 12 May 2017, Pakistan has not suggested that there is any inaccuracy in Annex 6 filed by India. The statement of the Advisor to the Prime Minister refers to Jadhav's right to file "a mercy petition"³⁶, as he calls it but in the same breath makes observations that merit reproduction verbatim:

"let me re-emphasise two points: first, all political parties are unanimous that the award of death penalty after due process and overwhelming evidence to a foreign spy, who was not only carrying out subversive activities in Pakistan but actually promoting terrorism, is the correct decision. Second, the whole nation is solidly united against any threat to Pakistan's security"³⁷.

30. India has also annexed a press report of 18 April 2017 setting out an interview given by the Director General of Inter Services Public Relations — referred to as a military spokesman. As per this press report, the military spokesman said that the case was moving towards the appeal process, and would be heard by a two-star general, and further that "[h]e, however, did not see any chance of the verdict being overturned. 'The verdict is based on incontrovertible evidence and the Army will fully defend it,' he said, recalling the decision at the corps commanders' conference, that there could be no compromise on anti-state acts."³⁸

31. India has also enclosed, by way of Annex 9, the record of press briefing by the spokesperson of the Ministry of Foreign Affairs, on 20 April 2017. Responding to a question, the spokesperson made baseless, contrived and propaganda driven allegations against Jadhav and India. He said,

"Commander Jadhav, who is responsible for espionage, sabotage and terrorism in Pakistan, was tried according to the law of the land, in a fully transparent manner while preserving his rights, as per the Constitution of Pakistan. His sentence is based on credible, specific evidence proving his involvement in espionage and terrorist activities in Pakistan, resulting in the loss of scores of precious lives of Pakistanis."³⁹

32. India refutes these allegations. India's position has been and continues to be that Jadhav was kidnapped from Iran and appears to have been framed based upon a confession extracted from

³⁶The expression used in the communiqué at Annex 6 of the Application of India and judges' folder, tab 6.

³⁷Application of India, Annex 6 and judges' folder tab 6.

³⁸Application of India, Annex 7 and judges' folder, tab 7.

³⁹Application of India, Annex 9 and judges' folder, tab 9.

him when he was in military custody. The allegations of Pakistan lack credibility, particularly in the absence of consular access being provided by which India would have been able to understand the circumstances of Jadhav's presence in Pakistan, secure first-hand information about Jadhav while in military custody, and secure information about the charges against him, the evidence against him, the order of conviction and sentence. India could also have taken measures to ensure appropriate legal representation for him.

33. In any event, in a case of egregious violations of the Vienna Convention, the possibility of filing applications for clemency do not present a sufficient means of review and reconsideration.

34. However, the allegations being made by Pakistan establish that the suggestion in the communication of 12 May 2017 about the availability of a remedy by way of "clemency" is not worthy of credence for the reason that any such process would be a chimera.

35. Finally, it cannot be assumed that Jadhav will wait until the 60th day to seek clemency from the Chief of Army Staff, and then up to the 90th day after the decision on the prior petition, to seek clemency from the President of the Islamic Republic of Pakistan. It is not known whether Jadhav will at all seek clemency, in the prevailing circumstances. Secondly, if he is so minded to seek clemency, it cannot be assumed that he will wait until the last day available. Thus, even if Jadhav does decide to go this route, the period could be much lesser than 90 days plus 60 days as is sought to be suggested in the communication.

36. It bears emphasis that Pakistan does not suggest in the communication of 12 May 2017 that there is any judicial remedy available to Jadhav once appeal is decided. India's case and its Application — as I will explain later — is that throughout the period of his incarceration in Pakistan and in the course of his trial, Jadhav has been denied consular access. India seeks restitution by way of annulment of the verdict, in addition to other reliefs. After the appeal there is no judicial remedy available for Jadhav in which he could assail the findings and the conclusions of the military court. In those circumstances, for the indication of provisional measures, what is relevant to assess the urgency, is the potential lapse of time inevitable in pursuing steps in the criminal justice process system. The availability of a right to seek a clemency is not relevant. This is particularly so in the facts and circumstances of the case, where any right to a petition for clemency is illusory.

37. It is, therefore, absolutely imperative that in order to prevent irreparable prejudice, this Court would indicate provisional measures to be in place until such time as India's Application can be heard and decided by this Court.

Prima facie case — jurisdiction of the Court

38. I will now briefly address you, Sir, on the prima facie case on the jurisdiction of this Court. The standard enounced by the Court in relation to arriving at a prima facie satisfaction as to the existence of jurisdiction, at the stage of deciding upon a request for indication of provisional measures, is that the Court "need not finally satisfy itself, before deciding whether or not to indicate such measures, that it has jurisdiction on the merits of the case, yet it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford the basis on which the jurisdiction . . . [is] founded"⁴⁰.

39. The principles are succinctly summarized in the commentary in the leading treatise on *The Statute of the International Court of Justice* edited by Zimmermann⁴¹. It states that,

"Since the Icelandic Fisheries cases, the Court's jurisprudence has been constant in requiring that the instrument(s) invoked by the parties conferring jurisdiction 'appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded'.⁴²

40. The Application filed by India is based on Article 36 of the Vienna Convention⁴³. India bases its assertion of the existence of jurisdiction on Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes 1963, which accompanies the Vienna Convention — I shall refer to it as the "Optional Protocol".

41. Article I of the Optional Protocol reads thus:

"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

⁴⁰*Avena and Other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, p. 87, para. 38; *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I), p. 13, para. 13; case concerning the Vienna Convention on Consular Relations (*Paraguay v. United States of America*), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998, p. 255, para. 23.

⁴¹*The Statute Of The International Court of Justice — A Commentary, Second Edition*, edited by Zimmerman, Tomuschat, Oellers — Frahm and Tams.

⁴²*The Statute Of The International Court of Justice — A Commentary, Second Edition*, edited by Zimmerman, Tomuschat, Oellers — Frahm and Tams, p. 1039.

⁴³The prima facie case on violation of Article 36 of the Vienna Convention is in the next section.

accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol”.

42. The language of Article I of the Optional Protocol admits of no ambiguity. The binary requirements for the existence of jurisdiction are:

- (a) The existence of disputes that arise out of the interpretation, or the application of the Convention; and
- (b) The party that brings an application before the Court raising such a dispute, should be a party to the Optional Protocol.

43. Indisputably, on 8 May 2017 (when India presented its Application) India and Pakistan were, and continue to be, parties to the Vienna Convention on Consular Relations as well as to the Optional Protocol. On 12 May 2017, communication by Pakistan does not suggest to the contrary.

44. India asserts in its Application that Pakistan has not provided consular access to Jadhav all along from the time of his alleged arrest until the present despite repeated entreaties by India. Pakistan offered no explanation in its exchanges with India, as to the reason why it has not provided consular access. Whatever may be the reasons that Pakistan may proffer in defence of its acts and omissions, disputes have arisen between India and Pakistan, when India asserts, and Pakistan presumably would deny, violations of the Vienna Convention. These disputes would relate, if not entirely, substantially to the interpretation of the Vienna Convention and to its application to the facts of the case.

45. India asserts that the Vienna Convention admits of no exceptions. India has not been given a copy of the charges or the verdict, and is therefore unable to comment on the allegations levelled against Jadhav. From the information in public domain, such as the public statements in Annex 6 and Annex 7⁴⁴ to India’s Application, it appears that the charges were grave and suggestive of acts of terrorism. India refutes these charges. But the merits of the case, Mr. President and esteemed Members of the Court, I remind myself, are not material for these proceedings. What is relevant as a principle of law, is that need for a wholesome compliance with procedural safeguards is greater where the charges are serious, and the sanction upon conviction is as severe as capital punishment.

⁴⁴Judges’ folder, tabs 6 and 7.

46. As this Court said in *Paraguay v. United States of America*,

“Whereas the issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and whereas, further, the function of this Court is to resolve international legal disputes between States, *inter alia*, when they arise out of the interpretation or application of international conventions, and not to act as a Court of criminal appeal;”⁴⁵

This principle was also reiterated in *Avena* and *LaGrand*⁴⁶.

47. It bears repetition that, where the national of another State is accused of acts of terrorism, and which if established carry the sanction of capital punishment, and the trial is by a military court, the need for consular access and the opportunity to arrange for legal representation in the course of the trial, as covenanted in the Vienna Convention, is all the more greater. An Indian national was in military custody, he was made to confess, and then he was tried for offences and awarded death penalty. The prejudice caused by the egregious breach of the Vienna Convention assurances provided for in Article 36 is writ large and does not merit any further elaboration.

48. India asserts that the breach of the Vienna Convention in the facts of the present case, is fatal to the trial of Jadhav. In its communication of 12 May 2017, Pakistan states that it “rejects the contents of the Request and [of] the Application as providing any basis for [this] Court to exercise jurisdiction whether by way of preliminary measures relief, or otherwise”⁴⁷.

49. India bases its Application on the jurisdiction of the Court conferred by Article 36, paragraph 1, of the Statute of the Court, and Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes, 1963.

50. The binary conditions required by the Optional Protocol are satisfied. That being so, this Court would have jurisdiction under Article 36, paragraph 1, of the Statute of this Court. India has thus provided, I submit, sufficient basis for this Court to come to the conclusion, definitely *prima facie* that it has jurisdiction.

⁴⁵Case Concerning the *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998, p. 248, para. 38.

⁴⁶*Avena and Other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, p. 77, para. 48; *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I), p. 9, para. 25.

⁴⁷Judges’ folder, tab 12.

Jurisdiction under Article 36, paragraph 1

51. I now move, Sir, to addressing you on the jurisdiction of this Court, under Article 36 (1). The compulsory jurisdiction of this Court under Article 36 (1) has three dimensions. Jurisdiction exists:

- (a) in respect of all cases which parties refer to it,
- (b) in respect of all matters specially provided for in the Charter of the United Nations, or
- (c) in respect of all matters specially provided for in treaties and conventions in force.

52. The Optional Protocol specially provides for resolution of disputes relating to the Vienna Convention — its language is mandatory. It provides that all disputes arising out of the interpretation or application of the Convention “*shall lie within the compulsory jurisdiction of the International Court of Justice*”.

53. Article 36, paragraph 2, of the Statute of the Court deals with a declaration by party states, of the recognition “as compulsory *ipso facto* and *without special agreement*, in relation to any other state accepting the same obligation”. India does not seek to assert jurisdiction for its Application in paragraph 2 of Article 36 of the Statute. Any reservations made in the declaration made under Article 36, paragraph 2, are irrelevant for the present case.

54. The construction of Article 36 is no longer *res integra*. The fact that this Court may have more than one jurisdictional basis is now well recognized, and where there is a multiplicity of agreements, it evidences that “contracting Parties intended to open up new ways of access to the Court rather than to close old ways or allow them to cancel each other . . .”⁴⁸.

55. The general principle, where the Court has jurisdiction based on both optional declarations and compulsory jurisdiction clauses in treaties, is that each title is autonomous and ranks equally with the others. The commentary in Robert Kolb’s book is illuminating. It says “Where there are several concurrent titles of jurisdiction, they do not cramp or limit each other’s effects: on the contrary, they complement and reinforce each other on a cumulative basis.”⁴⁹ It says that the reservations in one title of jurisdiction cannot be transposed into the other. The argument that the “title of jurisdiction resulting from optional declarations has a higher value in the hierarchy

⁴⁸*Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77, 76, cited in The Law And Procedure of the International Court of Justice, Fifty Years of Jurisprudence, Vol. II, Hugh Thirlway, p. 1684.*

⁴⁹*The International Court of Justice, Robert Kolb, 2013, p. 583.*

than one deriving from a treaty, must be rejected”⁵⁰. The commentary tells us that titles of jurisdiction remain in existence until either modified or terminated, and it cannot be argued that “a more restrictive subsequent optional declaration is evidence of the State’s will to submit to the Court’s jurisdiction in a more limited way, so that a prior and a more widely-worded compromissory clause must be considered to have undergone a kind of derogation (or vice versa)”⁵¹. It is for the “parties themselves to choose the titles of jurisdiction they intend to rely on”⁵². Mr. President, and esteemed Members of the Court, India relies on the Vienna Convention, the Optional Protocol, and Article 36 (1).

56. The jurisprudence of this Court also concludes this issue. In *Electricity Company of Sofia and Bulgaria* case, the Belgian Government relied on declarations of Belgium and Bulgaria accepting the compulsory jurisdiction of the Court, as also on the treaties of conciliation, arbitration and judicial settlement entered into between Belgium and Bulgaria on 23 June 1931. The Bulgarian Government challenged the jurisdiction of the Court. It was in this case that the Court held that,

“multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain”⁵³.

57. In *Nicaragua v. Honduras*, Nicaragua instituted proceedings in respect of a dispute concerning the alleged activities of armed bands, said to be operating from Honduras. It founded the jurisdiction of the Court on the American Treaty on Pacific Settlement — known as the “Pact of Bogotá”, and also the declarations of the two parties. Honduras resisted jurisdiction on the ground that the dispute was excluded by terms of the Honduran Declaration of 22 May 1986 and claimed that the declaration would apply to the Pact of Bogotá.

58. Honduras relied on the language of Article XXXI of the Pact which opened with the words, and I quote, because they are important, “In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice . . .”⁵⁴ Mr. President and esteemed Members of the

⁵⁰*Ibid.*, p. 585.

⁵¹*Ibid.*, p. 586

⁵²*Ibid.*, p. 589

⁵³*Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77, 76.*

⁵⁴Case Concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, para. 20.

Court you will find that no such words are to be found in the Optional Protocol. In the *Honduras* case, on the basis of those words, Honduras argued that the declaration made by it under Article 36, paragraph 2, of the Statute delineated the extent of jurisdiction even under Article XXXI of the Pact. This argument was rejected by the Court finding that the language of Article XXXI made it clear that it did not subject itself to the making of any new declaration to be deposited under Article 36, paragraphs 2 and 4, of the Statute. The Court observed — in paragraph 33 — turning to the Honduran interpretation,

“the Court may observe at the outset that two possible readings of the relationship between Article XXXI and the Statute have been proposed by the Parties. That Article has been seen either as a treaty provision conferring jurisdiction upon the Court in accordance with Article 36, paragraph 1, of the Statute, or as a collective declaration of acceptance of compulsory jurisdiction under paragraph 2 of that same Article.”⁵⁵

59. In that case, the argument by Honduras was based on Article XXXI of the Pact which expressly referred to Article 36 (2). Significantly, the Court recognized that there could be a treaty provision, in which event it confers jurisdiction upon the Court in accordance with Article 36, paragraph 1, of the Statute also. However, while dealing with Article XXXII, the Court noticed that this Article referred to the jurisdiction of the Court under Article 36, paragraph 1 of the Statute.

60. This issue arose once again in *Nicaragua v. Columbia*. The Court upheld a challenge to its jurisdiction under the Pact of Bogotá, in respect of disputes settled by the Pact. Nicaragua sought to sustain its complaint in relation to these very disputes under Article 36, paragraph 2 of the Statute. This was rejected by the Court and a challenge to its jurisdiction upheld, on the ground that to the extent that territories were settled under the Pact, there was no legal dispute between the parties.

61. Judge Abraham — as the Honourable President then was — in a separate opinion expressed his view that he found the argument of exclusivity of the Pact convincing. The judgment explained that the observations in the judgment of *Electricity Company of Sofia and Bulgaria* were undoubtedly correct as a general rule, but recognized that the general rule, in the words of the judgment “fails to take account of any of the distinctive characteristics of the Pact of Bogota . . .”⁵⁶.

⁵⁵ *Ibid.*, para. 33.

⁵⁶ Case Concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 832, Separate Opinion of Judge Abraham, para. 54.

62. Thus, there may be distinctive Pacts, and those would be governed by their own terms, and where they recognize the jurisdiction of this Court as a mechanism for dispute resolution, this Court would have the jurisdiction to entertain applications in relation to all such disputes as fall within such Pacts. And this jurisdiction, Mr. President and esteemed Members of the Court I submit, would be found in Article 36, paragraph 1, of the Statute.

63. In the *ICAO Council* case, India moved an application relying upon Article 84 of the Convention on International Civil Aviation, and Article II of the International Air Services Transit Agreement. The jurisdictional clauses of the treaties allowed an appeal to the Court from a decision of the Council. One of the defences raised by Pakistan was that the effect of one of India's reservations to her acceptance of the Court's compulsory jurisdiction under Article 36, paragraph 2, rendered this Court incompetent to entertain this appeal. The Court rejected this objection holding that,

“the various objections made to the competence of the Court cannot be sustained, whether they are based on the alleged inapplicability of the Treaties as such, or of their jurisdictional clauses. Since therefore the Court is invested with jurisdiction under those clauses and, in consequence (see paragraphs 14-16 above), under Article 36, paragraph 1, and under Article 37, of its Statute, it becomes irrelevant to consider the objections to other possible bases of jurisdiction.”⁵⁷

64. The jurisdiction of the Court in three cases cited earlier, relating to violations of the Vienna Convention were also entertained as disputes in the jurisdiction, the jurisdiction in relation to which was founded in Article 36, paragraph 1. In *LaGrand*, the Court proceeded on the footing that the Application filed by the Federal Republic of Germany for violation of the Vienna Convention was based on the jurisdiction of the Court under Article 36, paragraph 1 of the Statute of the Court read with Article 1 of the Optional Protocol. In fact, this position was not challenged by America.

65. In *Avena*, this Court noted that Mexico asserted jurisdiction of the Court under Article 36 paragraph 1 of the Statute and Article 1 of the Optional Protocol.

⁵⁷*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, p. 46, para. 25.

66. The Agreement on Consular Access⁵⁸ between India and Pakistan is irrelevant for the present proceedings. Mr. President and esteemed Members of the Court, I say it is irrelevant for three reasons:

- (a) India does not rely upon the Bilateral Agreement on Consular Access [which it entered into with Pakistan on in May 2008]. This Agreement, as recognized by Article 73 of the Vienna Convention, was with the object of, and I quote the language of the agreement itself, “furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country”. Some of the provisions of this Agreement reinforce the obligations of the Vienna Convention. These are the obligations to immediately notify “any arrest, detention or imprisonment of any person of the other country . . .” to the High Commission, and “to expeditiously inform the other of the sentences awarded to the convicted nationals of the other country . . .”. India does not rely, and does not need to rely on this Agreement. It bases its claim solely upon the Vienna Convention. India’s claim in its Application is *de hors* this Bilateral Agreement.
- (b) Article 102 (2) of the United Nations Charter 1945 proscribes invocation of any Agreement, unless it is registered. This Agreement is admittedly not registered⁵⁹.
- (c) Article 73 of the Vienna Convention recognizes that the Vienna Convention does not affect other international agreements in force. It also, however, expressly does not “preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof”.
- (d) Article 41 of the Vienna Convention on the Law of Treaties recognizes and ex-postulates the established principle of international law that two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty between themselves, if the possibility of such a modification is provided for by the treaty, or the modification in question is not prohibited by the treaty, and does not relate to a provision, the derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. Mr. President and esteemed Members of the Court, I submit that Article 73 of the Vienna Convention recognizes

⁵⁸Application of India, Ann. 10 and judges’ folder, tab 10.

⁵⁹Under Article 92 of the Charter, this Court is the principal judicial organ of the United Nations.

that there is scope for parties to supplement and amplify the provisions of the Vienna Convention — it does not, certainly does not, countenance a dilution of the principles embodied in the Vienna Convention. But I repeat, we do not rely on this bilateral agreement.

Prima facie case of violation of Vienna Convention

67. I now move onto, Sir, the next segment of my submission, which is a prima facie case of violation of the Vienna Convention. The facts set out in the Application, and which are supported by the exchanges between India and Pakistan, establish more than just a prima facie violation of the Vienna Convention.

68. On 25 March 2016, India was informed that Jadhav was allegedly arrested on 3 March, when the Foreign Secretary of Pakistan raised the matter with the Indian High Commissioner in Islamabad. On that very day, India sought consular access to Jadhav⁶⁰. On obtaining no response from Pakistan, India sent a reminder on 30 March reiterating its request for consular access.⁶¹ Innumerable requests through formal Notes Verbale and Verbal Demarches, were made to Pakistan between March 2016 and April 2017 for consular access to Jadhav⁶². The requests, however, elicited no response from Pakistan.

69. On 23 January 2017, which was almost a year after India's first request for consular access, India received from Pakistan a request for assistance in investigation of what was described as "FIR No. 6 of 2016."⁶³ Under the Pakistan Code of Criminal Procedure, the expression "FIR" is used as an acronym for a "First Information Report" which is registered after the police first gets information as to the commission of a crime. This was registered against the Indian national apparently on 8 April 2016. What is significant is that the letter acknowledged that this "FIR" had been registered against "*an Indian national*". The nationality of Jadhav has never been in doubt.

70. Thus, the international obligation to allow consular access under Article 36 of the Vienna Convention has admittedly been breached by Pakistan. It is obvious that even the right of Jadhav to seek and obtain consular access had been breached by Pakistan.

⁶⁰Application of India, Annex 1 and judges' folder, tab 1.

⁶¹Application of India, Annex 1 and judges' folder, tab 1.

⁶²Application of India, Annex 1 and judges' folder, tab 1.

⁶³Application of India, Annex 2 and judges' folder, tab 2.

71. On 3 February 2017 India protested through a *demarche* against the continued denial of consular access to Jadhav. The letter from Pakistan seeking assistance also established that there was a purported confession by him which was the basis or at least a significant part of the case against him. India raised concerns as to his safety, pointing out that “questions about his treatment in Pakistan’s custody continue to mount, given especially his coerced purported confession, and the circumstances of his presence in Pakistan remain unexplained”⁶⁴.

72. On 3 March 2017⁶⁵, India reminded Pakistan of the various requests.

73. India received another Note Verbale on 21 March 2017 from Pakistan. In this, Pakistan stated that, “the case for the consular access to the Indian national . . . shall be considered, in the light of [the] Indian side’s response to Pakistan’s request for assistance in investigation process and early dispensation of justice”⁶⁶.

74. The foregoing facts of the case including the Note Verbale of 21 March 2017 establishes that Pakistan had been acting in brazen violation of its obligations under the Vienna Convention, as the Convention does not include any exceptions in respect of consular access recognized in Article 36. The linking of assistance in the investigation to the grant of consular access was by itself a serious violation of the Vienna Convention.

75. India responded to this Note Verbale on 31 March 2017 pointing out 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”⁶⁷. India had information that he had been kidnapped from Iran, where he was carrying out business after retiring from the Indian Navy, and was shown to have been arrested in Baluchistan. These matters required verification, the first step would be consular access.

76. A press release was then issued by Inter Services Public Relations, a government agency of Pakistan, on 10 April 2017, regarding Jadhav. This said that, “[t]he spy has been tried through Field General Court Martial (FGCM) under Pakistan Army Act (PAA) and awarded death

⁶⁴Application of India, Annex 1 and judges’ folder, tab 1.

⁶⁵Application of India, Annex 1 and judges’ folder, tab 1.

⁶⁶Application of India, Annex 3 and judges’ folder, tab 3.

⁶⁷Application of India, Annex 1 and judges’ folder, tab 1.

sentence. Today COAS, Gen. Qamar Javed Bajwa has confirmed his death sentence awarded by FGCM.”⁶⁸

77. India received on 10 April 2017⁶⁹ another Note Verbale from the Ministry of Foreign Affairs, Islamabad conveying that consular access shall be considered in the light of India’s response to Pakistan’s assistance in the investigation.

78. India responded to this on 10 April 2017 itself pointing out that the offer was being iterated after the death sentence had been confirmed and the information of which confirmation was given in a press release by Pakistan. India expressed its anguish by saying that this offer “underlines the farcical nature of the proceedings and so-called trial by a Pakistan military court martial”⁷⁰. India reminded Pakistan that despite its repeated requests consular access had not been allowed.

79. A press statement was made by the Adviser to the Prime Minister of Pakistan on Foreign Affairs⁷¹. The press statement establishes the following facts:

- (i) After his alleged arrest, a “confessional video” was recorded on 25 March. The FIR was registered on 8 April.
- (ii) The accused was interrogated in May 2016, and in July 2016, a confessional statement was recorded before a magistrate.
- (iii) The court martial recorded summary of evidence on 24 September 2016, and in four proceedings culminating on 12 February 2017, the trial was over.
- (iv) In the course of the trial, it says, the accused “was allowed to ask questions from the witnesses”, and that “a law qualified field officer was provided to defend him throughout the court proceedings”.

80. The last proceeding in the case, as per this statement, was on 12 February. The conditional consular access offered by Pakistan on 21 March 2017 had in any event become meaningless as the trial was possibly over by then.

⁶⁸Application of India, Annex 4 and judges’ folder, tab 4.

⁶⁹Application of India, Annex 5 and judges’ folder, tab 5.

⁷⁰Application of India, Annex 1 and judges’ folder, tab 1.

⁷¹Application of India, Annex 6 and judges’ folder, tab 6.

81. These facts establish beyond a shadow of a doubt that the trial was conducted without informing the accused of his rights under the Vienna Convention, without granting consular access to India and denying the accused and India to arrange for legal representation. Pakistan, thus, conducted itself in a manner that constitutes an egregious violation of the Vienna Convention.

82. In a briefing on 17 April 2017, on behalf of the Government of Pakistan, the authorized spokesperson said that the Indian national is not eligible to consular access⁷².

Le PRESIDENT: Excusez-moi, Monsieur, puis-je vous demander de ralentir un peu le débit pour les interprètes ? Merci.

Mr. SALVE: The provisions of the Vienna Convention were thus violated, and the ongoing conduct of Pakistan continues to be in defiance of the provisions of the Convention.

83. On 19 April 2017⁷³, India yet again handed over a Note Verbale to Pakistan — through its High Commission in New Delhi — seeking copies of the charge sheet, proceedings of the Court of Inquiry, the summary of evidence and the judgment. The right of this State and the right of the accused, for the consular post to assist in legal representation, would in order to be meaningful, include the right to obtain this information.

84. I say, Sir, Mr. President and esteemed Members of the Court, India does not invite this Court to sit in appeal over the conduct of the Pakistani courts. But I make these points to underscore the consequences that have followed from the violation of the Vienna Convention.

85. The rights, I submit, Mr. President and esteemed Members of the Court, the rights of Article 36 are sacrosanct. They are enforceable rights.

86. The rights of consular access are a significant step in the evolution and recognition of the human rights in international law. The International Covenant on Civil and Political Rights, the ICCPR, notes that “the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. Article 6 of ICCPR recognizes that no one shall be arbitrarily deprived of his life. Article 9 recognizes the right to liberty and security

⁷²Paragraph 7 above.

⁷³Application of India, Annex 1 and judges’ folder, tab 1.

of person, and prohibits arbitrary arrests and detention. Article 14 of the ICCPR provides that “in the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” The subsets of this right, in paragraph 3 of Article 14, include the right “to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require”.

87. In order to make these salutary principles a living reality, where a national of one country is being tried in another country, adherence in letter and spirit to the Vienna Convention becomes a vital step. Mr. President and esteemed Members of the Court, I say with all the emphasis at my command, the graver the charges, the greater the need for punctilious adherence to the Convention. Although the Vienna Convention predates the ICCPR, international law and its jurisprudence specially in the dimensions of human rights have evolved with time, and the interpretation of the Vienna Convention and the implications of the rights guaranteed must be informed by current standards of conduct expected from sovereign States.

88. The Vienna Convention embodies a vital code of conduct that would give life and meaning to the right to fair trial to a national of one State arrested in another State. The content of Article 36 of the Vienna Convention in the present times must be informed by international jurisprudence which includes the salubrious principles recognized by ICCPR.

89. As held by this Court in *Avena*, “violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual”⁷⁴. Where the rights of an individual are violated, consequences must follow. The Vienna Convention recognizes the right of a State to seek redress on behalf of its national in this Court, where the rights of its national, and concomitantly its own rights under the Vienna Convention are violated by another State.

90. The facts set out in our Application, alluded to only briefly, establish egregious violation of the Vienna Convention. The events that have transpired since March 2016 establish the farcical

⁷⁴*Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004 (I), p. 36, para. 40.

nature of the trial and leave no manner of doubt that in the present case the violation of consular access in the Vienna Convention has been destroyed, and this has destroyed any credibility and sanctity that the verdict of the military court in Pakistan may have in international law.

91. India invites the attention of this Court, to Pakistan's conduct that violates the Vienna Convention, and I shall focus on one or two issues.

(a) In its letter of 21 March 2017, Pakistan responded to the request for consular access stating that

“the case for consular access to the Indian national... 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”⁷⁵. This is a completely untenable position, I submit, Mr. President and esteemed Members of the Court. This is a completely untenable position and it is a clear violation of the Vienna Convention. Article 36 confers the right upon the individual and upon the State. Firstly, the right of an individual to consular access cannot be made hostage to demands for assistance in investigation and the response of the State whose national is being deprived consular access. Secondly, the Vienna Convention does not countenance any such exceptions. Thirdly, I repeat, the more serious the charge, the greater the need for the procedural safeguards to ensure that the accused gets a fair trial. In the circumstances of this case, where the accused has been, by March 2017, for a year in military custody, incommunicado from his family and from his home State, the suggestion that there has been a fair trial without allowing consular access is patently untenable. The trial stands vitiated in international law, for egregious violations of the Vienna Convention.

(b) The press release of 10 April 2017⁷⁶, announcing the award of the death sentence and its confirmation by the Chief of Army Staff, stated that Jadhav confessed before a magistrate — *and his confession was that he had been tasked to coordinate and organise espionage and sabotage activities et cetera*. In the absence of any information as to the evidence led against him other than his confession, it can fairly be assumed that his confession played a significant part in his conviction. This confession was extracted when he was in military custody, incommunicado and continuously denied consular access. The repeated assertions that he was

⁷⁵Application of India, Annex 3 and judges' folder, tab 3.

⁷⁶Application of India, Annex 4 and judges' folder, tab 4.

afforded a fair trial, when his basic rights, under the Vienna Convention were thrown to the winds, ring hollow.

92. India seeks the intervention of this Court to address the injury caused by the violation of the Vienna Convention, and Mr. President and esteemed Members of the Court, I respectfully submit the existence of any another remedy, even assuming such remedy does exist in domestic law of Pakistan, does not bar invocation of the jurisdiction of this Court.

93. The assertions by Pakistan in its communication of 12th May 2017 that there are remedies available to Jadhav have to be viewed in the backdrop of the circumstances of the case and two of the circumstances are important:

- (a) at the appellate stage Pakistan steadfastly refuses to allow consular access – not that access at this stage would cure the fatal defect in the process which led to his conviction. It only shows that the illegality arising out of violation of the Vienna Convention continues unabated;
- (b) The information in public domain suggests that the appeal will be heard by a tribunal presided over by a two star general. The death sentence stands confirmed by the Chief of Army Staff of Pakistan – a four-star general. It strains credulity to believe that the Court of Appeal will have the degree of impartiality and independence, and decide the matter uninfluenced by these events.
- (c) The appeal will be heard when Jadhav continues to be incommunicado and deprived of consular access. The military spokesman candidly, in his press briefing, admitted that he did not see any chance of the verdict being overturned⁷⁷;
- (d) From the information in public domain, Jadhav would not have access to legal representation of his choice. It was reported⁷⁸ (and it has not been denied) that the Lahore High Court Bar Association has threatened to cancel the membership against any lawyer pursuing appeal of Jadhav against his conviction. Thus, Jadhav has neither consular access, nor prospects of finding proper legal representation even at this stage.
- (e) In any event, Mr. President, esteemed Members of the Court, I respectfully submit that there is no legal remedy that would be able to redress the injury caused by the violation of the Vienna

⁷⁷Application of India, Annex 7 and judges' folder, tab 7.

⁷⁸Application of India, Annex 11 and judges' folder, tab 11.

Convention. Spokespersons of Pakistan have already clarified their stance that the consular access under the Convention would not be allowed to Jadhav, which comments are consistent with Pakistan's communications to India.

94. Pakistan continues to make allegations suggesting that Jadhav was a commander in the Indian Navy and an Indian spy. India refutes these allegations as being baseless and being part of a propaganda war relentlessly waged by Pakistan. India asserts that Jadhav retired from the Indian Navy and has been pursuing business in Iran from where he was kidnapped. But Mr. President and esteemed Members of the Court, the merits of these allegations and counter allegations between the two countries are irrelevant for the case which you are going to decide. The seriousness of the allegations only underscores the need for strict adherence to the procedural rights and safeguards available to an accused not merely under domestic law, but in the case of Jadhav, also under the Vienna Convention.

95. India submits therefore, Mr. President and esteemed Members of the Court, that it has a strong *prima facie* case as to the jurisdiction of the Court and on merits, sufficient to justify seeking provisional measures. India in its reliefs seeks *restitutio in integrum* — which would, in the least, finally require annulment of the verdict.

96. In the circumstances, I submit that India has a strong case for provisional measures as an indication that the death sentence be not executed until such time as this Court has adjudicated upon India's Application.

Provisional Measures

97. And therefore on behalf of the Republic of India, Mr. President and esteemed Members of the Court, I request that pending final judgment in this case, the Court indicate provisional measures:

- (a) that the Government of the Islamic Republic of Pakistan take all measures necessary to ensure that Mr. Kulbhushan Sudhir Jadhav is not executed;
- (b) that the Government of the Islamic Republic of Pakistan report to this Court the action it has taken in pursuance of sub-paragraph (a); and

(c) that the Government of the Islamic Republic of Pakistan ensure that no action is taken that might prejudice the rights of the Republic of India or Mr. Kulbhushan Sudhir Jadhav with respect to any decision this Court may render on the merits of India's application.

Thank you Mr. President and esteemed Members of the Court.

The PRESIDENT: I now give the floor to Dr. Deepak Mittal, the Agent of the Republic of India.

Mr. MITTAL: Thank you, Mr. President and esteemed Members of the Court. I thank the Court for their patient hearing. As the Counsel for the Republic of India has already read out the request, I formally, once again, reiterate the request on behalf of the Government of India that, pending final judgment in the case, the Court indicate:

- (a) that the Government of the Islamic republic of Pakistan take all measures necessary to ensure that Mr. Kulbhushan Sudhir Jadhav is not executed;
- (b) that the Government of the Islamic Republic of Pakistan report to the Court the action it has taken in pursuance of sub-paragraph (a); and
- (c) that the Government of the Islamic Republic of Pakistan ensure that no action is taken that might prejudice the rights of the Republic of India or Mr. Kulbhushan Sudhir Jadhav with respect to any decision the Court may render on the merits of the case.

Thank you.

The PRESIDENT: Thank you. That ends the oral observations of the Republic of India. The Court will meet again this afternoon at 3 p.m. to hear the oral observations of the Islamic Republic of Pakistan. The sitting is closed.

The Court rose at 11.40 a.m.
