

INTERNATIONAL COURT OF JUSTICE
REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

JADHAV CASE

(INDIA *v.* PAKISTAN)

REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER OF 18 MAY 2017

2017

COUR INTERNATIONALE DE JUSTICE
RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE JADHAV

(INDE *c.* PAKISTAN)

DEMANDE EN INDICATION
DE MESURES CONSERVATOIRES

ORDONNANCE DU 18 MAI 2017

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ORDONNANCE

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INTERNATIONAL COURT OF JUSTICE

YEAR 2017

18 May 2017

JADHAV CASE

(INDIA *v.* PAKISTAN)

REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER

Present: President ABRAHAM; Judges OWADA, CAÑADO TRINDADE, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN; Registrar COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

Whereas:

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 “in the matter of the detention and trial of an Indian National, Mr. Kulbhushan Sudhir Jadhav”, sentenced to death in Pakistan.

2. At the end of its Application, India requests:

“(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.”

3. 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 concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations.

4. On 8 May 2017, accompanying its Application, India also 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.

5. In that Request, India asked that 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 subparagraph (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 th[e] Court may render on the merits of the case.”

6. The Request also contained the following plea:

“In view of the extreme gravity and immediacy of the threat that authorities in Pakistan will execute an Indian citizen in violation of obligations Pakistan owes to India, India respectfully urges the Court

to treat this Request as a matter of the greatest urgency and pass an order immediately on provisional measures *suo motu* without waiting for an oral hearing. The President is requested [to] exercis[e] his power under Article 74, paragraph 4, of the Rules of Court, pending the meeting of the Court, to direct the Parties to act in such a way as will enable any order the Court may make on the Request for provisional measures to have its appropriate effects.”

7. 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, in accordance with 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 of the Request.

8. 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.

9. By letters dated 10 May 2017, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of the Rules, the Court had fixed 15 May 2017 as the date for the oral proceedings on the Request for the indication of provisional measures.

10. At the public hearings held on 15 May 2017, oral observations on the Request for the indication of provisional measures were presented by:

On behalf of India: Dr. Deepak Mittal,
Dr. Vishnu Dutt Sharma,
Mr. Harish Salve.

On behalf of Pakistan: Dr. Mohammad Faisal,
Mr. Khawar Qureshi.

11. At the end of its oral observations, India asked the Court to indicate the following 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 the Court the action it has taken in pursuance of subparagraph (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”.

12. For its part, Pakistan asked the Court to reject India’s Request for the indication of provisional measures.

* * *

13. The context in which the present case has been brought before the Court can be summarized as follows. Mr. Jadhav has been in the custody of Pakistani authorities since 3 March 2016, although the circumstances of his arrest remain in dispute between the Parties. India maintains that Mr. Jadhav is an Indian national, which Pakistan recognized in its Notes Verbales of 23 January 2017, 21 March 2017 and 10 April 2017 (see Annexes 2, 3 and 5 to the Application). The Applicant claims to have been informed of this arrest on 25 March 2016, when the Foreign Secretary of Pakistan raised the matter with the Indian High Commissioner in Pakistan. As of that date, India requested consular access to Mr. Jadhav. India reiterated its request on numerous occasions, to no avail. On 23 January 2017, Pakistan sent a Letter of Request seeking India’s assistance in the investigation process concerning Mr. Jadhav and his alleged accomplices. On 21 March and 10 April 2017 Pakistan informed India that consular access to Mr. Jadhav would be considered “in the light of” India’s response to the said request for assistance.

14. According to a press statement issued on 14 April 2017 by an adviser on foreign affairs to the Prime Minister of Pakistan, Mr. Jadhav was sentenced to death on 10 April 2017 by a court martial due to activities of “espionage, sabotage and terrorism”. India submits that it protested and continued to press for consular access and information concerning the proceedings against Mr. Jadhav. It appears that, under Pakistani law, Mr. Jadhav would have 40 days to lodge an appeal against his conviction and sentence (i.e., until 19 May 2017), but it is not known whether he has done so. India states however that, on 26 April 2017, Mr. Jadhav’s mother filed “an appeal” under Section 133 (B) and “a petition” to the Federal Government of Pakistan under Section 131 of the Pakistan Army Act 1952, both of which were handed over by the Indian High Commissioner to Pakistan’s Foreign Secretary on the same day.

I. PRIMA FACIE JURISDICTION

15. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 114, para. 17).

16. In the present case, India seeks to found the jurisdiction of the Court 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 on Consular Relations (hereinafter the “Optional Protocol” and the “Vienna Convention”, respectively). The Court must therefore first seek to determine whether Article I of the Optional Protocol prima facie confers upon it jurisdiction to rule on the merits, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

17. India and Pakistan have been parties to the Vienna Convention since 28 December 1977 and 14 May 1969, respectively, and to the Optional Protocol since 28 December 1977 and 29 April 1976, respectively. Neither of them has made reservations to those instruments.

18. Article I of the Optional Protocol provides as follows:

“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.”

19. India claims that a dispute exists between the Parties regarding the interpretation and application of Article 36, paragraph 1, of the Vienna Convention, which provides as follows:

“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 subparagraph;

- (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 judgement. 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.”

* *

20. India contends that Pakistan has breached its obligations under the above-mentioned provisions in the matter of the arrest, detention and trial of Mr. Jadhav. The Applicant asserts that Mr. Jadhav has been arrested, detained, tried and sentenced to death by Pakistan and that, despite several attempts, it could neither communicate with nor have access to him, in violation of Article 36, subparagraphs (1) (a) and (1) (c) of the Vienna Convention, and that Mr. Jadhav has neither been informed of his rights nor been allowed to exercise them, in violation of subparagraph (1) (b) of the same provision. India asserts that Article 36, paragraph 1, of the Vienna Convention “admits of no exceptions” and is applicable irrespective of the charges against the individual concerned.

21. India acknowledges that the Parties have signed an Agreement on Consular Access on 21 May 2008 (hereinafter the “2008 Agreement”), but it maintains that this instrument does not limit the Parties’ rights and obligations pursuant to Article 36, paragraph 1, of the Vienna Convention. According to India, while Article 73 of the Vienna Convention recognizes that agreements between parties may supplement and amplify its provisions, it does not provide a basis for diluting the obligations contained therein. India therefore considers that this Agreement does not have any effect on the Court’s jurisdiction in the present case.

22. India also emphasizes that it only seeks to found the Court’s jurisdiction on Article I of the Optional Protocol, and not on the declarations made by the Parties under Article 36, paragraph 2, of the Statute. India is of the view that where treaties or conventions especially provide for the

jurisdiction of the Court, such declarations, including any reservations they may contain, are not applicable.

*

23. Pakistan claims that the Court has no prima facie jurisdiction to entertain India's Request for the indication of provisional measures. It first submits that the jurisdiction of the Court is excluded by a number of reservations in the Parties' declarations under Article 36, paragraph 2, of the Statute. Pakistan refers to two of India's reservations to its declaration of 18 September 1974, i.e., first, that preventing the Court from entertaining cases involving two members of the Commonwealth and, second, its multilateral treaty reservation. Pakistan also refers to a reservation contained in its own amended declaration of 29 March 2017, according to which "all matters relating to the national security of the Islamic Republic of Pakistan" are excluded from the compulsory jurisdiction of the Court. For Pakistan, this reservation is applicable in the present case because Mr. Jadhav was arrested, detained, tried and sentenced for espionage, sabotage and terrorism.

24. Secondly, Pakistan also contends that Article 36, paragraph 1, of the Vienna Convention could not have been intended to apply to persons suspected of espionage or terrorism, and that there can therefore be no dispute relating to the interpretation or application of that instrument in the present case.

25. Finally, Pakistan avers that the facts alleged in the Application fall within the scope of the 2008 Agreement, which "limit[s] and qualif[ies] or supplement[s]" the Vienna Convention. It refers to Article 73, paragraph 2, of the Vienna Convention, which provides that "[n]othing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof". Pakistan considers that the 2008 Agreement "amplifies or supplements [the Parties'] understanding and the operation of the Convention". In this regard, Pakistan calls attention to subparagraph (vi) of the 2008 Agreement, which provides that "[i]n case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits". Pakistan argues that this provision applies to Mr. Jadhav and that the Court therefore lacks prima facie jurisdiction under Article I of the Optional Protocol.

* *

26. The Court recalls that the Applicant seeks to ground its jurisdiction in Article 36, paragraph 1, of the Statute and Article I of the Optional

Protocol; it does not seek to rely on the Parties' declarations under Article 36, paragraph 2, of the Statute. When the jurisdiction of the Court is founded on particular "treaties and conventions in force" pursuant to Article 36, paragraph 1, of its Statute, "it becomes irrelevant to consider the objections to other possible bases of jurisdiction" (*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, *I.C.J. Reports 1972*, p. 60, para. 25; see also *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 872, para. 132). Therefore, any reservations contained in the declarations made by the Parties under Article 36, paragraph 2, of the Statute cannot impede the Court's jurisdiction specially provided for in the Optional Protocol. Thus, the Court need not examine these reservations further.

27. Article I of the Optional Protocol provides that the Court has jurisdiction over "[d]isputes arising out of the interpretation or application of the [Vienna] Convention" (see paragraph 18 above).

28. The Court will accordingly ascertain whether, on the date the Application was filed, such a dispute appeared to exist between the Parties.

29. In this regard, the Court notes that the Parties do indeed appear to have differed, and still differ today, on the question of India's consular assistance to Mr. Jadhav under the Vienna Convention. While India has maintained at various times that Mr. Jadhav should have been (and should still be) afforded consular assistance under the Vienna Convention (see for instance Notes Verbales dated 19 and 26 April 2017 annexed to the Application), Pakistan has stated that such an assistance would be considered "in the light of India's response to [its] request for assistance" in the investigation process concerning him in Pakistan (see the Notes Verbales of Pakistan dated 21 March and 10 April 2017 annexed to the Application). These elements are sufficient at this stage to establish prima facie that, on the date the Application was filed, a dispute existed between the Parties as to the question of consular assistance under the Vienna Convention with regard to the arrest, detention, trial and sentencing of Mr. Jadhav.

30. In order to determine whether it has jurisdiction — even prima facie — the Court must also ascertain whether such a dispute is one over which it might have jurisdiction *ratione materiae* on the basis of Article I of the Optional Protocol. In this regard, the Court notes that the acts alleged by India are capable of falling within the scope of Article 36, paragraph 1, of the Vienna Convention, which, *inter alia*, guarantees the right of the sending State to communicate with and have access to its nationals in the custody of the receiving State (subparagraphs (a) and (c)), as well as the right of its nationals to be informed of their rights (subparagraph (b)). The Court considers that the alleged failure by Pakistan to provide the requisite consular notifications with regard to the

arrest and detention of Mr. Jadhav, as well as the alleged failure to allow communication and provide access to him, appear to be capable of falling within the scope of the Vienna Convention *ratione materiae*.

31. In the view of the Court, the aforementioned elements sufficiently establish, at this stage, the existence between the Parties of a dispute that is capable of falling within the provisions of the Vienna Convention and that concerns the interpretation or application of Article 36, paragraph 1, thereof.

32. The Court also notes that the Vienna Convention does not contain express provisions excluding from its scope persons suspected of espionage or terrorism. At this stage, it cannot be concluded that Article 36 of the Vienna Convention cannot apply in the case of Mr. Jadhav so as to exclude on a prima facie basis the Court's jurisdiction under the Optional Protocol.

33. In respect of the 2008 Agreement, the Court does not need to decide at this stage of the proceedings whether Article 73 of the Vienna Convention would permit a bilateral agreement to limit the rights contained in Article 36 of the Vienna Convention. It is sufficient at this point to note that the provisions of the 2008 Agreement do not impose expressly such a limitation. Therefore, the Court considers that there is no sufficient basis to conclude at this stage that the 2008 Agreement prevents it from exercising its jurisdiction under Article I of the Optional Protocol over disputes relating to the interpretation or the application of Article 36 of the Vienna Convention.

34. Consequently, the Court considers that it has prima facie jurisdiction under Article I of the Optional Protocol to entertain the dispute between the Parties.

II. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE MEASURES REQUESTED

35. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 126, para. 63).

36. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*I.C.J. Reports 2017*, p. 126, para. 64).

37. In its Application, India asserts that the rights it is seeking to protect are those provided by paragraph 1 of Article 36 of the Vienna Convention (quoted above at paragraph 19).

38. As the Court stated in its Judgment in the *LaGrand (Germany v. United States of America)* case,

“Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection. It begins with the basic principle governing consular protection: the right of communication and access (Art. 36, para. 1 (a)). This clause is followed by the provision which spells out the modalities of consular notification (Art. 36, para. 1 (b)). Finally Article 36, paragraph 1 (c), sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State.” (*I.C.J. Reports 2001*, p. 492, para. 74.)

39. It follows from Article 36, paragraph 1, that all States parties to the Vienna Convention have a right to provide consular assistance to their nationals who are in prison, custody or detention in another State party. They are also entitled to respect for their nationals’ rights contained therein.

* *

40. In the present case, the Applicant claims that Mr. Jadhav, who is an Indian national, was arrested, detained, tried and sentenced to death by Pakistan and that, despite several attempts, India was given no access to him and no possibility to communicate with him. In this regard, India states that it requested consular access to the individual on numerous occasions between 25 March 2016 and 19 April 2017, without success. India points out that on 21 March 2017, at the end of the trial of Mr. Jadhav, Pakistan stated that “the case for the consular access to the Indian national Kulbushan Jadhav shall be considered in the light of India[s] response to Pakistan’s request for assistance” in the investigation process concerning him; Pakistan reiterated its position on 10 April 2017 — apparently the day when Mr. Jadhav was convicted and sentenced to death (see paragraphs 13-14 above). India argues in this connection that the conditioning of consular access on assistance in an investigation is itself a serious violation of the Vienna Convention. It adds that Mr. Jadhav has not been informed of his rights with regard to consular assistance. The Applicant concludes from the foregoing that Pakistan failed to provide the requisite notifications without delay, and that India

and its national have been prevented for all practical purposes from exercising their rights under Article 36, paragraph 1, of the Vienna Convention.

*

41. Pakistan, for its part, contests that it has conditioned consular assistance as alleged by India. Furthermore, it avers that the rights invoked by India are not plausible because Article 36 of the Vienna Convention does not apply to persons suspected of espionage or terrorism, and because the situation of Mr. Jadhav is governed by the 2008 Agreement.

* *

42. At this stage of the proceedings, the Court is not called upon to determine definitively whether the rights which India wishes to see protected exist; it need only decide whether these rights are plausible (see above paragraph 35 and *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 126, para. 64).

43. The rights to consular notification and access between a State and its nationals, as well as the obligations of the detaining State to inform without delay the person concerned of his rights with regard to consular assistance and to allow their exercise, are recognized in Article 36, paragraph 1, of the Vienna Convention. Regarding Pakistan's arguments that, first, Article 36 of the Vienna Convention does not apply to persons suspected of espionage or terrorism, and that, second, the rules applicable to the case at hand are provided in the 2008 Agreement, the Court considers that at this stage of the proceedings, where no legal analysis on these questions has been advanced by the Parties, these arguments do not provide a sufficient basis to exclude the plausibility of the rights claimed by India, for the same reasons provided above (see paragraphs 32-33).

44. India submits that one of its nationals has been arrested, detained, tried and sentenced to death in Pakistan without having been notified by the same State or afforded access to him. The Applicant also asserts that Mr. Jadhav has not been informed without delay of his rights with regard to consular assistance or allowed to exercise them. Pakistan does not challenge these assertions.

45. In the view of the Court, taking into account the legal arguments

and evidence presented, it appears that the rights invoked by India in the present case on the basis of Article 36, paragraph 1, of the Vienna Convention are plausible.

*

46. The Court now turns to the issue of the link between the rights claimed and the provisional measures requested.

47. The Court notes that the provisional measures sought by India consist in ensuring that the Government of Pakistan will take no action that might prejudice its alleged rights, in particular that it will take all measures necessary to prevent Mr. Jadhav from being executed before the Court renders its final decision.

48. The Court considers that these measures are aimed at preserving the rights of India and of Mr. Jadhav under Article 36, paragraph 1, of the Vienna Convention. Therefore, a link exists between the rights claimed by India and the provisional measures being sought.

III. RISK OF IRREPARABLE PREJUDICE AND URGENCY

49. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings (see, for example, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 136, para. 88).

50. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision (*ibid.*, para. 89). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

* *

51. India contends that the execution of Mr. Jadhav would cause irreparable prejudice to the rights it claims and that this execution may occur at any moment before the Court decides on the merits of its case, as any appeal proceedings in Pakistan could be concluded very quickly and it is unlikely that the conviction and sentence would be reversed. In this regard, India explains that the only judicial remedy available to Mr. Jadhav was the filing of an appeal within 40 days of the sentence

rendered on 10 April 2017. It points out that, although Mr. Jadhav may seek clemency, first from the Chief of Army Staff of Pakistan and secondly from the President of Pakistan, these are not judicial remedies.

*

52. Pakistan claims that there is no urgency because Mr. Jadhav can still apply for clemency and that a period of 150 days is provided for in this regard. According to Pakistan, even if this period started on 10 April 2017 (the date of conviction at first instance), it would extend beyond August 2017. The Agent for Pakistan stated that there would be no urgent need to indicate provisional measures if the Parties agreed to an expedited hearing and suggested that Pakistan would be content for the Court to list the Application for hearing within six weeks.

* *

53. Without prejudging the result of any appeal or petition against the decision to sentence Mr. Jadhav to death, the Court considers that, as far as the risk of irreparable prejudice to the rights claimed by India is concerned, the mere fact that Mr. Jadhav is under such a sentence and might therefore be executed is sufficient to demonstrate the existence of such a risk.

54. There is 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. Pakistan has indicated that any execution of Mr. Jadhav would probably not take place before the end of August 2017. This suggests that an execution could take place at any moment thereafter, before the Court has given its final decision in the case. The Court also notes that Pakistan has given no assurance that Mr. Jadhav will not be executed before the Court has rendered its final decision. In those circumstances, the Court is satisfied that there is urgency in the present case.

55. The Court adds, with respect to the criteria of irreparable prejudice and urgency, that the fact that Mr. Jadhav could eventually petition Pakistani authorities for clemency, or that the date of his execution has not yet been fixed, are not per se circumstances that should preclude the Court from indicating provisional measures (see, e.g., *Avena and Other Mexican Nationals (Mexico v. United States of America)*, *Provisional Measures*, Order of 5 February 2003, *I.C.J. Reports 2003*, p. 91, para. 54).

56. The Court notes that the issues brought before it in this case do not

concern the question whether a State is entitled to resort to the death penalty. As it has observed in the past, “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” (*LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 25; *Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 89, para. 48).

IV. CONCLUSION AND MEASURES TO BE ADOPTED

57. The Court concludes from all the above considerations that the conditions required by its Statute for it to indicate provisional measures are met and that certain measures must be indicated in order to protect the rights claimed by India pending its final decision.

58. Under the present circumstances, it is appropriate for the Court to order that 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.

* * *

59. The Court reaffirms that its “orders on provisional measures under Article 41 [of the Statute] have binding effect” (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

* * *

60. The decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of India and Pakistan to submit arguments in respect of those questions.

* * *

61. For these reasons,

THE COURT,

I. Unanimously,

Indicates 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.

II. Unanimously,

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

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighteenth day of May two thousand and seventeen, 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.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court; Judge BHANDARI appends a declaration to the Order of the Court.

(Initialed) R.A.

(Initialed) Ph.C.
