

INTERNATIONAL COURT OF JUSTICE

APPLICATION

INSTITUTING PROCEEDINGS

filed in the Registry of the Court
on 8 May 2017

JADHAV CASE

(INDIA *v.* PAKISTAN)

COUR INTERNATIONALE DE JUSTICE

REQUÊTE

INTRODUCTIVE D'INSTANCE

enregistrée au Greffe de la Cour
le 8 mai 2017

AFFAIRE JADHAV

(INDE *c.* PAKISTAN)

APPLICATION INSTITUTING PROCEEDINGS

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On behalf of the Republic of India, and in accordance with Article 40, paragraph 1, of the Statute of the International Court of Justice (hereinafter “Court”) and Article 38 of the Rules of the Court, read along with Article 1 of the Optional Protocol concerning the Compulsory Settlement of Disputes done at Vienna on 24 April 1963, I respectfully submit this Application instituting proceedings on behalf of and in the name of the Republic of India against the Islamic Republic of Pakistan for egregious violations of the Vienna Convention on Consular Relations, 1963 (the “Vienna Convention”) by Pakistan in the matter of the detention and trial of an Indian national, Mr. Kulbhushan Sudhir Jadhav which has resulted finally on 10 April 2017 in a death sentence being awarded to the said Indian national. The dispute being raised arises out of the interpretation and the application of the 1963 Vienna Convention on Consular Relations and lies within the compulsory jurisdiction of this Court as provided in Article 1 of the Optional Protocol Concerning the Compulsory Settlement of Disputes.

I am also enclosing a request for urgent provisional measures pursuant to Article 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court. The request for provisional measures seeks immediate orders as the Indian national who was tried by a military court has been sentenced to death, and his fate is uncertain due to lack of information and continued denial of consular access. The present proceedings relate to the violation of the Vienna Convention in relation to the arrest and trial of the Indian national Mr. Kulbhushan Sudhir Jadhav. India apprehends that although an appellate remedy is ostensibly available, it may be quickly exhausted in the same farcical manner in which his trial has been rushed through, and he could be executed summarily. India has no other legal recourse by which it could secure the interests of this Indian national except by way of the present proceedings.

I. INTRODUCTION

1. The authorities of Pakistan allegedly arrested, detained, tried, convicted and sentenced to death an Indian national Mr. Kulbhushan Sudhir Jadhav, and he is currently under a death sentence being held in Pakistan. The competent authorities of Pakistan, despite repeated requests by India beginning March 2016 have not granted consular access. Pakistan has, thus, been in egregious violation of its obligations under subarticles (a) (b) and (c) of Article 36, paragraph 1, of the 1963 Vienna Convention.

2. These violations have prevented India from exercising its rights under the Vienna Convention and have also deprived the Indian national of the protection accorded under the Vienna Convention and violated his rights under the Vienna Convention. This Application is being brought by India on its own behalf to seek relief in relation to violation of its rights, as well as on behalf of its citizen who has been seriously prejudiced and now faces a death sentence, in a process that deliberately and consciously denied to him the rights under Article 36 (1) (b) of the Vienna Convention.

3. The ICJ has held that the rule on exhaustion of local remedies is not applicable when a State invokes direct violation of its rights. In such cases, the State is not bound to wait until domestic proceedings have been completed by its injured national. Nor is the exhaustion of local remedies a compulsory requirement if the respondent State itself has failed to inform the person concerned about available

remedies in consonance with its obligations under international law (*Arrest Warrants* case; *LaGrand* case quoted in *The Statute of the International Court of Justice — A Commentary*, edited by Zimmermann, Tomuschat and Oellers-Frahm, 2005, p. 648). In view of the above, India is competent to bring this Application before the Court.

II. FACTS

4. An Indian national (Kulbushan Sudhir Jadhav) was allegedly arrested on 3 March 2016.

5. On 25 March 2016, India was informed of this alleged arrest when the Foreign Secretary, Pakistan raised the matter with the Indian High Commissioner in Islamabad. On that very day, India sought consular access to the said individual at the earliest.

6. The request did not evoke any response. Thus, on 30 March 2016, India sent a reminder reiterating its request for consular access to the individual at the earliest. Thirteen more reminders were sent by India on 6 May 2016, 10 June 2016, 11 July 2016, 26 July 2016, 22 August 2016, 3 November 2016, 19 December 2016, 3 February 2017, 3 March 2017, 31 March 2017, 10 April 2017, 14 April 2017 and 19 April 2017 (Annex 1). All these requests fell on deaf ears.

7. Almost a year after India's first request for consular access, on 23 January 2017 India received a request (Annex 2) from Pakistan for assistance in investigation of what was described as "FIR No. 6 of 2016". Under the Pakistan Code of Criminal Procedure, the expression "FIR" is used as an acronym for the first information report which is registered after the police comes to know of the commission of a crime. This was the criminal complaint that was registered against the Indian national apparently on 8 April 2016. What is significant is that this letter acknowledged that this "FIR" had been registered against "an Indian national", hence confirming the nationality of the individual.

8. Thus, the nationality of the arrested person, who was undergoing trial and that too in a military court was not in dispute or doubt. The international obligation to allow consular access under Article 36 of the Vienna Convention had admittedly been breached by Pakistan. It is obvious that even the right of Mr. Jadhav to seek and obtain consular access had been breached by Pakistan.

9. On 3 February 2017 India protested through a demarche against the continued denial of consular access despite the fact that his Indian nationality had been affirmed by Pakistan. The letter from Pakistan seeking assistance referred to in paragraph 7 above 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, therefore, raised the concern of 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".

10. On 3 March 2017 India reminded Pakistan of its various requests including its demarche of 3 February 2017 and again requested consular access.

11. India received another Note Verbale dated 21 March 2017 (Annex 3) 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”.

12. 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 this Convention does not include any exceptions in respect of consular access rights recognized in Article 36. The linking of assistance in the investigation process to the grant of consular access was by itself a serious violation of the Vienna Convention.

13. India responded to this Note Verbale on 31 March 2017 pointing out that, “consular access to Mr. Jadhav would be an essential prerequisite in order to verify the facts and understand the circumstances of his presence in Pakistan”. India had information that he had been kidnapped from Iran, where he was carrying on business after retiring from the Indian Navy, and was then shown to have been arrested in Balochistan. These matters required verification, the first step for which would be consular access.

14. A press release issued by Inter Services Public Relations on 10 April 2017, regarding Mr. Jadhav conveyed that “The spy has been tried through Field General Court Martial (FGCM) under Pakistan Army Act and awarded death sentence. Today COAS, General Qamar Javed Bajwa has confirmed his death sentence awarded by FGCM.” (Annex 4.)

15. India received on 10 April 2017 yet 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 request (Annex 5) for assistance in the investigation process.

16. India responded to this on 10 April 2017 itself pointing out that this offer was being reiterated after the death sentence had been confirmed — the information of which was given in a press briefing by Pakistan. India stated that this offer “underlines the farcical nature of the proceedings and so-called trial by a Pakistan military court martial”. India pointed out that despite its repeated requests, consular access had not been allowed.

17. A press statement was made by the Adviser to the Prime Minister of Pakistan on Foreign Affairs on 14 April 2017 (Annex 6). This press statement establishes the following facts:

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

18. The last proceeding in the case was, as per this statement, on 12 February 2017. It is obvious that by 21 March 2017, even the conditional consular access [to be granted post arrest, and in the course of the trial] that was offered by Pakistan had in any event become meaningless as the trial stood concluded.

19. India states that these facts establish beyond any shadow of doubt that in conducting the trial without informing the accused of his rights under the Vienna Convention and granting consular access to India, Pakistan has conducted itself in a manner that constitutes an egregious violation of the Vienna Convention.

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 for consular access nor will he be granted consular access (Annex 7). It is clear, that the provisions of the Vienna Convention have been violated, and the ongoing conduct of Pakistan continues to be in defiance of the provisions of the Convention.

20. On 19 April, India yet again handed over a Note Verbale (see Annex 1) 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. In addition to seeking [once again] consular access, it also asked Pakistan to:

- (a) share the procedure for the appeal;
- (b) facilitate the appointment of a defence lawyer, and facilitate the contact with the High Commission of India in Islamabad;
- (c) provide certified copies of medical reports;
- (d) issue visas to the family of Mr. Kulbhushan Sudhir Jadhav to visit Pakistan.

21. In order to pursue legal remedies available under the Pakistan Army Act 1952, howsoever circumscribed they may prove to be, the parents of Mr. Jadhav applied for Pakistani visas on 25 April 2017. This application was made through the offices of the Ministry of External Affairs of the Union of India. No response on these applications has been received by them to date.

22. The family of Mr. Kulbhushan Sudhir Jadhav has 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. The appeal and the petition were handed over by the Indian High Commissioner in Islamabad to Pakistan's Foreign Secretary in Islamabad on 26 April 2017. During this meeting, the representatives of India once again sought consular access to Mr. Jadhav (see Annex 1). This appeal has been filed based on information available in public domain, as no particulars of the charges, the evidence or the verdict have been provided by Pakistan. Without consular access and the access to all this information, there can be no effective appeal and even the right to appeal would be as farcical as the trial.

23. The External Affairs Minister of India wrote a letter to the Adviser to the Pakistan Prime Minister on Foreign Affairs on 27 April 2017 (Annex 8) in which she reiterated the requests for certified copies of the charge sheet against Mr. Kulbhushan Sudhir Jadhav, proceedings of the Court of Inquiry, the sum-

mary of evidence in the case, the judgment, appointment of a defence lawyer and his contact details and a certified copy of the medical report of Mr. Jadhav. She also reiterated the request for the visa for the parents of Mr. Jadhav. She sought the personal intervention of the Adviser in the matter. No response has been received to this missive.

24. India, therefore, submits that a case is made out of violation of treaty rights and India therefore seeks to apply to this Court for appropriate relief including by way of restitution.

III. JURISDICTION OF THE COURT

25. Article 36 (1) of the Statute of the Court confers upon this Court the jurisdiction to decide “all matters specially provided for . . . in treaties and conventions in force”.

26. 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 parties to the Vienna Convention on Consular Relations and its Optional Protocol concerning Compulsory Settlement of Disputes. Both States have accepted the Convention and the Optional Protocol without any reservation.

27. 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.”

28. India brings this case against Pakistan before the Court for violation of the Vienna Convention on Consular Relations based on the jurisdiction of the Court under Article 36, paragraph 1, of the Statute of the Court and Article I of the Optional Protocol on Compulsory Settlement of Disputes.

29. Both India and Pakistan have also accepted the compulsory jurisdiction of the Court under paragraph 2 of Article 36 of the Statute subject to declarations in which “they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court . . .” in legal disputes relating to, amongst other things, interpretation of treaties or questions of international law.

30. However, India is invoking the jurisdiction of the Court under paragraph 1 of Article 36 where treaties or conventions especially provide for the jurisdiction of the Court. In such cases, the declarations made by the parties under paragraph 2 of Article 36 — or any reservations in such declarations are not applicable.

31. This issue is no longer *res integra*. In the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, this Court came to the conclusion that the Pact of Bogota created jurisdiction independent of the declarations of compulsory jurisdiction as may have been made under Article 36, paragraph 2 (*I.C.J. Reports 1988*, p. 88, para. 41).

32. In the *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, apart from questioning the competence of the Court under Article 84 of the Chicago Convention and Article II, Section 2, of the Transit Agreement (called

“the jurisdictional clauses of the Treaties”), Pakistan also relied on India’s reservation to her acceptance of the Court’s compulsory jurisdiction under paragraph 2 of Article 36. The Court held 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.” (*I.C.J. Reports 1972*, p. 60, para. 25.)

33. In the *LaGrand* case (*Germany v. United States of America*) (*Judgment, I.C.J. Reports 2001*, p. 466), this Court accepted — as it was not a matter put in issue — 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 and on Article I of the Optional Protocol. Similarly, in the *Avena* case (*Mexico v. United States of America*) (*Judgment, I.C.J. Reports 2004 (I)*, p. 12), this Court noted in its judgment that Mexico based 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. The jurisdiction of this Court to entertain applications for relief in cases of breach of the Vienna Convention thus is not in doubt.

IV. THE VIENNA CONVENTION

34. Article 36 of the Vienna Convention was negotiated and adopted by the States, to set up amongst other things standards of conduct through an International Convention on Consular Relations, particularly concerning communication and contact with nationals of the Sending State which would contribute to the development of friendly relations amongst nations. Article 36 of the Convention specifically confers rights upon the States under subarticles (a) and (c) of Article 36, paragraph 1, and confers rights upon nationals of States, arrested, detained or put on trial in another State.

35. The provisions of Article 36 of the Vienna Convention were first interpreted by this Court in the *LaGrand* case. This Court held,

“Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection. It begins with the basic principles 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.” (*Judgment, I.C.J. Reports 2001*, p. 492, para. 74.)

36. In the *Avena* case, this Court was again called upon to interpret Article 36. It held that

“Article 36, paragraph 1 (b), contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of

his rights under Article 36, paragraph 1 (*b*); the right of the consular post to be notified without delay of the individual's detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person." (*Judgment, I.C.J. Reports 2004 (I)*, p. 43, para. 61.)

37. The facts narrated in the previous section establish that Pakistan had failed to inform the accused of his rights. The conduct of Pakistan, including at one time a suggestion that the Indian national was not entitled to any rights, also establishes that the accused was denied his consular access rights under Article 36, paragraph 1 (*b*), of the Convention.

38. India was informed of the detention of the Indian national much after his detention. India sought consular access incessantly. Considerably late in the day — after the trial had been concluded — Pakistan put a condition that India first accedes to its request for investigation in India. Such a condition is in violation of the Vienna Convention. Even this conditional offer came at a time when the trial had already been concluded.

39. It is obvious from the facts, which are in the present case indisputable, that Pakistan has denied India consular rights under Article 36, paragraph 1 (*a*) and (*c*), of the Vienna Convention.

40. The rights conferred by Article 36 of the Vienna Convention are sacrosanct. These rights are also enforceable as held by this Court in the *Avena* case in paragraph 40, that "violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violation of the rights of the latter may entail a violation of the rights of the individual". On this basis, this Court held that the sending State (in that case Mexico) could submit a claim in its own name and request the Court to rule on the violation of rights which it claimed to have suffered both directly and through the violation of the individual rights conferred on Mexican nationals.

41. Where there is a violation of a right under the Convention, this Court would have the power and the jurisdiction to provide suitable relief including a relief by way of restitution.

42. As explained in greater detail in the section under relief, in the present case, this Court would have the jurisdiction to, and the facts of the case demand that this Court does, set aside the conviction of the Indian national. Alternatively, this Court may, as a measure of restitution, direct Pakistan to take such steps as may be necessary to set aside the conviction of the accused Indian national. This Court may also direct a fresh investigation, after consular access is provided, and in the circumstances of this case also direct Pakistan to conduct the trial under their ordinary judicial system.

43. Pakistan has, in a press briefing on 20 April 2017 (Annex 9), referred to a bilateral agreement on consular access between India and Pakistan, concluded in 2008 (Annex 10) and suggested that the matter of consular access between the two countries is exhaustively dealt with in this bilateral agreement.

44. This argument lacks merit both because of the express provisions of the Vienna Convention, as well as the plain language of the Agreement on Consular Access signed between the two countries on 21 May 2008.

45. In the Agreement, which was entered into for "furthering the objective of humane treatment of nationals of either country arrested detained or imprisoned

in the other country”, the two signatory States, India and Pakistan, agreed to certain measures. They included release and repatriation of persons within one month of confirmation of their national status and completion of sentences. The Agreement recognized that in case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its own merits, and that in special cases which call for or require compassionate and humanitarian considerations, each side may exercise its discretion subject to its laws and regulations to allow early release and repatriation of persons. India is not seeking reinforcement of this Agreement nor is it basing its claim on any rights or obligations under it.

46. India’s claim is based solely upon the Vienna Convention. Article 73 of the Vienna Convention recognizes that there may be other international agreements in force as between the parties, and that nothing in the Convention “shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof”.

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

48. The Vienna Convention creates specific rights in favour of States and in favour of the nationals of Sending States in relation to consular access — and creates corresponding obligations upon Receiving States that arrest, detain or try and sentence nationals of other Member States. Bilateral treaties which create obligations can only supplement the provisions of the Vienna Convention and cannot modify these rights and corresponding obligations which form the object and purpose of Article 36 of the Vienna Convention.

V. THE CLAIMS OF INDIA

49. The Government of India claims that under Article 36 of the Vienna Convention, Pakistan was under an international legal obligation to India, a party to the Convention, to comply with the rights of consular access under subparagraphs (a) and (c) of paragraph 1 of Article 36. Pakistan was also under an obligation under international law and the Vienna Convention to inform the Indian national of his rights under paragraph (b) of Article 36 (1).

50. Despite persistent and repeated requests by India, Pakistan has brazenly refused consular access until March 2017 — by which time the trial was concluded. This trial has been concluded in violation of the rights under the Vienna Convention and stands vitiated. That is more so for the reason that the trial has been conducted not in accordance with the general law applicable to criminal trials in the regular courts, but has been conducted by way of a military Court Martial.

These trials under the law applicable to them are summary in nature. And indisputably, a confession by the accused while in Pakistani custody has been taken into account in the course of the trial — which confession was recorded after India had sought consular access.

51. Pursuant to Article 36, subparagraph 1 (*b*), of the Vienna Convention, Pakistan is under the international legal obligation to the Indian national to allow him consular access and also the right to receive assistance from India in the ongoing proceedings.

52. Pakistan continues to deny consular access to the Indian national. It is not even known whether an appeal has been filed by Mr. Jadhav, and if filed has already been heard. Pakistan steadfastly refuses to share any information about the accused.

53. The trial had been conducted under the Pakistan Army Act, 1952. The accused, it appears from the statement of 14 April 2017, was tried by a Field General Court Martial. While the rules of evidence are the same as those prevalent in criminal courts, the personnel who manned the Court Martial are three military officers. The decision of the Court Martial, under Section 105, is by an absolute majority of votes, and in the event a death sentence is to be awarded it has to be unanimous.

54. Section 84 of the Pakistan Army Act, 1952, confers the power to convene a Field General Court Martial upon an officer empowered in this behalf by an order of the Federal Government or of the Chief of Army Staff. The confirmation of a death sentence awarded in a Field General Court Martial is by the convening officer or by an authority superior to him. The only information available in the present case as to the state of play, is what was in the press statement by the Adviser to the Prime Minister of Pakistan which said that the accused was tried by a Field General Court Martial under Section 59 of the Pakistan Army Act, 1952. Section 59 extends the Army Act in its application to persons who in or beyond Pakistan commit any “civil offence”. It did not state the designation of the convening officer or the officer who “endorsed” the sentence on 10 April 2017.

55. A petition to the Federal Government is provided under Section 131. Under Section 133 B, the Court of Appeal is to consist, in cases of award of death sentence after 1992, of the Chief of Army Staff or one or more of the officers designated by him in this behalf and presided by an officer not below the rank of Brigadier in the case of a Field General Court Martial as in this case. The decision of the Court of Appeal is final and cannot be called in question before any court or other authority.

56. The mother of Mr. Kulbhushan Sudhir Jadhav 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. The appeal and the petition here handed over to the Pakistan Government by the Indian High Commissioner in Islamabad on 26 April 2017.

57. In the present case, India submits that even if, an appeal is available under the Statute, it is an illusory remedy. Some of the circumstances that establish that this remedy is worthless in the present case are as follows:

(a) The death sentence stands confirmed by the Chief of Army Staff. An appeal before a tribunal presided over by him or officers’ junior to him would be an appeal from Caesar to Caesar. A news report of 18 April 2017 in the *Dawn* states that an appeal process is under way and the appellate tribunal would be

constituted headed by a two-star general. The spokesperson is quoted as having said that he did not see any chance of the verdict being overturned.

- (b) The Adviser to the Prime Minister on Foreign Affairs issued a statement on 14 April 2017 (see Annex 6) in which he asserted that

“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.”

The official spokesperson for the Government in a press briefing on 17 April 2017 mentioned that the process will move ahead as per law and will go to the appellate court — it did not clarify whether an appeal had already been filed. He added “Kulbhushan was sentenced on undeniable evidence, if questioned on any form, the Pakistan Army will defend their case with all the resources in light of the undeniable evidence.” (See Annex 7.)

- (c) In a case that has created so much controversy, there is more than a reasonable apprehension that the Court of Appeal presided over by a two-star general of the Army [who is subordinate to the Chief of Army Staff who has confirmed the death sentence] — will not act independently, fairly and impartially to the standards of due process recognized in international law. There can be no faith or confidence in such a remedy, particularly in the facts and circumstances of the present case.
- (d) Further, when the Government of Pakistan has publicly taken such a position, it defies credulity to believe that a Court of Appeal constituted under the Pakistan Army Act, 1952 will be so independent and free from pressures so as to constitute a real and effective remedy.
- (e) Even in the course of the appeal, Pakistan has clearly refused consular access.
- (f) A news report [*Dawn*, 15 April 2017] (Annex 11) in Pakistan newspapers suggests that the Lahore High Court Bar Association passed a resolution on 14 April 2017 warning lawyers against accepting the brief of convicted “Indian spy Kulbhushan Jadhav”. The news report suggested that the Bar Association had decided to cancel the membership of the lawyer(s) found pursuing an appeal on behalf of this convict in a military court. Thus in all likelihood, even in appeal Mr. Jadhav will not be able to avail of the assistance of a lawyer. Pakistan has not responded to India’s request to facilitate the appointment of a defence lawyer.

VI. RELIEF

58. India submits that the breach of the Vienna Convention is admitted in the Note Verbale by Pakistan on 21 March 2017, which for the first time stated that Pakistan would consider consular access depending on India’s response to the request for assistance in the investigation. It reiterated this position in its Note Verbale of 10 April 2017. The press briefing by the official spokesperson of the

Government, on 17 April 2017, again asserted the Pakistan position that the Indian national was not entitled to consular access.

59. India submits that this Court has the power to take all such steps and issue all such directions as may be necessary, for as held in the *Avena* case, “it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form (*Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21*)” (*I.C.J. Reports 2004 (I)*, p. 59, para. 119).

This Court also held that where obligations accepted by the parties to the Vienna Convention include commitments as to the conduct of their municipal courts in relation to nationals of other parties, this Court had jurisdiction to examine the conduct of the municipal courts and the actions of such courts in the light of international law to ascertain whether there had been any breaches of the Convention (*ibid.*, p. 30, para. 28). India, therefore, submits that this Court has the power and the jurisdiction to mould the relief, to the facts of the present case, to ensure that this death sentence which has been awarded by a military court, in brazen defiance of the consular rights under Article 36 of the Vienna Convention and due process set at nought. This could be achieved by directing Pakistan — to take steps to annul the decision, and to direct Pakistan not to act on this sentence and conviction, and to direct the release of the convicted Indian national forthwith.

60. 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 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.

61. The Republic of India reserves its right to amend or supplement this Application anytime in future and requests the Court to indicate provisional measures of protection as set forth in the separate request filed along with this Application.

8 May 2017.

(Signed) Dr. Deepak MITTAL,
Joint Secretary,
Ministry of External Affairs,
Government of India.

LIST OF ANNEXES*

- Annex 1.* Notes Verbale issued by India on 25 March 2016, 30 March 2016, 6 May 2016, 10 June 2016, 11 July 2016, 26 July 2016, 22 August 2016, 3 November 2016, 19 December 2016, 3 February 2017, 3 March 2017, 31 March 2017, 10 April 2017, 14 April 2017, 19 April 2017 and 26 April 2017.
- Annex 2.* Note Verbale issued by Pakistan on 23 January 2017 (without attachment).
- Annex 3.* Note Verbale issued by Pakistan on 21 March 2017.
- Annex 4.* Press release issued by Inter Services Public Relations on 10 April 2017.
- Annex 5.* Note Verbale issued by Pakistan on 10 April 2017.
- Annex 6.* Press statement made by the Adviser to the Prime Minister of Pakistan on 14 April 2017.
- Annex 7.* Briefing by authorized spokesperson of the Government of Pakistan on 17 April 2017.
- Annex 8.* Letter from EAM to Adviser to the Pakistan Prime Minister on Foreign Affairs on 27 April 2017.
- Annex 9.* Press briefing of Government of Pakistan on 20 April 2017.
- Annex 10.* India Pakistan Agreement on Consular Access of 21 May 2008.
- Annex 11.* Copy of news report in *Dawn* of 15 April 2017.

* Annexes not reproduced in print version, but available in electronic version on the Court's website (<http://www.icj-cij.org>, under "cases").