

INTERNATIONAL COURT OF JUSTICE

JADHAV CASE
(India v. Pakistan)

REPLY
OF
THE REPUBLIC OF INDIA



सत्यमेव जयते

17 APRIL 2018

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I. EXECUTIVE SUMMARY

- 1) The Counter Memorial filed by the Islamic Republic of Pakistan (**Pakistan**) is an exercise in obfuscation and propaganda (making allegations without substance) instead of engaging with and addressing the core issues i.e. its failure to fulfil its obligations under the Vienna Convention on Consular Relations, 1963 (**Vienna Convention**).
- 2) Pakistan dwells at considerable length about the passport which it alleges was recovered from Mr. Kulbhushan Sudhir Jadhav (**Jadhav**). Pakistan alleges that the Republic of India (**India**) provided Jadhav with that passport and thereby gave him a false Muslim identity to facilitate his movement in and out of Pakistan. These allegations lack credibility. They are also unrelated to the issues in the present proceedings. To give a legal cover to its exercise of making such allegations, Pakistan has come with arguments of abuse of process, of *Ex Turpi Causa* and unclean hands etc.
- 3) Pakistan has treated Jadhav as a pawn in its endeavour to wage a propaganda war against India, as a riposte to the rising criticism it faces over its unabashed support for violent terrorism including by way of State sponsored terrorism unleashed by it on an increasing scale against India.
- 4) Unsurprisingly, its entire response to India's Memorial proceeds on the premise that the allegations made merit acceptance at face value.
- 5) In its Counter Memorial, which is riddled with inconsistencies, it rightly points out that this Court is not a criminal appellate court, and yet it invites by its conduct a retrial of the accused, which would be inevitable if this Court were to examine the truthfulness of its litany of allegations against India and Jadhav. It fails to engage with the point that the mechanism of consular access has come to be recognised as a vital element in insuring the fairness of a process by which a foreign national is detained and tried by a receiving State. Allegations made by the police of the receiving State, or findings of Military Courts arrived at in trials held in camera, and in which the accused is not even given the benefit of consular access, lack credibility. Unable to answer this fundamental point, Pakistan invites this Court to examine extraneous matters by either accepting that everything it alleges is true, or by converting itself into a criminal court of first instance

that will go into the provenance of the confession and the veracity of the allegations surrounding the admittedly forged passport allegedly recovered from Jadhav.

- 6) Pakistan contends that India has failed to explain the matter relating to its allegations that it seized a passport from Jadhav, which facially was, as per its allegations, a forgery because it had a false Muslim identity. India does not accept that in the first instance such a passport was recovered from Jadhav. Pakistan, however, invites this Court to accept its assertions as being true and to then infer that “...*Indian authorities who must also have clothed him with a false Muslim identity (in pursuit of his illegal activities).*”¹.
- 7) Pakistan seeks to avoid the key issue (and an embarrassing issue) that the allegations of “*illegal activities*” were not established in a trial that would meet the rigour of minimum due process. By suggesting that India is acting in bad faith by seeking to espouse the cause of a “spy” and a “terrorist”, Pakistan places the proverbial cart before the horse. Not having established in a fair trial by an independent judicial tribunal and by a process that conforms to the minimum due process standards, that Jadhav was engaging in any illegal activities, Pakistan seeks to fill this gap between allegations and proven facts by resorting to hyperbole.
- 8) Pakistan makes a point repeatedly about India’s alleged refusal to assist it in completing the investigation. It finds fault with India not having produced the entire document by which Pakistan had requested for assistance in the investigation. It fails to engage with the point that in the first instance, it is Pakistan which has failed to agree to a Mutual Legal Assistance Treaty (**MLAT**) with India. The reason why Pakistan has avoided signing an MLAT is not far to seek. Pakistan can ill afford to have an MLAT with India, considering its ceaseless campaign of terror, and its obdurate refusal to assist in investigation into terror-related offences². Pakistan openly provides safe haven to those engaged in serious terror activities, including some whose names are on global terrorist lists. It can hardly risk entering into a MLAT with India.

¹ Counter Memorial, para 7(III).

² At least 18 requests for investigation into terror related incidents including some horrendous incidents that have shocked the global community are pending with Pakistan.

- 9) It conveniently chooses to reach out to the UN Charter and Security Council Resolutions to found its right to seek cooperation in the matter of investigation, perhaps hoping that its own credentials in the matter of sponsoring and financing terror would be put to one side when considering its new-found respect displayed for these Resolutions in its pleadings.
- 10) Besides, its letters of request for legal assistance facially are propaganda documents rather than any serious request for investigating a crime. Beyond disclosing the First Information Report (**FIR**), even at this stage Pakistan fails to disclose the evidence that has been produced before its Military Court (other than the contrived confession) and on the basis of which the court has found it appropriate to convict Jadhav and award him the capital punishment. The request for cooperation in investigation is farcical and merely an exercise in posturing.
- 11) The Counter Memorial admits that even before the charges were framed (much less conviction by even its Military Court), on 25 March 2017 Pakistan “briefed” the P5 nations. India says that it now stands established that this matter is an exercise in propaganda, a measure to deal with the increasing pressure on it by the world community in the matter of cross border terrorism.
- 12) Having failed to find an answer to India’s allegations that Pakistan has violated the Vienna Convention, it contrives legal principles to base its submissions. The first submission is that India’s request is an abuse of process, an abuse of rights, an illegality, and hit by the doctrine of unclean hands. Its citations are of dissenting opinions, or of submissions made to this Court, which find no reflection in the judgement of the Court. It conflates abuse of substantive rights, wrongful use of sovereignty and its incidents, of actions which are contrary to public international law etc. It uses this as a springboard to suggest that insisting upon a vital procedural safeguard guaranteed under the Vienna Convention could be an abuse of some sort.
- 13) It overlooks that it is elementary to the doctrine of due process, that the more serious the charge, the greater the need for compliance with procedural safeguards. The Vienna Convention provides for a vital procedural safeguard – a mechanism by which the accused can obtain the assistance of his home state in defending himself against allegations made against him, in a trial being conducted in a foreign country. If the allegations against Jadhav are so serious, i.e. that he was an Indian “spy” or worse that

he was a “terrorist”, it was all the more necessary that the trial should have been open and fair; allowing Jadhav the full access to the assistance of his home state which could have helped him in defending himself against these serious allegations. Pakistan seeks to turn this on its head by suggesting that since the allegations were that he was a spy and a terrorist, he forfeited his right to a fair trial as it were, and India’s insistence upon consular access to help an accused in such a serious matter in arranging his defence would be an abuse of some sort. This approach is outrageous.

- 14) Pakistan also invites this Court to carve out an exception from the rights under Article 36 of the Vienna Convention, suggesting that such rights are not to be made available in the context of an individual against whom there is a *prima facie* case of espionage, a person who possesses (allegedly) an “...*authentic passport with a false...identity.*”³ for which the sending State refuses to provide an explanation. In support of this exception, Pakistan is unable to cite any principle or authority, and so it turns the argument on its head by contending that customary international law and practice do not provide any support for the contention that Article 36 applies where such allegations are levelled against an accused.
- 15) The plain language of Article 36 admits of no exceptions. The drafting history, parts of which are relied upon by Pakistan establish that the problems of espionage were present to the minds of those who negotiated the Vienna Convention and no exception was carved out from Article 36 in relation to cases where the receiving State alleged espionage. Pakistan recognises that it would have to provide strong evidence of customary international law and practice to support a position that despite the unconditional language of Article 36, some exception needs to be made for cases of alleged espionage and terrorism. Not only would it be impermissible to disregard the plain language of a treaty but a submission of the existence of such an exception is also plainly counterintuitive. If Pakistan is right, then any such exception would be sufficient to devour the rule, for all that a receiving State would have to do was to make allegations of espionage, upon which the consular access rule would become inapplicable. The history of disputes that have arisen in this context is replete with cases of alleged espionage. Any such interpretation that is not only against the plain language, but incompatible with the object and purpose of Article 36 is unacceptable.

³ Counter Memorial, para 7(II) - A contradiction in terms.

- 16) Pakistan's argument admittedly finds no support in the language of Article 36, not in the State practice or drafting history, and so it takes a convoluted position that India has to establish the negative, viz that customary international law and state practice show that there are no exceptions to the Vienna Convention. This approach is also hopeless.
- 17) Pakistan then attempts to find exceptions to the Vienna Convention in the Bilateral Agreement between India and Pakistan dated 21 May 2008. It invites the Court to misread this Bilateral Agreement.
- 18) Besides, the Vienna Convention recognises that States may have bilateral arrangements that amplify or supplement the principles engrafted in the Convention. Article 73(2) of the Convention does not recognise dilutions of the provisions of the multilateral convention by bilateral treaties. Neither India nor Pakistan have ever suggested that their Bilateral Agreement jettisons the Vienna Convention. The argument that the Bilateral Agreement of 2008 somehow allows Pakistan to deny consular access guaranteed in Article 36 of the Vienna Convention is an act of desperation, faced with the fact that Pakistan finds itself in brazen violation of the Vienna Convention.
- 19) Finally, Pakistan seeks to salvage the poor reputation of its Military Courts, in the matter of following due process, in the international community by relying upon a report.⁴ The report, however, recognises that its system has manifest failings. Pakistan fails to deny any of the allegations of the manner in which the military justice system functions, and for which it has faced criticisms in reports of international agencies of credibility and repute.
- 20) Without denying any of the allegations made, Pakistan uses the expression "*kangaroo courts*"⁵ – if in its perception its courts have been functioning in a manner which the international community has found unacceptable and for that reason should be characterised as "*kangaroo courts*", that is entirely a matter for Pakistan to introspect upon and to deal with. India has not used any such expression despite provocation, for using such language does not advance the case of a party.

⁴ Counter Memorial, Annex 142.

⁵ Counter Memorial, para 18.

- 21) The suggestion that Military Courts of India and Pakistan are in any manner similar is misleading. Indian Military Courts have absolutely no jurisdiction over civilians. Terrorists of Pakistani origin who have been caught red-handed have been tried in the ordinary criminal courts and their appeals have been heard under the Code of Criminal Procedure in the normal course. In the case of *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra*⁶ (Kasab), the procedure followed shows the rigorous standards of due process in the Indian legal system. Kasab was represented by an independent lawyer in the Trial Court, the High Court and the Supreme Court. In the Supreme Court a former Additional Solicitor General was appointed to appear for Kasab so that he would get legal assistance “...of a standard and quality that is not available to a majority of Indian nationals approaching this Court against their conviction and sentence.”⁷ In sharp contrast, the Lahore High Court Bar Association passed a resolution threatening any lawyer who would dare to appear for Jadhav.⁸ Finally it merits mention that India offered consular access to Pakistan in Kasab’s case (and in all other cases where Pakistanis are detained and then put on trial) however serious the allegations be against these persons. It is Pakistan that almost invariably refuses to accord assistance to its nationals.
- 22) Undoubtedly, the origins of the Military Courts, insofar as armed forces are concerned, are rooted in the Army Act of 1911. India and Pakistan have a shared history of legislation that precedes 1947, but the manner in which the constitutional due process jurisprudence has evolved is at a great distance from the state of the law in Pakistan. In Pakistan, Military Courts have been authorised to try civilians to the exclusion of the regular criminal courts. No such thing has even been mooted in India.
- 23) The judgement of the Supreme Court of Pakistan in *Said Zaman Khan v Federation of Pakistan through Secretary, Ministry of Defence, Government of Pakistan*⁹ establishes that the review of the process and product of the military law is in sharp contrast to the processes in India. This difference becomes apparent from reading the judgment of the Supreme Court of India in Kasab’s case. On account of the law being amended to allow

⁶ Reply, Annex 1 (*Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra*, Criminal Appeals Nos. 1899-1900 of 2011).

⁷ Ibid., para 5.

⁸ Memorial, Annex 11.

⁹ Counter Memorial, Annex 81.

trials by the Military Courts, and an amendment made to the Constitution of Pakistan by the 21st Amendment Act, 2015 to Article 175, the jurisdiction of the ordinary criminal courts has been excluded in matters that fall in the domain of the Military Courts. The only remedy to a person convicted by the Military Courts, is by proceedings of judicial review, which by their very nature are narrow in their scope. In stark contrast, the criminal trials in India are by regular courts having judges independent of the executive.

- 24) In the case of trials under the terrorism laws¹⁰, the trials were conducted by a Designated Court (presided over by a Sessions Judge or an Additional Sessions Judge), and an appeal on facts and law lay directly to the Supreme Court. After the repeal of the special law, the trial of a person accused of terrorism related crimes is conducted before the Court of Session¹¹ and an appeal lies to the High Court. In the case of death penalty, the sentence has to be confirmed by the High Court. A full appeal on facts and law is thus available to a convict. In death penalty cases the Supreme Court hears the appeals on the merits of the conviction (if challenged). Even review petitions against judgments in death penalty cases are heard in open court¹².
- 25) The following passage in the judgement of the Supreme Court brings out the stark difference between the two systems: *“We may also state here that since it is a case of death sentence, we intend to examine the materials on record first hand, in accordance with the time-honoured practice of this Court, and come to our own conclusions on all issues of facts and law, unbound by the findings of the trial court and the High Court.”*¹³ It is unfortunate that Pakistan has sought to suggest that there is any degree of similarity between the judicial systems in India and the Military Court system in Pakistan.
- 26) India reiterates its position that any relief by way of review and reconsideration, in the face of the allegations being made by Pakistan even in this Court, and the kind of system that prevails in Pakistan, would not be sufficient in the facts of the case, for any such review and reconsideration would be by a system marked by the absence of due process.

¹⁰ Terrorist and Disruptive Activities (Prevention) Act, 1987 (*repealed in 2004*).

¹¹ *i.e* a District and Sessions Judge.

¹² Reply, Annex 2 [*Mohd. Arif v Registrar, Supreme Court of India & Others*, Writ Petition (Criminal) No. 77] Review petitions in other cases are decided by the Supreme Court by circulation (on papers) unless the Court decides to hear it in open Court.

¹³ *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra*, para 6.

Besides, the Jadhav case is now admittedly a part of the propaganda by Pakistan. It would defy credulity to believe that a review and reconsideration would in any manner be fair and impartial, and compliant with the object and purpose of Article 36. The relief in the present case should be as sought by India, including by directing Pakistan to set Jadhav at liberty.

II. FACTUAL BACKGROUND

- 27) From Paragraph 22 onwards of the Counter Memorial, under the heading “*Factual Background*”, Pakistan has chosen to make allegations in relation to Jadhav, which are almost entirely based upon his alleged “confession”. India has challenged the provenance and credibility of this confession. The international agencies have been critical of the manner in which almost as a practice, confessions are obtained by the military of those detained by it and are treated as sufficient evidence of the wrongdoings to then base a conviction by the Military Court. This practice is completely incompatible with due process. Annex 17 of the Counter Memorial purports to be a confession made by Jadhav. India seriously challenges that any such confession was voluntarily made, and whether the text of the confession even faithfully reproduces what was extracted.
- 28) All these matters are, however, entirely irrelevant and beyond the scope of the present proceedings. The point at issue in the present case is whether Pakistan is in serious breach of its obligations under Article 36, and if so, whether the relief of *restitution in integrum* must necessarily be a restraint against Pakistan acting upon the conviction, and consequential release of Jadhav. Pakistan’s obdurate refusal to allow consular access, including the manner in which they behaved in the farcical exercise of the family visit, supports India’s position that Pakistan apprehends that if Jadhav is allowed consular access, and is given confidence that he will be given justice with appropriate legal assistance being arranged for him by (or with the assistance of) his sending State, and he is tried by an independent court in an open trial, the carefully crafted propaganda story may come apart.
- 29) India still maintains that there are serious allegations (more recently supported by an interview given by a Baloch Human Rights Activist¹⁴) which suggest that Jadhav was kidnapped from Iran where he was carrying on business after retiring from the Indian Navy. Pakistan’s version lacks credibility.

¹⁴ Reply, Annex 3.

- 30) The alleged “arrest” of Jadhav was first communicated to India on 25 March 2016 when the Indian High Commissioner was summoned by the Foreign Secretary.
- 31) Without any further verification, Pakistan claims to have notified the P5 States of this arrest and created a 12 page document making allegations against India.¹⁵ Some significant facts emerge from this document:
- a) It states that the security forces apprehended Jadhav. It is a fair assumption that he continued since his “arrest” in the custody of the Pakistan security forces.
 - b) This document does not indicate the date of arrest – it mentions “*first week of March 2016*”.
 - c) It states that “*The Agent has confessed...*”. It is obvious that soon after his arrest and in custody of the security forces, a confession was extracted. Much before this confession was placed before a court (the FIR was registered as late as 8 April 2016) it was used as propaganda, being paraphrased in a document being circulated to the P5 countries. This establishes that the entire exercise was an exercise in propaganda by Pakistan, who has of late been facing the heat from the international community for its unabashed support of terrorism.
 - d) It notes that he has been “*operating.... as a businessman in Chabahar..*”.
 - e) It alleges Jadhav crossed over from Iran to Balochistan. It does not deal with the serious allegation that he was kidnapped in Iran and taken over to Pakistan where the security forces extracted a confession from him. The way in which this confession was promptly used by the Pakistani system of propaganda to make allegations against India supports this allegation of kidnapping.
 - f) The document goes on to allege that he is a Commander in the Indian Navy. Obviously, the suggestion is that he was an Indian citizen – a prerequisite for being employed in the Armed Forces. Pakistan takes contradictory positions in the

¹⁵ Counter Memorial, Annex 12.

Counter Memorial – it asserts these allegations are true, but also argues in a separate section that India has failed to establish that Jadhav is an Indian national.

- g) It concludes by making serious allegations against India of “*state-sponsored terrorism*” and of repeating its efforts of 1971 in Balochistan. No further evidence is required to establish that Pakistan treats human lives with contempt, and has no compunctions in using a kidnapped Indian in its geopolitical propaganda warfare against India.
- 32) India, however, reiterates that none of this is of any relevance to the present case, beyond showing that any further review and reconsideration in Pakistan would not fulfil the standards of due process. Having no satisfactory response to India’s allegation that Pakistan is brazenly violating the Vienna Convention, Pakistan has used - rather abused - the opportunity to file a Counter Memorial in this Court to continue its propaganda against India rather than engage on the legal issues that arise in the case.
- 33) In its factual narrative, Pakistan acknowledges that as early as 30 March 2016¹⁶, the Indian High Commission in Islamabad sent a *note verbale* to Pakistan’s Ministry of Foreign Affairs requesting consular access. Pakistan obviously had no difficulty at that time in recognising that the request related to Jadhav, and for that reason it did not seek any clarification as to the identity of the Indian in respect of whom India was seeking consular access.
- 34) Pakistan has made available a copy of the FIR¹⁷ relating to Jadhav. It offers no explanation as to why an arrest made sometime in the first week of March led to the filing of an FIR as late as 8 April 2016. It notes in its Counter Memorial that “*once a FIR is registered, the police authorities may utilise their powers of investigation in order to investigate the offence complained of*”.¹⁸ It offers no explanation as to under what authority of law was he interrogated, detained and finally made to confess, all before the law triggers the powers of investigation into crime. Quite clearly the entire exercise was done by the “security forces”.

¹⁶ Memorial, Annex 1.2.

¹⁷ Counter Memorial, Annex 17.

¹⁸ Counter Memorial, para 31.

- 35) Section 154 of Pakistan’s Code of Criminal Procedure, 1898¹⁹ requires the information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, to be reduced to writing by him or under his direction. From the facts set out in the Counter Memorial, it is a fair assumption that the first time the Pakistan police was informed of the arrest of someone on the allegations of commission of an offence was 8 April 2016. However, there was much greater promptitude displayed by Pakistan in informing the world community about their having arrested an Indian spy, and then proceeding to make a slew of allegations against India.
- 36) The FIR²⁰ notes that “*It was revealed by him that he is a serving officer of the Indian Navy...*” et cetera. Obviously the reference is to the “confession” extracted by the military authorities of Pakistan. This is also clear from the assertion that “*During the interrogation/de-briefing before the Military Authorities of Pakistan, he declared that...*”. Finally, in paragraph 2 of the FIR, it is stated that the case may be registered against him “*for the offences not falling under the Pakistan Army Act 1952...*”. It is obvious that right from the moment he was apprehended (or kidnapped), Jadhav has been in the custody of the Pakistan Army and it is the Pakistan Army that extracted confessions from him which were promptly used by Pakistan to make false allegations against India.
- 37) The exercise of disinformation and propaganda continued, for it appears that on 15 April 2016²¹, Pakistan notified envoys of members of the Arab League and of the Association of South East Asian Nations (ASEAN), who were also “*briefed*” – a euphemism for Pakistan’s propaganda against India.
- 38) Going further, in its narrative Pakistan makes the point that in its *note verbale* of 10 June 2016²², it was for the first time that India actually identified the individual in question as Jadhav. It then uses that argument as a springboard to suggest that India has never explained or rebutted the serious implications of “*...the conduct of Commander Jadhav*”.²³ Pakistan had no difficulty in understanding India’s request made on 30

¹⁹ Counter Memorial, Annex 82.

²⁰ Counter Memorial, Annex 17.

²¹ Counter Memorial, Annex 16.

²² Counter Memorial, Annex 13.4.

²³ Counter Memorial, para 38.

March 2016 and this submission is plainly an afterthought. Secondly and more significantly, Pakistan converts the present set of proceedings, which relate to allegations of violation by Pakistan of the Vienna Convention, into a propaganda exercise in which it has arrogated to itself the right to assume that its allegations against Jadhav should be treated as true and it is India who should be providing answers to it.

- 39) Pakistan fails to accept that these attempts at trying to deflect attention from its own role in terrorism, and for which it is increasingly being criticised by the global community, should be carried out outside the precincts of the International Court of Justice and outside the proceedings before the Court. India does not consider it necessary to reply in any degree of detail to the litany of false allegations being made by Pakistan.
- 40) Pakistan mentions the fact that Jadhav's confession was recorded on 22 July 2016 before a Magistrate.²⁴ As a footnote in its Counter Memorial, it sets out Section 164, the provision under which this confession was recorded. The provision refers to recording of confessions "*in the course of an investigation under this Chapter or at any time afterwards before the commencement of the enquiry or trial...*".²⁵ The copy of the FIR suggests that the offences which were to be tried by the Military Courts were beyond the remit of the investigation being done by the Pakistan police. It is clear that the criminal courts have no role to play in military trials. Besides, this exercise of recording his confession was carried out at a time when he continued to be in military custody. It is naïve to suggest that being with a Magistrate would give any accused the courage to retract a confession and to accuse the military authorities of forcible extraction of a confession, when immediately after recording his confession, the accused is to be put back in military custody.
- 41) Pakistan's attempt to suggest that this again is similar to the procedures in India is an attempt to mislead. In the procedure followed in India, accused are either on bail or in judicial custody. As and when necessary, the police can seek custody for defined periods of time for purposes of interrogation, which is granted after a rigorous exercise seeking custody before the magistrate. The Indian security forces have no authority to keep any person in custody.

²⁴ Counter Memorial, Annex 23.

²⁵ Counter Memorial, footnote 1.

- 42) Pakistan continues the narrative of the facts mentioning commencement of the trial before the Military Court. No documents have, even at this stage, been placed on record that would give any idea of what evidence was placed, what charges were framed, and what kind of legal assistance was provided to Jadhav²⁶. While India maintains that the entire narrative is irrelevant since it seeks to obfuscate the real issue in the present proceedings, the conduct of Pakistan in keeping away any of the material that was used in the trial other than the contrived confession is significant, for it demonstrates the complete opacity in the proceedings, and is testimony of how the system of trial through Military Courts fails even the elementary tests of due process.
- 43) Pakistan again places on record its “MLA Request”. There is no MLAT between the two countries. The reason why Pakistan refuses to negotiate and sign legal assistance treaties, but continues to make requests for legal assistance on a unilateral basis on its own terms are not far to seek. It has little to gain and far more to lose in signing such treaties. There are over forty requests, including those relating to some shocking acts of terrorism such as the Mumbai attack, which call for investigation in Pakistan, to identify and bring to justice the masterminds of these heinous acts of terrorism. The truth is that Pakistan’s request for legal assistance was a propaganda measure and no more, and is now being used by Pakistan as yet another untenable defence to its brazen violation of the Vienna Convention rights of Jadhav and India.
- 44) The suggestion that by its *note verbale* of 21 March 2017²⁷ the proposal made by Pakistan was such that “*There was certainly no doubt at this juncture that Pakistan was prepared in principle to allow India consular access to Commander Jadhav*”²⁸ is plainly wrong. The Vienna Convention applies to all countries who are party to the Convention. Pakistan by its communication of 21 March 2017 stated that India’s request for consular access “*shall be considered..*”. Consular access under the Vienna Convention is a matter of right and the very fact that Pakistan suggested that it “*would consider*” consular access establishes that Pakistan has scant respect for its international obligations under treaties. Secondly, Pakistan’s position overlooks that the arrest was in March 2016, the trial in the Military Court had commenced on 21 September 2016 and by April 2017 he stood convicted. A suggestion that they would consider a request

²⁶ Beyond saying that a trained officer was made available, nothing is known of this.

²⁷ Memorial, Annex 3.

²⁸ Counter Memorial, para 60.

for consular access in March 2017 was obviously yet another attempt at creating material for propaganda rather than complying with its Vienna Convention obligations.

- 45) Secondly, States cannot unilaterally impose conditions under which they would discharge their obligations under international treaties. The submission by Pakistan must proceed on the premise that Pakistan was entitled to stipulate conditions extraneous to the Vienna Convention and is yet another factor that establishes that Pakistan trivialises its international obligations. The scant regard for human rights is obvious from the fact that even Jadhav who has a personal right (in addition to India's right) to consular access was effectively denied his right by making an offer to consider such requests conditional upon India agreeing to an absurd request for "legal assistance".
- 46) India's *note verbale* of 31 March 2017²⁹ rightly noted that consular access would be a pre-requisite in order to verify the facts and understand the circumstances of Jadhav's presence in Pakistan. India requested immediate consular access. By this communication India has made it clear that it did not accept unilateral conditions being imposed by Pakistan. Besides, even if there were an MLAT, the country whose assistance is sought is entitled to satisfy itself that it is a fit case for grant of assistance of the kind being sought by the requesting State. Pakistan's *note verbale* of 21 March 2017 again put the cart before the horse.
- 47) Death penalty in India for certain offences has been commented upon in paragraph 70 onwards of the Counter Memorial - an issue that is entirely alien to the present proceedings. However, to set the record right, India would like to set out the correct position in this regard:
- a) Pakistan sets out the recommendation of the Law Commission of India for abolition of death penalty. Even the Law Commission, which felt that steps should be taken to abolish the death penalty, noted that it would be for all offences other than terrorism-related offences. Cross-border terrorism sponsored by Pakistan is one of the greatest threats to Indian national security. It is one of the reasons why India has not considered the time to be right to abolish death penalty.

²⁹ Memorial, Annex 1.12.

- b) As noted in the Law Commission report quoted by Pakistan, the Supreme Court of India has restricted imposition of the death penalty to the rarest of rare cases. Besides, over a period of time, as a matter of procedure in appeals involving a capital sentence, the Supreme Court reviews once again the matter on merits including the evidence on which such conviction is based, and the basis for suggesting that the case is one which qualifies for the death sentence applying the test of “rarest of the rare cases”. As quoted earlier, even in the case involving Kasab - the terrorist of Pakistani origin who had been apprehended red-handed, the Supreme Court reviewed the evidence produced before the trial court fully while hearing his appeal and gave a fully reasoned judgement upholding his conviction.
- c) India is not a party to the First Optional Protocol to the International Covenant on Civil and Political Rights (**ICCPR**) for reasons that are completely irrelevant to the present proceedings. India has a robust criminal justice system, and does not recognise trials of those convicted even of the most heinous acts of terrorism by Military Courts. It has other supportive institutions such as Human Rights Commissions which provide effective means of resolution of grievances to those accused of commission of offences. The fact that India has not agreed to the jurisdiction of the Human Rights Committee whilst becoming a party to the ICCPR does not suggest that India has not subscribed to the principles of the ICCPR. On the contrary, the ICCPR has played a vital role even in the evolution of domestic jurisprudence and has been frequently relied upon by the Supreme Court to give an expansive meaning to the provisions of the Constitution which recognise civil rights and liberties. The suggestion that India cannot rely upon decisions of the Committee that administers the ICCPR is simply an argument of desperation.
- d) Consistent with India’s position in the matter of the death penalty, and in the matter of external oversight over the administration of the death penalty, India voted against the resolution of the Human Rights Council dated 29 September 2017. However, this is yet another matter that is completely irrelevant to the present proceedings.

- 48) In paragraph 79 of the Counter Memorial, Pakistan appears to deny the newspaper report which attributes to the Director General, the remark that “*Jadhav is a spy and consular access cannot be given to a spy.*” However, this statement is perfectly consistent with the stand taken by it in the present proceedings.
- 49) Pakistan acknowledges that on 19 April 2017³⁰, the Indian High Commission in Islamabad sent a *note verbale* asking for certified copies of chargesheets, proceedings of Court of Enquiry et cetera. It does not indicate any reason why these were not provided. Instead, it repeats that India “...evaded Pakistan’s MLA request.”³¹ It is a consistent theme of the Counter Memorial that wherever Pakistan lacks a sensible explanation for its conduct, it brings up its farcical request for legal assistance.
- 50) It is correct that some Indian journalists made the comments conveniently relied upon by Pakistan. That is a measure of the freedom of press in India, where no curbs are placed upon expression of individual opinions even if they be contrary to the stated position of the Government of India. This is in sharp contrast to a system where out of fear of the military, the Lahore High Court Bar Association passed a resolution threatening any lawyer who would offer services and legal assistance to Jadhav.
- 51) Pakistan mentions more “narrations” by Jadhav.³² The text and tenure of the narratives, which are highly inculpatory, by a person facing the death penalty, are testimony to the kind of pressure which Jadhav faces while he continues to be in military custody in Pakistan. It is for this reason that India has always expressed grave concern about his health and safety. His meeting with his wife and mother confirmed India’s worst fears about the kind of treatment which is being meted out to him in Pakistani custody.

³⁰ Memorial, Annex 1.15.

³¹ Counter Memorial, para 82.

³² Counter Memorial, para 107.

III. MEETING WITH MOTHER AND WIFE

- 52) The Counter Memorial mentions that a meeting with Jadhav's wife was under consideration. This meeting took place on 25 December 2017. A report prepared by Mr. J.P.Singh, Deputy High Commissioner of India in Islamabad³³ who was deputed by the Ministry to accompany the mother and wife for the meeting with Jadhav, describes eloquently the farce that was perpetrated and Pakistan's conduct in the matter.
- 53) On 10 November 2017³⁴, India received a *note verbale* from Pakistan stating that it had "*...decided to arrange a meeting of Commander Kulbhushan Jadhav with his wife, on humanitarian grounds*".
- 54) On 13 November 2017³⁵, India responded to this *note verbale* requesting that Jadhav's wife be allowed to travel with her mother-in-law (Jadhav's mother). India also sought a sovereign guarantee and assurance, that Pakistan will ensure the free movement, safety and security and well-being of the wife and mother of Jadhav.
- 55) On 8 December 2017³⁶, Pakistan responded favourably and extended its offer to Jadhav's mother "*on humanitarian and compassionate grounds*". It accepted that a diplomatic officer of the Indian High Commission in Islamabad may accompany them whilst they are in Pakistan. It assured India that it would take such measures as are available to safeguard their security, safety and freedom of movement. The visit was scheduled for 25 December 2017.
- 56) On 11 December 2017³⁷, India furnished its detailed response to Pakistan's request for assistance in the so-called investigation it proposed to carry out based on the alleged "disclosures" in Jadhav's extracted confession. India pointed out that the requests were farcical attempts at propaganda - a position which is now established by the fact that Pakistan took steps to notify the P5 countries and later the Arab League/ASEAN countries of Jadhav's confession, and on that basis made frivolous allegations against

³³ Reply, Annex 4.

³⁴ Counter Memorial, Annex 40.

³⁵ Counter Memorial, Annex 41.

³⁶ Reply, Annex 5.

³⁷ Reply, Annex 6.

India even before the FIR was registered. India further pointed out that Pakistan's requests did not furnish any evidence and did not even make over to India the charge sheet that must have been filed against Jadhav. India pointed out that there is no MLAT between India and Pakistan, and that Pakistan was unable to cite any bilateral or multilateral treaty on the basis of which it could assert a right, as it were, to demand an explanation from India. Finally, responding to the strange suggestion of extradition, India pointed out that it has no reason to suspect that Jadhav had committed any crime for which he could be tried in India. In fact, there is no criminal trial presently pending against Mr. Jadhav in India for which an extradition of Jadhav could be sought. Therefore, the question of seeking his extradition did not arise.

- 57) On 13 December 2017³⁸, India communicated through a *note verbale* to Pakistan, that it wanted a sovereign guarantee that Jadhav's wife and mother would not be questioned, interrogated or harassed during their stay in Pakistan, and that a diplomat of the High Commission of India in Islamabad will be allowed to accompany the mother and wife of Jadhav, and also be present in the meeting with him.
- 58) On 20 December 2017³⁹, Pakistan by its *note verbale* with reference to India's requests of 13 December 2017 "... and the verbal request of the Indian Deputy High Commissioner in Islamabad.." went on record "...to reiterate its concurrence to the Indian requests, as already conveyed through Ministry's Note Verbale of even number dated 8th December 2017..".
- 59) On 23 December 2017⁴⁰, Pakistan sent another *note verbale* which expressly recorded that an Indian diplomat of the Indian High Commission could accompany the visitors "including during the meeting, as further requested by India". It assured India that "all necessary courtesies.." would be extended to the visitors from India and their safety and security would be safeguarded. On 24 December 2017⁴¹ India sent a *note verbale* to Pakistan in relation to the visit, communicating the flight details of the wife and mother and the name of the Indian Deputy High Commissioner who would accompany

³⁸ Reply, Annex 7.

³⁹ Reply, Annex 8.

⁴⁰ Reply, Annex 9.

⁴¹ Reply, Annex 10.

them from the time of their arrival to departure. It also flagged its concerns about media interaction.

- 60) By a *note verbale* of the same date⁴², Pakistan communicated that it had noted India's request about media interaction, and that the Indian Deputy High Commissioner would be allowed to accompany the wife and mother of Jadhav from the time of their arrival to departure. They however insisted that the family would travel in a vehicle belonging to Pakistan.
- 61) A report⁴³ was received by the Indian Ministry of External Affairs from Mr. J.P. Singh, Deputy High Commissioner of India in Islamabad which set out the unfortunate manner in which the visit of Jadhav's mother and wife were once again used by Pakistan only for propaganda purposes, and the behaviour of the officials of the Pakistan government was not only seriously objectionable but a brazen infraction of the basic human rights of two human beings, more so the mother and wife of an accused where Pakistan has already branded him as a terrorist in its public pronouncements.
- 62) The conditions imposed for the meeting by Pakistan included a security check with full dignity, no media interaction with the family members, the location of the meeting in a room where Jadhav will sit on one side and the other participants would be on the other side of a glass panel, and the family members would communicate with him through an audio system or through a microphone.
- 63) The Indian High Commission requested for use of their vehicles for the transport of the family members, but this was rejected. The request to allow one lady officer from the Ministry of External Affairs to accompany the family during their visit to Pakistan, in order to provide them a sense of security and comfort, was also declined.
- 64) Contrary to the assurance that this meeting would not be a media circus, two cameramen showed up at the aircraft tarmac itself. The movement from the airport to the High Commission was filmed by the Pakistan media which was present at various points on the route. When the family members reached the foreign office, a large contingent of

⁴² Reply, Annex 11.

⁴³ Reply, Annex 4.

Pakistani media personnel were present to cover the arrival of the family members, and the vehicle was strategically stopped so that the family members had to walk 40-50 steps to reach the building, in the course of which they were heckled by the media persons present. The media persons present shouted at the mother and the wife, calling them the mother and wife of a murderer and a terrorist. The same circus was repeated when the family came out of the foreign office building - they were made to stand in front of the media by strategically delaying the arrival of the vehicle in which they were to be transported. During this also they were subjected to hostile comments. Unsurprisingly, the family members were seriously traumatised by all these events.

- 65) The worst was yet to come. During the departure from the airport, when they got down from the vehicle, about 15-20 Pakistani media-persons ambushed the family members and tried to pressurise them into making a statement that they accepted Jadhav as a terrorist. All this transpired in the presence of the Director, Ministry of Foreign Affairs of Pakistan.
- 66) Contrary to the understanding, the arrangements of the meeting at the venue were made in a way that the Indian diplomat was placed in a separate chamber while the mother, the wife, with two persons from the Pakistani establishment were in a middle chamber, and Jadhav was in a third chamber.
- 67) Jadhav's wife, meeting her husband after a considerable period, had worn ornaments which have religious sensitivities in Indian society. She was made to change her clothes and remove these ornaments. Jadhav's mother who wears a sari was forced to change into a Pakistani attire.
- 68) The family was prevented from talking to Jadhav in their mother tongue (Marathi language). Although this is clearly the natural medium of communication. While doing so, she was reportedly interrupted by the Pakistan official present in the meeting and eventually prevented from proceeding further in this regard.
- 69) These are only some of the significant matters that took place in a meeting that was touted to be a "*humanitarian*" gesture. The dehumanising treatment of Jadhav's mother and wife, only to gather propaganda material, establishes the low priority (if any) of the

rule of law in Pakistan, and that any assurances by their officials should be accepted with caution and circumspection.

- 70) Upon return, the mother and wife conveyed that Jadhav appeared under considerable stress and was speaking in an atmosphere of coercion. As the meeting evolved, it was clear to them that his remarks were tutored by his captors and designed to perpetrate the false narrative of his alleged activities. His appearance also raised questions of his health and well-being.
- 71) India communicated its protest over the violation of the letter and spirit of the understanding on the basis of which the wife and mother of Jadhav were sent to Pakistan by *note verbale* of 27 December 2017⁴⁴. India also conveyed that in the manner in which the meeting was conducted and its aftermath made it clear that it was an attempt by the Government and authorities of Pakistan to bolster a false and unsubstantiated narrative even if it was at the cost of violation of the basic right to dignity of Jadhav, his wife and his mother. India also conveyed serious concerns about the physical and mental well-being of Jadhav, his treatment by the Pakistani authorities and measures being adopted in gross violations of his basic human rights and the minimum standards of due process.
- 72) The manner of the conduct of meeting evoked strong concerns among the Indian public and shocked the conscience of the Indian nation. The External Affairs Minister of India made a Statement in the Indian Parliament⁴⁵ to place the facts of the meeting and its aftermath before the nation on 28 December 2017.
- 73) On 19 January 2018⁴⁶ Pakistan responded to India's letter of 11 December 2017. This letter was again more posturing, without containing any matter of substance. For the sake of completeness, a copy of the letter is attached to this Reply.

⁴⁴ Reply, Annex 12.

⁴⁵ Reply, Annex 13.

⁴⁶ Reply, Annex 14.2.

74) Pakistan also, by its *note verbale* dated 19 January 2018⁴⁷, responded to India's *note verbale* relating to the events that transpired in the course of the meeting.

- a) It sought to justify the undignified security check by alleging that Jadhav “...is a convicted Indian spy and terrorist.” and thus the “...security dimension could not be ignored.”. This was a sorry excuse for the treatment meted out to Jadhav's wife and mother.
- b) It acknowledged that they were asked to change their clothes before the meeting, and were permitted to change back into their clothes after the meeting. They acknowledged that the shoes of Jadhav's wife were retained – as per Pakistan “...they did not clear the security check.”
- c) It did not dispute that Jadhav and his mother were not allowed to communicate in their native language – the justification was that “India never requested that the Marathi language be allowed.”
- d) Despite what is available in public domain, which establishes that the media was allowed full access to the visitors, the *note verbale* stated that “As requested by India, the media was kept at a safe distance from the visitors.”

75) By its communications of 11 April 2018⁴⁸, in two separate *note verbales*, India has responded to both the communications of 19 January 2018. In relation to the meeting India denied that by agreeing to a security check with dignity, they had agreed to the insistence upon the removal of Jadhav's wife and mother's clothes and items of cultural and religious sensibilities. It placed on record that the Indian High Commission was never informed in advance that they would be required to sign a declaration form, and it was a surprise when they were asked to do so by the Director General, South Asia, just before the meeting on 25 December 2017. Besides, the declaration only mentioned that the family members and the Indian diplomat were not carrying either weapons or recording material - it did not require them to accept that they would change their clothes or remove their customary ornaments. India flagged its concerns over retention of the shoes, since the wife of Jadhav is also named in the FIR. It reminded Pakistan of

⁴⁷ Reply, Annex 14.1.

⁴⁸ Reply, Annex 15.1 and 15.2.

the media reports which established that the Pakistan press was not only allowed on multiple occasions to approach the family but were allowed to harass and hector them. Finally, India protested over the fact that the conversation between Jadhav and his mother and wife was deliberately made audible to the officials of Pakistan.

- 76) In the second *note verbale*⁴⁹ India dealt with the baseless allegations relating to the passport. India has also pointed out that if Pakistan invites India to conduct an investigation into the issue of the forged passport, the investigation would have to commence by first examining the provenance and credibility of the allegations, which in turn would require India to conduct an investigation into the conduct of the Pakistan officials who allegedly “apprehended” Jadhav, and into the facts and circumstances relating to his “arrest”, since the basic question as to whether Jadhav was indeed carrying such a forged passport document would have to be investigated in the first instance.
- 77) India submits that Pakistan has failed to set out any facts of relevance that would assist the Court in deciding whether Pakistan was guilty of egregious violation of its duties under the Vienna Convention.

⁴⁹ Reply, Annex 15.2.

IV. ABUSE OF PROCESS/RIGHTS AND LACK OF GOOD FAITH

- 78) From paragraphs 124 to 129 and 151 to 167, Pakistan cites commentaries of eminence, and from certain dissenting opinions or submissions made in certain cases where the word “*abuse*” and the expression “*good faith*” can be found. These phrases have been used in different contexts by different jurists, and each of the citations, apart from being non-authoritative, is irrelevant in the context of the present case.
- 79) Professor Kolb in his authoritative commentary *The International Court of Justice*,⁵⁰ identifies the notion of an “*abuse of process*” as the principle which is applicable “*both in international law and in systems of municipal law*”⁵¹. He further describes (at page 947) it as “*...the use by one or more of the parties, of procedural instruments and rights, for reasons that are fraudulent, or designed to cause delay, or simply frivolous; designed to harm the other side or give the abusing party and an illegitimate advantage; intended to devalue other pending proceedings or deprive them of their object; intended purely for propaganda purposes; or, generally, for any purpose other than that for which the procedural rights concerned were instituted in the first place.*”⁵²
- 80) Pakistan’s conduct of attempting to play the doctored video in the course of the hearing by this Court (at the time of indication of Provisional Measures), and its overall conduct in the present case, using the platform of the present proceedings for its propaganda, is a classic case of abuse of process.
- 81) Professor Kolb goes on to note that “*Such abuses cannot simply have presumed to have occurred and nor should they easily be considered to be proven. States are sovereign and accusations that there have been abuses should therefore be made only with great care. Also, the mere exercise of one’s rights should not be considered an abuse.*”⁵³ India seeks redress in relation to a violation of its rights and the rights of an Indian national under the Vienna Convention. The long Counter Memorial fails to provide a single substantial reason for denying consular access. The justification based on the domestic procedure of trial under offences tried by Military Courts is hopeless. It is a

⁵⁰ Robert Kolb, *The International Court of Justice* (2013).

⁵¹ Reply, Annex 16.

⁵² Ibid.

⁵³ Ibid.

settled principle that domestic law cannot be pleaded as the defence to a breach of international obligations. The rights of consular access in the context of an accused, particularly a person accused of such serious offences, repeatedly characterised as a spy and a terrorist, become even more important, for principles of due process insist upon punctilious compliance with procedural safeguards where the charges are grave. The Vienna Convention recognises the difficulties faced by an accused who is being tried in a foreign country. Such difficulties are exacerbated manifold when an accused is in the custody of security forces and is being tried by a Military Court. Thus, the safeguard by way of consular access and consular assistance in arranging for a defence becomes even more necessary in relation to an accused who is being tried for such serious offences by Military Courts.

- 82) Finally, as Professor Kolb notices *“The ICJ is frequently faced with allegations that procedural abuses have occurred. However, unlike other international tribunals, the Court has not so far ever had actually to conclude that an abuse has been demonstrated. This restrictive approach by the Court is desirable.”* He goes on to state that *“The practice shows that arguments to the effect that there has been a procedural abuse are themselves generally motivated by a most unwelcome wish to prevent the Court from taking cognizance of a case by arguing for its inadmissibility in limine litis.”*⁵⁴
- 83) This comment about the argument of procedural abuse is fully justified if regard is had to the kind of arguments advanced in the Counter Memorial to suggest that there has been an abuse.
- 84) The heads on which Pakistan suggests that there has been an abuse are as follows:
- a) India’s *“refusal to engage”*⁵⁵ with Pakistan on its request for information regarding the passport.
 - b) India allegedly furnishing Jadhav *“with a false identity so as to facilitate his travel to Pakistan to commit acts of espionage and terrorism..”*⁵⁶.

⁵⁴ Ibid.

⁵⁵ Counter Memorial, para 168.

⁵⁶ Counter Memorial, para 170.1.

- c) India's assertion of treaty-based consular access rights in order to access an espionage agent.
 - d) India invoking the provisional measures jurisdiction in the manner that it did – India having exercised its right as a tactical political weapon.
- 85) Each of these arguments justify Professor Kolb's cynicism about the way in which the abuse doctrine is abused. None of these heads have any relevance to this case. An Indian national is in Pakistan's custody. He was sent to trial and has been convicted and sentenced to death by a Military Court and while being all along in military custody. All this has happened without allowing him consular access which would have allowed his sending State to ensure his well-being and safety, and also assisting him in arranging his defence. India asserts that its rights and the rights of the Indian national Jadhav had been seriously impaired and the Vienna Convention brazenly violated.
- 86) Pakistan invites the Court to assume that the conviction is justified and on that basis seeks to explain away the complete defiance of the Vienna Convention. If an allegation by a State that a person in its custody is a spy or a terrorist is sufficient to jettison a procedural safeguard as critical as consular access in the context of being tried in a foreign country, it would have been expressly so mentioned in Article 36 of the Vienna Convention. In trying and convicting Jadhav of the offences of spying and terrorism, without allowing him consular access in the manner provided for by the Vienna Convention which would have assisted him in preparing his defence, and would have also ensured that he is not subjected to any torture or cruel treatment, Pakistan has seriously violated its international obligations.
- 87) Pakistan invites this Court to accept the truth of its allegations and the verdict of its Military Court, and treat India's protest at violation of the consular access rights under the Vienna Convention as an abuse. Such an approach turns the Vienna Convention on its head.
- 88) India has invariably offered consular access to Pakistan whenever a Pakistani national has been arrested and tried by the Indian courts. Pakistan has invariably refused to provide consular access to its own nationals who are accused of serious crimes of terrorism. India's national security needs are of no lesser sanctity, and in fact India faces

greater threats to its security from the menace of cross-border terrorism. India has however never deviated from its international obligations. Pakistan's suggestion that consular access would have in any manner affected its security concerns is a flimsy excuse for not fulfilling basic treaty obligations which are, presently recognised, as a dimension of the human rights of an accused.

- 89) Pakistan's case that India's refusal to "*provide explanations on a range of issues relating to the ongoing investigation...*"⁵⁷ and its refusal to engage with Pakistan's MLA request is a failure to act in good faith to the standard required by international law is baseless. The submission has neither any basis in law, nor does it have any basis in fact.
- 90) Pakistan calls to aid Article 2 (f) of the UN Security Council Resolution 1373.⁵⁸ In this context India submits as under:
- a) It is ironical that Pakistan relies upon this Resolution. The Resolution begins by a decision that all states shall prevent and suppress the financing of terrorist acts; refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts; take the necessary steps to prevent the commission of terrorist acts; deny safe haven to those who finance, plan, support or commit terrorist acts. Pakistan's own conduct has been in breach of each of these decisions.
 - b) Assistance in connection with criminal investigations of criminal proceedings including those relating to "*the financing or support of terrorist acts..*" is achieved through the entering into of mutual legal assistance treaties. There is no MLAT between India and Pakistan and it has been India's position all throughout that this is so because of Pakistan's reluctance to enter into such a treaty.

⁵⁷ Counter Memorial, para 172.

⁵⁸ Counter Memorial, Annex 89.

- 91) The request made by Pakistan does not satisfy the standards of a request which is made under legal assistance treaties. It fails to provide any evidence of material that would *prima facie* establish the commission of an offence. A confession extracted by the security forces and promptly used for propaganda purposes, as well as a forged passport which Pakistan repeatedly alleges was retrieved from Jadhav are all that it provides in support of its serious allegations. A reading of the letter of request leaves no manner of doubt that it is yet another step in the same direction of propaganda warfare.
- 92) In this long Counter Memorial, there is a complete paucity of details of how Jadhav came into the custody of the security forces, what was the other evidence (apart from the patently contrived confession and the forged passport) from which it could be established that Jadhav was engaging in acts of spying and terrorism, and in fact the particulars of such acts themselves, are conspicuously absent from all Pakistan's communications to India. The request for India's "cooperation" is only to be read in order to establish that it is yet another propaganda document rather than being a serious legal document on the basis of which assistance in investigations is sought.
- 93) The premise all these submissions is that Jadhav "*has himself voluntarily and repeatedly confessed to the financing and supporting of terrorist acts...*".⁵⁹ India asserts that in obtaining this confession and in the proceedings going forward ending with his conviction, Pakistan has acted in brazen defiance of the Vienna Convention. One of the consequences is that all such allegations by Pakistan, and the conviction by its court (and a Military Court at that) lack credibility. Pakistan invites this Court to hold that India's request for vindication of its right and the Vienna Convention is an abuse, on the basis of the allegations and the court proceedings the credibility of which stand entirely undermined by Pakistan's refusal to comply with its international obligations under the Vienna Convention.

⁵⁹ Counter Memorial, para 176.

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

- 94) Pakistan then alleges, as a defence to India's case, the principle of *Ex Turpi Causa* (Illegality)/ Unclean Hands/*Ex Injuria Jus Non Oritur*.
- 95) The submissions under this heading are as unmeritorious as those which precede them. The factual foundation for these is the same as the previous ground of defence of abuse. India reiterates its position set out in the paragraphs earlier.
- 96) The submissions in law are also untenable. In this context India's brief comments are as under:
- a) The observations in the judgement in the *Case Concerning The Factory At Chorzów (Claim for Indemnity) (Jurisdiction) (Federal Republic of Germany v. Poland)* have no relevance to the argument being presented by Pakistan. The passage that is extracted in the Counter Memorial⁶⁰ sets out a well-settled principle – a party cannot avail itself of the fact that the other party has not come to fulfil some obligation, where the former party itself has by some illegal act, prevented the latter from fulfilling the obligation in question. Pakistan fails to identify which illegal act by India *prevented* Pakistan from allowing consular access. Instead it suggests that a “*prior illegal act has the consequence of negating any correlative obligation...*”.⁶¹ There is no authority for any such proposition – apart from the fact that any such proposition would be destructive of the principles of the rule of law. In the law of contracts, where the obligations are sequential, the failure to perform one obligation by a party may relieve the other of performing its later obligation. Such a principle has never been extended to international law. Besides the obligations under Article 36 are stand alone and not dependent on some other obligation of the sending State either under the Vienna Convention itself or some other Treaty or otherwise.

⁶⁰ Counter Memorial, para 191.

⁶¹ Counter Memorial, para 192.

- b) Pakistan invites the court to hold that a State can unilaterally be the judge of the legality of the actions of another State under its own understanding of some general principles of customary law (or consequence of some U.N. Resolution) and on that basis refuse to perform what are admittedly its unrelated obligations under an international treaty. If such a proposition ever came to be accepted, it would be destructive of the rule of law and comity of nations.
- c) The Counter Memorial cites a Dissenting Opinion of Judge Anzilotti⁶² in *Legal Status of Eastern Greenland (Denmark v Norway) (1933) PCIJ (Series A/B) No.* 53. Even this is in any event completely out of context. India's assertion of the right to consular access was not an unlawful act – the action at law is based upon an assertion of India's treaty rights.
- d) It cites Judge Schwebel's Dissenting Opinion⁶³ in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Merits, Judgment, I.C.J. Reports 1986, p.14*. The proposition contained in the extract quoted in the Counter Memorial is irrelevant to the present case. The learned Judge held that Nicaragua's actions in El Salvador disentitled it to the claims it was bringing against the United States, since the actions of United States were consequential on or embarked upon to deal with Nicaragua's illegalities. It is completely irrelevant to the present case, and general statements of law cannot be torn out of context and cited in an entirely different context. Besides the propositions that Pakistan relies upon are however not to be found in any judgement of this Honourable Court. In any event Pakistan has hopelessly failed to state (much less establish) any grounds from which it could be deduced that India has come to this court with "unclean hands" or worse that India is guilty of any illegality, and which actions of India prevent Pakistan from discharging its obligations under Article 36.
- e) In paragraphs 198 to 201 of the Counter Memorial, Pakistan relies on submissions, and that too made in cases which have no factual similarity or contextual relevance to the present case. Submissions made by counsel not accepted in the judgement

⁶² Counter Memorial, para 194.

⁶³ Counter Memorial, para 196.

are not an authoritative exposition of the law. Pakistan invites this Court to assume that the submissions made to oppose the putting in place of Provisional Measures were impliedly accepted merely because Provisional measures were denied – an approach that is untenable.

- f) In relation to the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p.136* it relies on the Separate Opinion of Judge Elaraby⁶⁴ rendered in a context entirely different from the present case. The context was concerning the recognition of a territory – and the Learned Judge was of the view that illegal occupation of territories should not be recognised, and in that context he relied on the principle that an illegal act cannot produce legal results. This is yet again an irrelevant submission, and the authority (a dissenting opinion) included to embellish the Counter Memorial.
- 97) Pakistan seeks to rely on a purported Expert Report⁶⁵ as to the passport which it has unilaterally obtained. India has sufficiently dealt with the issue of the passport, which finds repeated mention, and repetitive narration, in the Counter Memorial. Suffice it to say that India denies all these allegations, and maintains they are irrelevant.
- 98) The only place that Pakistan purports to directly engage with the question of denial of consular access is in paragraph 218.5 of the Counter Memorial. Pakistan's suggestion that the denial of consular access was on account of India's alleged illegal activities seeks to arrogate to States that were parties to the Vienna Convention, the right to be the judge of the conduct of other States and decide for themselves whether or not they would comply with obligations expressed in unconditional terms in the Convention. India has always offered consular access to Pakistan even when those arrested have been caught red handed indulging in acts of terrorism. The principle that making allegations of espionage and terrorism excuse the sending State from complying with its obligations under the Vienna Convention is plainly wrong.

⁶⁴ Counter Memorial, para 204.

⁶⁵ Counter Memorial, Annex 141.

99) India reiterates that the allegations based on the two elements that lack any credibility- a confession extracted in military custody when the accused, before and after the confession continues to be held incommunicado, and a forged document that was allegedly recovered by these security forces from Jadhav in the same process, and which Pakistan rightly characterises as a forgery. Pakistan builds its case upon the fact that it called upon India to explain this forged document and India has not responded.⁶⁶ As a matter of law, it amounts to Pakistan accusing India of conspiring in the forging of the passport. The making of such an accusation does not excuse the sending State from its obligations under the Vienna Convention. Provisions for consular access are meant to safeguard the basic rights of foreign nationals in custody (and more so in custody of security forces) and to make the requirements of due process in the matter of a fair trial, and humane treatment even in custody, a reality. To recognise the right in a State to deny due process (an aspect of which is now captured in Article 36) because of the allegations made by it against an accused is to eviscerate the efficacy of the Vienna Convention. It bears repetition that even when India has accused Pakistan of sponsoring terrorism, it has always offered consular access.

⁶⁶ A document that is false is by definition a forgery. To characterise a document as an authentic forgery is a contradiction in terms.

VI. APPLICABILITY OF THE VIENNA CONVENTION

- 100) Pakistan's contention that India has failed or refused to furnish Pakistan with any evidence as to Jadhav's nationality is frivolous. In all its communications, Pakistan has characterised Jadhav as an Indian national. It readily made allegations against India before the international community on the premise that Jadhav was an Indian national who had been sent by India to act as a spy and to promote terrorism in Pakistan. It repeatedly addresses Jadhav as "*Commander Jadhav*" on the premise that he is a serving officer of the Indian Navy. Admittedly, in order to be a member of the Armed Forces, he has to be an Indian citizen - an Indian national. Surprisingly, in paragraph 238 of the Counter Memorial Pakistan suggests that India has to date failed or refused to furnish Pakistan with evidence of Jadhav's nationality.
- 101) The need to establish a fact arises where the fact is in dispute. This is elementary in adversarial proceedings. India states that Jadhav is an Indian national. Jadhav's employment in the Indian Navy is not in dispute⁶⁷. It has all along accused India of sponsoring terrorism in Pakistan on the basis of allegations levelled against Jadhav, an Indian national. In all the diplomatic communications, including the very first demarche, it proceeded on the acceptance of the fact that Jadhav is an Indian national. The plea raised in paragraph 238 is a contradiction to Pakistan's conduct, as also to its pleading in the Counter Memorial in other parts.
- 102) The second ground given to suggest that the Vienna Convention has no application is equally devoid of merit. As stated earlier, the Convention confers a right of consular access to the foreign national (who is arrested and then tried in a receiving State) as well as in the sending State,. The decisions of this Court establish that this is an indefeasible right and has with the evolution of the jurisprudence of this Convention been recognised as a dimension of the due process rights of the accused. In *LaGrand*, this Court observed "*Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case.*".⁶⁸ In *Avena*, this Court

⁶⁷ Pakistan insists he continues to be a Commander in the Navy. India says he is a former Naval Officer.

⁶⁸ *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 466, para 77.*

observed “*It would further observe that violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State: and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 (b). The duty to exhaust local remedies does not apply to such a request.*”⁶⁹

- 103) As already stated, the greater the gravity of the allegations made against an accused, the greater the need to ensure adherence to the procedural safeguards so as to ensure that the allegations are tried in full conformity with the principles of due process and the accused is treated in accordance with the rule of law.
- 104) Pakistan would have to establish an express exclusion to the Vienna Convention to justify a position that merely on allegations of espionage levelled by a state, based on confessions extracted by security forces, the precious safeguards under the Convention stand displaced. Pakistan acknowledges that there is no such material basis on which it could support such an extreme suggestion which would significantly undermine the efficacy of the Convention.
- 105) It therefore postulates the wrong test – it suggests that India must establish extrinsic support in customary international law over and above the plain language of the Convention, to assert the rights guaranteed in a convention and expressed in language that admits of no ambiguity. Pakistan’s case on this is hopeless.
- 106) Pakistan’s reliance on the judgement of this Court in *Avena* is misplaced. In *Avena*, the United States contended that “...*a substantial number of 52 persons listed in paragraph 16 above were United States nationals and that it thus had no obligation to these individuals under Article 36 paragraph 1(b).*”⁷⁰. It was in this context that the Court held that “...*it is for Mexico to show that the 52 persons...held Mexican nationality at the time of their arrest...*”⁷¹. In the present case, however, Jadhav’s nationality was

⁶⁹ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12, para 40, 140.

⁷⁰ *Ibid.*, para. 53.

⁷¹ *Ibid.*, para. 57.

never in dispute, being brought up by Pakistan only as an afterthought to bolster their case.

VII. REPLY TO PAKISTAN'S SUBMISSION THAT THE VIENNA CONVENTION IS NOT ENGAGED IN ESPIONAGE CASES

- 107) The entire discussion in this section of the Counter Memorial is based on quotations made out of context, or authorities cited which stand for precisely the converse proposition, or of extracts supplied without careful analysis, in relation to the assertion that State practice establishes that the rights under Article 36 of the Vienna Convention are not available to those detained, then arrested and tried for charges of espionage and terrorism.
- 108) India has already made the point that the fundamental approach itself is erroneous, for it asks the wrong question and thereby comes to the wrong answer. Pakistan poses the question as to whether there is State practice which establishes that even those arrested on serious charges of espionage and terrorism are to be accorded the right to consular access, and comes to the answer that there is no such State practice. This is an exercise in obfuscation. It half-heartedly addresses the real problem that confronts its legal approach - that despite the fact that the issue of espionage was present to the minds of those who negotiated the Vienna Convention, which is apparent from the material relied upon by it also, no exception was made to the Vienna Convention to deal with cases of espionage.
- 109) Recognising that it has a hopeless case that it seeks to run⁷², and also recognising that the discussions and commentaries do not support any such proposition, Pakistan then resorts to obfuscation by asking the wrong question, namely whether State practice supports extending the Vienna Convention rights to foreign nationals accused of espionage and terrorism, and then happily comes to the conclusion that it does not. India does not base its case on customary international law or State practice, but on the plain language of Article 36 – upon its language which does not admit of any ambiguity.
- 110) India does not suggest that legitimate consular functions include espionage and does not suggest that consular officers, who were protected under the Vienna Convention, are entitled to carry on espionage. Incidentally events of the past, however, leave a

⁷² that the Vienna Convention does not apply where the charges of espionage are levelled against a foreign national.

serious doubt whether Pakistan acknowledges this fundamental proposition in its own conduct.

- 111) Pakistan draws attention⁷³ to the commentary by do Nascimento GE.⁷⁴ These discussions establish that while consular officers may personally be responsible in certain circumstances and answerable to the local jurisdictions, “*The International Law Commission Draft adopted the theory that consular officers are not liable to arrest or detention pending trial except in the case of grave crime and subject to a decision by the judicial authority.*”⁷⁵ The commentary then traces the discussions and the sharp differences between the states. It goes on to state that that the Draft of the International Law Commission was only slightly modified by Article 48, which added carving out an exception in respect of civil action arising out of contracts concluded by consular officers not acting as agents of the sending state, or from damages arising from vehicular or other similar accidents. The commentary notes that this really did not add anything substantive since paragraph 1 granted the immunity “*...in respect of acts performed in the exercise of consular functions.*”⁷⁶
- 112) However, the discussion establishes that officers who were members of the consular post are subject to the civil and criminal jurisdiction of the local state “*...in respect of their private acts, especially if they carry out any private gainful activity.*”⁷⁷ None of this has any relevance to the present case. Besides, it is not Pakistan’s case that where there is suspicion of a consular officer ostensibly employed in consular activities, carrying on acts that constitute spying or espionage, the immunity against criminal action is waived. The practice is to declare such an officer a *persona non grata* and ask him to leave, and not to violate the sanctity of the consular premises or arrest such a consular officer in defiance of the Vienna Convention on the specious ground that a sending State that commits illegalities is not entitled to invoke the Vienna Convention. It would be destructive of the very fabric of international relations if a State could unilaterally charge a consular officer with acts of espionage, and thereby unilaterally

⁷³ Counter Memorial, para 275-279.

⁷⁴ Counter Memorial, Annex 115 - do Nascimento GE. ‘The Vienna Conference on Consular Relations’ in *The International & Comparative Law Quarterly*, Vol. 13, No. 4 (October 1964).

⁷⁵ *Ibid.*, page 1226.

⁷⁶ *Ibid.*, page 1227.

⁷⁷ *Ibid.*, page 1227.

disregard the immunity recognised since time immemorial in respect of those exercising consular functions.

- 113) Pakistan asserts that the effect of the Cold War upon the exercise of the codification of international law “cannot be overstated”⁷⁸ but fails to acknowledge that if despite this no express reservation was made in Article 36 of the Vienna Convention for charges of espionage, it establishes that (unsurprisingly) States did not want to allow a vital safeguard recognised in Article 36 to be subject to the actions of the receiving State in which the foreign national was arrested, enabling it to jettison Article 36 by unilaterally making allegations of espionage. If the logic espoused by Pakistan is carried to its conclusion, then a receiving State can throw all diplomatic immunities to the winds by alleging espionage, and then plead the existence of allegations against the sending State of the commission of wrongs as a full justification for denial of the protections engrafted in the Vienna Convention Rights. Pakistan invites this Hon'ble Court to accept that lawlessness of this kind is consistent with the principles of rule of law.
- 114) It bears repetition that the absence of such exceptions in the Vienna Convention is unsurprising, because the fundamental principles of due process recognise that the more serious the charge, the greater the need for procedural safeguards. Besides, there are some basic rules that must prevail between civilised nations, and cannot be displaced by unilateral allegations levelled by the receiving State.
- 115) Recognising that the needs of national security and efficacy of investigation may require the receiving State to withhold notification of the arrest by a few days, the draftsmen of the Treaty built in some “play in the joints” by the use of the phrase “without undue delay”. A State may be able to explain a few days gap between the arrest and the notification if the time is spent *bona fide* in investigating matters relating to espionage, before the sending State of the national is notified. It is one thing to explain the lapse of time between the arrest and the notification to the home state, and quite another to suggest that charges of espionage jettison Article 36.

⁷⁸ Counter Memorial, para 280.

- 116) The reliance on the ILC Yearbook, 1957 Vol. 1⁷⁹ is completely out of context. The Counter Memorial quotes from the discussion in the 414th meeting on June 11, 1957.⁸⁰ Paragraph 1 of the minutes sets out the context of this discussion. It states that “*The Chairman invited the Commission to continue its general discussion of Mr García Amador’s second report...*”. It is difficult to fathom the relevance of the observations quoted in paragraph 27. The same comment applies to the observations in paragraph 281 of the Counter Memorial, except that it is interesting that China’s protest against what it considered a harsh and discordant statement made against it carried the following assertion “*...it did not arrest diplomatic and consular agents on false charges of espionage, and did not violate the premises of embassies and consulates to attach apparatus to their telephones and desks...*”. The arrest of consular agents on charges of espionage would break the very system of diplomatic immunity.
- 117) Pakistan quotes Sir Arthur Watts QC, in his authoritative commentary explaining the ILC Draft Convention. In this commentary, Sir Watts explains the manner in which the interests of a State in a criminal investigation were balanced with the right to consular access. In paragraph 6 which is extracted⁸¹, it states “*the expression without undue delay used in paragraph 1 (b) allows for cases where it is necessary to hold a person incommunicado for a certain period for the purposes of the criminal investigation.*”. Pakistan wrongly suggests that there is nothing in the authoritative commentary to indicate that Article 36 would apply to individuals against whom allegations of espionage are made. Firstly, it again poses the wrong question and arrives at the wrong answer. Besides, the commentary explains how paragraph 6 accommodates the needs of a State to conduct investigations during which it may hold a person incommunicado. This was unnecessary if serious allegations of espionage and terrorism make Article 36 inapplicable.
- 118) Paragraph 288 of the Counter Memorial that has a quotation from the comments made by Mr Tunkin and the Chairman which close this issue. While Mr Tunkin, mentioning espionage cases, suggests that it may be desirable that the local authorities should not be obliged to inform the Consul, the Chairman remarked that if the Commission went into the question of whether cases of espionage should be made an exception the whole

⁷⁹ ILC Yearbook 1957, volume 1, page 159, paragraph 16, column 2.

⁸⁰ Counter Memorial, para 280.

⁸¹ Counter Memorial, para 284.

principle of consular protection and communication with nationals would have to be reopened. Far from being reluctant to undertake an examination of this problem, these extracts suggest that the problem of espionage was very much on the table despite which no exception was made to the treaty Article 36 in respect of cases where there were allegations of espionage.

- 119) Paragraph 295 of the Counter Memorial is in the same direction. The conclusion, however, suggested in paragraph 296 of the Counter Memorial is directly contrary to what is established by the very extracts upon which reliance is placed - it bears repetition that despite the problem of espionage being raised and discussed, even if it was recognised that it could in one view constitute a limitation on the right to consular access (as the Chairman's remarks noted), in the article that was finally put in the treaty, no such limitation was recognised.
- 120) Pakistan brings up the issue of the problems confronted in implementing the provisions of the Vienna Convention in the context of pleas for asylum and in situations of dual nationality. Both these also establish that the Vienna Convention is indeed the exhaustive rubric of consular access. It is invariably the provisions of the Vienna Convention that provide the basis for resolving the situations, finding solutions consistent with the Vienna Convention.
- 121) A case of asylum is the converse of a case where a person who is a national of the sending State and has roots in that State, and does not disclaim nationality. The question whether a person who seeks asylum and thereby expresses an intention to abandon his nationality, should be treated in the same way under Article 36 of the Vienna Convention is a vexed issue. Where Article 36 would detract from the human rights of the arrested national, its applicability raises a challenge which has no definite answer.
- 122) Equally, applying Article 36 to a person of dual nationality presents legal challenges which are *sui generis*. Disapplying Article 36 to a person of dual nationality is on the legal premise that being a national of the arresting State, he is not entitled to the protection of Article 36. Whether or not this legal premise is justified is itself a vexed issue.

- 123) In its desperation to find answers to the inexcusable conduct of brazenly violating Article 36 of the Vienna Convention, and not being able to find any support for its underlying theme that Article 36 is jettisoned the moment allegations of espionage are made, Pakistan gives examples of two areas where the application of Article 36 in its own context has unsettled results. These examples are completely irrelevant.
- 124) The practice in the United Kingdom cited in paragraphs 301-2 and the Irish practice cited in paragraph 303 of the Counter Memorial do not add anything to this discussion. The commentary in paragraph 305 of the Counter Memorial only recognises the problem – what it explains makes the example completely irrelevant to the present case. Where there is dual nationality, the first issue is to establish the nationality of an individual. The Vienna Convention proceeds of the premise that a national of one State is in detention in another state. In the case of dual nationality, the first step is to establish the capacity of a State to claim a right of protection since “...it is accepted that any of the states of nationality may represent the person”. Thus, the arresting state itself represents - or can claim to represent - the person, in which case the question of applying Article 36 would simply not arise. This is an interesting question of international law - it would be decided in an appropriate case when such an occasion arises. Inviting the Court to decide this in the present case is a misadventure.
- 125) The language of Article 36 admits of no ambiguity. Pakistan does not even seek to establish that settled State practice in the context of Article 36 has always excluded its extension to cases of espionage. (The question framed once again in paragraph 309 of the Counter Memorial is the converse.) The fact that countries have insisted upon consular access even where there are allegations of espionage (as suggested in paragraph 313) displaces any suggestion that Article 36 was not intended to apply to cases of espionage. Pakistan gives a series of examples which, in its assertion, are the “historic and modern example of espionage cases that states often operated on the voting that they were not entitled to or were not going to be able to gain access to their espionage agents once they had been captured”.⁸²

⁸² Counter Memorial, para 314.

126) India submits that apart from the fact that the material relied upon for what happened in those cases is hardly reliable for it is wanting in detail, even from that material what is stated is not borne out:

- a) In the case of Mikhail Gorin, it is not known whether or not the US denied him consular access. It appears he was allowed to telephone the Soviet Embassy three times, and he was visited by the Soviet Vice-Consul and was permitted to speak in Russian in the presence of a US naval intelligence officer.
- b) In the case of Gary Powers, he was denied, as per the material attached, consular access for 21 months. The material suggests that his father attended his trial and as per other material available in public domain, the American ambassador was invited to view the trial, but he deputed two junior officers. It also appears that this was prior to the Vienna Convention.
- c) Frederick Barghoorn was held incommunicado for 16 days, and was detained on espionage charges. There is no material to suggest that after the 16 days he was denied consular access. Besides what was in play in this case was a bilateral convention between US and Russia (of 1933) prior to the advent of the Vienna Convention.
- d) Hanson Huang was a Chinese American born in Hong Kong. He was detained in Beijing and sentenced to 15 years imprisonment for espionage. His friend was allowed to visit him. An article in the New York Times suggests that no diplomatic action was taken to gain access to him since he was not a US citizen.⁸³ This represents yet another instance of the problem of relying on newspaper reports to build up a case rather than on actual records which would establish whether or not consular access was sought, and if it was denied, the grounds for the denial.
- e) Harry Wu - a naturalised US citizen who was arrested in China in 1995 was granted consular access, albeit it was after he was formally charged with espionage. It is not known whether US was notified earlier, and whether it sought

⁸³ Reply, Annex 17.

access to its national. Besides, this example negates any suggestion that consular access is not available where the charges are those of espionage.

- f) Xue Feng and Phan Phan-Gillis, both US citizens arrested in China were granted consular access. They were also arrested on charges of espionage.
- g) The reference to the case of the two USSR diplomats and the US diplomat again are wanting in any detail that could establish any kind of practice.

127) As a matter of principle, examples where States have granted consular access after considerable delay or have denied access cannot affect the interpretation of the treaty and of Article 36 in particular. Pakistan, in this misadventure, however does not push it to the point of suggesting that there is an established practice to show that consular access is invariably denied. That being so, the individual incidents can at best establish that Pakistan may not be the only state which has violated Article 36 of the Vienna Convention or similar provisions in bilateral treaties that preceded the Vienna Convention. That is hardly a defence in an action brought for relief against Pakistan's violation of its international obligations.

128) Pakistan asserts that the Vienna Convention was “...*not intended to be engaged ...in the case of an individual who from his conduct and materials in his possession revealed a prima facie case of State-sponsored espionage.*”⁸⁴ It cites Luke T. Lee & John B. Quigley (1961)⁸⁵ to further its proposition that espionage is an exception to Article 36. However, in a later publication by Luke T. Lee (1966)⁸⁶ Chapter 14 has two passages of significance:

- a) He mentions that Article 36 “...*may be regarded as one of the most important contributions to consular law by the Vienna Convention. At the crux of the issue were the duties of the receiving state to permit unimpeded communication between consuls and nationals of the sending state, to inform consuls of the imprisonment or detention within their district of such nationals, and to allow consuls to visit*

⁸⁴ Counter Memorial, para 325.

⁸⁵ Counter Memorial, para 317.

⁸⁶ Reply, Annex 18.

them in prison, custody or detention. These rights of consuls admittedly are basic to their protective functions”.

- b) He goes on to note that “...*although customary international law does not require the receiving State to accord the above triple rites to consuls, such rights are often the subject of consular instructions and treaties. Sometimes they are granted by virtue of “international courtesy”, induced at least in part by the desire for reciprocity.*” He goes on to discuss the cases of Frederick Barghoorn and Gary Powers. Both these preceded the Vienna Convention.

- c) Even in respect of these two cases, the commentary notes that “*The Soviet refusals in the above cases were in direct contravention of the 1933 Soviet assurance to the United States concerning the consular right to be notified of the arrest of the national within three days in large centres and seven days in remote areas as well as the right to visit such nationals “without delay”.* He then goes on to state “*It may be observed that no exception is made to persons charged with espionage activities, whether in the 1933 agreement, the Soviet-United States Convention, or the Vienna Convention*”. (emphasis added)

129) Pakistan’s case that allegations of espionage exclude the operation of Article 36 is simply hopeless.

130) On the facts of the case, Pakistan mischaracterises India’s case, in order to find a response to such a mischaracterised case.

131) In its narrative of the factual background, Pakistan claims that Jadhav was arrested on 3 March 2016. On 25 March 2016 , it is alleged that he “*voluntarily confessed*”. Pakistan had no concerns about the news of his arrest becoming public and impairing any investigation, for it wasted no time in setting its propaganda machinery in motion. It also issued a *demarche* to the Indian High Commissioner.

- 132) There is no material placed which would establish that giving consular access prior to extracting a confession would have so imperilled its security or hampered investigation, that delaying making available of this information by 22 days was justified. This delay is plainly a violation in the absence of a cogent explanation for non-communication of his arrest for 22 days.
- 133) Even after the notification, despite unequivocal demands by India for consular access, such consular access has been denied all through his arrest and detention in Pakistan including in the course of his “trial”. Even after his conviction, consular access has not been provided. It is obvious that compulsions other than those of *bona fide* security needs are what are driving Pakistan’s actions and omissions, even if they result in an abject failure to comply with international obligations.
- 134) India also states that the repeated reliance upon a confession extracted during the custody of Jadhav lacks even a scintilla of credibility. India has independently had the confession examined by forensic experts who have confirmed (which is obvious to an extent apparent to even a lay observer) that the confession is anything but voluntary and is a heavily edited version. However, on a matter of principle, India had opposed and continues to oppose Pakistan’s attempts to bring the merits of the trial and conviction including the evidence such as this bogus confession into the present proceedings while contending in parallel that this court does not have appellate jurisdiction. India has had no access to the evidence at any stage. Besides, the strength (or its absence) of the case against Jadhav, is irrelevant to whether the rights under the Vienna Convention were available to him and to India in the present case. Pakistan is seeking to draw a veil over its brazen defiance of the Vienna Convention and its contempt for international obligations by diverting attention to matters that are irrelevant in the present proceedings and by selectively placing material illegally extracted by it.
- 135) Paragraph 2 of Article 36 recognises that the laws and regulations of the receiving state must enable full effect to be given to the purposes for which the rights accorded under this article are intended. Domestic law in any event is never a defence for violation of international obligations. Pakistan’s suggestion that the rights under Article 36 can be superseded by domestic law is plainly wrong.

VIII. THE 2008 BILATERAL AGREEMENT HAS NO BEARING ON THE PRESENT DISPUTE

- 136) Pakistan dwells upon the background of this Agreement and the steps in its negotiation. None of those have any relevance to the present case.
- 137) India asserts that Article 36 of the Vienna Convention is the primary source of the international obligations and the rubric for consular relations created by a multilateral treaty. The Vienna Convention recognises that there may be other treaties, particularly bilateral agreements between countries that address the same issue or similar issues. The relationship between those treaties and the Vienna Convention is spelt out in paragraph 2 of Article 73 which states that “*Nothing in the present Convention shall preclude States from concluding international agreements confirming, or supplementing or extending or amplifying the provisions thereof.*”
- 138) Pakistan invites the Court to hold that a bilateral agreement, which sought to address entirely different issues as explained later, creates an exception to Article 36, which would considerably erode its efficacy considering the kind of cases that frequently arise between the two neighbours India and Pakistan. It invites this court to hold that India would have thrown away the rights guaranteed under the Vienna Convention and agreed to its nationals being subject to the vagaries of the system in Pakistan where military trials extend to civilians, and for purposes of propaganda Pakistan could trample underfoot the rights of individuals merely on allegations of espionage and terrorism.
- 139) The 2008 Agreement sets out its object – “*...the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country...*”.
- 140) Considering that India and Pakistan are neighbours both on land and sea, and where people who live in the border areas frequently strayed into the other country and ended up in custody, it was found necessary to have a bilateral agreement that would supplement the Vienna Convention. Thus, the matters covered in paragraphs (i)⁸⁷,

⁸⁷ *Each Government shall maintain a comprehensive list of the nationals of the other country under its arrest, detention or imprisonment. The lists shall be exchanged on 1st January and 1st July each year.*

(iii)⁸⁸, (iv)⁸⁹ and (v)⁹⁰ were agreed to and these are not matters that are covered by the Vienna Convention, but supplement and extend the provisions of the Vienna Convention.

- 141) Pakistan appears to rely upon paragraphs (iv) and (vi)⁹¹. Neither of them suggest that they detract from the general provisions and the overarching protection of Article 36.
- 142) The requirement that each government shall provide consular access within three months does not give an excuse to delay consular access, but, even if it does apply as supplementing and amplifying Article 36, it can only fix an outer limit of three months in which consular access must be provided.
- 143) India does not accept that this Bilateral Agreement is to be read as superseding Article 36 and India asserts that its rights under Article 36, as well as Jadhav's rights under Article 36 are uninfluenced by this Bilateral Agreement of 2008. Even if paragraph (iv) of the 2008 Agreement was to apply, Pakistan could have provided a substantial explanation for why it needed three months for providing consular access, and upon which it could have claimed that it has complied with its treaty obligations. Even on the erroneous premise that paragraph (iv) applies, Pakistan has not complied with its treaty obligations.
- 144) Worse is the case of its reliance on paragraph (vi) of the Bilateral Agreement. The phrase "*examine the case on its merits*" makes it apparent that it applies to the agreement to release and repatriate persons within one month of the confirmation of their national status and completion of sentences. As an exception to this, India and Pakistan reserve the right to examine on merits of the release and repatriation of persons upon completion of their sentences, where their arrest, detention or sentence was made on political or security grounds.

⁸⁸ *Each Government undertakes to expeditiously inform the other of the sentences awarded to the convicted nationals of the other country.*

⁸⁹ *Each Government shall provide consular access within three months to nationals of one country under arrest, detention or imprisonment in the other country.*

⁹⁰ *Both Governments agree to release and repatriate persons within one month of confirmation of their national status and completion of sentences.*

⁹¹ *In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits.*

- 145) Paragraph (vii)⁹² of the 2008 Agreement also calls for compassionate humanitarian considerations in which each side may exercise its discretion to allow early release and repatriation of persons.
- 146) The focus of the 2008 Bilateral Agreement, in these three paragraphs, was upon the return of those arrested, tried and convicted in the receiving State, being nationals of the other State. India and Pakistan have shared land and sea borders, and there are frequent occasions of nomads or fisherman straying across the borders and being arrested. This treaty primarily sought to address problems arising out of these kinds of situations.
- 147) Pakistan invites this Court to add an exception to the Vienna Convention, which exception was mooted but not placed in Article 36 of the Vienna Convention as discussed earlier. Such an interpretation would be contrary to the plain english of Article 73 – it would neither supplement nor amplify but instead it would qualify and restrict the operation of Article 36. Pakistan invites the court to rewrite the relationship between the Vienna Convention and later bilateral treaties. This argument is a hopeless as its earlier arguments.
- 148) The discussion in paragraph 378 of the Counter Memorial is destructive of Pakistan’s argument. Judge Shigeru Oda’s treatise deals with the contrast between what is now Article 30 of the Vienna Convention on the Law of Treaties (“VCLT”) and the Vienna Convention of 1963. Article 73 (2) of the Vienna Convention is cited as a provision which recognises the right to supplement its provisions by bilateral treaties “*which do not derogate from the obligations of the general convention*”. The text of Article 30 (2) of the VCLT, according to the author, goes far beyond the mere confirmation of the legitimacy of bilateral agreements, and he argues that if Article 30 (2) were applied then the bilateral consular agreements would prevail over the Vienna Convention. This analysis of Article 73 is directly contrary to what Pakistan invites this Court to hold in the present case.

⁹² *In special cases, which call for or require compassionate or humanitarian considerations, each side may exercise its discretion subject to its laws and regulation to allow early release and repatriation of persons.*

- 149) Clearly, it is Article 73 (2) which is a part of the Vienna Convention 1963 that would apply and not the general provisions of Article 30 of the VCLT. It is also relevant in this context to note that India is not a party to the VCLT. While India accepts that a number of the principles incorporated in the VCLT are codification of the general principles of international law and, for that reason, of relevance, the suggestion that Article 30 of the VCLT would override Article 73 (2) of the Vienna Convention has merely to be stated to be rejected.
- 150) Pakistan states the point with a degree of ambivalence – it does not gather the courage to suggest that Article 30 of the VCLT would override Article 73 (2). Instead in its conclusions contained in paragraph 385 of the Counter Memorial, Pakistan claims that the Bilateral Agreement is a “*supplement and/or amplification*” of Article 36. India generally agrees with this assertion but points out that this premise is destructive of Pakistan’s case on the interpretation it seeks to place on paragraph (vi) of the Bilateral Agreement of 2008.
- 151) The fallacy of Pakistan’s case – and the point that reading paragraph (vi) of the Bilateral Agreement of 2008 would emasculate Article 36 becomes apparent from the point made in paragraph 385.4 of the Counter Memorial. The phrases “*political*” and “*national security*” are amorphous and indefinite in their import. If both countries can unilaterally decide the application of Article 36 to individual cases and reject its application on such subjective conditions, Article 36 would have lost its meaning. Arrests on trumped up charges are frequently made by Pakistan - the present case is a text book case of such conduct. All that Pakistan would have to do to wriggle out of Article 36 is to add a ground that can provide a hook to later claim “*political*” considerations in the arrest, even if it does not show up in the final charges and conviction, and on that basis deny consular access. Pakistan may as well denounce Article 36.

IX. RELIEF SOUGHT BY INDIA IS APPROPRIATE

- 152) India has given substantial grounds and on the basis of which it has sought the relief that the Court may restrain Pakistan from giving effect to the sentence, conviction and direct the release of Jadhav. Pakistan suggests that no relief beyond review and reconsideration, as directed in *LaGrand* and *Avena*, should be the only relief which should be granted.
- 153) Pakistan fails to engage with the key issues in this regard. This Court recognised that in cases of violation of the Vienna Convention, as in other cases, the principles of restitution would apply *proprio vigore*. Having so held, this Court found that, accepting the United States' assertion that the system that is prevalent in their country is fully compliant with due process, and because the lapse could be addressed by review and reconsideration, the Court balanced the relief in those cases.
- 154) India has set out the grounds of distinction between those cases in the present case. The only way in which Pakistan seeks to engage with the grounds of distinction is by citing a report it has obtained from "military law" experts. In this context India has the following comments to offer:
- a) India has based its case on the underlying principle that Pakistan's criminal justice system by way of trial in the Military Courts does not satisfy the minimum standards of due process in its application to civilians. India has relied on incontrovertible international material that has found serious lapses in the manner in which the criminal justice system, by trial held by Military Courts, has failed to satisfy the standards recognised in contemporary times by the international community. The two experts do not purport to testify on what would be the minimum standards of due process that this Court would apply - and rightly so, for the reason that this would be a matter for this Court to decide and not for experts on military law.
 - b) In the Conclusion as is set out in Paragraph 3 of their report, they note that the jurisdiction of Military Courts to try civilian offences such as espionage and terrorism (i.e. offences beyond the law applicable to members of the Armed Forces), their jurisdiction is limited to persons already subject to Service

jurisdiction. They go on to state that “*Modern state practice in most jurisdictions is that civil authorities of the state will undertake any prosecution of these offences where there is concurrent jurisdiction.*”⁹³ This supports India’s position that the Pakistan system in which Military Courts have exclusive jurisdiction, to the exclusion of the civil authorities, runs counter to the modern State practice. (emphasis added)

- c) The experts say that the “*Military Courts of Pakistan are soundly based in statute which provides the substantive legal basis for their jurisdiction*”.⁹⁴ They also find that it is consistent with Pakistan’s Constitution. Both these assertions are irrelevant for the present case for the reason that the international standards of minimum due process are not subject to domestic law, but provide a standard on which domestic law can, in certain situations be measured. It is the domestic law which is tested for its adherence to the minimum standards of due process in the context of a case.
- d) The experts notice that judicial review by the constitutional courts is available and in their view it “*appears to provide a potential effective safeguard against the manifest failings in due process*”.⁹⁵ India offers two comments on matters that are apparent in this guarded statement; Firstly, it acknowledges that in the system there are “*manifest failings*”. Secondly, it does not address the narrow remit of the courts exercising the power of judicial review, which is elaborately discussed in the judgement of the Pakistan Supreme Court cited by the experts. A fair trial in an open court presided over by a judge who is independent of the executive, and in which the accused gets a fair chance to defend himself and avail of legal assistance of his choice are indispensable elements of due process as it is understood in present times with the evolution of human rights jurisprudence. All these are absent - they are the manifest failings in the system. The replacement of judicial review by the National Constitutional Courts can hardly be a substitute for these basic elements of due process. By way of contrast, the Indian Supreme Court has expanded its scope of review in an appeal arising from a sentence of death, recognising the need of the highest degree of judicial scrutiny,

⁹³ Counter Memorial, Annex 142, page vi.

⁹⁴ Ibid.

⁹⁵ Ibid., page vii

untrammelled by procedural limitations, where the sentence of death is to be awarded to a human being. And these principles have been applied to a Pakistani national apprehended when he was openly engaged in acts of terrorism, caught by one of his victims whom he riddled with bullets.

- e) Finally the experts close with a note of caution stating that they are aware of the criticisms made of the courts which try terrorism offences, but at that they were not in a position “*to consider whether those criticisms are valid without further extensive research and review*”⁹⁶.

155) This report of the experts hardly supports Pakistan’s challenge to India’s position – on the contrary the Court now has a report filed by Pakistan which substantially confirms what India has said about the failings in the system of trial by Military Courts.

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

157) India challenges Pakistan’s assertions that going beyond review and reconsideration would, in the facts and circumstances of the case go beyond the legitimate functions of this Court. As set out in paragraph 473 of the Counter Memorial, in their domestic law, the convictions by the Military Courts can only be assailed on the ground of *coram non*

⁹⁶ Ibid.

judice, absence of jurisdiction, *mala fide* and malice in law. Pakistani law does not have an appellate procedure by which a trained independent judge dispassionately reviews the findings of a Military Court. In the absence of any independent procedure of trial or review of the evidence *de novo* by an independent appellate court, India claims that the relief that should be granted is as has been sought in its Memorial. To suggest to the contrary and to argue that this Court does not have the power to grant such relief is to seriously curtail the powers of this Hon'ble Court in the matter of grant of protection to the human rights of those accused of serious offences and facing the capital sentence, as well as those of the sending State to help its nationals effectively defend themselves – a vital right which is engrafted in Article 36 of the Vienna Convention.

India reserves the right to modify or extend the terms of its submissions, as well as the grounds invoked in this Reply.

Respectfully Submitted



Dr. Deepak Mittal

Agent of the Republic of India

Before the International Court of Justice

17 April 2018

Certification

I certify that the Annexes are true copies of the documents referred.

A handwritten signature in blue ink, appearing to read 'Dr. Deepak Mittal' with a stylized flourish at the end.

Dr. Deepak Mittal

Agent of the Republic of India

