

## DECLARATION OF JUDGE BHANDARI

1. I am in agreement with the Court's decision to indicate provisional measures in the present case. However, I wish to place on record my views concerning India's Request for provisional measures in more detail.

## THE FACTS

2. On 8 May 2017, India filed with the Court a case against Pakistan concerning the alleged violation of India's rights under the 1963 Vienna Convention on Consular Relations ("VCCR")<sup>1</sup>. India argued that

"Pakistan arrested, detained, tried and sentenced to death on 10 April 2017 an Indian national, Mr. Kulbhushan Sudhir Jadhav, in egregious violation of the rights of consular access guaranteed by Article 36, paragraph 1, of the [VCCR]"<sup>2</sup>.

According to India, Mr. Jadhav was kidnapped from Iran, where he was carrying out business following his retirement from the Indian Navy, and transported into Pakistani territory<sup>3</sup>. However, a Pakistani press release submitted by India stated that Mr. Jadhav was arrested in Balochistan<sup>4</sup>, on Pakistani soil, on 3 March 2016<sup>5</sup>.

3. India was made aware of Mr. Jadhav's arrest on 25 March 2016. Starting on 30 March 2016, India sent 13 Notes Verbales to Pakistan<sup>6</sup>. By way of such Notes Verbales, India requested Pakistan to allow consular

<sup>1</sup> United Nations, *Treaty Series (UNTS)*, Vol. 596, p. 261.

<sup>2</sup> Request for provisional measures, para. 3. See also CR 2017/5, p. 11, para. 1 (Mittal).

<sup>3</sup> Application instituting proceedings, para. 13. See also CR 2017/5, p. 12, para. 8 (Mittal).

<sup>4</sup> *Ibid.*, Ann. 4.

<sup>5</sup> *Ibid.*, para. 4.

<sup>6</sup> Request for provisional measures, para. 4. See Application instituting proceedings, Annex 1: Note Verbale No. ISL/103/1/2016 (25 March 2016); Note Verbale No. ISL/103/14/2016 (30 March 2016); Note Verbale No. ISL/103/14/2016 (6 May 2016); Note Verbale No. ISL/103/14/2016 (10 June 2016); Note Verbale No. ISL/103/14/2016 (11 July 2016); Note Verbale No. ISL/103/14/2016 (26 July 2016); Note Verbale No. ISL/103/14/2016 (22 August 2016); Note Verbale No. ISL/103/14/2016 (3 November 2016); Note Verbale No. ISL/103/14/2016 (19 December 2016); Note Verbale No. J/411/08/2016

access in accordance with paragraph 1 of Article 36 of the VCCR. Under that provision:

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

- (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
- (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
- (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.”

4. However, Pakistan allegedly did not reply to any such Note Verbale<sup>7</sup>. According to India, Pakistan has

“refused to communicate, to the consular officers, the charges against Jadhav and the evidence and other material adduced against him in the so-called trial so as to enable them to arrange for his legal representation”<sup>8</sup>.

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(3 February 2017); Note Verbale No. ISL/103/14/2016 (3 March 2017); Note Verbale No. ISL/103/14/2016 (31 March 2017); Note Verbale No. J/411/8/2016 (10 April 2017).

<sup>7</sup> Request for provisional measures, para. 4.

<sup>8</sup> CR 2017/5, p. 18, para. 6 (Salve).

Instead, on 23 January 2017 Pakistan requested India's co-operation in investigating Mr. Jadhav's alleged violations of Pakistani law<sup>9</sup>. India never responded. Pakistan stated that "India could and should have responded to [the letter] seeking India's assistance to investigate [Mr. Jadhav's] criminal activity and links with people in India"<sup>10</sup>. On 10 April 2017, India received a Note Verbale from Pakistan's Ministry of Foreign Affairs stating that "consular access . . . shall be considered, in the light of India's response to Pakistan's request for assistance in the investigation process"<sup>11</sup>.

5. During his detention in Pakistan, Mr. Jadhav was put on trial before a Field General Court Martial, in accordance with the Pakistan Army Act 1952<sup>12</sup>. According to the 1952 Act, "[t]he decision of the court martial, under Section 105, is by an absolute majority of votes, and in the event death sentence is to be awarded it has to be unanimous"<sup>13</sup>. A death sentence must subsequently be confirmed by a convening officer designated by the Federal Government or by the Chief of Army Staff<sup>14</sup>. As explained above, Mr. Jadhav was sentenced to death by the court martial, and his sentence was confirmed by the Chief of Army Staff. However, against such a sentence the 1952 Act allows for a petition to the Federal Government under Section 131<sup>15</sup>. In addition to such a petition, an appeal could be filed in a court of law under Section 133 (B) of the 1952 Act. Under that provision:

"the Court of Appeal is to consist, in cases of award of death sentence after 1992, of the Chief of Army Staff or one or more of the officers designated by him [on his] behalf and presided by an officer not below the rank of Brigadier in the case of a Field General Court Martial as in this case. The decision of the Court of Appeal is final and cannot be called in question before any court or other authority."<sup>16</sup>

6. Mr. Jadhav's mother filed both a petition under Section 131, and an appeal pursuant to Section 133 (B) of the 1952 Act<sup>17</sup>. However, Mr. Harish Salve, counsel for India, argued that

"[t]he appeal has been filed [by Mr. Jadhav's mother] as a measure of desperation, without knowing the charges against Jadhav, the evi-

<sup>9</sup> CR 2017/5, p. 18, para. 6 (Salve).

<sup>10</sup> CR 2017/6, p. 9, para. 11 (Faisal).

<sup>11</sup> Application instituting proceedings, Annex 4.

<sup>12</sup> *Ibid.*, para. 53.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, para. 54.

<sup>15</sup> *Ibid.*, para. 55.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, para. 56.

dence against him which has been relied upon to convict him, and without having access even to the judgment and order of conviction and sentence.”<sup>18</sup>

7. Mr. Salve submitted that “the more serious the charge [against Mr. Jadhav], the greater the need for the procedural safeguards to ensure that the accused gets a fair trial”<sup>19</sup>. Hence, in India’s view, any remedy against Mr. Jadhav’s death sentence available in Pakistan are “illusory”<sup>20</sup>. First, the death sentence was confirmed by the Chief of Army Staff, which entails that an appeal filed with a court presided by the Chief of Army Staff “would be an appeal *from Caesar to Caesar*”<sup>21</sup>. Second, Pakistan’s Government made it clear that they agree with the death sentence issued against Mr. Jadhav<sup>22</sup>. Third, India argued that the Court of Appeal could be seen not to be independent in a case like Mr. Jadhav’s<sup>23</sup>. Fourth, given the stance of the Pakistani Government on Mr. Jadhav’s criminal responsibility, India took the position that the Court of Appeal constituted under Section 133 (B) of the 1952 Act would not be “free from pressures so as to constitute a real and effective remedy”<sup>24</sup>. Fifth, “[e]ven in the course of the appeal, Pakistan has clearly refused consular access”<sup>25</sup>. Sixth, the Lahore Bar Association passed a resolution on 14 April 2017 by which it decided “to cancel the membership of the lawyer(s) found pursuing an appeal on behalf of [Mr. Jadhav]”, which entails that Mr. Jadhav would not be able to have proper legal assistance in the appeal against his death sentence<sup>26</sup>.

8. India stated that “Pakistan continues to deny consular access and to provide any information regarding the proceedings against the Indian national including whether an appeal has been filed in the matter”<sup>27</sup>. On 27 April 2017:

“[t]he External Affairs Minister of India wrote a letter to the Adviser to the Pakistan Prime Minister on Foreign Affairs . . . in which she reiterated the requests for certified copies of the charge sheet against

<sup>18</sup> CR 2017/5, p. 24, para. 27 (Salve).

<sup>19</sup> *Ibid.*, p. 40, para. 91 (Salve).

<sup>20</sup> Application instituting proceedings, para. 57.

<sup>21</sup> *Ibid.*, para. 57 (a) [emphasis added].

<sup>22</sup> *Ibid.*, para. 57 (b).

<sup>23</sup> *Ibid.*, para. 57 (c).

<sup>24</sup> *Ibid.*, para. 57 (d).

<sup>25</sup> *Ibid.*, para. 57 (e).

<sup>26</sup> *Ibid.*, para. 57 (f).

<sup>27</sup> Request for provisional measures, para. 11.

Mr. . . . Jadhav, proceedings of the Court of Inquiry, the summary of evidence in the case, the judgment, appointment of a defence lawyer and his contact details and certified copy of medical report of Mr. Jadhav. She also reiterated the requested [*sic*] for the visa for the parents of Mr. Jadhav. She sought the personal intervention of the Adviser on the matter. No response has been received to this missive.”<sup>28</sup>

Dr. Deepak Mittal, Agent of India before the Court, stated that:

“Mr. Jadhav [was] incarcerated in Pakistan for more than a year on concocted charges, deprived of his rights and protection accorded under the [VCCR], being held incommunicado without contact with his family and the home State, [and] is facing imminent execution. All notions of human rights now considered by the global community as basic to behaviour in civilized nations, have been thrown to the winds.”<sup>29</sup>

Moreover, Mr. Mittal also submitted to the Court that:

“Pakistan has not provided any information or documents, including the charge-sheet, proceedings of the Court of Inquiry, the summary of evidence, the judgment. Request for appointment of a defence lawyer for Mr. Jadhav has also not elicited any response.”<sup>30</sup>

9. The core of India’s argument is that :

“Pakistan failed to comply with all its obligations under Article 36. It denied India its right to consular access to its national. India has been seeking consular access incessantly since March 2016 when India was informed of the detention of Mr. . . . Jadhav by Pakistan.”<sup>31</sup>

India submitted that it “has a strong prima facie case as to the jurisdiction of the Court and on merits, sufficient to justify seeking provisional measures”<sup>32</sup>. For its part, Pakistan considers India’s Application a means to have Mr. Jadhav’s death sentence reviewed by the Court, which, as

<sup>28</sup> Application instituting proceedings, para. 23.

<sup>29</sup> CR 2017/5, p. 11, para. 3 (Mittal).

<sup>30</sup> *Ibid.*, p. 13, para. 11 (Mittal). See also Mr. Mittal’s submissions at *ibid.*, p. 14, para. 16 (Sharma).

<sup>31</sup> *Ibid.*, p. 16, para. 7 (Sharma).

<sup>32</sup> *Ibid.*, p. 42, para. 95 (Salve).

Pakistan stated, “cannot exercise a criminal appellate jurisdiction”<sup>33</sup>. In its prayer for relief, India requests the Court to exercise its power under Article 41 of the Statute and indicate the following provisional measures:

- (a) that Pakistan take all measures necessary to ensure that Mr. Jadhav is not executed;
- (b) that Pakistan report to the Court the action it has taken in pursuance of such measures necessary to ensure that Mr. Jadhav is not executed;
- (c) that Pakistan ensure that no action is taken that might prejudice the rights of India or Mr. Jadhav with respect to any decision the Court may render on the merits of the case<sup>34</sup>.

#### THE LAW

##### *The Test for Indicating Provisional Measures*

10. According to established jurisprudence, the Court indicates provisional measures provided that four requirements are met: (i) the Court has prima facie jurisdiction over the merits of the case; (ii) the rights asserted by the Applicant State on the merits are plausible; (iii) there is a real and imminent risk of irreparable prejudice to the rights of the applicant State pending the settlement of the dispute by the Court; and (iv) there is a link between the measures requested and the rights claimed by the applicant State on the merits<sup>35</sup>. Each requirement is analysed in turn.

##### *The 2008 Agreement on Consular Access*

11. Preliminarily, it should be noted that on 21 May 2008 India and Pakistan concluded the Agreement on Consular Access, whose provisions touch on issues relating to, as the title suggests, consular access, such as the immediate notification to the other State of the arrest, detention or imprisonment of one of its nationals<sup>36</sup>. Primarily, India stated that the claim brought by it exclusively relates to the VCCR, and does not concern the rights and obligations of the Parties arising under the 2008 Agreement<sup>37</sup>. In addition, India argued that the “2008 Agreement . . . is not registered with the United Nations under Article 102 of the Charter,

<sup>33</sup> CR 2017/6, p. 17 (Qureshi).

<sup>34</sup> Request for provisional measures, para. 22.

<sup>35</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Provisional Measures, Order of 7 December 2016*, *I.C.J. Reports 2016 (II)*, pp. 1155, 1165-1166 and 1168, paras. 31, 71-72 and 82-83.

<sup>36</sup> Application instituting proceedings, Ann. 10, para. (ii).

<sup>37</sup> *Ibid.*

and therefore under paragraph 2 of Article 102 this Agreement cannot be invoked before any organ of the United Nations”<sup>38</sup>.

12. According to India, the argument that the 2008 Agreement exhaustively regulates the matter of consular access between the Parties “lacks merit both because of the express provisions of the [VCCR], as well as the plain language of the [2008 Agreement]”<sup>39</sup>. India pointed out that:

“[i]n the [2008] Agreement, (. . .) the two signatory States (. . .) agreed to certain measures. They included release and repatriation of persons within one month of confirmation of their national status and completion of sentences. The Agreement recognized that in case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its own merits, and that in special cases which call for or require compassionate and humanitarian considerations, each side may exercise its discretion subject to its laws and regulations to allow early release and repatriation of persons.”<sup>40</sup>

13. India more specifically argued that the 2008 Agreement was irrelevant for four reasons:

- “(a) India does not rely upon the [2008] Agreement . . . It bases its claim solely upon the [VCCR]. India’s claim in its Application is *de hors* this Bilateral Agreement.
- (b) Article 102 (2) of the United Nations Charter 1945 proscribes invocation of any Agreement, unless it is registered. This Agreement is admittedly not registered.
- (c) Article 73 of the [VCCR] recognizes that the [VCCR] does not affect other international agreements in force. It also, however, expressly does not ‘preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof’.
- (d) Article 41 of the Vienna Convention on the Law of Treaties recognizes and expostulates the established principle of international law that two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty between themselves, if the possibility of such a modification is provided for by the treaty, or the modification in question is not prohibited by the treaty, and does not relate to a provision, the derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole . . . Article 73 of the [VCCR]

<sup>38</sup> CR 2017/5, p. 17, para. 16 (Sharma).

<sup>39</sup> Application instituting proceedings, para. 44.

<sup>40</sup> *Ibid.*, para. 45.

recognizes that there is scope for parties to supplement and amplify the provisions of the [VCCR] — it does not, certainly does not, countenance a dilution of the principles embodied in the [VCCR].”<sup>41</sup>

14. The Court correctly noted that:

“In respect of the 2008 Agreement, . . . the Court considers that there is no sufficient basis to conclude at this stage that the 2008 Agreement prevents it from exercising its jurisdiction under Article I of the Optional Protocol over disputes relating to the interpretation of the application of Article 36 of the [VCCR].”<sup>42</sup>

*Prima Facie Jurisdiction*

15. The Court may indicate provisional measures only if it satisfies itself that it has prima facie jurisdiction over the merits of the dispute<sup>43</sup>. India’s Co-Agent, Mr. V. D. Sharma, stated that “India relies upon the jurisdiction of this Court under paragraph 1 of Article 36 of the Statute of this Court”<sup>44</sup>. This was reiterated by Mr. Salve, who submitted that “India does not seek to assert jurisdiction for its Application in paragraph 2 of Article 36 of the Statute”<sup>45</sup>, but on “the jurisdiction of the Court conferred by Article 36, paragraph 1, of the Statute of the Court, and Article I of the Optional Protocol Concerning Compulsory Settlement of Disputes”<sup>46</sup>. Article I states that:

“[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol”.

16. In its Order, the Court upheld India’s position, insofar as it stated that

“the Applicant seeks to ground [the Court’s] jurisdiction in Article 36, paragraph 1, of the Statute, and Article I of the Optional Protocol [to the VCCR]; it does not seek to rely on the Parties’ declarations under Article 36, paragraph 2, of the Statute”<sup>47</sup>.

<sup>41</sup> CR 2017/5, pp. 34-35, para. 66 (Salve).

<sup>42</sup> Order, para. 33.

<sup>43</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, p. 151, para. 18.

<sup>44</sup> CR 2017/5, p. 16, para. 8 (Sharma).

<sup>45</sup> *Ibid.*, p. 30, para. 53 (Salve).

<sup>46</sup> *Ibid.*, p. 29, para. 49 (Salve).

<sup>47</sup> Order, para. 26.

17. In *LaGrand*, Germany based the Court's jurisdiction on the same legal instrument as India in the present case. Similarly to the present case, neither Germany nor the United States had made any reservation to the Optional Protocol to the VCCR. The Court found that it was satisfied "that, prima facie, it has jurisdiction under Article I of the aforesaid Optional Protocol to decide the dispute between Germany and the United States of America"<sup>48</sup>. The facts of this case, which concern the arrest, detention and sentencing to death of Mr. Jadhav, are similar to those in *LaGrand*. In addition, the jurisdictional basis invoked by India in the present case and by Germany in *LaGrand* are identical. In both cases, neither State made reservations to Article I of the Optional Protocol to the VCCR. Consistency with the Court's earlier prima facie jurisdiction jurisprudence requires the Court to reach in the present case the same conclusion it reached in *LaGrand*.

18. Moreover, India showed that a dispute prima facie exists between the Parties. In its Order on provisional measures in the present case, the Court endorsed the necessity to enquire into whether a dispute prima facie exists between the Parties<sup>49</sup>, as previously held in *Equatorial Guinea v. France*<sup>50</sup>. The existence of a dispute is clearly evidenced by the 13 Notes Verbales sent by the High Commission of India and the Ministry of Foreign Affairs of India to Pakistan's Ministry of Foreign Affairs, annexed to India's Application instituting proceedings. Such Notes Verbales show that the Parties hold opposing views concerning the interpretation and application of Article 36, paragraph 1, of the VCCR in respect of Mr. Jadhav. India's case could be regarded as being even stronger than *LaGrand* from the perspective of the prima facie existence of a dispute, owing to India's thirteen requests to have consular access to Mr. Jadhav since his arrest. In addition, while India argued for an unfettered right to consular access under the VCCR, Pakistan seemed to contend that it can be subjected to certain conditions, such as, in this case, India's response to Pakistan's request for mutual judicial assistance. On the prima facie existence of a dispute between the Parties, the Court stated, in the Order on provisional measures, that "the Parties do indeed appear to have differed, and still differ today, on the question of India's consular assistance to Mr. Jadhav under the [VCCR]"<sup>51</sup>. At this stage, this is enough evidence to conclude that a dispute prima facie exists between the Parties.

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<sup>48</sup> *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Report 1999 (I)*, p. 14, para. 18.

<sup>49</sup> Order, para. 28.

<sup>50</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1157, para. 37.

<sup>51</sup> Order, para. 29.

19. In *Equatorial Guinea v. France*, the Court went further, and found that “[i]n order to determine whether it has jurisdiction — even prima facie — the Court must also ascertain whether . . . a dispute is one over which it might have jurisdiction *ratione materiae* . . .”<sup>52</sup>. This entails that the Court should satisfy itself that the facts, as presented by India, prima facie give rise to a dispute falling within the scope of Article I of the Optional Protocol to the VCCR. The Court emphasized this point in its Order on provisional measures, as it found that “[in] order to determine whether it has jurisdiction — even prima facie — the Court must also ascertain whether such a dispute is one over which it might have jurisdiction *ratione materiae* on the basis of Article I of the Optional Protocol”<sup>53</sup>. The Court rightly found that:

“the acts alleged by India are capable of falling within the scope of Article 36, paragraph 1, of the [VCCR], which, *inter alia*, guarantees the right of the sending State to communicate with and have access to its nationals in the custody of the receiving State . . . as well as the right of its nationals to be informed of their rights . . .”<sup>54</sup>.

The Court’s assessment is correct. Pakistan’s actions, of which India complains, prima facie fall within the scope of the rights conferred on India by Article 36, paragraph 1, of the VCCR. India alleged that Pakistan breached its international obligations to grant consular access in accordance with the VCCR, especially by denying Mr. Jadhav the chance to communicate with the Indian consular authorities, as well as by preventing such authorities from entering into contact with Mr. Jadhav. Therefore, the dispute which India brought before the Court is one which prima facie falls within the scope *ratione materiae* of the VCCR.

20. The facts presented by India concern the arrest, detention and conviction of an Indian national, who was allegedly deprived of consular assistance to which he was entitled under Article 36, paragraph 1, of the VCCR. Mr. Khawar Qureshi, counsel for Pakistan, contended that persons suspected of espionage or terrorism are excluded from the scope of the VCCR, since “there must be no interference in the internal affairs of the receiving State”<sup>55</sup>, as required under Article 55 of the VCCR<sup>56</sup>. In this perspective, allowing consular access to a person suspected of espionage would be tantamount to interfering with the internal affairs of a State,

<sup>52</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1164, para. 67.

<sup>53</sup> Order, para. 30.

<sup>54</sup> *Ibid.*

<sup>55</sup> CR 2017/6, pp. 20-21 (Qureshi).

<sup>56</sup> Article 55, paragraph 1, of the VCCR states that “[w]ithout prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of the State.”

and thus a breach of the VCCR. The Court rightly noted that the VCCR “does not contain express provisions excluding from its scope persons suspected of espionage or terrorism”<sup>57</sup>. Yet, this argument wades into the merits of the case and it is premature to examine it at this stage of the proceedings. The Court showed awareness of this, as it stated that

“[a]t this stage, it cannot be concluded that Article 36 of the [VCCR] cannot apply in the case of Mr. Jadhav so as to exclude on a prima facie basis the Court’s jurisdiction under the Optional Protocol”<sup>58</sup>.

21. The title of jurisdiction invoked by India is Article I of the Optional Protocol to the VCCR, and not the Parties’ declarations under Article 36, paragraph 2, of the Court’s Statute. India explained that, even assuming that the Parties’ Optional Clause declarations were relevant,

“where the Court has jurisdiction based on both optional declarations and compulsory jurisdiction clauses in treaties, . . . each title is autonomous and ranks equally with the others”<sup>59</sup>.

This principle is borne out by the Court’s jurisprudence, especially *Electricity Company of Sofia and Bulgaria*<sup>60</sup>, *Border and Transborder Armed Actions*<sup>61</sup>, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*<sup>62</sup>, as well as *Appeal Relating to the Jurisdiction of the ICAO Council*<sup>63</sup>. Therefore, even if the Parties’ declarations under Article 36, paragraph 2, of the Statute were relevant, and even assuming that Pakistan’s declaration effectively excluded the Court’s jurisdiction in the present case on a prima facie level, the Court could still assert prima facie jurisdiction on the basis of the Optional Protocol to the VCCR, in full accordance with its established jurisprudence.

<sup>57</sup> Order, para. 32.

<sup>58</sup> *Ibid.*

<sup>59</sup> CR 2017/5, p. 30, para. 55 (Salve).

<sup>60</sup> *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77, p. 76.*

<sup>61</sup> *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 78, para. 20.*

<sup>62</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II), p. 918, para. 54 (separate opinion Abraham).*

<sup>63</sup> *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972, p. 60, para. 25.*

*Plausibility*

22. In order to indicate provisional measures, the Court should also satisfy itself that the rights claimed by India on the merits are plausible<sup>64</sup>. In *Certain Activities*, the Court stated that it “may exercise [the] power [to indicate provisional measures] only if it is satisfied that the rights asserted by a party are at least plausible”<sup>65</sup>. In its most recent Order on provisional measures in *Ukraine v. Russian Federation*, the Court found that it “need only decide whether the rights claimed by [the applicant State] on the merits, and for which it is seeking protection, are plausible”<sup>66</sup>. Furthermore, the Court also found that, in order for the rights claimed by the applicant State on the merits to be plausible, the acts alleged by the applicant State itself must fall within the scope *ratione materiae* of the treaty whose violation is alleged<sup>67</sup>.

23. In this instance, India alleged that Pakistan violated Article 36, paragraph 1, of the VCCR. Specifically, India argued that in cases in which a foreign national is being prosecuted for actions which

“carry the sanction of capital punishment, and the trial is by a military court, the need for consular access and the opportunity to arrange for legal representation in the course of the trial, as covenanted in the [VCCR], is all the more greater”<sup>68</sup>.

24. The 1961 ILC Commentary to the Draft Articles that became the VCCR states, with respect to the predecessor of Article 36, that “the receiving State must permit the consular official to visit a national of the sending State who is in custody, prison or detention in his consular district, to converse with him, and to arrange for his legal representation”<sup>69</sup>. The ILC Commentary specifies that this also applies in “cases where the judgment convicting the national has become final”<sup>70</sup>. Based on the material provided by the Parties, it is currently unclear whether an appeal

<sup>64</sup> CR 2017/5, p. 19, para. 11 (Salve).

<sup>65</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p. 18, para. 53.

<sup>66</sup> *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017, p. 126, para. 64.

<sup>67</sup> *Ibid.*, pp. 131-132, para. 75. In *Ukraine v. Russia*, the issue concerned whether the acts alleged by Ukraine were plausibly acts of terrorism in the sense of Article 2 of the International Convention for the Suppression of the Financing of Terrorism, and thus plausibly fell within the scope of that treaty.

<sup>68</sup> CR 2017/5, p. 29, para. 47 (Salve).

<sup>69</sup> *Yearbook of the International Law Commission* (1961), Vol. II, p. 112, para. 4 (c).

<sup>70</sup> *Ibid.*, p. 113, para. 4 (c).

against Mr. Jadhav's death sentence is still pending. In any event, Article 36, paragraph 1, of the VCCR applies irrespective of whether proceedings against a foreign national are still pending.

25. India alleged that it was denied access to Mr. Jadhav after having been made aware of its arrest and of the judicial proceedings against him. The facts alleged by India plausibly fall within the scope of Article 36, paragraph 1, of the VCCR, insofar as they concern the denial of consular assistance to a person entitled to it under the Convention. As evidenced from the record, the Indian authorities repeatedly contacted the Pakistani authorities in order to obtain consular access to Mr. Jadhav. Questions of consular access fall squarely within the scope of the VCCR, and specifically of Article 36, paragraph 1. It follows that the rights claimed by India on the merits are plausible.

#### *Real and Imminent Risk of Irreparable Prejudice*

26. The Court may indicate provisional measures only if there is a real and imminent risk of irreparable prejudice to the rights of the applicant State. According to recent orders on provisional measures, prejudice to a State's rights is "irreparable" if, without indicating provisional measures, it would be impossible to restore the *status quo ante* once the dispute is finally settled<sup>71</sup>. Furthermore, there is a real and imminent risk of irreparable prejudice if "action prejudicial to the rights of either party is likely to be taken before [a] final decision is given"<sup>72</sup>.

27. The facts of the present case are similar to those in *Breard*, *LaGrand* and *Avena*, as they all dealt with the scheduled execution of a foreign national. In *Breard*, a Paraguayan national, Mr. Angel Francisco Breard, had been sentenced to death in Virginia, and his execution was scheduled to take place on 14 April 1998<sup>73</sup>. On 3 April 1998, Paraguay filed a case with the Court against the United States of America on the grounds that Mr. Breard had not been given consular access after his arrest and during

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<sup>71</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures, Order of 7 December 2016, *I.C.J. Reports 2016 (II)*, p. 1169, para. 90; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, *I.C.J. Reports 2014*, p. 154, para. 32.

<sup>72</sup> *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, *I.C.J. Reports 1991*, p. 17, para. 23.

<sup>73</sup> *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998, *I.C.J. Reports 1998*, p. 249, para. 3.

the pendency of the criminal proceedings against him<sup>74</sup>. Paraguay also requested the Court to indicate, as provisional measures under Article 41 of the Statute, that the United States of America “take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case”<sup>75</sup>. On the issue of irreparable prejudice, the Court found that, since Mr. Breard’s execution was already scheduled, the carrying out of such an execution “would render it impossible for the Court to order the relief that Paraguay seeks [on the merits] and thus cause irreparable harm to the rights it claims”<sup>76</sup>.

28. In *LaGrand*, two German brothers, Karl and Walter LaGrand, had been sentenced to death in Arizona<sup>77</sup>. Similarly to *Breard*, the two brothers had not been given consular access to the German authorities<sup>78</sup>. Karl LaGrand was executed on 24 February 1999<sup>79</sup>, and Walter LaGrand was scheduled to be executed on 3 March 1999<sup>80</sup>. On 2 March 1999, Germany sought to stop Walter LaGrand’s execution by filing a case with the Court and requesting urgent provisional measures under Article 41 of the Statute. The Court held no hearings owing to the extreme urgency of the matter<sup>81</sup>, and indicated, as provisional measures, that the United States of America shall take all measures to ensure a stay of the execution of Walter LaGrand<sup>82</sup>. From the point of view of irreparable prejudice, the Court found that the “execution [of Walter LaGrand] would cause irreparable harm to the rights claimed by Germany”<sup>83</sup>.

29. *Avena* is comparable to *Breard* and *LaGrand*. In *Avena*, Mexico filed with the Court an Application against the United States of America, as well as a Request for provisional measures seeking to protect the rights of a number of Mexican nationals on death row in the United States of America<sup>84</sup>. Mexico grounded its claim in the alleged violation by the United States of America of Article 36, paragraph 1, of the VCCR<sup>85</sup>, since the United States of America had not given consular access to the individuals Mexico was seeking to protect. A number of such individuals

<sup>74</sup> *I.C.J. Reports 1998*, p. 249, para. 3.

<sup>75</sup> *Ibid.*, p. 251, para. 9.

<sup>76</sup> *Ibid.*, p. 257, para. 37.

<sup>77</sup> *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 24.

<sup>78</sup> *Ibid.*, p. 10, para. 2.

<sup>79</sup> *Ibid.*, p. 12, para. 8.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, p. 14, para. 21.

<sup>82</sup> *Ibid.*, p. 16, para. 29.

<sup>83</sup> *Ibid.*, p. 15, para. 24.

<sup>84</sup> *Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 78, para. 2.

<sup>85</sup> *Ibid.*

had had their execution dates fixed, while others had not<sup>86</sup>. The Court indicated provisional measures only in respect of those individuals whose execution had been scheduled, and decided that the United States of America shall take all measures to ensure that the executions of these individuals not be carried out pending the final judgment in the case<sup>87</sup>. Concerning irreparable prejudice, the Court found, in respect of the Mexican nationals scheduled to be executed in the United States of America, that “their execution would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico”<sup>88</sup>.

30. In the present case, the facts as presented by India closely resemble those in *Breard*, *LaGrand* and *Avena*. Mr. Jadhav, an Indian national, has similarly been sentenced to death by a Pakistani military tribunal. Should this sentence be carried out, as it would be likely to occur if Mr. Jadhav’s appeal were to fail, the harm would be irreparable to India’s underlying case, as no relief could return India to the *status quo ante*.

31. In addition to finding that there exists a risk of irreparable prejudice to the rights claimed, the risk must be imminent, or, in the Court’s language, there must be urgency in the circumstances<sup>89</sup>. This has previously been described by the Court as situations that are “unstable and could rapidly change”<sup>90</sup>. In the present case, the exact date of Mr. Jadhav’s execution is unknown. In *Avena*, the Court decided not to award provisional measures to protect those Mexican nationals whose date of execution had not been set<sup>91</sup>, while indicating provisional measures with respect to those Mexican nationals whose execution was already scheduled. The Court did not comment on whether a time scale of days, weeks or months would be determinative of a finding of urgency, as Pakistan suggested<sup>92</sup>.

32. However, the facts and circumstances of this case are vastly different. In the United States of America, execution dates are communicated to the public, generally with several weeks of notice, if not longer. This seemed to have a significant bearing on whether Mexico’s Request for

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<sup>86</sup> *I.C.J. Reports 2003*, p. 81, para. 11.

<sup>87</sup> *Ibid.*, pp. 91-92, para. 59.

<sup>88</sup> *Ibid.*, p. 91, para. 55. This paragraph of the Order on provisional measures in *Avena* was quoted by Mr. Salve at CR 2017/5, p. 23, para. 23.

<sup>89</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 392, para. 129.

<sup>90</sup> *Ibid.*, p. 396, para. 143.

<sup>91</sup> *Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, pp. 91-92, para. 59.

<sup>92</sup> CR 2017/6, p. 15 (Qureshi).

provisional measures was urgent. However, in the case of Pakistan, it is unclear both whether his date of execution would be communicated in advance to the public and the Indian authorities, and by which means. India has argued that a panel to consider the appeal against Mr. Jadhav's death sentence has already been constituted, and that the decision on such an appeal could be handed down at any moment. In the oral proceedings, India stated that Pakistan, "while suggesting the availability of 'remedies', fails to provide a clear assurance that until this Court is in seisin of this Application, the sentence will not be executed"<sup>93</sup>. According to counsel for Pakistan, Mr. Jadhav may have recourse to the clemency process under Pakistani law, which "[t]he Application conveniently glossed over"<sup>94</sup>. In this regard, Pakistan stated that "[a] period of 150 days is provided for . . . , which even if it started on 10 April 2017 — which is the date of conviction at first instance — could extend to well beyond August 2017"<sup>95</sup>.

33. Pakistan's argument is not convincing. Urgency is not assessed based on the number of weeks or months likely to elapse before Mr. Jadhav is executed. Urgency is assessed based on whether it is likely that the rights claimed by India on the merits would be irreparably prejudiced during the pendency of the proceedings before the Court. So long as there is a real risk that Mr. Jadhav could be executed before the Court finally disposes of this dispute, it does not matter whether his execution would take place in two days, two weeks, two months or two years. If the Court handed down the final judgment in this case within a two-year time frame, there would be urgent need for provisional measures if it were likely that Mr. Jadhav could be executed within that same time frame.

34. However, the issue is not only the fact that Mr. Jadhav faces execution that may be imminent, but, more specifically, that Pakistan continues to deny the Indian authorities consular access to Mr. Jadhav, violating Article 36 of the VCCR on a prima facie level. The continued denial of consular access already constitutes an on-going breach of the VCCR. Therefore, India's rights under Article 36, paragraph 1, of the VCCR could be seen to be already prejudiced. Should Mr. Jadhav be executed, such prejudice would become irreparable. Even if Mr. Jadhav's execution were stayed pending proceedings before the Court, the protracted denial of consular access would irreparably prejudice India's rights. Without consular access, India could not adequately assess and contribute to Mr. Jadhav's defence in the current court proceedings in Pakistan, and similarly could not ensure that Mr. Jadhav is humanely treated while in

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<sup>93</sup> CR 2017/5, p. 24, para. 26 (Salve).

<sup>94</sup> CR 2017/6, p. 15 (Qureshi).

<sup>95</sup> *Ibid.*, p. 10, para. 16 (Faisal).

custody. The facts alleged by India show that there is a real and imminent risk of irreparable prejudice to the rights it asserts on the merits.

*Link between the Rights Invoked and the Provisional Measures Requested*

35. In *Certain Activities*, the Court stated that “a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought”<sup>96</sup>. Similarly, in *Belgium v. Senegal* the Court held that “a link must . . . be established between the provisional measures requested and the rights which are the subject of the proceedings before the Court as to the merits of the case”<sup>97</sup>. India is requesting the Court to indicate the following provisional measures:

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

36. On their face, such measures appear to be linked to the rights claimed by India on the merits, namely the rights arising under Article 36 of the VCCR. This is similarly supported by the provisional measures ordered in *Avena*, *LaGrand*, and *Breard*. In each of these three cases, the Court indicated that the United States of America take all measures necessary to ensure that the foreign nationals concerned were not executed pending the final judgment<sup>98</sup>. India requested the Court to indicate this very same provisional measure in respect of Mr. Jadhav<sup>99</sup>. In addition, in *Avena* the Court also indicated that the United States of America “shall

<sup>96</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p. 18, para. 54.

<sup>97</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 151, para. 56.

<sup>98</sup> *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998, p. 258, para. 41; *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I), p. 16, para. 29; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, pp. 91-92, para. 59.

<sup>99</sup> Request for provisional measures, para. 22 (a).

inform the Court of all measures taken in implementation of [the] Order”<sup>100</sup>. India also requested the Court to indicate this provisional measure<sup>101</sup>, which previous jurisprudence suggests to be linked to the rights India claims on the merits.

#### CONCLUSION

37. In its request for provisional measures, India stated that “[i]nternational law recognizes the sanctity of human life”<sup>102</sup>. In cases in which a foreign national is arrested, convicted and sentenced to death, the right to consular access, and to seek the assistance of their home country “fulfils the aspiration of a fair trial in a foreign state”<sup>103</sup>. I agree with this statement.

38. A clear case has been made out for the indication of provisional measures in accordance with Article 41 of the Court’s Statute. Consequently, Mr. Kulbhushan Sudhir Jadhav shall not be executed during the pendency of these proceedings before the Court.

(Signed) Dalveer BHANDARI.

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<sup>100</sup> *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, p. 92, para. 59.

<sup>101</sup> Request for provisional measures, para. 22 (b).

<sup>102</sup> *Ibid.*, para. 17.

<sup>103</sup> *Ibid.*