

DECLARATION OF JUDGE SEBUTINDE

The two passports allegedly found in Mr. Jadhav's possession at the time of arrest is a matter that may call his identity or motives in question during criminal proceedings in Pakistan, but this has no bearing on proof of his nationality for purposes of Article 36 of the Vienna Convention on Consular Relations, 1963 ("Vienna Convention") — Each case must be decided on its own merits and in the present case, both Parties accepted his Indian nationality in their diplomatic exchanges — Paragraph (vi) of the Parties' bilateral Agreement of 2008 properly interpreted, relates to the release and repatriation of a certain category of persons, as an exception to paragraph (v) — Accordingly, where a national of a sending State was arrested, detained or sentenced in the receiving State on political or security grounds and has completed his/her sentence, the receiving State may examine the merits of the case in determining the release and repatriation of that person — It does not serve to deprive persons suspected of espionage or terrorism, of consular access rights under Article 36 of the Vienna Convention, nor does it render such rights "discretionary" or "conditional" — While the rights and privileges accorded by Article 36, paragraph 1, of the Vienna Convention are to be exercised in conformity with the domestic laws and regulations of the receiving State, those laws and regulations should not be applied so as to defeat the purposes for which those rights and privileges are intended.

I. INTRODUCTION

1. The present proceedings were brought by the Republic of India ("India") against the Islamic Republic of Pakistan ("Pakistan") on the basis of Article 36, paragraph 1, of the Statute of the Court and of Article 1 of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963 ("Optional Protocol") providing for the compulsory jurisdiction of the Court over "disputes arising out of the interpretation or application" of the Vienna Convention on Consular Relations, 1963 ("Vienna Convention"). India and Pakistan have been parties to the Vienna Convention since 28 December 1977 and 14 May 1969, respectively, and to the Optional Protocol since 28 December 1977 and 29 April 1976, respectively. Neither of the Parties has made reservations to those instruments. Article 1 of the Optional Protocol provides 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.”

2. India claims that Pakistan has committed breaches of the Vienna Convention in relation to the treatment of Mr. Kulbhushan Sudhir Jadhav, an Indian national who was detained in early March 2016 by Pakistani authorities and tried, convicted and sentenced to death by a Pakistani military court in Islamabad, for espionage and terrorism. India claims that Pakistan as receiving State where the Indian national is being held, has breached the international obligations incumbent upon it under Article 36, paragraphs 1 and 2, of the Vienna Convention towards India as sending State and towards Mr. Jadhav, relating to consular access, contact and communication. Pakistan rejects India’s claims in this regard.

3. Article 36 of the Vienna Convention provides in relevant part, as follows:

“Article 36

Communication and contact with nationals of the sending State

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

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

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.”

4. The Court in its Judgments in *LaGrand*¹ and *Avena*² described the above provisions as

“an interrelated régime designed to facilitate the implementation of [the system of] consular protection. It begins with the basic principle governing consular protection: the right of communication and access (Art. 36 para. 1 (a)). This clause is followed by the provision which spells out the modalities of consular notification (Art. 36, para. 1 (b)). Finally Article 36, paragraph 1 (c), sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State. It follows that when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay . . . the sending State [is] prevented for all practical purposes, from exercising its rights under Article 36, paragraph 1.”

5. From the outset I wish to clarify that I have voted with the majority in the operative part (*dispositif*) of the Judgment (para. 149). In my opinion however, there are a number of aspects in the reasoning of the Court where more light could have been shed in order to assist the reader to understand why the Court decided certain issues the way it did. These include (i) whether the issue of Mr. Jadhav’s questionable identity as appears in the two passports found in his possession at the time of arrest, has a bearing on proof of his nationality, for purposes of Article 36 of the Vienna Convention; (ii) whether the provisions of the Parties’ bilateral Agreement of 2008 exclude the application of Article 36 of the Vienna Convention, to persons suspected of espionage or terrorism; and (iii) the impact of domestic law on the right of consular access under the Vienna Convention. In this declaration, I attempt to deal with each of those aspects in greater detail.

¹ *LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 492, para. 74.

² *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, *I.C.J. Reports 2004 (I)*, p. 39, para. 50.

II. THE IMPACT OF MR. JADHAV'S DUAL IDENTITY ON PROOF OF HIS NATIONALITY

6. Pakistan has argued extensively about the fact that Mr. Jadhav's identity and, consequently, his nationality are in doubt. It claims that, upon his arrest by the Pakistani authorities, Mr. Jadhav was found in possession of an Indian passport No. L9630722 — issued on 12 May 2015 in the “Muslim” names of “Hussein Mubarak Patel” and bearing Mr. Jadhav's photograph — in addition to another Indian passport bearing the “Hindu” names of “Kulbhushan Sudhir Jadhav”. According to Pakistan, passport No. L9630722 was authenticated by the Respondent's experts as a “genuine Indian passport”. On its part, India discounts passport No. L9630722 as a forgery and describes Pakistan's claim that it was found in Jadhav's possession as “patently false”. Pakistan contends that Article 36 of the Vienna Convention is not engaged “until and unless the ‘sending state’ furnishes evidence of the nationality of the individual concerned”³ and that, in the present case, India has failed to prove Mr. Jadhav's nationality⁴. Pakistan challenges Mr. Jadhav's nationality on the grounds that the two passports found in his possession at the time of his arrest show a dual or fake identity and therefore cannot be taken as genuine proof of his nationality. According to Pakistan, a valid passport is considered the primary official document that certifies the bearer to be a citizen of the issuing State⁵. Thus, if a passport is found to have been issued in contravention of the law, it is not valid for any purpose in international law⁶. Accordingly, Pakistan raises the objection to Mr. Jadhav's identity not only as a jurisdictional argument, but also on the merits, where it claims that India deliberately issued Mr. Jadhav several passports in order to mask his true identity and in order to facilitate him to commit acts of espionage and terrorism in Pakistan.

7. India, while not commenting upon Mr. Jadhav's identity as such, maintains that he is an Indian national and that Pakistan itself recognized this fact in its Notes Verbales of 23 January 2017⁷, 21 March 2017⁸ and 10 April 2017⁹. India argues that Mr. Jadhav's Indian nationality has

³ Counter-Memorial of Pakistan (CMP), para. 11.

⁴ CMP, paras. 235, 268; CR 2019/2, p. 40, paras. 82-84 (Qureshi).

⁵ CMP, para. 244; CR 2019/2, p. 40, paras. 83-84 (Qureshi).

⁶ CMP, para. 249.

⁷ Application of India (AI), Ann. 2.

⁸ *Ibid.*, Ann. 3.

⁹ *Ibid.*, Ann. 5.

never been in dispute¹⁰ and that Pakistan's jurisdictional objection in this regard is "frivolous"¹¹. India observes that Pakistan has, in its communications with India and in public fora, characterized Mr. Jadhav as an Indian national who had been sent by India to spy on and promote terrorism in Pakistan¹². Furthermore, Pakistan refers to Mr. Jadhav as "Commander Jadhav" on the premise that he is a serving officer of the Indian Navy. India states that "in order to be a member of the Armed Forces, he has to be . . . an Indian national"¹³.

8. The Judgment says very little on the aspect of Mr. Jadhav's identity in view of the Parties' arguments outlined above (see paragraph 57). Under the Vienna Convention, a State has standing to claim consular access only in relation to its own nationals. It is this bond of nationality that confers upon a sending State the right of consular access to its nationals¹⁴. Thus, where the claimant State is unable to establish the nationality of an individual, it will have failed to establish its legal interest or standing in relation to that individual¹⁵.

9. In *Avena*, the Court held that a claimant State seeking to enforce rights under Article 36 of the Vienna Convention bears the burden of establishing the nationality of the individual in question¹⁶. The Court found that Mexico (the claimant State) had discharged its burden of proof and established the nationality of the persons it claimed as its nationals through the production of birth certificates and declarations of nationality¹⁷. The Court went on to reject the United States' argument that certain of those Mexican nationals held dual United States nationality, finding that the United States had failed to furnish the Court with evidence demonstrating such claimed dual nationality, and had thus failed to discharge its burden of proof¹⁸. Furthermore, the Court held that the detaining authorities had a duty to comply with the provisions of

¹⁰ Reply of India (RI), para. 101; CR 2019/1, p. 14, para. 20 (Salve); CR 2019/3, p. 17, para. 50 (Salve).

¹¹ RI, para. 100.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ J. Dugard, "Diplomatic Protection", *Max Planck Encyclopedia of Public International Law*, 2009, p. 118; *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16.

¹⁵ J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, 2012, p. 702.

¹⁶ *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I)*, pp. 41-42, para. 57.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

Article 36, paragraph 1 (*b*), of the Vienna Convention, “as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is *probably* a foreign national”¹⁹.

10. It is for each State to determine, in accordance with its laws, who its nationals or citizens are. In the present case, while the issue of Mr. Jadhav having allegedly been found in possession of two passports bearing two different sets of names may have a significant bearing on the criminal proceedings conducted in Pakistan, it is, in my view, a matter that goes to his identity and must not be confused with his nationality. Indeed while a passport may provide evidence that a person has a particular nationality²⁰, it is not a *precondition* to having such nationality. The determination of an individual’s nationality does not turn on whether that individual has the passport of a particular State. Indeed, millions of people around the world do not possess a passport but this does not render them stateless or without a nationality. Each case has to be determined on its own merits.

11. In all other aspects of its case, Pakistan pursues its arguments on the basis that Mr. Jadhav *is* an Indian national. It only raised the issue of Mr. Jadhav’s nationality 19 months after India’s first request for consular access, without seriously advancing any arguments or evidence to suggest that he was not an Indian national. While in the present case, India has not produced a birth certificate or explicit declarations of his nationality, there are other facts that support the assertion that Mr. Jadhav *is* of Indian nationality, including the following:

- (i) Perhaps the most direct means of ascertaining Mr. Jadhav’s nationality would have been for Pakistani authorities to ask him about it, which they probably did. Mr. Jadhav allegedly admitted throughout his “confessional statement” that he is a serving officer of the Indian Navy; that he joined the Indian National Defence Academy in 1987 and that he had been living in Mumbai, India²¹. While the veracity of this confessional statement — and the means by which it was obtained — are in dispute, the fact that Pakistan accepts and relies on its contents as true, is relevant to its obligations as receiving State, under Article 36 of the Vienna Convention.

¹⁹ Cf. *op. cit. supra* note 16, p. 43, para. 63 and p. 49, para. 88 (emphasis added).

²⁰ See e.g., *Haber v. Iran*, Award No. 437-10159-3 (4 September 1989), Vol. 23, Iran-United States Claims Tribunal, p. 135, paras. 9 and 10 (accepting US passport issued after claim was filed as proof of sole shareholder’s US nationality by birth).

²¹ CMP, paras. 25.1-25.2.

- (ii) India points out that under its domestic law²², Mr Jadhav's position as an Indian Naval officer requires him to be an Indian national²³. In any event, because the consular post of India in Islamabad was prevented from accessing Mr. Jadhav at all, Pakistan could not reasonably require India to provide documentary evidence relating to his nationality without communicating with Mr. Jadhav first.
- (iii) India has consistently maintained in its communications with Pakistan, and more broadly, that Mr. Jadhav *is* an Indian national. Its diplomatic correspondence with Pakistan²⁴, including its 19 requests for consular access²⁵, all refer to Mr. Jadhav as an "Indian national". On 11 April 2017, the Indian Minister of External Affairs issued a statement referring to Mr. Jadhav as an "Indian citizen" in an official weekly media briefing²⁶.
- (iv) Pakistan has also repeatedly asserted Mr. Jadhav's Indian nationality in diplomatic correspondence with India²⁷. In its 23 January 2017 request for mutual legal assistance and its cover letter, Pakistan refers to Mr. Jadhav as an "Indian national" and the request is titled "Letter of Assistance for Criminal Investigation against *Indian National* Kulbhushan Sudhair Jadhav"²⁸ (emphasis added). Pakistan's 21 March 2017 further request for assistance also refers to Mr. Jadhav as an "Indian national"²⁹.

12. In my view, the above facts were sufficient to alert the Pakistani authorities responsible for Mr. Jadhav's arrest and detention that he was, at the very least, *probably* a foreign national, which is sufficient to invoke the receiving State's obligations under Article 36 of the Vienna Convention³⁰. In the circumstances, Mr. Jadhav's Indian nationality should not be cast in doubt simply because of the two passports found in his possession and Pakistan's objection in this regard should be rejected.

²² RI, para. 100.

²³ CR 2019/3 p. 16, para. 43 (Salve).

²⁴ CMP, Vol. 2, Ann. 33, pp. 1-2; *ibid.*, Ann. 41 p. 1; RI, Ann. 15.2, p. 1.

²⁵ CMP, Vol. 2, Anns. 13.1-13.19. India's first request dated 25 March 2016 simply refers to Mr. Jadhav as an Indian.

²⁶ *Ibid.*, Vol. 2, Ann. 21. See also *ibid.*, Ann. 22, p. 6.

²⁷ *Ibid.*, Ann. 14; Ann. 17, p. 1; Ann. 19, p. 1; and Ann. 42, p. 2, para. (h).

²⁸ *Ibid.*, Ann. 17, pp. 1-2 (emphasis added).

²⁹ *Ibid.*, Ann. 14.

³⁰ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004 (I), p. 43, para. 63.

III. THE PARTIES' BILATERAL AGREEMENT OF 2008

13. A second important issue that is mentioned briefly in the Judgment relates to the Parties' bilateral Agreement on Consular Access concluded on 21 May 2008 ("the 2008 Agreement") and whether the provisions of that Agreement render Article 36 of the Vienna Convention inapplicable to persons suspected of espionage or terrorism. Without engaging in a detailed analysis and interpretation of the 2008 Agreement, the Judgment makes a number of "assumptions" and "presumptions" on the basis of which it concludes that

"the Court is of the view that the 2008 Agreement is a subsequent agreement intended to 'confirm, supplement, extend or amplify' the Vienna Convention. Consequently, the Court considers that point (vi) of that Agreement does not, as Pakistan contends, displace the obligations under Article 36 of the Vienna Convention." (Judgment, para. 97.)

Whilst I agree that the Court does not have jurisdiction to settle disputes regarding the interpretation or application of the 2008 Agreement, *per se*, I am of the view that the Court is not precluded from interpreting the provisions and scope of that Agreement in order to determine its impact, if any, on the Vienna Convention. This is in fact what the Parties have called on the Court to do through their arguments. In my view, it is not enough that the Court has reached its conclusion based on a set of assumptions. I accordingly interpret the provisions of the 2008 Agreement below with a view to ascertaining its impact if any upon the Vienna Convention.

14. Both Parties agree that they concluded the 2008 Agreement pursuant to the provisions of Article 73, paragraph 2, of the Vienna Convention and that it was intended to supplement the provisions of the Convention, as between themselves. However, the Parties disagree on the interpretation of some of the provisions of that Agreement (in particular paragraph (vi)) and how those provisions impact the application of the Vienna Convention as between India and Pakistan.

15. Pakistan argues that the 2008 Agreement was negotiated and signed expressly to deal with the issue of consular access between the Parties within their specific context of "national security"³¹. It contends that the nature and circumstances of Mr. Jadhav's criminal activities of espionage and/or terrorism brought his arrest squarely within the "national security" qualification stipulated in paragraph (vi) of the 2008 Agreement. Accordingly, Article 36 of the Vienna Convention is inapplicable to Mr. Jadhav's case and Pakistan is entitled to consider his case "on the merits" and to consider the question of consular access in the particular circumstances of his case³².

³¹ CMP, paras. 374-376.

³² *Ibid.*, para. 385.3-385.4; CR 2019/2, pp. 33-34, paras. 65-68 (Qureshi).

16. India disagrees with Pakistan’s interpretation of the 2008 Agreement as well as its impact on the Vienna Convention. India argues that under Article 73, paragraph 2, of the Vienna Convention, the 2008 Agreement can only supplement the provisions of that Convention and cannot modify those rights and corresponding obligations that form the object and purpose of Article 36 thereof³³. India argues further that there is nothing in the language of the 2008 Agreement that would suggest that India or Pakistan ever intended to derogate from Article 36 of the Vienna Convention and that any provision in the 2008 Agreement that derogates from the rights protected under that Convention would have to yield to the provisions of that Convention³⁴.

17. Furthermore, India argues that the words “examine the case on its merits” in paragraph (vi) of the 2008 Agreement “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”³⁵, as set out in paragraph (v) which directly precedes paragraph (vi). India contends that paragraph (vi) sets out an exception to paragraph (v) and allows for the receiving State to examine on the merits, the release and repatriation to the sending State, of a person where the arrest, detention or sentence of that person was made on political or security grounds³⁶.

18. Article 73 of the Vienna Convention provides in relevant part, as follows:

“Article 73

*Relationship between the present Convention and
other international agreements*

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2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.”

19. The Judgment correctly observes that the implication of this provision, is that only agreements confirming, supplementing, extending or amplifying the provisions of the Vienna Convention are permitted (see Judgment, paragraph 97). By virtue of an *a contrario* interpretation, an agreement that purports to negate, limit or derogate from the rights and obligations provided for under Article 36, would be inconsistent with Article 73.

³³ AI, p. 23, para. 48.

³⁴ MI, para. 99; CR 2019/1, pp. 30-31, paras. 105-109 (Salve).

³⁵ RI, para. 144; CR 2019/1, p. 32, para. 114 (Salve).

³⁶ RI, para. 144.

20. The 2008 Agreement provides as follows:

“Agreement on Consular Access

The Government of Pakistan and the Government of India, desirous of furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country, have agreed to reciprocal consular facilities as follows:

- (i) 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.
- (ii) Immediate notification of any arrest, detention or imprisonment of any person of the other country shall be provided to the respective High Commission.
- (iii) Each Government undertakes to expeditiously inform the other of sentences awarded to the convicted nationals of the other country.
- (iv) Each Government shall provide consular access within three months to nationals of one country, under arrest, detention or imprisonment in the other country.
- (v) Both Governments agree to release and repatriate persons within one month of confirmation of their national status and completion of sentences.
- (vi) In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits.
- (vii) In special cases, which call for or require compassionate and humanitarian considerations, each side may exercise its discretion subject to its laws and regulation[s] to allow early release and repatriation of persons.

This agreement shall come into force on the date of its signing.

Done at Islamabad on 21 May, 2008 . . .”.

21. In my view, paragraph (vi) of the 2008 Agreement, the meaning of which is in dispute between the Parties, cannot be interpreted or understood in isolation. In accordance with the rules of customary international law, the provisions of the 2008 Agreement must be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in light of the object and purpose of that Agreement³⁷. Recourse may be had to the drafting history (*travaux préparatoires*) in order to confirm the meaning of the provisions, or to remove ambiguity of obscurity, or to

³⁷ Vienna Convention on the Law of Treaties, 1969, Art. 31.

avoid a manifestly absurd or unreasonable result³⁸. I am also of the view that, in accordance with Article 73, paragraph 2, of the Vienna Convention, the 2008 Agreement forms part of the context of the Vienna Convention.

22. First, the object and purpose of the Vienna Convention is to “contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems”, by bestowing upon consular posts certain privileges and immunities in order to enable them to efficiently perform their functions on behalf of their respective States³⁹. On the other hand, the object and purpose of the 2008 Agreement is to further the “humane treatment of nationals of either country arrested, detained or imprisoned in the other country”⁴⁰. Clearly the object and purpose of the 2008 Agreement appears to complement that of the Vienna Convention.

23. Paragraph (iv) of the 2008 Agreement is the only provision that explicitly refers to “consular access” and that provision obligates the sending State to provide consular access to its nationals under arrest, detention or imprisonment in the receiving State “within three months” of receiving notification of such arrest, detention or imprisonment. This is followed by paragraph (v), which obligates the receiving State to release and repatriate the nationals of the sending State within one month of confirmation of their national status and completion of their sentence. Paragraph (vi) whose meaning is disputed, provides that “[i]n case of arrest, detention or sentence on political or security grounds, each side may examine the case on its merits”. Finally, paragraph (vii) provides that in special cases, which call for compassionate considerations, each side may exercise discretion to allow early release and repatriation of the national. None of the above obligations are stipulated or replicated in the Vienna Convention and can therefore be said to “supplement” or “extend” or “amplify” its provisions.

24. The placement of a provision in a treaty also undoubtedly forms a part of its context. The fact that paragraph (vi) is placed between two provisions that relate to the release and repatriation of nationals, supports the interpretation that it is also a provision that relates to the release and repatriation of nationals. Thus, where a person was arrested, detained or sentenced on political or security grounds, and has completed his/her sentence, the receiving State may examine the merits of the case in determining the release and repatriation of that person. This reading is consistent with the object and purpose of that Agreement, namely, to further the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country. That interpretation also

³⁸ Vienna Convention on the Law of Treaties, 1969, Art. 32.

³⁹ Preamble to the Vienna Convention.

⁴⁰ Preamble to the 2008 Agreement.

leaves intact the rights and obligations of the Parties under Article 36 of the Vienna Convention and is compatible with the object and purpose of that Convention.

25. The *travaux préparatoires* of the 2008 Agreement confirms the above interpretation. In 1982 India and Pakistan concluded a bilateral Agreement of Consular Access (“1982 Agreement”), which formed the basis of the negotiations for the 2008 Agreement⁴¹. The 1982 Agreement made clear that a receiving State could, upon examination of the merits of the case, deny requests of the sending State for consular access to its nationals accused of political or security offences. Paragraph (iii) of the 1982 Agreement provided that

“[e]ach Government shall give consular access on a reciprocal basis to nationals of one country under arrest, detention or imprisonment in the other country, *provided they are not apprehended for political or security reasons/offences. Request for such access and the terms thereof shall be considered on the merits of each case* by the Government arresting the person or holding the detenus/prisoners and the decision on such requests shall be conveyed to the other Government within four weeks from the date of receipt of the request.”⁴² (Emphasis added.)

26. However, during the bilateral negotiations leading up to the 2008 Agreement, paragraph (iii) of the 1982 Agreement was deleted in its entirety and was replaced during negotiations in October 2005 by draft paragraph (iii). That draft paragraph provided as follows: “Each Government shall give consular access to *all* nationals of the other country under arrest, detention or imprisonment within three months of the date of arrest/detention/sentence.”⁴³ (Emphasis added.) The final text of the bilateral Agreement was agreed and the treaty signed on 21 May 2008. Paragraph (iii) of the 1982 Agreement as adopted in its final form (now paragraph (iv) of the 2008 Agreement) provides that “[e]ach Government shall provide consular access within three months to nationals of one country, under arrest, detention or imprisonment in the other country”⁴⁴.

⁴¹ CMP, Vol. 7, Ann. 160.

⁴² *Ibid.*, Ann. 160, p. 3, paragraph (iii); emphasis added.

⁴³ *Ibid.*, para. 354 and Ann. 160.

⁴⁴ MI, Ann. 10.

27. Thus, a clear exception to consular access to individuals charged with political or security offences was consciously and deliberately removed from the text of the 1982 Agreement and replaced with a broad requirement to give consular access to all nationals of the sending State⁴⁵. This suggests that the Parties did *not* intend to exclude a class of individuals, namely, those who are arrested or detained for political or security offences, from the right to consular access.

28. In my view, the best interpretation of paragraph (vi) of the 2008 Agreement is that it relates to the *release and repatriation* of a certain category of persons, as an exception to paragraph (v). Accordingly, where a national of a sending State was arrested, detained or sentenced in the receiving State on political or security grounds, and he or she has completed his/her sentence, the receiving State may examine the merits of the case in determining the *release and repatriation* of that person. The provision does *not* as Pakistan suggests, serve to deprive this category of persons, of consular access rights under Article 36 of the Vienna Convention, nor render such rights “discretionary” or “conditional”. In other words, Pakistan may not exercise its discretion to deny consular access to Mr. Jadhav either because he is convicted of espionage and terrorism, or because it views India as being guilty of sending him to spy in Pakistan.

29. Similarly, Pakistan may not lay down preconditions such as requiring India to provide certain information first, before complying with its Article 36 obligations. This interpretation is consistent not only with the object and purpose of the 2008 Agreement, but is also consistent with Article 36 of the Vienna Convention and the overall object and purpose of that Convention.

30. Accordingly, the provisions of Article 36 of the Vienna Convention remain applicable and binding in cases where a national of the sending State has been arrested, detained or sentenced on political or security grounds in the receiving State.

⁴⁵ While, notably, draft paragraph (iii) had referred to “all nationals”, the word “all” was removed from the final text of paragraph (iii).

IV. THE IMPACT OF DOMESTIC LAW
ON THE RIGHT
OF CONSULAR ACCESS

31. Pakistan argues that India seeks to use the Vienna Convention to undermine its sovereignty and territorial integrity in a manner inconsistent with its functions under Article 5 of that Convention. Pakistan claims that according to Articles 5 (*i*) and (*m*) and 36 (2) of the Vienna Convention, consular access is not an unqualified right, and cannot involve any act that is prohibited by Pakistan's domestic law. It must be exercised in a manner that accords with Pakistan's domestic law⁴⁶. This is an issue that the Judgment briefly touches upon in paragraph 115.

32. Article 5 of the Vienna Convention provides in relevant part that

“[c]onsular functions consist in:

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- (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;
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- (m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.”

33. Article 36, paragraph 2, provides as follows:

“The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, *subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.*” (Emphasis added.)

⁴⁶ CMP, para. 344.

34. Article 55, paragraph 1, provides as follows:

“1. *Without 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 that State.” (Emphasis added.)

35. Pakistan overlooks the importance of the final clause of Article 36, paragraph 2, which requires that domestic laws “must enable full effect to be given to the purposes” for which the rights accorded under Article 36 are intended. This clause implicates the well-settled principle that the breach of international law cannot be justified by reference to domestic law. This principle was also at issue in *LaGrand* where the Court held that the United States was in breach of the Vienna Convention because its procedural default rule, as applied, did not enable full effect to be given to Article 36 of that Convention⁴⁷. Pakistan’s approach would directly contradict “the purposes for which the rights accorded under [Article 36] are intended”⁴⁸. Similarly, the opening phrase in Article 55 preserves the consular rights and privileges accorded by the Vienna Convention, regardless of the domestic law of the receiving State.

36. It appears that — right from the arrest of Mr. Jadhav and without waiting for his trial — Pakistan determined that he was a spy who under Pakistani law was not entitled to consular access and, similarly, that India having “interfered in the internal affairs of Pakistan” had also forfeited its right to consular access, under Article 36 of the Vienna Convention. Based on that presumption, Pakistan went ahead to deny Mr. Jadhav of his right to be informed without delay of his consular rights, and to deny officials of the Indian consular post in Islamabad access to its national. Pakistan’s conduct and attitude in this regard flies in the face of Article 36 and of the object and purpose of the Vienna Convention. Under Article 36, paragraph 1 (*b*), India’s consular officers had a right to be informed without delay of Mr. Jadhav’s arrest; a right under Article 36 (1) (*a*), to freely access and communicate with Mr. Jadhav; a right under Article 36 (1) (*c*), to visit Mr. Jadhav in prison, custody or detention (with his permission) to converse and correspond with him to arrange for his legal representation. India has established and Pakistan does not deny the fact that apart from informing India of Mr. Jadhav’s arrest 22 days later, at no stage after Mr. Jadhav’s arrest, detention, trial and conviction, were India’s consular officers permitted to access, communicate with or visit Mr. Jadhav, notwithstanding numerous requests. Paki-

⁴⁷ *LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 498, para. 91.

⁴⁸ Vienna Convention, Art. 36 (2).

stan is clearly in violation of its obligations under Article 36 (1) (a), (b) and (c) of the Vienna Convention.

(Signed) Julia SEBUTINDE.
