

DECLARATION OF JUDGE IWASAWA

Applicability of the clean hands doctrine to the present case — Anti-terrorism conventions also require consular access to be granted without delay — Relationship between the Vienna Convention and subsequent agreements — If the 2008 Agreement was intended to allow limitation of consular access in cases of espionage, Article 36 of the Vienna Convention would prevail over the 2008 Agreement.

1. I have voted in favour of all the Court’s findings in the operative paragraph (Judgment, para. 149) and agree for the most part with the reasoning set out in the Judgment. I offer here additional explanations for my support for the findings and set forth my views on some issues not dealt with by the Court in the Judgment.

I. THE CLEAN HANDS DOCTRINE

2. The Court rejected an objection based on the clean hands doctrine five months ago in *Certain Iranian Assets*. In that case, the Court noted that “the United States has not argued that Iran, through its alleged conduct, has violated the Treaty of Amity, upon which its Application is based”, and then declared that

“[w]ithout having to take a position on the ‘clean hands’ doctrine, the Court considers that, even if it were shown that the Applicant’s conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the ‘clean hands’ doctrine” (*Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2019*, p. 44, para. 122; see also *Avena and Other Mexican Nationals (Mexico v. United States of America)*, *Judgment*, *I.C.J. Reports 2004 (I)*, p. 38, para. 47; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2017*, p. 52, para. 142).

3. In the present case, Pakistan gives three grounds for its objection based on the clean hands doctrine: the fact that India provided Mr. Jad-

hav with an authentic Indian passport bearing a false identity; India's failure to provide any substantive response to Pakistan's request for mutual legal assistance; and the fact that India sent Mr. Jadhav into the territory of Pakistan to conduct espionage and terrorist activities. These allegations do not relate to the Vienna Convention on Consular Relations (VCCR) upon which India's Application is based. In the circumstances of the present case, as in *Certain Iranian Assets*, I agree that Pakistan's objection based on the clean hands doctrine does not by itself render India's Application inadmissible (see Judgment, para. 61). An objection based on the clean hands doctrine may make an application inadmissible only in exceptional circumstances.

II. THE RIGHT TO CONSULAR ACCESS

4. Subsequent to the conclusion of the VCCR in 1963, States have concluded a number of anti-terrorism conventions in which they have included the right of a person suspected of terrorism to have access without delay to the representative of the State of which he is a national. For example, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 provides that "[a]ny person in custody [for the purpose of prosecution or extradition for an offence under the Convention] shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national" (Art. 6, para. 3). Comparable provisions are also found in the Convention on Offences and Certain Other Acts Committed on Board Aircraft, of 1963 (Art. 13, para. 3), the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, of 1973 (Art. 6, para. 2), the International Convention against the Taking of Hostages, of 1979 (Art. 6, para. 3), the Convention on the Safety of United Nations and Associated Personnel, of 1994 (Art. 17, para. 2), the International Convention for the Suppression of Terrorist Bombings, of 1997 (Art. 7, para. 3), the International Convention for the Suppression of the Financing of Terrorism, of 1999 (Art. 9, para. 3) and the International Convention for the Suppression of Acts of Nuclear Terrorism, of 2005 (Art. 10, para. 3). In the present case, Mr. Jadhav was charged with espionage and terrorism. Although they are different crimes, they have in common that the receiving State may be inclined to delay consular access in both cases. The aforementioned conventions nevertheless require that consular access be granted without delay in cases of terrorism. According to the rules of treaty interpretation reflected in the Vienna Convention on the Law of Treaties (VCLT), together with the context, subsequent practice in the

application of the treaty (Art. 31 (3) (*b*)) and any relevant rules of international law (Art. 31 (3) (*c*)) should be taken into account, and recourse may be had to supplementary means of interpretation (Art. 32). In my view, the anti-terrorism conventions offer helpful guidance on the practice of the parties to the VCCR in respect of consular access, thus providing additional support for the interpretation that Article 36 of the VCCR requires consular access without delay also for persons suspected of espionage.

III. ARTICLE 73, PARAGRAPH 2, OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

5. Article 73 of the VCCR addresses the relationship between the Convention and agreements concluded between certain of its parties. It deals with *prior* agreements in paragraph 1 and *subsequent* agreements in paragraph 2.

6. Paragraph 1 provides: “The provisions of the present Convention shall not affect other international agreements in force as between States parties to them.” Until 1963, when the VCCR was adopted, consular issues were mostly regulated by a network of bilateral agreements whose content varied. The drafters of Article 73, paragraph 1, intended prior international agreements to remain intact. It is clear from this provision that if the VCCR conflicts with a prior agreement, the prior agreement prevails.

7. Paragraph 2 relates to subsequent agreements. Given that consular matters were regulated by bilateral agreements in various ways, the purpose of the VCCR was to set, to the extent possible, uniform and minimum standards on consular relations, especially on the privileges and immunities of consular officers. It is in this context that Article 73, paragraph 2, provides: “Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.” This provision authorizes the parties to the VCCR to conclude subsequent agreements “confirming or supplementing or extending or amplifying” the provisions of the VCCR. Thus, States may conclude agreements which would regulate matters not dealt with by the VCCR or facilitate the application of the VCCR, such as those stipulating the location of consular posts and the number of consular staff. States may

also conclude agreements which would raise the standards between them, for example by conferring more extensive privileges and immunities.

8. Article 73, paragraph 2, sets out conditions to be fulfilled by subsequent agreements in order for them to be legitimate under the VCCR. They must only confirm, supplement, extend or amplify the provisions of the VCCR. Subsequent agreements not meeting these conditions are “preclude[d]” by Article 73, paragraph 2. Thus, in accordance with the ordinary meaning to be given to the terms in their context and in the light of the object and purpose of the VCCR, Article 73, paragraph 2, should be interpreted as not allowing the parties to the VCCR to conclude subsequent agreements which would derogate from the obligations of the VCCR.

9. This interpretation of Article 73, paragraph 2, is confirmed by the *travaux préparatoires* of the VCCR. Paragraph 2 has its origin in an amendment to Article 73 proposed by India at the Vienna Conference in 1963. During the discussion, the amendment was understood as limiting “the scope of future agreements to provisions which confirmed, supplemented, extended or amplified those of the multilateral convention” (*Official Records of the United Nations Conference on Consular Relations, Vienna, 4 March-22 April 1963* (United Nations, doc. A/CONF.25/16), Vol. I, p. 235, para. 26 (Chile)). India itself explained that “[a] new convention could supplement, extend or amplify the provisions of the multilateral convention, but it must not reverse those provisions”, because “[i]t was undesirable to leave States free to contract out of the basic rules of international law laid down in order to rationalize and harmonize consular law” (*ibid.*, p. 234, paras. 11-12 (India)).

10. Moreover, the interpretation indicated above is in line with the account given by the International Law Commission (ILC) in 1966, three years after the adoption of the VCCR, in its commentary to draft Article 30 of the VCLT. The ILC stated that some clauses inserted in treaties for the purpose of determining the relation of their provisions to those of other treaties entered into by the contracting States, such as

“paragraph 2 of article 73 of the Vienna Convention of 1963 on Consular Relations, which recognizes the right to *supplement* its provisions by bilateral agreements, merely confirm the legitimacy of bilateral agreements which do not derogate from the obligations of the general Convention” (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 214, para. 4, emphasis in the original).

11. The VCLT contains Article 30 on the “Application of successive treaties relating to the same subject-matter” and Article 41 on “Agreements to modify multilateral treaties between certain of the parties only”. These provisions set forth rules on the relationship between successive treaties relating to the same subject-matter. Article 41, in particular, sheds light on the relationship between a prior multilateral treaty and a subsequent agreement concluded between certain of its parties and on the role that Article 73, paragraph 2, of the VCCR may play in this regard. Thus, Articles 30 and 41 of the VCLT are relevant to the examination of the relationship between the VCCR and the 2008 Agreement. In fact, both Parties in this case referred to Article 41 of the VCLT in their arguments. However, as neither India nor Pakistan is a party to the VCLT, I only mention Articles 30 and 41 of the VCLT in passing and refrain from discussing them in detail in this declaration.

12. A subsequent agreement which derogates from the obligations of the VCCR would not be invalidated because it does not meet the conditions set forth in Article 73, paragraph 2. In the discussion held by the ILC on the effects of subsequent agreements not meeting the conditions stipulated in Article 41 of the VCLT, it was generally agreed that such agreements would not be invalidated. While they are not invalidated, they are inapplicable between the parties concerned. Article 73, paragraph 2, of the VCCR allows only subsequent agreements meeting certain conditions. A subsequent agreement not meeting those conditions should not prevail over the VCCR. Otherwise, the purpose of limiting the scope of subsequent agreements to those meeting certain conditions would be defeated. Thus, if a subsequent agreement derogates from the obligations of the VCCR, the VCCR prevails over the agreement and is applied to the relations between the parties concerned. These conclusions would also find support in the rules set forth in Article 41 of the VCLT.

13. Accordingly, in my view, even assuming *arguendo* that the 2008 Agreement was intended to allow limitation of consular access in cases of espionage, Article 36 of the VCCR would prevail over the 2008 Agreement and would apply in the relations between India and Pakistan.

(Signed) Yuji IWASAWA.
