INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

JADHAV CASE

(INDIA *v*. PAKISTAN)

REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER OF 18 MAY 2017

2017

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE JADHAV

(INDE c. PAKISTAN)

DEMANDE EN INDICATION
DE MESURES CONSERVATOIRES

ORDONNANCE DU 18 MAI 2017

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ORDONNANCE

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JADHAV CASE

(INDIA *v.* PAKISTAN)

REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER

Present: *President* Abraham; *Judges* Owada, Cançado Trindade, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian; *Registrar* Couvreur.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

Whereas:

1. On 8 May 2017, the Government of the Republic of India (hereinafter "India") filed in the Registry of the Court an Application instituting proceedings against the Islamic Republic of Pakistan (hereinafter "Pakistan") alleging violations of the Vienna Convention on Consular Relations of 24 April 1963 "in the matter of the detention and trial of an Indian National, Mr. Kulbhushan Sudhir Jadhav", sentenced to death in Pakistan.

2. At the end of its Application, India requests:

"(1) A relief by way of immediate suspension of the sentence of death awarded to the accused.

(2) A relief by way of restitution in integrum by declaring that the sentence of the military court arrived at, in brazen defiance of the Vienna Convention rights under Article 36, particularly Article 36, paragraph 1 *(b)*, and in defiance of elementary human rights of an accused which are also to be given effect as mandated under Article 14 of the 1966 International Covenant on Civil and Political Rights, is violative of international law and the provisions of the Vienna Convention, and

(3) Restraining Pakistan from giving effect to the sentence awarded by the military court, and directing it to take steps to annul the decision of the military court as may be available to it under the law in Pakistan.

(4) If Pakistan is unable to annul the decision, then this Court to declare the decision illegal being violative of international law and treaty rights and restrain Pakistan from acting in violation of the Vienna Convention and international law by giving effect to the sentence or the conviction in any manner, and directing it to release the convicted Indian national forthwith."

3. In its Application, India seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations.

4. On 8 May 2017, accompanying its Application, India also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court.

5. In that Request, India asked that the Court indicate:

"*(a)* That the Government of the Islamic Republic of Pakistan take all measures necessary to ensure that Mr. Kulbhushan Sudhir Jadhav is not executed;

(b) That the Government of the Islamic Republic of Pakistan report to the Court the action it has taken in pursuance of subparagraph *(a)*; and

(c) That the Government of the Islamic Republic of Pakistan ensure that no action is taken that might prejudice the rights of the Republic of India or Mr. Kulbhushan Sudhir Jadhav with respect to any decision th[e] Court may render on the merits of the case."

6. The Request also contained the following plea:

"In view of the extreme gravity and immediacy of the threat that authorities in Pakistan will execute an Indian citizen in violation of obligations Pakistan owes to India, India respectfully urges the Court

to treat this Request as a matter of the greatest urgency and pass an order immediately on provisional measures *suo motu* without waiting for an oral hearing. The President is requested [to] exercis[e] his power under Article 74, paragraph 4, of the Rules of Court, pending the meeting of the Court, to direct the Parties to act in such a way as will enable any order the Court may make on the Request for provisional measures to have its appropriate effects."

7. The Registrar immediately communicated to the Government of Pakistan the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court, and the Request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing of the Application and of the Request.

8. By a letter dated 9 May 2017 addressed to the Prime Minister of Pakistan, the President of the Court, exercising the powers conferred upon him under Article 74, paragraph 4, of the Rules of Court, called upon the Pakistani Government, pending the Court's decision on the Request for the indication of provisional measures, "to act in such a way as will enable any order the Court may make on this Request to have its appropriate effects". A copy of that letter was transmitted to the Agent of India.

9. By letters dated 10 May 2017, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of the Rules, the Court had fixed 15 May 2017 as the date for the oral proceedings on the Request for the indication of provisional measures.

10. At the public hearings held on 15 May 2017, oral observations on the Request for the indication of provisional measures were presented by:

On behalf of India: Dr. Deepak Mittal,
Dr. Vishnu Dutt Sharma,
Mr. Harish Salve.

On behalf of Pakistan: Dr. Mohammad Faisal,
Mr. Khawar Qureshi.

11. At the end of its oral observations, India asked the Court to indicate the following provisional measures:

"*(a)* that the Government of the Islamic Republic of Pakistan take all measures necessary to ensure that Mr. Kulbhushan Sudhir Jadhav is not executed;

(b) that the Government of the Islamic Republic of Pakistan report to the Court the action it has taken in pursuance of sub-paragraph *(a)*; and

(c) that the Government of the Islamic Republic of Pakistan ensure

that no action is taken that might prejudice the rights of the Republic of India or Mr. Kulbhushan Sudhir Jadhav with respect to any decision the Court may render on the merits of the case".

12. For its part, Pakistan asked the Court to reject India's Request for the indication of provisional measures.

* * *

13. The context in which the present case has been brought before the Court can be summarized as follows. Mr. Jadhav has been in the custody of Pakistani authorities since 3 March 2016, although the circumstances of his arrest remain in dispute between the Parties. India maintains that Mr. Jadhav is an Indian national, which Pakistan recognized in its Notes Verbales of 23 January 2017, 21 March 2017 and 10 April 2017 (see Annexes 2, 3 and 5 to the Application). The Applicant claims to have been informed of this arrest on 25 March 2016, when the Foreign Secretary of Pakistan raised the matter with the Indian High Commissioner in Pakistan. As of that date, India requested consular access to Mr. Jadhav. India reiterated its request on numerous occasions, to no avail. On 23 January 2017, Pakistan sent a Letter of Request seeking India's assistance in the investigation process concerning Mr. Jadhav and his alleged accomplices. On 21 March and 10 April 2017 Pakistan informed India that consular access to Mr. Jadhav would be considered "in the light of" India's response to the said request for assistance.

14. According to a press statement issued on 14 April 2017 by an adviser on foreign affairs to the Prime Minister of Pakistan, Mr. Jadhav was sentenced to death on 10 April 2017 by a court martial due to activities of "espionage, sabotage and terrorism". India submits that it protested and continued to press for consular access and information concerning the proceedings against Mr. Jadhav. It appears that, under Pakistani law, Mr. Jadhav would have 40 days to lodge an appeal against his conviction and sentence (i.e., until 19 May 2017), but it is not known whether he has done so. India states however that, on 26 April 2017, Mr. Jadhav's mother filed "an appeal" under Section 133 (B) and "a petition" to the Federal Government of Pakistan under Section 131 of the Pakistan Army Act 1952, both of which were handed over by the Indian High Commissioner to Pakistan's Foreign Secretary on the same day.

I. Prima Facie Jurisdiction

15. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *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. 114, para. 17).

16. In the present case, India seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations (hereinafter the "Optional Protocol" and the "Vienna Convention", respectively). The Court must therefore first seek to determine whether Article I of the Optional Protocol prima facie confers upon it jurisdiction to rule on the merits, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

17. 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 them has made reservations to those instruments.

18. Article I of the Optional Protocol provides as follows:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

19. India claims that a dispute exists between the Parties regarding the interpretation and application of Article 36, paragraph 1, of the Vienna Convention, which provides as follows:

> "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 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."

* *

20. India contends that Pakistan has breached its obligations under the above-mentioned provisions in the matter of the arrest, detention and trial of Mr. Jadhav. The Applicant asserts that Mr. Jadhav has been arrested, detained, tried and sentenced to death by Pakistan and that, despite several attempts, it could neither communicate with nor have access to him, in violation of Article 36, subparagraphs (1) *(a)* and (1) *(c)* of the Vienna Convention, and that Mr. Jadhav has neither been informed of his rights nor been allowed to exercise them, in violation of subparagraph (1) *(b)* of the same provision. India asserts that Article 36, paragraph 1, of the Vienna Convention "admits of no exceptions" and is applicable irrespective of the charges against the individual concerned.

21. India acknowledges that the Parties have signed an Agreement on Consular Access on 21 May 2008 (hereinafter the "2008 Agreement"), but it maintains that this instrument does not limit the Parties' rights and obligations pursuant to Article 36, paragraph 1, of the Vienna Convention. According to India, while Article 73 of the Vienna Convention recognizes that agreements between parties may supplement and amplify its provisions, it does not provide a basis for diluting the obligations contained therein. India therefore considers that this Agreement does not have any effect on the Court's jurisdiction in the present case.

22. India also emphasizes that it only seeks to found the Court's jurisdiction on Article I of the Optional Protocol, and not on the declarations made by the Parties under Article 36, paragraph 2, of the Statute. India is of the view that where treaties or conventions especially provide for the

jurisdiction of the Court, such declarations, including any reservations they may contain, are not applicable.

*

23. Pakistan claims that the Court has no prima facie jurisdiction to entertain India's Request for the indication of provisional measures. It first submits that the jurisdiction of the Court is excluded by a number of reservations in the Parties' declarations under Article 36, paragraph 2, of the Statute. Pakistan refers to two of India's reservations to its declaration of 18 September 1974, i.e., first, that preventing the Court from entertaining cases involving two members of the Commonwealth and, second, its multilateral treaty reservation. Pakistan also refers to a reservation contained in its own amended declaration of 29 March 2017, according to which "all matters relating to the national security of the Islamic Republic of Pakistan" are excluded from the compulsory jurisdiction of the Court. For Pakistan, this reservation is applicable in the present case because Mr. Jadhav was arrested, detained, tried and sentenced for espionage, sabotage and terrorism.

24. Secondly, Pakistan also contends that Article 36, paragraph 1, of the Vienna Convention could not have been intended to apply to persons suspected of espionage or terrorism, and that there can therefore be no dispute relating to the interpretation or application of that instrument in the present case.

25. Finally, Pakistan avers that the facts alleged in the Application fall within the scope of the 2008 Agreement, which "limit[s] and qualif[ies] or supplement[s]" the Vienna Convention. It refers to Article 73, paragraph 2, of the Vienna Convention, which provides that "[n]othing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof". Pakistan considers that the 2008 Agreement "amplifies or supplements [the Parties'] understanding and the operation of the Convention". In this regard, Pakistan calls attention to subparagraph (vi) of the 2008 Agreement, which provides that "[i]n case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits". Pakistan argues that this provision applies to Mr. Jadhav and that the Court therefore lacks prima facie jurisdiction under Article I of the Optional Protocol.

* *

26. The Court recalls that the Applicant seeks to ground its jurisdiction in Article 36, paragraph 1, of the Statute and Article I of the Optional

Protocol; it does not seek to rely on the Parties' declarations under Article 36, paragraph 2, of the Statute. When the jurisdiction of the Court is founded on particular "treaties and conventions in force" pursuant to Article 36, paragraph 1, of its Statute, "it becomes irrelevant to consider the objections to other possible bases of jurisdiction" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 60, para. 25; see also *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 872, para. 132). Therefore, any reservations contained in the declarations made by the Parties under Article 36, paragraph 2, of the Statute cannot impede the Court's jurisdiction specially provided for in the Optional Protocol. Thus, the Court need not examine these reservations further.

27. Article I of the Optional Protocol provides that the Court has jurisdiction over "[d]isputes arising out of the interpretation or application of the [Vienna] Convention" (see paragraph 18 above).

28. The Court will accordingly ascertain whether, on the date the Application was filed, such a dispute appeared to exist between the Parties.

29. In this regard, the Court notes 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 Vienna Convention. While India has maintained at various times that Mr. Jadhav should have been (and should still be) afforded consular assistance under the Vienna Convention (see for instance Notes Verbales dated 19 and 26 April 2017 annexed to the Application), Pakistan has stated that such an assistance would be considered "in the light of India's response to [its] request for assistance" in the investigation process concerning him in Pakistan (see the Notes Verbales of Pakistan dated 21 March and 10 April 2017 annexed to the Application). These elements are sufficient at this stage to establish prima facie that, on the date the Application was filed, a dispute existed between the Parties as to the question of consular assistance under the Vienna Convention with regard to the arrest, detention, trial and sentencing of Mr. Jadhav.

30. 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. In this regard, the Court notes that the acts alleged by India are capable of falling within the scope of Article 36, paragraph 1, of the Vienna Convention, 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 (subparagraphs *(a)* and *(c)*), as well as the right of its nationals to be informed of their rights (subparagraph *(b)*). The Court considers that the alleged failure by Pakistan to provide the requisite consular notifications with regard to the

arrest and detention of Mr. Jadhav, as well as the alleged failure to allow communication and provide access to him, appear to be capable of falling within the scope of the Vienna Convention *ratione materiae*.

31. In the view of the Court, the aforementioned elements sufficiently establish, at this stage, the existence between the Parties of a dispute that is capable of falling within the provisions of the Vienna Convention and that concerns the interpretation or application of Article 36, paragraph 1, thereof.

32. The Court also notes that the Vienna Convention does not contain express provisions excluding from its scope persons suspected of espionage or terrorism. At this stage, it cannot be concluded that Article 36 of the Vienna Convention 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.

33. In respect of the 2008 Agreement, the Court does not need to decide at this stage of the proceedings whether Article 73 of the Vienna Convention would permit a bilateral agreement to limit the rights contained in Article 36 of the Vienna Convention. It is sufficient at this point to note that the provisions of the 2008 Agreement do not impose expressly such a limitation. Therefore, 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 or the application of Article 36 of the Vienna Convention.

34. Consequently, the Court considers that it has prima facie jurisdiction under Article I of the Optional Protocol to entertain the dispute between the Parties.

II. The Rights Whose Protection Is Sought and the Measures Requested

35. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *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. 63).

36. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*I.C.J. Reports 2017*, p. 126, para. 64).

37. In its Application, India asserts that the rights it is seeking to protect are those provided by paragraph 1 of Article 36 of the Vienna Convention (quoted above at paragraph 19).

38. As the Court stated in its Judgment in the *LaGrand (Germany* v. *United States of America)* case,

> "Article 36, paragraph 1, establishes 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." (*I.C.J. Reports 2001*, p. 492, para. 74.)

39. It follows from Article 36, paragraph 1, that all States parties to the Vienna Convention have a right to provide consular assistance to their nationals who are in prison, custody or detention in another State party. They are also entitled to respect for their nationals' rights contained therein.

* *

40. In the present case, the Applicant claims that Mr. Jadhav, who is an Indian national, was arrested, detained, tried and sentenced to death by Pakistan and that, despite several attempts, India was given no access to him and no possibility to communicate with him. In this regard, India states that it requested consular access to the individual on numerous occasions between 25 March 2016 and 19 April 2017, without success. India points out that on 21 March 2017, at the end of the trial of Mr. Jadhav, Pakistan stated that "the case for the consular access to the Indian national Kulbushan Jadhav shall be considered in the light of India['s] response to Pakistan's request for assistance" in the investigation process concerning him; Pakistan reiterated its position on 10 April 2017 — apparently the day when Mr. Jadhav was convicted and sentenced to death (see paragraphs 13-14 above). India argues in this connection that the conditioning of consular access on assistance in an investigation is itself a serious violation of the Vienna Convention. It adds that Mr. Jadhav has not been informed of his rights with regard to consular assistance. The Applicant concludes from the foregoing that Pakistan failed to provide the requisite notifications without delay, and that India

and its national have been prevented for all practical purposes from exercising their rights under Article 36, paragraph 1, of the Vienna Convention.

*

41. Pakistan, for its part, contests that it has conditioned consular assistance as alleged by India. Furthermore, it avers that the rights invoked by India are not plausible because Article 36 of the Vienna Convention does not apply to persons suspected of espionage or terrorism, and because the situation of Mr. Jadhav is governed by the 2008 Agreement.

* *

42. At this stage of the proceedings, the Court is not called upon to determine definitively whether the rights which India wishes to see protected exist; it need only decide whether these rights are plausible (see above paragraph 35 and *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).

43. The rights to consular notification and access between a State and its nationals, as well as the obligations of the detaining State to inform without delay the person concerned of his rights with regard to consular assistance and to allow their exercise, are recognized in Article 36, paragraph 1, of the Vienna Convention. Regarding Pakistan's arguments that, first, Article 36 of the Vienna Convention does not apply to persons suspected of espionage or terrorism, and that, second, the rules applicable to the case at hand are provided in the 2008 Agreement, the Court considers that at this stage of the proceedings, where no legal analysis on these questions has been advanced by the Parties, these arguments do not provide a sufficient basis to exclude the plausibility of the rights claimed by India, for the same reasons provided above (see paragraphs 32-33).

44. India submits that one of its nationals has been arrested, detained, tried and sentenced to death in Pakistan without having been notified by the same State or afforded access to him. The Applicant also asserts that Mr. Jadhav has not been informed without delay of his rights with regard to consular assistance or allowed to exercise them. Pakistan does not challenge these assertions.

45. In the view of the Court, taking into account the legal arguments

and evidence presented, it appears that the rights invoked by India in the present case on the basis of Article 36, paragraph 1, of the Vienna Convention are plausible.

*

46. The Court now turns to the issue of the link between the rights claimed and the provisional measures requested.

47. The Court notes that the provisional measures sought by India consist in ensuring that the Government of Pakistan will take no action that might prejudice its alleged rights, in particular that it will take all measures necessary to prevent Mr. Jadhav from being executed before the Court renders its final decision.

48. The Court considers that these measures are aimed at preserving the rights of India and of Mr. Jadhav under Article 36, paragraph 1, of the Vienna Convention. Therefore, a link exists between the rights claimed by India and the provisional measures being sought.

III. Risk of Irreparable Prejudice and Urgency

49. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings (see, for example, *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. 136, para. 88).

50. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision (*ibid.*, para. 89). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

* *

51. India contends that the execution of Mr. Jadhav would cause irreparable prejudice to the rights it claims and that this execution may occur at any moment before the Court decides on the merits of its case, as any appeal proceedings in Pakistan could be concluded very quickly and it is unlikely that the conviction and sentence would be reversed. In this regard, India explains that the only judicial remedy available to Mr. Jadhav was the filing of an appeal within 40 days of the sentence

rendered on 10 April 2017. It points out that, although Mr. Jadhav may seek clemency, first from the Chief of Army Staff of Pakistan and secondly from the President of Pakistan, these are not judicial remedies.

*

52. Pakistan claims that there is no urgency because Mr. Jadhav can still apply for clemency and that a period of 150 days is provided for in this regard. According to Pakistan, even if this period started on 10 April 2017 (the date of conviction at first instance), it would extend beyond August 2017. The Agent for Pakistan stated that there would be no urgent need to indicate provisional measures if the Parties agreed to an expedited hearing and suggested that Pakistan would be content for the Court to list the Application for hearing within six weeks.

* *

53. Without prejudging the result of any appeal or petition against the decision to sentence Mr. Jadhav to death, the Court considers that, as far as the risk of irreparable prejudice to the rights claimed by India is concerned, the mere fact that Mr. Jadhav is under such a sentence and might therefore be executed is sufficient to demonstrate the existence of such a risk.

54. There is considerable uncertainty as to when a decision on any appeal or petition could be rendered and, if the sentence is maintained, as to when Mr. Jadhav could be executed. Pakistan has indicated that any execution of Mr. Jadhav would probably not take place before the end of August 2017. This suggests that an execution could take place at any moment thereafter, before the Court has given its final decision in the case. The Court also notes that Pakistan has given no assurance that Mr. Jadhav will not be executed before the Court has rendered its final decision. In those circumstances, the Court is satisfied that there is urgency in the present case.

55. The Court adds, with respect to the criteria of irreparable prejudice and urgency, that the fact that Mr. Jadhav could eventually petition Pakistani authorities for clemency, or that the date of his execution has not yet been fixed, are not per se circumstances that should preclude the Court from indicating provisional measures (see, e.g., *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 91, para. 54).

56. The Court notes that the issues brought before it in this case do not

concern the question whether a State is entitled to resort to the death penalty. As it has observed in the past, "the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal" (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 25; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 89, para. 48).

IV. Conclusion and Measures to Be Adopted

57. The Court concludes from all the above considerations that the conditions required by its Statute for it to indicate provisional measures are met and that certain measures must be indicated in order to protect the rights claimed by India pending its final decision.

58. Under the present circumstances, it is appropriate for the Court to order that Pakistan shall take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order.

* * *

59. The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

* * *

60. The decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of India and Pakistan to submit arguments in respect of those questions.

* * *

61. For these reasons,

THE COURT,

I. Unanimously,

Indicates the following provisional measures:

Pakistan shall take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order.

II. Unanimously,

Decides that, until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighteenth day of May two thousand and seventeen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of India and the Government of the Islamic Republic of Pakistan.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court; Judge BHANDARI appends a declaration to the Order of the Court.

(Initialled) R.A.
(Initialled) Ph.C.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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*

I. *Prolegomena*

1. I have voted in support of the adoption today, 18 May 2017, of the present Order of the International Court of Justice (ICJ) in the case *Jadhav (India* v. *Pakistan)* — shortly after the holding of the public hearings before the Court of 15 May 2017 — indicating provisional measures of protection. Given the great importance that I attach to certain aspects pertaining to the matter dealt with in the present Order, I feel obliged to append this separate opinion thereto, under the merciless pressure of time (*ars longa, vita brevis*, anyway), so as to leave on the records the foundations of my own personal position thereon.

2. I shall thus consider, in the sequence next, the following points: *(a)* rights of States and of individuals as subjects of international law; *(b)* presence of rights of States and of individuals together; *(c)* the right to information on consular assistance in the framework of the guarantees of the due process of law; *(d)* the fundamental (rather than "plausible") human right to be protected: provisional measures as jurisdictional guarantees of a preventive character; *(e)* the autonomous legal regime of provisional measures of protection; and *(f)* the humanization of international law as manifested in the domain of consular law.

II. Rights of States and of Individuals as Subjects of International Law

3. The present *Jadhav* case concerns alleged violations of the 1963 Vienna Convention on Consular Relations with regard to the detention and trial of an Indian national (Mr. K. S. Jadhav), sentenced to death (on 10 April 2017) by a court martial in Pakistan. It is not my intention in the present separate opinion to dwell upon the arguments advanced by the Contending Parties themselves, India and Pakistan, during the public hearings before the Court of 15 May 2017, as this has already been done in the Court's Order itself, of today, 18 May 2017[1]. I have carefully taken note of such arguments, advancing distinct views of the interrelated issues of prima facie jurisdiction, the grounds for provisional measures of protection, the requirements of urgency and imminence of irreparable harm[2].

4. On one sole point their respective views initially appeared not being so distinct, when Pakistan, referring at first to a point raised originally by India in its Application instituting proceedings (of 8 May 2017), — whereby Article 36 of the 1963 Vienna Convention on Consular Relations (henceforth, the "1963 Vienna Convention") was adopted to set up "standards of conduct", particularly concerning "communication and contact with nationals of the sending State, which would contribute to the development of friendly relations amongst nations" (Application instituting proceedings, p. 16, para. 34), then added that "this is unlikely to apply in the context of a spy/terrorist sent by a State to engage in acts of terror"[3]. This is a point, however, that could be considered by the Court only at a subsequent stage of the proceedings in the *cas d'espèce* (preliminary objections, or merits), as the ICJ itself has rightly pointed out in its Order just adopted today[4]. At the present stage of provisional

[1] Cf. paragraphs 19-25, 29, 37, 40-41, 43-44 and 51-52 of the present Order.
[2] Cf. CR 2017/5, of 15 May 2017, pp. 11-43 (India); and CR 2017/6, of 15 May 2017, pp. 8-23 (Pakistan).
[3] CR 2017/6, of 15 May 2017, p. 19.
[4] Paragraph 43, and cf. also paragraphs 32-33, of the present Order.

measures of protection, the distinct views of the Contending Parties are thus found all over their respective arguments.

5. In the present separate opinion, I purport to concentrate attention on the aforementioned points (Part I, *supra*) bringing them into the realm of juridical epistemology. May I begin by observing that, in my perception, the present case *Jadhav (India* v. *Pakistan)* brings to the fore rights of States and of individuals emanating directly from international law. In effect, in its Application instituting proceedings as well as in its Request for provisional measures of protection, both of 8 May 2017, India has deemed it fit to single out that the 1963 Vienna Convention confers rights upon States (under Article 36 (1) *(a)* and *(c)*) as well as individuals (nationals of States arrested or detained or put on trial in other States, under Article 36 (1) *(b)*)[5].

6. As subjects of international law, individuals and States are, in the circumstances of the *cas d'espèce*, *titulaires* of the rights of seeking and of having, respectively, consular access and assistance[6]. The Request for provisional measures of protection further invokes, in addition to the aforementioned 1963 Vienna Convention (Article 36), the 1966 UN Covenant on Civil and Political Rights (right to a fair trial, Article 14), so as to safeguard ultimately the inherent fundamental right to life (Article 6), as "[i]nternational law recognizes the sanctity of human

[5] Cf. Application instituting proceedings, of 8 May 2017, p. 17, para. 34, and cf. also p. 3, para. 1; Request for the indication of provisional measures of protection, of 8 May 2017, pp. 3-4, paras. 5 and 9.

[6] Article 36 of the 1963 Vienna Convention concerns "Communication and contact with nationals of the sending State", and paragraph 1 provides that:

> "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."

life"[7]. In effect, public international law has, in this context as well, benefited from the impact of the emergence and consolidation of the international law of human rights (ILHR).

7. In contemporary international law, rights of States and of individuals are indeed to be considered altogether, they cannot be dissociated from each other. Before the turn of the century, the Inter-American Court of Human Rights [IACtHR] delivered its pioneering Advisory Opinion No. 16 on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 1 October 1999), advancing the proper hermeneutics of Article 36 (1) *(b)* of the 1963 Vienna Convention, reflecting the impact thereon of the *corpus juris* of the ILHR.

8. I drew attention to this important point in my concurring opinion (para. 1) appended to that Advisory Opinion No. 16, wherein I pointed out that:

> "The profound transformations undergone by international law, in the last five decades, under the impact of the recognition of universal human rights, are widely known and acknowledged. The old monopoly of the State of the condition of being subject of rights is no longer sustainable, nor are the excesses of a degenerated legal positivism, which excluded from the international legal order the final addressee of juridical norms: the human being. (. . .) [T]his occurred with the indulgence of legal positivism, in its typical subservience to State authoritarianism.
>
> The dynamics of contemporary international life has cared to deauthorize the traditional understanding that international relations are governed by rules derived entirely from the free will of States themselves. [Contemporary international law] (. . .) has for years withdrawn support to the idea, proper of an already distant past, that the formation of the norms of international law would emanate only from the free will of each State.
>
> With the demystification of the postulates of voluntarist positivism, it became evident that one can only find an answer to the problem of the foundations and the validity of general international law in the *universal juridical conscience*, starting with the assertion of the idea of an objective justice. As a manifestation of this latter, the rights of the human being have been affirmed, emanating directly from interna-

[7] Request for provisional measures of protection, *op. cit. supra* note 5, p. 8, para. 17.

tional law, and not subjected, thereby, to the vicissitudes of domestic law." (*Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, paras. 2-14.)

9. I added that the constraints of legal positivism had wrongly been indifferent to other areas of human knowledge, as well as to the existential time of human beings, reducing this latter to an external factor in the framework of which one was to apply positive law (*ibid.*, para. 3). The positivist-voluntarist trend, with its obsession with the autonomy of the "will" of the States, came to the extreme of conceiving (positive) law *independently of time*. It so happens that the very emergence and consolidation of the *corpus juris* of the ILHR are due to the reaction of the universal juridical conscience to the recurrent abuses committed against human beings, often warranted by positive law: with that, the law came to the encounter of human beings, the ultimate *titulaires* of their inherent rights protected by its norms (*ibid.*, para. 4).

10. In the framework of this new *corpus juris*, one cannot remain indifferent to the contribution of other areas of human knowledge, nor to the existential time of human beings. And I added that the right to information on consular assistance (to refer to one example), "cannot nowadays be appreciated in the framework of exclusively inter-State relations", as contemporary legal science has come to admit that "the contents and effectiveness of juridical norms accompany the evolution of time, not being independent of this latter" (*ibid.*, para. 5). I then recalled, in the same concurring opinion, that, despite the fact that the 1963 Vienna Convention had been celebrated three years before the adoption of the two Covenants on Human Rights (Civil and Political Rights, and Economic, Social and Cultural Rights) of the United Nations, the IACtHR was aware that its *travaux préparatoires* already disclosed "the attention dispensed to the central position occupied by the individual" in the elaboration and adoption of its Article 36 (*ibid.*, para. 16).

11. Thus, I proceeded, Article 36 (1) *(b)* of the aforementioned 1963 Vienna Convention, in spite of having preceded in time the provisions of the two UN Covenants on Human Rights (of 1966), could no longer be dissociated from the international norms of protection of human rights concerning the guarantees of the due process of law and their evolutive interpretation (para. 15). The action of protection thereunder, "in the ambit of the international law of human rights, does not seek to govern the relations between equals, but rather to protect those ostensibly weaker and more vulnerable"; it is this "condition of particular vulnerability" that the right to information on consular assistance "seeks to remedy" (*ibid.*, para. 23).

III. Presence of Rights of States and of Individuals Together

12. States and individuals are subjects of contemporary international law[8]; the crystallization of the subjective individual right to information on consular assistance bears witness of such evolution. Still in my aforementioned concurring opinion in the IACtHR's Advisory Opinion No. 16 on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), I recalled (para. 25) that the ICJ itself, in the case of *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 7), had pondered that the proper conduct of consular relations, established since ancient times *"between peoples"*, is no less important in the context of contemporary international law, "in promoting the development of friendly relations *among nations*, and *ensuring protection and assistance for aliens resident in the territories of other States*"; this being so, — the Court added, — no State can fail to recognize "the imperative obligations" codified in the 1961 and 1963 Vienna Conventions[9] on Diplomatic and Consular Relations, respectively.

13. Shortly afterwards, in the same case of *Hostages in Tehran* (Merits, Judgment of 24 May 1980), the ICJ, in referring again to the provisions of the Vienna Conventions on Diplomatic Relations (of 1961) and on Consular Relations (of 1963), pointed out the great importance and the imperative character of their obligations, and invoked expressly, in rela-

[8] Cf., in this sense, e.g., A. A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* — General Course on Public International Law — Part I", 316 *Recueil des cours de l'Académie de droit international de La Haye* (2005), Chaps. XII and IX-X, pp. 203-219 and 252-317; A. A. Cançado Trindade, *Le droit international pour la personne humaine*, Paris, Pedone, 2012, pp. 45-368; A. A. Cançado Trindade, "The Human Person and International Justice" (W. Friedmann Memorial Award Lecture 2008), 47 *Columbia Journal of Transnational Law* (2008), pp. 16-30; A. A. Cançado Trindade, "La Persona Humana como Sujeto del Derecho Internacional: Consolidación de Su Posición al Inicio del Siglo XXI", in *Democracia y Libertades en el Derecho Internacional Contemporáneo* (Libro Conmemorativo de la XXXIII Sesión del Programa Externo de la Academia de Derecho Internacional de La Haya, Lima, 2005), Lima, the Hague Academy of International Law/IDEI (PUC/Peru), 2006, pp. 27-76; A. A. Cançado Trindade, "A Consolidação da Personalidade e da Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", in 16 *Anuario del Instituto Hispano-Luso-Americano de Derecho Internacional*, Madrid (2003), pp. 237-288; A. A. Cançado Trindade, "A Personalidade e Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", in *Jornadas de Derecho Internacional* (Mexico, Dec. 2001), Washington D.C., OAS Sub-Secretariat of Legal Affairs, pp. 311-347.

[9] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, pp. 19-20, paras. 40-41.

tion to them, the contents of the 1948 Universal Declaration of Human Rights[10] (*I.C.J. Reports 1980*, para. 26).

14. The presence of rights of States and of individuals together was, subsequently, acknowledged in express terms by ICJ in the case of *Avena and Other Mexican Nationals (Mexico* v. *United States of America),* where it stated that "violations of the rights of the individual under Article 36 [of the 1963 Vienna Convention] may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual" (*Judgment, I.C.J. Reports 2004 (I)*, p. 36, para. 40).

15. In the present *Jadhav* case, in its oral arguments in the very recent public hearings before the Court of 15 May 2017, India referred to this dictum, and added that

> "[w]here the rights of an individual are violated, consequences must follow. The [1963] Vienna Convention recognizes the right of a State to seek redress on behalf of its national in this Court, where the rights of its national, and concomitantly its own rights under the Vienna Convention, are violated by another State"[11].

And it further pointed out that "[t]he rights of consular access are a significant step in the evolution and recognition of the human rights in international law", specifically referring to provisions of the UN Covenant on Civil and Political Rights (art. 6, 9 and 14)[12].

IV. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law

16. The insertion of the matter under examination into the domain of the international protection of human rights, counted early on judicial recognition (cf. Part III, *supra*), "there being no longer any ground at all for any doubts to subsist as to an *opinio juris* to this effect"; in effect — as I further pondered in my aforementioned concurring opinion in the IACtHR's Advisory Opinion No. 16 of 1999 — the subjective element of international custom is the *opinion juris communis*, and "in no way the *voluntas* of each State individually[13]" (para. 27);

[10] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, pp. 30-31, para. 62, and pp. 41-43, paras. 88 and 91-92.

[11] CR 2017/5, of 15 May 2017, pp. 39-40, para. 89.

[12] Pertaining to the right to life, the right to liberty and security of person, and the right to a fair trial, respectively; *ibid.*, pp. 38-39, para. 86.

[13] A. A. Cançado Trindade, "Contemporary International Law-Making: Customary International Law and the Systematization of the Practice of States", *Thesaurus Acroasium*

> "it is no longer possible to consider the right to information on consular assistance (under Article 36 (1) *(b)* of the 1963 Vienna Convention on Consular Relations) without directly linking it to the *corpus juris* of the ILHR" (IACtHR's Advisory Opinion No. 16 of 1999, para. 29).

17. In the framework of this latter, the international juridical personality of the human being, emancipated from the domination of the State — as foreseen by the so-called "founding fathers" of international law (the *droit des gens*) — has been established nowadays. (. . .) A "normative" Convention of codification of international law, such as the 1963 Vienna Convention, acquires a life of its own being clearly independent from the "will" of individual States parties. That Convention represents much more than the sum of the individual "wills" of the States parties, and fosters the progressive development of international law (*ibid.*, paras. 30-31).

18. The intermingling between public international law and the international law of human rights gives testimony of the recognition of "the centrality, in this new *corpus juris*, of the universal human rights — what corresponds to a new *ethos* of our times" (*ibid.*, para. 34). It has thus become indispensable to link, for the purpose of protection, "the right to information on consular assistance with the guarantees of the due process of law set forth in the instruments of international protection of human rights" *(ibid.)*. This, in turn, bears witness of "the process of *humanization* of international law" (*ibid.*, para. 35), as manifested in particular also in the domain of consular law nowadays (cf. Part VII, *infra*).

V. The Fundamental (Rather than "Plausible") Human Right to Be Protected: Provisional Measures as Jurisdictional Guarantees of a Preventive Character

19. The right to information on consular assistance is, in the circumstances of the *cas d'espèce*, inextricably linked to the right to life itself, a fundamental and non-derogable right, rather than a simply "plausible" one. This is true not only for the stage of the merits of the case at issue, but also for the stage of provisional measures of protection, endowed with a juridical autonomy of their own (cf. *infra*). Fundamental rights are duly safeguarded by provisional measures of protection endowed with a conventional basis (such as those of the ICJ and of the IACtHR, as truly fundamental (not only "plausible") rights are at risk[14].

Sources of International Law (XVI Session, 1988), Thessaloniki/Greece, Institute of Public International Law and International Relations, 1992, pp. 77-79.

[14] Article 41 of the ICJ Statute, and Article 63 (2) of the American Convention on Human Rights, respectively.

20. In this respect, in my book of personal memories of the IACtHR I recalled, in connection with the importance of compliance with provisional measures of protection, *inter alia*, the case of *James and Others* v. *Trinidad and Tobago* (1998-2000), pertaining to the guarantees of the due process of law and the suspension of execution of death penalty:

> "[T]eníamos conciencia de que trabajábamos contra el reloj, y no podríamos retardar nuestra decisión, pues estaba amenazado, además del derecho a las garantías judiciales, el propio derecho fundamental a la vida. Nuestra acción eficaz [decisión de la suspensión de la ejecución de pena de muerte], acatada por el Estado, llevó a que las vidas de los condenados a la muerte en Trinidad y Tobago fueran salvadas, y las sentencias condenatorias de los tribunales nacionales fueran conmutadas." ["We were conscious that we worked against the clock, and could not delay our decision, as the right to judicial guarantees, in addition to the fundamental right to life itself, were threatened. Our effective action [decision of suspension of the execution of the death penalty], complied with by the State, saved the lives of those condemned to death in Trinidad and Tobago, and the condemnatory sentences of the national tribunals were commuted."] [My own translation.][15]

21. The IACtHR extended the protection afforded by successive provisional measures (adopted in 1998-1999) to a growing number of individuals that had been condemned to death (so-called "mandatory" death penalty). To the Order of 25 May 1999 in the *James and Others* case, e.g., I appended a concurring opinion wherein I observed that, also in relation to provisional measures of protection, the international Court (be it the IACtHR or the ICJ) has the inherent power to determine the extent of its own competence *(compétence de la compétence/Kompetenz-Kompetenz)*, it is the guardian and master of its own jurisdiction (*jurisdictio, jus dicere*, to say what the law is), as its jurisdiction cannot be at the mercy of facts (either at domestic or international level) other than its own actions (*James and Others*, paras. 7-8).

22. In cases of the kind, involving the fundamental human right to life, I proceeded, the Court, by means of provisional measures of protection, goes well beyond the simple search for a balance of the interests of the contending parties (which used to suffice in traditional international law); one is here safeguarding a fundamental human right, and this shows — I concluded — that "provisional measures cannot be restrictively interpreted", and they impose themselves, to the benefit of the persons con-

[15] A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, 4th ed., Belo Horizonte/Brazil, Edit. Del Rey, 2017, p. 48.

cerned, as "*true jurisdictional guarantees of a preventive character* that they are" (IACtHR, *James and Others*, paras. 13-14, 16 and 18).

23. I also pondered that they are transformed into such jurisdictional guarantees by the proper consideration of their constitutive elements of extreme gravity and urgency, and prevention of irreparable damage to persons (*ibid.*, para. 10), — even more cogently when the fundamental right to life is at stake. Provisional measures of protection have an important role to play when the rights of the human person are also at stake; developed mainly in contemporary international case law, they have, however, been insufficiently studied in international legal doctrine to date.

VI. The Autonomous Legal Regime of Provisional Measures of Protection

24. May I now reiterate, in the present separate opinion, my understanding that provisional measures of protection are endowed with a juridical autonomy of their own. I have sustained it in my individual opinions in successive cases within the ICJ[16] (and, earlier on, within the IACtHR), thus contributing to its conceptual elaboration in the jurisprudential construction on the matter. I soon identified the component elements of such autonomous legal regimes, namely: the rights to be protected, the obligations proper to provisional measures of protection;

[16] Such as: in my dissenting opinion in the case concerning *Questions relating to the Obligation to Prosecute or to Extradite (Belgium* v. *Senegal), Order of 28 May 2009, I.C.J. Reports 2009*; in my separate opinion in the case of the *Temple of Préah Vihéar (Cambodia* v. *Thailand), Order of 18 July 2011, I.C.J. Reports 2011 (II)*; in my dissenting opinion in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Order of 16 July 2013, I.C.J. Reports 2013*; in my separate opinion in the same case in the Order of 22 November 2013; in my separate opinion in the Judgment of 16 December 2015 in the joined cases *(Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II))*; in my separate opinion in the case of *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.* With the exception of this last one, all other individual opinions of mine, referred to in the present separate opinion (which I have presented both within the ICJ and, earlier on, the IACtHR), are reproduced in the three-volume collection (Series *"The Judges"): Judge A. A. Cançado Trindade — The Construction of a Humanized International Law — A Collection of Individual Opinions* (1991-2013), Vol. I (Inter-American Court of Human Rights), Leiden, Brill/Nijhoff, 2014, pp. 9-852; Vol. II (International Court of Justice), Leiden, Brill/Nijhoff, 2014, pp. 853-1876; Vol. III (International Court of Justice, 2013-2016), Leiden, Brill/Nijhoff, 2017, pp. 9-764.

the prompt determination of responsibility (in case of non-compliance) with its legal consequences; the presence of the victim (or potential victim, already at this stage), and the duty of reparations for damages.

25. The present ICJ Order of today, 18 May 2017, in the *Jadhav* case *(India* v. *Pakistan)*, affords yet another illustration to the same effect, contributing to that jurisprudential construction. In the present separate opinion, I have already drawn attention to the presence of rights of States and of individuals together (Part III, *supra*). In effect, as to the ICJ, even though the proceedings in contentious case keeps on being a strictly inter-State one (by attachment to an outdated dogma of the past), this in no way impedes that the beneficiaries of protection in given circumstances are the human beings themselves, individually or in groups, — as I pointed out, e.g., in my dissenting opinion in the case concerning *Questions relating to the Obligation to Prosecute or to Extradite (Belgium* v. *Senegal)* (Order of 28 May 2009), and in my separate opinion in the case of *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)* (Order of 19 April 2017)[17].

VII. Final Considerations: The Humanization of International Law as Manifested in the Domain of Consular Law

26. Last but not least, I could not conclude the present separate opinion without addressing a point which has been grabbing my attention since the nineties, successively in two international jurisdictions (IACtHR and ICJ): I refer to the ongoing historical process of the *humanization* of international law, manifesting itself, as in the present *Jadhav* case, in particular also in the domain of consular law. In the present separate opinion, in focusing attention on the rights of States and of individuals as subjects of international law, I recalled the reflections I made in my concurring opinion in the IACtHR's Advisory Opinion No. 16 on the *Right*

[17] Cf. also, on the same jurisprudential construction, my separate opinion in the case *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*; and cf. also my reflections in, *inter alia*: A. A. Cançado Trindade, "La Expansión y la Consolidación de las Medidas Provisionales de Protección en la Jurisdicción Internacional Contemporánea", in *Retos de la Jurisdicción Internacional* (eds. S. Sanz Caballero and R. Abril Stoffels), Cizur Menor/Navarra, Cedri/CEU/Thomson Reuters, 2012, pp. 99-117; A. A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour interaméricaine des droits de l'homme", in *Mesures conservatoires et droits fondamentaux* (eds. G. Cohen Jonathan and J.-F. Flauss), Brussels, Bruylant/Nemesis, 2005, pp. 145-163.

to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (of 1 October 1999).

27. I pondered therein that, in spite of the fact that the 1963 Vienna Convention on Consular Relations precedes chronologically the two 1966 UN Covenants on Human Rights, Article 36 (1) of the former was soon to be interpreted under the impact of the ILHR (cf. Part II, *supra*). One could no longer dissociate the rights enshrined in that provision from the evolutive interpretation of the relevant norms of protection of human rights. States and individuals, as subjects of international law, and their corresponding rights, came to be taken together, as they should have been, in the new humanized *jus gentium*.

28. Shortly afterwards, in my following concurring opinion in the IACtHR's complementary Advisory Opinion No. 18 on the *Juridical Condition and Rights of Undocumented Migrants* (of 17 September 2003), I retook the point that, by the turn of the century, the humanization of international law was manifested, with judicial recognition, in new developments in the domain of consular law (paras. 1-2). I singled out the relevance, in this evolution, of fundamental principles, laying on the foundations themselves of the law of nations (*le droit des gens*, as foreseen by the "founding fathers" of the discipline), as well as of the emergence of *jus cogens* and the corresponding obligations *erga omnes* of protection, in their horizontal and vertical dimensions (*ibid.*, paras. 3 and 44-85).

29. Among general principles of law (in both comparative domestic law and international law), those which are endowed with a true fundamental character, I went on, do indeed form the *substratum* of the legal order itself, revealing the *right to the law (droit au droit)*, of which are *titulaires*, all human beings, irrespective of their statute of citizenship or any other circumstance (*ibid.*, para. 55). Without such principles, — which are truly *prima principia*, — wherefrom norms and rules emanate and wherein they find their meaning, the "legal order" simply "is not accomplished, and ceases to exist as such" (*ibid.*, para. 46).

30. I further made a point of underlying, in the same concurring opinion, that the "great legacy of the juridical thinking of the second half of the twentieth century, in my view, has been, by means of the emergence and evolution of ILHR, the rescue of the human being as subject" of the law of nations, endowed with international legal personality and capacity (*ibid.*, para. 10). This was due to the awakening of the *universal juridical conscience* (*ibid.*, paras. 25 and 28), — the *recta ratio* inherent to humanity, — as the ultimate *material source* of the law of nations[18], standing well above the "will" of individual States. It was necessary, in our days, — I added, — "to stimulate this awakening of the *universal juridical conscience*

[18] Cf., in this respect, A. A. Cançado Trindade, "International Law for Humankind . . .", *op. cit. supra* note 8, Chap. VI, pp. 177-202.

to intensify the process of humanization of contemporary international law" (IACtHR's complementary Advisory Opinion No. 18 of 17 September 2003, para. 25)[19].

31. This outlook was to have prompt repercussions in the region of the world I originally come from, though it in effect looked well beyond it: in acknowledging the expansion of international legal personality and capacity of individuals (along with of States), this development kept in mind the *universality* of the law of nations, as originally propounded by its "founding fathers" (*totus orbis* and *civitas maxima gentium*), and re-emerged in our times.

32. That outlook has decisively contributed to the formation, *inter alia* and in particular, of an *opinio juris communis* as to the right of individuals, under Article 36 (1) *(b)* of the 1963 Vienna Convention, reflecting the ongoing process of humanization of international law, encompassing relevant aspects of consular relations[20]. Always faithful to this humanist universal outlook, I deem it fit to advance it, once again, in the present separate opinion in the Order that the ICJ has just adopted today, 18 May 2017, in the *Jadhav* case.

33. The ICJ has, after all, shown awareness that the provisional measures of protection rightly indicated by it in the present Order (resolutory point I of the *dispositif*) are aimed at preserving the rights of *both* the State and the individual concerned (para. 48) under Article 36 (1) of the 1963 Vienna Convention. The jurisprudential construction to this effect, thus, to my satisfaction, keeps on moving forward. Contemporary international tribunals have a key role to play in their common mission of the realization of justice.

(Signed) Antônio Augusto Cançado Trindade.

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[19] As I had earlier asserted also, e.g., in my concurring opinion (para. 12) in the IACtHR's Order on provisional measures of protection in the case of *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (of 18 August 2000).

[20] A. A. Cançado Trindade, "The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-Law and Practice", in 6 *Chinese Journal of International Law* (2007), No. 1, pp. 1-3, 5 and 15. I further pointed out the impact of that outlook was also acknowledged in expert writing, as from the IACtHR's Advisory Opinion No. 19, of 1 October 1999, followed by the subsequent decision of the ICJ of 27 June 2001 in the *LaGrand* case *(Germany* v. *United States of America)*; I further recalled that the then UN Sub-Commission on the Promotion and Protection of Human Rights, in a statement issued on 8 August 2002 (and made public in a press release of the UN High Commissioner for Human Rights of the same date), urged the respondent State in the *LaGrand* case to stay the execution of a Mexican national (Mr. J. S. Medina), "on the basis of the Advisory Opinion No. 16 of the IACtHR and the subsequent Judgment of the ICJ in the *LaGrand* case (27 June 2001)"; *ibid.*, p. 10. And, on the pioneering character of the aforementioned IACtHR's Advisory Opinion No. 16 of 1999, in addition to that of its case law of that time asserting the binding character of provisional measures of protection, cf. also G. Cohen-Jonathan, "Cour européenne des droits de l'homme et droit international général (2000)", 46 *Annuaire français de droit international* (2000), p. 642.

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")[1]. 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]"[2].

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[3]. However, a Pakistani press release submitted by India stated that Mr. Jadhav was arrested in Balochistan[4], on Pakistani soil, on 3 March 2016[5].

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[6]. By way of such Notes Verbales, India requested Pakistan to allow consular

[1] United Nations, *Treaty Series (UNTS)*, Vol. 596, p. 261.
[2] Request for provisional measures, para. 3. See also CR 2017/5, p. 11, para. 1 (Mittal).

[3] Application instituting proceedings, para. 13. See also CR 2017/5, p. 12, para. 8 (Mittal).
[4] *Ibid.*, Ann. 4.
[5] *Ibid.*, para. 4.
[6] 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[7]. 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"[8].

(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).

[7] Request for provisional measures, para. 4.

[8] 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[9]. 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"[10]. 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"[11].

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[12]. 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"[13]. A death sentence must subsequently be confirmed by a convening officer designated by the Federal Government or by the Chief of Army Staff[14]. 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[15]. 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."[16]

6. Mr. Jadhav's mother filed both a petition under Section 131, and an appeal pursuant to Section 133 (B) of the 1952 Act[17]. 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-

[9] CR 2017/5, p. 18, para. 6 (Salve).
[10] CR 2017/6, p. 9, para. 11 (Faisal).
[11] Application instituting proceedings, Annex 4.
[12] *Ibid.*, para. 53.
[13] *Ibid.*
[14] *Ibid.*, para. 54.
[15] *Ibid.*, para. 55.
[16] *Ibid.*
[17] *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."[18]

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"[19]. Hence, in India's view, any remedy against Mr. Jadhav's death sentence available in Pakistan are "illusory"[20]. 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*"[21]. Second, Pakistan's Government made it clear that they agree with the death sentence issued against Mr. Jadhav[22]. Third, India argued that the Court of Appeal could be seen not to be independent in a case like Mr. Jadhav's[23]. 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"[24]. Fifth, "[e]ven in the course of the appeal, Pakistan has clearly refused consular access"[25]. 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[26].

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"[27]. 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

[18] CR 2017/5, p. 24, para. 27 (Salve).
[19] *Ibid.*, p. 40, para. 91 (Salve).
[20] Application instituting proceedings, para. 57.
[21] *Ibid.*, para. 57 *(a)* [emphasis added].
[22] *Ibid.*, para. 57 *(b)*.
[23] *Ibid.*, para. 57 *(c)*.
[24] *Ibid.*, para. 57 *(d)*.
[25] *Ibid.*, para. 57 *(e)*.
[26] *Ibid.*, para. 57 *(f)*.
[27] 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."[28]

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."[29]

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."[30]

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."[31]

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"[32]. For its part, Pakistan considers India's Application a means to have Mr. Jadhav's death sentence reviewed by the Court, which, as

[28] Application instituting proceedings, para. 23.
[29] CR 2017/5, p. 11, para. 3 (Mittal).
[30] *Ibid.*, p. 13, para. 11 (Mittal). See also Mr. Mittal's submissions at *ibid.*, p. 14, para. 16 (Sharma).
[31] *Ibid.*, p. 16, para. 7 (Sharma).
[32] *Ibid.*, p. 42, para. 95 (Salve).

Pakistan stated, "cannot exercise a criminal appellate jurisdiction"[33]. 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[34].

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[35]. 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[36]. 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[37]. In addition, India argued that the "2008 Agreement . . . is not registered with the United Nations under Article 102 of the Charter,

[33] CR 2017/6, p. 17 (Qureshi).
[34] Request for provisional measures, para. 22.
[35] *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.
[36] Application instituting proceedings, Ann. 10, para. (ii).
[37] *Ibid.*

and therefore under paragraph 2 of Article 102 this Agreement cannot be invoked before any organ of the United Nations"[38].

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]"[39]. 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."[40]

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]

[38] CR 2017/5, p. 17, para. 16 (Sharma).
[39] Application instituting proceedings, para. 44.
[40] *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]."[41]

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]."[42]

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[43]. 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"[44]. 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"[45], 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"[46]. 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"[47].

[41] CR 2017/5, pp. 34-35, para. 66 (Salve).
[42] Order, para. 33.
[43] *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.
[44] CR 2017/5, p. 16, para. 8 (Sharma).
[45] *Ibid.*, p. 30, para. 53 (Salve).
[46] *Ibid.*, p. 29, para. 49 (Salve).
[47] 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"[48]. 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[49], as previously held in *Equatorial Guinea* v. *France*[50]. 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]"[51]. At this stage, this is enough evidence to conclude that a dispute prima facie exists between the Parties.

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

[49] Order, para. 28.

[50] *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.

[51] 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* . . ."[52]. 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"[53]. 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 . . ."[54].

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"[55], as required under Article 55 of the VCCR[56]. In this perspective, allowing consular access to a person suspected of espionage would be tantamount to interfering with the internal affairs of a State,

[52] *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.

[53] Order, para. 30.

[54] *Ibid.*

[55] CR 2017/6, pp. 20-21 (Qureshi).

[56] 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"[57]. 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"[58].

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"[59].

This principle is borne out by the Court's jurisprudence, especially *Electricity Company of Sofia and Bulgaria*[60], *Border and Transborder Armed Actions*[61], *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*[62], as well as *Appeal Relating to the Jurisdiction of the ICAO Council*[63]. 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.

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[57] Order, para. 32.

[58] *Ibid.*

[59] CR 2017/5, p. 30, para. 55 (Salve).

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

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

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

[63] *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[64]. 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"[65]. 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"[66]. 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[67].

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"[68].

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"[69]. The ILC Commentary specifies that this also applies in "cases where the judgment convicting the national has become final"[70]. Based on the material provided by the Parties, it is currently unclear whether an appeal

[64] CR 2017/5, p. 19, para. 11 (Salve).

[65] *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.

[66] *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.

[67] *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.

[68] CR 2017/5, p. 29, para. 47 (Salve).

[69] *Yearbook of the International Law Commission* (1961), Vol. II, p. 112, para. 4 *(c)*.

[70] *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[71]. 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"[72].

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[73]. 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

[71] *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.

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

[73] *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[74]. 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"[75]. 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"[76].

28. In *LaGrand*, two German brothers, Karl and Walter LaGrand, had been sentenced to death in Arizona[77]. Similarly to *Breard*, the two brothers had not been given consular access to the German authorities[78]. Karl LaGrand was executed on 24 February 1999[79], and Walter LaGrand was scheduled to be executed on 3 March 1999[80]. 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[81], 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[82]. 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"[83].

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[84]. Mexico grounded its claim in the alleged violation by the United States of America of Article 36, paragraph 1, of the VCCR[85], since the United States of America had not given consular access to the individuals Mexico was seeking to protect. A number of such individuals

[74] *I.C.J. Reports 1998*, p. 249, para. 3.
[75] *Ibid.*, p. 251, para. 9.
[76] *Ibid.*, p. 257, para. 37.
[77] *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 24.
[78] *Ibid.*, p. 10, para. 2.
[79] *Ibid.*, p. 12, para. 8.
[80] *Ibid.*
[81] *Ibid.*, p. 14, para. 21.
[82] *Ibid.*, p. 16, para. 29.
[83] *Ibid.*, p. 15, para. 24.
[84] *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.
[85] *Ibid.*

had had their execution dates fixed, while others had not[86]. 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[87]. 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"[88].

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[89]. This has previously been described by the Court as situations that are "unstable and could rapidly change"[90]. 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[91], 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[92].

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

[86] *I.C.J. Reports 2003*, p. 81, para. 11.
[87] *Ibid.*, pp. 91-92, para. 59.
[88] *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.
[89] *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.
[90] *Ibid.*, p. 396, para. 143.
[91] *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.
[92] 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"[93]. According to counsel for Pakistan, Mr. Jadhav may have recourse to the clemency process under Pakistani law, which "[t]he Application conveniently glossed over"[94]. 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"[95].

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

[93] CR 2017/5, p. 24, para. 26 (Salve).
[94] CR 2017/6, p. 15 (Qureshi).
[95] *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"[96]. 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"[97]. 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[98]. India requested the Court to indicate this very same provisional measure in respect of Mr. Jadhav[99]. In addition, in *Avena* the Court also indicated that the United States of America "shall

[96] *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.
[97] *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.
[98] *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.
[99] Request for provisional measures, para. 22 *(a)*.

inform the Court of all measures taken in implementation of [the] Order"[100]. India also requested the Court to indicate this provisional measure[101], 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"[102]. 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"[103]. 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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[100] *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.

[101] Request for provisional measures, para. 22 *(b)*.

[102] *Ibid.*, para. 17.

[103] *Ibid.*