

International Court of Justice — Provisional measures of protection — Consular relations — Death penalty — Prima facie jurisdiction — Prima facie existence of a dispute — Prima facie jurisdiction *ratione materiae* — Vienna Convention on Consular Relations, 1963 (“Vienna Convention”) — Optional Protocol to Vienna Convention concerning Compulsory Settlement of Disputes, 1963 — Whether Agreement on Consular Access of 21 May 2008 excluding application of Vienna Convention — Plausibility — Article 36(1) of Vienna Convention — Right to consular access — Right to be informed of one’s consular rights — Irreparable prejudice — Urgency — Whether existence of appeals procedure against death sentence removing real and imminent risk of irreparable prejudice — Link between provisional measures requested and rights sought to be protected

Consular relations — Right of access to consul for person arrested — Indian national sentenced to death by court in Pakistan — Vienna Convention on Consular Relations, 1963 — Article 36(1) — Failure of arresting authorities to provide consular access — Whether Article 36(1) of Vienna Convention applying to persons suspected of espionage or terrorism

Treaties — Interpretation — Vienna Convention on Consular Relations, 1963 — Article 36(1) — Whether Article 36(1) of Vienna Convention applying to persons suspected of espionage or terrorism

Terrorism — Consular relations — Right to consular access — Treaties — Interpretation — Vienna Convention on Consular Relations, 1963 — Article 36(1) — Whether Article 36(1) of Vienna Convention applying to persons suspected of espionage or terrorism

JADHAV CASE¹

(INDIA *v.* PAKISTAN)

International Court of Justice

Order on Provisional Measures. 18 May 2017

¹ Counsel for the Parties are listed in para. 10 of the Court’s Order.

(Abraham, *President*; Owada, Cañado Trindade, Xue,
 Donoghue, Gaja, Sebutinde, Bhandari, Robinson,
 Crawford and Gevorgian, *Judges*)

SUMMARY:² *The facts*:—Mr Jadhav, an Indian national, had been detained in Pakistan since 3 March 2016. The circumstances of his arrest and detention were disputed between the Parties. The Parties agreed that Mr Jadhav was an Indian national. On 10 April 2017, Mr Jadhav was sentenced to death by a Pakistani Court Martial for his involvement in activities of espionage, sabotage and terrorism. Under Pakistani law, Mr Jadhav had a forty-day delay, which would have expired on 19 May 2017, to file an appeal against his death sentence. On 26 April 2017, Mr Jadhav’s mother filed an appeal against his death sentence under Section 133(B) of the Pakistan Army Act 1952, and a petition to the Federal Government of Pakistan under Section 131 of the Pakistan Army Act 1952.

On 8 May 2017, India filed with the International Court of Justice an application instituting proceedings against Pakistan, alleging violations of the Vienna Convention on Consular Relations, 1963 (“the Vienna Convention”), in relation to Pakistan’s arrest, detention, trial and sentencing to death of Mr Jadhav. India maintained that the Court possessed jurisdiction under Article 36(1) of the Court’s Statute and Article I of the Optional Protocol to the Vienna Convention concerning the Compulsory Settlement of Disputes, 1963.³

Together with its application instituting proceedings, India filed a request for the indication of provisional measures under Article 41 of the Court’s Statute. India requested the Court to indicate that: (i) Pakistan had to take all measures in order to ensure that Mr Jadhav would not be executed pending the proceedings before the Court; (ii) Pakistan had to report to the Court on the steps taken in the implementation of the Court’s order on provisional measures; and (iii) Pakistan had to take all measures in order to ensure that the rights of India would not be prejudiced pending the proceedings before the Court. Given the urgency of the circumstances, India requested that the Court indicate provisional measures without holding a hearing. The Court held public hearings on 15 May 2017.

According to India, a dispute existed between the Parties on the interpretation or application of Article 36(1) of the Vienna Convention.⁴ Despite

² Prepared by Mr M. Lando.

³ Article 36(1) of the Court’s Statute provided that: “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”

Article I of the Optional Protocol provided that: “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.”

⁴ For the text of Article 36(1) of the Vienna Convention, see para. 19 of the Order.

repeated requests from India to communicate with Mr Jadhav, Pakistan's authorities had never allowed India the access to him that India maintained was required under the Vienna Convention. India argued that the Agreement on Consular Access of 21 May 2008 between India and Pakistan ("the 2008 Agreement") did not limit India's rights under the Vienna Convention. Therefore, the Court had *prima facie* jurisdiction over the case. Pakistan contended that there was no dispute between the Parties, since Article 36(1) of the Vienna Convention did not apply to persons suspected of espionage or terrorism. According to Pakistan, the 2008 Agreement qualified and limited the rights of the Parties under the Vienna Convention. Accordingly, the Court did not have *prima facie* jurisdiction to hear the dispute filed by India.

India argued that the rights it asserted were plausible. According to India, the conduct of Pakistan was plausibly in breach of Article 36(1) of the Vienna Convention owing both to Pakistan's denial of India's requests for access to Mr Jadhav, and to the alleged failure of Pakistan to inform Mr Jadhav of his rights under the Vienna Convention upon arrest. Pakistan disputed that India's asserted rights under the Vienna Convention were plausible. First, Article 36(1) of the Vienna Convention did not apply to persons suspected of espionage or terrorism. Secondly, Mr Jadhav's case was governed by the 2008 Agreement.

India submitted that Mr Jadhav's execution could have taken place at any moment, which showed urgency in the circumstances and the existence of a risk of irreparable prejudice to India's rights under the Vienna Convention. According to India, any appeal against Mr Jadhav's death sentence could be concluded quickly, and the chances of the death sentence being reversed were limited. Pakistan contended that there was no urgency in the circumstances since an appeal against Mr Jadhav's death sentence could have taken up to 150 days to decide, which meant that the decision on such an appeal could have been handed down in August 2017.

Held (unanimously):—Pakistan had to take all measures at its disposal to ensure that Mr Jadhav would not be executed pending the proceedings before the Court, and had to inform the Court of the measures taken in the implementation of the order.

(1) The fact that India had requested consular access to Mr Jadhav on multiple occasions, and that Pakistan had stated that such requests would be considered in the light of India's response to Pakistan's requests for assistance in the investigation against Mr Jadhav, was sufficient to show the *prima facie* existence of a dispute concerning the interpretation or application of the Vienna Convention. The acts alleged by India were capable of falling within the scope of Article 36(1) of the Vienna Convention, and therefore the Court had *prima facie* jurisdiction *ratione materiae*. The Vienna Convention did not contain any express provision excluding its application to persons suspected of espionage or terrorism. The 2008 Agreement similarly did not contain any express exclusion of the applicability of the Vienna Convention. *Prima facie*, therefore, the Court had jurisdiction (paras. 29-34).

(2) The right to consular notification and access between a State and its nationals was recognized under Article 36(1) of the Vienna Convention. The arguments concerning the inapplicability of Article 36(1) of the Vienna Convention to persons suspected of espionage or terrorism were not sufficient to show that India's asserted rights were not plausible. Pakistan did not challenge that Mr Jadhav had been arrested, detained, tried and sentenced to death without India being given consular access and without his being informed of his consular rights. Therefore, the rights asserted by India were plausible. The provisional measures requested by India were linked to the rights asserted on the merits (paras. 43-8).

(3) The fact that Mr Jadhav had received a death sentence which could be carried out at any moment was sufficient to show the existence of a risk of irreparable prejudice to India's rights. Pakistan had given no assurance that Mr Jadhav would not be executed before the Court rendered its final decision on the merits. The fact that Mr Jadhav could appeal his death sentence and also petition for clemency did not preclude the indication of provisional measures by the Court (paras. 53-5).

Separate Opinion of Judge Cançado Trindade: (1) In this case, both States and individuals were holders of rights under international law. In contemporary international law, the rights of States and the rights of individuals could not be dissociated from one another. Rights of information on consular assistance could not be appreciated exclusively in the framework of inter-State relations. The Court had already recognized the importance of rights of consular assistance as being a combination of rights of States and rights of individuals in its earlier jurisprudence (paras. 6-14).

(2) In the present case, the right to consular assistance was inextricably linked to the right to life, which was not only a "plausible" right, but a "fundamental" one. Provisional measures were endowed with a juridical autonomy of their own. The present case was yet another example of the ongoing process of humanization of international law (paras. 19-33).

Declaration of Judge Bhandari: (1) The Court was right to conclude that the 2008 Agreement was not sufficient to exclude prima facie jurisdiction. The jurisdictional basis of this case was the same as that in *LaGrand*,⁵ thus the Court correctly made the same decision on prima facie jurisdiction. The prima facie existence of a dispute between the Parties was demonstrated by the thirteen *notes verbales* sent by India to Pakistan concerning consular access to Mr Jadhav. The Court was also correct in stating that the present case prima facie fell within the scope *ratione materiae* of the Vienna Convention (paras. 14-19).

⁵ *LaGrand Case (Germany v. United States of America) (Request for the Indication of Provisional Measures)*, 118 ILR 37.

(2) Questions of consular access, which India had requested on several occasions by means of *notes verbales*, fell squarely within the scope of Article 36(1) of the Vienna Convention. Therefore, the rights asserted by India were plausible. The facts of the present case were similar to those in *Breard*,⁶ *LaGrand* and *Avena*.⁷ From this perspective, the Court was correct in making the same finding with respect to the requirement of irreparable prejudice. Concerning urgency, the facts of this case were different from those in *Avena*, since in Pakistan, differently from the United States, the date of a person's execution was not necessarily communicated to the public in advance. In any event, so long as there was a possibility that Mr Jadhav's execution could have taken place before the final judgment by the Court, there was urgency in the circumstances. The provisional measures requested by India were similar to those requested in *Breard*, *LaGrand* and *Avena*. The Court was therefore correct in indicating the same measures as in those cases (paras. 25-36).

The texts of the Separate Opinion of Judge Cançado Trindade and the Declaration of Judge Bhandari commence at pp. 19 and 32 respectively. The following is the text of the Order of the Court:

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[232] 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.

⁶ *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America) (Request for the Indication of Provisional Measures and Order Discontinuing Proceedings)*, 118 ILR 1.

⁷ *Avena and Other Mexican Nationals (Mexico v. United States of America) (Provisional Measures)*, 134 ILR 95.

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.
- [233] (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 [234] 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 [235] 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.

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* *

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.

[236] 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, ICJ 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 [237] 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