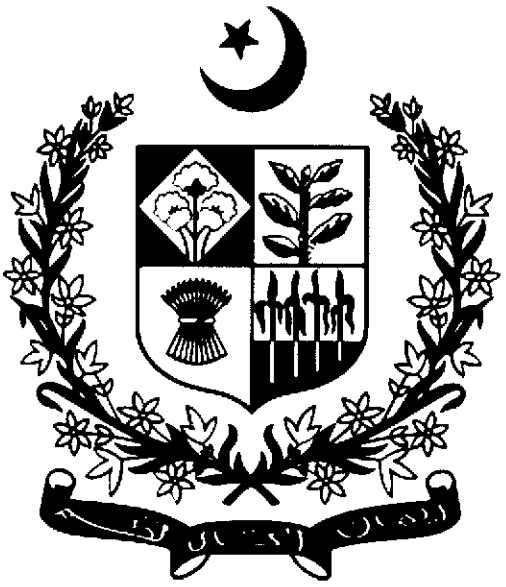
INTERNATIONAL COURT OF JUSTICE

THE JADHAV CASE

THE REPUBLIC OF INDIA v. THE ISLAMIC REPUBLIC OF PAKISTAN

REJOINDER OF THE ISLAMIC REPUBLIC OF PAKISTAN



17TH JULY 2018

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INTRODUCTION AND EXECUTIVE SUMMARY

1. On behalf of the Islamic Republic of Pakistan ("Pakistan"), it is an honour to present this Rejoinder to the Court pursuant to the Procedural Order dated 17 January 2018 **[Volume 1/Annex 5]**.

2. Pakistan adopts for the purposes of this Rejoinder any defined terms that were so defined in its Counter-Memorial filed with the Court on 13 December 2017 ("the Counter-Memorial").

3. In this Rejoinder, references to annexures are given in the form **[volume/annex/page/paragraph]**. References to exhibits that were previously included with the Counter-Memorial are given in the form **[CM/volume/annex/page/paragraph]**.

4. As will be elaborated upon below there are at least 7 fundamental concerns relating to the Reply which India served on 17 April 2018 ("the Reply"), purportedly to "*fully rebut*" the Counter-Memorial served by Pakistan on 13 December 2017 **[Volume 1/Annex 3/page 3/paragraph 5]**.

5. India has used the Reply (with great respect) to misrepresent and distract. Pakistan will show how hereinbelow. Whilst it is India that should apologise profusely for its conduct as demonstrated below, Pakistan feels it must apologise in advance if there is any trenchant terminology used to describe India's conduct. It is rare for brazen wrongdoing or misrepresentation to occur, and that is why the Court has not yet adjudicated on illegality/clean hands issues. Unfortunately, Pakistan is compelled to lay this bare.

6. Pakistan re-iterates its submissions as reflected in the Counter-Memorial. Not a single word within the Reply does anything but fortify those submissions.

The Seven Key Errors (at best) and Omissions in the Reply

(I). India (exceptionally) obtained permission for a further round of pleadings which has led to yet more delay – India having initiated these proceedings invoking extreme urgency and seeking provisional measures without a hearing on 8 May 2017. Far from rebuttal, the Reply is regrettably replete with misrepresentations, invective and irrelevant (albeit inflammatory and unfortunate) diversions.

(II). India, most unfortunately, brazenly and repeatedly misquotes the text from pre-eminent and highly respected British Military Law Experts to found its distortions with regard to the Pakistani Military Courts system.

Indeed, the Pakistani High Court and Supreme Court that India wrongly disparages has (on at least 3 occasions since 8 May 2017 and, in one case within 1 day of an application

being made) stayed death sentences imposed by the Military Courts, as well as setting aside the death sentence in one case[1].

There is absolutely no basis to suggest the Pakistani Courts would not have operated or will not operate in a similar manner in the case of Commander Jadhav, and provide an effective review process if warranted. Yet, instead of having recourse to effective domestic remedies (or even the mechanisms prescribed by the Optional Protocol **[CM/Volume 5/Annex 87]**), India sought to ambush Pakistan and grandstand before the Court in May 2017. Why? It seems so as to use the Court as a political theatre and enable the gross mischaracterisation of the (otherwise understandable) Provisional Measures Order by its media.

(III). India persists in distorting Pakistan's repeated requests for enquiry and information from the Indian authorities regarding the Indian passport Commander Jadhav was carrying and using in a false Muslim name ("the Passport Issue"). What would be a simple matter to address is the subject of obtuse (albeit highly revealing and incriminatory) distraction by India. Yet again, the independent expert report of an eminent British expert (who had also trained the Indian authorities) is belittled, without any response to its clear, cogent and compelling conclusions. India refuses to explain how Commander Jadhav obtained and extensively used an authentic Indian passport, issued in a Muslim name (the material and overwhelming falsity in the said document).

Lest there be any temptation to lend any credence to India's suggestion that Pakistan's requests in this regard are "*mischievous...propaganda*" **[Volume 1/Annex 17/pages 2-3/paragraph (iv)]**, it is not just Pakistan that is asking these questions. Senior and respected Indian journalists are also questioning why India will not address this matter. In addition to their questions being ignored, the journalists have been criticised by the Government of India **[Volume 1/Annex 29]**, as well as lambasted in the Indian media and on social media for being 'traitorous'[2].

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[1] 'Muhammad Imran' was convicted and sentenced to death on 28 June 2015 by the Military Courts. A writ petition was filed before the Peshawar High Court under Article 199 of the Constitution of Pakistan 1973 challenging the conviction and sentence. Following a hearing on 2 March 2017, the Chief Justice of the Peshawar High Court gave judgment on 25 May 2017 that it was not a case of no or insufficient evidence such as to justify the quashing of the conviction. However, based upon his finding that the Military Courts lacked legal jurisdiction to award the death penalty in respect of the particular charges against 'Muhammad Imran', the Chief Justice of the Peshawar High Court set aside the death sentence and remanded the matter to the Military Courts **[Volume 1/Annex 32/page 25/paragraph 38(3)]**

[2] On 3 February 2018, Mr. Praveen Swami (see paragraphs 89-94 below) posted on Twitter a copy of comments concerning him being made on a public forum following the publication of his article **[Volume 1/Annex 26/page 9]**. The comments included:

"*I request @MEAIndia to arrest @praveenswami for spreading fake news to hurt national interests. @SushmaSwaraj @HMOIndia*"

"*@praveenswami Pakistani news network were celebrating. Why India have to tolerate Traitors like you? How much ISI paid u? Or paki boss China? Folks when u see this guy on street of India, do justice for sake of kulbhusan & his family.*"

India knows full well that its dilemma is acute in this regard. Whatever it says, it cannot truthfully explain the Passport Issue without implicating itself as the puppeteer of Commander Jadhav – or say he has used a "*forged*" **[Volume 1/Annex 17/pages 1-2/paragraphs (i) and (iv)]** travel document and would therefore be viewed as a criminal in most jurisdictions. India's hands are anything but clean, its conduct anything but legal, and its absence of good faith is writ large in this matter. These are all unfortunate submissions to make, but they must be made.

(IV). India deliberately misreads the bilateral 2008 Agreement **[CM/Volume 7/Annex 160/page 37]** between India and Pakistan (entered into at the instigation of India and expressly addressing consular access) to negate the natural and ordinary meaning of Article (vi) thereof – by 'cutting and pasting' the said text in a cannibalised form within a completely separate provision, namely Article (v) of the 2008 Agreement.

(V). With regard to the existence of an 'espionage exception' as a matter of Customary International Law as at 1963, India sidesteps the statements of leading academic commentators from 1961 and 1965 (including the respected commentator Biswanath Sen – no less a person than the Honorary Legal Adviser to India's Ministry of External Affairs (1954-1964) **[CM/Volume 5/Annex 117]**). By way of hollow riposte, India invokes a text written by Professor Luke T. Lee in 1966 to somehow suggest he had changed his mind in respect of the observation he had made in his seminal text in 1961 that "*a frequent exception to the consular right to protect nationals and visit them in prison is the case of spies*" **[CM/Volume 5/Annex 112.1/page 125/first paragraph]**. A proper (as opposed to slanted) reading demonstrates he did no such thing. Consistent therewith, the unsurprisingly few examples of 'espionage' which emerged into the public domain involving the major powers, as commented upon in the Counter-Memorial, evidence (at the very least) a lack of acceptance of any obligation to provide consular access in cases where *prima facie* evidence of espionage exists. All India can do is misrepresent those examples.

(VI). India fails to engage with issues concerning the Optional Protocol **[CM/Volume 5/Annex 87]** – the very issues which India (and all State Parties) were invited by the Court to address on 18 January 2018 **[Volume 1/Annex 9]** (following a similar invitation from the Court on 20 November 2017 in respect of the VCCR 1963 itself **[Volume 1/Annex 8]**), but which India has chosen to ignore. India never notified Pakistan of a dispute *vis* the Optional Protocol, which could have engaged mandatory alternative dispute resolution processes for at least 2 months. Instead, for no good reason, India waited for more than 1 year, and then launched its ambush before the Court.

"*Why isn't this swine butchered in broad daylight with the telecast beaming live in Napakistan*"

"*Swamy may be on ISI parole. Regularly gets funds!*"

(VII). In its Reply, India asserts (at paragraph 29) that Commander Jadhav was "*kidnapped from Iran*" (sometime in early 2016), and (at paragraph 134) that his confession as broadcast to the world at large has been "*examined by experts*". These are irrelevant and unsustainable assertions. Yet, as if to underline their 'make weight/distracting nature', nothing remotely resembling credible evidence is deployed.

7. India devotes an entire section in the Reply (Section III/paragraphs 52-77) to castigating Pakistan for requiring the mother and wife of Commander Jadhav to speak in English, change their clothing and remove metal objects when visiting Pakistan to meet him on 25 December 2017. India overlooks the express written consent provided for security measures **[Volume 1/Annex 13]**, which are neither improper nor oppressive in the context of a visit to a convict[3]. India advances serious (but otherwise absurd and inappropriate) allegations as to mistreatment of Commander Jadhav to suggest that, when he met his wife and mother, he was "*not in his senses and was under the influence of something*" (perhaps suggesting he was drugged) or "*looking puffy and swollen*" (perhaps suggesting he was tortured) (Reply/Annex 4/paragraphs 14 and 17). India, in its Reply, asserts (at paragraph 70) as follows:

"*Upon return, the mother and wife conveyed that Jadhav appeared under considerable stress and was speaking in an atmosphere of coercion. As the meeting evolved, it was clear to them that his remarks were tutored by his captors and designed to perpetrate the false narrative of his alleged activities. His appearance also raised questions of his health and well-being*".

8. The absurdity of India's position is compounded when it is observed that India is compelled to ignore the clear report that was issued by an independent German physician, Dr. Uwe Johannes Nellessen (a Senior Consultant at the Saudi-German Hospital in Dubai **[Volume 1/Annex 11]**) who undertook a very thorough medical examination of Commander Jadhav on 21 December 2017. On 22 December 2017, the learned physician provided a 14-page medical report ("the Independent Medical Report") which included blood tests and heart scans **[Volume 1/Annex 12]**. He remarked (on page 3), *inter alia*, that Commander Jadhav was in "*excellent hea[l]thy condition*". The conclusions of the report were shared with India and the world at large on 25 December 2017 by Pakistan. Presumably India believes that Commander Jadhav was kept in excellent health up until 21 December 2017, and then subjected to torture so as to force him to see his wife and mother?

9. Pakistan observes (with regret) that, in some part, it apprehended (rightly, albeit unfortunately) that India would seek to negatively spin the humanitarian visit and gesture

[3] Certain States, such as the United Kingdom **[Volume 1/Annex 14]**, have published detailed rules/guidance on the regulation of prison visits to convicts indicating that matters such as security scans (with metal detectors), removal of jewellery, no contact (particularly as regards high security prisoners), signature of written declarations by visitors, and continuous monitoring of meetings are commonplace.

of goodwill on Christmas Day in whatever way possible (however unfair and implausible) (see Pakistan's *Note Verbale* to India dated 24 November 2017 at **[Volume 1/Annex 10/penultimate paragraph]**). By colourful and baseless assertions, India attempts to pour scorn upon the goodwill gesture, as well as the contemporaneous comments made by Commander Jadhav's mother as to his positive state of health (perfectly consistent with the Independent Medical Report prepared 3 days prior to her visit). In any event, these are not relevant matters, albeit Pakistan addresses them in this summary to make it plain that the 'spin' thereupon is not accepted.

10. Pakistan addresses each of the Seven Errors/Omissions in further detail below.

I. INDIA'S REPLY IS REPLETE WITH MISREPRESENTATIONS AND IRRELEVANT DIVERSIONS

11. India had stated, in its letter to the Court dated 10 January 2018, that it intended to utilise the Reply to "*fully rebut*" the Counter-Memorial **[Volume 1/Annex 3/page 3/paragraph 5]**. Pakistan took this statement at face value. In this context Pakistan notes that in its Counter-Memorial (filed on 13 December 2017), it was stated (at paragraph 6) that:

"*The key arguments identified herein have previously been raised at the Provisional Measures hearing on 15 May 2017*".

12. Pakistan expected India would at least attempt to respond in some form to these arguments in its Memorial (if nothing else to 'knock them down' (were that possible) or to enable the expeditious determination of this matter by the Court, as has been repeatedly sought by Pakistan since 15 May 2017[4]). India did no such thing. In any event, by the time of the filing of its Reply on 17 April 2018, India had been on notice of Pakistan's key arguments in the case for a period of approximately 11 months, and had the benefit of Pakistan's elucidation of those arguments as presented in the Counter-Memorial for a period of approximately 4 months.

13. Yet, despite having had ample time in which to understand and prepare a substantive response to Pakistan's arguments in its Memorial, India sought the Court's permission for a further round of pleadings **[Volume 1/Annex 1]**. In an effort to promote effective dispute resolution, Pakistan, in its letter of 5 January 2018, questioned the need for a further round of pleadings, and also suggested an expedited time frame in any event to limit further delay **[Volume 1/Annex 2]**.

14. By a letter dated 19 December 2017 **[Volume 1/Annex 1/page 2]**, India expressly asserted that the Counter-Memorial raised "*issues of fact and law that may not necessarily have been anticipated by India and considered in the Memorial filed by India*". (emphasis added)

15. By a further letter dated 10 January 2018, India asserted that Pakistan, in its Counter-Memorial, had for the first time "*set out its defence and in doing so has raised various issues of fact and law*" **[Volume 1/Annex 3/page 2/paragraph 2]** which "*would have to be fully rebutted*" **[Volume 1/Annex 3/page 3/paragraph 5]**. (emphasis added)

16. It was on the basis of India's purported justification of the need for a further round of pleadings to deal with issues "*of fact and law*" that the Court, by its order dated 17 January 2018 **[Volume 1/Annex 5]**, authorised the submission of a Reply by India and a Rejoinder by Pakistan (with 3 months for each, as sought by India).

17. Yet, Pakistan notes with regret that, despite the characterisation of the position by India as set out above, India has refused and/or failed to engage with and/or address highly

[4] See **[CM/Volume 1/Annex 5.2/page 10/paragraph 18]** and **[Volume 1/Annex 2/page 3/paragraph 13]** and **[Volume 1/Annex 4/page 3/paragraphs 12-13]**

material issues of fact and law raised by Pakistan. In its Reply, India's position is illuminated by its bald assertion (at paragraph 39) that:

"*India does not consider it necessary to reply in any degree of detail to the litany of false allegations being made by Pakistan*".

18. Pakistan makes no false allegations. Not least, it expects India to explain the critical Passport Issue (and is evidently not alone in seeking such an explanation – see Section III(C) below).

19. India is unable to restrain itself in otherwise 'spinning' Pakistan's case. In its Reply, India asserts (at paragraph 5) that Pakistan:

"*rightly points out that this Court is not a criminal appellate court, and yet it invites by its conduct a retrial of the accused, which would be inevitable if this Court were to examine the truthfulness of its litany of allegations against India and Jadhav*".

20. Pakistan is not the party seeking an order for 'acquittal or release' (see India's Application/paragraph 60(4) and India's Memorial/paragraph 214(iii)). Pakistan, again and again, pointed out that the Court expressly disavows any role akin to a criminal appellate jurisdiction **[see CM/Volume 1/Annex 4/pages 8-13/paragraphs 26, 32, 38, 47 and CM/Volume 1/Annex 5.2/pages 16-17 and Counter-Memorial paragraphs 391, 396-411]** – for very good reasons (including being inundated by 11th hour applications from multiple jurisdictions if it were to seek to embrace such a role).

21. Pakistan's submissions in the Counter-Memorial cannot conceivably be said to invite a re-trial. Pakistan provided some background factual context (admittedly irrelevant in reality to the dispute) simply to eviscerate India's ridicule of Pakistan's legal processes. In every other respect, the Counter-Memorial raises issues of fact and law which India seemed to have accepted required an answer – but when it came to providing an answer, India has no answer or refuses to give an answer. Instead, evasion is the major component of the Reply (with respect).

II. INDIA HAS DELIBERATELY MISREPRESENTED THE MILITARY LAW EXPERTS' REPORT

22. In its Counter-Memorial, Pakistan set out (at paragraphs 444-446) the conclusions reached in the review undertaken by two pre-eminent independent UK military law experts (Brigadier (Rtd) Anthony Paphiti and Professor Colonel (Rtd) Charles Garraway CBE ("the Military Law Experts")) of a representative example of the laws and procedures of certain UN Member States to address questions including State practice regarding the jurisdictional basis, process and procedure of Military Courts ("the Military Law Experts' Report"). The full report was produced as Annex 142 of the Counter-Memorial.

23. There are three critical respects in which India has deliberately misquoted the Military Law Experts' Report. One alone could be attributed to an error. Two misquotes, perhaps sloppiness. Three crosses the threshold into the realms of distortion and impropriety – unfortunate (at best) because it is so transparent upon a careful reading of the Military Law Experts' Report[5].

(A) THE THREE DISTORTIONS AND MISREPRESENTATIONS

The First Distortion

24. In the Military Law Experts' Report, Brigadier Paphiti and Colonel Garraway concluded (at paragraph 3(d)) as follows **[CM/Volume 7/Annex 142/page vii]**:

"*In the case of Pakistan, the "judicial review" function of the Civilian Courts...appears to provide a potential effective safeguard against manifest failings in due process*".

25. In its Reply, India asserts (at paragraph 19) as follows:

"*Finally, Pakistan seeks to salvage the poor reputation of its Military Courts, in the matter of following due process, in the international community by relying upon a report. The report, however, recognises that its system has manifest failings. Pakistan fails to deny any of the allegations of the manner in which the military justice system functions, and for which it has faced criticisms in reports of international agencies of credibility and repute*". (emphasis added)

26. Further, India, in its Reply, asserts (at paragraph 154(d)), when quoting from the Military Law Experts' Report, as follows:

[5] By a *Note Verbale* dated 5 June 2018 **[Volume 1/Annex 6]**, in the interests of fairness, India was given an opportunity to confirm the accuracy of the contents of the Reply on or by 21 June 2018 to enable the Rejoinder to be finalised in the light of any reply. Belatedly, by a *Note Verbale* dated 27 June 2018 **[Volume 1/Annex 7]**, India failed and/or refused to provide any substantive response, simply characterising the queries in respect of the Reply and its accuracy as "*inappropriate and irrelevant*".

"The experts notice that judicial review by the constitutional courts is available and in their view it "appears to provide a potential effective safeguard against ***the*** *manifest failings in due process". India offers two comments on matters that are apparent in this guarded statement; Firstly, it acknowledges that in the system there are "manifest failings"...*" (emphasis added)

27. Thus, it can be seen that India has erroneously added the word "*the*" before the words "*manifest failings*". The effect of the addition of the extra word is to materially alter the meaning of the sentence – from, on the one hand, the potential for the review of manifest failings (the meaning evidently intended by the Military Law Experts) to, on the other hand, misleadingly suggesting that the experts had identified and accepted that there were manifest failings in Pakistan's judicial system (the meaning that India would doubtless have preferred). The alteration by India of the conclusions expressed in the report is simply unacceptable.

28. As can be seen from paragraph 154(d) of India's Reply (as cited above), having materially altered the conclusions of the Military Law Experts, India then uses the altered meaning in order to attack the Military Law Experts' Report itself and Pakistan's reliance upon it.

29. Leaving the truth behind, India, in its Reply, asserts (at paragraph 155) as follows:

"This report of the experts hardly supports Pakistan's challenge to India's position – on the contrary the Court now has a report filed by Pakistan which substantially confirms what India has said about the failings in the system of trial by Military Courts".

30. India is only able to make that assertion as a result of its having made material alterations to the Military Law Experts' Report in order to falsely misrepresent its conclusions.

The Second Distortion

31. In the Military Law Experts' Report, Brigadier Paphiti and Colonel Garraway concluded (at paragraph 3(a)) as follows **[CM/Volume 7/Annex 142/page vi]**:

"While most Military Courts do have jurisdiction to try the civilian offences of espionage and terrorism, in addition to related military offences of a similar nature, this is ***often*** *limited to offences committed by persons already subject to Service jurisdiction".* (emphasis added)

32. India, in its Reply, asserts (at paragraph 154(b)), when quoting from the Military Law Experts' Report, that:

"In the Conclusion as is set out in Paragraph 3 of their report, they note that the jurisdiction of Military Courts to try civilian offences such as espionage and terrorism (i.e. offences beyond the law applicable to members of the Armed Forces), their

jurisdiction is limited to persons already subject to Service jurisdiction". (emphasis added)

33. Thus, it can be seen that India has erroneously omitted the word "*often*" before the word "*limited*". The effect of the omission is to materially alter the meaning of the sentence – from, on the one hand, the fact that such a limitation is not universal and (perfectly legitimately) does not appear in the military justice systems of some States (the meaning evidently intended by the Military Law Experts) to, on the other hand, a hard and universal limitation imposing an obstacle to the prosecution of a civilian (which India still, in the face of all evidence and without any attempt at substantiation, claims Commander Jadhav is) for espionage and terrorism offences (the meaning that India would doubtless have preferred). The alteration by India of the conclusions expressed in the report is thus deliberate, misleading and wholly improper.

The Third Distortion

34. In the Military Law Experts' Report, Brigadier Paphiti and Colonel Garraway concluded (at paragraph 3(f)) as follows **[CM/Volume 7/Annex 142/page vii]**:

"*We are aware of general criticisms made of the Courts which try terrorism offences both in India and Pakistan. We are not in a position to consider whether those criticisms are valid without further extensive research and review*". (emphasis added)

35. India, in its Reply, asserts (at paragraph 154(e)), when quoting from the Military Law Experts' Report, that:

"*Finally the experts close with a note of caution stating that they are aware of the criticisms made of the courts which try terrorism offences, but at* [sic] *that they were not in a position "to consider whether those criticisms are valid without further extensive research and review*"".

36. It is apparent that India is implying that the Military Law Experts are referring only to the Pakistani Military Courts, whereas, as is readily apparent, reference was being made to criticisms "*both in India and Pakistan*" (emphasis added). India thus manufactures another basis upon which to undermine the Military Law Experts – but only by deliberately misreading the first sentence of the relevant paragraph in order to mischaracterise their conclusions.

37. Why did India engage in such an obvious exercise to misrepresent the Military Law Experts' Report – because it has no answer, let alone a sustainable answer, to the contents thereof.

38. In addition, India plainly recognises that the presence of an effective review jurisdiction within the legal system of Pakistan, in truth, renders its application before the Court futile (at best) as India persists in seeking "*in the least*" **[CM/Volume 1/Annex 5.1/page 42/paragraph 95]** an order of acquittal or release of Commander Jadhav from the Court.

The Courts of Pakistan can and will provide review of the Military Courts when their jurisdiction is engaged. It is simply wrong for India to suggest otherwise.

(B) PAKISTAN'S HIGH COURT AND SUPREME COURT ARE CONTINUING TO EXERCISE A ROBUST REVIEW JURISDICTION IN RESPECT OF THE MILITARY COURTS.

39. In its Reply, India (at paragraphs 26 and 152-157) appears to suggest, even in the face of the Military Law Experts' Report, that Pakistan's civil courts (which have consistently held that they possess jurisdiction to judicially review any order emanating from the Military Courts) are an ineffective means by which Pakistan may enable "*review and reconsideration*" in respect of Commander Jadhav.

40. Pakistan refrains from engaging in a comparison between the Indian Supreme Court and the Supreme Court of Pakistan (as India purports to do in its Reply at paragraphs 23-25 and 154(d)). They are both respected institutions, and any attempt at comparison is meaningless in this context.

41. Pakistan hereby places before the Court three examples of the civil courts of Pakistan continuing to actively and robustly exercise their jurisdiction in respect of death sentences issued by the Military Courts since 18 May 2017 (when the Provisional Measures Order was made).

42. In August 2016, a writ petition was filed before the Peshawar High Court by Fazal Ghafoor, the father of 'Fazal Rabi', challenging the conviction and death sentence handed down by the Military Court in respect of his son and seeking, by way of interim relief, that the death sentence be suspended pending the final disposal of that writ petition. On 29 August 2016, the Chief Justice of the Peshawar High Court issued an order suspending the operation of the death sentence in respect of 'Fazal Rabi'. On 20 September 2016, the stay order was continued by a further order of the Chief Justice of the Peshawar High Court **[Volume 1/Annex 33]**. On 25 May 2017, the Chief Justice of the Peshawar High Court gave judgment dismissing the writ petition. In June 2017, the father of 'Fazal Rabi' filed a petition seeking leave to appeal to the Supreme Court of Pakistan against the judgment of the Peshawar High Court **[Volume 1/Annex 34]**. On 19 July 2017, the Supreme Court issued an order stating "*Notice for a date in office. In the meantime, the petitioners*[6] *shall not be executed*" **[Volume 1/Annex 35/page 1]** – thereby staying the carrying out of the death sentence in respect of 'Fazal Rabi'.

43. In January 2016, a writ petition was filed before the Lahore High Court by Muhammad Liaqat, the father of 'Shafaqat Farooqi', challenging the conviction and death sentence handed down by the Military Court in respect of his son. On 13 December 2016, the

[6] The reference to 'petitioner' is clearly intended to be a reference to the convicted person and the beneficiary of the stay order

Lahore High Court gave judgment dismissing the challenge. A petition was subsequently filed by Muhammad Liaqat seeking leave to appeal to the Supreme Court of Pakistan against the judgment of the Lahore High Court **[Volume 1/Annex 36]**. On 22 January 2018, a two-judge bench of the Supreme Court issued an order stating "*Notice. In the meantime, the sentence of death shall not be executed till further orders*" **[Volume 1/Annex 37/page 1/paragraph 2]** – thereby staying the carrying out of the death sentence in respect of 'Shafaqat Farooqi'.

44. On 8 May 2018, the father of 'Burhan-ud-Din' filed a writ petition before the Peshawar High Court challenging his son's conviction/sentence and seeking, by way of interim relief, that "*operation of execution of death sentence of convict/ detenue namely Burhan-ud-Din may kindly be suspended till the final decision of instant writ petition*" **[Volume 1/Annex 38/page 4]**. On 9 May 2018, the Chief Justice of the Peshawar High Court issued an order stating "*The execution of death sentence awarded to the convict by the Military Court is suspended*" **[Volume 1/Annex 39]** – thereby staying the carrying out of the death sentence in respect of 'Burhan-ud-Din' within 1 day of the filing of a challenge to the sentence.

III. INDIA CONTINUES TO REFUSE TO ENGAGE WITH THE PASSPORT ISSUE

45. In its Reply, India yet again seeks to deflect attention from a fundamental question – one that has been repeatedly raised with India by Pakistan and one which India has continually refused to answer.

46. That fundamental question (identified by Pakistan in its Counter-Memorial at paragraph 121 as a "*central question*") is this:

how is it that Commander Jadhav (an individual that India admits was a member of its armed forces, but (conveniently) suggests retired shortly prior to his arrest) was able to travel frequently to and from India using an authentic Indian passport bearing a false identity in a Muslim name?

47. This question itself raises yet further highly material questions. All of these questions have been repeatedly raised with India since 31 May 2017. India could easily answer them. It refuses to do so and seeks to wish them away as being "*irrelevant*" (Reply/paragraph 97) or "*mischievous...propaganda*" **[Volume 1/Annex 17/pages 2-3/paragraph (iv)]**. India's response as such is telling and can only be incriminatory.

48. Pakistan reiterates that at the time of his arrest Commander Jadhav was in possession of an Indian passport (number L9630722, issued on 12 May 2014, valid until 11 May 2024) bearing the Muslim name 'Hussein Mubarak Patel' ("the Passport").

49. As was set out in the Counter-Memorial (at paragraphs 206-209), Pakistan has repeatedly requested and India has obstinately refused to provide information relating to the Passport. Instead, India has deployed distractions, diversions, deflections, and deafening silence.

(A) THE SIX REQUESTS TO INDIA SINCE 31 MAY 2017 TO ADDRESS THE PASSPORT ISSUE.

- *Note Verbale* from Pakistan's Ministry of Foreign Affairs to the High Commission of the Republic of India in Islamabad dated 31 May 2017 (ref: No.Ind(I)-5/20/2017) **[CM/Volume 2/Annex 42]**
- *Note Verbale* from Pakistan's Ministry of Foreign Affairs to the High Commission of the Republic of India in Islamabad dated 30 August 2017 (ref: No.Ind(I)-5/20/2017) **[CM/Volume 2/Annex 43]**
- *Note Verbale* from Pakistan's Ministry of Foreign Affairs to the High Commission of the Republic of India in Islamabad dated 26 October 2017 (ref: No.IND(I)-5/20/2017) **[CM/Volume 2/Annex 44]**

- *Note Verbale* from Pakistan's Ministry of Foreign Affairs to the High Commission of the Republic of India in Islamabad dated 19 January 2018 (ref: No.Ind(I)-5/20/2018) **[Volume 1/Annex 16]**
- *Note Verbale* from Pakistan's Ministry of Foreign Affairs to the High Commission of the Republic of India in Islamabad dated 16 April 2018 (ref: No.Ind(I)-5/20/2018) **[Volume 1/Annex 18]**
- *Note Verbale* from Pakistan's Ministry of Foreign Affairs to the High Commission of the Republic of India in Islamabad dated 3 May 2018 **[Volume 1/Annex 19]**

50. Pakistan has annexed all the said requests and the replies (insofar as made by India). At no stage has India sought to engage with the legitimate and simple questions which India should easily be able to answer (if such answers were trouble free for India).

51. Instead, what is clear is as follows:

(1) Pakistan referred to the Passport in Commander Jadhav's possession as reflecting a patently false identity (a Muslim name) **[CM/Volume 2/Annex 42/page 1/paragraph (c)]**. India engaged in its characteristic spin to assert that Pakistan was asserting that Commander Jadhav was in possession of a "*false*" passport **[CM/Volume 2/Annex 33/page 1/paragraph (iii)]**.

(2) By way of purported reply to a very detailed request sent on 30 August 2017 **[CM/Volume 2/Annex 43]** and then repeated on 26 October 2017 **[CM/Volume 2/Annex 44]**, India's *Note Verbale* dated 11 December 2017 stated that Pakistan was repeatedly asking for an explanation:

"*in respect of a purported document that looks like a passport, and which, on the allegations made by Pakistan is clearly a forgery... Pakistan has raised questions on the provenance of the document that looks like passport and...seeks explanations from India in relation to the same document*".

[Volume 1/Annex 15/page 2/second paragraph]

India was quite right and plainly understood that Pakistan was seeking an explanation in respect of the Passport. However, India (for the first time) identified the Passport as "*clearly a forgery*" **[Volume 1/Annex 15/page 2/second paragraph]** – without any evidence to substantiate such an important evidential assertion.

(3) By a *Note Verbale* dated 19 January 2018, India was asked, *inter alia*, to explain how the Passport could be described by India as "*clearly a forgery*" **[Volume 1/Annex 16/pages 2-3/paragraphs under heading (B)]**.

(4) By this time, India had received the independent expert report of Mr. David Westgate (which was produced as Annex 141 of Pakistan's Counter-Memorial on 13 December 2017). In its Counter-Memorial, Pakistan set out (at paragraph 169) a summary of the

conclusions of the Westgate Report, arrived at after a thorough examination of the Passport, *inter alia*, as follows:

> "*The passport is a genuine and authentic Indian travel document and not a counterfeit (paragraph 9 of Mr. Westgate's report);*
>
> *The laminate has a security print on the inside which is clear and undamaged and there is no evidence that the image is not original to the document (paragraph 9 of Mr. Westgate's report);*
>
> *"From my knowledge and understanding of the airport immigration system in India, the immigration counters are connected to a central database, and any irregularities in the authenticity [of] a passport would ordinarily be flagged up on such a database. Thus I would observe that the frequency with which the individual presented the passport at the immigration counter in India for entry and exit [Mr. Westgate having earlier observed that it had been used thus on at least 17 occasions] is very supportive evidence of the authentic nature of the passport. In addition, if there were issues concerning the holder of an authentic passport, such as an Interpol I24/7 notice, and Indian central watch-list entry, criminal proceedings, issues relating to identity, these would be very likely to be spotted at the point of encounter with the immigration authorities when the passport was scrutinised by the officials in India. Such officials would be examining hundreds of passports on a daily basis, and would thus have considerably more experience in respect of such documents (paragraph 15 of Mr. Westgate's report)*".

(5) How did India respond? By its *Note Verbale* dated 11 April 2018, India asserted that Pakistan's questions relating to the Passport were "*aimed at propagating falsehood and propaganda by Pakistan in the matter*" **[Volume 1/Annex 17/page 1/second paragraph]**. With respect, this is unintelligible if it is intended to be a straightforward and honest response to the said queries, not to mention the compelling expert opinion provided to India. India did not stop there. India further asserted that Pakistan itself had described the Passport as "*patently false*" **[Volume 1/Annex 17/page 1/paragraph (i)/lines 1-6]** – which it must be observed was a patently false assertion. India also sought to escape the logic of its own stance (that the Passport was "*clearly a forgery*" **[Volume 1/Annex 15/page 2/second paragraph]**) by denying that Commander Jadhav had been in possession of a forged passport **[Volume 1/Annex 17/pages 1-2/paragraph (i)]**, and suggesting this was "*mischievous and yet another measure of propaganda*" **[Volume 1/Annex 17/pages 2-3/paragraph (iv)]**.

(6) On 16 April 2018, Pakistan sent India a *Note Verbale* reminding India that a substantive response was expected on the Passport Issue in the Reply **[Volume 1/Annex 18/page 1/sixth paragraph]**. Nothing remotely resembling this features in the Reply. The *Note Verbale* was otherwise ignored, as indeed was a further *Note Verbale* dated 3 May 2018 re-iterating the said queries **[Volume 1/Annex 19]**.

(B) INDIA'S STANCE IS MANIFESTLY UNTENABLE

52. To the extent that India makes any effort at all to engage with and/or address the Passport Issue in its Reply, Pakistan respectfully submits that India's position is (at best) manifestly inadequate and inconsistent.

53. On the one hand, India, in its Reply, asserts (at paragraph 2) that the Passport Issue is irrelevant or "*unrelated to the issues in the present proceedings*". Pakistan respectfully submits that, as was made clear in its Counter-Memorial, the Passport Issue is directly relevant to the issues of whether the Court should exercise jurisdiction and/or whether any relief should be granted in light of India's abuse of rights and/or illegality/unclean hands (undoubtedly, an issue in the present proceedings).

54. On the other hand, India, in its Reply, baldly asserts (at paragraph 6) that the Passport is "*facially...a forgery because it had a false Muslim identity*". Such a statement requires evidential support, not least in the face of the clear and compelling Westgate Report.

55. Furthermore, India's Reply (paragraph 92 thereof) itself appears to constitute an admission which (at the very least) requires further explanation[7].

56. India, in its Reply, seeks to create confusion in the matter by asserting (at paragraph 14, footnote 3) that Pakistan's own description of the Passport as an authentic passport with a false identity is: "*A contradiction in terms*". It is a simple, clear and accurate statement of fact. A passport can be an authentic document and yet carry a false identity. This is of course rare, because it would be highly improper for an authentic passport carrying a false identity to be made available by any UN Member State. The nefarious intent and purpose underpinning such a document (which seeks to disguise the true identity of its carrier) is all too obvious.

57. India still ignores that which Pakistan had repeatedly sought clarity upon and India has continually refused to explain (but which is now confirmed by the Westgate Report **[CM/Volume 7/Annex 141]**) – namely that the Passport was an authentic (namely real or genuine) passport issued by the competent authorities in India but issued in a different (Muslim) name to that of Commander Jadhav (wherein lies the falsity).

58. Pakistan observes that, since 13 December 2017, India has been provided with a copy of the Westgate Report **[CM/Volume 7/Annex 141]**. However, India has made no attempt whatsoever (either in correspondence with Pakistan or in its pleadings filed with the

[7] At paragraph 92 of the Reply (perhaps unwittingly) India appears to acknowledge that the Passport is *prima facie* evidence of espionage/terrorism: "*what was the other evidence (apart from the patently contrived confession and the forged passport) from which it could be established that Jadhav was engaging in acts of spying and terrorism*" (emphasis added)

Court) to engage with and/or address (never mind substantively contradict) the conclusions reached in the Westgate Report.

59. Instead, in its Reply, India (at paragraph 97) makes a meaningless reference to "*a purported Expert Report as to the passport which it* [Pakistan] *has unilaterally obtained*". (emphasis added)

60. To the extent that India's reference to Mr. Westgate as a "*purported*" expert is intended to cast aspersions upon Mr. Westgate's expertise, Pakistan draws attention to Mr. Westgate's qualifications and expertise as set out in his report and extracted below at paragraphs 65-67.

61. To the extent that India seeks to level criticism against Pakistan for having engaged Mr. Westgate "*unilaterally*", Pakistan notes that India has been on notice of the Passport Issue since 25 March 2016 **[CM/Volume 2/Annex 12]**, or at the latest since 23 January 2017 **[CM/Volume 2/Annex 17/pages 12-14]**. More specifically, since 31 May 2017 **[CM/Volume 2/Annex 42]**, Pakistan has repeatedly requested India to provide information relating to the Passport (which would be very simple for India (as the issuing authority for Indian passports) to obtain and provide to Pakistan and to the Court), yet India has continually refused to do so. With respect, it defies belief that India cannot access its own database and State resources to provide the necessary explanations in respect of the Passport Issue. The reality is simple. India will not do so, for reasons which must be all too clear to India (and to the Court).

62. Indeed, as the provenance and authenticity of the Passport has now been established by an independent and highly experienced expert, the burden falls on India to rebut the irresistible inferences that flow therefrom. Instead, India evades and (with respect) blusters. Why? Pakistan observes that there are two separate questions which might engage the Passport:

(1). What evidence did India provide to Pakistan to establish that Commander Jadhav was indeed an Indian national entitled to diplomatic protection – the answer is none. India's retort in its Reply (at paragraph 100) that the Pakistani authorities had stated to the international community in March 2016 that Commander Jadhav "*had been sent by India to act as a spy*" cannot amount to waiver/estoppel (if it be so contended). This cannot be embraced as a clear and unequivocal acceptance of Indian nationality. It clearly means 'a spy for India'. If India wished to contend that Commander Jadhav was an Indian but not a spy, it was incumbent upon India to explain how he possessed and used a passport with a false (Muslim) identity. India steadfastly avoids doing so, and Pakistan can well understand why it does not wish to dig a deeper hole for itself in this regard.

(2). Given the manifest illegality underpinning the Passport Issue (false name/issued by the Indian authorities/used frequently/in possession when apprehended in Pakistan), it is

incumbent upon India to explain the same, as it has been repeatedly called upon to do. Put another way, India's hands are not only unclean, and not only is its Application before the Court tainted by serious illegality on its part, there is a manifest absence of good faith in this regard on the part of India.

63. Furthermore, Pakistan submits that for India to assert, in the face of the Westgate Report (and without providing, or even attempting to provide, any evidence or substantiation for the assertion), that the Passport is a forgery is, with respect, untenable. This may be a simple and attractive diversion for India, but it cries out for an explanation.

64. Pakistan respectfully repeats that India's refusal and/or failure to address the Passport Issue is all the more troubling in the context of questions which are straightforward and simple for India to answer.

65. Mr. Westgate set out his expertise and qualifications in his report, stating (at paragraph 2) **[CM/Volume 7/Annex 141/page 1]** as follows:

"*I served as part of the United Kingdom Home Office and Immigration Intelligence for more than 27 years, during which time I obtained considerable experience of border control procedures and document verification. During the whole of my service I handled travel documents on a daily basis. I have been a member of the Heathrow Terminal 4 forgery team, from 1990 until 2001 and then served on attachment to the Foreign and Commonwealth Office as Immigration Airline Liaison Officer based in New Delhi serving the whole of northern India and Nepal advising airlines and border security control officials on forgery and fraud in travel documents. I have also served as a visa officer on secondment to the Foreign and Commonwealth Office in Karachi, Pakistan. On return to the UK in 2004 until I left the Home Office in February 2017 I served as Chief Immigration Officer at the National Document Fraud Unit, (NDFU). The NDFU is the centre of knowledge and information for the Home Office for travel documents. I have provided evidence in both Crown and Magistrates courts representing the Home Office in cases involving document fraud*".

66. Thus, Mr. Westgate was not only a long-standing and highly experienced senior official in the UK immigration authorities, but was responsible for the organisation dealing specifically with fraud detection in travel documents (namely, the NDFU).

67. In addition, and equally importantly, Mr. Westgate spent 3 years in India as Immigration Intelligence Liaison Manager which, as described in the Curriculum Vitae appended to his report **[CM/Volume 7/Annex 141/page 10]**, involved:

"*Working closely with Indian Intelligence Officers, police, UK Security Service and the visa sections across the whole of north India and Nepal. Advising Indian and Nepal border control on documentation and security*".

68. It is perhaps because of Mr. Westgate's special and undoubted expertise that India, rather than contest his expert evidence, seeks to 'bury it under the carpet'.

69. Furthermore, given the existence in India of a computerised central immigration database **[CM/Volume 7/Annex 141/page 7/paragraph 15]**, it would be a very simple matter for India to input the serial number of the Passport into its database, and then to inform Pakistan and the Court as to whether such a passport with such a serial number exists on India's records.

70. Even if such a passport with such a serial number does not exist on India's records, it is incumbent upon India to explain how (as Mr. Westgate has found) the Passport was able to be used to pass through immigration counters for entry or exit through India on at least 17 occasions **[CM/Volume 7/Annex 141/page 7/paragraph 14]**. On each such occasion, any CCTV or other cameras at/near the immigration counter would have captured and recorded the image of the person that presented the Passport, as well as the precise time and date.

71. Furthermore, many international airports are equipped with fingerprinting technology and passengers entering or exiting through such an airport are required to submit to a fingerprint scan[8]. A fingerprint scan produces a record for the competent authorities.

72. Moreover, as was observed by Mr. Westgate, the Passport contained valid Iranian visas **[CM/Volume 2/Annex 141/page 3/paragraph 11]**. The visa application process for Iran requires the submission of a form with accompanying documentation **[Volume 1/Annex 31]**. It would be perfectly possible for India to ascertain whether the visas for Iran were obtained by Commander Jadhav (masquerading as 'Hussein Mubarak Patel') in an improper manner.

73. Notwithstanding the simplicity of such investigative steps, and the ease with which they could be undertaken by India, India has consistently refused and/or failed to engage with and/or address these issues. Pakistan submits that such refusal and/or failure is, with respect, telling.

74. In light of the clear, reliable and cogent findings contained in the independent Westgate Report, Pakistan maintains that India supplied Commander Jadhav with the Passport, and thus (most regrettably) equipped him to carry out illegal acts in a manner that is not objectively different to supplying him with weapons. The Court will recall Articles 2(g) and 3(a) of UN Security Council Resolution 1373 (2001) **[CM/Volume 5/Annex 89]**, which emphasised the importance of ensuring travel documents were not abused but

[8] It is understood from a *Times of India* article that Indian international airports installed (or were soon to install) fingerprint scanners from at least around May 2011 onwards precisely to combat identity related travel document abuse, and use of forged travel documents **[Volume 1/Annex 30]**

subject to rigorous scrutiny, in the context of their use to facilitate grave acts of terrorism.

75. By supplying Commander Jadhav with the Passport, India materially enabled, and therefore must bear responsibility for, the illegal acts committed by Commander Jadhav in and against Pakistan and its citizens.

76. Moreover, the Passport is clear, cogent and compelling evidence of Commander Jadhav's clandestine and illegal activity, and it is evidence whose authorship and provenance lies in the hands of the Indian authorities. In light of that fact, it is regrettable (although wholly unsurprising) that India seeks to avoid addressing any aspect of the Passport.

77. In its Counter-Memorial, Pakistan (in Section III(C)) set out in detail its submissions on India's illegality, including (at paragraph 219) its submission "*that India is guilty of egregious illegal conduct in providing Commander Jadhav with an authentic passport and false identity, and despatching him to carry out acts of espionage and terrorism in Pakistan in contravention of the Charter of the United Nations*". Thus, Pakistan invited the Court to declare India's claim inadmissible and/or otherwise unacceptable on the basis of the doctrines of illegality and/or clean hands and/or the principle of *ex injuria jus non oritur*. The egregious conduct of India is either the operative cause for the proceedings before the Court, or it otherwise has the effect of barring any form of relief being available to India.

78. In correspondence and in its Reply, India has not sought to engage with this central submission. India's assertion to the contrary in its Reply (at paragraph 56) that it has given a "*detailed response*" to Pakistan's MLA Request by virtue of its *Note Verbale* dated 11 December 2017 **[Volume 1/Annex 15]** is manifestly untenable.

79. India continues to avoid the issue, including by continuing to assert in its *Note Verbale* dated 11 April 2018 that the Passport is a "*forgery*" **[Volume 1/Annex 17/pages 2-3/paragraph (iv)]** (despite the clear and cogent findings of the Westgate Report).

80. Furthermore, India has sought to describe Pakistan's legitimate concerns and queries in respect of the Passport as "*propaganda*" **[Volume 1/Annex 17/pages 2-3/paragraph (iv)]**, "*farcical*" **[Volume 1/Annex 15/page 2/second paragraph and Volume 1/Annex 17/page 3/second paragraph]**, "*mischievous*" **[Volume 1/Annex 17/pages 2-3/paragraph (iv)]** and (Reply/paragraph 39) part of a "*litany of false allegations*".

(C) PAKISTAN IS NOT ALONE IN QUESTIONING INDIA ON THE PASSPORT ISSUE

81. Pakistan is not the only party which is seeking explanations from India. Senior and respected Indian journalists are asking very similar questions and being (at best) stonewalled.

82. India, in its Reply, says (at paragraph 50) as follows:

> "*It is correct that some Indian journalists made the comments conveniently relied upon by Pakistan. That is a measure of the freedom of press in India, where no curbs are placed upon expression of individual opinions even if they be contrary to the stated position of the Government of India*".

83. It is assumed (because India has omitted to give any specific reference) that this is a reference to the article written by the highly respected Indian journalist Mr. Karan Thapar on 21 April 2017 (referenced by Pakistan in its Counter-Memorial at paragraph 85 and Annex 28). In fact at least 3 senior Indian journalists have separately and publically raised similar questions in this regard without any substantive response from the Indian authorities. The issue is not one of freedom to express an opinion. It is about a State providing (or, more accurately, refusing to provide) answers to legitimate questions.

84. Indeed, India's response seeks to completely obscure the point. There are simple (and determinative) questions regarding the Passport held by Commander Jadhav at the time of his arrest (bearing the name 'Hussein Mubarak Patel') that India has the ability to give the answers to – but refuses to do so.

The Quint – 5 January 2018

85. In this regard, Pakistan notes that on 6 January 2018, it was widely reported **[Volume 1/Annex 21]** that *The Quint*[9] had been forced to retract a story it had published on 5 January 2018 concerning Commander Jadhav written by its editor Mr. Chandan Nandy[10] **[Volume 1/Annex 20]**. *The Quint* is yet to provide any explanation as to the reasons for the sudden removal of the story. Pakistan is aware of media reports suggesting pressure

[9] An Indian online news platform founded by Mr. Ragav Bahl – a founder and former managing director of the Network18 Group (a leading Indian news television network) **[Volume 1/Annex 23]**

[10] Mr. Chandan Nandy has been the Political and Opinion Editor at *The Quint* since May 2015 **[Volume 1/Annex 22]**. He was formerly Senior Assistant Editor at 'The Times Group', which owns the *Times of India* (the largest circulation English language newspaper in India and one of India's newspapers of record)

was brought to bear upon *The Quint* but, absent any explanation from *The Quint* itself, the matter cannot be taken any further[11].

86. That story (entitled '*Senior RAW Officers Were Not in Favour of Jadhav*') quoted "*two former RAW senior officers, including one secretary who headed India's external intelligence agency after 2008*" **[Volume 1/Annex 20/page 1/second paragraph]** as stating that Commander Jadhav's recruitment by RAW was one of:

"*a few different attempts to launch renewed efforts to use human sources as "deep penetration" agents in Pakistan, where most intelligence assets, both HUMINT and SIGINT, were wound up during the prime ministership of IK Gujral in the late 1990s*".

[Volume 1/Annex 20/page 1/last paragraph]

87. The article further stated:

"*The clearest evidence that Jadhav operated for the RAW came to the fore only after his cover – as a businessman who would frequent Iran, especially Chabahar – was blown and he was captured by the Pakistan, following which a former RAW chief, besides at least two other senior officers, called his Mumbai-based parents to "advise" them to not speak about their son's case to anyone.*

The other evidence was the second passport, with the name Hussein Mubarak Patel, that he carried, which shows that it was originally issued in 2003 and was renewed in 2014. The second passport (no L9630722) was issued in Thane on 12 May 2014 and was due to expire on 11 May 2024.

While one passport (no E6934766) is in his name, the second one raises more questions, especially the date of its issue and why he signed as Hussein Mubarak Patel to enter into a property deal (with his mother) in Mumbai where he lived with his parents, wife, and children before he was nabbed by the Pakistan Inter-Services Intelligence (ISI)".

[Volume 1/Annex 20/page 2/third to fifth paragraphs]

88. India, in its Reply, seeks (at paragraph 50) to sweep aside Pakistan's reference to Mr. Karan Thapar's research by dismissing it as 'convenient'. Yet, the fact that multiple senior and respected Indian journalists are drawing attention to key factual issues in this case, including, *inter alia*, Commander Jadhav's possession of an authentic passport bearing a false identity, suggests (at the very least) that Pakistan's enquiries of India in respect of the same were justified and legitimate.

[11] Several Indian media sources have reported that a criminal complaint for sedition under Section 124A of the Penal Code of India was filed against Mr. Chandan Nandy and *The Quint* for this "*anti-national article*" **[Volume 1/Annex 24]**

Frontline – 31 January 2018

89. On 31 January 2018, the highly respected Indian journalist Mr. Praveen Swami[12] published an article in *Frontline*[13] entitled '*India's secret war*' **[Volume 1/Annex 25]**. In the article, Mr. Swami states:

"*In principle, there should be no difficulty in settling the truth of the claims that Jadhav still serves with the Indian Navy. The Gazette of India records, among other things, the commissioning, promotions and retirements of military and civilian officials in granular detail. Inducted into the Navy in 1987, with the service number 41558Z, Kulbhushan Sudhir Jadhav would likely have been promoted to the rank of commander after 13 years of service, in 2000.*

But the digital archive of the Gazette of India, a public document, has removed all files relating to the Defence Ministry for several months in 2000. Files in subsequent years bear no record of Jadhav's retirement – though the Gazette is far from being immune to errors and omissions.

The government of India has told the International Court of Justice that Jadhav was a retired naval officer – a question that is, in any case, irrelevant to the proceedings there – but it has declined to state exactly when he retired.

In response to a written question from this writer, the Naval Headquarters declined to confirm or deny whether Jadhav was a serving naval officer. Instead, it referred this writer to the Ministry of External Affairs. The Ministry, in turn, said it had "nothing to add to whatever is already in the public domain"". (emphasis added)

[Volume 1/Annex 25/page 1/eighth to eleventh paragraphs]

90. The approach of avoiding or evading simple and legitimate questions concerning Commander Jadhav (from respected Indian journalists as well as Pakistan), as has been demonstrated by the Government of India repeatedly in this matter, is, Pakistan submits, as telling as it is unacceptable.

91. The article goes on to state most significantly with regard to Commander Jadhav's passports:

[12] Mr. Praveen Swami is an independent journalist who was formerly the Diplomatic Editor of *The Daily Telegraph* in London (2010-2011), the Resident Editor of *The Hindu* (2011-2013), and the National Editor (Strategic & International Affairs) of *The Indian Express* (2014-2017) **[Volume 1/Annex 27]**

[13] *Frontline* is a fortnightly English-language current affairs magazine published by 'The Hindu Group' from Chennai, India which owns *The Hindu* (the second-largest circulation English language newspaper in India and one of India's newspapers of record)

"In December 2003, Jadhav travelled to Iran from Pune on a passport (E6934766) that identified him as Hussein Mubarak Patel. The passport identified "Patel" as a resident of the Martand Cooperative Housing Society in Pune but gave no apartment number. There has been no official investigation into how the passport was issued.

The Pune passport office records show the passport was earlier held by another individual, but the files contain no address. The Indian government has offered no explanation of how this passport was obtained by Jadhav".

[Volume 1/Annex 25/page 2/seventh and eighth paragraphs]

92. The article adds:

"In 2014, Jadhav obtained the passport (L9630722) he was eventually arrested with in Pakistan, which was issued in Thane. This time, he identified himself as a resident of the Jasdanwala Complex on the old Mumbai-Pune road cutting through Navi Mumbai. The flat, municipal records show, was owned by his mother, Avanti Jadhav".

[Volume 1/Annex 25/page 3/seventh paragraph]

93. Perhaps predictably, on 3 February 2018, India's Ministry of External Affairs' Official Spokesperson dismissed Mr. Swami's article as "*concocted and mischievous*" **[Volume 1/Annex 29]** – rather than seeking to rebut any of its content. This tone has a very familiar ring to it, mirroring the response to Pakistan in this regard.

94. Indeed, Mr. Swami and *Frontline* were criticised heavily in India in the mainstream media and social media following the publication of the article described above. On occasion such criticism was accompanied by calls for a tough response from the Government of India to journalists whose writings "*undermine national interest and wittingly or unwittingly, aid foreign enemies from Indian soil*" **[Volume 1/Annex 28/page 4/last paragraph]**.

95. Pakistan draws attention to these matters simply to illustrate that India's approach in this context has been to (i) say nothing (ii) attack (iii) deflect – whether challenged by Pakistan or its own independent and respected journalists.

Observations

96. Upon submission of this Rejoinder, formal pleadings are closed. Despite insisting upon a further round of pleadings to engage in "*effective rebuttal*" **[Volume 1/Annex 3/pages 5-6/paragraph 17]**, India has shown a marked unwillingness to engage with this issue and the independent expert report which calls for a substantive answer.

97. Pakistan will invite the Court to accept the evidence of Mr. David Westgate (however regrettable and significant the consequences of doing so from India's perspective). India's failure to respond in this regard cannot be camouflaged as a plea on relevance, let alone as denying "*propaganda*" **[Volume 1/Annex 17/pages 2-3/paragraph (iv)]**. It is precisely because the Passport Issue is highly relevant (if not determinative) of the facts and matters founding Pakistan's core submissions before the Court that, Pakistan submits with respect, the Court can and must consider whether the Passport was:

(1) An authentic Indian passport
(2) Issued by the Indian authorities
(3) In a false Muslim name
(4) Used extensively by Commander Jadhav to enter and leave India as well as to obtain foreign visas
(5) Purposefully provided in violation of the duty of good faith of all UN Member States, and/or abuse of rights and/or illegally and/or to facilitate grave illegality including violations of the fundamental principles of the UN Charter rooted in non-interference, respect for territorial integrity and sovereignty, as well as the *jus cogens* prohibition of terrorism (State-sponsored or otherwise).

III

98. Furthermore:

(1) The possession of the said Passport and the abject refusal of India to explain the same (as it could so easily) is clear, compelling evidence of its nefarious purpose, the most obvious being facilitation of Commander Jadhav's clandestine/illegal presence in foreign jurisdictions which must be for illegal purposes, including commission of acts of espionage and/or terrorism.
(2) India has been afforded every possible opportunity to explain the Passport Issue. A lack of adjudication and determination on this question (which India no doubt will strive for) can but condone such blatant violations of International Law.
(3) India's conduct in this matter is wholly abusive and even if no espionage exception existed as a matter of Customary International Law, or the 2008 Agreement did not have the effect contended for (neither proposition being sustainable on the materials placed before the Court by Pakistan), India's role in this regard precludes the grant of any relief by the Court at India's behest – whether as a matter of admissibility, merits or otherwise.

IV. INDIA HAS MISREPRESENTED THE BILATERAL 2008 AGREEMENT ON CONSULAR ACCESS

99. India appears to have misleadingly sought to elide distinct and separate provisions of the 2008 Agreement to support its construction of the same.

100. In its Reply, India asserts (as the heading to its Section VIII) that the 2008 Agreement "*HAS NO BEARING ON THE PRESENT DISPUTE*". Pakistan respectfully submits that it is untenable to assert that a carefully negotiated, detailed bilateral agreement (specifically on the provision of consular access) signed by both India and Pakistan can have "*no bearing*" on a dispute between India and Pakistan concerning consular access.

101. Indeed, India is now belatedly driven to accept (as it must) that the 2008 Agreement has legal meaning and effect. It is another matter that India seeks to misrepresent the same.

102. In its Reply, India asserts (at paragraph 144) that:

> "*The phrase "examine the case on its merits" [in Article (vi) of the 2008 Agreement] makes it apparent that it applies to the agreement to release and repatriate persons within one month of the confirmation of their national status and completion of sentences. As an exception to this, India and Pakistan reserve the right to examine on merits of the release and repatriation of persons upon completion of their sentences, where their arrest, detention or sentence was made on political or security grounds*".

103. However, it is, in fact, Article (v), and not Article (vi), of the 2008 Agreement that governs the situation of release and repatriation of persons after completion of their sentences.

104. Article (vi) refers to a different situation entirely – namely, the arrest, detention and sentence of persons on political or security grounds. This is the provision engaged in the present circumstances. India's (with respect) crass attempt to denude and distort the plain meaning of the agreement that India itself proposed and agreed to is most unfortunate.

105. It is perhaps necessary to quote the 2008 Agreement again in this regard, to illustrate that India's contention is simply untenable unless the 2008 Agreement is deliberately misread.

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

(i) Each Government shall maintain a comprehensive list of the nationals of the other country under its arrest, detention or imprisonment. The lists shall be exchanged on 1st January and 1st July each year.

(ii) Immediate notification of any arrest, detention or imprisonment of any person of the other country shall be provided to the respective High Commission.

(iii) Each Government undertakes to expeditiously inform the other of the sentences awarded to the convicted nationals of the other country.

(iv) Each Government shall provide consular access within three months to nationals of one country under arrest, detention or imprisonment in the other country.

(v) Both Governments agree to release and repatriate persons within one month of confirmation of their national status and completion of sentences.

(vi) In case of arrest, detention, or sentence made on political or security grounds, each side may examine the case on its merits.

(vii) In special cases, which call for or require compassionate and humanitarian considerations, each side may exercise its discretion subject to its laws and regulation to allow early release and repatriation of persons.

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

Done at Islamabad on 21 May, 2008 in two originals, in English language, each text being equally authentic." (emphasis added)

106. In its Memorial, India asserted (at paragraph 92) as follows:

"*The 2008 Agreement, was entered into for "furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country....", and by which the two signatory States, India and Pakistan, agreed to certain measures. These included the release and repatriation of persons within one month of confirmation of their national status and completion of sentences. The Agreement recognised 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. India does not seek early release or repatriation of Jadhav, as contemplated by the 2008 Agreement*". (emphasis added)

107. Insofar as one reads paragraph 92 of India's Memorial (above) with reference to Article (v) and Article (vi) separately (as one must), this is correct. The mischief is present in the 7th line thereof where the text elides Article (vi) and Article (v), by the simple device of a comma and convenient failure to mention that these provisions are distinct and separate.

108. Nevertheless, India's standpoint is (with respect) now significantly clearer.

109. India began somewhat dismissively by asserting at the Provisional Measures stage that the 2008 Agreement was "*irrelevant*" **[CM/Volume 1/Annex 5.1/page 17/paragraph 15 and page 34/paragraph 66]**, that "*India does not seek to rely upon this Bilateral Agreement*" **[CM/Volume 1/Annex 5.1/page 17/paragraph 14]** and that the 2008 Agreement was "*not registered with the United Nations under Article 102 of the Charter*" **[CM/Volume 1/Annex 5.1/page 17/paragraph 16; see also page 34/paragraph 66(b)]**.

110. Perhaps upon some limited reflection, in its Memorial, India asserted (at paragraph 91) that "*In any event, the question of consular access sought under Article 36 being denied or being subjected to the provisions of some bilateral treaty does not arise*" and (at paragraph 93) that the existence of the 2008 Agreement was "*irrelevant*".

111. Now, finally, India accepts that the 2008 Agreement was intended to and does indeed have legal effect. However, India seeks to negate the legal effect of Article (vi) of the 2008 Agreement by eliding it with Article (v).

IV

112. Pakistan maintains that, where the VCCR 1963 preserved the position as a matter of Customary International Law as at 1963, where there was no State practice to suggest that a *prima facie* case of espionage engages the facilities afforded by Article 36(1) VCCR 1963, it was and remains open for States to arrive at and agree a bilateral approach in this regard.

113. Given the tense and (unfortunately) often violent and belligerent nature of the relationship between India and Pakistan since 1947, the 2008 Agreement (initiated by India) is intelligible, vital and legally effective. It was meant to have the effect that its words carry.

V. *PRIMA FACIE* CASES OF ESPIONAGE ARE AN EXCEPTION TO ARTICLE 36 VCCR 1963 AS A MATTER OF CUSTOMARY INTERNATIONAL LAW

114. Pakistan re-iterates its submissions as reflected in the Counter-Memorial and develops the same herein with reference to the approach elucidated by the Court when evaluating and determining the existence and content of Customary International Law in a specific context.

(A) IDENTIFICATION AND/OR DETERMINATION OF RULES OF CUSTOMARY INTERNATIONAL LAW

115. In its Reply, India (at Section VII) rejects Pakistan's submissions in respect of a rule of Customary International Law as at 1963 concerning an exception to Article 36 VCCR 1963, as regards an individual evidencing, from their conduct and materials in their possession, a *prima facie* case of espionage. As the Preamble to the VCCR 1963 made clear, it was:

"*Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,*"

[CM/Volume 5/Annex 88/page 2]

Respected Academic Commentators

116. As Pakistan observed in its Counter-Memorial (at paragraph 317), by 1961, the State practice on consular access in espionage cases had led Professor Luke T. Lee[14] (the leading authority on the subject of the VCCR 1963) to the clear conclusion that:

"*A frequent exception to the consular right to protect nationals and visit them in prison is the case of spies*".

[CM/Volume 5/Annex 112.1/page 125]

117. Furthermore, as noted by Pakistan in its Counter-Memorial (at paragraph 318) it appears that (soon after the VCCR 1963 was adopted) the same understanding was also held by Biswanath Sen, an Honorary Legal Adviser to India's Ministry of External Affairs (1954-1964) who wrote in his *A Diplomat's Handbook of International Law and Practice* (1965) (at page 233):

"*A frequent exception to the consular rights to protect nationals and visit them in prison is the case of persons who are held on charge of espionage as evidenced by the practice of states*".

[14] Dr. Luke T. Lee (d.2015) served as a Member of the Senior Executive Service at the US State Department, as well as being a former Chairman of the International Law Association's Committee on the Legal Status of Refugees, and Adjunct Professor of Law at the American University in Washington DC **[Volume 2/Annex 58]**

[CM/Volume 5/Annex 117]

118. Pakistan submits that the observations of these learned and respected authorities are of great significance, if not conclusive in the absence of any credible and material statements to the contrary (which Pakistan has not found, nor, it seems, has India).

119. Nevertheless, in the interests of completeness, Pakistan outlines hereinbelow how the Court itself has evaluated the existence and content of Customary International Law, as has been encapsulated in statements propounded by the International Law Commission ("the ILC") in 2016 (and revised in March 2018). In this regard, Pakistan refers to the draft conclusions of the ILC as stated in the 70th session (17 May 2018) (A/CN.4/L.908) **[Volume 2/Annex 55]** and further explained by the Chair of the ILC Drafting Committee on 25 May 2018 **[Volume 2/Annex 56]**[15].

120. Pakistan enumerates fourteen observations in respect of the identification and/or determination of rules of Customary International Law by the Court. The materials referred to herein and the principles are all very familiar to the Court.

121. Pakistan submits that the approach of the Court is fully reflected in the commentaries above. Likewise such State practice as was visible in the context of the clandestine, necessarily concealed (if not illegal or murky) activity of espionage as at 1963 underpins the seminal commentaries identified at paragraphs 116-117 above.

i). The Two Elements of a Rule of Customary International Law

122. Article 38(1)(b) of the Statute of the Court provides as follows:

"*Article 38*

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[15] As can be seen from the Draft Conclusions, almost all of the suggestions of the Special Rapporteur were adopted

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto".

123. Article 38(1)(b) of the Statute of the Court thus clearly establishes that there are two elements to the identification and/or determination of a rule of Customary International Law: (1) the identifiable existence of a 'general practice'; (2) that is accepted as law, in the sense that it is carried out by States with a sense of legal right or duty (namely that it is accompanied by *opinio juris*). Such a position is borne out in the case law of the Court.

124. In *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands), Judgment, ICJ Reports 1969*, page 3, by a special agreement dated 20 February 1967, proceedings were instituted requiring the Court to state the applicable rules of international law and to carry out a delimitation of the continental shelf on the basis of those rules.

125. In its Judgment of 20 February 1969, the Court held (at paragraph 77) **[Volume 2/Annex 40]** as follows:

"*77. The essential point in this connection–and it seems necessary to stress it–is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the opinio juris;–for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty*". (emphasis added)

126. In *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985*, page 13, by a special agreement dated 26 July 1982, proceedings were instituted requiring the Court to delimit the continental shelf between Libya and Malta.

127. In its Judgment of 3 June 1985, the Court held (at paragraph 27) **[Volume 2/Annex 41]** as follows:

"*27. It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them*". (emphasis added)

128. More recently, in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment, ICJ Reports 2012*, page 99, by an application dated 23 December 2008, Germany instituted proceedings against Italy seeking a declaration from the Court that Italy had failed to respect Germany's State immunity by allowing civil damages actions against the German State in the Italian courts arising out of acts committed during World War Two.

129. In its Judgment of 3 February 2012, the Court, citing its judgment in *North Sea Continental Shelf*, held (at paragraph 55) **[Volume 2/Annex 42]** as follows:

"*the existence of a rule of customary international law requires that there be "a settled practice" together with opinio juris*".

130. In *Right of Passage over Indian Territory (Portugal v India), Judgment, ICJ Reports 1960*, page 6, by an application dated 22 December 1955, Portugal instituted proceedings claiming that it had a right of passage over two enclaves (Dadra and Nagar-Aveli) and that India had prevented Portugal's exercise of that right contrary to a previously followed practice.

131. In its Judgment of 12 April 1960, the Court held (at pages 42-43) **[Volume 2/Annex 43]** as follows:

"*It would thus appear that, during the British and post-British periods, Portuguese armed forces and armed police did not pass between Daman and the enclaves as of right and that, after 1878, such passage could only take place with previous authorization by the British and later by India, accorded either under a reciprocal arrangement already agreed to, or in individual cases. Having regard to the special circumstances of the case, this necessity for authorization before passage could take place constitutes, in the view of the Court, a negation of passage as of right. The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation*". (emphasis added)

132. In *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, page 226, the UN General Assembly requested an advisory opinion from the Court in respect of the question: "*Is the threat or use of nuclear weapons in any circumstance permitted under international law?*"

133. In its Advisory Opinion of 8 July 1996, the Court held (at paragraphs 72-73) **[Volume 2/Annex 44]** as follows:

"*72. The Court further notes that the first of the resolutions of the General Assembly expressly proclaiming the illegality of the use of nuclear weapons, resolution 1653 (XVI) of 24 November 1961 (mentioned in subsequent resolutions), after referring to certain international declarations and binding agreements, from the Declaration of St. Petersburg of 1868 to the Geneva Protocol of 1925, proceeded to qualify the legal nature of nuclear weapons, determine their effects, and apply general rules of customary international law to nuclear weapons in particular. That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons; if such a rule had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification.*

73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as lex lata, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent opinio juris on the one hand, and the still strong adherence to the practice of deterrence on the other". (emphasis added)

134. Thus, if the Court finds it is unable to establish that a general practice accepted as law exists, then it is likely to conclude that a rule of Customary International Law has not been proven.

135. Put another way, in this context, unless the Court can be satisfied that States generally accepted that there was a right to consular access as a matter of Customary International Law, unless expressly provided for in the VCCR 1963, the position as a matter of Customary International Law would continue to prevail. Indeed, Pakistan maintains that State practice as at 1963 evidences that there was no Customary International Law obligation to provide consular access where a *prima facie* case of espionage was manifest.

136. The Court has helpfully addressed the level of uncertainty that precludes the existence of Customary International Law. In *Asylum (Colombia/Peru), Judgment of 20 November 1950, ICJ Reports 1950*, page 266, proceedings were instituted whereby Colombia asserted that Peru was bound to give guarantees necessary for the safe departure of a refugee (accused of instigating a political rebellion) who had claimed asylum in the Colombian Embassy in Peru.

137. In its Judgment of 20 November 1950, the Court, having analysed the relevant State practice, held (at page 277) **[Volume 2/Annex 45]** as follows:

"*Finally, the Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or–if in some cases it was in fact invoked–that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence*". (emphasis added)

ii). The ILC's Draft Conclusions on the Identification of Customary International Law

138. It is apparent from the above that it is now clear and settled that the identification and/or determination of a rule of Customary International Law requires the establishment of two elements, namely: (1) a general practice; (2) that is accepted as law (i.e. *opinio juris*).

139. This position is now reflected in the Draft Conclusions on the Identification of Customary International Law drafted by the Drafting Committee, with the assistance of the Special Rapporteur Sir Michael Wood[16], and adopted by the ILC in 2016 ("the Draft Conclusions") **[Volume 2/Annex 53]**, wherein Draft Conclusion 2 provides as follows:

"*To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (opinio juris)*".

[Volume 2/Annex 53/page 82]

140. In the Commentary to Draft Conclusion 2, the Special Rapporteur explains (at paragraph (1)) **[Volume 2/Annex 53/page 82]** that these are "*two distinct, yet related, questions*".

[16] Sir Michael Wood was the principal Legal Adviser to the UK Foreign & Commonwealth Office (1999-2006) and has been a member of the International Law Commission since 2008

141. The Special Rapporteur further explains (at paragraph (2)) **[Volume 2/Annex 53/page 82]** that these two elements "*are the essential conditions for the existence of a rule of customary international law*" and that their presence in any given case must be identified after "*a close examination of available evidence*".

142. In the Commentary to Draft Conclusion 2, the Special Rapporteur explains (at paragraph (2)) **[Volume 2/Annex 53/page 83]** that what the Court embarks upon in identifying rules of Customary International Law is "*a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or obligation (namely, that it is required, permitted or prohibited as a matter of law). The test must always be: is there a general practice that is accepted as law?*"

iii). Assessment of the Evidence

143. It is apparent that, in the course of assessing evidence for the identification and/or determination of a rule of Customary International Law, it is a requirement to take into account the broader context as well as the nature of the rule contended for and the circumstances in which the relevant evidence is to be found.

144. In *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, in his Dissenting Opinion to the Court's Judgment of 20 February 1969, Judge Tanaka (Japan) held (at pages 175-176) **[Volume 2/Annex 46]** as follows:

"*To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances. Nor is the situation the same in different fields of law such as family law, property law, commercial law, constitutional law, etc. It cannot be denied that the question of repetition is a matter of quantity; therefore there is no alternative to denying the formation of customary law on the continental shelf in general and the equidistance principle if this requirement of quantity is not fulfilled. What I want to emphasize is that what is important in the matter at issue is not the number or figure of ratifications of and accessions to the Convention or of examples of subsequent State practice, but the meaning which they would imply in the particular circumstances. We cannot evaluate the ratification of the Convention by a large maritime country or the State practice represented by its concluding an agreement on the basis of the equidistance principle, as having exactly the same importance as similar acts by a land-locked country which possesses no particular interest in the delimitation of the continental shelf*". (emphasis added)

iv). Application of underlying principles of Public International Law

145. Pakistan submits that the applicability of any underlying principles of Public International Law should be taken into account by the Court within the contextual

assessment of the evidence for the identification and/or determination of a rule of Customary International Law. Thus, by way of an example which it is assumed is uncontroversial, the principles enshrined within the UN Charter must provide the 'four corners' for any Customary International Law.

146. In *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, the Court, in its Judgment of 3 February 2012, held (at paragraph 57) **[Volume 2/Annex 42]** as follows:

"*57. The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it*". (emphasis added)

147. In that case the Court considered State immunity as a rule of Customary International Law "*derive[d]*" from the underlying fundamental Public International Law principle of sovereign equality of States, as enshrined in Article 2(1) of the UN Charter **[CM/Volume 5/Annex 102]**.

148. In the joined cases of *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)*, proceedings were instituted concerning, *inter alia*, Nicaragua's claim that Costa Rica was performing extensive road construction along the border area that had significant environmental ramifications.

149. In her Separate Opinion to the Court's Judgment of 16 December 2015, Judge Donoghue (USA) held (at paragraph 3) **[Volume 2/Annex 47]** as follows:

"*3. An assessment of the existence and content of customary international law norms is often challenging. Over the years, some have seized on the 1927 statement of the Permanent Court of International Justice that "[r]estrictions upon the independence of States cannot . . . be presumed" ("Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 18) to support the assertion that, where evidence of State practice and opinio juris is incomplete or inconsistent, no norm of customary international law constrains a State's freedom of action. Such an assertion, an aspect of the so-called "Lotus" principle, ignores the fact that the identification of customary international law must take account of the fundamental parameters of the international legal order. These include the basic characteristics of inter-State relations, such as territorial sovereignty,*

and the norms embodied in the Charter of the United Nations, including the sovereign equality of States (Article 2, paragraph 1, of the Charter of the United Nations)". (emphasis added)

150. Having referred to the approach taken by the Court in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judge Donoghue continued (at paragraph 5) as follows:

"*5. The Court's approach in Jurisdictional Immunities of the State, which grounds the analysis in fundamental background principles, applies with equal force to the consideration of the existence and content of customary international law regarding transboundary environmental harm. If a party asserts a particular environmental norm without evidence of general State practice and opinio juris, the "Lotus" presumption would lead to a conclusion that customary international law imposes no limitation on the State of origin. As in Jurisdictional Immunities of the State, however, the appraisal of the existence and content of customary international law regarding transboundary environmental harm must begin by grappling with the tension between sovereign equality and territorial sovereignty*". (emphasis added)

151. Pakistan respectfully re-iterates that, in the instant case, the underlying fundamental Public International Law principles of refraining from the use of force against the territorial integrity of another State (as enshrined in Article 2(4) of the UN Charter) and non-intervention in another State's internal matters (as enshrined in Article 2(7) of the UN Charter) **[CM/Volume 5/Annex 102]** provide the essential legal and factual matrix for the Court. Therein, the Court must assess the position as a matter of Customary International Law as advanced by Pakistan in respect of consular access, in cases of an individual demonstrating from their conduct and possessions a *prima facie* involvement in espionage.

v). Consideration of the Availability/Lack of Availability of Evidence in the Circumstances

152. Furthermore, the Court's contextual assessment must evaluate the type of evidence that it receives with reference to the situation before it, and due regard must be had to the relative availability or lack of availability of such evidence in the circumstances.

153. In *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, in its Judgment of 3 February 2012, the Court held (at paragraph 55) **[Volume 2/Annex 42]** as follows:

"*In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by*

States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. Opinio juris in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States". (emphasis added)

154. In that case, the Court was able to identify where the best available evidence was likely to come from according to the circumstances of that case. Pakistan respectfully submits, since matters concerning espionage are typically zealously guarded (if not concealed) by States, official documentary and public records will be a rarity.

155. Nevertheless, sufficient credible and consistent publically available material has been placed before the Court by Pakistan to establish a general State practice as at 1963: No acceptance of consular access, and a consistent practice of denial of consular access in the context of a *prima facie* case of espionage, and/or significant lapse of time before some form of limited and highly controlled form of engagement or interaction is provided with consular officials from the 'sending State' with their individual national who is accused of espionage.

vi). Consideration of the Nature of the Rule of Customary International Law contended for

156. In the Commentary to Draft Conclusion 3 (which provides for the need for a contextual assessment when identifying and/or determining a rule of Customary International Law – extracted below), the Special Rapporteur explains (at paragraph (4)) **[Volume 2/Annex 53/page 86]** that:

"*In particular, where prohibitive rules are concerned (such as the prohibition of torture) it may sometimes be difficult to find positive State practice (as opposed to inaction); cases involving such rules will most likely turn on evaluating whether the practice (being deliberate inaction) is accepted as law*".

157. Whilst (unsurprisingly, given the approach of States to this subject), it has never been determined by the Court that the activity of espionage is contrary to international law (nor is that strictly necessary in this case), learned academic commentary at the time the VCCR 1963 was being negotiated provides clarity on the question. In 1962, Professor Quincy Wright[17] observed that "*In time of peace...espionage and, in fact, any*

[17] Professor Quincy Wright (d. 1970) was a member of the Department of Social Sciences at the University of Chicago (1923-1956) and then Professor of International Law at the Woodrow Wilson Department of Foreign Affairs at the University of Virginia (1951-1961). He was also President of the American Society of International Law (1955-1956) and a member of the editorial board of the American Association of International

penetration of the territory of a state by agents of another state in violation of the local law, is also a violation of the rule of international law imposing a duty upon states to respect the territorial integrity and political independence of other states" **[Volume 2/Annex 57/page 12/third paragraph]**.

vii). The Court must conduct separate inquiries as to 'general practice' and 'opinio juris'

158. It is apparent that the Court's assessment of whether there is a general practice together with *opinio juris* should take the form of two separate inquiries – one for general practice and one for *opinio juris* (albeit that there is likely to be some overlap in terms of the material used for each inquiry).

159. The position above is now reflected in the Draft Conclusions on the Identification of Customary International Law adopted by the ILC in 2016, wherein Draft Conclusion 3 provides as follows **[Volume 2/Annex 53/page 84]**:

"*1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (opinio juris), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.*

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element".

160. In the Commentary to Draft Conclusion 3, the Special Rapporteur explains (at paragraph (6)) **[Volume 2/Annex 53/page 86]** that "*While the constituent elements may be intertwined in fact (in the sense that practice may be accompanied by a certain motivation), each is conceptually distinct for purposes of identifying a rule of customary international law*".

161. In the Commentary to Draft Conclusion 3, the Special Rapporteur explains (at paragraph (2)) **[Volume 2/Annex 53/page 85]** that there is "*an overarching principle*" that "*the assessment of any and all available evidence must be careful and contextual*". The Special Rapporteur further explains that:

"*Whether a general practice that is accepted as law (accompanied by opinio juris) exists must be carefully investigated in each case, in the light of the relevant circumstances*".

[Volume 2/Annex 53/page 85]

Law (1923-1970). Additionally, he served as an advisor to Justice Robert H. Jackson at the Nuremberg Trials and as an advisor to the US State Department

viii). Assessment of 'General Practice'

162. As explained above, it may be that, given the nature of the underlying subject matter, positive State practice is inherently difficult to identify. Nevertheless, it is accepted that deliberate inaction by a State in the face of a certain set of circumstances can contribute to its 'practice'.

163. This position is now reflected in the Draft Conclusions on the Identification of Customary International Law adopted by the ILC in 2016, wherein Draft Conclusion 6 provides as follows **[Volume 2/Annex 53/page 91]**:

"*1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.*

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice". (emphasis added)

164. By way of update, Pakistan observes that, in his Fifth Report dated 14 March 2018, the Special Rapporteur, having regard to the comments made by States, suggested (at paragraph 55) **[Volume 2/Annex 54/page 25]** that Conclusion 6(1) could be amended so that it read as follows:

"*1. Practice may take a wide range of forms. It may include both physical and verbal acts, as well as deliberate inaction*". (emphasis added)

165. Pakistan respectfully submits that the evidence it has advanced concerning material State practice establishes that (as is relevant for present purposes, in the period before the VCCR 1963 was adopted) States generally acted in a manner not inconsistent with an acceptance that they would not be entitled as of right to be allowed consular access to individuals who were accused, on the basis of their conduct and possessions, of exhibiting a *prima facie* case of espionage.

ix). The Court must assess all available general practice as a whole

166. It is clear that the Court's assessment of the practice of a State must have regard to all available practice and, further, that the same is to be assessed as a whole.

167. In *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, in its Judgment of 3 February 2012, the Court held (at paragraph 76) **[Volume 2/Annex 42]** as follows:

"*that Greek State practice taken as a whole actually contradicts, rather than supports, Italy's argument*". (emphasis added)

168. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Judgment, ICJ Reports 1986*, page 14, by an application dated 9 April 1984, Nicaragua instituted proceedings against the United States of America concerning a dispute relating to responsibility for the use of force against Nicaragua.

169. In its Judgment of 27 June 1986, the Court held (at paragraph 186) **[Volume 2/Annex 48]** as follows:

"*186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule*". (emphasis added)

170. Thus, Pakistan respectfully submits that the fact that there are some instances where a receiving State has allowed a sending State consular access to its national accused of espionage (almost always under restrictive conditions) does not detract from the identification of the rule of Customary International Law advanced by Pakistan – that *prima facie* cases of espionage constitute an exception to the consular access that would otherwise be required by Article 36 VCCR 1963.

x). Inconsistency in practice does not necessarily require the practice to be given reduced weight

171. Furthermore, it is clear that inconsistency in the practice of a particular State does not necessarily lead to the conclusion that that State's practice will have a reduced (or no) weight before the Court.

172. In *Fisheries (United Kingdom v Norway), Judgment, ICJ Reports 1951*, page 116, by an application dated 28 September 1949, the United Kingdom instituted proceedings against Norway claiming that a Norwegian decree stipulating a methodology for drawing baselines for the calculation of the width of Norwegian territorial waters was unlawful.

173. In its Judgment of 18 December 1951, the Court held (at page 138) **[Volume 2/Annex 49]** as follows:

"*The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court*".

174. Likewise, Pakistan respectfully submits that the fact that there are some inconsistencies in the practice of certain States as regards allowing a sending State consular access to its national accused of espionage (mostly under restrictive conditions), does not detract from the identification of the rule of Customary International Law advanced by Pakistan – that *prima facie* cases of espionage constitute an exception to the consular access that would otherwise be required by Article 36 VCCR 1963.

175. The position above is now reflected in the Draft Conclusions on the Identification of Customary International Law adopted by the International Law Commission in 2016, wherein Draft Conclusion 7 provides as follows **[Volume 2/Annex 53/pages 92-93]**:

"*1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.*

2. Where the practice of a particular State varies, the weight to be given to that practice may be reduced".

176. In the Commentary to Draft Conclusion 7, the Special Rapporteur explains (at paragraph (2)) **[Volume 2/Annex 53/page 93]** that:

"*This means that the practice examined should be exhaustive, within the limits of its availability, that is, including the relevant practice of all of the State's organs and all relevant practice of a particular organ. The paragraph states, moreover, that such practice is to be assessed as a whole; only then can the actual position of the State be determined*". (emphasis added)

177. As a further update, Pakistan observes that, in his Fifth Report dated 14 March 2018, the Special Rapporteur, taking note of the comments made by States, suggested (at

paragraph 62) **[Volume 2/Annex 54/page 28]** that Conclusion 7(2) could be amended so that it read as follows:

"*2. Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced*".

xi). What is meant by 'general practice'

178. It is clear that the Court's inquiry as to 'general practice' is aimed at assessing the existence of a practice that, *inter alia*, is followed by a sufficiently widespread and representative number of States.

179. In *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, in its Judgment of 20 February 1969, the Court held (at paragraph 74) **[Volume 2/Annex 40]** as follows:

"*74. As regards the time element, the Court notes that it is over ten years since the Convention [1958 Geneva Convention on the Continental Shelf] was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;–and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved*". (emphasis added)

180. The Court continued (at paragraph 77) that what is required is a "*settled practice*" by States.

xii). Which States have relevant practice?

181. As the Court has made clear, it is important to have regard to the practice of the States which are or have been particularly involved in the relevant underlying activity or are most likely to be concerned with it (namely, in this case, espionage or the capture/detention of foreign espionage agents). In *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, in its Judgment of 20 February 1969, the Court held (at paragraph 74) **[Volume 2/Annex 40]** as follows:

"*an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform*". (emphasis added)

182. Pakistan submits that, notwithstanding the inherent unavailability of publically available official records in respect of the capture/detention of espionage agents, the State practice placed in evidence by Pakistan to date does illustrate the practice of a sufficiently wide group of States, including States often accused of engaging in espionage or having claimed from time to time to have captured a foreign espionage agent.

183. Furthermore, it is clear that the Court's inquiry as to 'general practice' is aimed at assessing the existence of a practice that, in addition to being practised by a sufficiently widespread and representative number of States, is also consistent.

184. Pakistan of course accepts that, where the Court considers that the relevant acts of States are divergent to such an extent that it cannot discern any particular pattern of behaviour or trend, it will not find that a rule of Customary International Law has been established.

185. In *Fisheries (United Kingdom v Norway)*, in its Judgment of 18 December 1951, the Court held (at page 131) **[Volume 2/Annex 49]** as follows:

"*In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law*".

186. In *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, ICJ Reports 1984*, page 246, by a special agreement dated 25 November 1981, Canada and the United States of America referred the issue of delimiting the maritime boundary dividing the continental shelf and fisheries zones in the area of the Gulf of Maine.

187. In its Judgment of 12 October 1984, a Chamber of the Court held (at paragraph 81) **[Volume 2/Annex 50]** as follows:

"*81. In a matter of this kind, international law – and in this respect the Chamber has logically to refer primarily to customary international law – can of its nature only provide a few basic legal principles, which lay down guidelines to be followed with a view to an essential objective. It cannot also be expected to specify the equitable criteria to be applied or the practical, often technical, methods to be used for attaining that objective – which remain simply criteria and methods even where they are also, in a*

different sense, called "principles". Although the practice is still rather sparse, owing to the relative newness of the question, it too is there to demonstrate that each specific case is, in the final analysis, different from all the others, that it is monotypic and that, more often than not, the most appropriate criteria, and the method or combination of methods most likely to yield a result consonant with what the law indicates, can only be determined in relation to each particular case and its specific characteristics. This precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law giving specific provisions for subjects like those just mentioned". (emphasis added)

188. As cited above, in *Asylum (Colombia/Peru)*, in its Judgment of 20 November 1950, the Court held (at page 277) **[Volume 2/Annex 45]** as follows:

"*The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum ... that it is not possible to discern in all this any constant and uniform usage ... with regard to the alleged rule of unilateral and definitive qualification of the offence*".

189. Yet, it is not a requirement that the practice of a particular State be completely consistent. Whilst the Court will look for substantial uniformity in State practice, it is not the case that inconsistent or even contradictory practice will be an insuperable obstacle to satisfaction of the requirement that there be a 'general' practice.

190. As cited above, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, in its Judgment of 27 June 1986, the Court held (at paragraph 186) **[Volume 2/Annex 48]** as follows:

"*186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule*". (emphasis added)

191. Thus, even where inconsistent practice by a State is manifested by that State's breach of the rule of Customary International Law contended for, a general practice may still be established.

192. The position above is now reflected in the Draft Conclusions adopted by the ILC in 2016, wherein Draft Conclusion 8 provides as follows **[Volume 2/Annex 53/page 94]**:

"*1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.*

2. Provided that the practice is general, no particular duration is required".

193. By way of update, Pakistan observes that, in his Fifth Report dated 14 March 2018, the Special Rapporteur, taking note of the comments made by States, suggested (at paragraph 69) **[Volume 2/Annex 54/page 31]** that Conclusion 8(1) could be amended so that it read as follows:

"*1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as virtually uniform*".

xiii). Assessment of 'Opinio Juris'

194. As regards the requirement that the general practice must be accompanied with *opinio juris*, it is clear that this entails that the practice must have been undertaken with a sense of legal right or duty, namely that States consider their practice to be carried out because it was compelled or entitled by reason of a rule of Customary International Law.

195. In *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, in its Judgment of 20 February 1969, the Court held (at paragraph 76) **[Volume 2/Annex 40]** as follows:

"*76. To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen (paragraphs 22 and 23), there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature*". (emphasis added)

196. It is clear that practice motivated solely by other considerations such as comity, convenience or political expediency will not constitute *opinio juris*.

197. In *Asylum (Colombia/Peru)*, in its Judgment of 20 November 1950, the Court held (at page 286) **[Volume 2/Annex 45]** as follows:

"*The facts which have been laid before the Court show that in a number of cases the persons who have enjoyed asylum were not, at the moment at which asylum was granted, the object of any accusation on the part of the judicial authorities. In a more general way, considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation*". (emphasis added)

198. In *The Case of the S.S. "Lotus" (France v Turkey)* (1927) PCIJ (Series A), No. 10, following a collision on the high seas between a French vessel and a Turkish collier, Turkey caused the officer of the French vessel to be arrested and prosecuted before a Turkish criminal court. Following France's rejection of the competence of the Turkish court, the matter of competence was referred to the Permanent Court of International Justice by a special agreement dated 12 October 1926.

199. In its Judgment of 7 September 1927, the Permanent Court of International Justice held (at page 28) **[Volume 2/Annex 51]** as follows:

"*Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true*".

200. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, in its Judgment of 27 June 1986, the Court held (at paragraph 207) **[Volume 2/Annex 48]** as follows:

"*207. ... Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level*

of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law".

201. It is clear that *opinio juris* is to be sought both as regards the States engaging in the relevant underlying practice and the States in a position to react to it. As cited above, in *Military and Paramilitary Activities in and against Nicaragua*, in its Judgment of 27 June 1986, the Court held (at paragraph 207) **[Volume 2/Annex 48]** as follows:

"*Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is*

'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis." (I.C.J. Reports 1969, p. 44, para. 77.)".

202. Whilst it is not necessary to establish that all States have *opinio juris* as regards the rule of Customary International Law contended for, it is a requirement that there be broad acceptance along with little or no objection.

203. In *Legality of the Threat or Use of Nuclear Weapons*, in its Advisory Opinion of 8 July 1996 the Court held (at paragraph 67) **[Volume 2/Annex 44]** as follows:

"*67. The Court does not intend to pronounce here upon the practice known as the "policy of deterrence". It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an opinio juris. Under these circumstances the Court does not consider itself able to find that there is such an opinio juris*".

204. If the requirement of *opinio juris* is lacking then any 'general practice' identified will be classified as mere habit or usage, because States considering themselves to be legally free either to follow or disregard the practice contended for cannot be said to be a reflection of a rule of Customary International Law.

205. The position above is now reflected in the Draft Conclusions adopted by the ILC in 2016, wherein Draft Conclusion 9 provides as follows **[Volume 2/Annex 53/page 97]**:

"*1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (opinio juris) means that the practice in question must be undertaken with a sense of legal right or obligation.*

2. A general practice that is accepted as law (opinio juris) is to be distinguished from mere usage or habit".

xiv). Failure to react over time as evidence as 'opinio juris'

206. It is clear that a State's failure to react over time to a general practice may in certain circumstances serve as evidence of that State's *opinio juris*.

207. In *The Case of the S.S. "Lotus" (France v Turkey)*, in its Judgment of 7 September 1927, the Permanent Court of International Justice held (at page 29) **[Volume 2/Annex 51]** as follows:

"*the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the Ortigia–Oncle-Joseph case and the German Government in the Ekbatana–West-Hinder case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law*".

208. In *Fisheries (United Kingdom v Norway)*, in its Judgment of 18 December 1951, the Court held (at page 139) **[Volume 2/Annex 49]** as follows:

"*The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.*

The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.

The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law".

209. Deliberate inaction may constitute *opinio juris* provided that the State concerned was in a position to react and the circumstances called for a reaction.

210. In *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, ICJ Reports 2008*, page 12, by a special agreement Malaysia and Singapore referred to the Court a dispute between them as to which had sovereignty over certain areas.

211. In its Judgment of 23 May 2008, the Court held (at paragraph 121) **[Volume 2/Annex 52]** as follows:

"*The absence of reaction may well amount to acquiescence ... That is to say, silence may also speak, but only if the conduct of the other State calls for a response*". (emphasis added)

212. The position above is now reflected in the Draft Conclusions adopted by the ILC in 2016, wherein Draft Conclusion 10 provides as follows **[Volume 2/Annex 53/page 99]**:

"*1. Evidence of acceptance as law (opinio juris) may take a wide range of forms.*

2. Forms of evidence of acceptance as law (opinio juris) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (opinio juris), provided that States were in a position to react and the circumstances called for some reaction".

Observations

213. For the reasons stated in the Counter-Memorial and as outlined above, Pakistan re-iterates that, as at 1963, it cannot be said that there was a Customary International Law acceptance by States that consular access was obligatory in the case of individuals accused of espionage based upon *prima facie* evidence.

214. Indeed, the learned academic commentaries and State practice Pakistan has referred to on the part of States (rightly or wrongly) associated with the activity of espionage provides a powerful illustration of how such States took this matter "off the table" in terms of any form of legal obligation to provide consular access prior to the adoption of the VCCR 1963. Time and again, consular access was refused or some form of highly controlled and attenuated engagement was provided in a case where *prima facie* espionage activity was allegedly involved.

215. Accordingly, since the VCCR 1963 came into force, it has been open to States to modify and/or expressly state their practice in this regard. With respect, the 2008 Agreement on consular access expressly entered into between India and Pakistan (specifically Article (vi) thereof) provides an illustration of how this has been done as between these two States.

(B) INDIA'S MISCONCEIVED CRITICISM OF CERTAIN EXAMPLES OF ESPIONAGE CASES CITED BY PAKISTAN

216. In its Reply, India selects and (wrongly) criticises (at paragraph 126) a few of the examples of espionage cases cited by Pakistan in its Counter-Memorial.

217. Pakistan's response to India's criticisms is as follows:

217.1. As regards the case of Mikhail Gorin, India's statement in its Reply (at paragraph 126(a)) that "*it is not known whether or not the US denied him consular access*" misses the point. As was made clear by Pakistan in its Counter-Memorial (at paragraph 315.1), the Soviet Vice-Consul was permitted to see Mikhail Gorin – however, the US State Department insisted that a Russian-speaking US Naval Intelligence officer should be present in the room during the meeting **[CM/Volume 7/Annex 146]**. Mikhail Gorin's case is thus an illustration of the point made by Pakistan in its Counter-Memorial (at paragraph 319) that States, in the time before the VCCR 1963, were typically extremely reticent to provide any form of consular access to suspected espionage agents or, if it were granted, then very strict limits were imposed upon the grant of consular access.

217.2. As regards the case of Gary Powers, the fact that his father attended his trial in Moscow is not relevant to the issue of whether or not Gary Powers was entitled to or did receive consular access. In its Reply, India asserts (at paragraph 126(b)) that "*as per other material in the public domain, the American ambassador was invited to view the trial*" – however, India makes no citation of any material at all in this respect. Apparently, according to an interview with one Vladimir I. Toumanoff[18], after President Khrushchev announced in a public speech that Gary Powers' U-2 plane had been shot down, the US Ambassador was invited to attend his show trial and, instead, two of his junior officers (including Mr. Toumanoff) attended **[Volume 2/Annex 61/page 5/paragraph 3]**. However, it cannot be suggested that this amounted to the grant of consular access. Furthermore, Mr. Toumanoff makes no reference in this interview to ever having been allowed contact with Gary Powers prior to or during the course of the trial – indeed, he states that, at the time of the trial, Gary Powers "*had been held for something like three months with no access to*

[18] A US official serving as a political counsellor in Moscow at the time of Gary Powers' trial **[Volume 2/Annex 61/page 2/paragraph 4]**

anyone except Soviet authorities, interrogators, and a "planted" cellmate. No Americans nor any foreigners" **[Volume 2/Annex 61/page 5/last paragraph]**.

217.3. India's further comment regarding Gary Powers' case in its Reply (at paragraph 126(b)) that "*It also appears that this was prior to the Vienna Convention*" is perhaps (with respect) an indicator that India has not addressed the point that, by virtue of the Preamble to the VCCR 1963, it is Customary International Law then existing before 1963 that must be identified to determine a matter not expressly provided for by the terms of the VCCR 1963 itself.

217.4. As regards the case of Professor Frederick Barghoorn, India, in its Reply, asserts (at paragraph 126(c)) that "*There is no material to suggest that after the 16 days he was denied consular access*". However, the letter from the US State Department to Senator Clifford P. Hansen extracted by Pakistan in its Counter-Memorial (at paragraph 322.1) states "*We were never permitted access to Professor Barghoorn prior to his expulsion from the Soviet Union*" **[CM/Volume 7/Annex 151/page 7041/third paragraph of letter to Senator Hansen]** (emphasis added). India complains that Pakistan has not produced sufficient official records in support of its arguments regarding espionage practice, yet ignores a near-contemporaneous account emanating from the US State Department adduced in evidence by Pakistan.

217.5. As regards the case of Hanson Huang, the fact that a friend might have been able to visit him is irrelevant to the issue of whether or not Hanson Huang was entitled to or did receive consular access. In its Reply, India asserts (at paragraph 126(d)) that "*An article in the New York Times suggests that no diplomatic action was taken to gain access to him since he was not a US citizen*". India further asserts: "*This represents yet another instance of the problem of relying on newspaper reports to build up a case rather than on actual records which would establish whether or not consular access was sought, and if it was denied, the grounds for the denial*". However, whilst it is India, in respect of Hanson Huang, which itself relies upon a newspaper article, the evidence put forward by Pakistan in respect of Hanson Huang is an extract from the *Historical Dictionary of Chinese Intelligence* (2010) **[CM/Volume 7/Annex 152]** written by experts I.C. Smith[19] and Nigel West[20].

217.6. As regards the case of Harry Wu, India, in its Reply, asserts (at paragraph 126(e)) that "*It is not known whether US was notified earlier, and whether it sought*

[19] I.C. Smith served as a FBI counterintelligence officer (1973-1998), as part of the FBI'S Senior Executive Service (1990), as the US State Department's Chief of Investigations, Counterintelligence Programs & Diplomatic Service (1990), and as the FBI's Section Chief for Analysis, Budget & Training in the National Security Division (1991) (where he was the principal FBI representative for the US intelligence community and the primary FBI liaison contact with foreign intelligence and security agencies) **[Volume 2/Annex 62]**

[20] Nigel West is an author specialising in security, intelligence, secret service and espionage issues. He is the European editor of the *World Intelligence Review* **[Volume 2/Annex 63/page 1]**

access to its national". However, the reports put in evidence by Pakistan in respect of Harry Wu make reference to US "*consular officials being kept from seeing Mr. Wu until yesterday*" **[CM/Volume 7/Annex 153/first page/third paragraph]** (emphasis added). These words imply prevention by the receiving State authorities against the sending State's efforts to gain access – indicating that the US did seek access to Harry Wu. Nevertheless, in its Reply India (wrongly) further asserts (at paragraph 126(e)) that "*this example negates any suggestion that consular access is not available where the charges are those of espionage*". Pakistan respectfully submits that Harry Wu's case is an example demonstrating that major powers (in this case China) never consistently operated on the basis that they were legally bound to provide immediate consular access to an espionage agent.

217.7. As regards paragraph 126(g) of India's Reply, it is assumed (because India has omitted to give any specific reference) that this refers to the cases cited at paragraph 349 of Pakistan's Counter-Memorial. The cases cited there demonstrate the point being made in Pakistan's Counter-Memorial (at paragraph 348) that espionage agents are often despatched under diplomatic cover and, if and when caught, are declared *persona non grata* by the receiving State before being expelled. India, too, recognises this point in its Reply (at paragraph 112).

(C) INDIA WRONGLY SUGGESTS THAT PROFESSOR LEE WAS INCONSISTENT OR CONTRADICTED HIS STATEMENT THAT ESPIONAGE WAS A "*FREQUENT EXCEPTION*" TO CONSULAR ACCESS

218. In its Counter-Memorial, Pakistan, having explained that, because of the Preamble to the VCCR 1963, it was necessary to examine Customary International Law as it existed in 1963 in order to determine a matter not expressly governed by the terms of the VCCR 1963 itself, cited (at paragraph 317) the 1961 edition of Professor Luke T. Lee's *Consular Law and Practice*. In that edition, it was stated (at page 125) **[CM/Volume 5/Annex 112.1]** that:

"*A frequent exception to the consular right to protect nationals and visit them in prison is the case of spies*".

219. In its Reply (at paragraph 128(c)), India cites a later writing by Professor Lee published in 1966 and quotes the following passage:

"*It may be observed that no exception is made to persons charged with espionage activities, whether in the 1933 agreement, the Soviet-United States Convention, or the Vienna Convention*".

220. If India's intention was to submit that Professor Lee altered his position in respect of this point following the promulgation of the VCCR 1963, then Pakistan respectfully submits that that is incorrect.

221. The above statement by Professor Lee comes directly after his discussion of how in cases of espionage, States including major Powers would consistently (despite the existence of treaties in place to deal with the issue of consular access to detained foreign nationals in general) refuse to allow consular access to the detained individual.

222. All of the above is also perfectly consistent with (and indeed adds further support to) the extract from Professor Lee's *Consular Law and Practice* (1961) cited by Pakistan in its Counter-Memorial as a statement of State practice/Customary International Law principles in 1963.

223. Thus, the extract from Professor Lee in 1966, read in context, is simply a statement that the VCCR 1963, and the other treaties referred to, contained no express exception in respect of espionage – a point that is not in dispute. India itself therefore begs the question – then why were States refusing consular access? Pakistan submits that it has provided the compelling answer, to which India cannot respond – because there was no obligation to do so as a matter of Customary International Law. Or, put another way, Customary International Law recognised an exception to consular access in such circumstances (which were, and are, very rare).

VI. INDIA HAS FAILED TO ENGAGE WITH PAKISTAN'S ARGUMENTS ON THE OPTIONAL PROTOCOL

224. In its Reply, India has refused and/or failed to engage with a key point raised by Pakistan concerning abuse of process by India.

225. In its Counter-Memorial, Pakistan set out in detail (at paragraphs 142-149) its argument that India had deliberately avoided and/or refrained from invoking the alternative dispute resolution mechanisms of the Optional Protocol **[CM/Volume 5/Annex 87]** to the VCCR 1963. In so doing, India had committed an abuse of process when it ambushed Pakistan with its Application/Request for the Indication of Provisional Measures on 8 May 2017.

226. The Optional Protocol provides as follows:

> *"**Optional Protocol concerning the Compulsory Settlement of Disputes***
>
> ***Done at Vienna on 24 April 1963***
>
> *The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,*
>
> *Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period.*
>
> *Have agreed as follows:*
>
> *Article I*
>
> *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.*
>
> *Article II*
>
> *The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application.*
>
> *Article III*
>
> *1. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice.*

2. The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application.

Article IV

States Parties to the Convention, to the Optional Protocol concerning Acquisition of Nationality, and to the present Protocol may at any time declare that they will extend the provisions of the present Protocol to disputes arising out of the interpretation or application of the Optional Protocol concerning Acquisition of Nationality. Such declarations shall be notified to the Secretary-General of the United Nations.

Article V

The present Protocol shall be open for signature by all States which may become Parties to the Convention as follows: until 31 October 1963 at the Federal Ministry for Foreign Affairs of the Republic of Austria and, subsequently, until 31 March 1964, at the United Nations Headquarters in New York.

Article VI

The present Protocol is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article VII

The present Protocol shall remain open for accession by all States which may become Parties to the Convention. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article VIII

1. The present Protocol shall enter into force on the same day as the Convention or on the thirtieth day following the date of deposit of the second instrument of ratification or accession to the Protocol with the Secretary-General of the United Nations, whichever date is the later.

2. For each State ratifying or acceding to the present Protocol after its entry into force in accordance with paragraph 1 of this article, the Protocol shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article IX

The Secretary-General of the United Nations shall inform all States which may become Parties to the Convention:

(a) of signatures to the present Protocol and of the deposit of instruments of ratification or accession, in accordance with articles V, VI and VII;

(b) of declarations made in accordance with article IV of the present Protocol;

(c) of the date on which the present Protocol will enter into force, in accordance with article VIII.

Article X

The original of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States referred to in article V.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Protocol.

DONE at Vienna, this twenty-fourth day of April, one thousand nine hundred and sixty-three". (emphasis added)

227. Pakistan and India acceded to the Optional Protocol on 29 March 1976 and 28 November 1977 respectively. Neither Pakistan nor India filed any reservation to the Optional Protocol **[Volume 2/Annex 64]**.

(A) THE COURT'S NOTIFICATIONS TO STATES PARTIES TO VCCR 1963 AND THE OPTIONAL PROTOCOL

228. Article 63 of the Statute of the Court provides as follows:

"*1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.*

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it".

229. On 20 November 2017 **[Volume 1/Annex 8]** and 18 January 2018 **[Volume 1/Annex 9]**, the Court issued notifications under Article 63 of the Statute of the Court to the States Parties to the VCCR 1963 and to the Optional Protocol, in light of the fact that the Court considered that there were issues of construction of the terms of the VCCR 1963 and of the Optional Protocol that were in question in these proceedings.

230. In respect of the Optional Protocol, Pakistan respectfully observes that the questions in this regard may well include:

(1) What minimum form and content should notification of a dispute take (Article II)?
(2) Whether notification is mandatory or permissive, what is the effect of a failure to effect notification as aforesaid?

(3) What is the effect of the two month period provided for in Article II and/or Article III?

(4) What is the consequence of a failure to comply with the two month provision as aforesaid?

231. Despite the strong indicator from the Court (issued 89 days before the filing of India's Reply) that the terms of the Optional Protocol will, or are likely to be considered in these proceedings, India has refused and/or failed in its Reply to address the issues raised by Pakistan concerning the Optional Protocol in any manner whatsoever.

232. Pakistan notes India's assertion to the Court on 10 January 2018, as part of its justification for the need for a further round of pleadings, was that the matters raised by Pakistan in its Counter-Memorial "*would have to be fully rebutted*" (emphasis added) **[Volume 1/Annex 3/page 3/paragraph 5]**.

233. Having sought the Court's authorisation of a further round of pleadings on the basis that it needed to "*fully*" rebut Pakistan's arguments as presented in the Counter-Memorial, Pakistan respectfully observes that India's manifest failure to even mention (let alone rebut) such an important aspect of the Counter-Memorial constitutes a further example of India's approach in this case.

234. This is all the more striking, given that it was at India's insistence that the more detailed jurisdictional provision contained in the Optional Protocol was adopted.

(B) INDIA WAS A DRIVING FORCE BEHIND THE ADOPTION OF THE OPTIONAL PROTOCOL AT THE UN VIENNA CONFERENCE ON CONSULAR RELATIONS

235. Article 72 (settlement of disputes) of the draft Vienna Convention on Consular Relations prepared by the Drafting Committee provided as follows **[Volume 2/Annex 65]**:

"*1. Any dispute arising from the interpretation or application of the present Convention shall be submitted at the request of either of the Parties to the International Court of Justice unless an alternative method of settlement is agreed upon.*

2. Any Contracting Party may, at the time of signature or ratifying the present Convention or of acceding thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other Contracting Parties shall not be bound by the said paragraph with respect to any Contracting Party which has made such a declaration".

236. At the twenty-first plenary meeting of the UN Conference on Consular Relations on 22 April 1963 at 10:45am, India's representative (Mr. Krishna Rao[21]) recommended that

[21] Dr. K. Krishna Rao was a Legal Adviser to India's Ministry of External Affairs at the time

Article 72 "*be replaced by an optional protocol on the compulsory settlement of disputes*" **[Volume 2/Annex 66/page 88/paragraph 10]**.

237. Interestingly, he also observed (at paragraph 3) as follows **[Volume 2/Annex 66/pages 87-88]**:

"*3. The impression had been created that the Court was a perfect instrument for the purpose of deciding all legal disputes and that any criticism of the Court should not be tolerated. He could fully understand the attitude of some European countries which genuinely placed their faith in the Court. However, he could not accept that great concern for the Court should be expressed by States which, in their declarations under article 36, paragraph 2, of the Statute, denied the Court the right to decide its own jurisdiction, as set forth in paragraph 6 of the same article 36. The record of India in that respect was much better than that of the latter group of countries. In that connexion, it was not inappropriate to cite the dictum of English law that "those who come to equity should come with clean hands". He agreed that every endeavour should be made to encourage as many States as possible to accept the jurisdiction of the Court. At the same time, however, an effort should be made to ascertain the reasons why so many States did not accept that jurisdiction and to remedy any defects which might thus be revealed*". (emphasis added)

238. It would appear that the learned and respected representative for India was alluding to the need for the jurisdiction of the Court to be clearly articulated. It would appear that concerns were being expressed as to the reticence of some States to confer jurisdiction upon the Court. This may well have been due to the 'Cold War' climate prevalent at the time.

239. What is particularly striking is that the Optional Protocol provides for what would be described as a 'multi-tier' dispute resolution process. Such provisions are commonplace in the 21st century, and are a reflection of a desire to avoid contentious dispute resolution and the concomitant escalation which ensues. Considerations of this nature are even more pressing in the context of diplomatic relations and issues as to consular access.

240. The Optional Protocol is thus a reflection of the agreement between the States Parties thereto to seek (in good faith) to avoid 'rushing' to the Court, and to allow less formal/confidential processes an opportunity to yield an acceptable outcome.

241. It is in that context that Pakistan observes India's conduct is all the more troublesome:

(1) Avoiding notification of a dispute to Pakistan.
(2) Thereby seeking to avoid arbitration/conciliation.
(3) Waiting for more than 1 year and then ambushing Pakistan with an application for Provisional Measures (whose equivalent could equally if not more expeditiously have

been granted by the High Court of Pakistan) to set the stage for political theatre and sensationalist as well as grossly distorted Indian media coverage.

242. Precisely (perhaps) the type of events that the drafters of the Optional Protocol were seeking to avoid.

(C) "NOTIFICATION"

243. Pakistan observes that the Optional Protocol does not make any express provision for the form that notification under the Optional Protocol is required to take.

244. Nevertheless, it is well-established that the concept of "notification" in the context of the law of treaties denotes a formal notification required to trigger certain legal events or time periods. The UN Treaty Collection's Glossary provides, as regards "notification", as follows **[Volume 2/Annex 67/page 2]**:

"*The term "notification" refers to a formality through which a state or an international organization communicates certain facts or events of legal importance. Notification is increasingly resorted to as a means of expressing final consent. Instead of opting for the exchange of documents or deposit, states may be content to notify their consent to the other party or to the depositary. However, all other acts and instruments relating to the life of a treaty may also call for notifications*" (emphasis added)

245. Furthermore, in Professor Oliver Dörr and Kirsten Schmalenbach's *Vienna Convention on the Law of Treaties: A Commentary* (2018), Professor Helmut Tichy[22] and Dr. Philip Bittner[23] state (at paragraph 6) **[Volume 2/Annex 59/page 1328]** in their commentary to Article 78 VCLT 1969 (which concerns notifications and communications under that Convention) as follows:

"*Generally, notification may be understood as "a formal, unilateral act in international law, by a State informing other States or organizations of legally relevant facts*"".

246. In Professor Olivier Corten and Professor Pierre Klein's *The Vienna Conventions on the Law of Treaties: A Commentary (Volume II)* (2011), Dr. Riad Daoudi[24] states (at paragraph 2) **[Volume 2/Annex 60/pages 1758-1759]** in his commentary to Article 78 VCLT 1969 as follows:

"*2. The Dictionnaire de la terminologie du droit international defines notification as the 'action to officially inform a third party of a fact, a situation, an action, a document in*

[22] Ambassador Prof. Dr. Helmut Tichy has served in Austria's Federal Ministry for Foreign Affairs (now the Federal Ministry for European & International Affairs) since 1983 and as Legal Adviser since 2010. He is also Professor at the Institute of International Law & International Relations at the University of Graz

[23] Dr. Philip Bittner has served as Counsellor (Legal Affairs) in Austria's Permanent Representation to the European Union

[24] Dr. Riad Daoudi served as a Member of the International Law Commission (2002-2006)

order to ensure that the object of the notification becomes henceforward legally known by the State to which it is addressed'. For this reason, any notification is subject to formal requirements. It is made in writing and must be signed by an authority empowered to express the consent of the State to be bound by a treaty as per Article 7 of the Vienna Convention of 1969. Otherwise full powers are required from the person signing the notification". (emphasis added, footnotes omitted)

247. Thus Pakistan submits that the inclusion of a provision for a formal notification of a dispute in the Optional Protocol, together with the existence of alternative forms of dispute resolution mechanisms intended to be used prior to engaging the Court's jurisdiction, is highly significant.

248. In the face of India's failure and/or refusal to engage with this issue, Pakistan reserves its right to expand and/or develop its submissions at the oral hearing phase.

249. In summary, Pakistan submits: (1) India was required to provide and/or should have provided clear written notification to Pakistan as to the existence (and nature) of a dispute with reference to the VCCR 1963; (2) such notification (if sent) would engage the conciliation/arbitration processes provided for by Articles II and III of the Optional Protocol; (3) the Court's jurisdiction could not be invoked prior to steps (1) and (2) above.

250. Alternatively, in the light of the facility provided for by Articles I and II of the Optional Protocol, India's recourse to the Court was done in bad faith and militates against the grant of any relief, whether viewed in isolation or in the context of the other matters set out in the Counter-Memorial and herein.

VII. DISTRACTIONS GENERATED BY INDIA

251. India asserts in its Reply (at paragraph 28) that much of the factual background presented by Pakistan in its Counter-Memorial at paragraph 22 *et seq* is "*entirely irrelevant and beyond the scope of these proceedings*". However unacceptable this stance may be, India does not shy away from littering these proceedings with mischievous, utterly baseless and irrelevant distractions. Pakistan refers to one by way of example.

(A) INDIA'S UNFOUNDED ALLEGATION THAT COMMANDER JADHAV WAS "*KIDNAPPED FROM IRAN*"

252. In its Reply, India asserts (at paragraph 29) that Commander Jadhav was "*kidnapped from Iran*". India puts forward as 'evidence' a transcript of an interview given to CNN News 18 (an Indian TV network) by one 'Mama Qadir' (who identifies himself to be the Vice-Chairman of the organisation 'Voice for Baloch Missing Persons') on 18 January 2018. Apart from curious issues such as the convenient timing of the interview, and its source, the transcript purports to show that Mama Qadir (as well as serving up serious and unsubstantiated allegations against various Pakistani authorities) makes several statements conveniently and belatedly adopted by India as the sole support for its allegation that Commander Jadhav was abducted from Iranian territory.

253. Pakistan notes that this is not the first occasion that India has made or adopted this palpably feeble and false allegation. On 11 April 2017, India's Minister of External Affairs said, in a speech to the Rajya Sabha, that Commander Jadhav "*was doing business in Iran and was kidnapped and taken to Pakistan*" – yet gave no evidence in support of that assertion **[CM/Volume 2/Annex 21/page 1/paragraph 2]**. More than a year later, India simply repeats its allegation in the hope that it will transmute into hard fact. It does so, but only as another illustration of India's approach.

254. In its Memorial, India asserted the allegation of kidnapping from Iran at paragraphs 41, 57, 133 and 206(a) – yet failed to advance even a scintilla of evidence in support. India even went so far as to assert in the Memorial (at paragraph 206(a)) that "*A former official of the Pakistan Army also purportedly stated on electronic media that Jadhav had been taken from Iran*" – yet, again, India failed to cite anything at all in support of that assertion.

255. Perhaps unsurprisingly, Pakistan has not located any publically available official statements (let alone evidence) suggesting that India has at any point in time made any official request to the authorities in Iran in respect of Commander Jadhav and his alleged "*kidnapping*". In any event, the suggestion that Commander Jadhav was kidnapped from Iran is, at best, far-fetched.

(B) TELLINGLY, INDIA DID NOT TAKE THE OPPORTUNITY TO RAISE THE MATTER OF THE ALLEGED "*KIDNAPPING*" WITH IRAN AT THE HIGHEST LEVELS

256. Indeed, despite such sweeping assertions, it is curious (to say the least) that a very recent opportunity to seek assistance or information from the competent authorities of Iran was not taken advantage of. In this regard, Pakistan makes reference to the visit by the President of Iran to India in February 2018. This was the subject of a detailed Ministry of External Affairs Media Briefing on 17 February 2018.

257. The official transcript of the briefing dated 19 February 2018 shows that at least 4 different questions were posed by the media in respect of Commander Jadhav, no doubt in response to the assertion that India had been publically projecting, namely that he had been abducted from Iran. On each occasion, the representative for India's Ministry of External Affairs (who is also India's Agent in these proceedings) confirmed that the issue had not been raised with the Iranian authorities (despite the clear opportunity to do so at the highest level) **[Volume 2/Annex 68/page 4/third-fourth paragraphs and page 4/ninth-tenth paragraphs and page 7/sixth-seventh paragraphs and page 8/fifth-sixth paragraphs]**:

"***Question:****You mentioned about the security cooperation and information exchange. Did we raise the issue of KulbhushanJadhav's abduction from Iran and after the ratification of extradition treaty as it happened today, will we ask Iranians to prosecute those who have aided and abated his kidnapping in Iran?*

Jt. Secretary (PAI), Dr. Deepak Mittal: *This issue did not figure in the discussions.*

...

Question:*Is there any reason why the Jadhav issue did not come up, why did we not bring it up in our discussions?*

Jt. Secretary (PAI), Dr. Deepak Mittal: *It is not a bilateral matter with Iran in any case.*

...

Question:*Iran had said that they would probe how KulbhushanJadhav was kidnapped from Iran and last that we have lerned that they were not getting any cooperation from Pakistan on that front to be able to probe it. Have they ever gotten back to India and whether they probed that issue at all, have they officially communicated anything at any level?*[25]

VII

[25] With regard to the premise of the question, Pakistan has not been able to identify any official public statement from any Iranian authority to suggest that Iran at any point accepted that Commander Jadhav had been "*kidnapped from Iran*". The question thus appears to be based solely upon the assertion advanced by India. Indeed, the Indian media reported on 12 April 2017 that Iran's Ambassador to India, Gholamreza Ansari, said

Jt. Secretary (PAI), Dr. Deepak Mittal: *I thought we are talking about the ongoing visit, as I mentioned this was not the topic of discussion today.*

...

Question: *When the areas of focus were being decided between India and Iran in the run up to the President's visit you mentioned that KulbhushanJadhav was not discussed but was it our decision that we did not want to include KulbhushanJadhavin one of the areas during the visit or we wanted it but Iran didn't want? ...*

Jt. Secretary (PAI), Dr. Deepak Mittal: *...the answer would be no and as I mentioned this is not a bilateral issue in any way between India and Iran*".

258. Pakistan submits that the statement by India's representative that this was "*not a bilateral matter with Iran in any case*" **[Volume 2/Annex 68/page 4/tenth paragraph]** is a most puzzling statement, given the serious allegation made against Pakistan, and the manner in which this matter has been amplified and elevated within the Indian media. Pakistan observes that India displayed strikingly less conviction in its assertion when it could have so easily sought to buttress the same, if it was in any way credible or serious.

259. Pakistan had explained at the Provisional Measures Hearing as well as in its Counter-Memorial (at paragraph 69) why India's unsubstantiated allegations of kidnap/abduction from Iran are farcical. India therefore has been on notice for some time that it must (as is said in England) 'put up or shut up' – substantiate or desist.

VII

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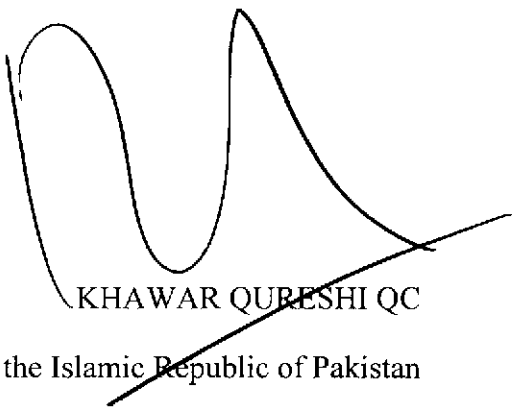
that "*Tehran was probing into the case of alleged Indian spy Kulbhushan Jadhav and his business activities in Chabahar*" **[Volume 2/Annex 69]**

CONCLUDING OBSERVATIONS

260. For the reasons set out in this Rejoinder, as well as those set out in the Counter-Memorial, Pakistan requests the Court to adjudge and declare that the claims of India, as advanced through its Application, its Memorial and its Reply, are rejected.

261. Pakistan reserves the right to supplement or amend the present submissions.



KHAWAR QURESHI QC

Counsel for the Islamic Republic of Pakistan

17 July 2018

VIII

SUBMISSION

I have the honour to submit this Rejoinder and the documents exhibited hereto on behalf of the Islamic Republic of Pakistan.

DR. MOHAMMAD FAISAL

Co-Agent of the Islamic Republic of Pakistan

CERTIFICATION

I have the honour to certify that this Rejoinder and the documents exhibited hereto are true copies and conform to the original documents.

DR. MOHAMMAD FAISAL

Co-Agent of the Islamic Republic of Pakistan

ANNEX: LIST OF EXHIBITS

(1) VOLUME 1 (ANNEXURES 1 – 39)

ANNEX	DESCRIPTION
COURT PROCEDURE	
CORRESPONDENCE CONCERNING FURTHER PLEADINGS	
1	19/12/2017 – India's letter to the Court regarding further pleadings
2	05/01/2018 – Pakistan's letter to the Court regarding further pleadings
3	10/01/2018 – India's further letter to the Court regarding further pleadings
4	15/01/2018 – Pakistan's further letter to the Court regarding further pleadings
5	17/01/2018 – Court's Procedural Order authorising further pleadings
6	05/06/2018 – *Note Verbale* from Pakistan's Ministry of Foreign Affairs to the High Commission of the Republic of India in Islamabad requesting India's confirmation of the accuracy of the contents of the Reply
7	27/06/2018 – *Note Verbale* from India's Ministry of External Affairs to the High Commission of the Islamic Republic of Pakistan in New Delhi failing and/or refusing to answer the queries raised in Pakistan's *Note Verbale* dated 5 June 2018
ARTICLE 63 NOTIFICATION	
8	20/11/2017 – Court's notification under Article 63 of the Statute of the Court in respect of the VCCR 1963
9	18/01/2018 – Court's notification under Article 63 of the Statute of the Court in respect of the Optional Protocol
FACTUAL BACKGROUND	
FAMILY VISIT	
10	24/12/2017 – *Note Verbale* from Pakistan's Ministry of Foreign Affairs to the High Commission of the Republic of India in Islamabad regarding the Family Visit
11	Curriculum Vitae of Dr. Uwe Johannes Nellessen
12	22/12/2017 – Independent Medical Report
13	25/12/2017 – India's and the Family's express written consent for security measures during the Family Visit

14	UK Ministry of Justice: 'Management of Security at Visits'
THE PASSPORT ISSUE	
LETTERS FROM PAKISTAN TO INDIA ON THE PASSPORT ISSUE AND INDIA'S PURPORTED RESPONSES	
15	11/12/2017 – *Note Verbale* from India's Ministry of External Affairs to the High Commission of the Islamic Republic of Pakistan in New Delhi
16	19/01/2018 – *Note Verbale* from Pakistan's Ministry of Foreign Affairs to the High Commission of the Republic of India in Islamabad
17	11/04/2018 – *Note Verbale* from India's Ministry of External Affairs to the High Commission of the Islamic Republic of Pakistan in New Delhi
18	16/04/2018 – *Note Verbale* from Pakistan's Ministry of Foreign Affairs to the High Commission of the Republic of India in Islamabad
19	03/05/2018 – *Note Verbale* from Pakistan's Ministry of Foreign Affairs to the High Commission of the Republic of India in Islamabad
INDIAN JOURNALISTS SEEKING ANSWERS TO THE PASSPORT ISSUE	
20	05/01/2018 – Mr. Chandan Nandy's article in *The Quint* entitled '*Two Ex-RAW Chiefs Did Not Want Kulbhushan Jadhav Recruited As Spy*'
21	06/01/2018 – media reports from *NewsLaundry* (an Indian digital media portal run by the founding editor of *India Today*, one of India's leading news magazines/television news channels) and *OpIndia.com* (an English-language Indian blog owned by the Swarajya media group) that Mr. Chandan Nandy's article had been retracted
22	Mr. Chandan Nandy's LinkedIn profile
23	Description of *The Quint*
24	11-15/01/2018 – media reports from *LatestLaws.com* (an Indian website commenting on legal news in India) and *NewsLaundry* that a criminal complaint for sedition under Section 124A of the Penal Code of India was filed against Mr. Chandan Nandy and *The Quint* for his "*anti-national article*"
25	31/01/2018 – Mr. Praveen Swami's article in *Frontline* entitled '*India's secret war*'
26	03/02/2018 – Mr. Praveen Swami's Twitter post of comments concerning him being made on a public forum following the publication of his *Frontline* article
27	Mr. Praveen Swami's LinkedIn profile
28	02/02/2018 – Article published by 'Nithesh S', a journalist at *OpIndia.com*, criticising journalists for publishing articles about this matter that are contrary to the Government of India's position
29	03/02/2018 – Government of India's Official Spokesperson dismissed Mr. Swami's article as "*concocted and mischievous*"
30	02/05/2011 – *Times of India* article entitled '*Fingerprint scanner at*

	airport to check illegal migration'
31	Iranian Ministry of Foreign Affairs visa application website providing specifications for the submission of passport copies and other documents required for an Iranian visa
PAKISTANI HIGH COURT / SUPREME COURT REVIEW JURISDICTION	
'Muhammad Imran' (case name: Muhammad Ayaz v The Superintendent District Jail, Timergara and others)	
32	25/05/2017 – Judgment of the Chief Justice of the Peshawar High Court in the case of 'Muhammad Imran'
'Fazal Rabi' (case name: Fazal Ghafoor s/o Abdul Manan, father of Fazal Rabi "Convict", R/o Mohallah Barpalo Road, Saugar, Tehsil Matta, District Swat v Federation of Pakistan through Ministry of Interior and others)	
33	20/09/2016 – order of Chief Justice of the Peshawar High Court continuing the 29 August 2016 stay order issued in respect of the death sentence in the case of 'Fazal Rabi'
34	June 2017 – 'Fazal Rabi' petition seeking leave to appeal to the Supreme Court of Pakistan against the judgment of the Peshawar High Court
35	19/07/2017 – Supreme Court stay order in respect of 'Fazal Rabi'
'Shafaqat Farooqi' (case name: Muhammad Liaqat v The State and others)	
36	2017 – 'Shafaqat Farooqi' petition seeking leave to appeal to the Supreme Court of Pakistan against the judgment of the Lahore High Court
37	22/01/2018 – Supreme Court stay order in respect of 'Shafaqat Farooqi'
'Burhan-ud-Din' (case name: Umardaraz son of Muhammad Ayaz R/o Nazakay Tehsil Salarzai Bajaur Agency v Secretary Defence, Federation of Pakistan through Pak Secretariat, Islamabad and others)	
38	08/05/2018 – 'Burhan-ud-Din' petition before the Peshawar High Court
39	09/05/2018 – Peshawar High Court stay order in respect of 'Burhan-ud-Din'

(2) VOLUME 2 (ANNEXURES 40 – 69)

ANNEX	DESCRIPTION
AUTHORITIES	
CASE LAW	
40	*North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, Judgment of 20 February 1969, paragraph 74 ||| 76 ||| 77
41	*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment of 3 June 1985, paragraph 27
42	*Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment of 3 February 2012, paragraph 55 ||| 57 ||| 76
43	*Right of Passage over Indian Territory (Portugal v India)*, Judgment of 12 April 1960, pages 42-43
44	*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, paragraphs 67 ||| 72-73
45	*Asylum (Colombia/Peru)*, Judgment of 20 November 1950, page 277 ||| 286
46	*North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, Judgment of 20 February 1969, Dissenting Opinion of Judge Tanaka, pages 175-176
47	*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 of 16 December 2015, Separate Opinion of Judge Donoghue, paragraph 3 ||| 5
48	*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment of 27 June 1986, paragraph 186 ||| 207
49	*Fisheries (United Kingdom v Norway)*, Judgment of 18 December 1951, page 131 ||| 138 ||| 139
50	*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment of 12 October 1984, paragraph 81
51	*The Case of the S.S. "Lotus" (France v Turkey)* (1927) PCIJ (Series A), No. 10, Judgment of 7 September 1927, page 28 ||| 29
52	*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, paragraph 121
ILC – IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW	
53	Draft Conclusions on the Identification of Customary International Law adopted by the International Law Commission at its 68th session

	in 2016 (plus commentaries)
54	14/03/2018 – Fifth Report of Special Rapporteur Sir Michael Wood
55	17/05/2018 – Draft Conclusions of the ILC as stated in the 70th session (A/CN.4/L.908)
56	25/05/2018 – Statement by the Chairman of the ILC Drafting Committee on 25 May 2018
ACADEMIC MATERIAL	
57	Wright Q, '*Espionage and the Doctrine of Non-Intervention in Internal Affairs*' in Stanger R and Wright Q et al (eds), *Essays on Espionage and International Law* (1962)
58	Biographical information for Dr. Luke T. Lee
59	Tichy H and Bittner P, '*Article 78*' in Dörr O and Schmalenbach K (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2018)
60	Daoudi R, '*1969 Vienna Convention – Article 78*' in Corten O and Klein P (eds), *The Vienna Conventions on the Law of Treaties: A Commentary (Volume II)* (2011)
61	Interview with Vladimir I. Toumanoff
62	Biographical information for I.C. Smith
63	Biographical information for Nigel West
OPTIONAL PROTOCOL	
64	UN Treaty Collection webpage showing accessions and reservations to the Optional Protocol
65	Article 72 of the draft Vienna Convention on Consular Relations prepared by the Drafting Committee
66	Statement by India's representative at the twenty-first plenary meeting of the UN Conference on Consular Relations on 22 April 1963 at 10:45am recommending Article 72 (settlement of disputes) "*be replaced by an optional protocol on the compulsory settlement of disputes*"
67	UN Treaty Collection's Glossary entry regarding "*Notification*"
IRRELEVANT DISTRACTION DEPLOYED BY INDIA	
68	19/02/2018 – Official Transcript of Ministry of External Affairs Media Briefing on the occasion of the visit to India by the President of Iran
69	12/04/2017 – media report from *The Indian Express* concerning a statement reportedly made by Iran's Ambassador to India concerning Commander Jadhav

17th July 2018