

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. On behalf of the Islamic Republic of Pakistan (“Pakistan”), it is an honour to present this Counter-Memorial to the Court pursuant to the Procedural Order dated 13 June 2017.
2. On 8 May 2017, the Republic of India (“India”) instituted proceedings before this Court and filed a Request for the Indication of Provisional Measures alleging (at paragraph 3 of that request) that “*the authorities of Pakistan arrested, detailed, tried and sentenced to death on 10 April 2017 an Indian national, Mr. Kulbhushan Sudhir Jadhav, in egregious violation of the rights of consular access guaranteed by Article 36, paragraph 1, of the Vienna Convention [on Consular Relations 1963]*” (“VCCR 1963”) and (“Article 36”).
3. Pakistan rejects any suggestion that it has committed any breach of any of its obligations as a matter of Public International Law.
4. Save where expressly admitted herein, India is put to proof of all facts and matters relied upon in support of its Application, Memorial and claims for relief.
5. In this Counter-Memorial, references to annexures are given in the form **[volume/annex/page/paragraph]**.

Executive Summary

6. Pakistan respectfully submits that India’s Application is misconceived. The key arguments identified herein have previously been raised at the Provisional Measures hearing on 15 May 2017.
7. It is therefore regrettable that India has not used the vehicle of its Memorial to advance its position with further clarity, or to address the arguments raised by Pakistan in any meaningful manner.
 - (I). India sought to engineer “urgency” to justify exceptional provisional measures without any hearing, and by deliberately failing to draw material facts and matters to the attention of the Court which negated the “imminence”/“any day” assertions regarding the carrying out of the sentence upon Commander Jadhav.
 - (II). It is a matter of considerable concern and regret that India has failed to explain how Commander Jadhav entered Pakistan in possession of an authentic Indian passport clothed with a false Muslim identity. Instead, seizing upon the fact that Commander Jadhav was using a false Muslim name, India stated “*the question of authenticating a declared false document does not arise*” **[Volume 2/Annex 33]**. This is evasive sophistry (at best) to conceal, Pakistan says, India’s wrongdoing in providing an authentic passport with a false Muslim identity.

- (III). Whilst India has thus far evaded providing any explanation on the passport issue, Pakistan has engaged an independent expert to examine the passport. The expert (a former Chief Immigration Officer at the UK National Document Fraud Unit for 13 years) has confirmed that the passport in the possession of Commander Jadhav (in a false name) is an authentic Indian passport [Volume 7/Annex 141]. Commander Jadhav must have been provided with this passport by the Indian authorities who must also have clothed him with a false Muslim identity (in pursuit of his illegal activities).
- (IV). In addition thereto, India remains unwilling to address legitimate requests for mutual legal assistance. Indeed, in a frank admission no less a person than India's Ministry of External Affairs Spokesperson on 13 April 2017 accepted that [Volume 2/Annex 22/page 6/para 7] "*The Pakistani authorities asked us to assist them in completing the investigation [concerning Commander Jadhav] this year*". There is simply no justification for refusing to provide such assistance – apart from a desire to deflect criticism – to Pakistan and obstruct the investigation and prosecution of Commander Jadhav.
8. These facts and matters, *inter alia*, engage the principles of:
- 8.1. Abuse of process;
 - 8.2. Abuse of rights;
 - 8.3. Illegality;
 - 8.4. *Ex turpi causa* (clean hands doctrine).
9. Given the egregious, deliberate nature of its acts and omissions, India's claims should be the subject of a preliminary evaluation in this regard and dismissed accordingly.
10. Further or in the alternative, these aforesaid facts and matters are highly relevant when considering India's claim that the VCCR 1963, specifically Article 36 thereof, has been breached by Pakistan.
11. Article 36 is not engaged until and unless the "sending state" furnishes evidence of the nationality of the individual.
12. In this case, whilst India now states that Pakistan proceeded at all times upon the basis that Commander Jadhav was a spy of Indian origin, it would be curious if a passport in a false identity and a confession of illegal activity would absolve a "sending state" of the treaty requirement to establish nationality. Indeed, India's Ministry of External Affairs Spokesperson appears to have accepted this was a requirement as in his press briefing on 13 April 2017 [Volume 2/Annex 22/page 3/para 2], he stated, *inter alia*, that the fact that "*he [Commander Jadhav] is an Indian... was communicated to Pakistan more than a year ago*". At no point in time (despite repeated reminders) has India furnished any evidence of the Indian nationality of Commander Jadhav – no doubt for the reasons explained further below.

13. Customary International Law and State practice provide no support (or clear and cogent support) to the contention that Article 36 is engaged in the context of an individual against whom a *prima facie* case of espionage exists, not least an individual who possesses an authentic passport in a false identity for which the putative “sending state” refuses to provide an explanation.
14. India itself advanced a bilateral agreement which was eventually entered into titled “Agreement on Consular Access” dated 21 May 2008 [Volume 7/Annex 160]. Article (vi) thereof in terms addresses the specific cases of arrest, detention or sentence made on “political or security grounds” and provides that each party may “examine the case on its merits”. In the Provisional Measures phase, India asserted that it did not “rely” upon the 2008 Agreement which was “irrelevant” [Volume 1/Annex 5.1/page 34/para 66]. In India’s Memorial (at paragraphs 89-99), a somewhat vague assertion is advanced to the effect that whilst some parts of the 2008 Agreement “supplement or amplify” the 2008 Agreement, Article (vi) is not such a provision.
15. However, yet again, the official position adopted by India through its Spokesperson on 13 April 2017 with regard to Consular access to Commander Jadhav was both frank and accurate [Volume 2/Annex 22/page 5/last para]:
- “Both India and Pakistan have also an agreement on consular access bilaterally. So we are not merely speaking about an international practice, we are speaking here of a bilateral agreement.”*
16. No doubt based upon advice from its lawyers, India now seeks to resile from its formal position (that it was in fact relying upon the 2008 Agreement less than 3 weeks prior to launching its Application before the Court). Indeed, India seeks to pretend that the 2008 Agreement can be conveniently ignored in respect of a central aspect. The 2008 Agreement was clearly intended to have legal effect, and can only be viewed as amplifying and supplementing the provisions of the VCCR 1963 as otherwise operative between these two States, whose relationship has been fractious at times.
17. Within the context of an overall abuse of process, India has sought relief from the Court (an order for “acquittal/release”) which the Court has stated, time and again, is not available. India has used the Courts process to engage in political grandstanding and a media/cyber war which belies its ultimate objective – to use the Court as a vehicle for a theatre of sorts.
18. Indeed, somewhat regrettably, India’s use of inflammatory language extended to insinuating that the military courts of Pakistan were akin to *kangaroo courts*. This is most unfortunate, not least because the military courts of India and Pakistan share the same origins. Moreover, independent pre-eminent military law experts from the United Kingdom have provided a report [Volume 7/Annex 142] which, *inter alia*, states that the

military courts of Pakistan are “*soundly based*” [Volume 7/Annex 142/page vi/para 3(b)], and they did not consider that “*the espionage jurisdiction of the military courts of Pakistan...is per se unfair or otherwise improper*” [Volume 7/Annex 142/page vii/para 3(c)].

19. Nevertheless, even if India were correct (which it is not), the Court would (assuming Article 36 VCCR 1963 is engaged and is breached, which is not accepted) direct a State at most to provide for “*review and reconsideration*”.
20. That task has been amply provided for by the Pakistani Courts, as confirmed by the Supreme Court in its decision in the case of *Said Zaman Khan v Federation of Pakistan through Secretary Ministry of Defence, Government of Pakistan* (Civil Petition No. 842 of 2016) [Volume 4/Annex 81/pages 50-52/para. 93 and pages 59-62/paras. 103-104] where it stated:

“93. ... *It is by now a well settled proposition of law, as is obvious from the judgments of this Court, referred to and reproduced hereinabove, that the powers of Judicial Review under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, against the sentences and convictions of the FGCM is not legally identical to the powers of an Appellate Court. The evidence produced cannot be analyzed in detail to displace any reasonable or probable conclusion drawn by the FGCM nor can the High Court venture into the realm of the “merits” of the case. However, the learned High Court can always satisfy itself that it is not a case of no evidence or insufficient evidence or the absence of jurisdiction.*

...
103. *The nature and extent of the power of Judicial Review in matters arising from an action taken under the Pakistan Army Act, 1952, has by and large been settled by this Court through its various judgments, referred to above. It now stands clarified that neither the High Court nor this Court can sit in appeal over the findings of the FGCM or undertake an exercise of analyzing the evidence produced before it or dwell into the “merits” of the case. However, we have scanned the evidence produced and proceedings conducted by the FGCM. The Convict pleaded guilty to the charges, which were altered to not guilty by operation of the law. There was a judicial confession of the Convict before a learned Judicial Magistrate, which was proved in evidence by the said Judicial Magistrate, who appeared as a witness. Such confession was never retracted by the Convict. Other relevant evidence, including eye witnesses of the occurrence was also produced. The prosecution witnesses made their statements on Oath and were cross-examined by the Defending Officer. Opportunity to produce evidence in defence was given, which was declined. The Convict was permitted to address the Court and made a statement, wherein he again admitted his guilt. In the above circumstances, it is not possible for us to conclude that it was a case of no evidence or insufficient evidence nor is it possible to hold that the conclusions drawn by the FGCM are blatantly unreasonable or wholly improbable.*

104. A perusal of the record of the FGCM reveals that in order to ensure a fair trial and to protect the rights of the Convict, the relevant Rules were complied with. The Summary of evidence had been taken and was laid before the FGCM, as is apparent from the record of the proceedings thereof. An Interpreter was appointed with the consent of the Convict in terms of Rule 91 of the Pakistan Army Act Rules, 1954. The nature of the offence for the commission whereof, the Convict was charged, was explained to him as too the possible sentence that would be awarded, as required by Rule 95. He was given an opportunity to prepare his defence and engage Civil Defence Counsel, if he so desired, in terms of Rules 23 and 24. On his exercising the option not to do so, a Defending Officer was appointed in terms of Rule 81. He was given an opportunity to object to the constitution of the FGCM and to the Prosecutor as well as the Defending Officer, in terms of Section 104 and Rule 35 also. No objection, in this behalf, was raised. The Members of the FGCM, the Prosecutor, the Defending Officer and the Interpreter were duly sworn in, as required by Rules 36 and 37. The charge was formally framed to which incidentally, the Convict pleaded guilty. The evidence was recorded on Oath. An opportunity to cross-examine was granted, which was availed off and an opportunity was also given to produce evidence in defence in terms of Rule 142, which was declined. He was also allowed to record his own statement and to address the Court in terms of Rule 143 wherein he admitted his guilt. The sentence was passed, which has been confirmed in accordance with Section 130 and the Appeal therefrom was dismissed by the Competent Authority. It appears that the provisions of the Pakistan Army Act and the Rules framed thereunder, applicable to the trial at hand have not been violated. Even otherwise, the procedural defects, if any, would not vitiate the trial in view of Rule 132 of the Pakistan Army Act Rules, 1954 nor did the High Court have the jurisdiction to enter into the domain of the procedural irregularities in view of the judgment, reported as *Mrs. Shahida Zahir Abbasi and 4 others (supra)*, especially as no prejudice appears to have been caused to the Convict nor any such prejudice has been pointed out by the learned counsel or specifically pleaded before the High Court.”

21. Accordingly, the claim brought by India (in every respect, including the relief sought), is (at best) adventurous, at worst abusive, and should be dismissed.

II. FACTUAL BACKGROUND

Arrest

22. On 3 March 2016, a man illegally and clandestinely entered Pakistan from across the Saravan border with Iran and was arrested by the Pakistani authorities in the course of a Counter Intelligence Operation from Mashkel in Balochistan Province [Volume 2/Annex 17/page 15/para. 5]. A map showing the region is provided [Volume 6/Annex 139].
23. He was in possession of an Indian passport (number L9630722, issued on 12 May 2015, valid until 11 May 2024) bearing the Muslim name ‘Hussein Mubarak Patel’ [Volume 2/Annex 17/pages 12-14]. However, he subsequently admitted and/or claimed to be Officer 41558Z, Commander Kulbhushan Sudhir Jadhav (“Commander Jadhav”), a serving officer of the Indian Navy [Volume 2/Annex 17/page 15/paras. 1, 3]. He is apparently 49 years of age at the date of this Counter-Memorial – his date of birth is 30 August 1968 [Volume 2/Annex 17/pages 12-14]. India has asserted he has “retired” from the Armed Forces. Commander Jadhav has stated he is due for retirement in 2022 (as set out in his first confession, reproduced in full below). From public source materials on the internet, the retirement age for an officer of his rank is understood to be not less than 52 [Volume 6/Annex 140]. No doubt India can confirm whether this is correct. Curiously therefore, whilst India has asserted (conveniently) that Commander Jadhav retired at some point in his career before being caught spying in Pakistan, Commander Jadhav himself appears to have referred to his future eligibility for retirement – perhaps a small but significant indication of the overall veracity of his confession – repeated for the benefit of the authorities, the Magistrate, the Court, and the world at large over a period of more than 1 year.
24. Without prejudice to the consequent doubts that still linger regarding that individual’s true identity, he is referred to in this Counter-Memorial (for the purposes of these proceedings) as “Commander Jadhav”. India has maintained its assertion (still without any substantiation) that this man was “*kidnapped from Iran, where he was residing and carrying on business after retiring from the Indian Navy*” (para. 57 of the Memorial).

Confession to Espionage and Terrorist Activities

25. As was made public on 25 March 2016, Commander Jadhav voluntarily confessed in detail to his involvement in the facilitation and commission of acts of espionage and terrorism in Pakistan at the behest of India’s Research & Analysis Wing (“RAW”) (the primary foreign intelligence agency of India). The transcript of that confessional statement is reproduced in full below:

“TRANSCRIPT IN ENGLISH

CONFESSONAL STATEMENT OF COMMANDER KULBHUSHAN JADHAV

1. I am Commander Kulbhushan Jadhav Number 41558Z. I am a serving officer of the Indian Navy. I am from the cadre of engineering department in the Indian Navy and my cover name was Hussain Mubarak Patel, which I had taken for doing some intelligence gathering for the Indian cover/ agencies.

2. I joined National Defence Academy in 1987 and I subsequently joined the Indian Navy in 1991 and was commissioned into the Indian Navy and subsequently served in the Indian Navy till around 2001 December when Indian Parliament attack occurred and that is when I started contributing my services towards the gathering of information and intelligence within India. I lived in the city of Mumbai in India.

3. I am still a serving officer in the Indian Navy and will be due for retirement by 2022 as a commissioned officer in the Indian Navy. After having completed 14 years of service by 2002, I commenced intelligence operations in 2003 and established a small business in Chabahar in Iran. As I was able to achieve undetected existence and visits to Karachi in 2003 and 2004 and having done some basic assignments within India for RAW, I was picked up by RAW in 2013 end. Ever since, I have been directing various activities in Balochistan and Karachi at the behest of RAW and deteriorating law and order situation in Karachi. I was basically the man for Mr Anil Kumar Gupta who is the joint secretary RAW and his contacts in Pakistan especially in the Balochistan Student Organisation.

4. My purpose was to hold meetings with Baloch insurgents and carry out activities with their collaboration. These activities have been of criminal nature. These have been of anti-national and terrorist activities leading to killing or maiming of Pakistani citizens also. I realized during this process that RAW is involved in some activities related to the Baloch Liberation Movement within Pakistan and the region around it. There are finances which are fed into the Baloch Movement through various contacts or various ways and means into the Baloch Liberation and the various activities of these Baloch Liberation and the RAW handlers go towards activities which are criminal, which are anti-national, which can lead to maiming or killing of people within Pakistan and mostly these activities were centred around what I have knowledge of Ports of Gawadar, Pasni, Jeevani and various other installations, which are around the coast, damaging various other installations, which are in Balochistan. So the activities seem to be revolving around and trying to create a criminal sort of mindset within the Baloch liberation and lead to instability within Pakistan.

5. In my pursuit towards achieving the set targets by my handlers in RAW, I was trying to cross over into Pakistan from the Saravan border in Iran on March 3, 2016 and was apprehended by Pakistani authorities while on the Pakistani side and the main aim of this crossing over into Pakistan was to hold meetings with BSN personnel in Balochistan for carrying out various activities, which they were supposed to undertake and carrying for backwards the messages which they had to deliver backwards to Indian agencies. The main issues regarding this were that they were planning to conduct some operations within the next immediate future, near future. So that was to be discussed mainly and that was the main aim of trying to coming into Pakistan.

II

6. So the moment I realized that my intelligence operations have been compromised on my being detained in Pakistan, I revealed that I am an Indian Naval officer, and it is on mentioning that I am Indian naval officer, the total perception of the establishment of the Pakistani side changed and they treated me very honourably and with utmost respect and due regards, and have handled me subsequently on a more professional and proper courteous way and they have handled me in a way that befits that of an officer and once I realized that I have been compromised in my process of intelligence operations, I decided to just end the mess I have landed myself in and just wanted to subsequently move on and cooperate with the authorities in removing complications which I have landed myself and my family members into, and whatever I am stating just now, it is the truth and it is not under any duress or pressure. I am doing it totally out of my own desire to mention and come clean out of this entire process which I have gone through for the last 14 years.”

India Informed of Arrest

26. On 25 March 2016, the Foreign Secretary of Pakistan gave express notification of the arrest of Commander Jadhav to the Indian High Commissioner in Islamabad. On the same day, Pakistan’s Ministry of Foreign Affairs issued a *demarche* to the Indian High Commissioner in Islamabad conveying Pakistan’s protest and deep concern on the illegal entry into Pakistan by a RAW officer and his involvement in subversive activities in Balochistan and Karachi [**Volume 2/Annex 11**].
27. On the same day, Pakistan, *inter alia*, also notified the P5 States (China, France, Russia, the United Kingdom and the United States of America) of the arrest by providing a 10-page briefing document which, *inter alia*, provided details of Commander Jadhav’s confession (as set out above) and photographs of the passport in his possession at the time of his arrest [**Volume 2/Annex 12**]. These are not the actions of a State trying to evade or conceal its conduct. These are the actions of a wronged State engaging with the “sending State” of the suspected spy/terrorist. They are the actions of a member of the United Nations which has nothing to hide from the Security Council or the international community.
28. Not unreasonably, Pakistan expects India to be held responsible for its conduct. Pakistan does not expect the “conceal/evade”/“attack to defend” approach of India to succeed in the face of such a serious violation of international law.
29. Later on the same day, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan’s Ministry of Foreign Affairs which referred to “*the purported arrest of an Indian in Baluchistan*” and requested access to that individual, but did not identify that the individual in question was Commander Jadhav [**Volume 2/Annex 13.1**].
30. On 30 March 2016, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan’s Ministry of Foreign Affairs which again referred to “*the purported arrest of an*

Indian national in Baluchistan” and requested access to that individual but again did not identify that the individual in question was Commander Jadhav [Volume 2/Annex 13.2].

First Information Report registered / Criminal proceedings initiated

31. On 8 April 2016, an initial First Information Report (No. 6 of 2016) concerning Commander Jadhav was registered [Volume 2/Annex 17/pages 5-9]. Pursuant to Section 154 of Pakistan’s Code of Criminal Procedure 1898 [Volume 5/Annex 82] (promulgated in the era of British rule in India), information given to the police authorities concerning the commission of a cognisable offence (i.e. an offence over which the police authorities have jurisdiction) must be put into writing by the police authorities – the resulting document is commonly known as a First Information Report (“FIR”). Once a FIR is registered, the police authorities may utilise their powers of investigation in order to investigate the offence complained of [Volume 2/Annex 18].

32. In summary, the FIR stated, *inter alia*:

32.1. “Kulbhushan Jadhev, alias, Hussain Mubarak Patel, is serving Commander of Indian Navy, and working with Indian Intelligence Agency / RAW, was apprehended by Pakistani Intelligence / Security Agencies on 3 March 2015 after he illegally crossed over to Pakistan from Iranian ‘Saravan’ border”. Commander Jadhav was in possession of an Indian passport, maps of Balochistan, and currency in US dollars, Iranian riyals and Pakistani currency.

32.2. Commander Jadhav was a serving officer of the Indian Navy, due to retire in 2022, and started rendering services to RAW/Indian Intelligence Agency after the attacks on the Indian Parliament in 2001.

32.3. Commander Jadhav stated that on instructions of RAW (and under the direct instruction of Anil Kumar Gupta (Joint Secretary, RAW)), he commenced intelligence operations against Pakistan, and planned and executed terrorist attacks and waged war against Pakistan “with a view to disintegrate by fomenting separatists movements in Balochistan, Pakistan”. For the said purpose, he established a small scale business in Chahbahar, Iran, during 2003-2004. In addition, he had been organizing, planning, conspiring and abetting waging of war in Pakistan through Baloch Insurgents/Baloch Liberation Organization/Baloch Students Organization and MQM.

32.4. In addition, he collected/obtained sensitive information about the Pakistani Armed Forces and their installations with a view to targeting the same, and planted several local residents, collaborators, co-conspirators, non-state actors and individuals from the proscribed organisations to carry out acts of terrorism and kidnapping for ransom in order to create unrest, insurgency, target killings, suicide bombings and targeted operations to achieve his objectives.

32.5. In addition, he stated that he had been involved in destroying civilian properties, carrying out attacks on law enforcement agencies particularly in Karachi and Balochistan. He would provide financial support to his collaborators to carry out subversive activities against Pakistan, and had also been providing training to the non-state actors in use of firearms, explosives, and improvised explosive devices in Balochistan.

32.6. Commander Jadhav stated that the unlawful activities were to destabilise Pakistan and obstruct the military and other law enforcement agencies from restoring peace in Balochistan and Karachi. It was also aimed to scuttle the Pak-China Economic Corridor Project. Commander Jadhav said that one of his co-accused/accomplices facilitated his illegal entry into Pakistan.

32.7. Commander Jadhav was subject to the Pakistan Army Act 1952, and was being dealt with under that Act, and was in the custody of the Pakistan Army.

33. The FIR concluded that the accused was under interrogation and was subject to other offences not falling under the Pakistan Army Act 1952, and it was requested to register the case of the Counter Terrorism Department under the relevant provision of law for those offences.

34. On 15 April 2016, Pakistan's Ministry of Foreign Affairs notified the envoys of members of the Arab League and the Association of Southeast Asian Nations ("ASEAN") Member States based in Islamabad of the arrest of Commander Jadhav and gave a briefing on Commander Jadhav's confession about Indian-sponsored subversive activities and terrorist financing to destabilise Pakistan [Volume 2/Annex 16].

35. Between 2 and 22 May 2016, Commander Jadhav was further questioned by the Pakistani authorities [Volume 2/Annex 23/page 2].

36. On 6 May 2016, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs which again referred to "*the purported arrest of an Indian national in Baluchistan*" and requested access to that individual but again did not identify that the individual in question was Commander Jadhav [Volume 2/Annex 13.3].

India purports to identify Commander Jadhav

37. On 10 June 2016, the Indian High Commission in Islamabad sent a *Note Verbale* to Pakistan's Ministry of Foreign Affairs. The full text of that *Note Verbale* is provided below:

"No.ISL/103/14/2016