

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CJ
MR. JUSTICE MIAN SHAKIRULLAH JAN
MR. JUSTICE TASSADUQ HUSSAIN JILLANI
MR. JUSTICE JAWWAD S. KHAWAJA
MR. JUSTICE TARIQ PARVEZ
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE IJAZ AHMED CHAUDHRY
MR. JUSTICE MUHAMMAD ATHER SAEED

CONSTITUTION PETITIONS NO. 77 TO 85 & 89 OF 2011
& CMA NO. 5505/2011 IN CONST. P. 79 OF 2011

[Constitution Petition under Article 184(3) of the Constitution regarding alleged Memorandum to Admiral Mike Mullen by Mr. Hussain Haqqani, former Ambassador of Pakistan to the United States of America]

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Watan Party	...	PETITIONER [CP 77/2011]
M. Tariq Asad Advocate Supreme Court	...	PETITIONER [CP 78/2011]
Muhammad Nawaz Sharif	...	PETITIONER [CP 79/2011]
Senator Muhammad Ishaq Dar & another	...	PETITIONERS [CP 80/2011]
Iqbal Zafar Jhagra & another	...	PETITIONERS [CP 81/2011]
Lt. General ® Abdul Qadir Baloch & 2 others	...	PETITIONERS [CP 82/2011]
Raja Muhammad Farooq Haider Khan & another...		PETITIONERS [CP 83/2011]
Syed Ghous Ali Shah & 2 others	...	PETITIONERS [CP 84/2011]
Hafeez Ur Rahman	...	PETITIONER [CP 85/2011]
Shafqatullah Sohail	...	PETITIONER [CP 89/2011]

VERSUS

Federation of Pakistan & others

... RESPONDENTS

For the petitioners:

Barrister Zafarullah Khan, ASC in person
 Mr. Tariq Asad, ASC in person
 Mr. Rashid A. Rizvi, Sr. ASC
 Senator Muhammad Ishaq Dar &
 Khawaja Muhammad Asif, MNA in person
 Mr. Muhammad Rafiq Rajwana, ASC
 Mr. Attique Shah, ASC
 Dr. M. Salahuddin Mengal, ASC
 Sardar Asmatullah Khan, ASC
 Syed Ghous Ali Shah, ASC
 Dr. M. Shamim Rana, ASC
 Mr. Naseer Ahmad Bhutta, ASC
 Mr. M.S. Khattak, AOR

For the President of Pakistan: *Nemo.*For the Prime Minister of Pakistan: *Nemo.*

For Chief of Army Staff,
 DG, ISI & M/O of Cabinet,
 Defence, Foreign Affairs,
 Interior & Law:

Maulvi Anwar-ul-Haq
 Attorney General for Pakistan
 Mr. Dil Muhammad Alizai, DAG

For Hussain Haqqani:

Ms. Asma Jahangir, ASC
 Ch. Akhtar Ali, AOR assisted by
 M/s Idrees Ashraf and Asad Jamal, Advocates

For Mansoor Ijaz:

Nemo.

Date of hearing:

19-23 & 27-30 December, 2011

...

ORDER**IFTIKHAR MUHAMMAD CHAUDHRY, CJ.** – The

Objectives Resolution, which has been made substantive part of the
 Constitution by means of Article 2A of the Constitution of Islamic
 Republic of Pakistan commands that:

"And whereas it is the will of the people of Pakistan to establish an order;

Wherein integrity of the territories of the Federation, its independence and all its rights, including its sovereign rights on land, sea and air, shall be safeguarded;

So that people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity."

2. This short order shall be followed by detailed reasons, to be recorded later. The above petitions have been instituted under Article 184(3) of the Constitution of Islamic Republic of Pakistan.

3. For the purpose of understanding the issues involved in these petitions precisely the facts noted from the pleadings of the parties are that on 10th October, 2011, the respondent Mansoor Ijaz wrote an Article in Financial Times, London. The contents of the said Memo have already been reproduced in the order dated 1st December, 2011, however, same are repeated herein below: -

**"CONFIDENTIAL MEMORANDUM
BRIEFING FOR ADM. MIKE MULLEN, CHAIRMAN, JOINT
CHIEFS OF STAFF**

During the past 72 hours since a meeting was held between the president, the prime minister and the chief of army staff, there has seen a significant deterioration in Pakistan's political atmosphere. Increasingly desperate efforts by the various agencies and factions within the government to find a home – ISI and/or Army, or the civilian government – for assigning blame over the UBL raid now dominate the tug of war between military and civilian sectors. Subsequent tit-for-tat reactions, including outing of the CIA station chief's name in Islamabad by ISI officials, demonstrates a dangerous devolution of the ground situation in Islamabad where no central control appears to be in place.

Civilians cannot withstand much more of the hard pressure being delivered from the Army to succumb to wholesale changes. If civilians are forced from power, Pakistan becomes a sanctuary for UBL's legacy and potentially the platform for far

more rapid spread of al Qaeda's brand of fanaticism and terror. A unique window of opportunity exists for the civilians to gain the upper hand over army and intelligence directorates due to their complicity in the UBL matter.

Request your direct intervention in conveying a strong, urgent and direct message to Gen Kayani that delivers Washington's demand for him and Gen Pasha to end their brinkmanship aimed at bringing down the civilian apparatus – that this is a 1971 moment in Pakistan's history. Should you be willing to do so, Washington's political/military backing would result in a revamp of the civilian government that, while weak at the top echelon in terms of strategic direction and implementation (even though mandated by domestic political forces), in a wholesale manner replaces the national security adviser and other national security officials with trusted advisers that include ex-military and civilian leaders favorably viewed by Washington, each of whom have long and historical ties to the US military, political and intelligence communities. Names will be provided to you in a face-to-face meeting with the person delivering this message.

In the event Washington's direct intervention behind the scenes can be secured through your personal communication with Kayani (he will likely listen only to you at this moment) to stand down the Pakistani military-intelligence establishment, the new national security team is prepared, with full backing of the civilian apparatus, to do the following:

- 1. President of Pakistan will order an independent inquiry into the allegations that Pakistan harbored and offered assistance to UBL and other senior Qaeda operatives. The White House can suggest names of independent investigators to populate the panel, along the lines of the bipartisan 9-11 Commission, for example.**

- 2. The inquiry will be accountable and independent, and result in findings of tangible value to the US government and the American people that identify with exacting detail those elements responsible for harboring and aiding UBL inside and close to the inner ring of influence in Pakistan's Government (civilian, intelligence directorates and military). It is certain that the UBL Commission will result in immediate termination of active service officers in the appropriate government offices and agencies found responsible for complicity in assisting UBL.**

- 3. The new national security team will implement a policy of either handing over those left in the leadership of Al Qaeda or other affiliated terrorist groups who are still on Pakistani soil, including Ayman Al Zawahiri, Mullah Omar and Sirajuddin Haqqani, or giving US military forces a "green light" to conduct the necessary operations to capture or kill them on Pakistani soil. This "carte blanche" guarantee is not without political risks, but should demonstrate the new group's commitment to rooting out bad elements on our soil. This commitment has the backing of the top echelon on the civilian side of our house, and we will insure necessary collateral support.**

- 4. One of the great fears of the military-intelligence establishment is that with your stealth capabilities to enter and exit Pakistani airspace at will, Pakistan's nuclear assets are now legitimate targets. The new national security team is prepared, with full backing of**

the Pakistani government – initially civilian but eventually all three power centers – to develop an acceptable framework of discipline for the nuclear program. This effort was begun under the previous military regime, with acceptable results. We are prepared to reactivate those ideas and build on them in a way that brings Pakistan's nuclear assets under a more verifiable, transparent regime.

5. The new national security team will eliminate Section S of the ISI charged with maintaining relations to the Taliban, Haqqani network, etc. This will dramatically improve relations with Afghanistan.

6. We are prepared to cooperate fully under the new national security team's guidance with the Indian government on bringing all perpetrators of Pakistani origin to account for the 2008 Mumbai attacks, whether outside government or inside any part of the government, including its intelligence agencies. This includes handing over those against whom sufficient evidence exists of guilt to the Indian security services.

Pakistan faces a decision point of unprecedented importance. We, who believe in democratic governance and building a much better structural relationship in the region with India AND Afghanistan, seek US assistance to help us pigeon-hole the forces lined up against your interests and ours, including containment of certain elements inside our country that require appropriate re-sets and re-tasking in terms of direction and extent of responsibility after the UBL affair.

We submit this Memorandum for your consideration collectively as the members of the new national security team who will be inducted by the President of Pakistan with your support in this undertaking."

4. Petitioners invoked original jurisdiction of this Court by means of Constitution Petitions, questioning therein the contents of above Memo on stated allegations that question of public importance involving their fundamental rights under the Constitution has been made out as according to the version of Mansoor Ijaz-respondent, Memo was prepared/drafted for the purpose of delivering the same to Chairman of the US Joint Chiefs of Staff Admiral Mike Mullen through Gen. (Retd.) James Logan Jones, former US National Security Advisor.

5. All the petitions were taken up for hearing on 1st December, 2011 when after hearing the petitioners, either through counsel or in person, notices were issued to the respondents for filing

of their replies and to conduct a probe regarding the Memo, Mr. Tariq Khosa, former Secretary Narcotics/DG, FIA, subject to his consent, was directed to act as a Commission. On the same day, by means of press-conference held in PID office by Dr. Babar Awan, Sr. ASC along with two Ministers and others, the order of the Court was criticized contemptuously. Inasmuch as, brother of Mr. Tariq Khosa, namely, Mr. Justice Asif Saeed Khan Khosa, a learned Judge of this Court, who although was not member of the Bench, was referred in terms which *prima facie* are contemptuous, therefore, for such reasons, Mr. Tariq Khosa recused to act as a Commission. In this context, reaction of the Chief Executive/Prime Minister of Pakistan had been obtained and appropriate directions shall be passed in the later part of the order.

6. Parties, including the Chief of Army Staff, DG, ISI, Mansoor Ijaz as well as Hussain Haqqani and the Federation of Pakistan through Secretary Interior, Foreign Secretary represented by learned Attorney General for Pakistan, filed their replies. No separate reply has been filed by the President of Pakistan.

7. With a view to narrow down the controversy between the parties, directions were issued to them to file counter affidavits/rejoinders to the replies of each others vide order dated 19.12.2011. A perusal of the pleadings suggests: -

- (i) *After the publication of above Article along with Memo in Financial Times, London on 10th of October, 2011, DG, ISI (Mr. Shujah Pasha) established his contact with Mansoor Ijaz in London and on his return to Pakistan shared his views with the Chief of Army Staff, General Ashfaq Parvez Kayani, thus, both of them in their replies to the petitions as well*

as affidavits have maintained that Memo dated 10th May, 2011 exists.

- (ii) On 16th November, 2011 Mr. Hussain Haqqani addressed a letter to the President of Pakistan wherein after mentioning certain facts, he desired to tender his resignation from the post of Ambassador of Pakistan in United States and expressed to probe into the matter.*
- (iii) About 3 to 4 meetings were held between the Prime Minister and Chief of Army Staff, the President and Chief of Army Staff and joint meeting between the President, Prime Minister, Chief of Army Staff, DG ISI and Hussain Haqqani, whereafter, Hussain Haqqani on account of their persuasion tendered his resignation on 22.11.2011, which was accepted vide notification dated 23.11.2011.*
- (iv) Former Ambassador, Hussain Huqqani has denied categorically about his role in preparation of the Memo who at the same time has relied upon an affidavit tendered by James Jones, to establish that Mansoor Ijaz has concocted this story that such Memo was sent by him for delivering to Admiral Mike Mullen before 9th May, 2011.*
- (v) In the meanwhile, vide letter dated 28.11.2011, issued under the signatures of Mr. Khushnood Akhter Lashari, Principal Secretary to the Prime Minister referred the matter to the Parliamentary Committee to conduct probe on the subject issue. The proposed terms of the reference are as under: -*
 - a. To probe into the memo purportedly written and sent by Mr. Mansoor Ijaz.*
 - b. To give consequential recommendations.*
- (vi) Federation of Pakistan through Secretary Interior had not denied the existence of the Memo in their counter affidavits except raising technical flaws in respect of undertaking journey by DG, ISI to London*

to conduct a meeting with Mansoor Ijaz without permission of the Prime Minister.

- (vii) *Mansoor Ijaz in his reply and in counter affidavit has contradicted the stand taken by Mr. Hussain Haqqani, former Ambassador and he has offered to provide further evidence to substantiate his plea that allegedly on persuasion of Mr. Hussain Haqqani, Memo dated 10th may, 2011 was drafted to be delivered to Mike Mullen through James Jones.*

8. On 1st of December, 2011 the Court itself raised the question about the maintainability of the petitions and at the same time it was observed that it would be appreciated if the outcome of the proposed inquiry by the Parliamentary Committee on National Security is shared with the Court, if possible.

9. After having heard the parties and having taken into consideration the relevant provisions of the Constitution and the law, judgments cited on behalf of both the sides and the pleadings of the parties carefully, we hold as under: -

- (a) *In exercise of powers of Judicial Review, we hold that in these petitions, petitioners have succeeded in establishing that the issues involved are justiciable and question of public importance with regard to enforcement of fundamental rights, prima facie, under Articles 9, 14 and 19A of the Constitution has been made out. Thus, the petitions under Article 184(3) of the Constitution are maintainable.*
- (b) *To delineate measures with a view to ensure enforcement of the fundamental rights noted in para ibid, a probe is called for to ascertain the origin, authenticity and purpose of creating/drafting of Memo for delivering it to Chairman of the US Joint Chiefs of Staff Admiral Mike Mullen through Gen. (Retd.) James Logan Jones, former US National*

Security Advisor. Thus, in exercise of powers conferred upon this Court under Article 187 of the Constitution, Order XXXII, Rules 1 and 2 read with Order XXXVI of the Supreme Court Rules, 1980 coupled with the principle of Civil Procedure Code, a Commission is appointed. As the due process of law is the entitlement of all the stakeholders, therefore, to ensure probe into the matter in an transparent manner the Commission shall be comprising of:

- (i) Mr. Justice Qazi Faez Isa, (Chairman)
Chief Justice of Balochistan High Court*
- (ii) Mr. Justice Iqbal Hameed-ur-Rehman (Member)
Chief Justice, Islamabad High Court*
- (iii) Mr. Justice Mushir Alam (Member)
Chief Justice, High Court of Sindh*

Raja Jawwad Abbas Hassan, District & Sessions Judge, Islamabad is appointed as Secretary to the Commission.

- (c) The Commission shall hold its meetings in the building of Islamabad High Court. The Commission shall be exercising all the powers of Judicial Officers for the purpose of carrying out the object mentioned hereinabove and it shall be free to avail services of advocates, experts of forensic science and cyber crimes. All the Federal Secretaries, including Interior Secretary, Secretary Cabinet, Secretary Foreign Affairs; Chief Secretaries of all the provinces; DG, FIA; Inspector Generals of Police of all the provinces and Ambassadors of Pakistan in USA and UK, shall provide necessary assistance to the Commission.*
- (d) Government of Pakistan through Secretary Cabinet Division shall provide logistic support to the Commission, subject to its demands through the Secretary of the Commission.*
- (e) The Commission shall be authorized to collect evidence within and outside Pakistan according to prevailing laws on the subject.*

- (f) *The Commission shall provide full opportunity of hearing to all the parties.*
- (g) *The Commission is required to complete this task within a period of four weeks after receipt hereof.*

10. It is to be noted that the reply submitted before the Court by Mr. Mansoor Ijaz, inter alia, comprises of certain documents including exchange of e-mails and other communications using the BlackBerry Messaging service commonly known as BBM between them i.e. Mansoor Ijaz and Hussain Haqqani were in constant touch either through BBM, e-mails or voice calling w.e.f. 9th to 12th May, 2011. In fact during relevant days, as many as 85 BBMs, voice calls and e-mails were exchanged between the two. Prima facie these communications form the most important piece of evidence regarding purported contacts between the two for the purposes of drafting the alleged Memo. In addition to these dates, Mansoor Ijaz also claims that he had electronic/telephonic interactions with Hussain Haqqani on October, 28 and November, 1 2011. Therefore, in the interest of justice, it is appropriate to get the confirmation about the veracity and authenticity of these communications from the original company known as Research in Motion (RIM) based in Canada being the sole and exclusive custodian of such information. Therefore, the learned Attorney General is directed to contact the said Company RIM through Secretary, Ministry of Foreign Affairs for getting confirmation about the authenticity of the above mentioned electronic communications exchanged between Mansoor Ijaz and Hussain Haqqani. This confirmation may be obtained at the earliest and in order to save and protect the forensic evidence and to scrutinize the same it should be produced before the Commission. As forensic evidence is likely to be

collected from the company Research in Motion (RIM) based in Canada, therefore, the High Commission of Pakistan in Canada is directed to cooperate and assist the Commission as well.

11. Vide order dated 1st December, 2011, Mr. Hussain Haqqani was directed not to leave the country without the permission of the Court. This order is kept intact.

12. Office is directed to put a separate note in the Chambers of Chief Justice of Pakistan along with the transcription of the press-conference dated 1st December, 2011 of Mr. Babar Awan, Sr. ASC along with replies/reactions of the Prime Minister of Pakistan dated 23rd December and 26th December, 2011 for passing appropriate orders.

13. The petitions are adjourned for a date to be fixed by the office after receipt of the report from the Commission.

IFTIKHAR MUHAMMAD CHAUDHRY, CJ

MIAN SHAKIRULLAH JAN, J.

TASSADUQ HUSSAIN JILLANI, J.

JAWWAD S. KHAWAJA, J.

TARIQ PARVEZ, J.

MIAN SAQIB NISAR, J.

EJAZ AFZAL KHAN, J.

IJAZ AHMED CHAUDHRY, J.

MUHAMMAD ATHER SAEED, J.

Islamabad, the
30th December, 2011

Approved For Reporting