

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 AMIR HANI MUSLIM
MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE IJAZ AHMED CHAUDHRY

CONSTITUTION PETITIONS NO. 77 TO 85 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]

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]

VERSUS

Federation of Pakistan & others	...	RESPONDENTS
---------------------------------	-----	-------------

For the petitioners: Barrister Zafarullah Khan, ASC in person
Mr. Tariq Asad, ASC in person
Mr. Muhammad Nawaz Sharif in person
Senator Muhammad Ishaq Dar &
Khawaja Muhammad Asif, MNA in person
Mr. Attique Shah, ASC
Dr. M. Salahuddin Mengal, ASC
Sardar Asmatullah Khan, ASC
Syed Ghous Ali Shah, ASC
Ch. Naseer Ahmad Bhutta, ASC
With Mr. M.S. Khattak, AOR

On Court notice: Maulvi Anwar-ul-Haq
Attorney General for Pakistan

Respondents: Not represented.

Date of hearing: 01.12.2011

...

ORDER

IFTIKHAR MUHAMMAD CHAUDHRY, CJ. - These petitions under Article 184(3) of the Constitution of the Islamic Republic of Pakistan have been instituted on behalf of the petitioners belonging to political parties and others hailing from all the federating units of Pakistan including Azad Jammu & Kashmir and Gilgit & Baltistan, in the wake of the confidential memorandum of 10th May, 2011, which was handed over by one Mansoor Ijaz, an American businessman of Pakistani origin to Admiral Mike Mullen, the then Chairman, Joint Chiefs of Staff of the United States through former US National Security Advisor James John. Mansoor Ijaz disclosed in an article published in the Financial Times London on 10th October, 2011. He claimed that the memorandum containing message from the Pakistan Government was handed over to him by the then Pakistan Ambassador Hussain Haqqani. According to him, both Mike Mullen and James John confirmed the contents of the memorandum. Upon such disclosure, there was unrest amongst the political government and the defence agencies as according to the contents of the memorandum,

which has now been published in the foreign as well as local media, *prima facie*, there was highly objectionable material relating to compromising the sovereignty, security and independence of Pakistan. The contents of the memorandum, which have been incorporated in most of the petitions, are reproduced hereinbelow: -

**"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."

2. It is significant to note that the issue of confidential memorandum was highlighted after 21st November, 2011. In the meanwhile, the then Ambassador of Pakistan to the USA, was summoned who tendered his resignation as per undisputed reports aired on electronic media. It may not be out of context to observe here that as per media reports, the ISI had also collected SMS messages exchanged between the former Ambassador of Pakistan and Mr. Mansoor Ijaz, extracts of which have been incorporated in the petitions.

3. It is to be noted that not only in the publication of the 'Financial Times' of 10th October, 2011, but subsequent thereto, material was published in the print media on behalf of Mr. Mansoor Ijaz, who emphasized that "Mr. Mullen insisted on having the Ambassador's offers to be put in writing because the US Government had been repeatedly deceived by Pakistan's verbal offers of action in the recent past." "He also insisted that I obtain the Ambassador's assurance that President Zardari had approved the offers contained in the memorandum. I did exactly those two things," he told The News. Speaking after Admiral Mullen confirmed the Memo, Mansoor said at 09:06:16 hours, "I spoke to Amb Haqqani at his London hotel (Park Lane Intercontinental Room 430) in a call lasting 11:16 minutes." "During this call, he confessed that the final text of the memo was OK and that he had 'the boss' approval' that the memorandum could be sent to Admiral Mullen. The boss was an obvious reference to President Zardari," Mansoor insisted."

4. We note that exchange of messages has also been admitted as is reported in the UK Financial Times of 10th October, 2011. The Federal Interior Minister Mr. Rahman Malik had, however,

admitted that Mr. Hussain Haqqani was involved in communication of voice/text messages with an American national, but there was no written letter, either from the Presidency or from any other agency of the Government. Mr. Malik is reported to have said that no doubt Mr. Haqqani was a close *aide* of the President, but this communication through SMS (text message) was between two individuals – one American national and the second was our Ambassador.

5. The material available was exchange of SMS messages and blackberry messages and we have to examine as to who had initiated these messages. It is clear that the matter is open for investigation.

6. All the petitioners were asked their opinion as to the objects and purposes for which the confidential memorandum in question attributed to the then Ambassador of Pakistan was sent to the US Chairman, Joint Chiefs of Staff by handing it over to James John and also utilizing the services of a businessman Mansoor Ijaz, particularly in the wake of the incident of Abbottabad of 2nd May, 2011. According to them, if the allegations contained hereinabove are established, then the culprits whosoever are involved, should be held liable for action and a Commission be constituted to probe into the memorandum scandal. Whereas the learned Attorney General for Pakistan stated that he is not against the probe, but as the matter is pending before the Parliamentary Committee on National Security, therefore, we should wait for the result of the Committee's proceedings. In our opinion, both the forums are not against probe into the matter and subject to constitutionality of the Committee, proceeding can be taken up simultaneously.

7. It may be observed that under Article 5 of the Constitution, it is the basic duty of every citizen to be loyal to the

State and to be obedient to the Constitution and law, being inviolable obligation wherever he may be and of every other person for the time being within Pakistan.

8. The memorandum, issuance whereof, *prima facie*, seems to be established, has posed immediately two questions – one with regard to civil/constitutional liability with its consequences as envisaged by Article 6 of the Constitution, and the second, the criminal liability as well. We are conscious of the fact that the respondents who include the President of Pakistan, the Army Chief, ISI, etc., have to file their replies to explain their position. However, we may, at this stage, refer to the case of United States v. Richard M. Nixon, President of the United States [418 US 683] wherein the then President of the United States was facing proceedings before the Committee of the Senate, and at the same time, pretrial evidence was being collected by a special prosecutor general, which was objected to by him and the matter went up to the US Supreme Court and ultimately it was resolved that such pretrial evidence could be collected. Similarly, there are so many other cases, including the case of Imtiaz Ahmad v. Government of Pakistan (1994 SC 2142) wherein collection of pretrial evidence against persons who are found guilty ultimately is not prohibited.

9. We are told that the Prime Minister of Pakistan has also announced that the Parliamentary Committee on National Security will probe into the matter. We do not know the mandate of the Committee. However, we have been informed that as far as this Committee is concerned, it has no constitutional backing, i.e. it has not been constituted under any provision of the Constitution. Be that as it may, if any incriminating evidence is collected by the Committee both for

civil and criminal action by probing into the matter, we would welcome the same. During the pendency of the proceedings, we would appreciate if the outcome of the proposed inquiry by the Committee is shared with us, if possible. Similarly, if the local Commission, which we are contemplating to constitute, succeeds in collecting forensic or other physical evidence, we would also be sharing the same with the Parliamentary Committee because the object and purpose both of the Parliament and of this Court is that there should not be any compromise on the sovereignty, security and independence of the country.

10. The petitioners, however, undoubtedly had to discharge their burden while arguing their cases with regard to the remedy, which they have invoked under Article 184(3) of the Constitution, however, it is considered appropriate that in the meantime, the respondents may file their replies to all the petitions within 15 days of the passing of this order. To protect and preserve the evidence, we would like to appoint a Commission comprising a competent officer for the purpose of collecting evidence on the issues, which have been highlighted hereinabove, including the question of authenticity of the memorandum, and the circumstances under which it was sent and the object behind addressing such memorandum to the high ups of a foreign country, and whether such an act is tantamount to compromising the sovereignty, security and independence of Pakistan.

11. The Registrar of the Court is directed to address a letter on behalf of the Court to Mr. Tariq Khosa, a former PSP officer, who had worked as Secretary Narcotics, DG, FIA as well as Inspector General/PPO, Balochistan to obtain his consent whether he agrees to perform this national duty. On receipt of his consent, the matter shall

be handed over to him. The Commission shall be entitled to the remuneration, TA/DA and other perks, which Mr. Tariq Khosa was receiving at the time of his retirement. If need be, Mr. Tariq Khosa may travel outside Pakistan for the purposes of collecting evidence as this Court had allowed such practice in the case of Benazir Bhutto v. State (PLD 1999 SC 937). As far as the expenditures of the Commission are concerned, those shall be borne by the Foreign Affairs, Interior, Cabinet and Defence Divisions.

12. In the meanwhile, we direct that all the concerned authorities of the Federal and the Provincial Governments shall extend their full cooperation to Mr. Tariq Khosa in collecting evidence. He would be free to associate with him any other sitting and/or retired officer of the police or any other technical person to collect evidence. He would be holding the probe in the Cabinet Division. The Cabinet Secretary shall provide him all logistic support for the purpose of performing the function on behalf of the Court. He is required to complete this task as early as possible, preferably within a period of three weeks from the receipt of this order. It is to be noted that in case Mr. Tariq Khosa declines to act as the Commission, he may inform the Registrar who shall place the matter in Chambers for passing of appropriate order for taking up the matter either in the Court or holding proceedings in the Chambers.

13. We may also observe here that no sooner the issue of memorandum came to limelight, the former Ambassador of Pakistan tendered his resignation. We do not want to attribute to him anything adverse about his involvement and he is entitled to due respect. But, we desire that he should fully cooperate with the Commission and during the pendency of the cases before this Court, he would not be

leaving the country without prior permission of this Court. This order should be communicated to the Secretaries of the Ministries of Interior and Foreign Affairs with the direction that if Mr. Hussain Haqqani violates the terms of this order and goes abroad, they shall be held personally responsible. At this juncture, we would expect from all the foreign agencies that they will extend full cooperation to the Commission as it is an issue of utmost importance for the sovereignty, security and independence of the country.

14. Adjourned to a date in office.

Sd/-

IFTIKHAR MUHAMMAD CHAUDHRY, CJ

Sd/-

MIAN SHAKIRULLAH JAN, J.

Sd/-

TASSADUQ HUSSAIN JILLANI, J.

Sd/-

JAWWAD S. KHAWAJA, J.

Sd/-

TARIQ PARVEZ, J.

Sd/-

MAIN SAQIB NISAR, J.

Sd/-

AMIR HANI MUSLIM, J.

Sd/-

EJAZ AFZAL KHAN, J.

Sd/-

IJAZ AHMED CHAUDHRY, J.

Islamabad, the
1st December, 2011

APPROVED FOR REPORTING