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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2017

Public sitting

held on Monday 15 May 2017, at 3 p.m., at the Peace Palace,

President Abraham presiding,

***in the* Jadhav Case**
(India *v.* Pakistan)

VERBATIM RECORD

ANNÉE 2017

Audience publique

tenue le lundi 15 mai 2017, à 15 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

***en l'affaire* Jadhav**
(Inde c. Pakistan)

COMPTE RENDU

Present: President Abraham

Judges Owada
Cançado Trindade
Xue
Donoghue
Gaja
Sebutinde
Bhandari
Robinson
Crawford
Gevorgian

Registrar Couvreur

Présents : M. Abraham, président
MM. Owada
Cançado Trindade
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford
Gevorgian, juges

M. Couvreur, greffier

The Government of the Republic of India is represented by:

Dr. Deepak Mittal, Joint Secretary, Ministry of External Affairs,

as Agent;

Dr. V. D. Sharma, Joint Secretary, Ministry of External Affairs,

as Co-Agent;

Mr. Harish Salve,

As Counsel;

Ms Kajal Bhat, First Secretary, Embassy of the Republic of India in the Kingdom of the Netherlands,

As Adviser;

Ms Chetna N. Rai,

As Junior Counsel.

Le Gouvernement de la République de l'Inde est représenté par :

M. Deepak Mittal, *Joint Secretary*, ministère des affaires étrangères,

comme agent ;

M. V. D. Sharma, *Joint Secretary*, ministère des affaires étrangères,

comme coagent ;

M. Harish Salve,

comme conseil ;

Mme Kajal Bhat, premier secrétaire, ambassade de la République de l'Inde au Royaume des Pays-Bas,

comme conseiller ;

Mme Chetna N. Rai,

comme conseil auxiliaire.

The Government of the Islamic Republic of Pakistan is represented by:

H.E. Mr. Moazzam Ahmad Khan, Ambassador of the Islamic Republic of Pakistan to the United Arab Emirates,

Dr. Mohammad Faisal, Director-General (South Asia & SAARC),

as Agents;

Mr. Syed Faraz Hussain Zaidi, Counsellor of the Embassy of the Islamic Republic of Pakistan in the Netherlands,

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Mr. Khawar Qureshi, Q.C.,

as Counsel;

Mr. Asad Rahim Khan,

as Junior Counsel;

Mr. Joseph Dyke,

as Legal Assistant.

Le Gouvernment de la République islamique du Pakistan est représenté par :

S. Exc. M. Moazzam Ahmad Khan, ambassadeur de la République islamique du Pakistan auprès des Emirats arabes unis**,**

M. Mohammad Faisal, directeur général (Asie du Sud et Association sud-asiatique pour la coopération régionale),

comme agents ;

M. Syed Faraz Hussain Zaidi, conseiller à l'ambassade de la République islamique du Pakistan aux Pays-Bas,

comme conseiller ;

M. Khawar Qureshi, Q.C.,

comme conseil ;

M Asad Rahim Khan,

comme conseil auxiliaire ;

M. Joseph Dyke,

comme assistant juridique.

The PRESIDENT: Veillez vous asseoir. L'audience est ouverte. The Court meets this afternoon to hear the oral observations of Pakistan on the Request for the indication of provisional measures submitted by the Republic of India.

I now call upon Dr. Mohammad Faisal, Representative of the Islamic Republic of Pakistan. You have the floor.

Mr. FAISAL:

Re: Commander (Naval) Kulbhushan Sudhir Jadhav (alias Hussein Mubarak Patel) ("Commander Jadhav") (holder of Indian passport number L9630722)

1. Your Excellency the President of the International Court of Justice, Honourable Judges of the Court, Excellencies, ladies and gentlemen, I am honoured to appear before this Court as Pakistan's Agent and to make the following remarks. The delegation from Pakistan includes Ambassdor Moazzam Ahmed Khan, the Agent, myself, Mr. Khawar Qureshi, our Counsel, barrister Asad Rahim, Deputy Counsel, Mr. Joseph Dyke, the Assistant Legal Counsel and Mr. Faraz Zaidi, Counsellor.

2. Mr. President, I will provide a brief overview of the response of Pakistan to this Application and then invite our Counsel Mr. Qureshi to develop the submissions, as to why this Application is unnecessary and misconceived.

3. Mr. President, I am compelled to observe that, whilst we share so much with the applicant State, we are on very different sides today. For our part, we wish that were not so. Moreover, for our part, we wish to make it absolutely clear that we remain committed to the path of peaceful resolution of all disputes, whatever the provocation.

4. Having faced the evil of terrorism on a daily basis, with deadly attacks only last Friday, killing 26 people and another killing 11 people on this Saturday in the area where Commander Jadhav was operating before his capture, we know only too well how the poison of hatred is used to achieve political ends by others.

5. That is why, despite being ambushed into appearing before the Court on a few days' notice, we are here. We are here because we will not be cowed by terrorism, nor will we allow any attempt to malign or misrepresent our position or legal processes to go unchecked. We will use all

legitimate means to protect our people, our territory and our reputation from attack. Robustly and resoundingly, Insha'Allah, always.

6. Unfortunately, India has seen it fit to use the International Court of Justice as a stage for political theatre. We regret that this has been done. We will not respond in kind.

7. Our Counsel Mr. Qureshi will explain why it was wrong for India to invoke the exceptional provisional measures jurisdiction of this Court, the judicial organ of the United Nations. He will touch upon the reasons why the Court should not otherwise exercise any jurisdiction or entertain any aspect of India's engagement of its jurisdiction.

8. Indeed, it is somewhat ironic but perhaps consistent, that India complains that it is not being given access to Commander Jadhav, who has confessed to having been sent by India to wage terror on the innocent civilians and infrastructure of Pakistan, and, in the same breath, has urged this Court to make an order without giving Pakistan any opportunity to be heard.

9. We are disappointed that India did not take the opportunity to be transparent, soon after 25 March 2016, when the Foreign Secretary of Pakistan protested in the strongest terms to the Indian High Commissioner regarding Commander Jadhav's criminal acts. India has been provided with a copy of the passport that was in the possession of Commander Jadhav when he was apprehended. You can see the copy of the passport on the screen there.

[Passport slides]

10. Mr. President, as the Court can see, the passport bears a Muslim name which plainly is not the name of Commander Jadhav. India has been unable — or, perhaps more accurately, unwilling — to provide an explanation for this passport, which is the most obvious indication of covert and illegal activity. India could simply have denied that the passport was genuine. We submit that India's silence is telling.

11. Indeed, India could and should have responded to a Letter of Request dated 23 January 2017 seeking India's assistance to investigate the criminal activity and links with people in India, which Commander Jadhav has revealed. Instead, India appears to have been in hyperdrive mode to brief its press that Commander Jadhav, a 47-year-old man took early retirement and was kidnapped in Iran from where he was brought to Pakistan — to give a false confession presumably.

12. We fully understand that this Court is not concerned at this stage with an evaluation of the "merits". We are not sure what merit there is in a State which sends a spy and terrorist seeking entitlement to untrammelled access to its tool for terror. However, we consider that it is important for this Court to hear the extracts of the confession which were made public on 25 March 2016.

13. On the same day, the P5 and the EU were also informed of Pakistan's grave concerns in this regard. Indeed, later that day, extracts of a video of the confession of Commander Jadhav were made public. I intended to share the extract of just around six minutes of the video with you now. I understand that the Court has viewed the video, but would prefer it not to be shown here. I should make it clear that the video is publicly and readily available for anyone who wishes to see it. The viewers can decide for themselves whether Commander Jadhav is confessing voluntarily and comprehensively.

14. India will no doubt say that the candid and contrite confession was extracted by foul means. That would, of course, be very wrong in every respect.

15. Mr. President, India has sought to persuade this Court that we intend to execute Commander Jadhav within days. Despite India having selectively quoted from the contents of Annex 8 to its Application, the Court can see for itself that this is totally false, simply by reference to the clemency process available as a right to Commander Jadhav.

16. A period of 150 days is provided for in this regard, which even if it started on 10 April 2017 — which is the date of conviction at first instance — could extend to well beyond August 2017. There is also of course the potential for the writ petition of the High Court to be invoked, as we believe India must be well aware. Pursuant to Article 184-3 and Article 199 of the Constitution of Pakistan, individuals have successfully obtained relief from the Courts. India and Pakistan have a common source for the vast bulk of our legal processes and procedures.

17. More importantly, if the Court will forgive my language, we simply have no reason to stop the canary from singing. Others might wish that — we do not.

18. Just to make the point absolutely clear, an expedited hearing which would dispel any suggestion of the need for provisional measures is an approach that Pakistan would invite the Court to adopt. On this basis Pakistan would be content for the Court to list the Application of India for hearing within six weeks.

19. We have no desire to waste the Court's valuable time and resources in trying to score political points. Indeed, Mr. President it is noteworthy that the Indian media widely reported your letter to the Parties dated 9 May 2017 as a "victory" by means of it being a "stay order", which plainly it was not. This surely is a valuable insight into what really lies behind this manoeuvring.

20. I conclude, Sir, where I started. Whilst we were bounced into appearing before the Court, it is always an honour to do so. The Islamic Republic of Pakistan cherishes the freedom which was gained 70 years ago. It wishes to live in peace with its neighbours and hopes they will soon appreciate the virtue of such an approach.

Le PRESIDENT : Je remercie l'agent de la République islamique du Pakistan et je donne à présent la parole à M. Qureshi, conseil pour le Pakistan.

Mr. QURESHI:

Mr. President, Members of the Court, it's an honour for me to appear before you on behalf of the Islamic Republic of Pakistan. On a previous occasion when I appeared before this Court it was in the context of a situation of real urgency. Exceptionality was plainly involved. That was in the context of the Genocide Convention being invoked by Bosnia and Herzegovina to seek and eventually obtain provisional measures from this Court to try to stem the flow of blood that was all too clear. In this case I will invite this Court to dismiss the Application that has been brought before this Court.

On three bases: firstly, there is no urgency; second, the relief that is sought is manifestly unavailable; and third, so far as jurisdiction is concerned, the jurisdiction under the Vienna Convention of 1963 is not as unchannelled as my learned friend has suggested. It is limited and indeed it is further limited and qualified or supplemented by the 2008 agreement which as the Applicant State has been at pains to disavow, an agreement that has been in place for 10 years, and it is now being suggested it is not relevant, it is also being suggested that because it did not comply with the requirements of Article 102 (2), it cannot be placed before this Court. It is rather unfortunate that having brought the Respondent State before this Court the Applicant State seeks to reply upon what can be best described as a technicality.

However, I begin by referencing the conduct of the Applicant. The Applicant has sought to invoke and obtain the most exceptional relief from this Court, and it has done so, as paragraph 23 of its Request makes clear, by urging this Court not to permit an oral hearing. If an applicant seeks to invoke such an extreme jurisdiction, to deny the other side a hearing, it is incumbent upon such an applicant to ensure that it provides a Court with full and frank disclosure, that it ensures that the documentation and information placed before the Court is accurate and that it ensures that all material facts are placed before the Court. As I will demonstrate there are, unfortunately, flaws in the approach of the Applicant in every respect so far as these three fundamental elements are concerned.

Firstly, paragraph 20 stressed that without provisional measures Commander Jadhav would be executed before the Court could consider the merits. Indeed, paragraph 21 stressed that there was such immense urgency that this might happen any day and therefore it is not surprising that when one seeks to invoke the jurisdiction of the highest judicial organ of the United Nations, indeed, the highest judicial organ that all members of civilized nations turn to, that the President issued the letter on 10 May as he did in the terms that he did.

It was said in the Application, furthermore, that the trial was rushed through and that Commander Jadhav could be executed summarily. The papers before the Court within the Application itself demonstrate at Annex 6 the detailed public statement made by the Advisor to the Prime Minister on 14 April, His Excellency Sartaj Aziz, that none of that is, with respect, true.

There were four stages of the trial, 21 September to 12 February 2017. The clemency process was identified clearly, the timeline: 90 days plus 60 days.

What is also said to this Court in the Application, paragraph 9, is that the Pakistani authorities had made it clear that Commander Jadhav was not eligible for consular access, nor would he be granted consular access. The Court was referred to Annex 7. Regrettably, Annex 7 says no such thing.

What the Applicant has sought to do is to introduce as Annex 11 an article from a newspaper, which whatever else it may be, is not a newspaper of the record in Pakistan. But what is important to note is that there was plainly a material misrepresentation in the Application that was placed before the Court as to the position of the authorities of the Islamic Republic of Pakistan

because, in fact, Annex 9 to the very same Application provided a draft transcript of a three-page press briefing provided by the spokesperson to the foreign office. And, the Court will see at page 3, that in answer to a direct question from a journalist, the foreign office official spokesman made it very clear that pursuant to the Bilateral Agreement between India and Pakistan of 2008, which India is anxious to avoid any reference to, the question of access to Commander Jadhav would be decided on the merits.

The Court has been given an indication moreover that there was some request for evidence made by the Pakistani authorities, but all that the Court was given was the cover letter in the annexures. Unfortunately, the Court was not provided with the substantive material which was given to India on 23 January 2017, but it has now.

In the judges' folder at Annex 1, the Court will see that the material comprised a cover letter which identified 13 names, names that Commander Jadhav had provided to the Pakistani authorities. The cover letter sought the assistance of the Indian authorities to the phone records of Commander Jadhav. It sought the assistance of the Indian authorities to bank account details. These are all perfectly reasonable, legitimate requests. The Indian authorities were provided with a copy of the first information request, the details of the allegation, Annex 1. Annex 2 was a copy of the passport.

Now, interestingly, at no stage has India made any comment about the possession of a passport by an individual whose nationality, as an Indian national has been assumed we say *de bene esse*, but has not actually been established by the Indian authorities. The passport plainly requires explanation.

There is the confession, which is in the bundle that was given to the Indian authorities, together with, significantly, the United Nations Security Council resolution 1373, one of the most important Security Council resolutions ever promulgated in the aftermath of the horrors of the attack on 11 September. India no doubt would have been fully familiar with the principles identified in that resolution, but incumbent upon all Member States of the United Nations is the obligation to assist not only in preventing terrorism, but the provision of evidence. What happened? Deafening silence. No response.

What is said in the Application at page 24, paragraph 50, is that the confession of Commander Jadhav was obtained after India had sought access. Somewhat ironic because, as you have seen and as the written submissions that are before the Court will make clear, the chronology is as follows: Commander Jadhav was arrested in the southern province of Pakistan, Baluchistan, which is mineral-rich and unfortunately has seen violence all too often. He crossed in from Iran bearing that false passport.

The position so far as the video is concerned is that that video was aired, that was a confession video aired on 25 March 2016. So it is plainly incorrect, if it is being suggested that that video was obtained after consular access was sought, because the chronology simply doesn't bear it out.

What is said in addition is that Pakistan, at the Application paragraph 28, made it a condition of consular access that the mutual legal assistance request was complied with. Now, pausing there, I respectfully submit to this Court that the obligation to prevent and to enable the punishment of terrorism is one of the highest obligations that all Member States of the United Nations are subject to. Indeed I would go much further and say it is an obligation *erga omnes*.

It was not a condition on consular access, it was a fundamental requirement that India was to comply with, and it is yet to give an explanation to this Court as to why it has not. And in fact, it is simply inaccurate, if not, with respect, misleading, to suggest that the Government of Pakistan and its officials had attached conditionality. What they had said, and again this is in the annexes before the Court, Annex 3, the letter of 21 March 2017, before judgment was handed down on 10 April 2017, is that the consular access request would be considered in light of the response to the mutual legal assistance request so as to enable early dispensation of justice, so that the evidence could be provided to enable the legal process to take its course in Pakistan.

In so far as it has been suggested that the process that Commander Jadhav is subjected to is some form of kangaroo court, it is rather bizarre that a court exists in a State which is seeking to do justice and is asking for evidence in that regard and is sharing evidence in that regard. So, the position that is advanced before this Court is, with respect, a sham.

But what does this all get to? We saw in the Request at paragraph 20 that the Court, the President was urged to act on the Request for provisional measures because Commander Jadhav

might lose his life any day. India generated a sense of urgency, not Pakistan. India invoked the jurisdiction of this Court improperly and, as a result, has now interestingly shifted its position as to what urgency is. We began with "any day", but my friend, when he addressed the Court with reference to the *Avena* case, suggested that it was appropriate for this Court to grant provisional measures where, in the *Avena* Mexico case, the death sentence prospect was some six months away. Firstly, that is not correct. And second, it is not acceptable to invoke the jurisdiction of this Court on the basis of imminence, any day, about to be committed, and then come to the Court and say it may be six months. That is enough for you. Because when one looks at the cases themselves, the three death sentences cases, they all relate to the use of capital punishment in the United States of America.

In the Paraguay case there was a period of 11 days before the death sentence would be imposed. In *LaGrand*, it was the next day. And in *Avena*, the earliest that any one of those 54 Mexicans might be exposed to the death sentence was four weeks. Not six months, four weeks.

And when one looks at the drafting history of Article 41, which this Court in the *LaGrand* provisional measures case helpfully provided an insight to, at paragraph 105, Article 41 relates to certain situations in which irreparable harm is about to be committed, about to be committed. There is plainly in that language a sense of immediacy, imminence, urgency, and six months plainly in nobody's book is imminent, or urgent, or immediate.

The Application conveniently glossed over the existence and availability of clemency which was articulated in the Advisor to the Prime Minister's public statement on 14 April, which was before the Court, but was not drawn to the attention of the Court.

In the oral phase this morning, my friend indicated that action was likely to be taken before final decision is likely to be given. An elastication, at best, of the position that was placed before the Court in writing. That simply will not do. This Court has on its docket some of the most important issues engaging the States. This Court exists to ensure that States engage in peaceful resolution of disputes. This Court does not exist for time-wasting and political grandstanding.

The second point is that the relief that is being sought is palpably unavailable. In the oral submissions, what my friend said is that in the least, the least position, at the very least, what is required is annulment. At the highest, forthwith release. The Court will see this from paragraph 60

of the Application. There is no realistic, plausible prospect of obtaining such relief from this Court. This is not aspirational, this is beyond aspiration.

The Court is well aware that in the Paraguay case, despite the order of this Court being handed down on 9 April, the execution was to take place on 14 April, the reparation provided by the United States of America was an apology. A similar relief was sought by Paraguay.

In the *LaGrand* case, despite one of the two brothers, Walter LaGrand, being executed on 3 March 2009 in the face of this Court's Order, the Order that was ultimately granted by the Court in 2000 was for the United States in respect of other German nationals subjected to similar treatment to be made, for the position in their regard to be such that review and reconsideration of their position was available. By means, that it was to be chosen by the United States of America. Indeed, in the *Avena* case, at paragraphs 121 to 124, the Court stressed, this Court stressed, as had been said in the *LaGrand* case at paragraph 225, that this Court is not a criminal Court of Appeal, this Court does not exercise criminal appellate jurisdiction.

Paragraphs 121 to 124 of the *Avena* Judgment dated 31 March 2004 stressed this point. In the present case, paragraph 121, this Court stated very clearly the Court's task is to determine what would be adequate reparation for the violations of Article 36. It should be clear that that was referring to what needs to be done to make good the violations, and what was stated by the Court was that it follows that the remedy to make good of these violations should consist in an obligation on the United States to permit a review and reconsideration of these national cases, the 54 by United States courts. The Court also made it clear at paragraph 122, "the Court reaffirms that the case before it concerns Article 36 of the Convention and not the correctness of the death penalty" forgive me, "of any such conviction or sentencing".

There was a suggestion on the part of Mexico that the reparations entitled them to seek, the reparations Request entitled Mexico to seek partial or total annulment of conviction or sentence and that was the necessary and so remedy. We see parallels of that in the position that India has adopted.

The case that was relied upon was the Congo and Belgium case, and of course this Court explained that Congo and Belgium was dealing with different facts. There was immunity available, so the individual who had immunity should never have been subjected to the criminal process.

What is therefore the objective of this Application? The Agent for Pakistan referred to Pakistan having been bounced before this Court. What is the objective? If this Court cannot exercise a criminal appellate jurisdiction and if the only relief that India is seeking is not available, what is the objective?

The provisional measures, we respectfully submit in our written submissions, at paragraphs 19 and 20, are sought by India on "bootstraps arguments". If there is no availability of the substantive relief, provisional measures cannot and should not flow. A bootstraps arguments is a term familiar to English lawyers, and I apologize for using it, but I hope one can visualize how someone trying to pull themselves up from their boots.

India itself has referred to all of the previous decisions of the Court that I have just alluded to where a substantive relief of the sort that it was seeking was not granted. India must be taken to be aware of this. Accordingly, with respect, it is difficult to avoid the inference that India's real and only goal before this Court, that is, is a provisional measures order, stay order. Whilst stay orders, as they are referred to in some places, may be seen as providing substantive relief in certain jurisdictions, where delay is tantamount to negation of Court process, such a context finds no reflection before this Court where time is precious, the Court's time at least, and it ought to be seen as such.

Indeed, it is respectfully submitted that the Court should exercise considerable caution in circumstances where there is no apparent and/or realistic nexus between the request for provisional measures and the rights relief which the measures are intended to ensure the preservation of.

My third and final point relates to jurisdiction. In this regard there are four sub-points that I wish to make. The Court has before it my written submissions and paragraphs 50 to 93 addressed the question of jurisdiction.

I fully accept that at this stage the Court is not engaging with the substance of jurisdiction and the test is whether or not its arguable prima facie. We submit that at the very least the Court ought to have regard to the following four factors.

Firstly, paragraphs 53 to 61 of my written submissions elaborate this. On 8 September 1974 India deposited a reservation which had two elements to it. The first was to exclude from the jurisdiction of this Court any dispute with a Government of a State which has been a member of the

Commonwealth. And secondly, to exclude disputes, paragraph 7 — that was paragraph 2 of the reservation — paragraph 7 of the reservation was intended to exclude the jurisdiction of this Court in respect of disputes concerning the interpretation and application of multilateral treaties, which the Vienna Convention plainly is, unless all the Parties to the treaty are also Parties to the case before the Court, which they are not, or the Government of India specially agrees to jurisdiction, which it has not.

India invoked these provisions in the *Aerial Incident* case, a decision of this Court that was handed down on 21 June 2000. Rather awful circumstances on 10 August 1999, a Pakistani plane was shot down over Pakistan airspace by Indian forces leading to the loss of many lives. The claim was brought before this Court, *inter alia*, with reference to the United Nations Charter and India invoked these reservations. The claim was brought on the basis of Articles 36 (1) and 36 (2) of the Statute of this Court. The Court, this Court, decided that it needed not consider paragraph 7 of the reservation because paragraph 2 sufficed. As Pakistan was a Commonwealth State, the reservation was effective. But, of course paragraph 7 was intended to apply to multilateral treaties.

The Pakistani reservation is the second point. There was a Pakistani reservation to this Court's jurisdiction entered on in 1960 and another on 29 March 2017. And what was the ambit of this reservation, all matters relating to the national security of the Islamic Republic of Pakistan are excluded from the jurisdiction of the Court. This is not on its face an objectionable reservation, it is not an unsurprising reservation. And I pause there to observe regrettably that the relationship between these two States has often been fractious, and that is relevant when we consider the 2008 agreement on consular access.

But so far as my observations on these two reservations are concerned, even if the Court considers that it is not able to determine at this stage whether the reservations are fully engaged so as to preclude the exercise of the Court's jurisdiction, they are nevertheless relevant in the exercise of the Court's consideration as to whether to grant exceptional relief.

For two reasons: firstly, India's intention as is evident from its reservation is to exclude any case appearing before this Court, which involves the Government of Pakistan.

Pakistan's intention is to exclude from determination by this Court any issue that involves national security.

Thirdly, the Vienna Convention. Now, here we can agree with the Applicant, and one ventures to suggest as a result there is always hope, because the Applicant in Application page 16, paragraph 34, observed as follows: "The Vienna Convention Article 36 was adopted to set up standards of conduct, particularly concerning communications and contact with nationals of the sending State, which would contribute to the development of friendly relations among nations" and the observation we make immediately is that this is unlikely to apply in the context of a spy/terrorist sent by a State to engage in acts of terror.

Indeed, it is clear from the Vienna Convention itself that there are provisions beyond Article 36 that need to be considered before coming to the Court with the bald assertion that the Vienna Convention is an inter-related régime. Indeed it is. There are 73 Articles, but the only one that has been brought before this Court is Article 36. The preamble makes it very clear that the rules of customary international law continue to govern matters that are not expressly regulated by the provisions of the convention. That is an important point.

Article 5 identifies the scope of consular functions. Article 5 *(a)*, within the limits permitted by International Law. Article 5 *(i)*, subject to the practices and procedures obtaining in the receiving State. Article (5) *(m)*, functions not prohibited by the laws and regulations of the receiving State, all to which no objection is taken by the receiving State, or which are referred to in international agreements, in force between the sending State and the receiving State the 2008 agreement being such an agreement.

It suggested to this Court that there is provided for, by Article 36, untrammeled, immediate access. What is said is that Article 36 was violated by the Pakistani authorities from the time of arrest of Commander Jadhav. This is plainly wrong.

In the *Avena* decision of this Court of 31 March 2004, paragraphs 80 to 87, consideration was given to the time period within which access was to be given, and the Court concluded that this was not required before commencement of an investigation. So India, with respect, is obviously wrong.

And one then tests the proposition as to the expansive nature of the Vienna Convention with reference to 36 (1) *(c)*. "Consular officers shall have the right to visit, converse and correspond with the national."

Now, if we read this again, "Consular officials [of a State that is sending somebody to spy] shall have the right to visit, converse, and communicate, correspond with the national [the man or woman who is sent to spy]."

And when one reads the provision in that way, it is immediately obvious that 36 (1) *(c)* could never have been intended to apply in this context.

We further elaborate upon this in our written submissions. And one has to have regard as to the circumstances within which the Vienna Convention was considered and ultimately adopted.

There is no reference to espionage, spying, let alone terrorism, in the *travaux* and then makes it abundantly clear that none of the Parties that were engaged in this process was even considering the Application of this convention to terrorists or spies.

And it is not surprising. It was not that long ago that the Soviet Union and the United States of America were engaged in what is known as the Cold War, and we all accepted the fiction that there were no spies. But, of course, what we have in front of us in this case is a passport that has yet to be explained.

Commander Jadhav, it is said, is an Indian national. What has India done to establish that? In the *Avena* case, the decision of the Court of 31 March 2004, paragraphs 55 to 57, this Court made it clear that a State that wishes to engage consular official access to an individual has the onus of establishing that the individual is a national.

Here, with respect by sleight of hand, we have India maintaining the position that this gentleman is an Indian national. He is in possession of a palpable false passport. Forget about providing assistance to the Request for assistance of 23 January 2017, which gave India the false passport. It would have been open to India to say, well, actually, he has this passport which has his name on it. Of course one can immediately see how that might present problems.

India could also have provided a copy of this birth certificate as the Mexican authorities did in *Avena*. None of those happened, so we respectfully observe that it is rather unfortunate that India is coming to this Court adamant that this Commander Jadhav is an Indian national but has done nothing to prove that or establish that, at all. And it may not be surprising why that is the case.

There are plainly qualifications within the Vienna Convention itself which point to the exclusion of the operation of the convention with respect to acts of this nature. Article 55 makes it

clear that there must be no interference in the internal affairs of the receiving State. That itself makes it plain that if an individual is accused of espionage, terrorism, consular access which may involve compromising evidence which may involve exacerbating the threat for the receiving State because of coded communication, cannot possibly be anything other than a breach of Article 55.

I turn, finally, to the 2008 Agreement, which my friend has been at pains to distance himself from. We have been told it is not relevant, it is not relied on, it is not on the register. And as I said before, it is unfortunate that a technical argument, which is, itself misconceived, is being brought before this Court to try to persuade this Court nevertheless to grant exceptional provisional measures against a member State of the United Nations. In pursuit of peace. I venture to suggest not.

Serious allegations are being made against a Member State of the United Nations. Not one jot of evidence has been advanced by India to rebut the clear manifest position that this individual is a terrorist.

The Court has seen the video. The Agent has invited the world at large to watch it, and the world at large can decide for itself whether this gentleman was kidnapped from Iran, brought to Pakistan for the sole purpose of confession to criminal act. There is a long border between India and Pakistan and there are hundreds of millions of people to choose from. So to kidnap him from Iran and bring him to Pakistan for the sole purpose of extracting a confession seems, at best, farfetched.

The 2008 Agreement, it is interesting to note, it is not suggested by India that it is ever been breached by Pakistan. And we say it informs the Parties' understanding with regards to the Vienna Convention. It amplifies or supplements their understanding and the operation of the Convention. And given the fractious nature of the relationship between these two States, it provides a helpful, if not, vital medium for that relationship to be as free from friction as possible; therefore, it is perfectly consistent with the objectives of the Vienna Convention. Indeed, it, I would suggest, is essential.

So, to minimize its operation and existence by saying it is irrelevant is perhaps convenient, but it simply will not do.

Annex 10 of the Application includes the Agreement but, of course, the Court was told, on an Application which was made for provisional measures within a day or two without any hearing,

that it was irrelevant. An applicant making such an application before the Court at least ought to have explained why it was not relevant. It is operated for nearly a decade. There is no complaint that the Government of Pakistan has breached this Agreement.

I will come to how the Government of Pakistan's position has been mischaracterized, but the Agreement, which I will read, is very short and very clear. And perhaps that is why it is operated successfully. It consists of seven paragraphs and is headed "Agreement on Consular Access", the very subject that this Court's jurisdiction is being engaged upon now on an urgent basis. And it says as follows,

> "The Government of India and the Government of Pakistan desires to furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in either country have agreed to reciprocal consular facilities as follows:
>
> (1) each government shall maintain a comprehensive list of the nationals of the other country under its arrest, detention or imprisonment. The list shall be exchanged on 1st January or 1st July each year." It is quite precise.
>
> "2) immediate notification of any arrest, detention or imprisonment of any person of the other country shall be provided to the respective High Commission."

So we have flesh to the bones of Article 36 (1) in terms of the time period.

"(3) Each Government undertakes to expeditiously inform the other of the sentences awarded to the conflicted nationals of the other country." One is not sure whether the word "award" is appropriate for a sentence, but in any event that is the choice that the drafters made.

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

And this Court is being told that by failing to provide — that there is an objection to the approach that the Government of Pakistan engaged in. And this Court has not been told about Article 6, which I turn to after I read Article 5, which says,

> "Both governments agree to release and repatriate persons within one month of confirmation of their national sentence, status and completion of sentences.
>
> (6) In case of arrest, detention or sentence made on political or security grounds. Each side may examine the case on its merits.
>
> (7) In special cases, which call for or require compassionate and humanitarian consideration, each side may exercise its discretion subject to its laws and regulations to allow early release and repatriation of persons. This Agreement shall come into force on the date of its signing, 21st May 2008."

With respect, not only is this a binding Agreement between the two States, it provides helpful, if not vital, amplification of the understanding and operation of the Vienna Convention between two States that have been at war on more than two occasions.

What was said to this Court was that the Government of Pakistan was denying consular access. Nothing can be further from the truth. The Court will see that the Foreign Office's formal position, at Annex 9, as stated by the Foreign Office spokesperson, page 3 of the extract, at Annex 9, was that consular access would be provided with reference to the 2008 Agreement.

That is far removed from the way in which the Government of Pakistan is being presented before this Court. Making reference to an Agreement that is in place between two States genuinely, honestly, sincerely is not an illustration of bad faith, making reference to such an Agreement negates any suggestion of an egregious violation, a deliberate flouting of obligations. Making reference to such an Agreement evidences a genuine position, a genuine position which, I might add, seems to have operated, more or less satisfactorily, because it is not being suggested, certainly by India at least, that the Government of Pakistan has breached this convention, this Agreement for nearly ten years.

And therefore, one turns to the conclusion to be drawn from the approach regrettably that has been adopted by the Government of India to try and persuade this Court to grant provisional measures without the Government of Pakistan being present. It was wholly inappropriate to invoke the exceptional jurisdiction of this Court.

Insofar as it is even remotely suggested that there may be some concerns as to the fate of Commander Jadhav, those concerns, in so far as it is being suggested, and we maintain those are not well-founded, the Agent has made it clear that the Government of Pakistan will be happy to assuage those concerns in the manner that he has suggested, i.e., proceed to an expedited hearing as he has suggested.

There is no real risk of irreparable harm taking place within a day or two as was suggested by the Government of India and now elasticated to six months.

This is a hearing that I have had the honour to appear before this Court on, but a hearing that was not necessary. Thank you.

MR. PRESIDENT: Merci, Monsieur le conseiller du Pakistan. So this brings the oral proceedings on India's Request for the indication of provisional measures to an end.

It remains for me to thank the Representatives of the two Parties for the assistance they have given to the Court by their oral observations.

In accordance with practice, I would ask the Agents of both Parties to remain at the Court's disposal.

The Court will render its order on the Request for the indication of provisional measures as soon as possible. The date on which this order will be delivered at a public sitting will be duly communicated to the Parties.

As the Court has no other business before it today, the sitting is closed.

The hearing ends at 3.55 p.m.

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