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International Court of Justice

THE HAGUE

Cour internationale de Justice

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YEAR 2019

Public sitting

held on Tuesday 19 February 2019, at 10 a.m., at the Peace Palace,

President Yusuf presiding,

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

VERBATIM RECORD

ANNÉE 2019

Audience publique

tenue le mardi 19 février 2019, à 10 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

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

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Bennouna
		Cançado Trindade
		Donoghue
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Crawford
		Gevorgian
		Salam
		Iwasawa
	Registrar	Couvreur

Présents : M. Yusuf, président
Mme Xue, vice-présidente
MM. Tomka
Abraham
Bennouna
Cançado Trindade
Mme Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford
Gevorgian
Salam
Iwasawa, juges

M. Couvreur, greffier

The Government of the Republic of India is represented by:

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

as Agent;

Mr. Vishan Dutt Sharma, Additional Secretary, Ministry of External Affairs,

as Co-Agent;

Mr. Harish Salve, Senior Advocate,

as Senior Counsel;

H.E. Mr. Venu Rajamony, Ambassador of the Republic of India to the Kingdom of the Netherlands;

Mr. Luther M. Rangreji, Counsellor, Embassy of India in the Netherlands,

as Adviser;

Ms Chetna N. Rai, Advocate,

Ms Arundhati Dattaraya Kelkar, Advocate,

as Junior Counsel;

Mr. S. Senthil Kumar, Legal Officer, Ministry of External Affairs,

Mr. Sandeep Kumar, Deputy Secretary, Ministry of External Affairs,

as Advisers.

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

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as Agent;

Mr. Mohammad Faisal, Director General (South Asia and South Asian Association for Regional Cooperation), Ministry of Foreign Affairs,

as Co-Agent;

H.E. Mr. Shujjat Ali Rathore, Ambassador of the Islamic Republic of Pakistan to the Kingdom of the Netherlands;

Ms Fareha Bugti, Director, Ministry of Foreign Affairs;

Mr. Junaid Sadiq, First Secretary, Embassy of Pakistan in the Netherlands;

Mr. Kamran Dhangal, Deputy Director, Ministry of Foreign Affairs;

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

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

comme agent ;

M. Vishan Dutt Sharma, *Additional Secretary* au ministère des affaires étrangères,

comme coagent ;

M. Harish Salve, avocat principal,

comme conseil principal ;

S. Exc. M. Venu Rajamony, ambassadeur de la République de l'Inde auprès du Royaume des Pays-Bas ;

M. Luther M. Rangreji, conseiller à l'ambassade de l'Inde aux Pays-Bas,

comme conseiller ;

Mme Chetna N. Rai, avocate,

Mme Arundhati Dattaraya Kelkar, avocate,

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M. S. Senthil Kumar, conseiller juridique au ministère des affaires étrangères,

M. Sandeep Kumar, *Deputy Secretary* au ministère des affaires étrangères,

comme conseillers.

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

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comme agent ;

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

comme coagent ;

S. Exc. M. Shujjat Ali Rathore, ambassadeur de la République du Pakistan auprès du Royaume des Pays-Bas ;

Mme Fareha Bugti, directrice au ministère des affaires étrangères ;

M. Junaid Sadiq, premier secrétaire à l'ambassade du Pakistan aux Pays-Bas ;

M. Kamran Dhangal, directeur adjoint au ministère des affaires étrangères ;

Mr. Ahmad Irfan Aslam, Head of the International Dispute Unit, Office of the Attorney General;

Mian Shaoor Ahmad, Consultant, Office of the Attorney General;

Mr. Tahmasp Razvi, Office of the Attorney General;

Mr. Khurram Shahzad Mughal, Assistant Consultant, Ministry of Law and Justice;

Mr. Khawar Qureshi, QC, member of the English Bar,

as Legal Counsel and Advocate;

Ms Catriona Nicol, Associate, McNair Chambers,

as Junior Counsel;

Mr. Joseph Dyke, Associate, McNair Chambers,

as Legal Assistant;

Brigadier (rtd.) Anthony Paphiti,

Colonel (rtd.) Charles Garraway, CBE,

as Legal Experts.

M. Ahmad Irfan Aslam, chef du service chargé des différends internationaux au bureau de l'*Attorney General* ;

Mian Shaoor Ahmad, consultant auprès du bureau de l'*Attorney General* ;

M. Tahmasp Razvi, bureau de l'*Attorney General* ;

M. Khurram Shahzad Mughal, consultant adjoint auprès du ministère de la justice ;

M. Khawar Qureshi, QC, membre du barreau d'Angleterre,

comme conseil juridique et avocat ;

Mme Catriona Nicol, avocate, McNair Chambers,

comme conseil juridique auxiliaire ;

M. Joseph Dyke, avocat, McNair Chambers,

comme assistant juridique ;

le général de brigade Anthony Paphiti (e.r.),

le colonel Charles Garraway (e.r.) (CBE),

comme experts juridiques.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the first round of oral argument of the Islamic Republic of Pakistan. I shall now give the floor to the Agent of Pakistan, H.E. Mr. Anwar Mansoor Khan. You have the floor, Sir.

Mr. KHAN: Mr. President, honourable Members of the Court, it is a great honour for me to address this Court on behalf of the Islamic Republic of Pakistan. Before making any substantive submissions, I must record my delegation's profound concern over the unfortunate situation. We noticed that the Judge *ad hoc* nominated by Pakistan could not attend the proceedings yesterday. And he is not present today. This is a matter of great concern for Pakistan.

Pakistan exercised its right to appoint a judge *ad hoc*, as provided in Article 31, paragraph 2, of the Statute of the International Court of Justice. Article 31 (2) clearly provides that if one State party to a dispute has a permanent judge on the Bench, the other State has the right to appoint a judge *ad hoc*. This fundamental procedural right of the State party to a dispute, a right that Pakistan exercised in good faith, and in full compliance of the Rules of Court.

Regrettably, however, this right is yet to be effectively exercised. The Judge *ad hoc* has not yet been sworn in. Accordingly, at present, Pakistan does not have a judge *ad hoc*. We have further been informed that the Judge *ad hoc*, Mr. Jillani, is indisposed and is unable to attend the proceedings. We wish Mr. Jillani a quick recovery and that he restores to good health.

Pakistan is ready and committed to presenting this case to the Court, but we invite the Members of the Court to appreciate the extraordinary situation that we find ourselves in. If proceedings continue, the vital part of the proceedings shall conclude today, and Pakistan's procedural right to have a judge *ad hoc* on the Bench shall stand permanently frustrated. While a citizen of the complaining State sits as a permanent judge on the Bench, the responding State's right to have an *ad hoc* judge is not effected.

In light of the above Pakistan, while placing itself in the hands of this Court, is obliged to request the Court to allow for another individual to be sworn in, as provided for under Article 35 (5) of the Rules of Court. Article 35 (5) provides: "A judge *ad hoc* who has accepted appointment but who becomes unable to sit may be replaced." This rule caters to precisely the

present situation. It is also requested that the Court may give him sufficient time to go through the brief.

I would like to reiterate that Pakistan is ready and committed to present its case to the Court. As always, we remain assured that the interests of responding States will be adequately guarded by this Court and that Pakistan's requests will be met with consideration, as the circumstances demand.

I am in your Lordships' hands. That is all. As this Court so pleases.

The PRESIDENT: Have you completed your introduction of today's hearings? The presentation of Pakistan?

Mr. KHAN: Yes, we have completed the presentation of Pakistan. My statement is ready. That is also there, but for this, I am in the Court's hands.

The PRESIDENT: I would like to ask you to read your statement, if your statement is ready.

Mr. KHAN: It is ready.

The PRESIDENT: And we are ready to hear you and to hear your side, and the arguments of Pakistan.

Mr. KHAN: I will proceed.

The PRESIDENT: Thank you.

Mr. KHAN:

1. Your Excellency, the President of the Court, honourable Judges, Excellencies, ladies and gentlemen:

I, the Attorney General for Pakistan, am honoured to appear before this august Court as the Agent of the Islamic Republic of Pakistan. With the leave of the Court, I would like to introduce our delegation:

(i) Dr. Mohammad Faisal, the Co-Agent for Pakistan,

(ii) Mr. Shujaat Ali Rathore, Ambassador for Pakistan to the Netherlands,

(iii) Mr. Ahmad Irfan Aslam,

(iv) Mr. Tahmasp Razvi,

(v) Mr. Khawar Qureshi QC, legal counsel and advocate,

(vi) Mr. Joseph Dyke, legal assistant,

(vii) Ms Catriona Nicol, junior counsel for Pakistan, and

(viii) Mian Shaoor Ahmad.

2. Mr. President, honourable Judges of the Court, I will provide a brief overview of the form that Pakistan's submission will take.

3. This esteemed Court has been made aware from the pleadings of the Parties here, giving the background events leading to the appearance today. However, I need to talk straight, seeking to highlight the heart of the matter, with a view to emphasize the inconsistencies and contradictions made with the aim to mislead this honourable Court.

4. The Constitution of the Islamic Republic of Pakistan provides for due process, as a fundamental right, tolerance and being peaceful. All laws are made by the Parliament in accordance with the Constitution after proper debate and discussions. The local laws are thus within the domain of the Parliament and the independent courts of Pakistan. Similarly, the creation of military courts was through this parliamentary process. Pakistan's sovereignty cannot be compromised under any legal dispensation. All courts are working under due legal process, having proper jurisdiction as provided by law. In contrast without due process, the action of our neighbour India, chooses to destabilize and create hegemony over its neighbours, by force, causing terrorism, training terrorists for acting in neighbouring countries, sending their trained spies, to fund and create chaos in those countries. For our part, we wish that were not so. Moreover, we wish to make it absolutely clear that we remain committed to the path of peaceful resolution of all outstanding disputes.

5. Pakistan, as a consequence of the Indian intervention along with others, is a major victim of terrorism where the country and its innocent citizens continue to fight this menace both inside and on the borders. Pakistan has consequentially suffered more than 74,000 casualties and fatalities due to terrorism caused mainly by the interference of our neighbour India. It is in this context that Commander Kulbhushan Jadhav, a serving officer of the Indian Navy, working for the India's

Research & Analysis Wing (commonly called as RAW, India's brutal primary foreign intelligence agency) entered Pakistan, with a predetermined aim, on the instructions of the Government of India, to assist, plan and cause terrorism in Balochistan and the Sindh provinces and other places in the country. This much he has admitted before an independent judicial magistrate sitting in a court of competent jurisdiction with the benefit of stringent safeguards to protect him against any form of pressure or coercion when making such a confession.

6. The Indian State-sponsored terrorism has been the order of the day. India, contrary to all international laws and norms, interferes in training and arming anti-Pakistan militias, and funding them to attack East Pakistan to cause the dismemberment of Pakistan, which fact, in 2016, the Indian Prime Minister, Mr. Narendra Modi, twice admitted. The Indian National Security Adviser, Mr. Ajit Doval, makes no secret of his plans to foment and foster unrest in Pakistan through Indian spy agencies by applying — what he called — a "double squeeze" strategy. The Indian petition at the ICJ is a classic example of the old adage, that the mouth prays to Buddha but the heart is full of evil.

7. May I say that I have been a victim of Indian brutalities — when I say "I", I mean my person — Indian brutalities, detained and tortured under inhumane conditions, contrary to the Geneva Convention, during my captivity as a prisoner of war, being a 20-year-old officer of the Pakistan Army in 1971. This is the India that we sadly see all too often.

8. Mr. President and learned Judges, even prior to the capture of Commander Jadhav, it was after the speech of Mr. Ajit Doval, a huge blast wrecked the Balochistan High Court at Quetta, where we lost more than 70 senior and experienced lawyers. Karachi has had dozens of attacks causing multiple precious lives to be lost. Similar blasts and suicide bombers have killed numerous citizens in Pakistan.

9. The unlawful actions of India have also proven that India has been using Afghanistan as the "Second Front", at the western border of Pakistan, as has been said by the ex-US Defence Secretary, Chuck Hagel, in the speech in 2011 at the Oklahoma University. This has been proved by the deadly attack on the army public school (APS) at Peshawar, where we lost more than 140 innocent school children, some as young as 6 years old, massacred by the inhumane attack, admittedly sponsored by India from Afghanistan on 16 December 2014. In fighting terrorism, we

have lost more than $123 billion, loss of a sense of security, flight of capital from the country, and unbearable human costs, which continue to mount.

10. In an apparent, albeit regrettable attempt, to use the august forum for grandstanding and politicking, India never notified Pakistan of a dispute through the Optional Protocol which could have engaged mandatory alternate dispute resolution processes for at least two months, but inexplicably chose to ambush the Court invoking urgency.

11. Commander Jadhav planted several local residents, collaborators, conspirators, non-State actors becoming an integral part of a network run by him to carry out despicable terrorism and suicide bombings, target killings, kidnappings for ransom, and targeted operations to create unrest and instability in the country.

12. His unlawful activities were directed at creating anarchy in Pakistan and particularly targeted the Pakistan-China Economic Corridors. Ports of Gawadar, Turbat and Jiwani were specifically identified to damage the China-Pakistan Economic corridor that is bringing development to Pakistan's poorest regions. In addition, he funded subversive and secessionist elements through informal and illegal money channels contrary to the laws of Pakistan and in violation of the financial action task force (FATF) principles and provisions. Commander Jadhav was nominated in the police First Information Report (FIR) for his terrorist activities prior to the judicial confession. In the existing FIR, a supplementary FIR was filed on additional information given by Commander Jadhav in his judicial confession. Commander Jadhav's activities are not acts of an individual. Rather, these are being committed at the behest of the Indian State and the Government.

13. Commander Jadhav's confession speaks of India's State policy of sponsoring terrorism in Pakistan. The acts of appalling violence orchestrated by Commander Jadhav and the loss of thousands of innocent lives are actual manifestations of such Indian policy.

14. Since 1947 India has consistently pursued the policy of trying to destroy Pakistan. This has taken several forms and manifestations over the last seven decades. India blocked river water flowing through Pakistan and continues to do so in violation of the Indus Waters Treaty. The Indian Prime Minister, Mr. Narendra Modi, is on record as having said, using water as a weapon against Pakistan.

15. India's petition to this Court seeks relief for a terrorist, for obvious reasons, that he was sent by India. This has exposed the sham reality of duplicitous policy whereby India contrary to the facts, laments being a victim of terrorism to attempt to divert the attention of the international community from its own continuing policy of State-sponsored terrorism.

16. Pakistan has treated Commander Jadhav in a manner that is due to every human being. On humanitarian grounds, Pakistan has allowed Commander Jadhav's mother and wife to visit him. I challenge India to quote a similar example where a person involved in espionage and terrorism was granted such an access to families on humanitarian grounds.

17. Mr. President, honourable Judges, it is the duty of Pakistan to protect its own citizens, whose fundamental right to life is being violated by these vicious attacks through these designs, by India. Pakistan wishes peace and a peaceful neighbourhood but that does not deter us from our commitment to the duty to protect the motherland, the life, liberty, property of every person and citizen of Pakistan against all such evils by ensuring that those guilty of any offense face the law of the land.

18. In conclusion, the people and the Government of Pakistan have complete faith in this esteemed Judicial Institution of the United Nations. We expect this Court to decide this matter in accordance with the legal principles, which lead to only one conclusion — namely, that India's claim for relief as sought must be dismissed.

I thank you for your attention. With the leave of the Court, I shall now request Mr. Khawar Qureshi QC to take the floor and present the substantive arguments. Thank you very much.

The PRESIDENT: I thank the Agent of Pakistan, Mr. Anwar Khan for his statement. I wish to assure him that I have also noted the concerns of his delegation with regard to the health condition of Judge *ad hoc* Jillani. The Court will provide its response to your questions in due time. In the meantime, I wish to join you on behalf of all my colleagues to wish Judge *ad hoc* Jillani a prompt and complete recovery.

I will now give the floor to Mr. Qureshi. You have the floor, Sir.

Mr. QURESHI:

OBSERVATION ON INDIA'S ORAL PLEADING — FIRST PHASE

1. Mr. President, Members of the Court. Good morning. It is my honour and privilege to appear before this Court again, having appeared before the Court in the provisional measures application brought by India on 8 May 2017. I am compelled to express disappointment: yesterday was a wasted opportunity for India. This is a case in which two rounds of pleadings were insisted upon by India to fully rebut the law and facts. What do we find? India fails to explain its conduct. India fails to answer serious and relevant questions. India fails to address key issues. Instead, what happens is that we have, with respect to my friend, almost a verbatim read-out from his existing pleadings.

2. There are fundamental points of principle that this case engages about the conduct of a litigant, never mind a State, seeking relief from a court, never mind the World's Court. It is the brazen conduct of India which is unfortunate and I agree with my learned friend: this is an unfortunate matter, but it is unfortunate because of the way his client has behaved.

3. What the Court is asked to consider, for the first time in the Court's history — and indeed for the first time in the context of the Vienna Convention on Consular Relations of 1963 (VCCR) — is whether India is entitled to claim that Pakistan has breached the VCCR by denying consular access to Commander Kulbhushan Jadhav, a man arrested on 3 March 2016 when crossing into Pakistan from Iran with intent to pursue India's deadly campaign of death and destruction in Balochistan and Sindh provinces. As the Attorney General has already pointed out, there is a confession by Kulbhushan Jadhav before a judicial magistrate which has been repeated subsequently. It is important to remember that Mr. Jadhav was convicted of espionage offences in April 2017 after a trial which commenced on 21 September 2016 and was adjourned at his request for three weeks to enable him to prepare, with the benefit of legal advice. It is also important to remember he was convicted pursuant to Section 3 of the Official Secrets Act of 1923 which vested jurisdiction in the military courts for the offence of espionage for nearly a century — not as a result of any extension to the jurisdiction of the military court in the aftermath of terrible terrorist atrocities committed in 2014. It is also important to remember that at all material times,

Commander Jadhav and his family have the right to challenge the conviction before the military court by way of judicial review, as well as to seek clemency. These are all matters that India glosses over. But that gloss will not do, because I will demonstrate to the Court today that India's sham riposte, repeated reference to propaganda concoction, is nothing but a subterfuge. It is my unfortunate duty to do that because this is a court which, mercifully, has had occasion to deal with States that generally behave decently most of the time. This is a case in which indecent behaviour has to be exposed, not just because of my duty to my client and my duty to the Court, but because the truth must be told.

4. India has never established that Commander Jadhav was an Indian national. India says that Pakistan — by reference to the authentic Indian passport and a false Muslim cover name — was satisfied that he was an Indian national: a bizarre proposition that a document tainted with illegality and blood ought to provide some semblance of legitimacy. India fails to explain why it is that he was able to use this document to enter and leave India, on at least 17 occasions, and obtain visas for Dubai and Iran.

5. India refuses to explain why it is that eminent academic commentators have observed since the 1960s that the VCCR expressly left intact the customary international law position. Lest we forget, one of those academic commentators also include the former honorary Legal Adviser to the Indian Ministry of External Affairs.

6. It is also highly significant, I submit, that not a single State of the 177 States that are party to the VCCR has embraced the invitation of this Court issued on 20 November 2017 to address the Court on the question as to whether Article 36 provides for a customary international law exception with regards to espionage [Counter-Memorial of Pakistan (CMP), Vol. 1, Ann. 18]. That I believe, and submit, is yet more powerful, indeed clear, cogent and compelling evidence of the desire of States to, at the very least, maintain what I would describe as "studied ambiguity" on this issue — with the consequence that it simply cannot be said that the customary international law position has now crystallized to support the contention India advances.

7. India has never explained why Article (vi) of the 2008 Agreement titled "On Consular Access", no less, which it drafted, does not apply. Instead, India described the Agreement initially as "irrelevant" and "not relied on" but finally, as we shall see, India did violence not just to the

Agreement but to the English language to arrive at an interpretation which is nonsensical. Words mean what they say and were intended to mean when India and Pakistan adopted the 2008 Agreement, not what India wants them to mean *now*. I am reminded of a character occupying a fantasy land called Wonderland: some of you may be aware of him, Humpty Dumpty. Humpty Dumpty insisted that words meant what he said they meant. Now, we all know what happened to Humpty Dumpty. Humpty Dumpty was sitting on a flimsy wall and when he fell, that was the end of Humpty Dumpty. We shall see that the wall that India is sitting on is a flimsy wall of lies and it will come crashing down when probed.

8. India never engaged with a legitimate request for mutual legal assistance request from Pakistan sent on 23 January 2017 which could have provided inculpatory or exculpatory evidence. In the face of binding United Nations Security Council resolution 1373 (2001), which we must not forget was adopted in the aftermath of the terrible events of 9/11, Articles 2 *(f)* and *(g)* thereof oblige States, *oblige*, mandatory Chapter 7 United Nations resolution, ***it is*** not good enough for India to now contend before this Court, in a mealy-mouthed manner, that there is no MLA treaty required or that there should have been an MLA treaty between India and Pakistan and it was not in existence or, in an act of utter desperation, to assert that Pakistan has failed to assist India in the past. Even if that were true, it provides absolutely no excuse.

9. I am compelled to point out that India's own conduct, not just in sending Commander Jadhav but in the context of these very proceedings and during the course of these proceedings, is a shameless attempt to perpetuate blatant misrepresentations not just in the pleadings but the evidence filed before the Court. It raises, I regret but am compelled to say, a clear, uncontradicted basis for the Court to declare India's claim inadmissible, or otherwise militates against the grant of any relief.

10. It is important to understand India's mindset, and the pleading is very revealing. Paragraph 77 of India's Memorial (page 19) states as follows: "Neither the nature of the charges [against Commander Jadhav], ***nor*** the conduct of the sending State [India] is relevant in examining the allegations of the violation of Article 36."

11. It is a startling proposition! As we will see, it is contrary to Articles 5 *(a)* and 55 of the VCCR but, if India were right, this is a charter for blatant violation of international law — a puzzling proposition from a State that professes to seek a permanent position on the Security Council. Puzzling and preposterous.

12. But it is the core justification for India's blasé response. When asked serious questions, it invokes its mantra of "propaganda", "concocted", "irrelevant".

13. When it comes to this Court, after we filed our Counter-Memorial, on 10 January 2018 no less, India insisted for a second round of pleadings, unprecedented in a case of this nature, to be able to fully rebut the issues of fact and law raised in our pleading. What did we get on 17 April 2018 by way of reply, their following proposition: "India does not consider it necessary to reply in any degree of detail to the litany of false allegations being made by Pakistan" [Reply of India (RI), p. 13, para. 39]. An outrageous, offensive position to adopt having asked the Court for an opportunity to serve a further round of pleadings.

14. India continues to assert without a molecule of evidence that Commander Jadhav — who was 47 when arrested on 3 March 2016 crossing into Pakistan from Iran — had "retired" from the Indian armed forces, and was an innocent businessman. Unsurprising that they have to assert that. Kidnapped from Iran — appalling proposition to advance, devoid of any evidence or merit — for the sole purpose of forcing him to confess to crimes he did not commit. The absurdity of this I will shortly demonstrate.

15. And then we get to the claim for relief that India is seeking. India asks for at the least acquittal, release and return — a modest claim, particularly in the light of the approach that the Court has stated repeatedly in the *LaGrand* case and the *Avena* case. But India does not have much regard for precedent, or certainly not this incarnation of India, because I must point out that I have had the honour and privilege to represent, amongst many States, India in the past, and I repeat, honour and privilege. The incarnation of India that is before this Court is not one that I recognize.

16. Even if this Court were to find that the VCCR was engaged, the appropriate remedy, as this Court has stated repeatedly, is "review and reconsideration" by the Pakistani High Court — a remedy which has been available at all times since 10 April 2017, not just to Commander Jadhav, but his family.

17. India resists claiming this remedy because it has got an "all or nothing strategy" and I remember what I said to this Court on 15 May 2017: that these are proceedings launched for political theatre, making a claim for relief that is unsustainable, and they should be dismissed.

18. Now, the Court has before it my written submissions and a copy of this electronic presentation. There are nine aspects to this presentation which I shall go through.

19. First, I shall deal with the context. My learned friend Mr. Salve says there is no credible evidence against Mr. Jadhav. Well, I will demonstrate how not only is there credible evidence — evidence from the hand of India itself — but independent analysis: evaluation by highly respected individuals, who sadly have had the misfortune to be called traitors, ***that*** corroborates the confession.

20. ***Second point: f***ar from India's conduct being irrelevant, the bold proposition, the blanket immunity from law and morality that India seeks for itself, its conduct is highly relevant. India shirked from even approaching the gateway to engage the VCCR. ***Third point: i***t never established nationality, and we can see why. By clothing an individual with ~~***a false passport,***~~ a false Muslim name by way of cover, by giving him an authentic passport and making sure that he was embedded in its system, how can India possibly provide us with a copy of his actual passport? It shows the lie to India's position even more dramatically.

21. Fourth point: customary international law. State practice did not provide for consular access prior to the VCCR and the Vienna Convention expressly preserved the position of customary international law in 1963. ***Fifth point: e***ven if the Vienna Convention was engaged, consular access to a prima facie case of espionage suspect would violate Articles 5 *(a)* and 55, the principle of upholding international law, not violating it and not interfering in the internal affairs of the State.

22. Much as it might wish to, point six, India cannot wish away Article 6 of the 2018 Agreement. ***Seventh point: t***he claim for at least acquittal, release and return is outlandish and effective review has always been available before the Pakistani courts. ***Eight point: m***uch as India might wish to insult the institutions of Pakistan, they have been robust and continue to be robust to uphold the rule of law — most recently on 18 October 2018, when the Peshawar High Court had no hesitation in overturning 70 plus death sentences and convictions for terrorist offences.

23. And last: concluding remarks.

The fundamental flaw in India's position is that neither the nature of the charges nor the conduct of the sending State is relevant and, as I point out, that is an absurd proposition. One only has to see it on the screen, to read it, to process the words, to see how nonsensical it is.

24. But let us look at Commander Jadhav's conduct.

25. His admission included the following, and the reference is to my written submissions at page 67.

— He was a serving officer of the Indian Navy, due for retirement in 2022. He was 47 at the time that he was arrested, with a cover name of Hussein Mubarak Patel, which was used for intelligence operations on behalf of RAW (India's principal foreign intelligence agency) [CMP, p. 11, paras. 1-3];

— RAW began to sharpen their focus on undermining Balochistan around 2014 when the new Government came to power in India [CMP, p. 30, para. 106, para. 3];

— Commander Jadhav was apprehended soon after having crossed the border into Pakistan from near Saravan. His intention was to meet his "assets", the instruments of terror, the terrorists used by India [CMP, p. 11, para. 5; CMP, p. 33, para. 2]. He was travelling with his RAW handler "Rakesh" up to the border [CMP, p. 33, para. 2];

— He was carrying the "cover name" Indian passport so that if stopped and checked, he could demonstrate that he held a valid visa to be in Iran [CMP, p. 33, para. 3].

26. India resists, according to Mr. Salve, the temptation to answer the following questions. When did he retire and why, well before retirement age? What evidence is there that he has retired? I am very happy to ask my learned friend for an explanation as to why, if Commander Jadhav had retired on 29 February 2016, Commander Jadhav's account received 90,605 rupees by way of pay. Not pension: pay. I am quite happy to share this with my learned friend. I am quite happy for him to see these, because India unfortunately is too reticent to share with this Court the evidence which would demonstrate its own moral turpitude.

27. Why was he ***in*** possession of an authentic Indian passport with a ***Muslim*** "cover name" yet again? What is India bashful about? We provided India with a copy of a detailed explanation provided by Commander Jadhav in a 10-minute video yesterday. It is not in the public domain. It

has not been leaked to anybody. India's answer, to try and block it from being presented before this Court, was: no explanation has been provided as to the need for production of this evidence. Really? It answers the question why he was in possession of an authentic Indian passport. If this is allowed to be exhibited, India will be seriously prejudiced. Yes, absolutely, because the world will see why you gave him the passport, who gave it to him, when they gave it to him, and he will explain in his own words that so far as he was concerned, this is an elementary tool of spycraft. And it is a pity that India, at every available opportunity, seeks to block any access to the truth.

28. If he was forcibly taken from his "cover business base", how did he end up making the nine-hour journey to Pakistan? In the boot of a car? And what steps did India take to seek an investigation within Iran as to the alleged kidnap? The answer, I hope, will be provided at some stage.

29. Lest anybody suggests that Pakistan is alone in asking these questions, there are three highly credible, independent Indian journalists who have carried out their own investigations from April 2017 onwards. Each and every one of them has been subjected to scurrilous abuse, from showing an anti-national stand to being a traitor, to being a swine, to ***advancing*** a concoction and, most recently, to be the subject of a criminal complaint for sedition. So much for the world's largest democracy and freedom of press.

30. The first gentleman, Karan Thapar, is the son of the former Indian Army Chief of Staff, hardly a rebel renegade, one would have thought, a former CNN correspondent. And what does his article say? It is in the judges' folder at tab 26. **"**The case offers more questions than answers**"**, the case of Commander Jadhav, and he asks the Ministry of External Affairs about the passport. They said they needed to access Commander Jadhav to check why he had the "Muslim cover name passport" — that is my language — and the one in his own name. And he asked them, not unnaturally: "Why not check the records attached to the passport numbers? Surely they would tell a story?" It is not a story that India wants the world to read or hear about, so it just uses the phrase "concoction, propaganda, litany of lies". Well, these lies are being exposed here and now.

31. Praveen Swami, former diplomatic editor of the *Daily Telegraph* of London, no less. His journalism is the epitome of journalism. These individuals represent the beating heart of the India that I have respect and admiration for, that I ***worked*** with; they are fearless, prepared to expose the

truth and stand up for pluralism~~, *and*~~ secularism and democracy; and what does Praveen Swami identify, with reference to intelligence officers' interviews with people who *served* with Commander Jadhav? That RAW was building up a covert action programme to target Pakistan from 2013 onwards, as masterminded from May 2014 onwards by Ajit Doval (we will see a picture of him shortly. I am sure he does not want the world to see it, but they will) — the National Security Adviser to the Prime Minister of India [judges' folder, tab 28; see also Rejoinder of Pakistan (RP), pp. 26-27, paras. 89-94; RP, Vol. 1, Ann. 25] that Commander Jadhav established a cover business in Chabahar, which did little business, very similar to what Commander Jadhav was saying . . .

The PRESIDENT: Mr Qureshi, Mr. Qureshi, I am sorry to interrupt you, but could you kindly speak a bit slower for the interpreters?

Mr. QURESHI: Of course, of course.

The PRESIDENT: Thank you.

Mr. QURESHI:

32. There's a "Muslim cover name" passport that gives an address which is the property owned by Commander Jadhav's mother [judges' folder, tab 28, p. 253, para. 7]. According to a RAW official this "makes it impossible for India to deny he is who he says he is, which [apparently] is a basic element of tradecraft". No doubt angered by this exposure, the very same RAW official went on to say: "It's criminally irresponsible for a spy's cover identity to be so closely linked to his real life" [judges' folder, tab 28, p. 253, para. 8]. It seems ***that*** unfortunately that Commander Jadhav was displaying the arrogance which is reflected in the conduct of India in these proceedings. What was the answer of India? To describe the article as "concocted and mischievous". And what was the response of the public of India, who unfortunately had been had been whipped up into a fury — as no doubt they are being right now, as I'm speaking, to encourage the murder of Praveen Swami as a "traitor"[RP, p. 5, fn. 2].

33. Chandan Nandy, the former senior assistant editor of the *Times of India* group, one of only two newspapers of record of India **[**judges' folder, tab 27]. He was forced to retract this article

the very next day. There is no suggestion that it was inaccurate; the suggestion in the public domain is that he was put under intense pressure and is the subject of a complaint for criminal sedition. And what does he say?

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

34. The other evidence, the evidence that India does not want to engage with — the evidence which is damning as to India's illegality — was the second passport, with the name Hussein Mubarak Patel, that he carried, which shows that it was originally issued in 2003 and was renewed in 2014.

"While one passport is in his name **(**and, mercifully, whilst we have been asking since May 2017 for India to provide a copy of his actual passport, the way that normally nationality is established, it has taken a journalist to tell us what his actual passport is**)**. The second one raises more questions, especially the date of its issue and why he signed it as Hussein Mubarak Patel to enter into a property deal (with his mother) in Mumbai where he lived with his wife, parents and children before he was "nabbed"**"**, they say — we say arrested — by the Pakistani Intelligence Services **[**judges' folder, tab 27, p. 248].

35. Now Dr. Mittal is sitting here next to me, and Dr. Mittal had no problem respectfully submitting to the Court that India believed Commander Jadhav had been kidnapped from Iran [MI, 13 Sept. 2017, p. 10, para. 41]. Reply insisted upon [RP, 17 April 2018, para. 31 *(e)*]. Where is the belief? India hosted the President of Iran, no less, on 19 February 2018, in between India's rather bare Memorial and even barer Reply. Perhaps Dr. Mittal will explain to this Court eventually why he did not ask the President of Iran — or the Indian Government did not ask the President of Iran, the questions that journalists were positing to Dr. Mittal. The first question — this is an official Ministry of External Affairs release on 19 February, Dr. Mittal deflected — I'm being polite — questions.

> "Q. Did we raise the issue of [Jadhav's] abduction from Iran?
>
> A. This issue did not figure in the discussion.

[judges' folder, tab 14, p. 162, paras. 3-4]

Q. Is there any reason why the Jadhav issue did not come up, why we did not want to bring it up in our discussion?

A. It is not a bilateral matter with Iran in any case.

[judges' folder, tab 14, p. 162, paras. 9-10]

Q. Was it our decision that we did not want to include Kulbushan Jadhav in one of the areas during the visit or we wanted it but Iran didn't want it?

A. the answer would be no. And as I mentioned this is not a bilateral issue in any way between India and Iran."

[judges' folder, tab 14, p. 166, paras. 5-6]

Please, Dr. Mittal, tomorrow, explain how you can respectfully believe that he was kidnapped.

36 .Then we come to the crux of the matter, the reason that exists for creating people like Kulbhushan Jadhav. And ***it is*** embodied in this gentleman, India's so-called *superspy*, who outlined how he wanted to "tackle Pakistan". In a disgraceful show of bravado, at a university, no less, Sastra University [judges' folder, tab 25, p. 2, para. 9]**.** What does he say? In a speech that was quoted on 30 September 2016 in The *Indian Express*, a speech he had given in February 2014, prior to the election of this present incumbent government [CMP, p. 49, para. 170.2; Ann. 143, p. 2]**,** a speech which, it has not been suggested, is inaccurate. Ordinarily, as all of us understand, if somebody is misquoted in a newspaper, generally they make an effort to try and obtain a retraction or an apology. Generally. If they do not, then one is left with the impression that what is in the paper is true. Unfortunate, but in this case, India has had access to this since December 2017. It has not said this is not accurate, so the Court proceeds on the basis it is accurate, unless Mr. Doval wants to come to Court tomorrow and say otherwise.

"Pakistan's vulnerability is many times higher than that of India. Once they know that India has shifted its gear from the defensive mode to defensive offence, they will find that it is unaffordable for them. You can do one Mumbai, *you may lose Balochistan. There is no nuclear war involved and there is no troops engagement. If you know the tricks, we know the tricks better than you*." (Emphasis added)

A shameful, disgraceful way of putting a position of a State forward without any apology. And yet, despite all of this, India has the audacity to describe the trial of Commander Jadhav as farcical. India has the audacity to criticize the death sentence which was imposed after a trial lasting nearly six months, with four stages, giving Commander Jadhav three weeks to prepare, at his request, an

adjournment with a legally qualified defending officer. I say audacity because very recently, on 30 January 2019 the Indian Prime Minister, no less, reflected a lynch mob mentality, I'm sorry to say, where he extolled the virtue of rapists being hanged within "3 days, 11 days and 1 month" And then the fact check correction suggested that what he was saying was "being sentenced to death" within 3 days, 11 days, 1 month. The references are in the written submissions.

We move on to the next phase, India's conduct.

37. India has deployed this process for political theatre, for "point scoring", seeking in the words of my friend, Mr. Salve, when he was trying to knock out the *Marshall Islands* case, "remedies and relief far beyond those that would flow" [CMP, p. 38, para. 129].

38. Why did India come to this Court on 8 May demanding an order for provisional measures without a hearing, insisting that Commander Jadhav could be executed any day, insisting that his death was imminent. Why, when proper examination takes place, is this case as far removed from *LaGrand*, where somebody was executed in the face of this Court's provisional measures Order, or *Avena*, where people continued to be executed in the face of provisional measures orders. Why is this case as far removed as can be from the invocation of provisional measures, never mind provisional measures without a hearing. What was India's objective? ***What w***as it really, if one seeks to descend into the febrile or perhaps demented imagination that might be behind this? Was India really expecting that Pakistan would execute Commander Jadhav in the face of this Court's Order? India does not know Pakistan. Pakistan is a State that has provided one of the largest contingents for peacekeeping for the United Nations, whose soldiers have lost their lives in pursuit of international peace and security. India seriously expected, in that context, I am imagining what a demented imagination might be wishing in the face of a provisional measures Order, that Pakistan would violate that Order? On the contrary, not only was the Order obeyed and respected as Pakistan has repeatedly pointed out, but Commander Jadhav has been visited by his mother and his wife on Christmas Day -- the birthday of Mr. Jinnah -- in 2017. India could not resist spinning that either.

39. India, I am sorry to say, has demonstrated a lack of good faith throughout these proceedings and I am going to identify three abuse of rights which India has manifested because good faith is unquestionably a part of international law and if my friend wants to tell me that

Sir Hersch Lauterpacht is not an authority for a proposition of international law, then I welcome him to do so.

40. The three abuses are as follows:

(1) India needs to explain *how* Commander Jadhav was an Indian national, provide evidence of the same. They will not provide his actual passport in his real name. To suggest that a false cover name authentic passport is valid evidence of Indian nationality is, at best, perverse.

However, India goes one step further, and India is adamant that Commander Jadhav has not committed a criminal offence and he is not going to be investigated. The Indian Passport Act 1967 makes possession or use of a document in a false name a criminal offence, punishable by imprisonment unless the State has given immunity. So it may be that the reason why Commander Jadhav has not committed a criminal offence is because, according to the statute, he has been given immunity. It gets murkier and murkier if India tries to answer, and no surprise that it does not wish to.

(2) By failing to engage with the mutual legal assistance request of 23 January 2017 [extract at judges' folder, tab 6; see also CMP, p. 17, para. 52; p. 50, para. 172, Vol. 2, Ann. 17], India did everything other than provide ~~***with***~~ the greatest measure of assistance in connection with a criminal investigations or criminal proceedings relating to the financing or supporting of terrorist acts including assistance in obtaining evidence necessary for proceedings. Why do I say that? Because most mutual legal assistance requests are not based upon treaties and certainly not if they are invoking a mandatory United Nations resolution such as this. To say this is propaganda is, with respect, risible. To say that India was not provided with enough information is equally far-fetched. The MLA request identified Commander Jadhav's activities, his own confession no less, the first information report, the criminal provisions of Pakistan's law that were engaged and identified the evidence that was required, bank account records, information relating to individuals that he had named, including an Inspector ***Bali*** who, when India watches the video, which I assume they have, is the gentleman who gave the passport to Commander Jadhav. What does India say? It is propaganda. What else does India say? We made 18 requests for mutual legal assistance [RI, p. 2, fn. 2], which then jumps a few

paragraphs later to 40 [RI, p. 14, para. 43, line 5], unable to contain their enthusiasm for exaggeration, that have not been answered by Pakistan. Is that justification?

(3) The third point, failing to provide any form of explanation ***as to*** how it is that Commander Jadhav was able to travel frequently to and from India using an authentic Indian passport bearing a false identity in a Muslim name [CMP, pp. 59-63, paras. 206-218.2; RP, pp. 16-23, paras. 45-80].

It simply cannot be legitimate for a State to issue travel documents in false identities which are otherwise authentic and facilitate travel, as well as provide "cover" for illegal acts. I say that and if authority is needed for that proposition then one turns to the very same Security Council resolution 1373, Article 2 *(g)* demands controls on the issuance of travel documents, not liberally providing them to enable cover for illegal criminal activities, destructive activities, including espionage, requires that States accelerate the exchange of information especially regarding terrorist persons' movements, "forged or falsified travel documents" [CMP, p. 51, paras. 178-182] and that is what India was being asked for on 23 January 2017 when a copy of the passport, assuming India did not know what the passport said, was provided to India. India ridiculously put the documents back proverbially in the post, the diplomatic bag, sent them back to Pakistan. I say ridiculously, as if somehow wishing to push this issue away metaphorically, legally, physically, morally, but they could not because it is here before this Court today.

41. It is a simple proposition, and again I challenge my learned friend to explain to me why Judge Schwebel no less is not authority, never mind Sir Gerald Fitzmaurice, for the proposition that an unlawful act cannot serve as the basis of an action in law. Because if he is going to say that Sir Hersch Lauterpacht, Judge Schwebel and Sir Gerald Fitzmaurice are not authorities, then I am afraid all of my studies of public international law have gone to waste.

42. The failure to engage with the MLA requests is only for one reason, due to the lack of clean hands on India's part.

43. The failure to rebut the clear and necessary inferences that India provided an authentic Indian passport to Commander Jadhav in a false Muslim "cover name", is compelling evidence that

India's hands are sullied and that its claim to seek consular access is founded on a bed of moral turpitude.

44. I am not making these submissions lightly. I made them with a heavy heart. But I am compelled to make them because it is the truth. These observations are based not just upon the unchallenged evidence of an expert but the Court has been given an insight into the investigative efforts of three separate Indian, highly credible, highly respected journalists supporting these propositions to suggest this is a concoction, to suggest this is propaganda, is utterly absurd.

45. India knows that. India's Note Verbale dated 11 December 2017 stated, although it is not so far off into the distance as the typo would suggest, one wonders what would be here in the year 20117, it is 2017 of course. What did India say? That Pakistan is asking repeatedly for an explanation

> "in respect of a purported document that looks like a passport [it is a document, whether it purports to be a passport or not is another matter, it is not a purported document, it is a document], and which, on the allegations made by Pakistan is clearly a forgery . . . [We never said it was a forgery but thank you for saying that for the first time. And then perhaps you will explain why it is a forgery.] Pakistan has raised questions on the provenance of the document that looks like a passport [it smells like a passport and it feels like a passport and — surprise, surprise — it is a passport] and . . . seeks explanations from India in relation to the same document" [judges' folder, tab 10.4, p. 85, para. 2; see also RP, Vol. 1, Ann. 15, p. 2, para. 2].

Yes, you understood perfectly well, India, what Pakistan was asking for. But what did you say?

46. When we asked on 19 January 2018 how you had described it as "clearly a forgery" [judges' folder, tab 10.5, pp. 89-90, paras. under heading (B); see also RP, Vol. 1, Ann. 16, pp. 2-3, paras. under heading (B)], because by then you had received our Counter-Memorial ***annexed to which*** was a report produced by an independent expert, Mr. David Westgate ***[Ann. 141; judges' folder, tab 3]***. We asked you having read, one assumes, the Counter-Memorial by then, having had it for nearly a month, how do you disagree with its conclusions, which included that "The passport is a *genuine and authentic Indian* travel document and not a counterfeit" [paragraph 9 of Mr. Westgate's report]. How could you rebut his understanding, because he said:

> "From *my knowledge and understanding of the airport immigration system in India*, the immigration counters are connected to a central database, and *any irregularities in the authenticity [of] a passport would ordinarily be flagged up on such a database*." (Emphasis added)

And then what did he say in his conclusions:

> *"Based upon my observations and my experience and examination of the passport, I am satisfied that it is an authentic Indian passport which I believe must have emanated from the Indian authorities."* [Para. 16; emphasis added.]

And how did he sign off?

> "*I fully understand my duties to the courts when giving an expert report*" [para. 18; emphasis added].

47. And what was ***India's*** answer, three months later? The questions were "aimed at propagating falsehood and propaganda by Pakistan in the matter" [judges' folder, tab 10.6, p. 91, para. 2; see also RP, Vol. 1, Ann. 17, p. 1, para. 2]. This is a passport, I must remind the Court, that had been used on at least 17 occasions by Commander Jadhav to come in and out of India.

48. And what did India do? Not content with describing Pakistan's position as "aimed at propagating falsehood and propaganda", they added insult to injury, the injury that Commander Jadhav has caused countless civilians in Pakistan the destruction, the trail of destruction and devastation that he had left behind, the guiding hand of which is Mr. Ajit Doval, insultingly describing Mr. Westgate as a "purported" expert. There is that word "purported" again, the word that people use when they do not want to believe the truth. What is his expertise? The Court has his report in front of it, but I will just read it out for the benefit of India in case my learned friend never read it.

> "3. In the course of my work, I have examined many thousands of travel documents. Specifically, I have experience of Indian travel documents due to my 3 years' experience in the region and the follow up work I conducted whilst serving at the NDFU [National Document Fraud Unit of the United Kingdom which is the centre of knowledge and information for the UK Home Office for all travel documents].
>
> . . . . . .
>
> 5. I am presently engaged in Forensic analysis and business support for a major international company that produces passports and identity cards.
>
> . . . . . .
>
> 7. On 7 November 2017 I conducted a physical examination of the passport in London, United Kingdom. The document was handed to me . . . During the course of my examination I used a long wave Ultra Violet (UV) light source and magnification."

Not throwing it up in the air, with a coin at the same time — "heads" it is authentic, "tails" it is fake.

> "Details of the passport

> 9. The document that was presented to me purports to be an Indian passport of the "L" series of which I am very familiar. [He says 'purports' because he has not examined it yet, that is the chronology of events.] Although I held no comparison material, from my knowledge, expertise and familiarity with these documents I can state that it is a genuine document and not a counterfeit. The document contains various security elements which together make the document what it is. I noted the presence of a high quality cylinder mould watermark throughout the document, random UV fluorescent fibres and high quality print."

49. I should point out that in the Counter-Memorial the Court will find that the ICAO guideline 9303, seventh edition (2015), identifies the standard pursuant to which travel documents ought to be issued by States if they want their nationals and those who are masquerading as their nationals for legitimate and illegitimate purposes to travel. And these are the characteristics from there.

> "The main portrait in the document is inkjet printed and there was no evidence to support that this image had been manipulated. There is an additional ghost image which is made up of personal data in a wave pattern which adds further confirmation to the authenticity of the image and data. The laminate has a security print on the insides which I found to be clear and undamaged. I found no evidence that the image is not original to the document."

50. And what did he say, he "served as part of the United Kingdom Home Office and Immigration Intelligence for more than 27 years" — the UK Home Office and Intelligence. He has been

> "a member of the Heathrow Terminal 4 forgery team [for 11 years] and then served on attachment to the Foreign and Commonwealth Office as Immigration Airline Liaison Officer based in New Delhi serving the whole of northern India and Nepal advising airlines and border security control officials on forgery and fraud in travel documents".

51. And then what did he do?

> "[He] left the Home Office in 2017, but [he] served as Chief Immigration Officer at the National Document Fraud Unit (NDFU). The NDFU is the centre of knowledge and information . . . for travel documents. [He] has provided evidence in both Crown and Magistrates courts representing the Home Office in cases involving document fraud."

52. To describe him as a "purported" expert, four months after having read his report is galling. ***Likewise, t***o describe him as a "purported" expert after he spent three years in India as Immigration Intelligence Liaison Manager, where his CV also tells us he worked closely with Indian intelligence officers, police, UK security services and the visa sections, across the whole of northern India and Nepal advising Indian and Nepal border control on documentation and security. To describe nevertheless the position in the light of this report as "propaganda", as farcical, as

mischievous, as part of a litany of false allegations which India will not respond to, is disgraceful. We say that it has reached the level of disgrace for this Court, for the first time ever, to conclude "that India is guilty of egregious illegal conduct in providing Commander Jadhav with an authentic passport and false identity, and despatching him to carry out acts of espionage and terrorism in Pakistan in contravention of the Charter of the United Nations" [CMP, Section III (C), p. 63, para. 219]. The Attorney General gave the Court an insight and of course it is all too often the case that there are complaints and counter-complaints, allegations and counter-allegations, here, perhaps for the first time, we have a court which is presented with clear, compelling, uncontradicted evidence of the turpitude of the State abusing the facility of provision of a passport to provide one of its agents of destruction and terror with a facility to be able to wreak havoc in Pakistan. Havoc that, thanks to the sterling work of the Pakistani security services, he was prevented from continuing. Havoc which must have consequences, not just for India but for Commander Jadhav. The idea that he can be immune in the way that India suggests it is immune for its actions, is obnoxious, I am sorry to say.

53. We say, as a consequence, of all the evidence that is before the Court, the burden of proof shifted to India in December 2017. After all, India asked for a further round of pleadings to fully rebut the facts and the law. And what did it do? It did ***nothing***. ***Yes, t***he burden of proof shifted***, t***o explain the passport issue and explain India's conduct. It just was not acceptable to avoid doing that.

54. The second aspect of India's conduct which is unsavoury and which I am forced to bring before this Court is the report of the military experts and India's doctoring of it.

55. India does not like the truth, I am sorry to say, and I am not going to varnish it. Because the truth has to be heard. Yesterday, we heard Mr. Salve's mealy-mouthed explanation for doctoring the experts' report and yesterday the experts had, by way of a supplementary report, sought to make it absolutely clear what they intended in their report, lest anybody who does not understand the English language in the way that it is meant to be understood, was under a false impression. And India tried to block that. It was not an unabashed attempt to lead further evidence, it was to address misrepresentations, but of course that is not what India wanted. What was impermissible was not allowing the experts to come before the Court and say, unlike

Humpty Dumpty, we used plain English; we did not give India a license to add or delete words. India did not want you to hear that, honourable Members of this Court. But I am telling you now.

56. The military experts, the distortions, the *shocking* distortions.

The first one is the typographical error that my learned friend says "entered into" paragraph 154, but he could not stop himself. Because yesterday, in paragraph 222 of the transcript he said: "In paragraph 3 *(d)* of the report, the experts state their conclusion that manifest failings . . . can be remedied by judicial review. India relies on this statement as an acknowledgment that there are manifest failings." I don't see how, given that they use the word "potential". But there you have it, we obviously have been using different languages and different dictionaries in different parts of the world. "It does so in paragraph 19 of the Reply. Pakistan does not suggest there is any misquotation in this paragraph."

I say, he could not help himself, because if he had bothered to look at our Rejoinder, page 4, Part II, paragraphs 24 to 26, we made it clear we were taking issue with paragraph 19 and paragraph 154 *(d)*.

57. So sadly, with respect to my friend, we did. But this is yet another example of a "catch-me-if-you-can" type attitude towards legal proceedings.

Well we have caught you. Deletions and additions of words is the order of the day.

Deleting the word "often" was the second distortion. And then wanting to pretend that the experts, as objective and independent bystanders with their expertise and credibility, were not trying to help the Court by referring to the fact that courts which try terrorism offences both in India and Pakistan had both been the subject of general criticism, they gloss over the reference to India and Pakistan and create the irresistible impression that the experts were only referring to ~~***India***~~ ***Pakistan***.

58. Now, if one mistake had been made, one could understand perhaps it is carelessness or incompetence. If two, troubling. Three, deliberate. Even worse, as the Court knows, we have repeatedly written to India to ask India to correct. In June of last year, before we were finalizing our Rejoinder, we asked India to check the contents of the Rejoinder. And we were brushed aside, when the Rejoinder was filed.

59. Subsequent to that, India could have corrected. We were brushed aside, told: "Take it up with the Court." We took it up with the Court, on 19 January of this year. And what happened? India maintained its position.

60. Then, I, as a matter of professional courtesy, drew it to the attention of my friend, Mr. Salve, on 7 February, because some of us still believe in professional courtesy, some of us believe in professionalism. I am sorry to say, I never received a reply from Mr. Salve. I pointed out 14 February would be an opportune date to provide me with a response, so that we could take stock.

61. So to say that the experts have been deployed before this Court late, as India has done in its letter of yesterday, fails ~~***to prepare the Court and***~~ provide the Court with a full picture, unsurprisingly. We were trying to give India every single opportunity to correct, to clarify, to apologize. And it is only at the last moment that we wanted the Court to be ~~***made aware***~~ ***reminded*** exactly of what the experts had said ***if necessary***. And that is why the experts were keen to ensure that there was no misunderstanding and to file a supplementary report.

62. Each and every opportunity India was given. Arrogantly it dismissed. Well you can't dismiss the truth; it is here, now. And each and every one of those opportunities just adds to the ***conclusion*** of deliberate conduct. Because if you are given four opportunities to correct the position, and you don't, it is difficult to conclude other than: you are being cavalier, you are being arrogant, but you are also being very insulting. And that won't work. There may be some courts in this world where it is possible to get away with lies of this nature but this Court is not a court where any litigant, let alone a State or any advocate can be allowed to play fast and loose with the truth.

63. And it is important for this Court, even if this is the first time ever in the Court's history, to identify what the red lines are for conduct. Sadly, we are living in a world in which the rule of law is coming under increasing threat. And it is important for this Court as it has done historically throughout its existence to inform the world where the lines are. And not to allow them to be erased or blurred by States that believe that alternative facts, fiction, fantasy, fallacy are the order of the day.

64. And then we move on to the second category of misleading.

It was not enough to doctor the military experts' report, India had to then try and disavow its own handiwork; the 2008 Agreement on Consular Access. India's Reply said: "This has no bearing on the present dispute." I remind myself, the title was: "Agreement on Consular Access". But now it says, it does have meaning. It does supplement and amplify the understanding of the Parties vis-à-vis the Vienna Convention in some ways, but conveniently, not in this case.

Why? And this is where yet further distortion comes in, because what India does is, it totally misreads, deliberately the terms of the Convention, the bilateral agreement. Pakistan is not relying on Article (iv) or (v), it is referring to stand-alone provision Article (vi), which I shall take the Court to.

65. What does Article (vi) say? And I will explain that full stops have a meaning; commas have a meaning. This is not a lesson in punctuation, this is a lesson in accuracy. Article (vi) says the following: "In the case of arrest, detention, or sentence made on political or security grounds, each side may examine the case on its merits." That's pretty clear language. What does India do? In its Memorial, paragraph 92,

> *"The 2008 Agreement, was entered into for 'furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country . . .', and by which the two signatory States, India and Pakistan, agreed to certain measures."* (Emphasis added)

No qualms with that.

> "These included the release and repatriation of persons within one month of confirmation of their national status and completion of sentences."

No qualms with that.

> "The Agreement recognised that in case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its own merits . . ."

Absolutely right, that's Article (vi). But then what happens: the text, the mischievous comma, and the addition of the words "and that", what I describe politely as India's "creative addition", others may say "deceit":

> "in special cases which call for or require compassionate and humanitarian considerations, each side may exercise its discretion subject to its laws and regulations to allow early release and repatriation of persons. *India does not seek early release or repatriation of Jadhav, as contemplated by the 2008 Agreement*". (Emphasis added)

What utter nonsense.

66. By simply — I say simply — adding a comma and the words "and that". And no doubt Mr. Salve eventually, when pushed, will tell us that was yet another typo.

67. It is a simple fact that the 2008 Agreement was negotiated over a period of three years. Indeed it expressly sought to replace an earlier agreement operating since 1982 no less. Article (iii) of that agreement, which the Article (vi) sought to replace, was much more detailed.

> "Each Government shall give consular access on a reciprocal basis to nationals of one country under arrest, detention or imprisonment in the other country, *provided they are not apprehended for political or security reasons/offences. Request for such access and the terms thereof shall be considered on the merits of each case by the Government arresting the person or holding the detenus/prisoners and the decision on such requests shall be conveyed to the other Government within four weeks from the date of receipt of the request*" [CMP, pp. 100-108; judges' folders, tab 18, p. 209; emphasis added.]

It is exactly the same language consideration on the merits: political and security reasons offences. Somehow, unfortunately, when it comes to this case, India's answer is: but Pakistan never referred to it. Well you did, as I shall show it shortly.

68. And when did you refer to the Vienna Convention on Consular Relations, as my dear friend reminded us yesterday in your regular missives about consular access. Did you invoke the Vienna Convention on Consular Relations? Was it necessary? You are saying it is an agreement between the parties, so was it necessary to refer to it? Was it equally necessary to refer to this 2008 Agreement?

We will come to the 2008 Agreement subsequently.

69. And the third category of misleading, which I have to say I am much more disappointed about, because I would have wanted Mr. J.P. Singh to be available for this Court. He submitted what he described as a seven-page report dated 26 December ***2017*** in the aftermath of the visit to Commander Jadhav of his wife and mother. Now, if it has been suggested that Commander Jadhav's visit was evidence of impropriety on the part of Pakistan, we are very happy to share the entire video, unedited, of the interaction between Commander Jadhav and his wife with J.P. Singh looking on to ensure that matters were dealt with properly. And the video will show that Commander Jadhav's mother commented on his excellent health. We referred to the report as being materially inaccurate and we asked Mr. Singh be tendered for cross-examination. India refused and said we should take it up with the Court.

70. We asked by Note Verbale of 5 June for India to check the accuracy of the contents of the reply and again we were told, in essence, as is characteristic for India: "This is inappropriate, irrelevant", by letter dated 27 June 2018. So much for wanting to help. Sadly, even in this day and age, sadly even a handshake seems to be misunderstood. On the one side, it is a sign of respect; on the other side, it is a sign of shame. Decorum: that is all we are asking for.

71. So we asked the Court on 18 January for Mr. Singh to be available for cross-examination, and the reply was a model of evasion. He did not give a witness statement, he gave a report. And then what happened. By the way, he has corrected his report. The date was not 26 December, it was 5 January. And this is the marvel that we were presented with, purportedly dated 8 August 2018, provided by way of attachment to a letter dated 23 January from Dr. Mittal. Why, one asks, when we were raising this with you in June 2018, when you had notice from us that there may be issues about inaccuracy? Why is it that Mr. Singh is writing this letter in August 2018? Was it the monsoon heat that got to him, that made him remember the date of the letter? Because what he says is: "I know it is dated 26 December" — ***legibility*** is not quite right for whatever reason, happy to see the original — "but you should read it as 5 January 2018, sent to Dr. Mittal".

72. I am sorry that he is not here, because this letter can be easily demonstrated to be a "concoction" to use India's words, "manufactured". Melodrama is added to this letter by the use of the word "secret" at the top right-hand side. Bizarre that a letter that is supposed to be secret finds its way as an annex to a Reply to a case before the International Court and is ***now*** being seen by the world at large. We will see, at the bottom, that J.P. Singh arrived in Delhi on ***26 December 2017*** at 3.45. It is dated 26 December 2017; it is seven pages, and he says at the bottom that he signed it in New Delhi, while he did not, he says himself he did not. So the date is wrong, when he signed it is wrong, where he signed it is wrong, because on 28 December he went back to Pakistan where he is the Deputy High Commissioner.

73. And what else was there in this letter that is objectionable? It is written to Dr. Mittal, and I am reminded that he is sitting next to me. Of course, he is the Agent for India. If anybody knows about Indian culture, it is Dr. Mittal. And what does he say to him? While the Government of Pakistan did assure a security check with full dignity, the Pakistani security official removed all the

ornaments and bangels, including *mangalsutra* and *bindi*, which are of immense religious sensitivity in Indian society and a symbol of a married woman. Did Dr. Mittal really need to be told that? Please. You may fool yourselves but you do not fool the rest of the world. And then what does he say? "The appearance of Mr. Kulbhushan Jadhav — while I could not hear the conversation of Jadhav and family members because of two glass partitions — the physical appearance, gestures and body language indicated the following" . . .

The PRESIDENT: Mr. Qureshi, the interpreters are having a lot of difficulty to follow you.

Mr. QURESHI: I apologize.

The PRESIDENT: If you can please slow down for their sake.

Mr. QURESHI: I can only apologize. I am conscious and anxious to ensure that the material is, we have a time-limit and I want to stick to the time-limit and am not one for elongated time-limits, so I apologize for going through this at my normal canter speed. I will move into ***slow*** trot.

"Jadhav's face was looking puffy and swollen. He was very hyper-active, seemed as if he was not in his senses, was under the influence of something." Short-hand for he had been tortured, he ***had*** been drugged? This is an independent medical expert no less.

74. Dr. Nellessen, a German national, not a Pakistani national, based in Dubai at the Saudi-German hospital, a consultant who produced a 14-page medical report, independent medical examination on 22 December ***2017***, concluding that Commander Jadhav was in excellent health condition. Three days later, we are told that he was looking puffy and swollen. He is not in his senses. Now, I have to make the following observation. It means this: up until the doctor saw him, Commander Jadhav was healthy and in the interim he was tortured and sedated. Now I do not mean this in jest, but was that necessary for him to see his mother and his wife? Is that the reason? It just illustrates the absurdity of the proposition.

75. And in paragraph 15: "KJ's video released by Pak[istan's] side after the meeting". The Court has not seen this but I may as well tell everybody what the video says. It is Commander Jadhav, untutored, unprompted, exasperated at the fact that J.P. Singh was shouting at his mother and wife. This video was released on 4 January 2018, not a few days after the meeting.

So you see the entire narrative of J.P. Singh breaks down, because it was not a few days after. So much for truth and accuracy. I do wish J.P. Singh well in his future career as a fantasy fiction writer, but the next time he want*s* to produce a document which is going to be put before court, I hope he will make himself available for cross-examination.

76. Third point, at no material time, even now, has India furnished any evidence that Commander Jadhav is an Indian national, despite repeated requests. The gateway point that I mentioned at the outset . .

Is this a convenient moment?

The PRESIDENT: Yes. It is a convenient moment for a break and therefore the Court will observe a 15-minute break. The meeting is adjourned.

The Court adjourned from 11.35 a.m. until 12.00 noon.

The PRESIDENT: Please be seated. The sitting is resumed. I invite Mr. Qureshi to continue his presentation. In view of the longer coffee break taken by the Court, Mr. Qureshi, on behalf of Pakistan may go a little bit beyond 1 o'clock, and I hope that will enable him also to allow the interpreters to follow him and not to rush too much.

Mr. QURESHI: Mr. President, I ought to make it clear that Fani Oubella and Catherine Le Madic have both received a personal apology from me, and not by way of inducement, they shall also receive a box of chocolates. And if necessary, we shall also provide a box of chocolates to the interpreters, who do a wonderful job and are hidden from view, but it is thanks to them that the record is created for posterity's sake. So thank you very much, and I apologize.

77. Now, before I move on at a slower pace, I should make reference, in fairness, to the experts who have been blocked by India from providing the Court with their emphatic denunciation of India's doctoring of their report, who have been blocked by India from referring to the 18 October 2008 Peshawar High Court decision confirming the observations they had made on 29 November 2017 as to the effective nature of review and reconsideration pursuant to Article 199 of the Constitution of Pakistan, and been blocked by India from pointing out that less than

8 per cent of those convicted by military courts have in fact been executed. But I put that before the Court now, and that statistic is available from the International Commission of Jurists report of January 2019, and it is a pity that India did not seek to update the Court about the Peshawar High Court decision of 18 October and it is a pity that India did not seek to update the Court about the International Commission of Jurists report of January 2019, but to help out my learned friend, I have done it for him.

78. Now, the experts' report is at tab 4 of the judges' folder, but all I am going to do is to refer to it very, very summarily. The experts, for many of us, need no introduction. They are individuals whose background is one that speaks clearly not just of independence and impartiality, but also expertise. Professor Charles Garraway, who has not been prohibited from sitting in this Court because he was not going to seek to give evidence in any event, has served for 30 years as a legal officer, had served for 30 years as a legal officer, in the army of the United Kingdom. He was appointed a CBE in 2002 and he was the general editor of the United Kingdom *Manual on the Law of Armed Conflict* from 2008 to 2013. He is the consulting editor of the *Practitioners' Guide to Human Rights Law in Armed Conflict* published by Oxford University Press. Brigadier Anthony Paphiti, who has been locked out of court, but is able, thanks to the miracles of modern technology, to watch these proceedings in the adjacent room, is a lawyer who was in the army and was the first legal adviser to the NATO Allied Command Europe Rapid Reaction Corps headquarters. He is also the author of the *Military Justice Handbook: For Court Martial Practitioners,* 2013.

79. So one would have thought that when they approach the subject of State practice regarding the jurisdictional basis, process and procedure for military courts, and when they reviewed the State practice of ten United Nations Member States, including the United Kingdom, the United States of America, Israel, New Zealand, Nigeria, Pakistan and last, but by no means least, India, that their report might be given some respect, because they asked themselves what the practice was of States regarding the jurisdictional basis, process and procedure for military courts, and military courts vested with jurisdiction to try the offence of espionage. This is in their summary of instructions at paragraph 1.

80. At paragraph 2, the context for the report, the proceedings before this Court, and they asked themselves whether examination of open source materials — India has made much of military courts being shrouded in secrecy — open source materials, is the jurisdiction practice and procedure of the Pakistani military courts manifestly unfair or does it reflect practices and procedures common to military courts generally? Having reviewed ten different jurisdictions, common law and otherwise, the conclusions, which India could not resist doctoring, were as follows, at paragraph 3:

> "Whilst most military courts do have jurisdiction to try the civilian offences of espionage and terrorism, in relation to related military offences of a similar nature, this is often limited to offences committed by persons already subject to service jurisdiction. Modern State practice in most jurisdictions is that the civil authorities of the State will undertake any prosecution of these offences where there is concurrent jurisdiction.
>
> *(b)* The military courts of Pakistan are soundly based in statute which provides the substantive legal basis for their jurisdiction . . ."

And India could not resist deleting the following words, "practice and procedure". Important points because there are so many jurisdictions where the law provides for rights but the law is so often violated, but it is the practice and procedure that Professor Garraway and Brigadier Paphiti were looking at:

> "Article 10 of the Constitution of Pakistan guarantees a defendant the right to consult and be defended by a legal practitioner of his choice. This constitutional right is reflected in Rule 23 of the Pakistani Army Rules 1954. This jurisdiction is not inconsistent with the practices and procedures common to military courts generally and does not appear to us to be manifestly unfair.
>
> *(c)* We do not consider that the espionage jurisdiction of the military courts of Pakistan finding its source in a statute law of 1923 during the British India period is per se unfair or otherwise improper.
>
> *(d)* In the case of Pakistan, the judicial review function of the civilian courts, as identified in the *Zaman* Supreme Court decision [they refer to paragraph 32 of their expert report], appears to provide a potential effective safeguard against manifest failings in due process."

81. India decided that "potential" meant "actual", by adding the word "the" manifest failings, which we are supposed to believe was a typographical error upon which the edifice of nonsense was constructed by India to justify saying, "Well, there you have it. Pakistan's own experts are corroborating, confirming our position." About ***as*** absurd a proposition as one could think. Did

India really expect that no one would read and compare its reply with the contents of the experts' report? Is it that brazen conduct? Shameless?

> "*(e)*Military courts in other jurisdictions are vested with jurisdiction to try terrorism matters.
>
> *(f)* We are aware of general criticisms made of the courts which try terrorism offences both in India and Pakistan. We are not in a position to consider whether those criticisms are valid without further extensive research and review."

What is wrong with that? That is not what they were being asked to consider. They were being asked to consider the questions that they did consider.

82. Moving on, the third fundamental point. It is not good enough for India to say

> "Well, you called him an 'Indian spy'. You referred to the passport that he had in his possession for your internal investigations as establishing that he had been sent by India. You convicted him of espionage obviously as a spy sent by India and therefore you cannot say that we needed to furnish you with evidence as to his nationality".

83. That simply is unsustainable because, as this Court made clear in the *Avena* case, a State that wishes to avail itself and provide its national with diplomatic protection has the obligation to furnish evidence of nationality, commonly by means of passport, birth certificate, as we saw in the *Avena* case, where the Court upheld the United States of America's objection on the basis that Mexico had failed to identify and positively establish the nationality of one of the individuals in respect of whom it was demanding diplomatic protection.

84. And lest it be said by India that Pakistan has somehow represented in a clear and unequivocal manner to India, that it is not going to bother with evidence of nationality that is simply *not* the case. There is no proposition of law advanced before this Court with reference to *any* authority the *Temple of Preah Vihar* case, for example, to suggest that there is the doctrine of estoppel at large; there is nothing. The Memorial and the Reply of India are shamelessly devoid of substantive legal content. If India wants to argue estoppel, it is too late, but I'll make the argument for them, shall I? There is no clear and unequivocal representation made directly to India, with the intention or effect that India detrimentally relies upon it such as to constitute a waiver of the requirement for India to establish the Indian nationality of Commander Jadhav.

85. The proposition I advanced, the proposition that none of the 177 States parties to the VCCR disagrees with, because if they *did*, the others, because there are two here, they had ample

opportunity, pursuant to the invitation of this Court to present themselves and take issue with the proposition that I seek to advance. But they *do not,* because this is an issue which States have refrained from becoming visible upon and adopted a position that I described as being one of studied ambiguity, with the consequence that it cannot be said that there is a general practice accepted as law *(opinio juris)* by States to provide consular access in cases where espionage was reasonably suspected, such as to evidence that any such practice was undertaken with a sense of legal right or obligation , which I respectfully observe is the essential requirement for a customary international law principle to have crystallized and to be evident.

86. The ILC draft conclusion 9, with the Rapporteur, Sir Michael Wood, provides us with *ample* understanding in this regard. And it is the State practice position as at 1963 that we are concerned with. And we know — I was not alive at that juncture — but we know, that at this point in time the world was troubled, sadly as it seems to be now — all the more reason for the rule of law to be upheld, because those who are participating in this exercise to ensure that a convention could be adopted were describing the task in 1963 as thankless, because distrust and suspicion reigned everywhere and almost all States had recourse to emergency laws and regulations. Two pivotal figures in international law, certainly for somebody like myself. I cannot speak for India and I dare not *try* to speak for India in its present incarnation. Sir Gerald Fitzmaurice, former UK Foreign and Commonwealth legal adviser and then a judge at this Court, had observed that national security would be the only reason with sufficient weight to justify restricting communications between foreign nationals and their consular officials.

87. Grigory Tunkin, then Head of the Legal Department of the USSR Foreign Ministry, in the negotiation process, as can be seen from the *travaux,* had made it absolutely clear that the USSR took the view that in cases of espionage, and as an exception, there was no obligation to provide consular access which would otherwise be available. This was with reference to the language of "without delay, subsequent undue delay". And he was calling for that language to be deleted with emphasis being placed upon this particular issue, and what was the response of the Chairman? A statement of general principle, could not possibly cover all conceivable cases. If the Commission went into the question of whether cases of espionage should be made an *express*

exception, then the whole principle of consular protection and communication with nationals would have to be reopened.

88. Now, India reads this as it reads anything in the English language, in a somewhat topsy-turvy manner, but what does it *mean*? Three propositions: the USSR in plain and simple language is making it clear, at this juncture, espionage was a special case outside the general approach to questions of consular access. And second, the Chairman agreed, by stating that the general principle could *not* cover all conceivable cases, far from India's exhaustive rubric. There is a lot of flowery language in India's pleadings, but there is not much by way of substance. And *further*, the only way to read the Chairman's comments is as follows: any attempt to open up the espionage exception, so as to include express language, would throw the entire process of formulating the draft convention into disarray. How else do we read this? If the Commission went into the question of whether cases of espionage should be made an express exception, the whole principle of consular protection and communication with nationals would have to be reopened. He is not saying, "Don't be silly, there is no such an exception". He is saying, "Let's not touch that, shall we? Because if we do, we're not going to get anywhere". Of course, that is how I read it, from my understanding of English, but if somebody else has got an understanding of English which is intelligible, logical, then I welcome them to explain otherwise. And perhaps to some extent, this is why the preamble of the VCCR states as follows, "affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present convention" [CMP, p. 86, para. 297; CMP, Vol. 5, Ann. 88], and that is consistent with Grigory Tunkin's observation, as that is also *consistent* with the way in which the major Powers were behaving at this material point in time.

89. Now, of course, it is very rare for espionage cases to appear on the public radar, and this is the first time ever the VCCR is being considered in the context of espionage. ***Four*** examples we have given, the Counter-Memorial and the Rejoinder provide authoritative references. We are not talking about references from newspapers in some provincial town, somewhere in the middle of nowhere. We are talking about US State Department official documents. We are talking about texts produced by authorities on this area.

(1) Mikhail Gorin, USSR national, 1938, despite a bilateral treaty on consular access of 1933 between the USSR and the USA, he was only allowed access in the presence of a US naval intelligence officer.

(2) Colonel Abel. Many people will recognize him from the Hollywood treatment "Bridge of Spies", a USSR national, 1957, no consular access sought or provided, convicted of espionage activities.

(3) Gary Powers, a USA national, 1960, no consular access, convicted by the USSR of espionage.

Nos. (2) and (3) were swapped in Berlin.

(4) Mark Kaminsky, a USA national, 1960, no consular access, convicted by the USSR of espionage.

90. That is State practice, such as one is likely to see in an area as shrouded in secrecy, as subject to subterfuge, as this. But what have academics who have reviewed this got to say about it? Professor Lee, the leading authority on consular law ***and*** practice, in 1961, two years before the negotiation was taking place, "a frequent exception to the consular right to protect nationals and visit them in prison is in the case of spies" [judges' folders, tab 21, p. 232]. Clear. Even better, Biswanath Sen, 1965, two years after the Convention was adopted, India's Honorary Legal Adviser, 1954 to 1964, ten years, in his textbook, *A Diplomat's Handbook of International Law and Practice,* no less, says as follows: "A frequent exception to the consular rights to protect nationals and visit them in prison is the case of persons who are held on charge of espionage as evidenced by the practice of states" [judges' folders, tab 22, p. 234].

91. Of course, customary international law being customary international law, being based upon State practice and an understanding as to obligation, States are free to modify their own practice. India put before the Court two examples of State practice yesterday, recent State practice: China and the detention of Canadian nationals — but there is an express agreement, detailed agreement, between China and Canada on consular access — and Russia also. But we could give the Court many other examples, but we have not littered this Court with examples of what has

happened subsequently because what matters is what the understanding was in 1963 in so far as customary international law is concerned. That is what matters because that was preserved.

92. India's main point — which I have to accept has some force if it had any substance — is that, if an exception exists as a matter of State practice for consular access in the context of espionage, some States could manufacture an allegation of espionage so as to deprive an individual of consular access. We only have to look at that proposition to see how nonsensical it is. Why? This is the first case before this Court where the VCCR is being considered since 1963. So it has worked effectively for more than fifty years. There has not been abuse, not a single one of the 177 States is before this Court, unless I am missing something. To raise an argument against the proposition that I am advancing, which they could — none of the members of the Security Council is present before this Court to take issue with the observation that I am advancing: why? Because they have to maintain, understandably, a position of studied ambiguity.

93. We have to thank India in its infinite wisdom for wanting to help clarify the law as to espionage. We have to thank India for placing these issues before the Court as to consequences of illegal conduct, the proper interpretation of the VCCR. We are grateful to India because the legal community needs clarity. But allegations of espionage are extremely rare and, in this case, the notion that this is an allegation — it is not, it is proven — Commander Jadhav's confession is highly credible, it is corroborated by at the very least those three independent, Indian, highly respected journalists and their investigations. The position of India, in stark contrast, is to disavow through language which is hollow — "concoction", "propaganda", "litany of false allegations".

94. And the passport! The passport — we must not forget the passport. What is India's explanation for this passport? The expert is a "purported" expert — the gentleman who trained the Indian authorities for three years, who is one of the foremost authorities in the United Kingdom until 2017 on travel document fraud detection, is a "purported" expert. What a ridiculous suggestion.

95. And then, last but by no means least, the Optional Protocol which India sought not to engage through Articles II and III allows for what I would describe as "multi-tiered dispute resolution". Anybody who drafts commercial contracts or has to engage with them will know that those who seek to avoid disputes will try negotiation, mediation, arbitration, and then eventually go

to court. Articles II and III . . . the discussion is illuminating because these were the subject of discussion by no less than the Indian delegate, as you will see from our Rejoinder and Counter-Memorial. The Indian delegate was at pains to point out that States ought to be encouraged to resolve their disputes through dispute-resolution mechanisms.

96. But what did India do in this case? When was the first time India actually sought, formally, to notify a dispute? 8 May 2017. Did India, before that — on its case, when it was entitled to consular access, on its case, on 25 March 2016 — notify a dispute? No. Did India suggest negotiation, mediation, arbitration? No. What did India do? India came to this Court on 8 May, demanded provisional measures without a hearing, ambushed Pakistan. Perhaps in the hope that Pakistan would not appear. Well, it did. And understandably this Court granted provisional measures, perfectly understandably. As much as India wants to scrape the barrel of the internet and try and find one of those who no doubt still believes the Earth is flat, to provide some justification to criticize Pakistan, a population of 220 million, there is no official statement from anybody in Pakistan which is other than respectful of this Court. Why, oh why, India, from 25 March 2016, did you not notify Pakistan of a dispute? Why come to this Court for provisional measures, without a hearing and tell the Court that premeditated murder was about to take place? Which was the language that you used at a hearing that was not necessary. When, even now, Commander Jadhav, that video of late November 2018, which you viewed, showed that he is in very good health. You also knew, India, with respect, about the existence of the 2008 Agreement because on the 21 March 2017 before judgment was pronounced on 10 April by the military court trying Commander Jadhav for espionage, you were reminded that your request for consular access would be considered in the light of your response to the request for assistance in the investigation process and early dispensation of justice. ***Not a case of***, not premeditated murder, not lynch mob ***justice***. Execution or death sentence within three days, ***rather to achieve*** early dispensation of justice. To be afforded to a man who was given a three-week adjournment to prepare his case on 21 September in a situation where there were four stages of trial. What is Pakistan asking India to do? Reasonably, in an obligatory manner, assist. And what does India say? They note the willingness of the Pakistan side to provide consular access — this is 31 March 2017, it is in the bundle. What else happens? Never mind the sophistry and the contortions that my friends are engaged in, by now we are all too

used to it. On 13 April 2017 the official spokesperson for the Indian Ministry of External Affairs said this: "Both India and Pakistan have an agreement on consular access bilaterally." So we are not merely speaking about an international practice. We are speaking here of a bilateral agreement. Suddenly that has vanished. But it comes to this Court. It cannot ***be hidden*** any longer. And what is that agreement? Article (vi) of the Agreement could ***not*** be simpler, could ***not*** be clearer. My friend pointed to Article 31 of the VCLT yesterday but all of a sudden he does not want to accept the plain meaning of this provision. He does not want to accept that it must be interpreted in good faith, in the light of its object and purpose within its context, namely, as its title suggests, to address consular access. In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on the merits. And what is the argument on the merits? That is problematic. Political or security grounds, that is problematic. More than 35 years after this language was used, India's language — because India was pivotal in the drafting exercise in the conclusion of this treaty — India is now saying it is terribly difficult to understand the language "national security", it is terribly difficult to understand the language "the merits". It is at best — being respectful and delicate to India — highly disingenuous and as far removed from a good faith requirement as could be.

97. India says that the 2008 Agreement was meant to deal with "nomads and fishermen" [RI, p. 49, para. 146, line 4] of which there are apparently many people crossing because of the border that is a thousand miles plus, which again raises this bizarre question that I had raised on 15 May. Why choose somebody sitting in Chabahar in Iran, nine hours' drive from Pakistan, to kidnap, to drag him into Pakistan, to force him to give a confession. Why choose somebody of that nature? You have got so many people on the border if you want to create a fictitious story, why go for him? Article (vi) means what it says.

Moving on to the next part.

98. India's claim for "at least" acquittal, release or return is outlandish, by which I mean, it occupies a different legal universe. Because this legal universe, in fact this very room, has ***~~adjudicated~~ witnessed definitive adjudication*** on this question, not once, but twice, in the *LaGrand* case and the *Avena* case. But what this Court is being invited to do now — I assume because it is Pakistan and because it seems sadly that the present incarnation of India cannot view Pakistan, save

through a warped, close-minded perspective — it is being told to, in this case, make an exception for Pakistan. The rule of law applies to all, and as the Attorney General has pointed out, Pakistan is before this Court because it is supremely confident in the ability of this Court — the world's highest Court, the Court that upholds international law, that declares international law when necessary — to ensure that international law is upheld.

99. And India, unfortunately, could not help itself in its shameless misrepresentation of the experts. India, I am afraid, cannot extricate itself from at the very least the credibility, if not the powerful veracity of the confession of Commander Jadhav. India can say as much as it likes about premeditated murder — it no doubt looks good on social media, which is no doubt ablaze at the moment, which is fine — but to talk about premeditated murder in respect of an individual who confessed before a judicial magistrate with stringent safeguards, in the context of a trial for espionage that took place over four stages, over a period of six months, allowing him three weeks for an adjournment, is . . a little unfair — let us be charitable to India: a little unfair — to call that premeditated murder. Some might suggest that saying that rapists ought to be "hung, if not sentenced to death within three days" is a little bit unfair, but we will leave that to Mr. Modi to explain. India simply fails to answer serious questions, which could be exculpatory, but more likely, and that is the explanation why India will not answer them, are damning and implicatory.

100. India invoked ten reports of the United Nations Human Rights Committee concerned with alleged violations of the ICCPR [MI, pp. 55-57/paras. 164-168] — not only is this irrelevant, but not a single one of those reports concerns Pakistan. India quotes from reports of an NGO, the International Commission of Jurists — and in case my friend has not seen it, there is recent report of January 2019, which refers to the recent case from the Peshawar High Court, where more than 70 convictions and death sentences rendered by military courts were annulled by the High Court — but the International Commission of Jurists' observations of 2016 and 2017 were premised on the misunderstanding that the High Court and Supreme Court of Pakistan could not undertake a review of the military court decisions which is plainly wrong. The experts said it, and their position was confirmed subsequently by the Peshawar High Court overturning those convictions.

101. And then, in a flourish of enthusiasm, no less than the decisions of the Inter-American Commission of Human Rights are invoked by my learned friend. I could understand why they were

invoked as against the United States of America in the *Breard* (Paraguay) in the *LaGrand* (Germany) and in the *Avena* (Mexico) cases. What are they doing here? Even worse than that, the quotation that my friend puts before the Court is incomplete.

Now, as a member of the English Bar, I know only too well that what I ought to do is to ensure that the Court is not, inadvertently, misled. I am not suggesting my friend was doing that, but it might have been helpful to also have put before the Court paragraphs 104 and 105, because what my friend was contending for, was some process which I have yet to understand, whereby there is some sort of "cross-fertilization" as he puts it.

102. What he says is that the IACHR decisions of the Commission, which are recommendations, ought to be given weight before this Court. But what did the Commission do in that case where the Commission was concerned with individuals who were also featuring in the *Avena* dispute before this Court. The Court was asked whether or not the individual applications before it were precluded because those individuals were also featured in the ICJ case. The answer of the Commission was that the individuals were ***not*** appearing before this Court *qua* individuals, they did not have locus. And also the Commission went on to say as follows:

> "The central issue before the ICJ was whether the United States violated its international obligations to Mexico under Articles 5 and 36 of the Vienna Convention based upon the procedures of the arrest, detention, conviction and sentencing of 54 nationals on death row . . . The issue before th[is] Commission, on the other hand, is whether the United States violated [the individuals'] rights to due process and fair trial under Articles XVIII and XXVI of the American Declaration, based upon [the alleged Article 36 of the VCCR breach]. In the Commission's view, the claims brought before the Commission raise substantive issues that are distinct from those decided upon by the ICJ."

103. Moreover, in paragraph 105,

> "The function of the ICJ [and I ask for forgiveness for saying this to the Court for the Court knows full well what its function is, but I may as well refer the Court to this provision given that my friend did not. The function of the ICJ,] as defined through Article 1 of the Optional Protocol to [the VCCR], is to settle, as between states, disputes arising out of the interpretation and application of the [VCCR]. The IACHR, on the other hand, is the principal human rights organ of the [OAS] charged with promoting the observance and protection of human rights *in the Americas*, which includes determining the international responsibility of states for alleged violations of the fundamental rights of persons." [Emphasis added.]

Even in that case, as can be seen from the decision, despite the fact that two of the applicants had been executed prior to the IACHR determination in the *Medellin* case, a retrial was recommended. Even in that situation.

104. Nevertheless, as I said, India's position rests upon this wonderful image that I have of "cross-pollination of jurisprudence of rights recognised across treaties, and judgments of these institutions". Let us forget about jurisdictional distinct and separateness, let us forget about treaty arrangements, let us ***enjoin the world to*** "cross-pollinate".

And then, India's arguments as to "minimum due process" — Article 36 of the VCCR having the character of a human right/annulment of conviction and sentence being the only effective reparations have been ventilated repeatedly —this is where the abuse comes in. There comes a point in time where to come before a judicial institution to ask for relief that the Court has stated repeatedly is not available, becomes abusive. I appreciate that there are those who wish to push the metaphorical "jurisprudential envelope" — and I am sure that there are many members of the Bench who are anxious to do so, but within limits, because judicial activism, with respect, has to take place within the appropriate context. And the context here, as the Court made clear, all too clear in the *Avena* case, is as follows:

105. Paragraphs 119-124 which I am afraid my learned friend failed to draw to the Court's attention, so I will do it now:

> "120. In the *LaGrand* case the Court made a general statement on the principle involved as follows:
>
> > 'The Court considers in this respect that if the United States, notwithstanding its commitment [to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*] . . .'".

I will pause there. The United States promised to make sure consular access was provided in the future as the Court is all too aware, since the *Avena* decision of 2004. There was a United Nations General Assembly resolution of last year, which was less than complementary of the position of the United States of America. I say no more, save to refer to the fact that both India and Pakistan were parties to that resolution. However,

> "should [the USA] fail in its obligation of consular notification to the detriment of German nationals [in the future], an apology would not suffice".

Sorry, we executed somebody, we will not do it again — which is what happened in the *LaGrand* case: provisional measures ordered on 2 March 1999, execution on 3 March 1999.

> "'In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.' (*I.C.J. Reports 2001*, pp. 513-514, para. 125.)"

The choice of means must be left to Pakistan, not to India.

> "121. . . . the internationally wrongful acts committed by the United States were the failure of its competent authorities".

Assuming there was such a failure (and I say there was not) but even assuming, giving India the benefit of the doubt (which it is not entitled to in the face of clear overwhelming evidence of its contumelious conduct) — assuming there were failures to inform, as Pakistan said, and the convention was engaged, the remedy to make good these violations should consist in an obligation on — we say — Pakistan, to permit review and reconsideration by the courts of Pakistan. Because if it is good enough for the United States, why is it not good enough for Pakistan? Does India want Pakistan to be treated differently? Why? Is it not a Member of the United Nations? Is it not subject to the rule of law, in the same way that India is?

> "122. The Court reaffirms that the case before it concerns Article 36 of the Vienna Convention and *not the correctness as such of any conviction or sentencing*. The question of whether the violations of Article 36, paragraph 1, are to be regarded [assuming there was a violation of the requirement to provide consular access] as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States [the courts of Pakistan] and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States [Pakistan] to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.
>
> 123. It is not to be presumed, as Mexico [India] asserts [despite this Judgment] that partial or [India is not going for partial:] total annulment [and India is not just going for annulment, it wants him to be sent back to India. One wonders why? Terrorism? Is India afraid that the legal process of Pakistan, and they have yet to be engaged, in so far as terrorist activities are concerned. Has India got something to hide? Once that comes out into the public domain. I can understand why India would want him back as soon as possible. But that would be wrong.] [partial or total annulment] of conviction or sentence provides the necessary and sole remedy."

That assertion is wrong because it is not the conviction and sentences which are regarded as a violation of international law, but the breaches of treaty obligations which preceded them.

106. And then we move on to: Article 36 is in the nature of human rights argument. Well, that has been gone through before, believe it or not, Mr. Salve.

Paragraph 124 says:

> "124. Mexico has further contended that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention".

It is almost as if that has been cut and pasted into India's submissions which we were treated to a repetition of yesterday.

> "[A]ccording to Mexico, this right, as such, is so fundamental that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right [sounds very familiar]. Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. [Quite right but, importantly] Th[is]Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires*, support the conclusion that Mexico [slash India] draws from its contention in that regard." (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001,* pp. 59-61, paras. 119-124; CMP, Vol. 3, Ann. 67.)

Effective review and reconsideration. And I have to refer to the proposition simply to illustrate how absurd it is. India's Reply, para. 157, makes the bald assertion as follows:

> "Pakistani law does not have an appellate procedure by which a trained independent judge dispassionately reviews the findings of a Military Court. In the absence of any independent procedure of trial or review of the evidence de novo by an independent appellate court, India claims that the relief that should be granted is as has been sought in the Memorial." [RI, p. 53, para. 157.]

Offensive, patronizing, false, contradicted by the experts' reports and contradicted by the decisions of the Pakistani courts themselves. As recently as 18 October 2018, the High Court of Peshawar set aside more than 70 convictions and sentences handed down by military courts. That Court did not shirk from demonstrating ***review*** procedure. That Court did not shirk from showing dispassionate review. That Court had no fear of being independent. It set aside more than 70 convictions and sentences. It did not hesitate to identify flaws in the processes and evidence leading to the convictions and sentences.

107. The decision is in the public domain. It is a detailed decision and I am disappointed that my learned friend did not access it. The Indian team is perfectly capable of finding scraps, slender scraps, of information to suggest this institutional bias and hostility towards Mr. Jadhav. A rather laughable reference which keeps on repeating itself is to the Lahore High Court Bar Association and the Secretary of the Lahore High Court Bar Association having said he would condemn any lawyer who acted for Mr. Jadhav.

What is the Lahore High Court Bar Association? Is it an organ of the State? And who is this individual? Is he one of those who — with respect to him — still believes that the Earth is flat? Well, you found your flat ***earther***, Sir, because the rest of the world and Pakistan was there for you to investigate. No one else said that. But why did you not find this decision and put it before the Court? There is a reason why. Because upon proper examination, what has the Court said? The Court has been absolutely clear. That it will exercise review jurisdiction if there is insufficient evidence, if there is no evidence, if there is absence of jurisdiction, if there is malice of facts and law. All of the underlying convictions and sentences were set aside for insufficiency of evidence. Orders were granted for release, the matter subject to appeal.

108. I am reminded that of course, the supervisory body in Pakistan is no different from my supervisory body, the Bar Council of England and Wales. It is the Pakistani Bar Council that has disciplinary functions, not the Lahore High Court Bar Association. But it shows you how desperate India is. That its reference for institutional bias it finds in the utterance which isn't accepted in any event of an individual who occupies the modest role of a secretary of a provincial Bar association. Now that tells you a lot with respect.

CONCLUDING OBSERVATIONS

Mr. President, thank you for your indulgence in providing me with the opportunity to go a little over one o'clock, but I ***don't think I*** will.

109. I have nine points to make by way of conclusion. And again, I make them in the light of the observations I made right at the outset, the Court has my detailed written submissions, the Court has this document before it, in the judges' bundle with the references, and I say unhesitatingly, based upon the evidence, as follows:

(1) India's Application should be declared inadmissible. I appreciate this is the first time this is going to happen, but sadly, there is a first for everything. But we have to thank India for that. Because India is the first State to come before this Court to abandon studied ambiguity and in its breathtaking arrogance to try to continue to persuade the Court that the evidence that is before the Court is concocted, that it is a litany of false allegations. Well, it isn't.

And as if that is not good enough, to keep on invoking the same mantra of concoction, irrelevance, propaganda, the burden of proof shifted to India, that burden has not been discharged.

As a consequence, the evidence before the Court sadly manifests abuse of rights, lack of good faith, illegality, lack of clean hands and misrepresentation. ***Any one*** of those would militate against relief. All of them together, not least those brazen attempts during the course of these proceedings, to doctor the military experts' reports, to engage in linguistic contortions, so as to wish away the 2008 Agreement, and this ridiculous document, headed "Secret", 7-page memo, which could not have been possibly created on 26 December. All to try and persuade this Court of the position of India, taken together, requires this Court with respect to declare the Application inadmissible.

(2) Or militates against the grant of any relief.

(3) The VCCR is not engaged as India has not established, for its own reasons, that Commander Jadhav is an Indian national, nor that consular access was refused prior to commencement of these proceedings;

(4) Customary international law provided for an exception to consular access in the case of an individual reasonably suspected of espionage, not suspected on the basis of manufactured evidence. This remained unaffected by the VCCR;

(5) Even if the VCCR was engaged, India's conduct in sending Commander Jadhav to engage in acts of espionage cannot but constitute a brazen, blatant violation of Article 5 *(a)* — a violation of international law — as well as Article 55: non-interference in internal relations of a State. The absurd proposition that is being advanced is: officials who have diplomatic immunity ought to be able to go and see Commander Jadhav to glean from him which of their assets, their tools of terror are still safe, and be able to continue with impunity, until they are declared

persona non grata. That is not what the Vienna Convention was intended for, as Grigory Tunkin and others pointed out in 1960. And to allow that to happen in this case would provide a fundamental obstacle to the pursuit of the objectives of the VCCR, namely the promotion of friendly relations between States. A red line exists, and that red line has to be shown in clear and simple terms.

(6) Further, or in the alternative, India and Pakistan entered into a clearly worded agreement on consular access (operative in material terms since 1982 and amended in 2008) which identified the basis upon which consular access would be considered in the case of an individual reasonably suspected of espionage. The said Agreement (at Article (vi)) must be given legal effect, in accordance with its plain and ordinary meaning and objective. It is not suggested that India and Pakistan have not applied the Agreement for decades, and I respectfully submit it is perfectly consistent with the VCCR, either because it supplements/amplifies the terms between these two States, or because it elaborates how they will deal with espionage cases, in the context of the absence of any customary international law requirement to provide consular access in such cases;

(7) India's claim, which it continues to persist in, for "at least" — goodness knows what more they want — beyond "acquittal, release or return"/annulment of the conviction" is being charitable to India yet again, misconceived, being more realistic, at worst made in bad faith in the light of the Court's previous decisions consistently rejecting such a claim. And there is a reason why, and I will come to it with my final point.

(8) Because India has made no other claim for relief and therefore, if its all-or-nothing strategy fails, it should not be entitled to relief.

(9) Penultimately, even if the Court were to hold that the VCCR Article 36 was engaged and a right to consular access was denied, the appropriate remedy is amply provided for by effective review and reconsideration before the Pakistani High Court, in accordance with Article 199 of the Constitution of Pakistan. This remedy has been available to Commander Jadhav and his family at all material times since his conviction.

And that is an important point, because India has studiously avoided invoking this. India, Commander Jadhav's family, have not invoked this. It was open to them to do so after

10 April 2017. Why not? And I come back to the point that I made before this Court on 15 May 2017: this case is not about consular access. This case, has at all material times, I am sorry to say, been political theatre, grandstanding, a platform for India to engage in rhetoric. This incarnation of India, I'm sorry to say, not the India I am familiar with. And as such it is an impermissible use of this Court.

(10) The Court can be confident that Commander Jadhav has the entitlement that even if the Vienna Convention was engaged, would otherwise flow~~, and~~ ***in any event. I***t is vital for the rule of law, not least in these times, for the Court to review the conduct of India for what it is. And I invite the Court to dismiss the Application of India accordingly.

Thank you, Mr. President.

The PRESIDENT: I thank Mr. Qureshi. Your statement brings to an end today's sitting. Oral argument in the case will resume tomorrow, Wednesday 20 February 2019 at 3 p.m. for India's second round of pleading. At the end of that sitting, India will present its final submissions. Pakistan will present its second round of oral argument on Thursday 21 February 2019 at 4.30 p.m. At the end of that sitting, Pakistan will also present its final submissions. Each Party will therefore have a maximum of one and a half hours, to present its arguments for the second round.

I would like to recall that in accordance with Article ***60***, paragraph 1, of the Rules of Court, the oral statements of the second round are to be as succinct as possible. The purpose of the second round of oral argument is to enable each of the parties to reply to the arguments put forward, orally, by the opposing party. The second round must therefore not be a repetition of the arguments already set forth by the parties, which moreover are not obliged to use all the time allotted to them.

The sitting is now adjourned. Thank you.

The Court rose at 12.55 p.m.