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CR 2019/3

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Wednesday 20 February 2019, at 3 p.m., at the Peace Palace,

President Yusuf presiding,

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

VERBATIM RECORD

ANNÉE 2019

Audience publique

tenue le mercredi 20 février 2019, à 15 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. ***Vishnu*** 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:

Mr. Anwar Mansoor Khan, Attorney General for Pakistan,

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. ***Vishnu*** 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,

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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,

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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 this afternoon to hear the second round of oral argument of the Republic of India. I shall now give the floor to Mr. Harish Salve.

Mr. SALVE:

1. Honourable President, honourable Judges of this Court, I am grateful for this opportunity to present the second round of oral submissions on behalf of the Republic of India. Responding to the points that were made yesterday by Pakistan, I start with some issues, Sir, Mr. President and honourable Judges, which should never detain this Court and waste its precious time, but since they arise and have been raised and almost given centre stage, I propose to deal with them briefly. Pakistan, through its counsel, made a scathing attack on India, on India's Memorial, and also did not spare the legal counsel who have assisted India in preparing the Memorial.

2. They overlooked that there is a fundamental difference between proceedings brought, for example, in a United Kingdom court under the rules of the court and proceedings brought before this Court.

3. The proceedings in this Court are applications filed by sovereign States. No private party generally has a right to bring proceedings in this Court.

4. Under Article 38 of the Rules, an Application before the Court has to be signed by either the agent of the party submitting it, or by the diplomatic representative of that party in the country in which the Court has its seat or by some other duly authorized person. The signature of a person other than the diplomatic representative has to be authenticated by either the diplomatic representative or by the competent authority of the applicant's foreign ministry.

5. Under Article 40, all steps after proceedings have been instituted shall be taken by agents. Memorials are filed under Article 49. The original of every pleading shall be signed by the agent and filed in the Registry.

6. Consistent with the dignity of the sovereign States who file applications, there is no requirement for solemn affirmations of any kind as to the truth of the contents of the pleadings. Errors and misstatements in a Memorial are addressed by the other party in the Counter-Memorials or in the Rejoinders (where permitted).

7. The last pleading — the last word even in oral submissions, always is with the respondent.

8. A criticism by one sovereign State of the case made out by the other State must be in language consistent with the dignity of sovereign States and the majesty of this Court and the solemnity of the proceedings in this Court. Humpty Dumpty has no place in this Court. This Court has jurisdiction over sovereign States and conducts proceedings in which sovereign States are given directions which are binding upon them. This Court therefore conducts itself with restraint and respect which does not undermine the sovereignty of any of the States or show disrespect towards any of them.

9. The language which has echoed in this Court, Sir, in these hallowed precincts, is ***unfortunate*** and so that such misadventures are not repeated, perhaps this Court may, in counsel's words, "lay down some red lines" of how proceedings ought to be conducted.

10. The transcript is peppered with words such as "shameless", "nonsensical", "laughable", and "breathtaking arrogance". On a quick count, "shameless" and "nonsense" occur five times each, "arrogance" four times, "ridiculous" four times and "disgraceful" four times. And these are addressed to the submissions made in the Memorial and the Reply by the sovereign Republic of India. India takes exception to being addressed in this fashion in an international court. Beyond saying this, I would let the matter rest for I do not — and the Indian culture prevents me from so doing — indulge in similar language of invectives and insults. India believes we have a strong case, and so we have, Sir, as the saying is, hammered the facts and hammered the law. As the old lawyers' saying goes, "When you are strong on the law, you hammer the law, if you are strong on the facts, you hammer the facts, and when you have neither on your side, you hammer the table". Bereft of a case, Pakistan has hammered the proverbial table.

11. Since counsel brought it up, I must mention that I have received a letter from him containing a veiled threat for my role in certain submissions and extracts of certain reports found in India's Memorial and Reply. This again is not a matter for this Court, but since it was brought up, my only response is to say that there appears to be a fundamental misunderstanding as to the role of counsel in preparation of pleadings under the Rules of the Court, which were followed by India. No Indian pleading has been signed by any lawyer, unlike Pakistan's filings, and the Rules of this Court do not countenance filings by or through lawyers.

12. Unlike the pleadings filed by Pakistan, India has filed pleadings in its own name and signed by its Agent, and takes full responsibility for the content of its pleadings.

13. On 5 June 2018[1], Pakistan wrote a letter to India demanding a confirmation that the contents of the Reply are in all material respects accurate, and requesting India to confirm whether its lead counsel had reviewed or approved the Reply as filed.

14. India replied on 27 June[2] asking Pakistan to raise any issue they desired before this Court in accordance with the Rules and that "the details of the preparation/review process including leading to the final submissions is purely internal to the Government of India. The queries raised by the Government of Pakistan are, therefore, inappropriate and irrelevant."

15. On 17 July 2018, the Rejoinder was filed in which Pakistan pointed out the alleged mischaracterizations and misquotations. The matter should have ended there, leaving it to the Court to hear submissions and deal with the expert report appropriately if necessary, since the original of the report was in any event on the record of the Court.

16. On 18 January 2019[3], India received from this Court a letter attaching a communication of the same date received by the Court from Pakistan. Paragraphs 6 and 7 of the letter raised the issue of the alleged mischaracterization and misquotation. It magnanimously offered the Government of India an opportunity to consider its position, and, with Pakistan's characteristic humility, which we saw on display yesterday, demanded "a forthright apology and undertaking not to repeat these matters before the Court". This letter raised various issues in relation to the cross-examination of Mr. J. P. Singh.

17. A response was given to this letter on 23 January 2019[4] in which, on these issues, India maintained its position. The matters arising out of these letters of 18 January 2019 and 23 January 2019 were dealt with by this Court in its communication of 24 January 2019[5]. The only order made was that the request for cross-examination of Mr. J. P. Singh was declined.

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[1] Judges' folders, tab A.

[2] Judges' folders, tab B.

[3] Judges' folders, tab C.

[4] Judges' folders, tab D.

[5] Judges' folders, tab E.

18. Pakistan continues to raise this issue and, in my opening, I pointed out that the typographical error in paragraph 154 *(d)* of the Reply is such that it made no difference to India's conclusions. The same part was also quoted in an earlier paragraph 19 of the Reply, without the error. I had hoped that this statement would put the issue to rest, but, since it has not, I shall deal with it in somewhat greater detail. The other two alleged mischaracterizations of the report were competing versions of the interpretation of the report of the experts. It is a matter for submissions before the Court as to what is the meaning of that report.

19. Having had India's Reply with them since 17 April 2018, and India's response to their letter of 5 June and 27 June 2018, if Pakistan considered there was the need to get the experts to clarify the mischaracterizations, it could have done so before it filed its Rejoinder on 17 July 2018. The letter of 5 June 2018 had suggested that it wanted India's clarification as it was in the process of preparing a Rejoinder. However, it did not consider it necessary to file any report or get its experts to clarify the meaning of their report.

20. The very fact that Pakistan considered it *so* very necessary at this late stage to bring the experts into the box to speak to their report and clarify the alleged mischaracterizations, and when *this* was denied, they tried to put it in a supplementary report perhaps suggests that in their own view the original report required to be clarified so as to leave no scope for the kind of inferences being drawn by India.

21. The report is, in India's submission, an entirely irrelevant document to the present proceedings since it seeks to give an "expert" view on matters of law such as whether military courts are due process compliant, which, honourable President and honourable Judges, I submit are matters of law, and matters of great moments of law, to be decided by this Court based on filings and submissions and on analysing the law. That issue has been the subject of submissions on both sides. This Court does not need the expertise of any external agencies to decide whether applying the standards of the ICCPR and other sources of such jurisprudence, a military court of that kind that is in place in Pakistan is due process complaint. This Court does not need an expert to assist it in coming to the conclusion whether limited judicial review cures the defects inherent in such a system. Pakistan did not have an answer to the trenchant criticism of the International Commission of Jurists, the European Parliament, and the Human Rights Committee. It was perhaps driven to

field two gentlemen to give an "expert" view to this Court on matters that arise for consideration as serious issues of human rights jurisprudence. Honourable President and honourable Judges, I suggest this report be ignored.

22. It is for this reason that India's Reply deals with this report briefly. Some of the conclusions of the experts, taking a view most charitable to Pakistan, are equivocal and tend to support India's case.

23. Pakistan has mischaracterized India's reading of the report as an attempt by India to mislead the Court, and has gone to the extent of suggesting that the addition of the article "the" in the extract at paragraph 154 *(d)* of the Reply which is absent in the extract of the same section in paragraph 19, was with an intent to mislead the Court. Possibly they felt the Court would read only one half of our Reply and not the other half and therefore be misled.

24. It is with a degree of regret that I submit that the tone and tenor of submissions made yesterday do not befit the dignity and solemnity of the proceedings in this Court, are incompatible with the degree of respect that needs to be shown to sovereign republics in relation to matters such as their filings and submissions.

25. The second matter of regret, and a much greater regret, is the manner in which Pakistan has expressed its veiled criticism of the rulings of this Court on procedural matters. The criticism of the provisional measures put in place by this Court, was by the Lahore High Court Bar Association. The kind of sentiments that have been expressed about the stature of the Association are a surprise, at least to me as an Indian lawyer. The Lahore High Court is one of our original Letters Patent Courts; we cite their authorities, it has a history and a tradition that is respected in the subcontinent. Speaking of its Bar Association with such derision is a matter on which I would not comment any further, beyond saying that perhaps Mr. Qureshi may never be invited to tea by that Association again.

26. Although it has tried to distance itself from the resolution of the Bar Association, it is obvious that Pakistan supports the criticism. India asked for putting in place provisional measures on 8 May 2017, apprehending that Mr. Jadhav may be put to death. When the provisional measures were sought, the Court had sought an assurance from Pakistan that Mr. Jadhav will not be executed before the Court has rendered its final decision, and such an assurance was not forthcoming.

Pakistan, in its oral submissions, ***indicated*** that any execution of Mr. Jadhav would "probably not take place" before the end of August 2017 — this is recorded in the provisional measures Order, in paragraph 54. The suggestion was that this Court must tailor its calendar to meet the probability of his not being executed by August 2017.

27. In the circumstances, the Court found good reason to put provisional measures in place. India's seeking provisional measures has been criticized in the course of the opening submissions as an abuse of process, and that too, after *this* Court found good reason to put provisional measures in place. If a relief is sought and is granted after hearing both sides, and on the same facts is criticized as being an abuse of process, it is unabatedly a criticism of the Court that granted the relief. The Lahore Bar Association, it appears, was echoing the sentiments of the Republic of Pakistan, or vice versa.

28. But the criticism of this Court does not end there. Three attempts by Pakistan to derail proceedings and obtain procedural advantages have been rejected by the Court and each of them came up for criticism yesterday.

29. Pakistan criticized India for having blocked the cross-examination of Mr. J. P. Singh. Pakistan sought production of Mr. J. P. Singh for cross-examination and India contested this in the two letters I have referred to a moment ago, i.e. the letters of 18 January 2019 and India's response of 23 January 2019. The Order of the Court was communicated on 24 January 2019[6] which also contains the following words: "Moreover, in the view of the Court, this letter does not seem to be directly relevant to the issues before the Court in the current case. In any event, the Parties are free to comment on the letter in question during the course of the hearings."

30. Pakistan criticized India for blocking the cross-examination of Mr. J. P. Singh. If that is so it must necessarily mean that the Order of the Court, including the observation in that letter that it did not seem to be directly relevant to the issues before the Court, is not correct.

31. On the opening day of the case, 18 February 2019[7], a letter was received, which was dated 17 February 2019, but was served through the office of the Registrar on India late in the afternoon of 18 February 2019. Pakistan sought to examine one of the two experts who had given a

[6] Judges' folders, tab E.

[7] Judges' folders, tab F.

report "to provide the Court with an update to the report . . . and to address the misrepresentations of the said report by India". India opposed the request[8] since the examination of a witness, and therefore the right to cross-examine the witness, required arrangements to be made in advance of the hearing, and such a request being made 30 minutes before the commencement of the opening submissions, which was first told to us, was clearly badly timed, or to borrow Pakistan's favourite expression — an attempt at an ambush. Pakistan has not offered any explanation as to why it had to wait until the morning of 18 February to make such a request.

32. Later in the afternoon of 18 February 2019[9], a *second* request was made for leave to display a video content on a USB drive, purportedly a confession of Mr. Jadhav recorded by someone somewhere. No explanation was given as to why this USB and the video on it were being made available for the first time on the late afternoon of 18 February, when even as per Pakistan's assertion, the video was made sometime in November 2018. India opposed this request[10].

33. On 18 February 2019[11], late in the evening, a third request was made, latching onto the clarification that the use of the word "the" was a typographical error, to file a supplementary report a copy of which was attached to the letter, and a further request was again made that the expert may be examined at the hearing if India objects to the production and inclusion of the supplementary report. In the copy of the supplementary report that was attached to the letter, made over to India, one page was missing.

34. India objected[12] to the production of the report on the ground that, if Pakistan wanted to clarify an alleged misrepresentation, it could have done so by filing this supplementary report along with its Rejoinder.

35. All the three requests made by Pakistan on 18 February 2019 were declined. This Court on 19 February 2019[13] held that "the request of Pakistan was made on the day of the opening of the oral proceedings and that the production at this stage of the document referred to as 'Supplemental

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[8] Judges' folders, tab IJ.

[9] Judges' folders, tab G.

[10] Judges' folders, tab IJ.

[11] Judges' folders, tab H.

[12] Judges' folders, tab IJ.

[13] Judges' folders, tab K.

Report' was not justified". Similarly, in relation to Pakistan's request to produce a video, the Court decided "that it would not be appropriate to grant Pakistan's request".

36. In the course of its submissions, Pakistan criticized India for blocking the production of this evidence. What followed then was somewhat unusual. Counsel addressing the Court said that since the production of the video was not allowed, he would orally state what was the content of the video. This is to be found in paragraph 27 of the transcript of the hearing. Something which was declined to be taken on record was sought to be placed on record — or rather the substance of it was sought to be placed on record, using the opportunity to make submissions. Again there is a reference to a video relating to the meeting of Mr. Jadhav and his wife and mother. This is not on record. Counsel deposed as to its contents, which is in paragraph 75 of the transcript.

37. The production of the supplementary report of the experts was declined, but counsel took upon himself to inform the Court what was stated in the supplementary report.

38. If a request for additional evidence is declined, to accuse the other Party of blocking that evidence unfairly is clearly a criticism of the Order of the Court. Worse is an attempt to place on record, through oral submissions, the content of evidence, the production of which stands declined by the Court.

39. Finally, I was surprised to hear a mention of some money lying in Mr. Jadhav's account — or deposited in Mr. Jadhav's account — and how the money reached there. Our team has, in the time available since yesterday, searched the entire material and not found any mention of 90,605 rupees[14], the figure from the transcript, deposited in his accounts by way of pay. This was a statement made in the course of submissions. We checked, it is not in his confession. It is not available on the material we checked yesterday. If it is on record, I would be happy to stand corrected.

40. I now proceed to deal with the points made by Pakistan in relation to the case which have a bearing on the case. I have tried to gather these points carefully, traversing the minefield of expletives and wanton allegations of shamelessness, disgracefulness, etc. heaped on the sovereign Republic of India.

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[14] CR 2019/2, p. 19, para. 26.

41. The first issue I would like to address is the issue of abuse. In the presentation made to the Court there are three bases on which an abuse of process argument is raised. They were:

(a) India had not established that Mr. Jadhav was an Indian national and estoppel would not apply. Whatever India did, it never suggested estoppel. At least we do not have to keep reminding ourselves that we are not in a commercial court. We are in the International Court of Justice.

(b) That India's refusal to co-operate in the investigation requested in the absence of a mutual legal assistance treaty was mandated by the United Nations resolution (1373), and its failure to do so and yet insist on Article 36 was an abuse.

(c) India had not proffered any explanation for the use of the passport and thus, as a State having issued an illegal document, India had forfeited its rights to invoke Article 36. These are my paraphrases of what I have picked up of Pakistan's points.

42. The first point about Mr. Jadhav's nationality surely cannot be a serious one. I would only remind the Court of what I said in my opening and to which I have not heard a reply.

43. On 25 March 2016, a démarche was issued protesting the "illegal entry into Pakistan by a RAW officer". Pakistan is aware that to be an officer of the RAW, the primary requirement is to be a citizen of India.

44. In the first propaganda material issued to the P5 countries on that very date, the allegation was that his biodata has revealed that he is a commander in the Indian Navy. Again this would be an assertion of his citizenship in India.

45. In all the Notes Verbales issued by India, India demanded consular access on the premise that Mr. Jadhav was an Indian national. Thirteen reminders were sent. Pakistan did not reply. Pakistan did not question his nationality.

46. Article 36 requires consular access to be given in the first instance upon arrest without undue delay. At the time of his arrest, if Pakistan was protesting that an Indian national employed by the Indian RAW — or Army, or Navy — was carrying out subversive activities, and was using this allegation to malign India before the world, was there a need for India to assert the nationality of the person arrested? Unlike Pakistan, India has never needed to deny the nationality of its nationals apprehended in Pakistan, for Indian nationals are not the kind whose nationality ever

needs to be denied. The conduct of Pakistan however is to the contrary — they disown any responsibility for terrorist acts by Pakistani nationals and even deny their nationality.

47. If at the time when Article 36 of the Convention requires consular access to be provided, the receiving State has no doubt about the nationality of a person arrested, it is duty-bound to carry out its obligations under the Convention.

48. The Respondent seeks to rely on the *Avena* Judgment. It destroys their case. There was a doubt in that case as to how many of the persons who were under arrest and trial were of Mexican origin, but US nationals. The United States claimed that it had no obligation in relation to US nationals to inform Mexico, even if they were citizens of both States. There was a dispute as to nationality, Mexico acknowledged that it had the burden of proof and produced birth certificates. That was in the facts of that case. The legal test however was set out by the Court in paragraph 63 and paragraph 88.

49. In paragraph 63, the Court held that the detaining authority had the duty to give information to the individual "once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I),* p. 43, para. 63). A similar thought is echoed in paragraph 88 where the Court said "there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national" (*ibid.*, p. 49, para. 88).

50. Pakistan had no doubt when they arrested Mr. Jadhav that he was an Indian national — and on that basis complained about India to the global community. Pakistan invites the Court to treat as true the confession made by Mr. Jadhav to the military and in that the very first assertion is that he is an Indian national and an officer of the RAW. If Pakistan so closely, dearly and fully believes his confession, why do they doubt his nationality? This point, honourable President, honourable judges, is simply hopeless.

51. Pakistan's suggestion that India failed to comply with its obligations under the United Nations Security Council resolution 1373 is equally without merit. Pakistan relies on paragraph 2 *(f)* of the resolution which says

> "*Decides* also that all States shall . . . [a]fford one another the greatest measures of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings".

This decision is reflected in paragraph 3 *(c)* in a call upon all States to "Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and to take action against perpetrators of such acts". These actions are taken through criminal investigations, through freezing of funds and the various methods available.

52. Bilateral treaties for investigation into funding of terrorist acts, an investigation into terrorist acts themselves in order to assist prosecution of those who indulge in such acts would fall in paragraph 2 *(f)* read with paragraph 3 *(c)*. Pakistan has not entered into any such treaty with India despite repeated invitations. I made this point in the opening and — in a reply marked by diatribe against India — I did not find a contradiction of such an important matter, i.e. that there is a reason that there is no legal assistance treaty, that is on account of Pakistan's reticence to enter into any such treaty. Pakistan challenged the figure of 40, saying that it jumped from 18 to 40. I think my figure was right, but let us assume that there were 18 requests mentioned in passing about the pending requests for legal assistance. It is a very large number, 18 is a very large number, such a large number of requests in relation to acts of terrorism which have horrified the global community including the Mumbai attack of November 2008. There was no answer.

53. Secondly, and I have made this point earlier to which I did not hear a reply, Article 36 does not depend on complying with any request for mutual legal assistance. Yesterday this Court was shown photographs of high functionaries and was told that an investigation into their conduct was sought by Pakistan. A reading of the document for legal assistance which begins with an investigation into the conduct of the Heads of various organizations in India makes it apparent that it is not a serious document for legal assistance but another weapon in the propaganda armoury of Pakistan. Why propaganda? I shall deal with it towards the end of my presentation.

54. The third point made by Pakistan is that India has not offered any explanation for the use of the passport by Mr. Jadhav. This point is rhetoric and has no legal basis.

55. Article 36 came into play on the date of the "arrest", i.e. 3 March 2016 or soon thereafter "without undue delay". The rights under Article 36 relate to Mr. Jadhav's prosecution for acts which are offences under the laws of Pakistan. Pakistan rightly contended that possessing a false passport, if he did possess one, would possibly be an offence under the Indian Passport Act, ***1967***. Secondly, despite Pakistan's laws that generously award capital punishment, it is unlikely that possessing a passport of this kind would even under the laws of Pakistan involve awarding the death penalty.

56. If Mr. Jadhav had been involved in subversive activities in relation to defined incidents, irrespective of the passport he carried, he would have been prosecuted for espionage and acts of terrorism and be liable to be awarded the death penalty. If Mr. Jadhav was innocent of the allegations of participation in those acts and those activities, then notwithstanding the possession of such a passport, he would have to be acquitted of the charges of terrorism.

57. What Pakistan has been extremely reticent to share with the world and with this Court is the judgment of the court which convicted Mr. Jadhav. It is that judgment which will show the offences for which Mr. Jadhav had been charged, his connection with the offences with the role played by him, the evidence against him for participation in those offences, and the basis for the conviction in relation to those specific offences.

58. India has repeatedly requested Pakistan for a copy of the judgment, the evidence against Mr. Jadhav, and the grounds on which he was convicted etc. After all legal proceedings have come to an end, at least now, there could be no threat to the existence and security of Pakistan if these documents are made available to India. But for good reason, Pakistan is shy of sharing these details. I have little doubt that if there was any substantive evidence of Mr. Jadhav's participation in any offences, 140 minutes of yesterday's 180 minutes would have been devoted to this.

59. All Pakistan has is a passport. On its allegation that the passport was issued by India, and bolstered by a report of an expert, on which considerable time was spent, Pakistan claims that Mr. Jadhav was an Indian terrorist sent by India to Pakistan to indulge in acts of terrorism. This is a flying leap of faith. Pakistan has nothing beyond the extracted confession on which Mr. Jadhav has

been convicted of participation in the subversive activities. Possessing a passport does not make you party to offences. Your role in those offences is what gets you a conviction. Not having a passport which would enable you to sneak into a country, ***~~as you mean~~ assuming*** there was such a passport. The confession was extracted for the first time by the armed forces when he was in their custody and even before the First Information Report (FIR) was registered on 8 April 2016. Embarrassed to share with the world community that like, possibly, 95 per cent of such other convictions, Mr. Jadhav is being sent to the gallows on the basis of an extracted confession, Pakistan seems to suggest that the possession of a passport which it alleges was issued in India is sufficient proof of his being a terrorist and sufficient proof of his having indulged in acts of terrorism over a period of two years. All they have is his confession.

60. But lest I be accused again of misquoting and misrepresenting Pakistan's case, I hasten to add that yesterday they claimed that they have clinching and convincing evidence of the case against India and Mr. Jadhav. This is by way of three articles which found place in the Indian press. Substantial praise was heaped upon the journalists who wrote these articles. If one is to proceed on the basis that what is contained in these articles is the absolute and complete truth, one must also believe what is written in *The Quint* by Mr. ***Nandy***. The article cited above has the following first paragraph: "While the Pakistani intelligence had initially claimed that he was trapped in Saravan on the Iran-Pakistan border, a Baloch leader by the name of Sarfraz Bugti had disclosed at the time that Jadhav was held near the Chaman in Baluchistan", which is in Pakistan. If this is true then the FIR is false; the story of the Army is false; the story of his arrest from the Saravan Border promptly circulated to the world is equally false.

61. The second article cited, from the *Frontline*, states:

> "following Jadhav's *kidnapping from Saravan*, Pakistani sources said, a decision was taken at the ISI directorate to link him to acts of terrorism. Notably, however, the first of Jadhav's confessional videos, released by Pakistan's military, referred in general terms to acts of terrorism by India but none involving himself."

These are articles written by those journalists who are the epitome of good journalism and Pakistan swears by their credibility. This is what they have to say in those articles.

62. I have my doubts if the witnesses, who were allegedly produced in the course of the trial and are referred to in the 14 April 2017 statement by Sartaj Aziz — who Mr. Jadhav was allegedly

allowed to cross-examine, those witnesses who Mr. Jadhav was allegedly allowed to cross-examine — included the three revered journalists from India.

63. By hanging its case on possession of a passport in a false identity issued by India, Pakistan makes the case that India had sponsored terrorism in Pakistan. Pakistan's case against Mr. Jadhav on the question of the passport is yet to be fully investigated by India, since the two of the three — they called them "unimpeachable" by their version — journalists have not accepted his arrest at Saravan theory. However, there is not a scintilla of evidence beyond Mr. Jadhav's obtained confession to suggest that he was an "Indian agent", that he participated in any specific activities or was responsible for any specific incidents of terrorism.

64. Pakistan's suggestion that it has established an illegal act on the part of India, therefore, is hopeless.

65. But assuming that they are right, Article 36 of the Vienna Convention does not admit of any exceptions of this kind. Pakistan is wrong in suggesting that, because of their argument of customary international law, the plain language of Article 36 should be cribbed and confined and an exclusion be created for allegations of espionage.

66. Invariably a national of another State caught and charged with allegations of espionage would obviously be an "agent" of the sending State. Allegations would then be made against the sending State of indulging in espionage. To argue that where allegations of espionage are made, the sending State is to be considered a delinquent State and consular access is to be excluded, would be to introduce an exception in respect of espionage into the language of Article 36.

67. Finally, it is now settled that Article 36 confers a right on the individual and the right on the State and has now been recognized to be a dimension of the human rights of a person charged with serious offences. Such a right cannot be emasculated on an allegation that the sending State is guilty of a violation of some treaty or of the conduct incompatible with international law.

68. In the course of the opening submission, it was also suggested that India's failure to invoke the dispute resolution procedure of Article II and Article III of the Optional Protocol was an abuse of process. This submission did not deal with the *Tehran* Judgment which clarified that these articles were not a precondition to the invocation of the dispute resolution process under Article I. The argument that ~~***is***~~ not invoking the dispute resolution process under Articles II and III renders

the decision to invoke the jurisdiction of the Court as an abuse, therefore, has to be stated to be rejected.

69. On the construction of Article 36, two broad points have been made by Pakistan. The first is trying to attribute some meaning from a discussion found in the *travaux*, and the second is to suggest that anything contained in the Vienna Convention, which is not supported by customary international law, should be treated as excluded from the plain language of the Convention.

70. Both points lack any merit. As far as the *travaux* is concerned, the discussion relied upon establishes in fact that espionage was included in Article 36.

71. The two relevant paragraphs read thus:

> "47. Mr. TUNKIN felt it might be best to delete the words 'without delay'. There were cases in which it was impossible to inform the consul immediately of the arrest or detention of a national. Sometimes — for instance in espionage cases, where there might be accomplices at large — it might be desirable that the local authorities should not be obliged to inform the consul.
>
> 48. The CHAIRMAN remarked that a statement of a general principle of law could not possibly cover all conceivable cases. If the Commission went into the question of whether cases of espionage should be made an exception the whole principle of consular protection and communication with nationals would have to be re-opened."

These words do not leave any doubt that the understanding of the Chairman clearly was that if you want to start creating exceptions, the whole principle of consular protection would have to be reopened.

72. The discussion in the *travaux* relates to an amendment that had been proposed to substitute the words "without delay" with the words "within a reasonable time".

73. While discussing this proposal Mr. Tunkin suggested that it might be best to delete the words "without delay" for which he gave two reasons. The second reason was that "for instance in espionage cases, where there might be accomplices at large — it might be desirable that the local authorities should not be obliged to inform the consul". He was not suggesting an exception for espionage, but suggesting that there may be a case to withhold informing the consul till everybody had been apprehended.

74. The Chairman remarked even on this statement that a general principle of law could not probably cover all conceivable cases. And I have repeated that sentence because that sentence is

extremely important where he said "if the Commission went into the question whether cases of espionage should be made an exception the whole principle of consular protection and communication with nationals would have to be reopened". The Chairman put to vote the proposal that the receiving State should have automatic responsibility for notifying a consul of the arrest or detention of one of his nationals, which proposal was adopted by 14 votes to 1.

75. The discussion establishes that the authors of the Convention expressly treated espionage also as being covered by the consular access principles. It is surprising that despite the plain language of this, and the point having been made in India's Reply, the matter was still pursued.

76. The observations of Sir Gerald Fitzmaurice which were referred to were made in a completely different context. One of the issues was whether communication with nationals "in areas to which access was prohibited on grounds of national security" should be factored into the treaty. Sir Gerald Fitzmaurice, responding to the proposed amendment by Mr. Erim stated that "the only real objection that had been made to paragraph *(a)* of his draft concerned communication with nationals in areas to which access was prohibited on grounds of national security. There was really no other ground on which the right of a consul to visit his nationals could be in question — [no other ground], He agreed that the matter of prohibited zones should be considered but he thought Mr. Erim's amendment was too broad."

77. These parts of the *travaux* are destructive of the premise that the draftsmen of the Convention wanted to exclude espionage from Article 36.

78. If the *travaux* suggests that there is no exception in favour of espionage, then Pakistan's argument has to be that despite the framers of the Convention wanting to include espionage in the *chapeau* of rights available under Article 36, if customary international law did not have a consistent practice of allowing consular access in the case of espionage then notwithstanding the language of Article 36, it should be read down to exclude espionage from its remit. The two bases for the submission are firstly that the preamble suggests that the Vienna Convention crystallized prevailing customary international law rights and secondly none of the countries to whom invitations were sent by this Court, have shown up for the hearing.

79. The first submission is completely unavailing. The language of the Convention cannot be whittled down because the preamble sets out the backdrop in which the Treaty came to be created.

Secondly, if this approach to construction is to be accepted then in every respect, where there is a breach of the Convention it would be open to the delinquent State to argue that the breach of the provision is ineffective because the conduct of the delinquent State has not shown to be contrary to established State practice and customary international law. If this approach is countenanced, then the Convention may as well be scrapped.

80. The second argument shows a degree of confidence unusual even by their standards in their submissions — Pakistan invites this Court to hold that its submissions should be accepted unless the global community that has signed the Vienna Convention appears in this Court and opposes its position. Perhaps Pakistan seems to assume that the interpretation commended by it for acceptance raises issues of such great moment that until all or most of the signatories to the Convention join in to oppose its position in one voice, it should be assumed that Pakistan's assertions are unassailable. A leap of faith again.

81. Considerable time was spent in the opening on the construction of the 2008 bilateral Agreement. India's case is simple. The 2008 bilateral Agreement cannot take away a right conferred by Article 36 of the Convention, for the bilateral Agreement will then be rendered ineffective on account of Article 73.

82. It is not clear from the presentation whether Pakistan's case is that India only invoked the 2008 Agreement and did not ever invoke the right and Article 36 or whether basing themselves on an interpretation of clause (vi) Pakistan contends that consular access between India and Pakistan is not a duty but something which each State will allow depending on its evaluation of the merits of the case.

83. In paragraphs 368 to 371 of its Counter-Memorial, Pakistan acknowledges that the bilateral Agreement can and should be seen as "supplementing" or "amplifying" the provisions of the Vienna Convention. If Article 36 casts an unconditional obligation on the receiving State to allow consular access to a national of the sending State upon arrest or soon thereafter, and continue such consular access throughout the period of his incarceration and trial, this obligation cannot be converted into a conditional obligation, conditioned upon the sending State deciding in which cases consular access should or should not be granted.

84. India has given its interpretation of the bilateral Agreement of 2008 which puts the Agreement in context and gives meaning to clause (vi). Use of adjectives to suggest that this is a mischaracterization or an attempt to mislead this Court do not help the Court in deciding the case of construction of treaties. This is a matter of law and should be addressed in language of studied moderation.

85. But it is India's case that there is no need for the Court to pronounce finally on the construction of the bilateral Agreement 2008 as there are other substantial issues for adjudication.

86. Pakistan does not run the extreme case that the 2008 Agreement supersedes or overrides the Vienna Convention. At the stage of the provisional measures, a more extreme submission was raised and is recorded in paragraph 25 of the Order of this Court dated 18 May 2017, noting that Pakistan had put in issue the jurisdiction of this Court under the Optional Protocol by relying on the 2008 bilateral Agreement. This submission challenging jurisdiction on this basis is conspicuous by its absence in these proceedings.

87. If Article 36 of the Vienna Convention cannot be whittled down by a bilateral treaty, then the language of the treaty does not call for any interpretation, where the language of Article 36 is clear. Besides Article 36 must have the same meaning irrespective of the States involved, and its meaning cannot change chameleon-like depending on bilateral treaties between parties. Article 36 must mean the same between India and Pakistan as it must mean between America and Brazil or France and Germany. Additional and supplementary matters may be covered by bilateral treaties. They will stand outside the Vienna Convention, but not be contrary to it, and thus not affected by Article 73. Anything directly covering the same ground as the Vienna Convention and diluting its provisions must fail. Instead of construing clause (vi) as suggested by Pakistan, it should be read down in its context as suggested by India.

88. I now move to the military courts point. Pakistan defends its military courts' system of dispensation of justice by relying upon the report of the military experts. India's criticism of the system of military courts trying civilians generally, and of the manner in which the military courts have functioned, has been documented by the International Commission of Jurists, the Human Rights Committee and even in a resolution of the European Parliament.

89. Pakistan invites the Court to disregard the findings of these recognized bodies in favour of the opinion of the military experts, or two of them.

90. Firstly, the question whether a legal system is compliant with the contemporary understanding of due process is a matter for a court of law. It is not a matter for an expert deposing before a court of law. It is for this reason India invited the Court to completely disregard this report.

91. The conclusions by the military experts are set out in paragraph 3 of page (vi) of their report.

92. The first conclusion they arrive at is that while most military courts have jurisdiction to try civilian offences of espionage and terrorism, 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 are concurrent jurisdictions.

93. A fair reading of this suggests that the experts find that military courts are generally confined to service personnel. It is known that there are some military courts — Pakistan is one, and unfortunately not the sole example — in which military courts have jurisdiction to try civilians.

94. The use of the word "often" by the experts — a delightfully vague expression — makes it obvious that the trend is not to have military courts trying civilians. That is precisely what India inferred from the report. Pakistan, realizing that the conclusions in the report were against their interest, tries to obfuscate the issue by saying that omitting the word "often" in India's paraphrase was an attempt to mislead the Court — a suggestion that but for this great report, this Court would perhaps not even know that there are some military courts in the world which have the power to try civilians. This is being rather presumptuous.

95. The second paragraph of the report is irrelevant. It says that the military courts of Pakistan are based on the domestic law of Pakistan. If the military courts do not measure up to due process standards and international law, their domestic statutory power is irrelevant. I do not need to take the time of this Court on the settled proposition that domestic law is never a defence if what is involved is a violation of international law or an international obligation.

96. The third conclusion is that the judicial review function of the courts "appears to provide a potential effective safeguard against manifest failings in due process". They do not say "manifest

failings if any". There are bound to be failings in a military court trying civilians and according to the experts the judicial review is a potentially effective safeguard against these failings.

97. Two points follow. The addition of the article "the" before the words "manifest failings" does not change the sense of what is said in the report nor does it affect India's interpretation of the report. Secondly, it is for this Court and not for the experts to opine on whether the judicial review function is sufficiently a potential effective safeguard. I say it is rather presumptuous to think that this Court would go by an expert to decide whether judicial review is a sufficient safeguard on the ground of due process shortfalls. We do not need experts. This Court will decide.

98. Judicial review is hopelessly insufficient and this is also apparent from the judgment of the Pakistan Supreme Court. The limited area of judicial review is set out in paragraphs 73, 93 and 103 of the *Zaman Khan* judgment. The first judgment of the Peshawar High Court follows this narrow remit of judicial review and on that basis declined to interfere with the orders of the military court.

99. Pakistan said that India had not updated this Court with a report of the International Commission of Jurists published in 2019[15]. To complete the record, the report is attached to this presentation. It is in the public domain.

100. The criticism of the military court is as trenchant as it was before. The only thing new in the report is a reference to a recent decision of the Peshawar High Court.

101. The criticism levelled by the International Commission of Jurists and other fora which reviewed and commented upon Pakistan's military court system is that it is non-compliant with due process standards, and that is the report of 2019. Pakistan's argument is that judicial review provided for under the Pakistan Constitution is a sufficient safeguard and therefore the overall system, with the check and balance of a judicial review, becomes compliant with due process. But this is not what the Supreme Court of Pakistan held in *Zaman Khan*[16].

102. Article 10A[17] of the Constitution of the Islamic Republic of Pakistan provides for due process. Article 8[18] of the Constitution declares laws contrary to Part I of the Constitution will be

[15] Judges' folders, tab L.

[16] CMP, tab 81.

[17] Judges' folders, tab M.

void. An exception is carved out for laws that are placed in the First Schedule, by Article 8 (3). The Pakistan Army Act, 1952 is placed in the First Schedule[19] and is therefore immune from challenge on the ground that it violates due process.

103. The violation of due process under Article 10A was challenged in *Zaman Khan.* In paragraph 101 of the judgment, the Supreme Court turned down the challenge on the short ground that the 2015 amendments to the Pakistan Army Act, 1952 were placed in the First Schedule and were therefore immune from challenge on the ground that they violated Article 10A. It was held:

> "[t]his Court in its judgment in the case of District Bar Association, Rawalpindi and others *(supra)* has held that the Pakistan Army Act, 1952 as amended by the Pakistan Army (Amendment) Act 2015 was validly and effectively incorporated through the amendment in the First Schedule to the Constitution as a consequence whereof, the provisions thereof cannot be called into question on the ground of being in violation of the fundamental rights guaranteed under the constitution in view of Article 8 sub-article (3)."

104. If the 2015 amendments enabling the military courts to try civilians were due process compliant, that should have been the Republic of Pakistan's answer in their court, saying that the amendments comply with Article 10A. That is not what the Pakistan Supreme Court held, but what it did hold is that the amendments in the Army Act enabling military courts to try civilians were beyond the pale of challenge on the ground that they violated due process.

105. The recent judgment of the Peshawar High Court appears to have taken a broader view. Pakistan faults *India* for not producing the judgment, without offering an explanation as to why *it* did not rely upon the judgment if it supported its case. But, honourable President and honourable Judges, the reason is not far to seek. The Pakistan Government has filed an appeal against the judgment of the Peshawar High Court and it appears from the report of the International Commission of Jurists that the Supreme Court has suspended the operation of that judgment. Perhaps they were embarrassed that ***~~he~~ if they*** dare produce the judgment, they would be compelled to tell this Court that the Republic of Pakistan has challenged the judgment. The ICJ report is important it says "The Supreme Court has in the past dismissed review petitions in cases with nearly identical facts to the petitions before the PHC." There was a time in India when some of our high courts took very bold views of Indian fundamental rights, which unfortunately in 1976 were

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[18] Judges' folders, tab M.

[19] Judges' folders, tab M.

reversed by the Supreme Court. The ICJ apprehends that the Peshawar High Court seems to have taken a bold view. The Republic of Pakistan does not accept that view. It is challenging it in the Supreme Court but it solemnly tells the Court "Why has India not produced that judgment?" It does not tell this Court "we have not produced that judgment because we are challenging that judgment in the Supreme Court".

106. Finally, dealing with the question of the evolution of the law and the cross-fertilization of jurisprudence of the Vienna Convention with other human treaties, the only submission made was that the Inter-American Court was dealing with their own charters and not with the Vienna Convention. It is correct that the court was dealing with its own charters and administering rights and obligations under those charters, but for the purpose of which it relied on the Vienna Convention. That is what is called cross-fertilization of jurisprudence.

107. The final submission that the relief should be the same as in the *LaGrand* and the *Avena* cases — with the exception that the word "Pakistan", should be substituted for "United States". Fortunately no representative of the United States Government was present here; he may not have been amused. The substitution would require rewriting the Pakistan Constitution by removing the constitutional protection from a challenge on due process grounds. It would require, in Pakistan, substituting a trial by a grand jury with a trial by a Pakistani military officer — and if the reverse was to be done, I do not know if military officers in the United States would be comfortable trying their own civilians and generously awarding death sentences to them on extracted confessions. This submission is hopeless. When the two legal systems are *so*, so far apart, you cannot say "substitute my name for that of the United States and give the same relief".

108. The last submission brings out in bold relief why India submits the relief granted should be beyond what was granted in *Avena* and *LaGrand*. It is for this reason that India submits that this Court should not sanctify a trial by the military court of civilians generally, and specifically the trial by the Pakistani military courts in the face of the findings of the International Commission of Jurists, the Human Rights Committee and even the European Parliament. It bears emphasis that the entire basis for holding that the US suggestion for review and reconsideration, in the context of US laws, was sufficient *restitutio in integrum* was that, apart from the confusion which led to

denying consular access, there was no other reason to question the integrity of the US criminal justice system.

109. For a criminal justice system, to be compliant with contemporary standards of due process, "everyone shall be entitled to a fair and public hearing [absent] by a competent, independent and impartial tribunal [absent] established by law" and "to have adequate time and facilities [absent] for the preparation of his defence and to communicate with counsel of his own choice [absent]" and "the right to have his conviction and sentence being reviewed by a higher tribunal according to law"[20]. The system which lacks these fundamental attributes cannot pass muster merely because there is a judicial review in a constitutional court available within a narrow legal remit. As the Pakistan Supreme Court said, widening the grants of judicial review would result in diluting the constitutional amendment which granted immunity from a constitutional challenge on the anvil of due process, to the amendments made to the Pakistan Army Act, 1952 made in 2015. The Constitution was amended to expressly exclude scrutiny of the Army Act 2015 which allowed trial of civilians by military courts on the ground of due process, recognizing that such an amendment was necessary to save the present dispensation by which Mr. Jadhav has been given a death sentence. The report of the military experts which finds great substance and the fact that the military courts are fully supported by domestic law is of little worth and value. This Court will have to decide for itself whether it considers such a system could be sanctified by an order of review and reconsideration.

110. When we talk of review, I would draw the attention of the Court in stark contrast, in the *Kasab* case where the Supreme Court of India, dealing with an application filed by a Pakistani terrorist, apprehended red handed and caught by a brave police officer who absorbed on himself a magazine of bullets on his person, the Supreme Court held that "We may also state here that since it is a case of death sentence, we intend to examine the materials on record first hand, in accordance with the time-honoured practice of this Court, and come to our own conclusions on all issues of facts and law, unbound by the findings of the trial court and the High Court." This is called "review".

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[20] ICCPR, Art. 14.

111. I would like to conclude my opening presentation by dealing with the point made in India's Memorial and Reply repeatedly, and which was the subject of severe criticism yesterday. Pakistan suggested that in refusing to answer questions and wrongly characterizing them, including its request for legal assistance as a propaganda measure, India had done something wrong. Let me explain to you why India calls all this a propaganda and not serious legal steps. Pakistan has continued to misuse the opportunity provided by this august institution with false and malicious propaganda on issues which are not part of substantive legal issues for this Court to consider.

112. Also, one of the reasons why India seeks Mr. Jadhav's release, apart from showing propaganda, is that he has become a pawn and a convenient tool for Pakistan to try and unsuccessfully divert global attention from its own conduct. And Pakistan's conduct is well documented by information and material contained in public domain. These include:

(i) State sponsorship of terrorism, by including and allowing its territory to be used to train, arm and finance and launch terrorist attacks against its neighbours. Some of the recent terrorist attacks include:

(a) On 14 February 2019, a dastardly terror attack was carried out in India by Pakistan-based and United Nations proscribed-based entity, killing more than 40 Indian security personnel. This has received global condemnation. The United Sates has even called upon Pakistan "to end immediately the support and safe haven provided to all terrorist groups operating on its soil, whose *only goal* is to sow chaos, violence and terror in the region"[21].

(b) In another terror attack, in Iran on 13 February 2019, the Iranian side has stated that the Pakistan Government must be made accountable for terror attacks which are planned and carried out by a terrorist group on its soil. In a statement issued by the Iranian Foreign Office on 17 February 2019[22], it was stated that the Iranian side has conveyed its protest to Pakistan "at the growing number of terrorist attacks designed in and led from Pakistan including the terrorist attack in Zahedan-Khash road (13 February 2019)".

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[21] Judges' folders, tab NO.

[22] Judges' folders, tab PQ.

(ii) Pakistan is under pressure from the Financial Action Task Force (FATF) for weaknesses and deficiencies in the anti-money laundering and counter-terrorist financing (AML/CFT) régime of Pakistan. In June 2018[23], FATF decided to place Pakistan on its Compliance Document (grey list) for ICRG monitoring. FATF identified Pakistan as one of the jurisdictions with "strategic anti-money laundering (AML)/counter-terrorist financing (CFT) deficiencies".

(iii) Pakistan is used as a safe haven by United Nations proscribed terrorist entities[24], including Al Qaeda, Lashkar-e-Tayya, Jaish-e-Mohammed, Falah—i-Insaniyat, Haqqanni Network; individuals including Hafiz Saeed, Dawood Ibrahim and others. More than 30 individuals and entities who have been proscribed by the Counter-Terrorism Committee pursuant to United Nations Security Council resolutions 1267, 1989, 2253 are from Pakistan. It is surprising that Pakistan calls to aid the same United Nations Security Council resolution in support for its request for legal assistance, turning the proverbial Nelson's eye to its own track record.

(iv) Equally significantly large number, more than 20 proscribed entities and individuals are believed to be associated with Pakistan. Many countries, from time to time, continue to call upon Pakistan to take credible and effective action against these designated individuals and entities.

Counsel for Pakistan yesterday said that he has great respect for India but not in its present incarnation. I would only say that there was a time when the world respected Pakistan, but today the world does not have the same respect for Pakistan in its present incarnation.

(v) Pakistan has taken action to try civilians by its military courts, and made no progress to take forward trials in cases of heinous terror attacks, like the one in Mumbai, on 26 November 2008 in which 166 persons from 15 countries were killed by Pakistani terrorists. The prominent Pakistani English newspaper *Dawn* carried an interview of the

[23] Judges' folders, tab R.

[24] Judges' folders, tab S.

former Prime Minister, Mr. Nawaz Sharif[25], in which he was quoted as having made the admission of Pakistan's complicity in the Mumbai terror attacks, stating that "militant organisations are active. Call them non-state actors, should we allow them to cross the border and kill 150 people in Mumbai? Explain it to me. Why can't we complete the trial?"

Mr. Jadhav's trial was completed in six months? Four months? How many weeks? Quick trial? What has happened to the 150 people killed in Mumbai? Nothing.

This interview had not been denied.

113. The outcome document of the European Union (EU) Council proceedings titled "Council Conclusions on EU priorities in UN Human Rights Fora in 2019"[26] that was released day before yesterday on 18 February 2019 makes for compelling reading. Paragraph 9 of the document explicitly reflects concerns at the conduct of certain States, in which Pakistan figures prominently, with regard to due process of law and fairness of trial, referring to the offences of torture, enforced disappearances and extrajudicial killings. The European Union has called on Pakistan to ensure effective investigations in an impartial and transparent manner. This, in general, mirrors the truth of Pakistan's system in the conduct of criminal investigation and trial.

114. I therefore submit India has made out a case that there has been an egregious violation of the Vienna Convention. India has made out a case that, in the present circumstances, considering the absence of a due-process-compliant justice delivery system in Pakistan, and various other ~~***actors***~~ ***factors*** including Pakistan's propaganda which has publicly condemned Mr. Jadhav by naming him as an Indian terrorist, any relief by way of review and reconsideration shall be a chimera. This case calls for appropriate relief. The *LaGrand* judgment, rejecting the United States contention that, as in the other cases, the only sanction for violating Article 36 should be demanding an apology, noted:

> "It is no doubt the case, as the United States points out that Article 36 of the Vienna Convention imposes identical obligations on States, *irrespective of the gravity of the offence a person may be charged with and of the penalties that may be imposed.* However, it does *not* follow therefrom that the remedies for a violation of this Article must be identical *in all situations*. While an apology may be an appropriate remedy in

[25] Judges' folders, tab TU.

[26] Judges' folders, tab V.

> some cases, it may in others be insufficient." (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 489, para. 63.)

I respectfully submit, Sir — in all humility — all the emphasis at my command.

115. Honourable President, honourable Judges, the time has come for this Court to take this law forward and to make Article 36 a potent weapon for protecting human rights. Thank you, Sir.

The PRESIDENT: I thank Mr. Salve and I now give the floor to the Agent of India. You have the floor.

Mr. MITTAL: Thank you Mr. President.

Mr. President and honourable Judges, before making my final submissions, I would like to say that the Government of India takes full responsibility for what we have filed and protest the strong language used in Pakistan's opening arguments regarding India and her pleadings.

Now I make the final submissions.

FINAL SUBMISSIONS BY THE REPUBLIC OF INDIA

(1) The Government of India requests this Court to adjudge and declare that, Pakistan acted in egregious breach of Article 36 of the Vienna Convention on Consular Relations, 1963 (Vienna Convention) in:

(i) Failing to inform India, without delay, of the detention of Jadhav;

(ii) Failing to inform Jadhav of his rights under Article 36 of the Vienna Convention on Consular Relations, 1963;

(iii) Declining access to Jadhav by consular officers of India, contrary to their right to visit Jadhav, while under custody, detention or in prison, and to converse and correspond with him, or to arrange for his legal representation.

And that pursuant to the foregoing,

(2) Declare that:

(a) the sentence by Pakistan's military court arrived at, in brazen defiance of the Vienna Convention rights under Article 36, particularly Article 36 paragraph 1 *(b)*, and in defiance of elementary human rights of Mr. Jadhav, which are also to be given effect as mandated under Article 14 of the 1966 International Covenant on Civil and Political

Rights (ICCPR), is violative of international law and the provisions of the Vienna Convention;

(b) India is entitled to *restitutio in integrum*;

(3) Annul the decision of the Military Court and restrain Pakistan from giving effect to the sentence or conviction in any manner, and

(4) direct it to release the Indian National, Jadhav, forthwith, and to facilitate his safe passage to India;

5) In the alternative, and if this Court were to find that Jadhav is not to be released, then

(i) Annul the decision of the Military Court and restrain Pakistan from giving effect to the sentence awarded by the Military Court,

or in the further alternative

(ii) direct it to take steps to annul the decision of the military court, as may be available to it under the laws in force in Pakistan,

and in either event

(iii) direct a trial under the ordinary law before civilian courts, after excluding his confession that was recorded without affording consular access, and in strict conformity with the provisions of the ICCPR, with full consular access and with a right to India to arrange for his legal representation.

Thank you.

The PRESIDENT: I thank the Agent of India, Dr. Mittal. The Court takes note of the final submissions which you have just read on behalf of the Republic of India.

I will now turn to the statement made yesterday by the Agent of Pakistan.

As you are aware, Judge *ad hoc* Jillani has been unable thus far to attend these oral proceedings due to temporary indisposition. At the public sitting held on Tuesday 19 February 2019, the Agent of Pakistan raised certain concerns of his Government with respect to this situation. In particular, he stated that, in light of the absence of Judge *ad hoc* Jillani from the hearings, his Government's right to appoint a judge *ad hoc* under Article 31, paragraph 2, of the Statute has "yet to be effectively exercised". He added that "[t]he Judge *ad hoc* has not yet been

sworn in" and "[a]ccordingly, at present — he said — Pakistan does not have a judge *ad hoc*". He further stated that "Pakistan, while placing itself in the hands of th[e] Court, is obliged to request the Court to allow for another individual to be sworn in, as provided for under Article 35, paragraph 5, of the Rules of Court".

In order to clear up any misunderstandings which may have arisen and reassure both Parties of the smooth running of these proceedings in accordance with the principle of equality of the Parties, I would like to take a few moments to make some observations on the entry into function and position of judges *ad hoc* in cases before the Court.

First, it should be noted that, once a judge *ad hoc* has been chosen in proceedings before the Court and in the absence of any objection within the prescribed time-limit, his or her appointment as a judge *ad hoc* in the case is confirmed by a letter of the Court to the Parties under Article 35, paragraph 3, of the Rules of Court. From that moment on, a State's right to choose a judge *ad hoc* under Article 31, paragraph 2, of the Statute is exercised. The judge *ad hoc* is sent the case file and begins carrying out the duties of judge *ad hoc*. Indeed, in the present case, Judge *ad hoc* Jillani was sent the case file and duly took part in all the previous stages of the proceedings. In particular, he received copies of all the written pleadings filed by the Parties and participated in the adoption of the Court's Order of 17 January 2018 in the case. During this hearing, in full equality with his colleagues, he will receive all transcripts of the oral proceedings and may also watch them via webcast either as they are held or at a later date. It follows that the judge *ad hoc* chosen by Pakistan for the current proceedings has been participating in the case and may continue to do so.

Secondly, having begun his duties, a judge *ad hoc* serves the Court, like all his or her colleagues as an independent judge, for the remainder of the case, including all subsequent phases through to final judgment or until the case is otherwise removed from the General List. It is true that under Article 35, paragraph 5, of the Rules of Court, "[a] judge *ad hoc* who has accepted appointment but who becomes unable to sit may be replaced". However, the Court has not received so far any evidence that Judge *ad hoc* Jillani is unable or unwilling to continue to exercise his duties as a judge *ad hoc* in this case. In this regard, it is important to recall that, even if a judge *ad hoc* is not able to attend the hearings, he or she may be authorized by the Court to take part in the subsequent deliberations, readings, and final vote on a judgment.

Finally, with respect to the solemn declaration required of all judges *ad hoc*, as set out in Article 8 of the Rules, if it was not possible for a judge *ad hoc* to make such a declaration during the hearings, it could still be made in a separate sitting of the Court at a later date. Therefore, if Judge *ad hoc* Jillani is not able to be present with us tomorrow, there is, in view of the particular circumstances, the possibility of organizing such a sitting at an appropriate time in the near future. At this point in time, it remains for us all to wish him a prompt and complete recovery.

With this statement we come to the end of the sitting of this afternoon. The Court will meet again tomorrow, Thursday 21 February, between 4.30 p.m. to 6 p.m., to hear the second round of oral argument of the Islamic Republic of Pakistan.

The sitting is adjourned.

The Court rose at 4.35 p.m.

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