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CR 2019/4

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Thursday 21 February 2019, at 4:30 p.m., at the Peace Palace,

President Yusuf presiding,

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

VERBATIM RECORD

ANNÉE 2019

Audience publique

tenue le jeudi 21 février 2019, à 16 h 30, 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
	Judge *ad hoc*	Jillani
	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.	Jillani, juge *ad hoc*
	M.	Couvreur, greffier

The Government of the Republic of India is represented by:

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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.

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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 :

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comme agent ;

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

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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 ;

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

Mr. Tahmasp Razvi, Office of the Attorney General;

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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* ;

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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 arguments of the Islamic Republic of Pakistan. Before giving the floor to Mr. Qureshi, I shall invite Judge *ad hoc* Jillani, who, as you see, has joined us this afternoon, to make the solemn declaration provided for under Article 20 of the Statute, which applies also to judges *ad hoc*. However, in accordance with custom, I shall first say a few words about his career and qualifications.

Mr. Jillani, of Pakistani nationality, obtained a Bachelor's and Master's degree in political science from the Forman Christian College in Lahore, before obtaining a Bachelor of Laws at the University of Punjab. He began his long career as a district court lawyer in Multan in 1974 and was subsequently admitted as an advocate of the High Court. In 1983 he was admitted as an advocate of the Supreme Court of Pakistan. In 1993 he was appointed Advocate-General of Punjab, having already held the post of Additional Advocate-General. During his practice in law, Mr. Jillani held various elected offices, including Secretary General of the Multan District Bar Association and member of the Punjab Bar Council. After many years as a high-level legal adviser to the government, in 1994, Mr. Jillani became a judge of the Lahore High Court. He was appointed judge of the Supreme Court of Pakistan in 2004 and served as Chief Justice of Pakistan from December 2013 until his retirement in July 2014.

Mr. Jillani has participated in many international conferences and has received various awards for his work in promoting the rule of law. Mr. Jillani also serves as an Honorary Co-Chair for the World Justice Project, an international civil society organization which works to advance the rule of law around the world.

I shall now invite Mr. Jillani to make the solemn declaration prescribed by the Statute, and I request all those present to rise. Mr. Jillani, you have the floor.

Mr. JILLANI:

> "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The PRESIDENT: Thank you. Please be seated. I take note of the solemn declaration made by Mr. Jillani in accordance with the Statute and Rules of Court as judge *ad hoc* in the *Jadhav* case *(India* v. *Pakistan)*.

I now invite Mr. Qureshi to take the floor. You have the floor, Sir.

Mr. QURESHI:

1. Mr. President, honourable Members of the Court, may I begin by saying how pleased I am to see *ad hoc* Judge Jillani join the Bench in the course of these proceedings. But these proceedings are at the end, and I remind myself that the Court provided the Parties with an opportunity, through the second round of oral pleadings, to succinctly reply to the arguments that had been advanced against them in the first round. And I note, with regret, that India did not in fact reply, succinctly or otherwise, to my arguments, but instead continued to do what it has done, with respect, throughout, namely to distract, to deflect and to evade in the hope that it can shift the spotlight away from its own unlawful and, I regret to say, abusive conduct.

2. India failed to engage with any substantive argument substantively. Instead, India criticized Pakistan for not embracing "studied moderation" — I am not quite sure what that is — in response to India's repeated excursions from truth and reality to the realms of, with respect, irrelevance, fiction and, I am driven to point out, falsity. India told the Court that Pakistan should have refrained from using words such as "ridiculous" and "nonsense" in response to the approach adopted by India. Those words were unfortunate, but those words were, unfortunately, required and were given meaning by the context created by India — not Pakistan. Even in this regard, India could not stop itself from exaggeration, even on the very simple issue as to which words I had used and how frequently.

3. Sadly, as the Court will see at Annex 1 to my written submissions, I have identified that in fact I only used the word "ridiculous" twice, whereas my learned friend contended I had used it four times. I used the word "arrogance" twice. My learned friend contended I used it four times. But the winner in terms of the reality and what was presented before the Court was "nonsense". I only used that word twice, not five times, and I am sorry to say that I had to use it, but as the Court

will recall from the content of the Counter-Memorial and the Rejoinder, various issues were raised which India simply failed to engage with.

4. As for its own reply submissions, Pakistan has no need to add padding. The facts speak loud and clear by themselves. Indeed, India's attempt to drown out the truth with background noise simply will not work.

5. And therefore Pakistan intends to be brief and succinct in its reply in accordance with the very helpful direction given by the President. That is because India has made no arguments, substantive or otherwise. What has happened, and I am compelled to point out, is that there are yet further examples during the course of the oral pleading yesterday of contumelious conduct in the guise of reply. They were nothing of the sort. In addition, yesterday India demonstrated its abject failure to engage with the evidence that States made an exception for espionage prior to the VCCR being adopted in 1963 — that State practice was unaffected by the VCCR, and I heard not a word as to why Dr. ***Sen***, writing in 1965, two years after the VCCR, was wrong in recording that State practice reflected a frequent exception to consular access in the case of espionage.

6. Indeed, now India is, in fact, driven, as it must, to deny efficacy, meaning or relevance to a decision of the Peshawar High Court handed down on 18 October 2018. It is a clear and robust example of the High Court of Pakistan exercising ***its*** effective review jurisdiction — as is required, not least by Article 199 of the Constitution of Pakistan, and there simply is no basis to contend otherwise.

7. And in the course of my oral submissions which are reflected in the written submissions handed in — and the page numbers are at the top, I'll address, to begin with the conduct, and six facets of India's conduct, which I am driven to address because I am before a court. I am not before the Commercial Court of England and Wales, I am before *the* most august Court on this planet, the International Court of Justice, and it is very difficult to confuse the two. Anybody who has visited the Commercial Court of England and Wales or has practised there, as I have, cannot but recognize the majesty and splendour of *this* building and the modesty and the efficacy based construction of the Commercial Court of England and Wales. However, it would be ironic, would it not, that standards are lower in this Court than they are in the domestic courts.

8. So I shall allude to the approach of India, as most recently reflected with regard to the 2008 Agreement, firstly, the military law experts' report, ***then*** the *secret* report, then I must try and understand India's obsession with the Lahore High Court Bar Association, which appears to provide a "catch all", "embrace all" justification. ***Then t***he double standards that India has engaged in are evident from its own submissions as late as yesterday. Then the kidnap fiction. Why? Before I turn to the substantive issue, so far as we are concerned, because India's conduct, as most States behave decently, should never have featured before this Court; and I as an advocate, have had to draw attention to it because I am compelled to draw attention to it, because it is my duty to the Court to draw attention to it, not for any other reason.

9. The Vienna Convention and the espionage exception and the approach of India to it has been developed yet further as of yesterday. The relief sought the review and reconsideration which has been established as *the* relief in the event that there is a breach of Article 36 of the VCCR is a matter that India's submissions bear considerable scrutiny upon, because they seek to distance themselves from the position of this Court, stated again and again**,** by some degree of subterfuge, by in effect asking this Court to become a court of appeal, a role it has ***disavowed*** for very obvious reasons since the *Paraguay* case of 1998 and subsequently, and I'll end with my concluding remarks.

A. India's conduct

10. ***B***ut to begin with India's conduct is in fact no surprise, because India in its own pleading made it very clear that "Neither the nature of the charges, nor the conduct of the sending State is relevant in examining the allegations of the violation of Article 36."[1]. When I look at the Vienna Convention shortly, we will see that that patently is inconsistent with the Convention itself. This mindset provides the explanation for India's *entire* approach in this matter, as we shall see, and as was demonstrated all too clearly yesterday. I am compelled to point out that this is a mindset that one finds in fiction — indeed in Wonderland, because India, *yet again*, demands words mean what it says they mean and that its deliberate addition/omission of words to text must be seen as mere "interpretation" — not, as anyone in the real world would see it — namely unashamed alteration.

[1] MI, p. 9, para. 77.

There is a distinction, a linguistic distinction, a distinction of effect and I agree with my learned friend, characters from Wonderland have no place in this Court, not least the rotund character with a fragile cranium, but Pakistan is not the State that brought that character into this Court. Pakistan is seeking to banish that character from this Court, and we are confident that the approach that this Court adopts to the English language is that of the real world and not of some faraway place of fiction.

(i) The 2008 Agreement

11. India stated yesterday that its case is simple[2], that is true, it is simply wrong. It is to deliberately misread Articles (vi), (v) and (vii) by joining them together through an abuse of punctuation and grammar. I understand from my friend that India shirks from and finds language such as the phraseology of abuse distasteful, but I venture to suggest that it is very difficult to find any other language or any phraseology other *than* abuse when one looks at the addition that took place to a text negotiated between India and Pakistan over three years. In the aftermath of negotiation, *ten* years later, namely the addition of a comma and two words, to draw a conclusion that in fact the approach that India was adopting was not alteration, it was *interpretation.* It is not, as India puts it, simply "a matter of law" and it cannot with the very greatest of respect yield a response of "studied moderation"[3], whatever studied moderation is.

(ii) The Military Law Experts' Report

12. India, with respect, did not demonstrate abatement at this juncture. Of course what we were told yesterday was that the report of the military law experts is now "irrelevant"[4] and should be "completely disregarded"[5]. As the Court is aware, there were strenuous efforts made by Pakistan from May 2018 onwards, to seek correction of India's mischaracterization of the contents of the military ***law*** experts' reports. Those efforts were to no avail, and it would seem from the submission that was made yesterday, that on India's position it had no duty to ensure that its

[2] CR 2019/3, p. 24, para. 81.

[3] CR 2019/3, p. 25, para. 84.

[4] CR 2019/3, p. 26, para. 95.

[5] CR 2019/3, p. 26, para. 90.

pleadings or annexes were accurate and it would seem on India's position as of yesterday, its counsel has no obligation to do so either.

13. My friend pointed out that Pakistan's pleading in contrast to India's was signed by counsel; that is absolutely right. Why? Because a member of the English Bar, as I am, I take responsibility for the contents of a pleading and the accuracy of the facts therein. And I am perfectly prepared to be held accountable because those facts are unimpeachable. I challenged India to identify any discrepancy, any inaccuracy in those facts and there was not any. That is the reason why parties are held to their pleadings. Otherwise what is the purpose of certification of pleadings? Is taking full responsibility, as the Agent for India said yesterday, devoid of content, devoid of consequence? Is this a Court where it is possible to advance a case and then retract based upon inaccurate, if not misleading, information? How can that be the case? Because if it is, then the only conclusion one can draw is that professional ethics are to be left at the door of the Peace Palace. That simply cannot be correct. That simply *cannot* be correct. Indeed it is quite clear that after the military law experts' report was filed on 13 December 2017, in its Reply of 17 April 2018, India was *more* than happy to refer to ***and*** adopt the military ***law*** experts' report. Of course after having, as we say, doctored the report, it did not just refer to it, it enthusiastically embraced the report as being supportive of its conclusions, because it said in the Reply: "This report of the experts hardly supports Pakistan's challenge to India's position — *on the contrary the Court now has a report filed by Pakistan which substantially confirms what India has said about the failings in the system of trial by Military Courts*."[6] (Emphasis added.)

14. From India's perspective, as at that juncture, it was relevant. However, as a result of no less than three subsequent communications by Pakistan, including ***from*** myself to my friend, which I am very disappointed to learn was considered a "veiled threat". I am very disappointed because what I had asked was given that the ICJ hearing commences on 18 February 2019, I hope you will be able to fully explain or correct matters promptly, by letter dated 7 February ***2019***. Was that such an unfair, onerous, unrealistic request from one professional to another? Was that such an unfair,

[6] RI, p. 53, para. 155.

unrealistic request on behalf of a State which had sought as a matter of courtesy to extract a correction? Because what is being said now is that, firstly,

— by adding the word "the" by, we are told, mistake — given that we asked you on at least three occasions before 18 February to check and to identify errors and we had drawn what you described as errors expressly to your attention and you decided not to correct them, which makes the conclusion of mistake ever so slightly more problematic — that adding the word "the" by mistake to arrive at a conclusion based upon what could only be described as doctoring; and secondly,

— omitting the word "often" as a result of, what we were told was a "paraphrase"[7],

could not possibly be matters for concern. Indeed, it was said yesterday that Pakistan was being "presumptuous"[8] by suggesting that this Court would not identify the error, discrepancy, typographical mistake, mistake simpliciter, that India had been responsible for. Not so much as an apology, not so much as sorry. Is it that difficult to accept mistakes?

15. Then we are told that,

— the addition of the word "the", as well as

— ignoring the word "potential", and

— omission of the word "often"

do not change the sense of what is said in the report and are matters of "interpretation"[9]. Now I ask myself, how can this invite a response of "studied moderation" in the real world, the language that my learned friend was imploring me to use? "Studied moderation". How can a response of exasperation be avoided in the real world where real people rely upon words to have meaning and effect which is objectively ascertainable. Not meaning that moves subject to the whims of the user of the words.

16. Furthermore, as is quite clear from the conduct which I am driven, compelled to point out to the Court, India had ***~~engaged in~~*** four opportunities to at least do the decent thing and tell us we got it wrong, assuming that was the case. It seems that India maintains it had absolutely no duty to

[7] CR 2019/3, p. 26, para. 94, line 4.

[8] CR 2019/3, p. 26, para. 94.

[9] CR 2019/3, p. 27, para. 97.

respond to requests made (in the interests of accuracy and clarity) to effect correction, until it saw fit, *until it saw fit*, in the oral round to advance the wholly implausible explanation of "typo" and "interpretation". Yet, how is Pakistan supposed to respond to this approach — with those wonderful words of my learned friend has aped and we will see from where, "studied moderation". Well I am sorry if I was not able to moderate and I am sorry if after many hours of study of those words I had to draw the conclusions that I did. I do not shirk from those conclusions.

17. So far as the military law experts are concerned, India is at pains to point out that this is a case *only* about denial of consular access to Commander Kulbhushan Jadhav. Far from it.

18. The Memorial, the Counter-Memorial, and indeed this mass of material that was placed before the Court yesterday, make it very clear that India persists to the very end in seeking to distract and deflect attention from its failure to answer critical questions by levelling, with respect, baseless allegations against Pakistan. Allegations that this Court should not even countenance. Not just because they are utterly devoid of evidential bases, but they are based upon materials that India has been forced to add to its reply as what I would describe as bombastic ballast, with no other value in these proceedings.

19. That material, that padding, has no bearing on the issues before the Court, save that that material and the contents of the file that was put before the Court yesterday continues to provide confirmatory evidence of India's overall approach even at the end of these proceedings — to deflect, to distract and ultimately to evade.

(iii) The "Secret" Report

20. We see a pattern developing on the part of India and it is as follows. A document was adduced as an annex to the Reply, a seven-page document, which purported to be dated 26 December 2017. It underpinned approximately 15 per cent of the Reply — *15 per cent*. When repeatedly pushed by Pakistan, India rebuffed all requests to check the accuracy of the Reply soon after it was filed. I am compelled to point these matters out because they are relevant because these proceedings do not exist in a vacuum.

21. However, yet again, because it was compelled to, when Pakistan made it clear that it intended to expose the manufactured nature of the document — and I use those words carefully

because on Tuesday I identified six respects in which that document can be undermined and I am sorry that Mr. J. P. Singh is not here because it would have been important to illustrate that undermining. What did India do? It sought to effect a correction to the date of the "Secret" Report on 23 January 2019 (with reference to a letter purportedly dated 8 August 2018). Presumably, how? As a "slip/error" to the date of the said document. But of course there is a rule which provides for corrections: Article 52 (3) of the Rules of Court (1978). But corrections can only be made "with consent [of the party] or leave of the President". That was not sought. This was a document that was introduced.

22. That is consistent with India's approach because, with respect, it believes it has no duty to ensure accuracy in its pleadings. It believes it has no duty to effect timely corrections, and, worst of all, it believes that there are no consequences for its blatant inaccuracies otherwise. And now what happens? Ultimately, India now contends that even this "Report" is irrelevant[10].

23. India has to accept, because it placed this document before the Court, that it believed it was relevant when it filed its Reply.

24. It was obviously intended to have evidential effect. However, once the inaccurate (if not manufactured) nature of the document was laid bare, India's answer was simple — it was now irrelevant.

(iv) India's obsession with the Lahore High Court Bar Association.

25. Then we come to the Lahore High Court Bar Association and I can pass by this very shortly because it seems very simple. In its desperation and total disregard for the truth — I am sorry to say, and I apologize for using these words but they are necessary, so the apology is sincere but it is only because I am forced to use the words that I use them, the facts compel me to use them — India is reduced to equating words allegedly attributed to the secretary, *the secretary*, of a provincial Bar association with the formal position of the Islamic Republic of Pakistan. Now I ask myself, mercifully, it was not the President. How is this not risible?

[10] CR 2019/3, p. 13, para. 30.

(v) India's double standard parades itself

26. Double standards are unedifying, but when witnessed in a party's conduct, they must be commented on. Yesterday we had an interesting insight into this approach. India asserts at one and the same time that Pakistan failed to comply with 18[11] — and as I have pointed out in my written submissions, five pages later in its reply that jumped to 40[12] — MLA requests, and also contends at the same time, at one and the same time, that when it came to India itself, it had no obligation to comply with the requests made by Pakistan to it on 23 January 2017, because there was no bilateral treaty, no mutual legal assistance treaty. Now I ask myself, how do double standards manifest themselves, generally by a party demanding behaviour towards it, which it is not prepared to show to others. That is not how States are supposed to work. That is certainly not the behaviour that this Court should countenance of any State.

27. Yesterday in oral submissions India said it believed "its figure" was correct without specifying which figure until, eventually, the Court was told to assume that 18 MLA requests had been, the wonderful phrase, "mentioned in passing" by India[13]. Yet another example of trying to turn down the volume on a point that had been made with some force ***of*** conviction to begin with, but when the point was analysed, its efficacy was diminished. It recedes into the distance, into the dim and dark distance, because it is replaced by deflection.

28. Another example of deflection. It was asserted yesterday that the Court had been shown photographs, plural —this is not a matter of interpretation; photograph, single, photographs, plural — of "high functionaries"[14]. Singular or plural? Plural. And "was told that an investigation into their conduct was sought by Pakistan". Just one photograph was shown of an Indian person, namely Mr. Ajit Doval (India's self-styled "superspy"). There was no suggestion made that Pakistan had sought an investigation into his conduct — however, what is illuminating is that the speech of February 2014, as reported in 2016, was not denied. The accuracy of that speech was not denied. I had said in my submissions on Tuesday, perhaps half expecting it to be realized, that Mr. Doval might well come to Court to explain to the Court that the speech had been an incorrect

[11] RI, p. 2, fn. 2.

[12] RI, p. 14, para. 43, line 5.

[13] CR 2019/3, p. 18, para. 52, lines 7-8.

[14] CR 2019/3, p. 18, para. 53.

attribution to him. He did not. If Mr. Doval happens to visit London at any point in time — I understand there is a vacancy for the actor to play James Bond — he may well come and tell me exactly whether that was correct or not. But the brutal reality is that even if he has not been made the subject of an investigation, the words that he has not disavowed and India has not disavowed surely provide the murky context for Commander Jadhav's actions. They provide the context, the background, they chime with all of the other material that I have placed before the Court. This is not fiction, this is fact. Lest there be any other doubt, and the memory of my friends for India is unclear, there is only one other photograph that was shown to the Court. And it was this. Definitely not an Indian national, a German national.

(vi) The kidnap fiction

29. Why, oh why, is it necessary yet again to engage in fiction? I mention Dr. Mittal because Dr. Mittal was of course the individual who was fielding rather, perhaps unfairly because he was also the Agent in these proceedings, and definitely unsuccessfully, questions from Indian journalists in a press briefing where Indian journalists, on no less than four occasions, asked why President Rouhani of Iran had not been the subject of queries relating to Commander Jadhav. And the Court will recall that Dr. Mittal was at pains to close that line of questioning down. A failure on the part of a sovereign State which places pleadings before this Court and says it is respectfully submitting to this Court, signed by its Agent, that it reasonably believes that Commander Jadhav was kidnapped from Iran, ought to try and make a little bit of an effort to put some information before the Court as to the steps it has taken. But what are we left with? This fiction is left completely unexplained. Why? Very simple, because providing an explanation would expose the fiction.

30. Then we turn to the three independent Indian journalists that Pakistan had referred to, to illustrate that their independent investigations, at the very least, corroborated Commander Jadhav's own confession of being a RAW agent. And I am not going to give the Court an insight into what has been happening so far as social media and India is concerned with regards to these three brave individuals. But what was the riposte? India's response was to assert that Pakistan had used the

words "clinching and convincing"[15] as well as "unimpeachable"[16] to describe the evidential value of the investigations made by the journalists. Whatever words I may have used, credibility, corroboration, I never used those words. Those are words apt to be used by an adjudicative tribunal, judiciary, not me, not an advocate.

(1) Therefore, Pakistan asks how can India's approach be anything other than wholly improper? How can it be to play fast and loose with words in this way?

(2) And how can it be that yet again we have another example of inconsistency? Because, perhaps unwittingly, India says the following — and it has not yet explained it, because we asked for an explanation. In paragraph 92 of its own Reply, it adopted the following position, "what was the *other* evidence (apart from the patently contrived confession and forged passport) from which it could be established that Jadhav was engaging in acts of spying and terrorism" (emphasis added). Interesting revelation into the insight of the pleader, whoever it was. "Other", apart from two material sources are identified, and the passport is one of them. And of course now what India has said about the passport, we shall see. It is "rhetoric" and in any event the issue has no legal consequence. Well, with respect, we say, it does and it must.

(3) And I ask myself and I ask the Court, is it permissible for a party to "chop and change", to move around its case without consequence? Is it possible for a party to advance material, which is supposed to have the quality of evidence, and then when challenged, not just to diminish its presence, but to discard it as being totally irrelevant. India says, and I use the word "assert", and I do not mean any offence by saying "assert", because an assertion is a proposition advanced without any foundation and substance. And this is a proposition advanced without any foundation and substance.

31. It asserts that there was no need to address the passport issue as this had no legal consequence and Pakistan's submissions were mere "rhetoric". Submissions which (as the Court was shown) were based upon clear, compelling, uncontradicted expert evidence, which was described as the evidence of a "purported expert". That was how it was diminished, sadly. A "purported expert", the gentleman who trained the Indian authorities for three years, been the head

[15] CR 2019/3, p. 20, para. 60, line 2.

[16] CR 2019/3, p. 21, para. 63, line 4.

of the National Fraud Detection Unit in England, was a "purported expert". The gentleman who viewed thousands of passports was a "purported expert". So India moves from that position to say, "Well, in any event, so what? It does not have any legal consequences. Your submissions are mere rhetoric." And then yesterday, we were told that, in essence, it seems that even if he sneaked in using the passport, so what. Well is that what we are left with, so what? The suggestion that India's conduct in this regard has no legal consequence, if accepted, it is a suggestion that I would invite the Court to pause upon, because if it is accepted, it would allow a serious transgression of the duty of good faith, never mind fundamental international obligations to be untrammelled upon and violations to go unchecked.

32. So then we turn to the approach that my learned friend suggested that India was adopting, which was to "hammer the facts, hammer the law". And here, I can tell the Court, I agree. I agree, that is exactly what India was doing. It was hammering the facts such as to twist them, and it was hammering the law such as to break it to suit its purpose. India's conduct cannot go unchecked — it must not go unchecked. This is the Court of the international community. This is the Court of the United Nations. This is the Court that has been furnished with evidence, not fiction, not fantasy. Pakistan's position has remained firm throughout, based upon that evidence. The only party that has been distancing itself from its own evidence and trying to diminish its effect, is India by describing its own evidence as ultimately irrelevant.

B. VCCR and the espionage exception

33. The proposition that was advanced yesterday by my friend, I have sought to encapsulate in the first proposition because what is said is as follows. Even if an individual "agent" — the word that was used by my friend, not me — of the sending State has been properly charged with espionage activity, properly charged, not fictitious/trumped-up, on behalf of that State, the denial of consular access would constitute the introduction of an impermissible limit or exception into the language of Article 36 VCCR[17]. And again, I will interpret India's position. I respectfully observe that the Court is invited to interpret India's position because, in my humble understanding of the English language, what it means is that on India's understanding even if there is a case to answer,

[17] CR 2019/3, p. 21, para. 66.

no matter how serious, of sending State complicity in seeking to undermine the territorial integrity of the receiving State or blatant violations of international law otherwise, on India's understanding, that is totally irrelevant.

34. It is a submission which is plainly wrong, however convenient it may be, because unless India is contending that Article 5 *(a)* of the VCCR which enjoins State parties to comply with international law, or that Article 55, which prohibits interference in the internal affairs of the State, have no meaning. Then we are left with a situation where it is difficult to comprehend the position being advanced, unless of course one remembers India's core stance. The behaviour of the State is irrelevant. That cannot be right.

35. Yesterday yet again my friend invoked the language of "exhaustive rubric". Flowery language. But how is it reconciled with the interaction between Mr. Tunkin and the Chairman of the Drafting Conference in the context of the language related to delay temporal limits within which consular access could be denied? The Chairman's response was as follows. A statement of general principle of law could not possibly cover all conceivable cases. How can the two be reconciled? Is this a matter of interpretation? Yes, it is. Because if one embraces India's approach to language and ignores all other evidence, then India arrives at the conclusion that the words that the Chairman was using chime with its understanding of an "exhaustive rubric". A statement of general principle which could not possibly cover all conceivable cases is an "exhaustive rubric". Well, I have to confess, I have not been able to reconcile the two but I am very pleased that India in its own mind has been able to. I doubt very much if the other 177 State parties would agree. But they are not here. The only point that I was making to the Court was not that the absence of the other 177 States parties somehow provides me with invisible support to my submissions. On the contrary, the position that I advanced before this Court with reference to State practice from the 1930s was that States adopted a position of what I described as "studied ambiguity". They were careful to ensure that the position they had adopted here was ambiguous. That has remained the case when one looks at the *travaux* and the discussion of the VCCR, that is clear. When one looks at State practice, that is clear. But then I realized that my learned friend's use of the phrase "studied moderation" seems to have been directly linked to my use of the words "studied ambiguity". If I am right, then I understand that imitation is the sincerest form of flattery and I am obliged. But

whilst "studied ambiguity" makes sense, with respect, the English language that I am familiar with, "studied moderation" in this context, simply does not.

36. India contends that Pakistan is suggesting that Article 36 of the VCCR should be "read down to exclude espionage"[18], that the provision itself ought to be interpreted in a manner which enables an espionage exception to be carved out from it, if customary international law did not have a consistent practice in allowing consular access in such cases. That is simply wrong. The preamble to the VCCR makes it clear that the position as at customary international law was *unaffected* in the absence of express provisions to the contrary in the VCCR. Indeed, lest we have forgotten, the preamble provision stated as follows: "Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention."[19]

37. I, for my part, with respect, read that as being clear and simple because it provides that in the *absence* of a consistent practice of allowing consular access to espionage suspects, it is the absence of that which constitutes the customary international law basis for denial of the same. There is absolutely no need to read down Article 36 of the VCCR.

38. Not content with using the language of reading down which those of us who are familiar with statutory interpretation will understand, we move on to "crystallization". So we have "fertilization", we have "reading down", and now we move to "crystallization". Because India wrongly suggests, wrongly I am sorry to say, that the preamble to the VCCR "crystallized" prevailing customary international law. It did not. On the contrary, what did it say? The rules of customary international law continue to govern matters not expressly regulated by the provisions of the present convention.

C. Relief sought — review and reconsideration

39. The Court was treated to an interesting exercise in distinguishing and negating judicial precedent. We are all familiar with the basic proposition, one hopes, that a judgment of a court is binding until a superior court states otherwise. But the position that was advanced by India

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[18] CR 2019/3, p. 23, para. 78.

[19] CMP, p. 86, para. 297; CMP, Vol. 5, Ann. 88.

yesterday, I say again, with respect, unabashedly, was that Pakistan was not relying upon the recent judgment of the Peshawar High Court dated 18 October 2018, in the *Abdur Rashid* case. Of course, it had not been an annex to the Counter-Memorial of December 2017 and it had not been an annex to the Rejoinder of July 2018, for one very simple reason. Because Pakistan understands chronology. Whilst documents headed "SECRET" can be back-dated, the reality of the matter is that this judgment was handed down on 18 October 2018 and it is publically available. It is a 170-page judgment and we had no qualms about bringing it to the attention of the Court in my written submissions. But in fact what India said yesterday was that Pakistan had not offered an explanation to the Court "as to why it" — these are the words that were used yesterday, my written submissions identify the passages in the transcript, and I am driven to have to draw these to the Court's attention, I wish I had not had the duty to do so but I do, and it bears heavily upon me but I must discharge it — India asked why Pakistan had not offered an explanation to the Court as to why "it [Pakistan] did not rely upon the judgment if it supported its case"[20].

40. I must confess that that is a bizarre proposition because it would appear that this is a proposition that can only be advanced if, with respect, India had closed its eyes as well as its mind, because the very screen that I am looking at right now gave clear and express reference to the judgment in the PowerPoint presentation[21], and I made sure, unless I have acquired senility over the past 24 hours that I made reference to it in my oral submissions[22].

41. India did not stop there. India further asserted that Pakistan was concealing — use of the word "concealing". It is a very heavy word. I am told that I should be very careful about the words that I use, but it seems that it is okay, it is all right, it is acceptable, in fact it is justified, for India to say that Pakistan was concealing the fact that the Islamic Republic of Pakistan had filed an appeal against the Peshawar High Court decision[23].

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[20] CR 2019/3, p. 28, para. 105.

[21] Pakistan's PowerPoint presentation to the Court on 19 Feb. 2019 (slides 46-48).

[22] CR 2019/2, p. 18, para. 22; and p. 51, paras. 106-107.

[23] CR 2019/2, p. 28, para. 105, lines 7-8.

42. Now, with respect, when the Court looks at the slides that were before the Court[24], the Court will see that that slide made express reference to the appeal pending before the Supreme Court[25].

43. But yet, what is Pakistan supposed to do even now? I am supposed to stand on a platform and maintain a position of "studied moderation", whatever that means. When a sovereign State is being accused of concealing a fact, I am supposed to stand here and say to the Court that I agree I should maintain a position of "studied moderation". Well, I can tell the Court one thing, that what Pakistan has maintained throughout these proceedings is dignity in the face of contumelious conduct on the part of India, which I am driven again to remind this Court of. What Pakistan has not done is allow itself to be provoked by tactics which are unbecoming of a State that identifies itself as the world's largest democracy.

44. And in fact, the linguistic gymnastics that India has to engage in are of its own creation. Why? India said the following in its Reply[26] on 17 April 2018, that Pakistan, a sovereign State, did not have a procedure by which a "trained independent judge" — now, I just pause there to see the nature, the startling nature of that proposition, that Pakistan, a sovereign State, did not have a "trained independent judge", not a single one of them, who was able to "dispassionately review the findings of a military court". So not only do they not have a single trained judge who is independent, but this individual is incapable of being dispassionate.

45. Well, I am sorry to say — as I said on Tuesday — that I would hope in due course the relationship between these two States can be one based upon comity, upon amity, with less heat, more light, more cordiality, more substance. But what is very clear is that the Peshawar High Court was able to address the questions before it, evidencing legal acumen, evidencing robust independence, evidencing objectivity. Indeed, the Peshawar High Court decision chimed with the observations of the experts, because the experts had clearly stated on 28 November 2017 that the High Court of Pakistan possessed an effective review and reconsideration jurisdiction.

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[24] CR 2019/2, p. 48, second bulletpoint.

[25] Pakistan's PowerPoint presentation to the Court on 19 Feb. 2019 (slide 48, second bulletpoint).

[26] RI, pp. 53-54, para. 157.

46. So having said that Pakistan did not have a single trained, it seems, independent judge who was able to set aside his or her prejudices to dispassionately review the findings of a military court, now that there is the Chief Justice of the Peshawar High Court, no less, sitting in a divisional bench with another High Court judge, what is the solution? Well, the solution that India has turned to on more than one occasion, to say, "But the judgment has no value. It is irrelevant. Why? Because it is the subject of an appeal". Again, in all legal systems that I am familiar with, civil law, common law, a court's decision is valid until declared otherwise by a superior court, otherwise the whole nature of precedent and legal findings would be thrown into chaos.

47. But not in this case. In this case, what we are told is, "Let us ignore the decision of the Peshawar High Court. It has no value. It is irrelevant because it is the subject of an appeal". Does that mean that parties are not entitled to seek appeal? Does that diminish the existence of an effective review and reconsideration jurisdiction in the High Court of Pakistan? How can it?

48. And then we move beyond that. By way of the materials that India served in its reply yesterday, a large file of documents, part and parcel of the scattergun approach of deflection, a problem arises for India, namely this: that India referred to a recent European Council resolution — even assuming that that had any relevance in this context — to assert that this resolution *explicitly* — now, again, so far as I am aware, the word "explicitly" means expressly, clearly — reflects concerns at the conduct of certain States, in which Pakistan "figures prominently"[27].

49. Now, my understanding of English, my simple understanding of English, tells me that to "figure prominently" means to be in amongst a list but to have your presence accentuated, to have your presence drawn attention to. With regard to due processes of law and fairness of trial, however, I regret, despite having read paragraph 9 several times, in the early hours of the morning as well, and recently, as opposed to (what no doubt India will say is) India's "interpretation", it shows no such thing.

50. There was absolutely *no* explicit or underlying reference otherwise with regards to due process of law and fairness of trial. So why use language such as "explicitly"? It figures

[27] CR 2019/2, p. 33, para. 113.

prominently. Is this part and parcel of what I said to the Court on Tuesday? Is it a mindset of catch me if you can?

51. And so far as the military courts are concerned, I ought to make it absolutely clear that notwithstanding the experts' report, notwithstanding the availability of effective review and reconsideration before the High Court pursuant to the Constitution of Pakistan, it is simply wrong for India to disparage the military courts of Pakistan as it has done. The rules of evidence and procedure are the same as in the civilian courts, with evidentiary standards, procedural rights and the capacity to grant relief being substantively the same.

52. The confession that is adduced as evidence in the military court is recorded under Section 164 of the Code of Criminal Procedure before the judicial magistrate in the manner as provided in the Code of Criminal Procedure and in accordance with the standards that apply otherwise. Indeed, the very same magistrate is called as a witnesses before the military court to give evidence as to the confession that he or she took, a confession that is taken in accordance with stringent safeguards.

53. But India, with respect, is seeking to misrepresent the military courts of Pakistan. Not a single juvenile was tried and convicted by the military courts.

54. And it is important to remember that Commander Jadhav was tried and convicted pursuant to Section 3 of the Official Secrets Act of 1923, which provides for jurisdiction in respect of espionage offences. He was not tried and convicted pursuant to the extension of the military courts' jurisdiction in 2015, brought about as a result of the appalling atrocity whereby innocent children were massacred in a school in Pakistan, in Peshawar, more than 100. That is what prompted the extension of the jurisdiction of the military courts, and the carnage that has ensued in Pakistan over the past ten years, which has been abated because of the considerable efforts and sacrifices of the forces of Pakistan, is a carnage that many of you on this Bench and many in the room will be all too familiar with, and some have suffered personally themselves.

55. So it is absolutely wrong, I would say improper, to have sought to castigate the courts of Pakistan in the way that India has done, to suggest that there is not a single trained independent judge who is capable of dispassionately reviewing the findings of a military court, and that is what it comes to when you boil down the proposition.

D. Concluding observations

56. So I move finally to my concluding observations. And as I had said in the Counter-Memorial, and I apologized in the ***Rejoinder*** ~~***Counter-Memorial***~~, I apologized that I would have to use trenchant language, forceful language. That I was being compelled to use forceful language. It is not ordinarily the case that I use forceful language. But sometimes, situations demand language is used because it is necessary to convey the essence of the situation. And indeed, that is what language is meant to do. It is meant to enable us, with precision and accuracy, to convey. It is meant to carry, with precision and accuracy and objectivity, meaning and effect. But the brazen distortion of the 2008 Agreement and the doctoring of the military ***law*** experts' reports were matters that even at the commencement of the oral phase of these proceedings, however incredulous it may seem to some, Pakistan was expecting India to show some respect, at least to the Court, and if not to Pakistan, at least to the independent experts. An apology would not have gone amiss. That has not happened.

57. And so we are here, now, in a position, so far as India is concerned, which is as devoid of legal merit as it was on 8 May 2017. In fact, even more so in the light of India's continuing conduct, I am sorry to say, I regret to say, but I am compelled to say. And India's claim for relief remains as far-fetched now as it was then.

58. And all of these matters are important because this Court, the International Court of Justice, the World Court, stands at the apex of all judicial institutions. This is the Court that provides the touch stone for conduct of States as amongst themselves. This is the Court that sets the ground rules pursuant to which States engaged mostly decently and identifies however reluctantly when States have behaved indecently, because it is a difficult conclusion to draw. It is bad enough having to conclude that an individual has behaved indecently, or abusively, let alone a State. But sometimes, very rarely, sometimes nevertheless, it is incumbent upon an ***adjudicative*** body to identify the facts and see them for what they are, and express its position clearly. Not just for the litigants in the particular case, but for the future, because the rule of law depends upon it. India's conduct has shown contempt for accuracy, I am driven to say, and I have shown the examples, its conduct is repeated even yesterday, and a total disregard for the truth, I am sorry to say.

59. But I am not sorry to say the following. As I said on 15 May, in the context of the provisional measures Order and I say it again: India's claim for relief must be dismissed or declared inadmissible.

Mr. President, thank you.

The PRESIDENT: I thank Mr. Qureshi for his statement. I shall now give the floor to the Agent of Pakistan, Mr. Anwar Mansoor Khan. You have the floor, Sir.

Mr. KHAN: Your Excellency, the President of the International Court of Justice, honourable Judges, before I start my closing statement, I must say that I am extremely happy that Mr. Jillani has recovered and is able to attend this Court.

1. At the close of the case, I would, as Agent of the Islamic Republic of Pakistan bring forward some crucial issues, which were raised and were irrelevant to the case in hand.

2. Very strong, uncalled for criticism has been made on the judicial system of the Islamic Republic of Pakistan, in an attempt to show that it had no review or reconsideration process. Pakistan has a very robust judicial review and reconsideration system. May I say that the entire courts, whether regular civil/criminal courts, special courts, specialized tribunals or military courts are created through various Acts of Parliament, as prescribed by the Constitution.

3. The proceedings before any court are in accordance with the criteria as specified by the law in force and that it is true, as to the procedure prescribed by law, for a trial before the military courts. Naturally, for reasons of State security, confidentiality and State secrets, some of the trials cannot be made public. This is true in almost all jurisdictions, including India.

4. Article 4 of the Constitution of the Islamic Republic of Pakistan provides that every person shall enjoy the protection of law, and no action detrimental to his life, liberty, body, reputation or property shall be taken, except in accordance with law. And Article 10A of the Constitution of the Islamic Republic of Pakistan, gives as a fundamental right, the right to "Fair Trial", without it being subjected to any law, where many other rights are subject to law. Thus, fair trial is an absolute right and cannot be taken away. All trials are conducted in that manner, and if not, the process of judicial review is always available.

5. Mr. President and honourable Judges, I need to remind my friends of the case of Afzal Guru, he was refused a lawyer and the court-appointed lawyer filed an application stating that Afzal wanted to be killed by a lethal injection. It is amazing that the honourable Supreme Court of India, while absolving him from the charge of being from a terrorist organization, but to satisfy "the collective conscience of the society", upheld the death sentence. I ask them, is that a ground for conviction under the law or the Constitution. This is a fair trial in judicial review in India.

6. Mr. President and honourable Judges, I did not want to bring in the various contentious issues of India, but for unwarranted and concocted allegations, I need to make a mention of the Samjhota express terrorist acts, where more than 42 Pakistanis were burnt alive. Pakistan has requested that the perpetrators be brought to justice, but no action has been taken. India has embarked on the process of exonerating the accused who have confessed to the carrying out of this heinous act. Families of thousands of Muslims of Gujarat who were massacred in 2002 with full state connivance await justice.

7. When we talk of the unfortunate incident in Pulwama in Indian occupied Jammu and Kashmir, India has become a judge, the executioner and call themselves the "victim", without any evidence to show or any enquiry held. Pakistan has the right to ask for proof to which India has no reply.

8. May I now only refer to the atrocities committed by India, without any recourse for the victims. Indian human rights have been targeted all over the world, and may I mention the use of pellet guns by Indians on innocent citizens of Indian occupied Jammu and Kashmir, where more than 200 innocent civilians have lost their lives, more than 15,000 have been injured, more than 15,000 missing. More than 2,000 innocent men, women and children have been blinded for life by the use of pellet guns. This includes the 18-month-old Hiba, who will never be able to see, in her life.

Do we forget the rape of the young 8-year-old Kashmiri girl, Asifa Bano, of Rasana village in Kathug. The United Nations report asked for inquiry, but to no avail.

We also cannot forget the soldiers of 4 Rajputana Rifles Regiment having raped 23 women in Kunan and Poshpara village of Kupwara District of Indian occupied Jammu and Kashmir. Attempts to seek justice was denied by the authorities and the judicial system.

9. According to the Human Rights Watch, the Indian army courts of inquiry dismissed all the charges against five officers for the high-profile killing of civilians in Indian occupied Jammu and Kashmir, demonstrates the Indian occupation forces' continuing impunity for serious abuses. On 24 January 2014, the army said that it was closing the case for lack of evidence against the army officers, who were accused in March 2000 for extrajudicial killings at Chittisinghpura, of five civilians and falsely claiming that the civilians were terrorists who killed 36 villagers. The army blocked the case after it used the Armed Forces (Special Powers) Act, 1958 (AFSPA) and was invoked to block the case brought by the civilian Central Bureau of Investigation.

10. India relies on the report of a private NGO "International Commission of Jurists" to discredit Pakistan. There are numerous reports of a similar nature from the public domain against India. Some of them have been filed and available in the judges' folders. The findings of the private organization are being put forward to challenge the report of the qualified experts filed by Pakistan. The report filed by Pakistan is plausible and correct. The report of the Commission is unfortunately biased.

I have dozens of other examples of lack of judicial review in the Indian judicial system.

11. I need to explain that the judgment of the Peshawar High Court which was rendered under Article 199 of the Constitution of Pakistan. The judgment of the Peshawar High Court allowed the petition on the grounds of the facts available were not sufficient to convict the 72 persons. The appeal to the Supreme Court was on the facts and the evidence before the High Court which was not fully appreciated by them. May I say that the military courts of our country are governed by the Constitution and by all the statutes, including the laws of evidence, the Criminal Procedure Code and all similar laws. Thus, saying that the military courts are for some reason incompetent and above the law is an incorrect assertion.

12. I would also make it clear that the said Commander Jadhav has been charged with terrorism, for which a FIR has been registered with the police, that is a civilian agency. The military courts have sufficient proof of espionage, and that the said military courts on the available

evidence and the judicial confession proceeded to convict him. Despite he being given the option of going for a judicial review, he has refused to do so.

13. May I, Mr. President and honourable Judges, say with full authority, that the systems of judicial review in Pakistan are potent and very effective. The courts of law are extremely independent and only act on the facts and the law without being influenced by any extraneous reasons.

14. India claims consular access surely was not allowed for good reason in terms of the Agreement of 2008, especially for the reason that Commander Jadhav being involved in espionage. He was allowed to choose a lawyer for himself, but instead he opted to be represented by an in-house counsel/public defence officer qualified for legal representation. Should he choose to enter into the domain of judicial review, he will have the right to choose his lawyer to represent him.

15. I am the Chairman, Sir, of the Pakistan Bar Council, the highest body of lawyers in Pakistan. I say that there is no resolution of the Pakistan Bar Council to the effect as passed by the Lahore High Court Bar Association. The said Bar Association passing a resolution is within their own body, however the Pakistan Bar Council is for Pakistan and overrides all Bar associations.

16. Mr. President and honourable Judges, India seeks relief, which they cannot claim from this Court. Seeking to release Commander Jadhav, allowing him to proceed to India or a direction of review and reconsideration. It is the choice of the convict to seek a review or reconsideration, which if he seeks, will be given to him. I surely want to bring forth the fact that there is an existing FIR against him in the civilian domain and that, in addition to the conviction so given, the case of terrorism is to commence against him. In addition, such a relief may not be allowed. Naturally maintaining the judgment is essential till it is set aside by a court of competent jurisdiction in a judicial review proceeding, which he is advised to take in Pakistan.

And, finally, Sir,

FINAL SUBMISSIONS

The Islamic Republic of Pakistan respectfully requests the Court, for the reasons set out in Pakistan’s written pleadings and in its oral submissions made in the course of these hearings, to

declare India's claim inadmissible. Further or in the alternative, the Islamic Republic of Pakistan respectfully requests the Court to dismiss India's claim in its entirety.

Mr. President, distinguished Members of the Court, to conclude our participation in these hearings, I wish to extend, on behalf of the Islamic Republic of Pakistan, our sincere appreciation to you, Mr. President, and to each of the distinguished Members of this Court, for your kind attention to our presentations.

May I also offer our sincere thanks and appreciation to the Court's Registrar, to his staff, to the interpreters and translators, and to all of the Court's staff, who have worked hard to ensure the smooth running of these hearings.

Thank you very much.

The PRESIDENT: I thank the Agent of Pakistan. The Court takes note of the final submissions which you have just read on behalf of the Islamic Republic of Pakistan. This brings us to the end of this week-long hearing devoted to the oral arguments in the case. I would like to thank the Agents, counsel and advocates of the two Parties for their statements.

In accordance with usual practice, I shall request both Agents to remain at the Court's disposal to provide any additional information the Court may require. With this proviso, I declare closed the oral proceedings in the *Jadhav* case.

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its Judgment.

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

The Court rose at 5.50 p.m.

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