DISSENTING OPINION OF JUDGE MORENO QUINTANA

[Translation]

To my great regret I am unable to associate myself with the opinion of the majority of my colleagues of the Court, who, on the merits of the case, have admitted, though within limits and incompletely, that Portugal has a right of passage over Indian territory. There follows from the majority opinion a legal premise that I cannot accept. That premise is the theoretical continuance of a *de facto* situation which was in my opinion discontinued by what occurred in the enclaves in 1954. It implies, by definition, a recognition that territorial sovereignty can be acquired by prescription, a private law institution which I consider finds no place in international law. Further, the majority decision takes its exclusive stand upon a date which does not allow a settlement of the whole of the problem submitted to the Court.

My dissenting opinion is based upon considerations of fact and of law which I append hereto.

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By an Application of 22 December 1955, the Government of Portugal instituted proceedings against the Government of India and asked the Court to recognize a right of passage for persons and goods, including armed forces, "between its territory of Daman (coastal Daman) and its enclaved territories of Dadra and Nagar-Aveli and between each of the latter", in order to ensure, without restrictions or difficulties, "the effective exercise of Portuguese sovereignty in the same territories". It also asked the Court to declare that India was violating its international obligations by preventing the exercise of that right and to adjudge that India should put an end to this *de facto* situation. The applicant's Memorial amplifies this claim and supplies the legal grounds which it considers applicable to the case.

In this Counter-Memorial the respondent argues that the Portuguese claim is vague and dubious, that the right of passage claimed lacks a legal basis, that no proof has been furnished of any local usage and that, even if it were otherwise, the said basis or proof would be irrelevant and inapplicable to the circumstances of the case. The applicant in turn repeated its submissions in its Reply, declaring that it did not question India's sovereignty within its territory and was only asking that India should not obstruct communications with the Portuguese enclaves.

A wealth of documentary evidence going back to the eighteenth century was furnished by each of the Parties in support of their

claims. It is mainly on the strength of this evidence that the applicant must establish the grounds for the right of passage it claims, since it cannot deny that in principle the passage of persons and goods through a State's territory lies within the domestic jurisdiction of that State.

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The Court must first of all, and indeed exclusively, ascertain whether a right of passage existed in Portugal's favour for communication between Daman and the enclaves and between the enclaves themselves. For, if it did, India would be failing to observe its international obligations by preventing Portugal from exercising that right. The existence of a right in international relations is a fact which, when contested, must be proved by the party which invokes it. That is an elementary principle of procedure.

However, the Court's task is not so simple as that, owing to the frequent changes made by the applicant in its submissions and to the uncertainty it has betrayed at different stages in the case concerning the foundation of its right. At one time, as in its Application, it asks for full recognition of a right, at another, in the Memorial, it reduces the claim, and again, in its Reply, limits the exercise of that right to regulation by the territorial sovereign and admits that the passage of armed forces could be temporarily suspended if it were liable to create disorder within the State passed through. And it is precisely in the event of a disturbance of the situation in the enclaves that the passage of troops is found necessary in order to restore Portugal's alleged sovereignty.

A right of passage is not an abstract construction. It cannot be defined in the varying, inexact and mutually contradictory terms employed by the applicant. The right either exists in law or it does not. Its existence cannot depend upon fluctuations and fine distinctions dictated by circumstances. In particular, the passage of organized military units is a question that cannot be separated from the immunity they enjoy on or in transit through foreign territory. They represent the authority of the State itself. It is for that reason that customary international law assigns to them the immunity necessary to the performance of their duties. In my opinion that immunity is a necessary legal condition and cannot be waived. In a word, a right that is on each occasion made conditional upon the judgment of the local authority in the place where it is exercised is a right in name only. It does not constitute a legal right; rather it is a faculty tolerated by the territorial sovereign.

In the international sphere the normal method of acquiring rights or of contracting obligations takes the form of an agreement, which

in its widest sense is termed a *treaty*. These rights or obligations may also be the consequence of a custom that has become established between the parties from a conviction that they are applying the law. They may even follow, and Article 38 of the Court's Statute acknowledges this in its paragraph 1 *(c)*, from a general principle of law recognized by civilized nations. In any case, although I agree that that Article establishes a legal order of precedence in the application of sources of international law, I consider that the validity of a general principle may take the place of international custom, and the existence of international custom the place of a treaty.

But the applicant fails to supply a firm and conclusive basis for its right when it relies at one time upon a treaty, at another on custom, on a principle or, alternatively, on legal doctrine. According to its argument, each of these sources is of itself a sufficient basis. It also confuses these sources when it says that the right it claims rests at the same time on the three main sources mentioned, and it even invokes an historical title said to be conferred upon it by the practice of two hundred years. Its attitude could not be more eclectic.

However, Portugal's principal title is the treaty known as the Treaty *of Punem*, concluded in 1779 with the Maratha ruler, who is said to have granted to the applicant the right of passage it is claiming. Analysis of this treaty is of the first importance to an international court if it can prove or disprove the soundness of this basis of the case. Indeed, the application of any other source than the treaty is logically conditional upon whether the treaty did or did not transfer to Portugal sovereignty over the enclaves of Dadra and Nagar-Aveli. If it did not, no right of passage could derive from an act of territorial usurpation. At the hearing of 2 October, Professor Bourquin expressly acknowledged that the right of passage that Portugal claims is only a corollary of its sovereignty over the enclaves.

This method of procedure may be found useful whenever it can save the Court from treading upon uncertain ground. I consider to be uncertain ground the reference in this case to the general principles of law recognized by civilized nations and even the reference to general custom viewed as granting *erga omnes* a right of passage through territory of third States linking enclaved territories under the system of international law with the metropolitan country. This method also avoids consideration of a theory so controversial and vulnerable as the theory of so-called international servitudes. Although the applicant denies this—the question is one of legal terminology—it accepts it by implication when it appeals in support of its claim to the general principles of law.

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According to the applicant, Article 17 of the Treaty of Punem established Portugal's sovereignty over the enclaves of Dadra and Nagar-Aveli and proved the intention of the Parties to create a right of passage between Daman and those enclaves. A treaty can, of course, create a rule of law, such as a right of passage, even by implication, but in this case the main proposition to be proved is the transfer of sovereignty. A right of passage through foreign territory in order to communicate with an enclave can be based only upon the title of territorial sovereign. In neither text of the treaty presented to the Court is there any question of that right having been created. Their terminology is ambiguous and leaves room for doubt of all kinds. But neither of them reveals any act of such positive effect in international relations as the transfer of territorial sovereignty. Restrictions upon the independence of States cannot be presumed, said the Permanent Court in the celebrated *Lotus* case (see *Judgments,* Series A, No. 10, p. 18).

It might even be asked whether the said agreement really constitutes a treaty, since there is no document in existence ratified simultaneously by the two contracting parties and which may be regarded as its authentic text. However, even a cursory study of the situation shows that the exchange of documents—the Marathi text of 4 May 1779 and the Portuguese text of 17 December of the same year—was no doubt the expression of a common agreement creating mutual rights and obligations between two legal persons recognized as such in their international relationships. Article 6 makes it clear that a bilateral treaty was concluded and the documentary evidence produced also shows by many instances that it was the intention of the parties to conclude a treaty and that they were aware of having done so. It took the legal form of an exchange of notes and the jurisprudence of the Permanent Court accepted this form as valid in its Advisory Opinion on the *Austro-German Customs Régime* (see *Judgments,* Series A/B, No. 41, p. 47).

What does this agreement say? I will take my stand on the Marathi translation from the original Portuguese, submitted in this case by the respondent; it bears the signature of the Portuguese Viceroy, José Pedro da Camara, and is to be found at Annex F. No. 23. Article 17, which is the decisive one, says: "The Firangee State (Portuguese State of India) entertains friendly sentiments towards the Pandit Pradhan (the Maratha ruler); the envoy conveyed assurances. Therefore, it is agreed that the Pandit Pradhan should assign towards Daman from the current year a *jagir* of the revenue of twelve thousand rupees in Prant Daman. Accordingly, a *sanad* listing the villages be given to the Firangee State by making a separate agreement." This text is clear, so clear as fully to explain

two important points discussed by the Parties: the nature of the instrument concluded and that of the concession granted. Firstly, the expressions "it is agreed" and "separate agreement" show beyond doubt that the instrument is a treaty in the wide sense given to this word by international jurisprudence and doctrine. Secondly, the word *"jagir"* describes its purpose, which is determined by the friendly sentiments of the Portuguese towards the Marathas. In any event, comparing one text with the other, they do not differ much as to what was given by the Marathas to the Portuguese: according to the former, a *jagir*, according to the latter, a *contribuçao*. In neither text is there any vestige of a transfer of sovereignty.

It has been established that the Mogul word *jagir*, corresponding to the Marathi term *saranjam*, means the granting of a fiscal revenue and not a transfer of territorial sovereignty. The Parties, however, are not agreed upon the import of that concession. India maintains that it is a favour granted for an uncertain tenure and revocable at the will of the donor; Portugal declares that there were also *saranjams* that were hereditary, perpetual and irrevocable, such as those guaranteed by a treaty, and that this is one of them. It is not for the Court to adopt a position towards a dispute of purely historical interest. But it may well observe that none of the characteristics invoked by Portugal appears in the text of Article 17 of the Treaty of Punem. Where there is doubt, the Court must stand by the narrower interpretation. This the Permanent Court laid down in its Judgment on the *Mavrommatis Concessions* (see *Judgments*, Series A, No. 2, p. 19). And that interpretation in the present instance is the one given by the beneficiary of the concession. Accordingly, the Treaty of Punem expresses a promise by India to give sums of money as a token of friendship and not a transfer of sovereignty over villages which were not even named.

Nor is there any reference to the assignment to Portugal of a right of passage in order to collect its *jagir*. The Parties saw no need to mention this in view of the friendly sentiments, the aid and military assistance of the Portuguese, all of which formed the consideration for the concession granted by the Marathas. It could not be supposed that the collection of *jagir* would be obstructed by the Maratha ruler. Further, the villages which were to furnish the annual revenue to Portugal were not mentioned in the treaty; they were to be listed later in a *sanad*. That administrative act of the Maratha sovereign was free to decide and regulate the terms of the grant. The first annual payments were not collected by the Portuguese from any village, being paid directly by the Marathas. It cannot therefore be imagined that the said right of passage was contemplated by the Treaty of Punem. In any case it was a question to be settled later, should it be necessary. And it was not so settled,

since passage continued to exist as a necessary corollary to the collection of *jagir* and did not thereby constitute a separate right in Portugal's favour. By 1954, however, the position had changed. The friendship promised by the Portuguese to the Marathas in 1779 had given way to a cold war between India and Portugal. The Indians had closed their Legation in Lisbon because of Portugal's refusal to negotiate the surrender of its sovereignty over parts of India. As the result of circumstances the mutual rights and obligations under the Treaty of Punem were extinguished. There could not be a better application than this of the rule recalled by Emerich de Vattel in his well-known treatise: *Omnis conventio intelligitur rebus sic stantibus*. The Treaty of Punem was no more; Portugal no longer claimed the payment of *jagir;* passage between Daman, Dadra and Nagar-Aveli had no further *raison d'être.*

The system established by the Treaty of Punem was completed by two later agreements between the Portuguese and the Marathas concluded on 29 May 1783 and 22 July 1785. Under the former the promised fiscal revenue was to be collected from the *pargana* of Nagar-Aveli, under the latter, from the village of Dadra. This second agreement established in No. 11 of its accompanying capitulations —their authenticity is questioned by India—an obligation upon Portugal to suppress any revolt that might break out in the *pargana*. From this it may be inferred that neither that obligation nor any similar one would have been specially inserted in those capitulations if Portugal had received the *pargana* with full sovereignty. The suppression of revolt in one's own territory is a function implicit in territorial jurisdiction.

It was further claimed by the applicant that, even if the Treaty of Punem did not transfer to the Portuguese sovereignty over the enclaves, they had acquired it by *possessio longi temporis*. I cannot consider that argument, the question not having been included in the subject of the dispute.

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The history of this case shows that Daman has been in full Portuguese possession since the sixteenth century. Various later treaties and agreements seem to have recognized this sovereignty, which is not a direct issue in the case. The fact, however, is important in estimating the extent of the international custom which is supposed to have created the right of passage between Daman and the enclaves of Dadra and Nagar-Aveli. This custom is claimed to have existed for two hundred years.

For the purpose of examining the characteristics of passage between Daman and the enclaves, the story of Portugal's relations with India may be divided into three periods. The first is the Maratha period, extending from 1779 (the date of the Treaty of Punem) until 1818, when Great Britain annexed the Maratha Empire. This period, according to the applicant, is that in which the rule of custom took shape. The second and longest of the three periods is from 1818-1947, at which last date India gained its independence. This, the British period, is supposed to be the period during which the rule was confirmed by the successors to the Marathas. The third period is the period of Indian independence, from 1947 to 1954, this last year being the year in which occurred the events that terminated Portuguese passage between Daman and the enclaves. It is in this last period that the rule is said to have been applied. Each of these historical stages really reveals the exercise of passage in a different light, and it must be analysed separately in order that the necessary conclusions may be drawn.

Study of the Maratha period does not tell us very much about the recognition of a right of passage in favour of the Portuguese. No documents and no facts support the theory during this period. The Marathas did not oppose the passage of Portuguese officials, private persons or goods. To have done so would have been abnormal since they had surrendered to Portugal the revenues of the villages of Dadra and Nagar-Aveli and they were bound to provide the Portuguese with the means of collecting them. On the other hand, they granted them no authorization for the passage of troops. It therefore does not appear that the Marathas had abandoned their *de facto* and *de jure* sovereignty over the enclaves despite the fact that they issued the necessary permits for every such passage. On three occasions the Marathas even confiscated the said revenues, which seems to show that they had no intention of surrendering sovereignty. In a word, an examination of this period shows that passage always took place with the agreement of the Maratha sovereigns. The applicant furnished no evidence that its alleged right of passage was exercised independently of the express will of the territorial sovereign in every case.

During the British period passage between Daman and the enclaves became a more or less regular usage, either out of consideration for a country bound to Britain by an ancient alliance or from ignorance of what was Portugal's real position in law. At the same time there is no indication that Great Britain recognized the passage it granted to Portugal as though it were a right. The British do not seem to have renounced exercise of the powers of the territorial sovereign any more than the Marathas did. Daman and the coastal possessions were surrounded by a frontier cordon. The British Government required that Portuguese officials of European origin

passing through Indian territory from one Portuguese possession to another should carry passports and visas. It must be remembered that, under the treaty concluded on 13 June 1817 between the British East India Company and the Maratha Empire, sovereignty over this part of Indian territory passed to the British Crown, and that situation continued until 15 August 1947 when Great Britain recognized the independence of India. The obligations of the territorial sovereign passed to the conqueror in application of the rules governing succession by States. No legal act by the British Government altered the *status juris* established by the Maratha rulers with regard to the so-called enclaves. Portugal could not claim any more rights than it had previously possessed, nor could Great Britain arrogate such to itself. In those circumstances no usage in the matter of passage during this period could be transformed into such a practice as to create an international custom invocable against any territorial successor.

When it became independent, India made no fundamental change in the established system. We must not forget that India, as the territorial successor, was not acquiring the territory for the first time, but was recovering an independence lost long since. Its legal position at once reverted to what it had been more than a hundred years before, as though the British occupation had made no difference. Dadra and Nagar-Aveli figure as open enclaves within Indian territory. Goods were imported from Daman to the enclaves as though they belonged to that territory. No insuperable difficulty arose until 27 February 1950, when the Indian Minister in Lisbon handed to the Portuguese Government an aide-memoire proposing that negotiations should be started to fix the conditions for the handing over of the Portuguese territories in India. After Portugal refused, the Indian Government on 26 May 1953 notified the Portuguese Government of the termination of its diplomatic mission to Portugal. From that moment the Government of India began to impose a number of restrictions which seriously hampered communications between Daman and the enclaves. Those communications were finally cut on 21 July 1954 in consequence of what happened in the enclaves.

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To support the Portuguese claim in this case, which implies survival of the colonial system, without categorical and conclusive proof is to fly in the face of the United Nations Charter.

As judge of its own law—the United Nations Charter—and judge of its own age—the age of national independence—the International Court of Justice cannot turn its back upon the world as it is.

"International law must adapt itself to political necessities", said the Permanent Court of Arbitration in its award on indemnities to Russian individuals (11 XI 1912). That is the reason why the Charter made legal provision to cover the independence of non-self-governing territories.

My conclusion is that, as the Government of India submits, there has never existed a Portuguese right of passage between its coastal possession of Daman and the enclaves of Dadra and Nagar-Aveli nor between those enclaves. In my opinion the claim of the Portuguese Government should have been dismissed.

(Signed) Lucio M. MORENO QUINTANA.