

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE
CONCERNING SOVEREIGNTY
OVER CERTAIN FRONTIER LAND
(BELGIUM/NETHERLANDS)

JUDGMENT OF 20 JUNE 1959

1959

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE A LA
SOVERAINETÉ SUR CERTAINES
PARCELLES FRONTALIÈRES
(BELGIQUE/PAYS-BAS)

ARRÊT DU 20 JUIN 1959

This Judgment should be cited as follows:

*“Case concerning Sovereignty over certain Frontier Land,
Judgment of 20 June 1959: I.C.J. Reports 1959, p. 209.”*

Le présent arrêt doit être cité comme suit :

*« Affaire relative à la souveraineté sur certaines parcelles frontalières,
Arrêt du 20 juin 1959: C. I. J. Recueil 1959, p. 209. »*

Sales number 208
N° de vente : 208

INTERNATIONAL COURT OF JUSTICE

YEAR 1959

20 June 1959

CASE
CONCERNING SOVEREIGNTY
OVER CERTAIN FRONTIER LAND
(BELGIUM/NETHERLANDS)

*Boundary Convention of 1843 between the Netherlands and Belgium.—
Determination of Frontier.—Status quo.—Proof of mistake.—Acquisi-
tion of sovereignty, in derogation of Treaty.*

JUDGMENT

*Present: President KLAESTAD; Vice-President ZAFRULLA KHAN;
Judges BASDEVANT, HACKWORTH, WINIARSKI, BADAWI,
ARMAND-UGON, KOJEVNIKOV, Sir Hersch LAUTERPACHT,
MORENO QUINTANA, CORDOVA, WELLINGTON KOO, SPIRO-
POULOS, Sir Percy SPENDER; Deputy-Registrar GARNIER-
COIGNET.*

In the case concerning Sovereignty over certain Frontier Land,

between

the Kingdom of Belgium,
represented by

M. Yves Devadder, Legal Adviser to the Ministry of Foreign
Affairs,

as Agent,

assisted by

Me Marcel Grégoire, of the Bar of the Brussels Court of Appeal,
as Advocate,

and

M. Louis Geeraerts, Inspector-General in the Ministry of Foreign
Affairs,

M. Alfred van der Essen, Director, Ministry of Foreign Affairs,

as Experts,

and

the Kingdom of the Netherlands,
represented by

M. W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs,

as Agent,

assisted by

Me C. R. C. Wijckerheld Bisdom, of the Bar of the Supreme Court
of the Netherlands,

as Counsel,

and

Me J. Schepel, of the Bar of the Supreme Court of the Netherlands,

Me L. Lagers, Chief of Section, Ministry of Foreign Affairs,

as Experts,

THE COURT,

composed as above,

delivers the following Judgment:

By a letter of 26 November 1957 received in the Registry on
27 November, the Minister for Foreign Affairs *a.i.* of the Netherlands
transmitted to the Registry a certified true copy of a Special

Agreement concluded between the Government of the Kingdom of Belgium and the Government of the Kingdom of the Netherlands, signed at The Hague on 7 March 1957, Articles I to IV of which are as follows:

“Article I

The Court is requested to determine whether sovereignty over the plots shown in the survey and known from 1836 to 1843 as Nos. 91 and 92, Section A, Zondereygen, belongs to the Kingdom of Belgium or the Kingdom of the Netherlands.

Article II

Without prejudice to any question as to the burden of proof, the Contracting Parties agree, having regard to Article 37 of the Rules of Court, that the written proceeding should consist of:

1. a Memorial of the Kingdom of Belgium to be submitted within three months of the notification of the present Agreement to the Court in pursuance of Article III below;
2. a Counter-Memorial of the Kingdom of the Netherlands to be submitted within three months of delivery of the Memorial of the Kingdom of Belgium;
3. a Reply of the Kingdom of Belgium followed by a Rejoinder of the Kingdom of the Netherlands to be delivered within such times as the Court may order.

Article III

Upon the entry into force of the present Agreement, it shall be notified to the Court under Article 40 of the Statute of the Court by the Kingdom of the Netherlands.

Article IV

The present Agreement shall be subject to ratification.

The instruments of ratification shall be exchanged as soon as possible in Brussels and the present Agreement shall enter into force immediately upon the exchange of those instruments.”

The Minister for Foreign Affairs *a.i.* of the Netherlands attached to his letter a certified true copy of the Certificate of the exchange of instruments of ratification of the Special Agreement, which took place at Brussels on 19 November 1957.

Pursuant to Article 33, paragraph 2, of the Rules of Court, the Registrar at once informed the Belgian Government of the filing of the Special Agreement. In accordance with Article 34, paragraph 2, of the Rules of Court, copies of it were transmitted to the other Members of the United Nations and to non-Member States entitled to appear before the Court.

By an Order of 12 December 1957, time-limits for the filing of the Memorial and Counter-Memorial were fixed in accordance with

the proposals made by the Parties in paragraphs 1 and 2 of Article II of the Special Agreement. At the request of the Netherlands Government and with the agreement of the Belgian Government, the time-limit for the Counter-Memorial was extended by an Order of 27 May 1958. The time-limits for the filing of the Reply and Rejoinder were fixed by an Order of 1 July 1958.

These pleadings having been filed within the time-limits fixed by these Orders, the case was ready for hearing on 31 March 1959.

Hearings were held on 27, 28 and 29 April and on 1, 2, 4 and 5 May 1959, in the course of which the Court heard the oral arguments and replies of M. Devadder and M^e Grégoire on behalf of the Government of the Kingdom of Belgium, and of M. Riphagen and M^e Wijckerheld Bisdom on behalf of the Government of the Kingdom of the Netherlands.

In the course of the written and oral proceedings, the following submissions were presented by the Parties:

On behalf of the Belgian Government, in the Memorial:

May it please the Court to adjudge and declare that:

“sovereignty over the plots shown in the survey and known from 1836 to 1843 as Nos. 91 and 92, Section A, Zondereygen, belongs to the Kingdom of Belgium”.

On behalf of the Government of the Netherlands, in the Counter-Memorial:

May it please the Court to adjudge and declare that:

“sovereignty over the plots shown in the survey and known from 1836 to 1843 as Nos. 91 and 92, Section A, Zondereygen, belongs to the Kingdom of the Netherlands”.

These submissions were maintained by the Parties in the Reply and in the Rejoinder and during the oral proceedings.

* * *

By the Special Agreement the Court is requested to determine whether sovereignty over the plots shown in the survey and known from 1836 to 1843 as Nos. 91 and 92, Section A, Zondereygen, belongs to Belgium or to the Netherlands.

The frontier between the two States in the area where the two plots in dispute are situated presents certain unusual features. Whilst the frontier in general is a linear one, in the area north of the Belgian town of Turnhout there are a number of enclaves formed by the Belgian commune of Baerle-Duc and the Netherlands commune of Baarle-Nassau.

The territory of the Belgian commune of Baerle-Duc is not continuous. It is made up of a series of plots of land, many of which

are enclosed in the Netherlands commune of Baarle-Nassau. Various pieces of the commune of Baerle-Duc are not only isolated from the main territory of Belgium but also one from another. Neither is the territory of the commune of Baarle-Nassau continuous: that commune has enclaves within Belgium. The Court is informed that the origin of this situation is very ancient.

In 1826, when the Netherlands and Belgium were a single Kingdom, a proposal was made to fix the boundaries between the two communes. A minute of delimitation, drawn up on 10 September of that year, to which was appended a map, proposed a continuous boundary for Baarle-Nassau, the abolition of enclaves within its territories and compensation in land. This proposal was abandoned as it was rejected by the commune of Baerle-Duc.

In 1836, an attempt was made by the burgomasters of the two communes to establish the exact boundaries between the two communes in order to secure an equitable allocation of land tax. In that year, the burgomasters, with their officials, proceeded to establish as exactly as possible the division that had existed from the earliest times between the plots of land enclosed within these communes. They established a Minute which is dated 29 November 1836, but which was not completed until about the middle of 1839. It was finally signed on 22 March 1841. It is hereinafter referred to as the "Communal Minute".

This Minute was drawn up in two original copies to be deposited in the archives of each of the two communes. What purports to be one of these original copies has been produced by the Netherlands.

The copy produced by the Netherlands states under "Section A called Zondereygen" as follows:

[Translation]

"Plots numbers 78 to 111 inclusive belong to the commune of Baarle-Nassau."

The Communal Minute was not established without difficulty. For a considerable time the commune of Baerle-Duc refused to sign it. In some respects the decisions taken in 1836 left some doubt and did not satisfy either commune. Considerable effort appears to have been made to remove mistakes. The Communal Minute itself provided that any errors therein could be corrected by common accord. There seems to have been no intention that the Communal Minute should constitute an immutable document.

The separation of Belgium from the Netherlands was sanctioned by the Treaty of London of 19 April 1839. Under the terms thereof,

a Mixed Boundary Commission was set up to fix and determine the limits of the possessions of the two States.

This Commission was already engaged upon its work at the time when the Communal Minute was signed in March 1841. Shortly thereafter, it directed its attention to the situation existing between the two communes and continued to do so till the end of 1841. It then discontinued its labours and they were not resumed until early 1843.

During this interval the two Governments had, on 5 November 1842, signed a Boundary Treaty which entered into force on 5 February 1843. They had considered it necessary to intervene to settle by their common agreement certain questions relating to the determination of the frontier. It should here be recalled that on 4 September 1841 the Belgian Government had rejected a proposal to settle, by means of mutual exchange of territories, the situation in respect of the communes of Baerle-Duc and Baarle-Nassau, and had declared in favour of the maintenance of the *status quo*. Accordingly, Article 14 of this treaty stated:

[*Translation*]

“The *status quo* shall be maintained both with regard to the villages of Baarle-Nassau (Netherlands) and Baerle-Duc (Belgium) and with regard to the ways crossing them.”

Article 70 stipulated that the Mixed Boundary Commission should “draft the convention ... in accordance with the foregoing provisions...”.

The work of the Mixed Boundary Commission resulted in the text of a Boundary Convention dated 8 August 1843, ratifications of which were exchanged on 3 October 1843. Articles 1, 2 and 3 of this Convention provided as follows:

[*Translation*]

“Article 1. The frontier between the Kingdom of the Netherlands and the Kingdom of Belgium stretches from Prussia to the North Sea.

This frontier, which is divided into three sections, is defined in an exact and invariable way by a Descriptive Minute, drawn up according to the detailed survey maps, drawn to a scale of 1/2,500, and by means of examinations made on the spot by commissioners delegated for that purpose.

However, as an exception, the maps to a scale of 1/10,000 have been considered sufficient to show that part of the frontier formed by the Meuse and the Scheldt.

The same is the case for the communes of Baarle-Nassau (Netherlands) and Baerle-Duc (Belgium) in regard to which the *status quo* is maintained in virtue of Article 14 of the Treaty of 5 November 1842.

A special map, in four sheets, comprising the whole survey, plot by plot, of these two communes, has been drawn up to a scale of 1/10,000 and to this map are annexed two separate sheets

showing, to the scale of 1/2,500, such parts of those two communes as a smaller scale would not show clearly.

Article 2. Topographical maps, to the scale of 1/10,000, designed to show the frontier as a whole and in relation to bordering localities, have been prepared in sections, as follows:

On the Netherlands side, by means of survey maps, lists of particulars, and examinations on the spot, so far as these were necessary to determine the frontier;

On the Belgian side, by means of survey maps and examinations on the spot, covering the whole of the Belgian part.

These maps take in the whole of the frontier, to an average depth of 2,400 'aunes' (metres).

Article 3. The descriptive minute, the detailed survey maps and topographical maps, scale 1/10,000, prepared and signed by the Commissioners, shall remain annexed to the present Convention and shall have the same force and effect as though they were inserted in their entirety."

The descriptive minute referred to in Article 3 contains an article, Article 90, relating to the communes of Baerle-Duc and Baarle-Nassau: this Article is referred to in the present Judgment as the "Descriptive Minute". The special map relating to the disputed plots, being one of the maps referred to in Articles 1 and 3, was produced before the Court on behalf of the Belgian Government at the hearing on 2 May 1959.

Article 14, paragraph 5, of the Boundary Convention provides:

[*Translation*]

"On reaching the said communes of Baerle-Duc and Baarle-Nassau, the boundary is interrupted in consequence of the impossibility of drawing a continuous line between these two communes, in view of the provisions of Article 14 of the Treaty of 5 November 1842, which says:

'The *status quo* shall be maintained both with regard to the villages of Baarle-Nassau (Netherlands) and Baerle-Duc (Belgium) and with regard to the ways crossing them.'

The division of these two communes between the two Kingdoms is the subject of a special study.

(Article 90 of the Descriptive Minute.)"

The Descriptive Minute is made up of two parts. The first determines the procedure used when the demarcation of the frontier reaches the territory of the communes of Baarle-Nassau and Baerle-Duc. It reads as follows:

[*Translation*]

"As regards these two communes the boundary commissioners:

In view of Article 14 of the Treaty of 5 November 1842 worded as follows:

'The status quo shall be maintained both with regard to the villages of Baarle-Nassau (Netherlands) and Baerle-Duc (Belgium) and with regard to the ways crossing them.'

Considering that the present situation of these places, maintained by the provision of Article 14 above, does not allow of a regular delimitation of the two communes in question;

Considering, however, that it may be useful to note what was established with the agreement of both sides, by the Minute of 29 November 1836, agreed to and signed on 22 March 1841 by the local authorities of the two communes.

Decide:

a. The above-mentioned Minute, noting the plots composing the communes of Baerle-Duc and Baarle-Nassau, is transcribed word for word in the present Article.

b. A special map, in four sheets, showing the whole detailed survey plot by plot of the two communes, on a scale of 1/10,000, has been made, and to this map have been annexed two separate sheets showing on a scale of 1/2,500 those parts of the communes which a smaller scale would not show clearly."

The second part, expressed in Dutch, follows the text of the Communal Minute. Instead, however, of the words appearing in the Communal Minute in the copy thereof produced by the Netherlands, namely:

[Translation]

"Plots numbers 78 to 111 inclusive belong to the commune of Baarle-Nassau",

there appears the following:

[Translation]

"Plots numbers 78 to 90 inclusive belong to the commune of Baarle-Nassau.

Plots numbers 91 and 92 belong to Baerle-Duc.

Plots numbers 93 to 111 inclusive belong to Baarle-Nassau¹."

The special map referred to in Article 1 of the Boundary Convention and which, in accordance with Article 3 thereof, has the same force and effect as though inserted therein, shows the disputed plots as belonging to Belgium.

The Belgian Government relies upon the above quoted terms of the Communal Minute as they appear in the Descriptive Minute annexed to the Boundary Convention and as having the same force and effect as if inserted therein, for the purpose of showing that the

¹ Translation of the text reproduced in the Rejoinder of the Netherlands Government, Vol. II, p. 79. The text reproduced in the Memorial of the Belgian Government, p. 11, is as follows:

[Translation]

"Plots numbers 78 to 90 inclusive belong to the commune of Baarle-Nassau.

Plots numbers 91 and 92 belong to the commune of Baerle-Duc.

Plots numbers 93 to 111 inclusive belong to the commune of Baarle-Nassau."

disputed plots have thus been recognized as belonging to the commune of Baerle-Duc. It follows, in its view, that in accordance with the terms of the Boundary Convention sovereignty over these plots belongs to Belgium.

On its side, the Netherlands Government itself claims to have a title to sovereignty over the disputed plots and at the same time it challenges the validity of the title invoked by the Belgian Government. It relies upon the following grounds:

In the first place, it maintains that the Boundary Convention of 1843 did not by its terms do any more than recognize the existence of the *status quo* and did not determine what that *status quo* was; that accordingly the *status quo* must be determined in accordance with the Communal Minute under which sovereignty over the disputed plots was recognized as vested in the Netherlands.

Alternatively, the Netherlands Government maintains that, even if the Boundary Convention purported to determine the sovereignty over the disputed plots, this was vitiated by mistake and did not carry out the intention of the Parties. It contends that a mere comparison between the terms of the Communal Minute and the Descriptive Minute establishes this. It states that it is not necessary to establish the origin of the mistake because the mistake itself is apparent on the face of the two documents. In support, however, of its contention that a mistake did occur, it advances an hypothesis, as to the origin and consequences of the alleged mistake, which will be adverted to later.

As a further alternative, the Netherlands Government submits that, should it be held that the Boundary Convention determined the sovereignty in respect of the disputed plots and is not vitiated by mistake, acts of sovereignty exercised by it since 1843 over the plots have displaced the legal title flowing from the Boundary Convention and have established sovereignty in the Netherlands.

The Court will proceed to deal with these three grounds in the order in which they have been presented by the Netherlands.

* * *

Did the Boundary Convention itself determine sovereignty over the disputed plots or did it confine itself to a reference to the *status quo*?

At its 174th meeting held on 1 December 1841 the Mixed Boundary Commission took note of the difficulty which had prevented it from proceeding to a continuous boundary delimitation between Baarle-Nassau and Belgium, which was due "to the very special situation of the territories of Baarle-Nassau and Baerle-Duc which consist of intermingled plots of land". It was decided to proceed to the verification of the work of a Sub-Commission which had been

deputed "to establish the sovereignty of each power over the plots of land which form the territory of these communes".

The work and deliberations of the Sub-Commission are recorded in what is known as the Achel Minute, dated 26 October 1841. The Sub-Commission therein reported that because of the decision of the Belgian Government that the *status quo* was to be maintained, it was not able to apply to the "delimitation" between the communes "the same methods and types of operations used for the rest of the frontier line", and for that reason agreed to act as follows:

(a) "It not being possible to effect a delimitation properly so called without infinite difficulty and serious drawbacks", all that could be done was to "recognize and note" which were the plots which belonged to the Netherlands and Belgium respectively.

(b) The Communal Minute should be taken as the basis for the separation of the territories of the two communes.

(c) It was therefore decided and accepted by both sides that the territory of the Netherlands commune of Baarle-Nassau consisted of certain enumerated plots or parts of plots and, in the same way, the Belgian territory of Baerle-Duc consisted of certain enumerated plots or parts of plots. Under this enumeration, the disputed plots were attributed to Baarle-Nassau.

At the 175th meeting of the Mixed Boundary Commission held on 2 December 1841 the examination and verification was continued. It was decided that the Achel Minute should be an annex to the minutes of that meeting and that the proposals to be made for Baarle-Nassau and Baerle-Duc by the Mixed Boundary Commission should be inserted textually in the minutes of the meeting. Under the heading: "Separation of the territories of the communes of Baarle-Nassau (Netherlands) and Baerle-Duc (Belgium)", paragraph 1 reads: "It not being possible without the very greatest difficulty to effect a delimitation properly so called as between these two communes, all that can be done is to recognize and designate the plots ... which belong respectively to the commune of Baarle-Nassau (Netherlands) and the commune of Baerle-Duc (Belgium)."

At its 176th meeting held on 4 December 1841, after the Mixed Boundary Commission had continued the examination and verification of the work of the Sub-Commission and after discussion, the following paragraph was added:

[Translation]

"Paragraph 2:

The plots which should belong to each of the two States are therefore recognized and designated by their number and Section in the Survey as follows:

Plots forming the commune of Baarle-Nassau (Kingdom of the Netherlands)..."

Here they are set out and include the disputed plots.

[*Translation*]

"Plots forming the commune of Baerle-Duc (Kingdom of Belgium)..."

Here they are set out and do not include the disputed plots.

The Mixed Boundary Commission did not take up the matter again until its 208th meeting, held on 23 February 1843. In the meantime, the Treaty of 5 November 1842 had been ratified.

Up to this point of time, the following conclusions emerge from a perusal of the Minutes:

From 4 September 1841, the work of delimitation proceeded on the basis of the maintenance of the *status quo*. Because of this, it was not possible to establish any regular and exact delimitation of boundaries between the Netherlands and Belgium. Methods and types of operation differing from those pursued in respect of the rest of the frontier line had to be adopted to delineate the boundaries between the two communes and by so doing between the two States. These methods and types of operation consisted of recognizing and designating the plots which belonged to the Netherlands on the one hand and Belgium on the other. For these purposes a survey was used. The Mixed Boundary Commission carefully examined and verified the work of separation of the territories of the two communes. The Communal Minute was taken as the basis of its labours.

When the work of delimitation of boundaries was resumed by the Mixed Boundary Commission at its 208th meeting on 23 February 1843, it took note of the Treaty of 5 November 1842. Since the Commission had, from 4 September 1841 onwards, based its labours on the maintenance of the *status quo* and since the said Treaty did not modify this position, it was agreed that the work would begin with the definitive revision of its previous minutes describing the boundary.

At the 209th meeting held on 3 March 1843, it was decided that the Presidents of the respective Boundary Commissions should take immediate steps for the preparation and for fair copies of maps of the plots which had become necessary as the result of the Treaty of 5 November 1842 and that the Descriptive Minute should be revised and completed by one of several sub-commissions, which should submit the result of its work for the approval of the Commission.

The minutes of the 211th meeting of the Mixed Boundary Commission held on 9 March 1843 indicate that it met to consider the course which should be followed regarding the villages of Baarle-

Nassau and Baerle-Duc, and that after discussion it was decided that:

(1) The boundary of the communes should not be described, the regular description of the boundary line should stop at a certain point and be resumed again at a certain point; and

(2) The Descriptive Minute of the second section of the Convention should include one or several articles referring, by their numbers and section in the Survey, to all the plots of which the sovereignty belongs to one State or the other, in conformity with the minute of the 176th meeting.

The problem of the separation of the two communes had been in the hands of a sub-commission. At its 220th meeting held on 27 March 1843, the Mixed Boundary Commission had before it a draft proposed by that sub-commission. The discussion was to be taken up at a future meeting. Ample notice of the draft which subsequently came before the 225th meeting was thus given to both Parties.

At that meeting held on 4 April 1843 the Mixed Boundary Commission resumed consideration of the "description for the communes of Baarle-Nassau and Baerle-Duc". It annulled its Minutes of the 175th and 176th meetings which attributed the disputed plots to the Netherlands. It adopted the text of an article which provided, in the terms appearing in the first part of the Descriptive Minute, for the transcription word for word of the Communal Minute and for the preparation of detailed survey maps. Thereby it attributed the disputed plots to Belgium.

The importance of these detailed survey maps must have been obvious to both the Netherlands and Belgian Commissions. The Mixed Boundary Commission recognized the necessity for detailed survey maps, which of their nature require most careful preparation and checking. These maps, in which the disputed plots are shown as belonging to Belgium, were designed to become and did become part of the Convention and, in accordance with Article 3 thereof, had the same legal force as the Convention itself.

The Mixed Boundary Commission did not confine itself to a mere reference to Article 14 of the Treaty of 5 November 1842 and to the *status quo* whatever it was. From the record of its proceedings as disclosed in the minutes, it appears that the Commission went much further and proceeded to delimit the boundaries between the two States in respect of the two Baarles in the only way which was open to it.

In fact this was what the Commission had been doing from 4 September 1841 when Belgium declared in favour of the maintenance of the *status quo*, as appears clearly from the letter from the President of the Netherlands Commission of 16 December 1841 to the Netherlands Foreign Minister in which he stated:

[Translation]

“the two sub-commissions, at the time of their work on the spot, had therefore to confine themselves to drawing up a Minute of Separation of the territories of the two enclosed communes and that therefore they were not able to fix a continuous and uninterrupted line between Baarle-Nassau and Belgium ... it was decided to reconsider the Minute of the Separation of the Territories, which was previously established in agreement by the respective local administrators of the two communes ... so that if necessary the Minute in question could be incorporated in the Boundary Convention to be drawn up and so as to decide which parts of these enclosed communes should henceforward belong to the Netherlands and which parts should belong to Belgium.”

This letter, read together with that of the Burgomaster of Baarle-Duc of 23 December 1841 to the President of the Belgian Boundary Commission, where he speaks of studies and researches then being carried out “to form the line dividing the plots in these communes” and states that “there are certain disputed points in the Minute of 22 March 1841 and it will be difficult to complete the work because on a number of different points we and the communal administration of Baarle-Nassau are unable to agree...”, provides clear contemporaneous evidence of the nature of the task on which the Mixed Boundary Commission was engaged.

The authority of the Mixed Boundary Commission to demarcate the two communes was, in the view of the Court, beyond question. It follows from Article 6 of the Treaty between the Netherlands and Belgium concluded at London on 19 April 1839, which provides:

“In consideration of the territorial arrangements above stated, each of the two Parties renounces reciprocally and for ever, all pretension to the Territories, Towns, Fortresses, and Places, situated within the limits of the possessions of the other Party, as those limits are described in Articles 1, 2 and 4.

The said limits shall be marked out in conformity with those Articles, by Belgian and Dutch Commissioners of Demarcation, who shall meet as soon as possible in the town of Maestricht.”

This is confirmed by the Preamble to the Boundary Convention of 8 August 1843, which recites that:

“... The King of the Netherlands ... and ... the King of the Belgians, taking into consideration the Treaty of 19 April 1839, and wishing to fix and regulate all that relates to the demarcation of the frontier between the Kingdom of the Netherlands and the Kingdom of Belgium, have for this purpose, and in conformity with Article 6 of the said Treaty, appointed as their commissioners the following: ... [the names of the Commissioners appointed follow].”

This statement represents the common intention of the two States. Any interpretation under which the Boundary Convention is regarded as leaving in suspense and abandoning for a subsequent appreciation of the *status quo* the determination of the right of one

State or the other to the disputed plots would be incompatible with that common intention.

The Court reaches the conclusion that the Boundary Convention was intended to determine, and did determine, as between the two States, to which State the various plots in each commune belonged. Under its terms, the disputed plots were determined to belong to Belgium.

* * *

The Court will now proceed to an examination of the contention of the Netherlands that the Convention is vitiated by mistake.

This contention may be stated as follows:

The Descriptive Minute, after reciting "that it may be useful to note what was established with the agreement of both sides, by the Minute of 29 November 1836, agreed to and signed on 22 March 1841 by the local authorities of the two communes", stated that "the above-mentioned Minute, noting the plots composing the communes of Baarle-Duc and Baarle-Nassau, is transcribed word for word in the present Article". A comparison of the copy of the Communal Minute produced by the Netherlands with the Descriptive Minute discloses that there was not a "word for word" transcription of the former, inasmuch as the Descriptive Minute attributed the disputed plots to Belgium, whereas this copy of the Communal Minute attributed them to Baarle-Nassau. Therefore, the Netherlands contends, it follows that there was a mistake and that that mistake vitiates the Convention in this respect.

The Court does not consider that a mere comparison of these two documents establishes any such mistake. Under the terms of the Boundary Convention, sovereignty over the disputed plots is vested in Belgium. The only question is whether a mistake, such as would vitiate the Convention, has been established by convincing evidence.

To succeed on the basis of the alleged mistake, the Netherlands must establish that the intention of the Mixed Boundary Commission was that the Descriptive Minute attached to and forming part of the Convention of 1843 should set out the text of the Communal Minute contained in the copy produced by the Netherlands, and that this intention was defeated by the transcription in the Descriptive Minute of a different text, which, contrary to the text of that copy and the intention of the Mixed Boundary Commission, attributed the disputed plots to Baarle-Duc instead of to Baarle-Nassau.

The duty of the Mixed Boundary Commission was to determine and fix the limits of the possessions of the two States. So far as the two communes were concerned, the essence of its task was to determine the *status quo*. In order to discharge its duty, the Commission, directly and through sub-commissions, made examinations on the

spot, had recourse to researches, records and surveys, verified the findings of the sub-commissions and carefully checked its own labours.

On 26 October 1841 the Commissioners delegated by the Mixed Boundary Commission drew up the Achel Minute in which plots 91 and 92 were attributed to Baarle-Nassau. On the following day, 27 October 1841, the Belgian Commissioner, Viscount Vilain XIIII, writing from Achel, addressed a letter to the Burgomaster of Baerle-Duc. It read as follows:

“The boundary minute for the commune of Baarle-Nassau shows, in the section known as Sondereggen, that the plots Nos. 91 and 92 belong to the commune of Baerle-Duc. Our commune’s minute does not mention them. Would you kindly reply to me at Maastricht letting me know whether in fact these two plots belong to Baerle-Duc.”

The reply to this letter is not before the Court. But that a divergence in fact existed in relation to plots 91 and 92 between the two copies of the Communal Minute mentioned in that letter is confirmed by a letter of 31 October 1841 from the President of the Netherlands Commission to the Netherlands Minister for Foreign Affairs in which the former stated that “... at our meeting at Achel on the 26th of this month, we signed the minute determining and fixing the bounds of the two enclaved communes... As regards details, I have the honour to submit herewith a copy containing a few formal changes...” This copy was produced during the hearings. It sets out a number of articles under the heading “Minute of the separation between the territories of the communes, etc.”, Article 4 of which reads:

“It is therefore agreed and accepted, on both sides, by the delegates of the Mixed Commission that the territories of the two communes of Baarle-Nassau and Baerle-Duc consist of the plots or parts of plots shown in the following table...”

This table is in the form of vertical columns. Under Section A Zondereygen appears the following:

<i>Nos. of plots</i>	<i>To the Netherlands</i>	<i>To Belgium</i>
62 to 67 inclusive	entirely	
68 to 77 inclusive		entirely
78 to 90 inclusive	entirely	
91 and 92		entirely
93 to 111 inclusive	entirely	

The attribution of the disputed plots to Belgium in this document was different from the attribution made in the Achel Minute and there can be little doubt that the reason was that the copy of the Communal Minute then in the possession of the President of the

Netherlands Commission attributed these plots to Baerle-Duc and that in his report he followed the text of that copy.

The Court draws the conclusion from these documents that the two copies of the Communal Minute held by the Netherlands and Belgian Commissions were at variance on the attribution of the disputed plots to the two communes. There is no satisfactory explanation how a text—which according to the copy of the Communal Minute produced by the Netherlands consists of one paragraph reading “plots numbers 78 to 111 inclusive belong to the commune of Baarle-Nassau”—could have by mistake been broken up into three separate paragraphs giving a different attribution to the disputed plots.

The President of the Netherlands Commission had received a copy of the Communal Minute which had not then been signed. It was described by him in his letter to the Governor of North Brabant of 16 March 1841 as “a most important document”. Later, he personally went to both communes and learned that the Minute had been signed a few days before. To the copy which had been sent to him he at once added the names of the signatories, and it was “signed and stamped as being authentic by the municipality of Baarle-Nassau”. (Letter of 5 April 1841 from the President of the Netherlands Commission to the Governor of North Brabant.)

The Netherlands has suggested that this copy contained in manuscript not one but three paragraphs dealing respectively with plots 78 to 90, 91 and 92, and 93 to 111 as they appear in the Descriptive Minute, but that this copy was not an authentic copy. It suggests that the commune of Baarle-Nassau, when certifying it as an authentic copy, could not suppose that an error had already crept into it. A further collating of the two documents would, it was urged by the Netherlands, have entailed a great deal of work.

To explain how the Netherlands Commission’s authenticated copy was in the same terms as those used in the Descriptive Minute, the Netherlands advances the following hypothesis. The Controller of the Survey at Bois-le-Duc (Netherlands) made a mistake in 1840 as to the numbers of the different plots, disregarding the fact that a renumbering of plots had taken place in the Netherlands survey, and altered a copy of the Communal Minute which copy or a copy of it subsequently found its way to the Netherlands Commission. In that copy the disputed plots were attributed, by this official’s mistake, to Baerle-Duc, in the form in which the entry appears in the Descriptive Minute.

The material placed before the Court in support of this hypothesis fails to establish it; nor does it appear to the Court that the hypothesis is a plausible one.

The Netherlands contends however that it need not establish the origin of the mistake, since a simple comparison between the copy of the Communal Minute produced by it and that appearing in the Descriptive Minute reveals sufficiently that a mistake occurred. The matter is not, however, capable of being disposed of on this narrow ground. The Court must ascertain the intention of the Parties from the provisions of a treaty in the light of all the circumstances.

As of April 1843, the position was as follows: Since October 1841, both Commissions were in possession of copies of the Communal Minute. These copies differed in relation to the attribution of the disputed plots. This difference was known to the two Commissions and must have been a subject of discussion between them in 1841. The divergence between their copies could hardly have been overlooked in April 1843 by the two Commissions and by their respective staffs. The divergence must have been known to the Mixed Boundary Commission from 1841 onwards. Detailed survey maps of the commune of Baarle-Nassau with a map of that part of Baerle-Duc which was included therein according to the Communal Minute, had been prepared by the Netherlands and placed at the disposal of the Belgian Commission. Both sides could have had no doubt that the Mixed Boundary Commission, in dealing with the two Baarles, was itself determining the *status quo* and was proposing to fix the boundaries between the two States on that basis. It was to decide which parts of these enclosed communes belonged to the Netherlands and which parts belonged to Belgium.

The President of the Netherlands Commission had anticipated in his letter of 16 December 1841 to the Netherlands Minister of Foreign Affairs that a copy of the Communal Minute would be incorporated in the Boundary Convention to show—on the basis of the maintenance of the *status quo*—which parts of the two communes belonged to the Netherlands and which parts belonged to Belgium. The copy of the Communal Minute which he then had in mind to be so incorporated was not, word for word, a copy of the Communal Minute produced in these proceedings by the Netherlands. It could only have been the copy which he then possessed, and which, as is clear from his letter of 31 October 1841 to the Minister of Foreign Affairs and as stated in the Descriptive Minute, attributed the disputed plots to Belgium.

In the detailed map which was drawn up pursuant to the decision of the Mixed Boundary Commission at its 225th Meeting and which was to become part of the Boundary Convention, it was shown clearly, and in a manner which could not escape notice, that the disputed plots belonged to Belgium. They stood out as a small island in Netherlands territory coloured to show, in accordance with the legend of the map, that they did not belong to the Netherlands but to Belgium. The situation of those plots must have immediately arrested attention. This map, signed by the members of the res-

pective Commissions, of its very nature must have been the subject of check by both Commissions against original documents and surveys.

It is difficult to accept the view that an error was made in the Descriptive Minute in the process of copying. The difficulty in the way of the Court accepting such a view as a practical possibility appears to have been appreciated by the Netherlands. In the case put forward by it in its pleadings, it accordingly presented the argument that there was an error in the copy of the Minute in the hands of the Netherlands Commission which had automatically repeated itself, both in the word for word transcription of the Communal Minute into the Descriptive Minute and in the detailed map, without the error being discovered by the Mixed Boundary Commission. The Descriptive Minute, it was argued, could never have been checked, except perhaps against the allegedly incorrect Netherlands copy.

This explanation fails to have regard to the true function of the Mixed Boundary Commission and to the facts as they appeared to it. The Commission was not a mere copyist. Its duty was to ascertain what the *status quo* was. It had authority to fix the limits between the two States, which duty it discharged. At the 175th and 176th meetings of 2 and 4 December 1841, it was aware of the discrepancy between the two copies of the Communal Minute. That uncertainty still prevailed in the minds of both Commissions is evident from the contemporaneous correspondence of December 1841 and January 1842. Each side was seeking further information. Between the 175th and 225th meetings the Commission, by enquiries on the spot and by recourse to records and surveys of both communes, must have reached its own conclusion and determined, as was its duty, what the *status quo* was in relation to the disputed plots. At the 225th meeting, it must have decided that the *status quo* was correctly stated in the copy then in the possession of the Netherlands Commission and that it was this text—and not the copy produced by the Netherlands before the Court—which was to be transcribed word for word in the Descriptive Minute. Consequently it annulled the Minutes of its 175th and 176th meetings and attributed sovereignty over the disputed plots to Belgium. This decision found its expression in the Boundary Convention.

In the view of the Court, apart from a mere comparison of the text of the Descriptive Minute with the copy of the Communal Minute produced by the Netherlands, all attempts to establish and to explain the alleged mistake are based upon hypotheses which are not plausible and which are not accompanied by adequate proof.

The Boundary Convention of 1843 was the result of several years of labour, with members of the Mixed Boundary Commission not only in contact with the respective communal administrations but also with the Governments of the respective States. According to information furnished to the Court, copies of the text of the Communal Minute to be incorporated in the Descriptive Minute, and which was in fact incorporated therein, were signed by the secretaries of each commune. The actual text transcribed was accordingly known to both communes and both States. The Convention was confirmed by the Parliament of each State and ratified in accordance with their constitutional processes. Its terms have been published in each State. For almost a century the Netherlands made no challenge to the attribution of the disputed plots to Belgium.

The Court is satisfied that no case of mistake has been made out and that the validity and binding force of the provisions of the Convention of 1843 in respect of the disputed plots are not affected on that account.

* * *

The final contention of the Netherlands is that if sovereignty over the disputed plots was vested in Belgium by virtue of the Boundary Convention, acts of sovereignty exercised by the Netherlands since 1843 have established sovereignty in the Netherlands.

This is a claim to sovereignty in derogation of title established by treaty. Under the Boundary Convention, sovereignty resided in Belgium. The question for the Court is whether Belgium has lost its sovereignty, by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands at different times since 1843.

As to the question whether Belgium ever relinquished its sovereignty over the disputed plots, it is to be observed that Belgian military staff maps since their first publication in 1874 have shown these plots as Belgian territory. The plots were included in Belgian survey records from 1847 to 1852, when one plot for some reason was struck out but restored about 1890, since which time both have continued to appear therein. Transfer deeds relating to one of the plots were entered in the Records of the Survey authorities at Baerle-Duc in 1896 and 1904.

In 1843, the plots were uncultivated land, of which one was described by the Netherlands as being in 1860-1863 "a clearing of heathland". The Netherlands state that since 1866 the use to which both plots have been put has changed a number of times, although the nature and dates of these changes are not stated. Prior to 1906 some transfers of land were recorded in the Office

of Baarle-Nassau. In 1906 some houses were erected upon part of plot 91 and thereafter further transfers of lands were recorded in that Office. Since that time also, registrations of births, deaths and marriages of inhabitants of these houses have been entered in the Baarle-Nassau Communal Register. It is stated by Belgium that these houses, constructed round the Baarle-Nassau (frontier) station built by the Netherlands Government, were occupied by Netherlands officials.

Some time after their erection, a Belgian inspector of survey, having visited Baarle-Nassau, found that plots 91 and 92, entered in the Belgian survey, were also entered in the Netherlands survey. Official Belgian enquiries were then initiated, and finally, in July 1914, the Director of the Survey at Antwerp informed the Belgian Minister for Finance that he thought it necessary for the matter to be submitted to the Belgian Ministry for Foreign Affairs. The First World War then intervened. In December 1919 the file was transmitted to that Ministry.

Following examination by that Ministry, the Belgian Minister at The Hague in August 1921 drew the attention of the Netherlands Government to the fact that the two disputed plots and two other plots belonging to Baerle-Duc were entered in the survey documents of both States. The Netherlands Minister for Foreign Affairs replied on 6 October 1922, when he acknowledged that the two other plots were Belgian and should be struck out of the Netherlands survey documents, but for the first time it was claimed that the Communal Minute had been inaccurately reproduced in the Descriptive Minute and that plots 91 and 92 belonged to the Netherlands. Since then, sovereignty over these two plots has been the subject of dispute between the two States.

The Netherlands relies, in addition to the incorporation of the plots in the Netherlands survey, the entry in its registers of land transfer deeds and registrations of births, deaths and marriages in the communal register of Baarle-Nassau, on the fact that it has collected Netherlands land tax on the two plots without any resistance or protest on the part of Belgium.

Belgium's reply is that it was quite unaware that tax was being collected; that neither plot was under Belgian law liable to its land tax, since both plots were until recent years uncultivated and one of them was State property. This explanation is disputed by the Netherlands Government.

Reliance is also placed by the Netherlands upon certain proceedings taken by the commune of Baerle-Duc before a Breda tribunal in 1851. These proceedings were concerned with a proposed sale of a large area of heathland over which the commune of Baerle-Duc

claimed to have certain rights of usufruct. This area included part of the disputed plots.

A further act relied upon by the Netherlands is the sale by the Netherlands State, publicly announced in the year 1853, of the heathland above referred to. The Belgian Government states that the fact that this area included a part of the disputed plots escaped its notice.

The Netherlands also claims that Netherlands laws, more particularly in regard to rents, were applied to houses built on the plots.

Finally, the Netherlands places reliance upon the grant of a railway concession which related to a length of line, a small portion of which passed through the disputed plots.

The weight to be attached to the acts relied upon by the Netherlands must be determined against the background of the complex system of intermingled enclaves which existed. The difficulties confronting Belgium in detecting encroachments upon, and in exercising, its sovereignty over these two plots, surrounded as they were by Netherlands territory, are manifest. The acts relied upon are largely of a routine and administrative character performed by local officials and a consequence of the inclusion by the Netherlands of the disputed plots in its Survey, contrary to the Boundary Convention. They are insufficient to displace Belgian sovereignty established by that Convention.

During the years 1889 to 1892 efforts were made by the two States to achieve a regular and continuous frontier line between them in this region through exchanges of territory. A new Mixed Boundary Commission, which met during those years, finally prepared a Convention which was signed by the plenipotentiaries of the two States in 1892, but which was never ratified. Under the terms of the Convention, Belgium agreed to cede to the Netherlands, *inter alia*, the two disputed plots. The Netherlands urged that this should not be read against it since the Convention was not ratified and since little importance had attached to the two plots in question and it had allowed itself to be misled by the text of the Descriptive Minute and the significance of any cession was not the subject of consideration.

The unratified Convention of 1892 did not, of course, create any legal rights or obligations, but the terms of the Convention itself and the contemporaneous events show that Belgium at that time was asserting its sovereignty over the two plots, and that the Netherlands knew it was so doing. In a letter of 20 August 1890, the Belgian Minister for Foreign Affairs had informed the Netherlands Minister in Brussels that an enclave, intersected by the railway from Turnhout to Tilburg, had been omitted from the list of territories to be ceded by Belgium to the Netherlands. This enclave comprised the disputed plots; they were incorporated in the Convention of

1892 and subsequently specifically covered by a separate Declaration of December of that year. The Netherlands did not in 1892, or at any time thereafter until the dispute arose between the two States in 1922, repudiate the Belgian assertion of sovereignty.

Having examined the situation which has obtained in respect of the disputed plots and the facts relied upon by the two Governments, the Court reaches the conclusion that Belgian sovereignty established in 1843 over the disputed plots has not been extinguished.

For these reasons,

THE COURT,

by ten votes to four,

finds that sovereignty over the plots shown in the survey and known from 1836 to 1843 as Nos. 91 and 92, Section A, Zondereygen, belongs to the Kingdom of Belgium.

Done in English and French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of June, one thousand nine hundred and fifty-nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Kingdom of Belgium and the Government of the Kingdom of the Netherlands, respectively.

(Signed) Helge KLAESTAD,
President.

(Signed) GARNIER-COIGNET,
Deputy-Registrar.

Judge Sir Hersch LAUTERPACHT makes the following Declaration:

I have voted in favour of a decision determining that the sovereignty over the plots in dispute belongs to the Netherlands.

Article 90 of the Descriptive Minute of the Boundary Convention of 1843, in assigning these plots to *Belgium*, purports to transcribe word for word the Communal Minute between Baerle-Duc and Bäärle-Nassau which assigns these plots to the *Netherlands*. The Netherlands has produced before the Court what it described as one of the two original copies of the latter Minute. No other copy of the original Minute has been produced before the Court. The authenticity of the Minute produced by the Netherlands has not

been challenged—though it has been alleged by Belgium that a mistake had occurred in the course of transcribing it. On the other hand, it has been alleged by the Netherlands that a mistake, in the contrary direction, had occurred in the process of transcribing that document when the Descriptive Minute was adopted in 1843. In the words of Counsel for Belgium, the accumulation of errors in this case was such “as though some evil genius had presided over the whole affair”. I have formed the view that the evidence submitted to the Court in the shape of the formal Minutes, succinct in the extreme, of the Boundary Commission and of fragmentary correspondence lacking in sequence has not wholly dispelled the impact of the confused situation thus created. The circumstances of the adoption, in 1843, of the Descriptive Minute must, to some extent, be in the nature of conjecture. In particular, it has not been proved possible to state a direct conclusion as to the authenticity or otherwise of the cardinal piece of evidence, namely, of the only existing copy of the Communal Minute produced by the Netherlands. Moreover, while the Commissioners who drafted the Descriptive Minute enjoyed wide powers, they had no power to endow with legal efficacy a document in which they purported to transcribe word for word the Communal Minute and to observe the *status quo* but in which they actually modified the Communal Minute and departed from the *status quo*. The law knows of no such power. For these reasons, I am of the opinion that the relevant provisions of the Convention must be considered as void and inapplicable on account of uncertainty and unresolved discrepancy.

The Special Agreement of 26 November, 1957, submitting the dispute to the Court is by design so phrased as not to confine its function to giving a decision based exclusively on the Convention of 1843. By the generality of its terms it leaves it open to the Court to determine the question of sovereignty by reference to all relevant considerations—whether based on the Convention or not. Accordingly, in the circumstances, it seems proper that a decision be rendered by reference to the fact, which is not disputed, that at least during the fifty years following the adoption of the Convention there had been no challenge to the exercise, by the Government of the Netherlands and its officials, of normal administrative authority with regard to the plots in question. In my opinion, there is no room here for applying the exacting rules of prescription in relation to a title acquired by a clear and unequivocal treaty; there is no such treaty. It has been contended that the uninterrupted administrative activity of the Netherlands was due not to any recognition of Netherlands sovereignty on the part of Belgium but to the fact that the plots in question are an enclave within Netherlands territory and that, therefore, it was natural that Netherlands adminis-

trative acts should have been performed there in the ordinary course of affairs. However, the fact that local conditions have necessitated the normal and unchallenged exercise of Netherlands administrative activity provides an additional reason why, in the absence of clear provisions of a treaty, there is no necessity to disturb the existing state of affairs and to perpetuate a geographical anomaly.

Judge SPIROPOULOS makes the following Declaration:

The international legal status of the disputed plots seems to me to be extremely doubtful.

The facts and circumstances (decisions of the Mixed Boundary Commission, letters, etc.) at the basis of the Belgian hypothesis that the copy, which has not been produced before the Court, of the Communal Minute of 1841 attributed the disputed plots to Belgium or that the Boundary Commissioners had corrected it to that effect—which facts go back more than a century—do not, in my opinion, make it possible to conclude with sufficient certainty that the Belgian hypothesis corresponds with the facts.

On the other hand, the thesis of the Netherlands to the effect that an error crept into the Minute attached to Article 90 of the Descriptive Minute of 1843 is also merely based on a hypothesis, i.e. on the mere fact that the text of the Communal Minute of 1841 departs from the text of the Minute attached to Article 90 of the Descriptive Minute of 1843.

Faced as I am with a choice between two hypotheses which lead to opposite results with regard to the question to whom sovereignty over the disputed plots belongs, I consider that preference ought to be given to the hypothesis which seems to me to be the less speculative and that, in my view, is the hypothesis of the Netherlands. For this reason I have hesitated to concur in the Judgment of the Court.

Judges ARMAND-UGON and MORENO QUINTANA, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their Dissenting Opinions.

(Initialed) H. K.

(Initialed) G.-C.