DISSENTING OPINION OF JUDGE MORENO QUINTANA

[Translation]

To my great regret, I am unable to concur in this case in the opinion of the majority of my colleagues of the Court, nor in the decision which the Judgment gives, nor in the reasons on which that Judgment is based. I base my own position on considerations of fact and of law, which have led me to take a dissenting view. These considerations are as follows.

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By a Special Agreement dated 7 March 1959, the Governments of the Netherlands and of Belgium submitted to the International Court of Justice their dispute regarding sovereignty over the plots shown in the Survey and known from 1836 to 1843 as Nos. 91 and 92, Section A, Zondereygen. The diplomatic negotiations, begun between the two Governments at The Hague in March 1955, failed to arrive at a direct settlement of the affair; while a treaty of mutual cession of territory dated 11 June 1892—which allotted the disputed plots to the Netherlands—was never ratified.

The plots in question, which if constituting Belgian enclaves in Netherlands territory are part, in their turn, of other enclaves—those of Baerle-Duc (or Baarle-Hertog in Flemish) in Netherlands territory, which belongs to Belgium, or those of Baarle-Nassau, itself enclosed in the Belgian enclave already referred to. There is a veritable network of Belgian enclaves in Netherlands territory, and of Netherlands enclaves in Belgian territory; this represents a very ancient situation, along a frontier which is for the most part continuous. This network of enclaves may be compared, contrary to the case of other enclaves, to a veritable jigsaw, as it were, made from a geographical map. It complicates extremely—as is easy to understand—the problems of every kind which arise for the administrations of the two countries, in particular those which relate to jurisdiction. Moreover, the two Baarles—as I have been able to see for myself—in reality constitute one and the same village.

From the material point of view, the plots do not seem to have a very great importance; that could hardly be so, as their whole area covers only fourteen hectares. It is rather the question of sovereignty between Belgium and the Netherlands which is at stake.

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The dispute about the plots in question originates from the division of the ancient seigneury of Baarle into two seigneuries, as a

consequence of the division, in the thirteenth century, of the holdings of the Berthout family. The commune of Baarle-Nassau fell to the family of that name, who were Barons of Breda; later it passed to the United Provinces, which were the forerunners of the present Kingdom of the Netherlands. The commune of Baerle-Duc belonged to the House of Brabant and afterwards to the Southern Netherlands, which were the nucleus of the present Kingdom of Belgium. But as the commune of Baarle-Nassau was rich in heathlands, which Baerle-Duc was without, the inhabitants of the latter commune got into the habit of making use of those which they lacked. Hence arose a certain network of interests between the two communes.

When Belgium and Holland were separated in 1831, the question arose of drawing the common boundaries between the two countries. Difficulties arose about a proposal for exchanges of territory, and the situation resulting from the existence of the enclaves was maintained. Article 14 of the Treaty of 5 November 1842 maintained the *status quo* as regards the villages of Baarle-Nassau and Baerle-Duc. Article 14, paragraph 5, of the Boundary Convention between the two countries signed at Maastricht on 18 August 1843 confirmed this situation. In Article 3, this Convention contains a reference, as regards the boundaries, to other documents which have the same legal value as the Convention.

The document which is the subject of this reference is the Communal Minute of 22 March 1841 which drew up a list of the respective plots of the two communes. As is customary, this document was drawn up in two copies, one for each of the Parties. The Netherlands has produced its copy; the Belgian copy seems to have disappeared. In any case, it is unlikely that original authentic copies of the same legal document can differ in their text. There is only one Minute: that referred to in Article 1 of the Annex to the Minute drawn up by the 251st meeting of the Mixed Boundary Commission. It is not conceivable—and the fact is far from having been proved by Belgium—that the Boundary Commissioners should have had two copies of the same Minute differing in their texts. It is still less conceivable—as Counsel for the Belgian Government maintains—that, by some inexplicable manoeuvre, the copy intended for the commune of Baerle-Duc was that which was in possession of the commune of Baarle-Nassau. The copy produced by the Netherlands Government is clear on the subject of the disputed question: the plots belong to the commune of Baarle-Nassau.

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As it arises for the Court, the problem to be resolved derives from the interpretation of a treaty. The principles involved are well

known; they have been established by doctrine and, on many occasions, by the decisions of the Permanent Court and of our own Court. Certain suppositions have been put forward by the Parties in the pleadings and oral arguments in the case with a view to explaining seemingly strange situations. But the Court need not dwell upon these suppositions, for a judgment cannot adopt a capricious interpretation, nor found its view of the evolution of events on venturesome hypotheses. Judgment must be given on the basis of recognized facts which are founded on legal data.

The principal legal instrument in this case is the Maastricht Boundary Convention already mentioned, which regulates a territorial *status quo* as it existed at the date of signature. This regulation deals legally with a situation of fact which can and should be noted, but not changed. The Boundary Commissioners appointed by virtue of the Treaty signed at London on 19 April 1839 had a specific task, which cannot be distorted. They were a technical body and not a judicial commission. The frontier plots under Netherlands authority then belonged to the Netherlands, and those under Belgian authority to Belgium. It is a question of factual verification, and not one of enumerative description or graphical reproduction—since the Convention in question is in fact accompanied by a Descriptive Minute, and Article 90 of that document establishes that plots 91 and 92 form part of the commune of Baerle-Duc.

The Descriptive Minute is also borne out by a map which was signed by the plenipotentiary delegates of the two countries. As a result of this description, the said map, or any other document, which might be the consequence of a mistake in numbering, would be of highly doubtful value. One is aware, moreover, of the value—the very relative value—which international law attaches to geographical maps. This was made sufficiently clear in the Award of arbitrator Max Huber in the Island of Palmas case (see United Nations, *Reports of International Arbitral Awards*, Vol. II, pp. 852-854).

But this Descriptive Minute is supposed to transcribe "word for word", as the Boundary Commissioners decided at their 251st meeting, what was previously indicated in the Communal Minute drawn up in 1841. To transcribe "word for word" is not a simple directive but involves compliance with a clear and precise obligation: that of transcribing *ne varietur* a definite text, and not of changing, whether deliberately or by a clerical error, the *status juris* of two territorial plots. And this Communal Minute states the contrary of what the Descriptive Minute affirms: the plots belong to Baarle-Nassau. Was this a mistake, or an intentional rectification made by the Boundary Commissioners in Article 90 of the Descriptive Minute? If it was a rectification, the Boundary Commissioners had in no way the power to make it, and, even if they had that power, they should have expressed themselves in a clear

and categorical fashion in the same document in which they gave the result of their work.

Moreover, the Communal Minute merely notes the existing situation of fact. Holland, ever since she historically constituted an independent State, and not Belgium, is the Power which exercised sovereignty over the plots in question. That situation is even more significant if regard be had for the fact that it is manifested as pertaining to the exercise of a legitimate authority, after the signature of the Convention of 1843, of which it seems merely to be a natural consequence. It is Holland which accorded the use of the heathlands and collected the land tax on the plots, entered in its registers private legal acts occurring within the area, was responsible for the communal administration of the said plots, applied its national legislation to them, and in 1886 arranged for a forced expropriation affecting them. In 1853, Holland even proceeded to the sale—as *domina terrarum*—of plot No. 91. Such a legal act, in so far as it has a character *jure gestionis*, pertains to the power of a State, and not of a private person. And such facts are so striking—they are self-evident—that in my view they remove all doubt as to the legitimacy of Netherlands sovereignty over the plots in question.

These facts, which are the capital facts in the case, are not contested by the other Party. The latter admits them, but gives them an interpretation which was not that of the international decisions in the well-known cases of the Banks of Grisbadarna (see *Hague Court Reports*, pp. 130-132), of the Island of Palmas (see U. N. *Reports*, etc., Vol. II, p. 870), of the Island of Clipperton (see U. N. *Reports*, etc., Vol. II, pp. 1109-1110), of the Legal Status of Eastern Greenland (see P.C.I.J., *Judgments*, etc., Series A/B, No. 53, pp. 45-46) and of the Minquiers and Ecrehos (see *I.C.J. Reports 1953*, p. 65). Belgium, which was not separated from Holland until 1831, has since that date, and up to 1921 perhaps—almost a century—made no formal protest against the exercise of sovereignty by the other country. It could clearly not do so because the possession exercised by the Netherlands was in no way a defective one and was based upon an incontestable legal title: Article 14, paragraph 5, of the Maastricht Convention, which established the *status quo*. It was a possession exercised in all good faith, with the *animus domini* which characterizes a situation of this kind and which the law protects. Let us recall, moreover, the well-known principle of *uti possidetis* in Book XLIII, Chapter 17, paragraph 1, of the Digest: "As you possess, you shall continue to possess."

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If a provision such as that of Article 14, paragraph 5, of the Maastricht Convention provides for the maintenance of a situation

of fact, if this situation of fact is contrary to the stipulations of a Minute which forms part of the Convention and to the attestation on a map drawn up to this effect; if, moreover, this Minute is in flagrant contradiction with the document on which it should be based, it is clearly the interpretation of the Convention which should prevail in the mind of the international judge. On this question, the Award of Arbitrator Lardy on the delimitation of the Island of Timor lays down clearly that the real intention of the Parties prevails over an erroneous terminology (see *Hague Court Reports*, p. 362), and the Advisory Opinion given by the Permanent Court on the conditions of labour in agriculture stated that a treaty must be read as a whole and not on the basis of phrases detached from their context (see *Judgments*, etc., Series B, Nos. 2 and 3, p. 23). For, that Article 90 of the Descriptive Minute in question can constitute, by its text alone, a source of territorial sovereignty is an idea legally unacceptable. And, in the present case, this sovereignty can only flow from two elements: the text of the Boundary Convention and the resulting situation of fact. It is they which give the key to the interpretation of the said instrument.

In the Maastricht Convention, the delimitation of the two Baarles is a very special case. Article 1 of this Convention establishes the frontier "in an exact and invariable way" save—and this is an exception—for the communes of Baerle-Duc and Baarle-Nassau, in respect of which—so runs the text—"the *status quo* shall be maintained in virtue of Article 14 of the Treaty of 5 November 1842". According to Article 14, paragraph 5, of the Convention of Maastricht, the negotiators agreed that a continuous linear delimitation was practically impossible and that such delimitation was the subject of a "special study". Now, this special study was never carried out, since the simple enumeration in Article 90 of the Descriptive Minute cannot be regarded as such. What falls for interpretation is the meaning of the Treaty and this can only be the maintenance of the *status quo* on the basis of a document—the Communal Minute of 1841—the authenticity of which has not been questioned by the Parties. In producing it in this case, the Netherlands has discharged its obligation as to the burden of proof resting on each of the Parties under Article II of the Special Agreement submitted to the Court and in accordance with the law laid down by the Court in the Minquiers and Ecrehos case (see *Reports 1953*, p. 52). Belgium—which has not produced its copy—must, in accordance with a well-known principle of procedure, bear the consequences of its negligence. This reasoning, which is clear and categorical, leads naturally to the conclusion that the Descriptive Minute accompanying the Maastricht Convention has no more value, in Article 90, than that of an incorrect copy of the Communal Minute.

This real intention of the Parties, to which international decisions have referred, and which is at the basis of any *negotium juris*, may

also be inferred in the present case from the minutes of the meetings of the Boundary Commissioners of the Parties. The Permanent Court has given a very clear idea of the importance of preparatory work for the interpretation of treaties in its Advisory Opinion on the treatment of Polish nationals in Danzig (see *Judgments*, etc., Series A/B, No. 44, p. 33). In the Annex to the Minute of the 251st meeting held on 12 June 1843 by the Boundary Commissioners, it was stated that the Communal Minute of 1841 was "transcribed, word for word, in the present Article". Such a statement on the part of the Mixed Commission, which consisted of the Boundary Commissioners, gives a definite decision regarding the plots in question. It is a direct consequence of the earlier decision adopted by that Commission at its 225th meeting (4 April 1843), which acknowledged the full value of this Communal Minute by allotting the disputed plots to Holland, at the same time annulling—in substituting for them the statements of an authentic document—the provisions adopted at the 175th and 176th meetings.

All this procedure was perfectly logical, since any enclave is a derogation from the principle of territorial continuity, while the special situation of plots 91 and 92 of Zondereygen was even more abnormal, since they did not in any way constitute a unity in themselves and because they were fairly distant from the Belgian enclave of Baerle-Duc. It is perfectly understandable therefore that the two Parties should have wished to correct by the Treaty of 1892—through compromise—a legal situation which the Descriptive Minute showed to be incorrect. Far from constituting, in my view, an argument in favour of the Belgian thesis, this Treaty establishes the exact contrary. The Treaty, useful as *praesumptio juris*, has no value as a proof of Belgian sovereignty over the plots. In its Judgment in the case concerning the Factory at Chorzów (Merits), the Permanent Court recognized that it could not take into account opinions which the Parties may have made during negotiations when such negotiations have not led to a complete agreement (see *Judgments*, etc., Series A, No. 17, p. 51), while our own Court, in its Advisory Opinion on reservations to the Convention on Genocide, held that although signature constituted a preparatory stage in the drawing up of a treaty, its lack of ratification deprived it of legal effect (see *I.C.J. Reports 1951*, p. 28).

It is, however, necessary to draw attention to the existence of an indisputable clerical error in the Descriptive Minute, when it allots the disputed plots to Baerle-Duc. This error is so obvious that it is only necessary for the Court to observe its existence; and this observation is inescapable. How this error may have come to be made is not a matter which interests the Court. An international court of justice is not called upon to make police enquiries. For the same reason, the Court need not consider other hypotheses, as strange as the one put forward by Counsel for Belgium, to the

effect that the copyist of the Communal Minute of 1841 omitted two lines of a supposed earlier list and thus, in running the text together, attributed the plots to Baarle-Nassau.

A mistake of fact—as the most qualified writers in international law teach us—vitiates the consent of the Parties to a legal instrument such as a treaty. This defect in consent involves the total or partial nullity of the instrument in question. In the present case, it is only Article 90 of the Descriptive Minute, which allots the plots to Baerle-Duc, that would be affected by the decision of a judicial body. The other provisions of the Convention of Maastricht, which reflect the intention of the Parties, would be unaffected. And, so as to conform with this decision, it would be for the Parties to regulate their new legal situation according to the principles of international law—as they had shown the will to do on the occasion of the abortive Treaty of 1892.

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I conclude by giving my opinion—as the Court is requested to—that the plots in question belong to the sovereignty of the Kingdom of the Netherlands.

(Signed) Lucio M. MORENO QUINTANA.