

DECLARATION BY JUDGE BASDEVANT

[*Translation*]

I have understood the dispute referred to the Court as relating essentially to the conflict of views between the Parties with regard to the lawfulness or unlawfulness of the measures taken by India in respect of passage between Daman and the enclaves, it being possible to hold that those measures were unlawful, as alleged by Portugal, only if it first be found that passage constitutes a right of Portugal and not the result of a practice of accommodation on the part of the sovereign of the neighbouring territories: on this point, too, a conflict of views between the Parties has emerged before the Court. Portugal claims that it has a right of passage to the extent necessary for the exercise of its sovereignty over the enclaves and that that right was disregarded by India in 1954. It does not appear to me that the Court has been asked to adjudicate upon the existence of this right of passage in respect of any given categories as between which the Court has made a distinction.

I have moreover felt that it was only in order to determine the lawfulness or unlawfulness of a particular measure restricting passage that the distinction between the passage of private persons, that of civil officials, that of armed forces, etc., could arise, for the purpose of determining whether the restrictive measure was such as to compromise the exercise of Portuguese sovereignty over the enclaves. A restriction of passage applied to the Governor of Daman has in this connection a significance different from that of the same restriction applied to a private person.

The Court has adopted a different course. I have, consequently, acceded to the method which it has adopted.

Following this course, I observe that Portugal has not attributed an absolute character to the right of passage which it claims. Apart from its limitation to that which is necessary for the exercise of its sovereignty over the enclaves, Portugal recognizes that the exercise of the right is subject to the regulation and control of India. I agree with the Judgment that that dual limitation is not sufficient to deprive the right claimed of all substance. At the same time I am of opinion that the combination of these various elements must lead us to interpret with prudence the facts relied upon and not too readily to consider a given example of regulation as equivalent to a gratuitous concession or that a given restriction is necessarily an infringement of a right of passage, assuming such a right to be found.

While subscribing to what is said by the Court as to the present decision being one dependent upon the particular facts of the case, I should have been inclined to place more weight upon the fact that in the present case two territorial sovereignties, mutually

recognized, confront each other. A duty of mutual respect is incumbent upon both. The problem is to define, and to make clear in the light of the facts complained of by Portugal, the scope of that duty, and to do this for the concrete case before the Court, taking into account as accurately as possible the rights of each of the Parties without exaggerating, on the one hand, the requirements of Portuguese sovereignty over the enclaves or, on the other hand, those of Indian sovereignty in the intervening territory. The reconciling of the requirements of these two sovereignties was achieved during a long period, taking into account the particular features of the case, by the practice established between the Parties. It was in that direction that I looked to seek the solutions which, in this particular case, seemed to me those most in accordance with legal principle.

Acceding to the method adopted by the Court, I have had to express my view on the issues which it regards as arising. This I have done, on some points in the sense adopted by the Court, on other points in the contrary sense. I shall confine myself to this indication without going into further detail, Article 57 of the Statute entitling me, but not requiring me, to state in greater detail the extent of my dissent.

(Signed) BASDEVANT.