

DECLARATION BY JUDGE BADAWI

[*Translation*]

Portugal has consistently argued in its pleadings and oral arguments that the British and, after them, India recognized its sovereignty over the enclaves, and that before 1954 Portugal had in fact no complaint of the way in which they acted towards it. If there were occasional incidents or differences of opinion between them, these were due to their power of control and regulation which Portugal could not challenge.

On this matter the Judgment takes up a half-way position. It holds that the British, without expressly recognizing that sovereignty, never called in question the exclusive authority of Portugal over the enclaves, that they thus recognized its sovereignty in fact and by implication, and that later that sovereignty was tacitly recognized by India.

In my opinion, however, by proceeding on the basis of a finding that the British and, after them, the Indians recognized the sovereignty of Portugal, the question is postulated instead of being proved.

In my opinion it is necessary in the first place to examine and analyse the relations between the British and Portugal and to draw therefrom the appropriate conclusions in this connection.

In the absence of an explicit and formal recognition, it is necessary to ascertain whether the attributes of sovereignty were in fact recognized.

Now, it cannot but be recognized that, apart from the fact that the frontiers of the enclaves merging with Indian territory, the passage of goods between Daman and the enclaves and between those enclaves was in general treated as a case of import and export, the passage of police, armed forces and arms was always, as the Judgment finds, subject to the necessity of an authorization and was therefore at the discretion of the British.

The Treaty of 1878 between Great Britain and Portugal, notwithstanding its basis in the reciprocal rights and obligations of the two Parties in their respective spheres, could not depart from that necessity. The expiry of this Treaty in 1892 did not of course add to the rights of Portugal or alter their nature.

In these circumstances it would be difficult to reconcile recognition of sovereignty with the exercise of a discretion which, in principle, repudiates one essential consequence of that sovereignty.

The fact that the authorization was always granted in the past has no legal bearing or significance. While the circumstances remain the same, there is nothing surprising in the authorization being regularly granted. Nor is there anything surprising in its being

refused if the circumstances change. It is of the very essence of authorization, which has as its basis the concept of discretion.

The alliance between Great Britain and Portugal and the former's guarantee of Portugal's colonial possessions may have disguised the true legal aspect of their relations, as regards the enclaves. The fact remains that on an analysis of these relations it must be recognized that there existed between them only a factual situation *sui generis* having well-defined limits.

It is however difficult to classify this situation in a category of rights recognizable in international law, and still more difficult to classify it in the category of sovereignty: to admit the sovereignty of Portugal would be to admit that it could involve legal consequences other than those which are recognized in practice. That conclusion should alone suffice to exclude such admission, since it would go beyond the factual situation which the Court has recognized.

However much the alliance between Great Britain and Portugal and the British guarantee to protect Portuguese possessions may have served to obscure the extent of Portugal's rights over the enclaves, it is clear that this treaty could only create personal rights and obligations between Portugal and Great Britain which were obviously not transmitted to the national Government of India. With the change of partner, the situation would necessarily be less favourable to Portugal.

It is hardly surprising that all these confused circumstances should have created an ambiguous situation in which Portugal believed in a genuine right of sovereignty binding upon India, while the latter could see in it merely a right entirely subject to its discretion, to be exercised under very different conditions from those with which Portugal was familiar throughout the British period.

(Signed) A. BADAWI.