

DISSENTING OPINION OF JUDGE ARMAND-UGON

[*Translation*]

As I am, to my regret, unable to concur entirely in the decision of the Court on the merits, I feel called upon to explain the reason for my dissenting opinion.

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The Portuguese Government asserts in the first of its final submissions that it possessed a right of passage between Daman and the enclaves of Dadra and Nagar-Aveli in July 1954.

That right, Portugal argues, is a right of transit the sole purpose of which is to ensure continuous communication between the enclaves themselves and between the enclaves and Daman. The transit is between two pieces of Portuguese territory. It involves a right of access to Portuguese territory enclaved within Indian territory, not a right of access to the latter. Such a right must be regulated to the extent essential for the exercise of Portuguese sovereignty within the enclaves of Dadra and Nagar-Aveli. Sovereignty over the territory through which communication takes place belongs exclusively to India, and this Portugal does not dispute; that transit remains subject to Indian sovereignty, and no immunity is claimed; it is therefore for the Indian Government to regulate and control this right of transit across its territory. This regulation and control must be exercised in good faith and under the responsibility of India; but that power of regulation is not a discretionary power and the Indian Government cannot be allowed to prevent the transit necessary for the exercise of Portuguese sovereignty within the enclaves.

This first of the final submissions of the Portuguese Government asks the Court to adjudge and declare:

“That the right of passage between the enclaves of Dadra and Nagar-Aveli and between these enclaves and the coastal district of Daman, as defined above, is a right possessed by Portugal and which must be respected by India.”

It is upon this basis that the Court has been asked to adjudicate, and it must be taken as a whole, neither the Parties nor the Court itself being permitted to make any alterations in it. The words “*finalemeut conclure*” in the French text of Article 48 of the Statute of the Court make it clear that such submissions are final and unalterable and differ from the submissions referred to in Articles 42 and 43 of the Rules of Court, which, being preliminary submissions, may be modified. It is evident therefore that, “though (the Court) may construe the submissions of the Parties, it cannot

substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced" (Case concerning *Certain German interests*, Series A, Judgment No. 7, p. 35, 1927). A final submission cannot be divided into several separate submissions based upon the elements and aspects it contains. "It is the duty of the Court not only to reply to the questions as stated in the final submissions of the Parties, but also to abstain from deciding points not included in those submissions" (*I.C.J. Reports 1950*, p. 402). The Court is required to decide upon the final submissions of the Parties, not to revise them.

What Portugal claims is a right peculiar to itself. The right of passage claimed forms a whole. It is always the same right. The decision asked for is its establishment. The present case is entered in the General List as "Right of Passage over Indian Territory".

Counsel for Portugal, in particular, argued that: "The right, in itself, remains unchanged, as a right of transit between Daman and the enclaves to the extent necessary for the exercise of sovereignty over those enclaves. What varies is the regulation of the right, for it presents different aspects at different periods. But in the midst of all these extrinsic transformations, which do not affect the substance of the right, that right remains unimpaired." (Oral proceedings, Vol. II, p. 67.)

The Court is asked for a declaratory judgment as to the existence of the right of passage; provision is made for such a request in Article 36 (2) (b) of the Statute of the Court.

It is not upon the breaking up and dismemberment of the content and the elements of this right that the Court has to pass. The conditions governing the execution of the right of passage are within the jurisdiction of the Indian Government and none of the submissions of the Parties touches upon them. The forms in which the right of passage is exercised must not be confused with the right itself. A decision on the right of passage cannot be based upon the forms and conditions of its application without departing from the specific terms of the final submissions of the Parties. The Government of Portugal asks the Court to adjudicate upon "a right of passage" and the Government of India asks the Court to hold "that the claim is unfounded"; the claims of the Parties are perfectly clear. The Court is not requested to adjudicate upon the forms in which the right of passage is to be exercised, that is something which has not been asked.

Portugal claims to derive the right from the provisions of the Treaty of 1779 from general and local custom and from certain principles of international law.

The fact that Portugal claims this right for the purposes of access to the enclaves makes it necessary to seek the legal foundation for this claim. The road leading from Daman to the enclaves is Indian

territory, and the right claimed by Portugal would restrict the rights of India in this portion of territory. The judicial sanctioning of a right of this nature must have a firm legal basis.

The passage with which we are concerned was exercised during the Maratha, British and Indian periods. Those periods constitute the period of its normal exercise; an abnormal period begins after the events of July 1954 when the blockade of the enclaves by the Indian Government was brought into effect.

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The Applicant places the origin of its right of passage at the period when the villages of Nagar-Aveli and Dadra were ceded to Portugal by the Maratha Government. That cession is said to have resulted from the Treaty of 1779, the agreements of 1783 and 1785 and the subsequent *sanads* (decrees). There was a long discussion between the Parties as to the existence of that Treaty and as to the content of its Article 17.

There is no denying that at that time neither the Maratha Government nor the Portuguese Government had any doubt that the said Treaty had in fact been concluded and was valid. The two Governments were agreed on that. There is therefore no purpose in pursuing the argument on a point they both accepted. We can rely on their wisdom; their conduct should suffice to convince us that a treaty was concluded in 1779 between the Maratha and Portuguese Governments. When a Government declares officially that a treaty was concluded, the Court can hold that this declaration is sufficient and it is not required to check its accuracy. It was admitted by the Maratha Government.

The purport of Article 17 of this Treaty is disputed by the Parties.

The Applicant alleges that certain territories were ceded in full sovereignty, on the basis of their revenues. The Respondent claims that there was only a *jagir* or *saranjam*, that is, a temporary and revocable cession of the revenues of the villages of Nagar-Aveli and Dadra.

In the support of its contention the Indian Government relies solely upon the text of Article 17 in a Marathi translation of the Portuguese text of 4 May 1779, which is said to have been registered at Goa and signed by the Portuguese Viceroy. This translation of Article 17 states that the Marathas granted a *jagir*. The three other texts of this Treaty do not mention this word.

Assuming that a *jagir* or *saranjam* was provided for, it would still remain to determine what form of that tenure was agreed upon. Was it a temporary and revocable *saranjam* of revenues, or was it a *saranjam* irrevocably and finally ceding villages and the ground on which they stood? On this point neither the explanations

furnished by the Parties nor the contradictory documents on the record are fully conclusive. The use of the word *jagir*, as employed in Article 17 in the Marathi translation of the Portuguese text, does not indicate beyond dispute the legal character of the tenure contemplated. The term had no single and legally precise meaning.

Our reasoning must proceed on the basis of the validity of the argument in favour of full sovereignty and of that in favour of a *saranjam*. In either case it is clear that the Portuguese authorities must necessarily have had a right to pass through Maratha territory, whether to exercise their sovereignty over the enclaves or to administer and collect taxes from the villages. Whether the Marathas ceded sovereignty or granted a *saranjam*, they were obliged to allow the rights granted to the Portuguese over their territories to be exercised. It would be inadmissible to grant sovereignty over certain territories or a *saranjam* of certain villages and then to set up obstacles to the fulfilment of the obligations agreed upon. One cannot accept an obligation and then withhold the means of performing the obligation. There was thus an obligation binding upon the Marathas based upon agreements which they had signed and that obligation involved authorization of passage through their territory for the Portuguese.

It may safely be asserted that during the Maratha period, a period of 35 years, neither the Poona Government nor its principal officials ever disavowed this obligation to allow the Portuguese to travel to the enclaves.

One reason for the concession (in addition to grounds of friendship) was to facilitate the supplying of Daman, and that would have been impossible unless passage to the enclaves was recognized and allowed. The importance of the right of passage had also an economic basis. Numerous *sanads* referring to this concession mention "villages adjoining Daman" (Annex C, Nos. 8, 9, 10, 14, 15 and 16). This implies the idea of contiguity, which in actual fact was not achieved, and only thereafter were villages not adjoining Daman considered. The lack of contiguity was to be made good by passage.

To do away with this passage is to infringe either territorial sovereignty or the *saranjam*. That is not the situation contemplated in Article 17 and the supplementary agreements. This situation had its origin in a treaty and the Maratha Government which agreed to the conclusion of that treaty was obliged to accept all its consequences, submitting to the restrictions it involved within its territory.

Transit, or the fact of transit, during the Maratha period is a definite right vested in the Portuguese State. It is an implied right, to be inferred from the 1779 Treaty and from the supplementary agreements in favour of the Portuguese State, even if it was not specifically expressed. The obligations assumed by the Maratha

Government must accord with the rights it recognized in the Treaty. Portugal therefore acquired the powers necessary for effective exercise of the powers and rights expressly granted. Those powers imply recognition of a right of passage.

This right appears to be even more essential in the case of a *saranjam*. How could the holder of such a tenure enjoy it if denied the possibility of visiting the enclaves in order to collect the taxes granted and to deal with matters of village administration? Such communication is of the very essence of such a tenure, which would otherwise be inconceivable.

The principle of implied powers was recognized by the Permanent Court in the *Memel Territory* case (Series A/B, 1932, pp. 313-314), which deduces from the sovereignty of Lithuania that Lithuania possessed powers not set forth in the Memel Statute. In its Advisory Opinion on *Reparation for Injuries suffered in the Service of the United Nations*, the International Court of Justice also recognized that the Organization enjoyed implied powers (*I.C.J. Reports 1949*, pp. 174, 178, 179, and 180).

The right of passage is essential to secure the rights of territorial sovereignty or the *saranjam* rights possessed by Portugal. Mere toleration of passage, or a temporary favour liable to withdrawal, would fail to make possible enjoyment of the rights conferred by the aforementioned Treaty and the agreements; they would be at the mercy of the Maratha Government. But the rights granted to Portugal by that Government were not of such a nature. If transit were merely tolerated, Portugal could not enjoy its rights in an appropriate way. It is not to be supposed that the Maratha Government decided to concede certain rights to Portugal, and at the same time to reserve the power to adopt special measures to defeat the purpose for which those rights had been granted.

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This situation was respected and accepted by the British in 1818, when the Maratha Empire and its territories came under their rule.

There is no doubt that at that time the British authorities carefully investigated Portugal's position in the enclaves of Dadra and Nagar-Aveli situated in their newly acquired territory. They could ascertain the facts from the Maratha archives which were available to them. They enquired into these with reference to a request by the Portuguese authorities in 1818 for a customs exemption, but Portuguese sovereignty was not questioned (Annex C, No. 35, Document 4). During the period 1818 to 1947 the British entertained no doubt as to Portugal's sovereignty over these enclaves.

Accordingly, during the British period, no difficulty or obstacle was raised concerning the existence of this obligation to allow

passage. The British Government, when they succeeded to the Maratha territory, recognized it.

In the *Free Zones* case, the Permanent Court implicitly recognized the principle of the succession of local obligations of general interest. France, "as Sardinia's successor in the sovereignty over the territory in question", had to respect the system established by the treaties of 1815-1816" (Series A/B, No. 46, p. 145).

The jurisdiction of the British authorities was confined in practice to regulating the exercise of this right. The application of the right was controlled in various ways, but the existence of the right was never disregarded. This power of regulation was founded upon British sovereignty over the short distance between Daman and the enclaves. It did not in principle include the power of absolutely prohibiting the forms of passage necessary for the exercise of sovereignty over the enclaves. The British always authorized in that territory a usage adapted to the requirements of this passage. It should be noted that passage was sometimes regulated by agreement with the Portuguese authorities, especially in the transit of police forces (Treaty of 1878 and Agreements of 1913, 1920 and 1940). By this last agreement armed police not exceeding ten in number could pass, provided intimation of their passage was given by post to the British authorities within 24 hours of the passage. If any number exceeding ten were required, the previous practice of obtaining concurrence was to be followed (Indian Annex C, No. 57).

The regulations issued by the British Government were designed to define passage, to govern the details of its exercise. Most of them were police regulations laying down restrictions on, and, in exceptional cases, prohibitions of freedom of transit. During the whole of the British period there were two prohibitions, in respect of salt and alcohol. Such restrictions are common and frequent where rights have to be regulated; it is not permissible to infer that this governmental activity meant that the rights did not exist. The same is true when this power of regulation is applied to the right of passage in its different forms, either for the purpose of maintaining order or to improve financial administration. Such regulations, far from constituting a denial of the right of passage, are strong confirmation of it and clearly define its sphere of application.

At one moment the British authorities even contemplated establishing a corridor between the two Portuguese territories, but the plan was not ultimately adopted. The proposal, however, corroborated the view, often expressed in correspondence between the British and Portuguese authorities, that the enclaves were in a special position and that their communications required to be assured and facilitated. This cession of territory, a British official said, "would give free access to the Portuguese pargana of Nagar-Aveli" (Annex F, No. 58).

Portugal's contribution to the cost of repairing a section of the road leading to the enclaves, on British territory, in 1900 and 1926 appears to confirm the necessity of this right of access to the enclaves.

The Portuguese authorities had no need to be continually claiming a right that was recognized as theirs. In his Note of 27 May 1892 (Annex C, No. 41) the Portuguese Governor asserts that "transit (between Daman and Nagar-Aveli) was free while the Treaty of 1878 was in force, and it was so before the Treaty". He adds that this was "the practice followed and observed formerly, before the Treaty of 26 December 1878". This Treaty, which remained in force from 1879 until 1892, established a general regime for the territories in India of the two contracting parties; it ratified an already established right of passage for purposes of communication with the enclaves. When the Treaty of 1878 came to an end, the right of passage continued to exist.

It is not disputed that throughout the British period passage to the enclaves was maintained on the basis of the established regulations. That situation continued peacefully and without interruption for 130 years. Throughout that long period the road between Daman and the enclaves remained open; no disagreement arose between the two Governments on that point.

All this time a deliberate intention was manifested, either implicitly or expressly in agreements and regulations. This indicates a common awareness reflecting the conviction of the two Governments as to the right of passage to the enclaves. It must be regarded as evidence that the British authorities recognized that right. What "is" becomes what "must be".

The concept of effectiveness is of great importance in international law. In the present case the effectiveness of the fact of passage should be regarded from the standpoint of its duration and of its acceptance by the two Governments concerned. This effective exercise of passage to the enclaves, regularly kept up, contributes towards the establishment of a right.

This notion of effectiveness has been regarded as a decisive factor in the solution of certain problems arising out of relations between States. The Court relied upon it in the *Nottebohm* case (*I.C.J. Reports 1955*, pp. 56 *et seq.*, 62 and 299), and, at an earlier date, in the *Minquiers and Ecrehos* case (*I.C.J. Reports 1953*, pp. 60-66, 67-70).

Legal opinion is faithful to this concept.

The continual repetition of an act over a long period does not weaken this usage; on the contrary, it strengthens it; a relationship develops between the act and the will of the States which have authorized it. The recurrence of these acts over so long a period engenders, both in the State which performs them and in the State which suffers them, a belief in the respect due to this long-established practice (Article 38 (1) (b) of the Statute of the Court).

A right of passage, like territorial sovereignty, may be acquired on the basis of an effective practice. A fact observed over a long period of years, as in the present instance, acquires binding force and assumes the character of a rule of law.

The Portuguese regularly travelled to and from the enclaves without opposition for 170 consecutive years. The effectiveness of access to the enclaves created a legal *status quo* which no State can unilaterally infringe. This legal *status quo* is the work of States over a long period of years and has the force of an agreement. A change in the situation would alter a practice and a usage traditionally admitted, accepted and tolerated. A certain order was established in this matter and was recognized by the two States, its purpose being to ensure certain relations between them in order to facilitate the discharge of their governmental functions. A breach of that order committed without a sound legal excuse creates an unlawful state of affairs.

The Permanent Court of Arbitration in one of the grounds of its Award given on 23 October 1909 in the *Grisbadarna* case said, in particular, that "it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible" (English translation from Scott, *The Hague Court Reports*, p. 130).

Passage is not a simple fact, but a legal fact, connected with a legal order of things, established, moreover, in concrete form by regulations issued by the State through the territory of which passage is to be effected. Rights and obligations have been created between the two States concerned. For the State which grants passage there arises a legal obligation towards the State which benefits therefrom; the latter State is therefore entitled to claim a certain legal protection if it feels that the obligation has been disregarded.

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From the first day of India's independence in 1947 until 1953, the *jus communicationis* in respect of the enclaves was exercised without impediment. Indeed India acknowledged Portuguese territorial sovereignty within the enclaves. This is evidenced by the Indian Government's request in 1950 and 1953 for the transfer of the Portuguese territories. At the very beginning of this period regulations were even passed to facilitate it: customs duties were abolished and so was the salt ban.

The contribution by Goa towards the construction of the Lavacha culverts, to avoid interruption of communications between Daman and Silvassa, is confirmation that the two Governments shared the view that these communications were necessary.

Even when relations between the two Governments became critical in 1953 and 1954, it was never suggested that the right of passage

did not exist. On 6 August 1954, when the Portuguese Government explicitly claimed that right, the Indian Government made no reservation. The measures then taken against passage were none of them based upon legal arguments. India did not contend that Portugal had no right of passage. That contention was put forward for the first time in the present proceedings.

The Indian Government admits that it did not stand upon its "strict legal rights" in the matter of transit between Daman and the enclaves until 1953. "These rights", it adds, "had been well recognized throughout the British period." (Rejoinder, paragraph 417.) But these "strict legal rights" did recognize a certain, though much restricted, right of passage.

It is impossible to imagine small enclaves like those of Dadra and Nagar-Aveli, with an area of less than 500 square kilometres, without communications along a road of 13 km. 200 m. through the enclaving territory.

All existing enclaves known to history have always enjoyed a right of passage, expressly or tacitly. It would be impossible to discover an enclave without that right. An enclave necessarily presupposes a right of access to it for the exercise of governmental functions on its territory.

If the principle of international freedom of transit scarcely encounters any longer any prohibition of passage on the basis of territorial sovereignty, still less can that sovereignty be adduced as a reason for withdrawing a long-practised right of transit to an enclave. The right of passage derived from the 1779 Treaty and from more than a century of practice has its foundation in local custom; there is therefore no need to consider whether it finds support in other sources such as general custom or the general principles of law recognized by civilized nations.

Consequently, the first of the final submissions of the Portuguese Government should be upheld.

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The right of passage thus consistently recognized began to meet with certain impediments, particularly as from the second half of 1953; this was when a crisis arose in the diplomatic relations between India and Portugal due to the refusal of the Portuguese Government to agree to the transfer of its Indian territories. The formalities required for the exercise of passage were at that time greatly increased. It is sufficient to mention this fact without giving details.

After the closing of the Indian Legation in Lisbon on 11 June 1953 the Governor of Daman and European Portuguese officials were required to obtain passports and visas (Memorial, Annexes 35

and 36), a change in the *status quo ante* against which the Portuguese authorities protested (Memorial, Annexes 37 to 40).

On 17 July 1954 the Consul-General of India at Goa communicated a number of changes "in the concessions hitherto granted to the Portuguese Administration of Daman and Nagar-Aveli"; one of these restrictions referred to the ban on the transit of firearms, ammunition and military stores. The prohibition also covered the passage of armed police and Portuguese military personnel. These were departures from the established system of prior authorization in this respect in each instance. The Indian Government thus assumed over this form of passage a discretionary power which did not previously exist. This innovation of the Indian Government ignored the right of passage. There was no general prohibition in the matter, which would have been a serious infringement of the right of passage. This right was accepted but made subject to an authorization not left to the unfettered discretion of the Indian Government. The fact that the exercise of a right requires authorization does not mean that the right is non-existent; on the contrary, it often implies that it does exist. The permission does not create the right, it simply enables it to be exercised. Authorization was required before the passage of armed forces could be exercised, in order that consideration might be given to the conditions under which such action was to take place. India was bound to settle each request for authorization in good faith and with due regard to the purpose of such passage; uninfluenced by considerations extraneous to that purpose.

The formality of prior authorization is perfectly consistent with the existence of a right of passage.

The Charter of the United Nations envisages a right of passage for the armed forces of the Organization across the territories of its Member States, in accordance with special agreements concluded with the Security Council (Article 43, paras. 1 and 2). Those agreements might establish the need for authorization by the State through the territory of which passage is to be effected or for notification to that State; but such a formality would not negative the right.

That was the situation expressly provided for in Article XVIII, paragraph 3, of the Treaty of 1878, which recognized the passage of armed forces of the Contracting States across their respective territories, subject to authorization. Both States had a right to this authorization. If permission was granted, nothing stood in the way of passage; if it was refused, the objections at that time to the exercise of passage were pointed out. In both these situations transit continued to be a right.

Similarly, the passage of warships through territorial waters which constitute international routes is regarded as a right derived from a customary rule of international law, and there is nothing to prevent a riparian State, in the regulation of that right, from

including in its regulations the requirement of prior notification or authorization. The right of passage subsists none the less.

In the night of 21/22 July 1954 a number of persons entered the Dadra enclave from Indian territory; the Portuguese authorities were divested of their functions. In two Notes dated 24 and 26 July the Portuguese Government requested the Indian Government to permit the passage of the forces necessary to restore order; on 28 July the latter Government categorically rejected this request for the transit of troops and police (Memorial, Annex 52).

On 29 July the enclave of Nagar-Aveli was entered in its turn; there, too, the local authorities were deposed and rebel elements occupied the enclave, which is still in their power.

No satisfaction was obtained from requests made by the Portuguese Government to the Indian Government for permission to send delegates of the Governor of Daman and of third powers as impartial investigators and observers. The two enclaves were thus left without any contact with Daman. The exercise of the right of passage was definitely suspended in both enclaves.

The Indian suspensions of passage thus preceded the events of July 1954 and followed immediately thereon. The Government of India therefore failed to comply with the obligations incumbent upon it by virtue of Portugal's right of passage.

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In the third of its final submissions Portugal asks the Court:

“(a) to hold that the arguments of India set out above under A, B and C are without foundation;

(b) as to the argument of India set out above under D:

1. If the Court is of opinion that the above-mentioned conditions which must be satisfied to justify the suspension of the passage of Portuguese armed forces are not fulfilled,

to adjudge and declare

that India must end the measures by which it opposes the exercise of the right of passage of Portugal;

2. If the Court is of opinion that the above-mentioned conditions which must be satisfied to justify the suspension of the passage of Portuguese armed forces are fulfilled,

to adjudge and declare

that the said passage shall be temporarily suspended; but that this suspension shall end as soon as the course of events discloses that the justification for the suspension has disappeared;

that, during such suspension, India must abstain from any measure which might strengthen the position of the adversaries of the lawful Government in the enclaves and thus provoke the aggravation or prolongation of the circumstances relied upon in support of that suspension;

that there is no legitimate reason entitling India to ask that the other forms of the exercise of the right of passage should likewise be suspended."

It is no part of the Court's duty in the operative part of its Judgment to adjudicate upon the arguments referred to under (a) and (b), which can only be considered, if this is necessary, in the reasoning of the Court's Judgment.

It is clear that this final submission of the Portuguese Government includes two claims, 1 and 2. Both are conditioned by the present state of affairs in the enclaves and relate to the passage of Portuguese armed forces.

A preliminary observation is necessary with regard to the present situation in the enclaves.

It is a fact which cannot be overlooked in these proceedings that the population of the enclaves, in the month of December 1954 or perhaps before, set up for itself a free government in the territory of the enclaves. This factual situation existed when, on 22 December 1955, the Application was submitted to the Court.

The right of passage regarded as a whole arose and was exercised in normal periods when the enclaves were indubitably under effective Portuguese sovereignty. This was the position from the year 1783 until July 1954. This long practice was never disturbed by facts putting Portuguese authority in issue. The right of passage, in its different forms, was exercised in peaceful circumstances.

The right was not granted in the course of the long practice referred to previously for a situation such as that which has arisen in the enclaves. The existence of a *de facto* government there is a contingency not contemplated and one which is new in the habitual practice of the right of passage.

The changes which have occurred in the enclaves affect the causes which gave rise to the right of passage and must naturally have their effect on the right of passage itself or on the ways in which it may be exercised. These new facts must lead to holding either that the right which has been recognized must be suspended or that it has become extinguished. In either case, it must be concluded that the passage claimed must be regarded as incapable of exercise the present situation.

(Signed) ARMAND-UGON.