

## DISSENTING OPINION OF JUDGE CHAGLA

In my opinion the fifth and sixth objections of India should prevail and the Court should hold that it has no jurisdiction to entertain Portugal's Application.

*Fifth Objection*

With regard to the fifth objection in my opinion it is now only of academic importance, and I have nothing to add to what I have already stated in my dissenting opinion on the Preliminary Objections.

*Sixth Objection*

I have very little to add to what I said in my dissenting opinion on the Preliminary Objections. I can sum up the objection in one sentence. The real dispute is with regard to the obligation of India, not with regard to her violation of that obligation; and the source of that dispute is the conflicting views taken by India and Portugal as to the true legal effect of the events from 1779 onwards. Thus put, it is clear that the situations and facts for the purpose of this objection took place prior to 1930.

Further the Court has no jurisdiction to adjudicate upon facts and situations which arose prior to the relevant date. Three aspects of the matter may be considered. Parties may not be at divergence with regard to these facts and situations, in which case no adjudication is called for as in the case of the *Electricity case* where there was no dispute as to the Awards of the Tribunal. The second aspect is where the facts and situations may be only part of *res gestae* and may not have any causal connection with the dispute. In this case also adjudication in the strict sense is not called for. But the third case is the case we have here. If there is a causal connection between the facts and situations and the dispute or the facts and situations are the source of the dispute, then the Court would be adjudicating upon something which the State submitting to the jurisdiction of the Court has expressly excluded from the Declaration accepting the jurisdiction of the Court. This was the case in the *Morocco Phosphates case* where the *dahir* of 1921 was outside the relevant period.

The object of this reservation *ratione temporis* is clearly to keep ancient disputes outside the jurisdiction of the Court. In this case the Court is being called upon to adjudicate upon the divergent view of the Parties with regard to situations and facts which go back 200 years. Let us take a practical view of the matter. India is fortunately in a position to produce a vast volume of documentary

evidence to resist Portugal's claim and to demonstrate its hollowness. But India would have been seriously prejudiced if the evidence had not been preserved or had been destroyed. When India made her Declaration in 1940 she definitely did not intend that matters and situations which arose before 1930 and went back 200 years would come before the International Court and she would be called upon to explain and give an account with regard to them.

This is precisely the reason why the Court in the *Phosphates in Morocco case* observed: "to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise".

Portugal has sought to draw a distinction between source of right and source of dispute—and she says that facts and situations prior to 1930 deal with the source of Portugal's right. There is a clear fallacy in this argument. If there is a divergence or difference between the Parties as to the very sources of the right claimed, then it is clear that this divergence or difference constitutes the source of the dispute which is before the Court. In the *Electricity case* the source of the right was the Awards of the Mixed Tribunal. There was no difference or divergence between the parties with regard to these Awards. It is precisely because of this that the Court held that the date of the Awards was irrelevant for the purpose of considering the *ratione temporis* limitation.

It is incorrect to suggest, as suggested by Portugal, that for the purpose of the *ratione temporis* limitation the only factor that is legitimate to consider is the unlawful acts of India about which Portugal complains. These alleged unlawful acts are only the incidents which brought the matter to a head and forced Portugal to come to this Court. They can have no bearing on the controversy between the Parties. And if the controversy goes back further than 1930, then the jurisdiction of the Court is clearly excluded.

Portugal urges that the dispute is about the right of passage and its violation. That is strictly not correct. The substantial dispute is about the right of passage. The question of violation is only ancillary to the question of right. If there is no right, there can be no violation. Violation merely constitutes the accrual of the cause of action which entitled Portugal to come to Court.

Counsel for Portugal gave the instance of a debt and the failure to pay the debt. In my opinion, if the debt was contracted before the relevant date and the Court has to pronounce upon its validity, then clearly the Court would have no jurisdiction by reason of *ratione temporis*. If the debt was not disputed, then the position would be different.

It is contended by Portugal that such a wide construction of the *ratione temporis* reservation would deprive the Court of jurisdiction in most cases, because under international law most legal titles arise before 1930, the date selected by most countries accepting the compulsory jurisdiction of the Court. The fallacy underlying this contention is that in most cases, legal titles are not disputed, as—to refer once more to the *Electricity case*—the Awards of the Mixed Tribunal were not disputed.

It is unnecessary for me to point out the innumerable instances prior to 1930 where Portuguese access to the enclaves gave rise to divergence of opinion and even to actual disputes. Let me only quote from a letter of the Governor of Goa dated 12 September 1859 (p. 175, Indian Annex to Counter-Memorial): “The ever-mooting disputes which have for so long troubled the British and Portuguese Governments.”

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On the merits, in my opinion, India has substantially won. Although I take the view that Portugal has no right of passage whatever, inasmuch as the Court has found in favour of Portugal a very limited right confined to private persons, goods and civil officials, and inasmuch as India herself has stated that she has no objection to the passage of private persons and goods, and the right regarding civil officials is of little consequence and is also subject to the regulatory power of the Government of India, I think that the Judgment of the Court in the main vindicates the attitude taken up by India in the controversy between herself and Portugal over the question of the right of passage.

I should like briefly to state the reasons why I have come to the conclusion that Portugal has failed to establish that she has any right of passage as claimed by her.

The claim put forward by Portugal in this case is an extraordinary and unprecedented one. She claims a right of transit from Daman to her enclaves in Dadra and Nagar-Aveli through Indian territory. She concedes that her right is without immunities—direct or indirect. She admits the complete and absolute sovereignty of India over the territory over which she claims a right of transit. Her case is that the right she claims does not lead to the dismemberment of India's sovereignty but only the acceptance by India of certain obligations towards Portugal in the exercise of her sovereignty. Portugal has refused to define the extent or the content of this right. The purpose of this right, according to her, is to make it possible to exercise her sovereignty in the enclaves and for that purpose to maintain a liaison between Daman and the enclaves. She is unable to tell the Court what the conditions or modalities of this right should be—this, according to her, is for India to lay down, so long as these do not conflict with her fundamental right to maintain a

liaison between Daman and the enclaves. The right she claims is like a geometrical line between two points without any breadth.

It will be noticed that the subtle distinction drawn by Portugal between dismemberment of sovereignty and limitation in the exercise of sovereignty is difficult to substantiate. To the extent that India is sovereign she must have complete, absolute and unrestricted right to regulate the passage of goods, men and traffic—and regulation must include complete prohibition. To the extent that Portugal claims that India cannot prohibit her passage to the enclaves it must inevitably mean the dismemberment of her sovereignty—it must involve a restraint and limitation of her sovereignty.

It is also difficult to understand how any right of transit can be without any immunities whatever. This concession makes the right even more unsubstantial than it already is. Portugal says that she has no right to object to the manner in which India can regulate this right. She can impose customs duties. She can prohibit the entry of certain types of goods, she can insist on prior authorization before arms or armed men can enter or leave the enclaves. These are all immunities which are under the sole competence of India—but she cannot completely cut off Portugal's communications with her enclaves. When one analyses the situation, in the ultimate analysis, Portugal is in fact claiming a right of transit with immunities. She is claiming certain immunities which India cannot change or abolish. India can prohibit this or that, she can regulate this or that, but she cannot prohibit or regulate something else. What else can this be except a claim of a right of transit with immunities, however limited or restricted they may be? It is merely a futile exercise in dialectics to say that Portugal does not wish to interfere with India's right to regulate the right of transit so long as India does not make the exercise of that right impossible.

There is one further difficulty about the right which Portugal claims. In order that the Court should award her that right, the Court must be in a position clearly to define it—so that it would be capable of being enforced on the one hand and of being complied with on the other. But the right claimed by Portugal is a vague, shadowy, unsubstantial and indefinite right—whose content and modalities would change from time to time and whose enforceability would depend upon circumstances as they change from day to day. India would determine to what extent the right should be allowed and even in certain eventualities to suspend it altogether. It would then be for Portugal to complain of an unlawful act on the part of India and bring the matter before the Court. So we have a grim

prospect of unending litigations in this Court. May I be permitted to quote a passage from Judge Lauterpacht's latest book, which very succinctly and very appropriately describes what I have just been saying:

"It is in accordance with the true function of the Court that the dispute submitted to it should be determined by its own decision and not by the contingent operation of an attitude of accommodation on the part of the disputants."

One thing is clear—if Portugal gets from this Court what she is asking, the dispute between India and Portugal will not be determined by its own decision. The Court will only be sowing seeds for future disputes and discords.

The Court has consistently emphasized the necessity of finally settling a dispute (see the case of *Certain German Interests in Polish Upper Silesia* and also the *Corfu Channel* case).

The right claimed by Portugal lacks precision for another reason. You have to reconcile it between the needs of Portugal to exercise sovereignty and the regulating power of India to control and regulate it.

Needs of Portugal is an entirely subjective concept and it is impossible for the Court to declare a right which can be exercised, not according to any criterion laid down by the Court, but according to the subjective determination of Portugal, which determination may vary from time to time and according to varying circumstances.

On the question of local custom it is undoubtedly true that throughout the material period there was in fact transit between Daman and the enclaves—there was a constant and almost continuous traffic of goods and men. If the establishment of a local custom depends merely on a piling up of a large number of instances, then undoubtedly local custom can be said to be established in this case. But local custom under international law requires much more than that. It is not enough to have its external manifestation proved; it is equally important that its mental or psychological element must be established. It is this all-important element that distinguishes mere practice or usage from custom. In doing something or in forbearing from doing something, the parties must feel that they are doing or forbearing out of a sense of obligation. They must look upon it as something which has the same force as law. If I might put it that way, there must be an overriding feeling of compulsion—not physical but legal. That is what the jurisprudence on the subject calls the conviction of necessity. I do not wish to go into the subtleties of this jurisprudence. But the language of the Statute of the Court is clear and binding upon the Court. Article 38 (1) (b) lays down one of the sources of international law which the Court shall apply in deciding disputes before it. It says: international custom, as evidence of a general practice accepted as law.

Now, from 1818 right down to 1954, there is not a single instance on record where Portugal has claimed the transit or passage as a right, or where Britain or India has admitted an obligation on their part to grant it. When one goes through the details—set out in such wealth in the pleadings—it is a case of permission or authorization granted by the Indian authorities, of permission or authorization modified or even permission or authorization revoked and even transit of certain types of goods and certain kinds of personnel completely prohibited.

The record contains several instances of complete prohibition of certain kinds of goods, and also of goods being made subject to the payment of customs duty. See, for instance, the prohibition of salt from Daman, the prohibition in British India of country liquor and other articles connected with its manufacture from any Portuguese territory, and the complete prohibition of all imports by land into Daman during the war years of 1939-1945.

The Barcelona Conference is important for the fact that, under Article 14 of the Convention, it was implicit that separate and special provisions with regard to enclaves, including the enclaves we are considering in this case, were to be made by the countries concerned. There was no suggestion at this Conference, by Portugal, that she had any right of transit. The question was to be regulated, not on the basis of any right but on the basis of an agreement to be arrived at between Portugal and India.

It may be that Portugal realized the necessity of maintaining a liaison with her enclaves. But Portugal's necessity does not constitute the conviction of necessity required for a local custom to which effect can be given. There must be an equally clear realization on the other side of an obligation to respect this necessity. And we seek in vain to find any such realization in the whole of the record, from 1818 till 1954, when both the enclaves were lost to Portugal. Concessions were made from time to time, both by the British and Indian Governments, but they were on the basis of either reciprocity or good-neighbourliness; but never on the basis of accepting a past practice as having the force of law. The record clearly shows that it was British interests, not a sense of obligation to the Portuguese, that guided Indian officials. They were prepared to help the Portuguese but only if it was convenient to do so. When they did so they were granting a request, not respecting a right.

At best and at the highest, Portugal has only established a series of revocable acts of courtesy and accommodation on the part of the British authorities.

The basis of the passage, as stated by Portugal herself, was the rule of good neighbourhood and international co-operation—moral

principles which lack a legal content (see the Portuguese Note to Government of India of 11/2/54—Annex 40 to the Portuguese Memorial).

In my opinion, therefore, Portugal has failed to establish any local custom even with regard to a limited right of passage. In the result, she is not entitled to any relief and her Application should be dismissed.

*(Signed)* M. C. CHAGLA.