

CASE CONCERNING SOVEREIGNTY OVER CERTAIN FRONTIER LAND

Judgment of 20 June 1959

The case concerning sovereignty over certain Frontier Land was submitted to the Court by Belgium and the Netherlands under a Special Agreement concluded between the two Governments on 7 March 1957.

By this Special Agreement, the Court was requested to determine whether sovereignty over the plots shown in the survey and known from 1836 to 1843 as Nos. 91 and 92, Section A, Zondereygen, belongs to the Kingdom of Belgium or to the Kingdom of the Netherlands. By ten votes to four, the Court found that sovereignty over these plots belonged to Belgium.

Sir Hersch Lauterpacht appended to the Judgment a Declaration explaining the reasons why he had voted in favour of a decision determining that the sovereignty over the disputed plots belonged to the Netherlands. Judge Spiropoulos also appended to the Judgment a Declaration explaining that, faced with a choice between two hypotheses leading to opposite results, he considered that preference ought to be given to the hypothesis which seemed to him to be the less speculative, that is to say, in his view, the hypothesis of the Netherlands. Judges Armand-Ugón and Moreno Quintana, availing themselves of the right conferred upon them by Article 57 of the Statute, appended to the Judgment statements of their Dissenting Opinions.

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In its Judgment, the Court finds that in the area north of the Belgian town of Turnhout there are a number of enclaves formed by the Belgian commune of Baerle-Duc and the Netherlands commune of Baarle-Nassau. The territory of the former is made up of a series of plots of land many of which are enclosed in the commune of Baarle-Nassau. Various portions of the commune of Baerle-Duc are not only isolated from the main territory of Belgium but also one from another.

Following on attempts to establish the boundaries between the two communes and the frontier between the two countries, a Minute known as the "Communal Minute" was drawn up by the authorities of the two communes between 1836 and 1841. A copy of this Minute was produced by the Netherlands. Under the heading "Section A, called Zondereygen", it states:

"Plots numbers 78 to 111 inclusive belong to the commune of Baarle-Nassau."

Further, following the separation of the Netherlands from Belgium in 1839, a Mixed Boundary Commission was set up to determine the limits of the possessions of the two States. A Boundary Treaty, concluded between them in 1842, which entered into force in 1843, stated in Article 14 that

"The *status quo* shall be maintained both with regard to the villages of Baarle-Nassau (Netherlands) and Baerle-Duc (Belgium) and with regard to the ways crossing them."

The work of the Mixed Boundary Commission resulted in the text of the Boundary Convention dated 8 August 1843, which was ratified on 3 October 1843. The descriptive minute of the frontier annexed to this Convention states in Article 90 the procedure that was followed when the determi-

nation of the frontier reached the territory of the communes of Baarle-Nassau and Baerle-Duc, and says that the Boundary Commissioners decided that the Communal Minute of 1841, "noting the plots composing the communes of Baerle-Duc and Baarle-Nassau, is transcribed word for word in the present Article".

In that part of the descriptive minute of 1843, however, which repeats the text of the Communal Minute of 1841, the following appears:

"Plots numbers 78 to 90 inclusive belong to the commune of Baarle-Nassau.

"Plots numbers 91 and 92 belong to Baerle-Duc.

"Plots numbers 93 to 111 inclusive belong to Baarle-Nassau."

Further, the special map annexed to the Boundary Convention shows the disputed plots as belonging to Belgium.

The Belgian Government relies upon the terms of the Communal Minute as they appear in the Descriptive Minute, for the purpose of showing that plots Nos. 91 and 92 have been recognized as belonging to the commune of Baerle-Duc and that sovereignty over these plots belongs to Belgium.

The Netherlands Government, for its part, maintains that the Convention of 1843 did no more than recognize the existence of the *status quo* without determining it and that this *status quo* must be determined in accordance with the Communal Minute under which sovereignty over the disputed plots was recognized as vested in the Netherlands.

Alternatively, the Netherlands Government maintains that, even if the Boundary Convention purported to determine the sovereignty, the provision relating to the disputed plots was vitiated by mistake. It contends that a mere comparison between the terms of the Communal Minute and the Descriptive Minute establishes this.

As a further alternative, the Netherlands Government submits that, should it be held that the Boundary Convention determined the sovereignty in respect of the disputed plots and is not vitiated by mistake, acts of sovereignty exercised by it since 1843 over these plots have displaced the legal title flowing from the Convention and have established sovereignty in the Netherlands.

In its Judgment, the Court deals successively with these three contentions.

In order to answer the first question: Did the Convention of 1843 itself determine sovereignty over the plots or did it confine itself to a reference to the *status quo*?, the Court examines the work of the Boundary Commission as recorded in the Minutes. From this examination, it appears that, from 4 September 1841, the work of delimitation proceeded on the basis of the maintenance of the *status quo* and that, at the meeting on 4 April 1843, the Mixed Boundary Commission adopted the text of an article which provided, in the terms appearing in the Descriptive Minute, for the transcription word for word of the Communal Minute. Thereby the Mixed Commission attributed the disputed plots to Belgium.

The Court is of opinion that the authority of the Mixed Boundary Commission to demarcate the two communes is beyond question. This follows from Article 6 of the Treaty between the Netherlands and Belgium concluded in London on 19 April 1839, which provides:

“The said limits shall be marked out in conformity with those Articles, by Belgian and Dutch Commissioners of Demarcation who shall meet as soon as possible . . .”, and this is confirmed by the preamble to the Boundary Convention of 1843.

Any interpretation under which the Boundary Convention is regarded as leaving in suspense and abandoning for a subsequent appreciation of the *status quo* the determination of the right of one State or the other to the disputed plots would be incompatible with the common intention of the Parties as thus indicated.

On the first contention, the Court concludes that the Convention did determine as between the two States, to which State the various plots in each commune belonged and that, under its terms, the disputed plots were determined to belong to Belgium.

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On the second contention to the effect that the Convention is vitiated by mistake, the Court says in its Judgment that this contention may be stated as follows: The Descriptive Minute of 1843 specified that the Communal Minute of 1841 noting the plots composing the communes of Baerle-Duc and Baerle-Nassau should be transcribed “word for word” in Article 90 of the Descriptive Minute. A comparison of the copy of the Communal Minute produced by the Netherlands with the Descriptive Minute discloses, however, that there was not a “word for word” transcription of the former, inasmuch as the Descriptive Minute attributes plots Nos. 91 and 92 to Belgium, whereas this copy of the Communal Minute attributes them to Baerle-Nassau.

The Court considers that a mere comparison of these two documents does not establish the existence of a mistake. To succeed on this basis, the Netherlands must establish that the intention of the Mixed Boundary Commission was that the Descriptive Minute attached to and forming part of the Convention of 1843 should set out the text of the Communal Minute contained in the copy produced by the Netherlands.

The Court recalls the fact that the duty of the Mixed Commission was essentially to determine the *status quo*.

From the examination of the documents produced concerning the work of the Mixed Boundary Commission and from the correspondence relating thereto, the Court draws the conclusion that the two copies of the Communal Minute held by the Netherlands and Belgium Commissions were at variance on the attribution of the disputed plots to the two communes. It considers that the hypotheses advanced by the Netherlands, to explain how the copy of the Communal Minute in the hands of the Netherlands Commission was in the same terms as those used in the Descriptive Minute, fail to establish the existence of a mistake.

The Netherlands having contended that it need not establish the origin of the mistake, since a simple comparison between the two documents reveals sufficiently that a mistake was made, the Court replies that the matter is not capable of being disposed of on this narrow ground and that it must ascertain the intention of the Parties from the provisions of a treaty in the light of all the circumstances. It finds that, in April 1843 both Commissions had been in possession of copies of the Communal Minute since 1841. The difference between these copies in regard to the attribution of plots Nos. 91 and 92 was known to the two Commissions and must have been a subject of discussion between them. In the detailed maps drawn up to constitute part of the Boundary Conven-

tion, it was clearly shown, and in a manner which could not escape notice, that the plots belonged to Belgium. Further, the Commission was not a mere copyist; its duty was to ascertain what the *status quo* was. At its 225th meeting it attributed sovereignty over the disputed plots to Belgium. This decision found its expression in the Boundary Convention.

In the view of the Court, apart from a mere comparison of the text of the Descriptive Minute with the copy of the Communal Minute produced by the Netherlands, all attempts to establish and to explain the alleged mistake are based upon hypotheses which are not plausible and which are not accompanied by adequate proof. The Court says that it is satisfied that no case of mistake has been made out and that the validity and binding force of the provisions of the Convention of 1843 in respect of the disputed plots are not affected on that account.

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The final contention of the Netherlands is that the acts of sovereignty exercised by the Netherlands since 1843 have established sovereignty over the plots in the Netherlands. The question for the Court is therefore whether Belgium has lost its sovereignty by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands at different times since 1843.

The Court recalls different acts performed by Belgium which show that Belgium has never abandoned its sovereignty—the publication of military staff maps, the inclusion of the plots in the survey records, the entry in the Records of the Survey Authorities at Baerle-Duc in 1896 and 1904 of transfer deeds. On the other hand, the Netherlands relies upon the entry in the Records of Baerle-Nassau of several land transfers relating to the plots, and the entry in the Communal Register of that commune of births, deaths and marriages. It was in July 1914 that an official Belgian enquiry led the Director of the Survey at Antwerp to inform the Belgian Minister for Finance that he thought it necessary for the matter to be submitted to the Belgian Minister for Foreign Affairs. The First World War then intervened. In August 1921, the Belgian Minister at The Hague drew the attention of the Netherlands Government to the fact that the two disputed plots belonging to Baerle-Duc were entered in the survey documents of both States. It was in 1922 that the Netherlands authorities for the first time claimed that the Communal Minute of 1841 had been inaccurately reproduced in the Descriptive Minute of 1843 and that plots 91 and 92 belonged to the Netherlands. The Netherlands relies, in addition to the incorporation of the plots in the Netherlands survey, the entry in its registers of land transfer deeds and registrations of births, deaths and marriages in the Communal Register of Baerle-Nassau, on the fact that it has collected Netherlands land tax on the two plots without any resistance or protest on the part of Belgium. Reliance is also placed by the Netherlands upon certain proceedings taken by the commune of Baerle-Duc before a Breda tribunal in 1851 and on various other acts which are claimed to constitute the exercise of Netherlands sovereignty over the plots without any opposition on the part of Belgium.

The Court finds that the acts relied upon are largely of a routine and administrative character and are the consequence of the inclusion by the Netherlands of the disputed plots in its survey, contrary to the Boundary Convention. They are insufficient to displace Belgian sovereignty established by that Convention.

The Court notes further that, in an unratified Convention between the two States going back to 1892, Belgium agreed to cede to the Netherlands the two disputed plots. This unratified Convention did not, of course, create any legal rights or obligations, but its terms show that, at that time, Belgium was asserting its sovereignty over the two plots and that the Netherlands knew it was so doing. The Netherlands did not,

in 1892 or at any time thereafter until the dispute arose between the two States in 1922, repudiate the Belgian assertion of sovereignty. The Court finds that Belgian sovereignty established in 1843 over the disputed plots has not been extinguished.

For these reasons, the Court reaches the conclusion given above.