

## DISSENTING OPINION OF JUDGE FERNANDES

[*Translation*]

The Court in part gives satisfaction to the claim of Portugal. It recognizes that when India decided to oppose the communications between the Portuguese territories of Daman, Dadra and Nagar-Aveli, Portugal had a right of passage over Indian territory to ensure these communications to the extent necessary for the exercise of Portuguese sovereignty over the enclaves of Dadra and Nagar-Aveli. But the Court takes the view that this right relates only to the transit of private persons, civil officials and goods in general and not to that of armed forces, armed police and arms and ammunition. I cannot agree with that differentiation, which appears to me to be artificial and unfounded, in fact and in law. I am consequently in disagreement also with the conclusion reached in the Judgment, that India has not acted contrary to its obligations resulting from Portugal's right.

## I

1. I have first a few observations to make.

Underlying the present case is the essential fact that Portugal is sovereign of the two enclaves of Dadra and Nagar-Aveli situated inside Indian territory. The Judgment rests upon that essential fact and it finds (*a*) that the exclusive authority of Portugal over these enclaves was never questioned and (*b*) that Portuguese sovereignty over them was recognized by the successive rulers of the surrounding territory, that is to say, the British from 1818 until 1947 and India after it gained its independence.

It is evident that Portuguese sovereignty over the enclaves could not have existed all that time and could not continue to exist today if there were no right of transit in favour of Portugal and no corresponding obligation incumbent on India; the purpose of that right and obligation is to ensure the essential communications with the enclaves to the extent necessary for exercise of the sovereignty upon which they depend.

Such then is the situation of fact and of law which governs the whole case: unquestioned Portuguese sovereignty over the enclaves and the impossibility of exercising it without a right of transit.

The Court arrives at the conclusion that Portugal is indeed the possessor of a right of transit for communication with the enclaves, but with one restriction: that right includes the passage of private persons, civil officials and goods in general to the extent necessary for the exercise of Portuguese sovereignty over these territories,

but does not include the passage of armed forces, armed police and arms and ammunition.

Sovereignty over any territory implies the capacity to exercise public authority in that territory. It implies the right and the obligation to maintain order there, if necessary *manu militari*. Lastly it implies the discharge of police duties. In the particular case of the Portuguese enclaves, how would that authority, that right and obligation and those duties be exercised if a right of access to the enclaves were not recognized for armed forces, armed police and arms and ammunition?

2. Portugal is claiming a *total* right of passage in respect of what is necessary for the exercise of its sovereignty over the enclaves. Portuguese Counsel more than once emphasized this aspect of the Portuguese claim. They said, for example, at the hearing on 25 September 1959: "that right must be viewed in the round, in relation to its purpose, which was to ensure liaison with the enclaves to the extent necessary for the effective exercise of Portuguese sovereignty" (Oral Proceedings (Merits), Vol. I, p. 110).

It is true that the Parties dealt separately in the case with the transit of persons and goods and also with that of armed forces, police and arms. But that was only a method of exposition in order to examine case by case the practice which is said to have led to the creation of a local custom and its only purpose was to show that the regulation of the exercise of the right varied according to the different categories to which the right applied.

In its final Submissions Portugal presents its claim to a right of passage *as a whole* and India disputes it in the same fashion.

For these reasons I am not in agreement with the method that has been followed of making a separate analysis of the Portuguese claim according to the various categories dealt with in the Judgment: private persons, civil officials, goods in general, armed forces, armed police and arms and ammunition.

These categories relate to the ways in which the right of transit can be exercised, and may affect its regulation; Portugal admits that these ways of exercise and this regulation are matters within the exclusive jurisdiction of India.

With particular regard to armed forces, armed police and arms and ammunition Portugal has made it plain that the only right it claimed was to send into the enclaves the elements of the public forces necessary for the maintenance of order, that is, for the discharge of police duties. "There is no doubt whatsoever", it was said at the hearing of 1 October 1959, "that the right of passage claimed by Portugal is limited to certain elements of the public forces responsible for maintaining order." That duty may sometimes

be entrusted to forces not part of what is usually called police, including military elements, but that does not alter the essential fact that they are performing a police duty. From the point of view of international law, what matters is the function and not the administrative organization of the public force, which is a matter within the exclusive competence of the State. This consideration is important to a proper understanding of the nature and content of the right claimed by Portugal.

The public force consists of course of personnel and of material. It is an armed force. A right of passage for armed forces—with no arms—is inconceivable.

3. My third and last preliminary observation is that Portugal, as I see it, did not apply to the Court for recognition of a right it claimed to possess in the past. In its final Submissions of 6 October 1959 it asks the Court to adjudge and declare "that the right of passage ... *is* a right possessed by Portugal and which *must be respected* by India". "Is a right" and "must be respected", that is to say at the present time, on the day on which the Submissions were filed.

Portugal did not institute proceedings merely in order to obtain moral satisfaction. It did so in order to secure recognition of an existing right, a right which it believes that it still possesses even though it admits that in certain circumstances its exercise might be held to be suspended.

4. The facts regarding the passage of elements of the public forces between Daman and the enclaves, facts which were illustrated by an abundance of documents filed with the Court, are indicated in the following paragraphs.

5. Examination of the evidence permits of one general statement which is certain beyond doubt: these elements of the public forces passed between the three pieces of territory forming the Portuguese district of Daman practically daily, with no obstruction at all, from the time when the enclaves were acquired by Portugal in 1783 and 1785 until July 1954. It was not until this last date that, for the first time in history, this transit was prevented by the Government of India. Until then these organs of the Portuguese public force had in no single case been refused passage, whether they were individuals or whether they were in more or less large parties. That is highly significant.

6. In the Maratha period (1785-1818) passage of the public forces was effected as a right.

A question discussed at great length by the Parties during the proceedings dealt with the legal character of the concession granted by the Marathas to the Portuguese under a treaty of 1779.

Portugal argues that this treaty conferred upon it sovereignty over the territories making up the enclaves of Dadra and Nagar-

Aveli. India contests this argument and maintains that the concession granted by the treaty was a feudal tenure known as a *saranjam* or *jagir* granting to Portugal only the right to collect certain fiscal revenues in the enclaves.

The Court accepts the Indian thesis.

I do not agree, but I do not propose to prolong this opinion by a discussion of this question, since it seems to me unnecessary in order to establish the existence, today as in the past, of the right of passage claimed by Portugal for its public forces.

It is sufficient for my purpose to record the Court's finding that Portugal has been for a long time the undisputed sovereign of the enclaves. That is what is important in order to determine whether Portugal possesses the right it claims. How Portuguese sovereignty was acquired is of minor importance in this demonstration. It exists and that is all that matters.

7. Nevertheless, the fact that I refrain from discussing the legal character of the concession accorded to the Portuguese by the Treaty of 1779 does not prevent me from repeating the statement already made, namely that the passage of armed forces was exercised as a right throughout the Maratha period from the very day on which the Portuguese took possession of the enclaves.

Even granted that the Portuguese obtained from the Maratha a simple *saranjam*, all the documents and authorities cited in the case by the Government of India show that that tenure carried with it very wide powers. There is good reason for ascribing to it a feudal character. It conferred on the *saranjamdar* (the holder of the *saranjam*) not only the right to collect taxes, but also the right and the duty to administer the territory in the widest sense. The Peshwa's sovereignty was hardly more than nominal. Moreover, it has been shown that in those days and in those territories sovereignty amounted to very little. Its essential attribute was the collection of taxes.

8. An agreement of 1785, intended to settle certain questions arising out of the transfer of the villages to the Portuguese, acknowledged in their favour full powers over these villages. Sovereign powers, as I call them; *saranjamdar* powers, according to those who do not share my opinion on the scope of the 1779 Treaty. The point is of small importance. What matters—this no one can deny in view of the express terms of the 1785 Agreement and the later *sanads*—is that the Portuguese were given full administration and jurisdiction over the territories transferred with authority to collect taxes, administer justice, pursue criminals, maintain order, suppress rebellions, etc.

It follows as a necessity that, by granting these powers to the Portuguese, the Marathas implicitly recognized in their favour the

right of passage indispensable for the exercise of those powers. Nor could that right be limited to the passage of private persons, officials and goods. To maintain order, suppress revolt, etc., the right of passage had necessarily to include the public forces with all that they needed in order to carry out their duty. That is only logical and needs no further proof. The records supply evidence that the right of passage for the public forces was normally exercised in the Maratha period even to defend the enclaves from military attacks by the Marathas themselves (Memorial, Annexes 9-13; Reply, Annexes 42 and 43).

9. The question then arises, what became of this right of transit (assuming that it was only a *saranjam*) after the Portuguese secured full sovereignty over the enclaves? Did it thereby disappear? It would be absurd to suppose so. The reinforcement of the title under which the Portuguese exercised their exclusive authority over the enclaves (admitted in the Judgment), the conversion of an accessory and incomplete title—a *saranjam*—into a complete and principal title—sovereignty—could not possibly expunge the right which already existed under the lesser title. On the contrary, this evolution or alteration of title would have been reflected by a similar reinforcement of the right of passage. This would have acquired a greater content and greater mandatory force in its transformation from a right for the purpose of exercising the powers of a *saranjam-dar* into a right for the purpose of exercising sovereignty. That is all that needs to be said about the facts and their legal implication during the Maratha period.

10. As regards the British and post-British periods, apart from the fact I mentioned above—that the passage of the public forces was always effected without a single case of obstruction—the following facts must be recalled:

(a) Before the coming into force of the Anglo-Portuguese Treaty of 1878, the passage of armed forces and police required no authorization. This is admitted by the Government of India in paragraph 333 of the Rejoinder, which says:

“... The fact ... is that before 1879 the entry of troops or armed police of either Government into the territory of the other was governed by a reciprocal arrangement. The existence of such an arrangement made it unnecessary for a formal request to be made and permission to be granted on each occasion of entry.”

I need only point out that any existing agreement of this kind must have been a tacit one (giving rise to custom), since there is no trace of any express agreement.

(b) Article XVIII of the Anglo-Portuguese Treaty of 1878 stipulated that the armed forces of one of the Parties would not enter into the territories of the other in India without a formal request to do so. Police might enter without that request only in pursuit of criminals or smugglers.

These provisions did not in my opinion apply to the particular passage between Daman and the enclaves. The records contain a large number of documents (Reply, Annexes 50-76) showing that this passage continued to take place, at any rate until 1890, with no need for an authorization.

It was only in December 1890 (twelve years after the date of the treaty) that the British authorities considered that permission was necessary for the transit of armed troops and of Portuguese police between Daman and the enclaves. They adopted this attitude by way of reprisal against the Portuguese action in disarming a British detachment which had entered the Portuguese territory of Goa without permission in accordance with the treaty.

In the correspondence which passed with regard to this incident, the Governor-General of Portuguese India stated that "Portuguese troops never cross British territory without previous permission". But the fact that the same Governor-General adds three lines lower down that: "For centuries has this practice been followed", whereas the enclaves had been contiguous to British territory for only 72 years, obliges us to suppose that the Governor-General was not referring to transit between Daman and the enclaves, but to the general case of entry by the Portuguese into British territory from their earlier possessions in the Indian Peninsula.

In any event, it is significant that the British police, with reference to the Portuguese Governor's letter, declared in 1891 that they had "no orders to prevent armed men of the Portuguese Government ... from passing through British territory on duty" without obtaining permission. And they added: "The Superintendent of Police is of opinion that the present arrangements should be allowed to continue." The Northern District Commissioner expressed his agreement with the police that "the present arrangement is convenient and might be allowed to continue" (Rejoinder, Annexes, p. 223). This shows that there were special arrangements for the passage of armed police between Daman and the enclaves and that these arrangements allowed passage without permission in derogation from the rule in Article XVIII of the Treaty of 1878.

(c) In the period which followed the denunciation of the Treaty in 1892, the practice varied considerably. An agreement of 1913 established that the police of each Party might cross the other's territory on previous notification (no authorization). From the correspondence which led to that agreement, and which is reproduced on pages 305-309 of the Annexes to the Counter-Memorial, it is to be inferred that the agreement confirmed the earlier practice in the sense that previous notification was all that was required.

An agreement of 1920 made passage by armed police below a certain rank subject to prior permission (Indian Annex C. No. 56). This is the first time that this requirement was stated in an agree-

ment between the Parties since the denunciation of the Treaty of 1878.

Another agreement of 1940 waived permission for police forces up to ten men and required it for larger numbers. This is the only agreement specifically concluded for transit between Daman and the enclaves. (Indian Annex C. No. 57.)

11. Accordingly, if the practice followed for 170 years is viewed as a whole, it is found that the passage of troops and armed police without previous permission was the rule and that the need for permission was the exception. That, however, does not alter the fact that permission was needed at certain times. But that does not in my opinion authorize the conclusion that the right of transit did not exist. I desire to justify my statement. For the moment I will only observe that, whenever authorization was needed, it was invariably granted, without exception, and that the British never had any intention of refusing it. A letter sent by the Governor-General of British India to the Governor of Portuguese India on 9 April 1891 concerning the need for an authorization, said that it was not "suggested that permission, when applied for in respect to Portuguese armed men, would not be accorded in consonance with past practice". (Rejoinder, Vol. II, p. 223.)

12. An examination of the facts also reveals that the granting of permission whenever it was requested was based on the idea that the grant of permission was obligatory by virtue of a right of Portugal. The variation in the practice which has just been examined can prove only that the necessity, at certain periods, for an authorization was a purely regulatory requirement.

Portugal is claiming a right which is subject to regulation and control by India. We find that regulation very liberal over a very long period and later on more strict; being sometimes content with a simple pass issued by the Government of the forces in transit (Indian Annex C. No. 39); at other times requiring notification of passage, in some cases made beforehand, in others afterwards; and at yet other times demanding a formal request for permission. It cannot be argued that the very existence of the right was subject to these vicissitudes.

13. Much was said during the proceedings about the essential distinction between the right and its regulation. That is elementary and needs no stressing here. Nor is it necessary to emphasize the equally elementary distinction between the possession of a right and the ability to exercise it. What does need recalling, having regard to the doctrine underlying the Judgment, is the fact that, if there are authorizations which genuinely constitute rights, there are more which do not. It cannot be asserted that the necessity of an authori-

zation is a negation of a right of more ancient date. Such an affirmation would be flatly contradicted by all jurisprudence.

14. The general notion of authorization is linked with the distinction that I have just mentioned between the right and its regulation and between the right and its exercise. The notion is common to all branches of law, but finds its widest field of application in public law, especially administrative law.

15. "The authorization is the administrative act by which the authority removes in each case the limitations imposed by rules of law upon the exercise, by a given subject, of a right or power *already belonging* to the subject himself to exercise a certain activity or perform a legal act, such exercise or performance being assessed in the light of the public interest which it is the duty of the authority to safeguard." (Ortolani in *Scritti giuridici in onore di Santi Romano*, Vol. II, p. 251.)

Accordingly, the authorization does not create the right. The necessity for it cannot be made equivalent to non-existence of the right. On the contrary, it normally presumes the existence of an earlier right.

"The right exists before issue of the permissive act", De Francesco says (*L'ammissione nella classificazione degli atti amministrativi*, p. 83). And he adds: "The administrative act simply consents to the exercise of what already exists" (*ibid.*, p. 88). From this he infers: "The act of the authority functions as a condition of the exercise of the right" (*ibid.*, p. 83).

There we have a definition of authorization in one word: it is a conditioning act. It is not an act establishing a norm, nor is it a contract. It does not create rights, it only conditions their exercise.

16. Looked at in another aspect, authorization is an act of control, of that control over the exercise of its right of passage which Portugal admits that India possesses.

"The control exercised by means of the authorization—says Donati—is designed only to recognize and declare that a certain behaviour on the part of a subject of law is in accordance with certain determining factors, rules, principles and objectives of the interest towards the satisfaction of which the act sought by the subject tends." (Quoted by Ortolani, *op. cit.*, p. 253.)

17. Practice confirms doctrinal opinion. A very large number of examples could be given where authorization is necessary for the exercise of a pre-existing right, where it functions as a mere conditioning act or as a means of controlling observance of the regulations and expediency.

A few examples will suffice.



The ownership of land necessarily implies the right to build upon it. What legal systems do not require a permit for such building, at least in urban areas? It would be harder still to find any which do not also require a permit to occupy for the first time a building just erected. As D'Alessio says, "The person who obtains a building permit is not granted any right he did not previously possess" (Ortolani, *op. cit.*, p. 225).

The owner is sole lord of his domain. But if his neighbour needs to enter that domain to gather fruit from a tree situated on its border, the owner cannot refuse him the necessary authorization. So, too, if the neighbour needs to erect scaffolding in the boundary area between the two properties in order to put up some building or undertake repairs on his own estate. These are rights which the neighbour possesses before obtaining an authorization. The law recognizes his rights, but it also makes their exercise dependent upon consent by another. That consent can be made subject to reasonable conditions, but it cannot be refused out of hand. If it is, the courts will decide (Portuguese Civil Code, Articles 2314 and 2318).

18. There is however no need to go beyond international law or even beyond treaty law in connection with international transit in order to find instances which confirm what is here asserted, namely that the necessity for an authorization cannot be assimilated to absence of a right.

19. The study by Professor Édouard Bauer submitted to the Court by Portugal in order to show that there has not been a single case in history, since the Treaty of Westphalia, where a right of passage was not recognized in favour of an enclave (including the passage of armed forces), that study, I say, shows that treaties have adopted three systems for regulating the exercise of that right.

Sometimes a prior authorization was necessary, sometimes a mere notification of passage was enough, sometimes again very strict and detailed regulations were agreed upon, which made the request for permission unnecessary. Examples of the first case are the Treaty of Munster of 24 October 1648 and the Peace of the Pyrenees concluded on 7 September 1659. In both these cases a right of passage was recognized for the passage of Louis XIV's troops to the French enclaves of Lorraine and Alsace, subject to a request for permission being addressed to the rulers of the intervening territories. "... *pateatque illac regio militi quoties postulatum fuerit tutus ac liber transitus*". Such was the formula in the Treaty of Munster. It shows that, even where the right of transit is granted by treaty, the request for previous authorization may be laid down as a condition of the exercise of the right.

20. Authorization, I repeat once more, is a method of control. It follows that it can be dispensed with when the Parties agree to

establish another equally effective means of control. A case in point is the German-Polish Convention on Freedom of Transit signed in Paris on 21 April 1921. This Convention regulated military transit across Poland between East Prussia and the rest of Germany so strictly and in such detail that any authorization became unnecessary. Provision was made for one military train once a week to carry personnel and for another train to carry arms and ammunition. The whole matter was strictly regulated in the numerous clauses of the Convention governing this form of transit. Nevertheless it was provided that "the German authorities shall notify the Polish authorities of the departure of this train at least twenty-four hours before it starts".

21. Let us now consider two more recent instances.

The Chicago Convention of 7 December 1944, to which nearly all nations have acceded, lays down in its Article 5:

"Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services, shall have the right ... to make flights into or in transit non-stop across its territory ... without the necessity of obtaining prior permission ... subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes or to *obtain special permission for such flights.*"

It can therefore be seen that the right of air transit is recognized, but subject to regulation and control. This regulation and this control in every case include the right of the State flown over to require landing and, in special cases, an application for prior permission. This requirement of permission does not mean that foreign aircraft have not the right to fly over "regions without adequate air navigation facilities", it means only that authorization may be required for the exercise of that right.

22. Another instance is furnished by the Charter itself. Article 43 provides that: "All Members of the United Nations ... undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, *including rights of passage*, necessary for the purpose of maintaining international peace and security." The forces in the service of the United Nations have therefore a right of passage over the territory of Member States. Can that right be exercised without the permission of the State passed through? Certainly not. A *special agreement* is needed to which that State is a party. But the latter cannot lawfully refuse to subscribe to that agreement unless for a reason which the Security Council deems valid.

23. I think I have now proved my point that the need for an authorization in order that police or other forces may pass through foreign territory is in no way incompatible with the existence of a right of passage of older date than this authorization. This clearly means that the right of the State passed through to require an authorization before its territory is traversed does not necessarily imply a discretionary power to grant the passage or refuse it.

Its purpose being to establish that the conditions regulating exercise of a right are satisfied and that in each case no injury is done to the lawful interests of the party whose authorization is requested, the authorization implies a power of appraisal, but not a discretionary power. If those conditions are met and if those lawful interests are not sacrificed, the authorization must be granted. The jurisdiction of the authorizing party must be exercised with a view to the purposes for which it was conferred. "There is a multitude of cases—says Hauriou—in which, for the exercise of one or another of their rights, the governed are obliged by law to ask the government for authorization...; the government is thereby obliged to perform the act asked of it..." (*Précis de droit administratif et de droit public*, 12<sup>me</sup> édition, p. 357.)

In the present case, the requirement at certain times of authorization for the passage of elements of the police and armed forces was dictated by precisely those "considerations of security" referred to in the Judgment in connection with certain restrictions imposed on the transit of goods. It is difficult to see why restrictions based on such considerations should be compatible with a right of transit in respect of goods and not in respect of other categories of transit.

24. When we consider the very nature of the right of transit for armed forces and its possible repercussions on defence and public order in the territory passed through, we shall have no difficulty in understanding that an authorization or equivalent form of control is necessary for its exercise, even when the right is established by a treaty. It may even be said that the authorization is inherent in this kind of right unless it is excluded by agreement between the Parties.

In fact, the true subject-matter of the right of transit is the *authorization to pass*, in whatever form, express or tacit, that authorization may be.

The right of transit is not a real right, possessed by the subject directly *per se*, in the territory to be passed through. It is a personal right, and the passive subject in the legal relationship has a corresponding personal obligation, which may be regarded either in its positive aspect of *facere* (granting an authorization) or in its negative aspect of *non facere* (not opposing passage).

In this way the territorial sovereignty of the State passed through is entirely consistent with the obligation to allow passage.

25. It has also been contended that the transit of elements of Portuguese armed forces and police towards the enclaves was not exercised as of right, on the ground that it was exercised on a basis of reciprocity, i.e. in consideration for the recognized right of elements of British armed forces and police to cross Portuguese territory when they had to move between two points in their own territory separated by Portuguese territory.

I am unable to accept the view that there can be no right when there is reciprocity. Most of the rights recognized between nations rest on a basis of reciprocity; they do not thereby lose their real character of rights. Not only is reciprocity not incompatible with such rights; it is the very condition for their effectiveness. The right which Portugal is claiming for itself is exactly the same as the right Portugal recognizes India to possess for the purposes of communicating with its enclave of Meghwal situated inside Portuguese territory.

## II

26. Portugal invokes as the titles of its right the Treaty of 1779, local custom, general custom and the general principles of law.

27. I have said enough about the 1779 Treaty in paragraphs 6 to 9 above.

I consider that in virtue of this Treaty and of its supplementary agreements Portugal received full sovereignty over the enclaves and, with it, the implicit and necessary right of access to them.

Even if I take up the position adopted by the majority of the Court, namely, that there was no transfer of sovereignty but only the granting of a *saranjam*, I still come to the conclusion that a right of transit was by implication conferred upon the Portuguese for the exercise of the powers of administration, police, etc., which were granted to them. And I cannot see that the conversion of the *saranjam* into sovereignty, in the British period, caused the right of access to the enclaves to disappear.

28. With regard to local custom I have perhaps already said too much.

I do not see why that custom should be the source of a right of transit for private persons, civil officials and goods in general, and not be so for armed forces, armed police and arms and ammunition. If the reason for this is that the latter passage depended at times upon an authorization, I believe that I have shown that this reason has no support in either the theory or the practice of the law. There is an even stronger reason why the right of passage should be

recognized for armed forces, armed police, arms and ammunition than for private persons and goods in general. The right for these two last categories is recognized in virtue of Portuguese sovereignty over the enclaves. That sovereignty is the cause and also the purpose of the right. Without it the right would not exist. But the right for armed forces, armed police and for arms and ammunition is much more closely linked, because much more necessary, to the existence of sovereignty than is the right for private persons and goods. And this is why, although the last-mentioned categories were sometimes the subject of prohibitions in respect of specific commodities (salt, liquor and products for distillation) and were even altogether banned in the last war, passage of armed forces was never forbidden. Is it not illogical that the right should be considered not to exist for categories most closely associated with sovereignty and which have never been prohibited, while its existence in the case of the other categories occasions no doubt?

29. A point upon which I do not agree with the majority of the Court is that an examination of the practice established between the Parties in the course of history, namely, local custom, is sufficient to settle the case. That would be so if, on the basis of that examination only, the Court had considered the Portuguese claim as a whole to be founded. In that case it would certainly not be necessary to waste time seeking confirmation of that conclusion in the general titles invoked by the Applicant.

But this is not the case. The decision arrived at involves a vital amputation of the right claimed by Portugal. And if, as Portugal argues, none of the titles exclude the others, but, on the contrary, all confirm and reinforce each other, the examination must extend to the general rules invoked by the Applicant if justice is to be done.

It is true that in principle special rules prevail over general rules, but to take it as established that in the present case the particular rule is different from the general rule is to beg the question. Moreover, there are exceptions to this principle. Several rules *cogentes* prevail over any special rules. And the general principles to which I shall refer later constitute true rules of *ius cogens*, over which no special practice can prevail.

30. A weighty reason why examination of the general titles should not be rejected *a priori* is the very important part they played in the arguments of the two Parties.

Counsel for Portugal emphasized the outstanding importance they attached to them when Professor Bourquin said at the hearing of 30 September 1959:

"I may be allowed to begin by recalling to the Court the important place in our argument reserved for general international law.

*It constitutes the very basis of that argument.*

As M. Telles rightly said, the particular titles we invoke rest in the last resort upon general rules. They are an application, a concrete illustration, of those rules. I may add that, even if they did not exist, Portugal's right of passage would be no less indisputable."

31. Portugal invokes general custom and the general principles of law as the general titles of its claim.

32. A study of the situation found to exist throughout history, and which is to be found existing today, in all known enclaves has shown that a uniform and consistent practice has been established between States in favour of recognizing that the sovereign of an enclave has the right of transit necessary for the exercise of its sovereignty. That shows, beyond any possible dispute, that there is a general rule of custom which would alone suffice to establish the Portuguese claim.

33. As general principles of law, Portugal invoked two kinds of principle:

- (a) the principle deriving from a comparison of the municipal laws of civilized nations in the matter of right of access to enclaved property;
- (b) certain fundamental principles inherent in the very fabric of international law.

34. As regards the first of these principles, it was shown by a study of comparative law by Professor Max Rheinstein, filed with the Court, that the laws of all civilized nations recognize the right of access to enclaved property in favour of its owner. No sort of analogy needs to be drawn between ownership and sovereignty, nor is it necessary to transfer a rule of municipal law to the field of international law. What has to be determined is whether there is not a reason deeply rooted in the legal consciousness of all peoples for admitting, as a logical and practical necessity, the recognition of a right of passage to one who has a certain legal capacity to exercise in an area to which he cannot have access without using an area reserved for another. If that is not a general principle of law, valid alike in municipal and international law, within the meaning of Article 38 of the Statute of the Court, then no principles will meet the conditions of that Article.

35. Lastly, there remain the general principles of law invoked by Portugal as inherent in the international legal system. Whatever view may be held in regard to these principles, whether they are

considered to be emanations of natural law or to be rules of custom, or constitutional principles of the international legal community, or principles directly deduced from the concept of law, or principles agreed to by States because they are members of a legal family, whatever, I say, may be the attitude of each towards the origin and basis of these principles, all are agreed in accepting their existence and their application as a source of positive law.

36. The very first of these essential principles is mutual respect for sovereignties. That principle has more than a negative content in the sense that States must not intervene in matters within the territorial jurisdiction of other States. It has also a positive content in the sense that each State "consents to a certain restriction of action in the interests of the liberty of action granted to every other State". (Oppenheim-Lauterpacht, para. 113.)

37. In our own case two sovereignties stand face to face: that of Portugal over the enclaves and that of India over the surrounding territory. The existence of the former depends absolutely upon the maintenance of communications between the enclaves and the rest of the territory of the State of which they are an integral part. And since an essential obligation of sovereignty is to maintain order in the territory in which it operates, those communications must needs include the passage of the elements of the public forces necessary for that purpose. To prevent those essential communications would fail to respect the sovereignty depending upon them. It would crush it out of existence. There is not much difference, it was said at the hearings, between shooting a man dead and causing his death by strangulation.

38. If the State in possession of the surrounding territory were permitted to obstruct the communications necessary for the exercise of a sovereignty over enclaves, it would mean that that State was free to suppress that sovereignty at its own discretion. Such action would be technically different from conquest by arms, but it would have exactly the same results. If international law forbids the latter, it cannot permit the former.

The sovereignty of a State over any part of its territory cannot be made subordinate to the will of another State. The very essence of sovereignty is independence of an exterior will. The prime function of international law is to safeguard the independence of States, their territorial integrity, and mutual respect for sovereignties.

39. No doubt the obligation upon a State to agree to the passage over its territory of the nationals of another State means that, to this limited extent, its jurisdiction is no longer discretionary and is

fettered by that international obligation. International law has no other purpose than to create mutual rights and obligations between States and thus to fetter their respective jurisdictions.

The obligation upon India flows from a legal necessity imposed by the geography of the enclaves. Factual data have legal implications. For instance, a geographical fact underlies the rule of custom which recognizes the right of navigation over waterways connecting inland ports with the sea.

"It is the land which confers upon the coastal State a right to the waters off its coasts", the Court said in the *Fisheries* case, thereby recognizing the legal implications of geographical facts (*Reports 1951*, p. 133).

40. In the particular case before the Court there is another special reason for upholding the existence of the right claimed by Portugal and the reciprocal obligation binding upon India. It is that the enclaves were constituted in Indian territory with the implied consent (if the Portuguese argument based on the Treaty of 1779 be rejected) of the successive sovereigns of that territory. The Court has accepted it as proved that Portuguese sovereignty was recognized by the British in fact and by implication and that it was subsequently tacitly recognized by India.

At this point I come to an argument of Portugal which appears to me to be fairly decisive. It may be formulated as follows: recognition, by a State, of the sovereignty of another State over an enclave situated within the territory of the former necessarily implies, as a logical consequence, recognition at the same time of the right of transit essential for the exercise of that sovereignty, subject to regulation and control by the sovereign of the territory surrounding the enclave.

Recognition of the sovereignty of a State over a certain territory is an act involving a number of legal consequences. By that act that sovereignty is accepted as forming part of the international legal order and the States which have so acted undertake to respect all the attributes which that legal order confers upon sovereignty, in particular that of organizing the public forces and the maintenance of order in the territory in question. By recognizing Portuguese sovereignty over the enclaves, the British, and later the Indians, could not but impliedly have accepted all the logical and necessary consequences of that recognition, amongst which a right of transit for the forces responsible for police duties is one of the most necessary.

41. There is a legal rule that he who sanctions an act sanctions also the foreseen and necessary consequences which logically flow therefrom.

The doctrine of implied powers contained in a general power, by virtue of the purpose of the latter, was approved by the Court



in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations* (*I.C.J. Reports 1949*, p. 182). "Under international law", the Court said, "the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by *necessary implication* as being essential to the performance of its duties." That is what Portugal asks: recognition of a right which, if not expressly laid down in a written rule, is conferred upon it by necessary implication by the fact of recognition of its sovereignty over the enclaves, as being essential to the exercise of that sovereignty. "The intent to observe a legal rule", says Anzilotti, "implies the intent also to observe the rules without which the original rule would have no meaning and which are logically included in it." (*Corso di Dir. Int.*, I, p. 64.)

42. The principle of the interpretation of legal rules and acts in accordance with their purpose is also well settled. The purpose of recognition of the sovereignty of a State over a given territory is that the right of that State to exercise governmental functions over that territory should be recognized. It could not be contended that, in the case of an enclave, that exercise would be possible without a right of access thereto, especially for the purpose of ensuring the maintenance of public order there.

43. If the State occupying the surrounding territory recognized the sovereignty of another State over an enclave while at the same time mentally reserving the right to sever the communications with it when it chose, it would not be acting in accordance with the principle of good faith, which is the most general and the most essential of the general principles of law.

44. This then is what follows from the general principles of law: the transit necessary in order to exercise all governmental functions in an enclave, including the organization of public forces and the maintenance of order, is a right of the State which is sovereign of the enclave; to this right there corresponds the obligation of the State occupying the surrounding territory not to oppose that transit. This conclusion is particularly inescapable in the case of a State which has recognized the sovereignty of the other over an enclave situated within its own territory.

45. The particular practice which was established between Portugal and the successive sovereigns of the territory surrounding the enclaves cannot exclude the application in the present case of the general principles of law, still less can it be interpreted in a way which conflicts with those principles.

"The general principles of law are at the basis of custom and of conventional law. The latter are usually no more than the crystallization of those principles. The concrete rules cannot be construed

to conflict with the principles of which they constitute the application." (Verdross, *Derecho Internacional Público*, pp. 205-206.)

"The priority given by Article 38 of the Statute of the Court to conventions and to custom in relation to the general principles of law in no way excludes a *simultaneous* application of those principles and of the first two sources of law. It frequently happens that a decision given on the basis of a particular or general convention or of a custom requires recourse to the general principles of law... A court will have recourse to those principles to fill gaps in the conventional rules, or to *interpret* them." (De Visscher, in *Rev. de Dr. int. et de Lég. comparée*, 1933, p. 413.) "International practice shows that a court or an arbitrator cannot ascertain the true meaning of the provisions of a treaty without considering these within the framework of certain general principles which dominate them." (*Ibid.*, p. 405.)

The authorities whom I have just cited strengthen me in my opinion that it was really necessary to have recourse to the general principles, at least for the purpose of properly interpreting the practice established between the Parties.

46. All I have said with regard to the general rules of international law, and, in particular, with regard to the general principles of law tends to show the existence of the right claimed by Portugal *in toto*, as it was formulated by Portugal and the content of which has no other definition than that which the Applicant itself has given to it: a right of transit for that which is necessary for the exercise of Portuguese sovereignty over the enclaves. But I have mainly in mind the passage of armed forces, armed police and arms and ammunition. I consider that there is nothing in the rules and principles invoked to warrant the conclusion that there should be one right for civil transit and another for military transit. If there were any reason for a distinction it would be in favour of the latter as being more closely bound up with the exercise of sovereignty.

I therefore come to the conclusion that the right claimed by Portugal is well established, both on the basis of the relevant special rules and on that of the relevant general rules.

### III

47. It becomes clear that if I reach the conclusion that Portugal has a right of passage over Indian territory to the extent necessary for the exercise of its sovereignty over the enclaves, which cannot fail to include—I repeat it once more—the passage of the armed forces necessary to ensure the maintenance of law and order in those territories; if I arrive at that conclusion, I must also conclude that India has violated Portugal's right by its action in preventing, without any legally valid reason, the exercise of that right by Portugal.

The fact has been abundantly proved in the proceedings, as have the purely political reasons for the attitude of India.

After the failure of the requests which it made through diplomatic channels, between 1950 and 1953, to obtain the direct transfer to its sovereignty of the Portuguese territories in the Indian Peninsula, the Government of India sought to obtain the same results by less direct but more unlawful methods.

48. To consider only the facts relating to the severing of communications with the enclaves, attention may be directed merely to the following:

(a) From October 1953, the transit of police and military personnel was prohibited (Indian press communiqué of 22 July 1954, Memorial, Annex 44).

(b) The transit of arms and ammunition of all categories was prohibited on 17 July 1954, that is, four days before the attack on Dadra (Memorial, Annex 47).

(c) On 13 June 1954, the transit of vehicles between Daman and the enclaves was prohibited with the consequential repercussions on the transit of goods (Reply, Annex 168).

(d) On 20 July 1954, a bus on the regular service between Daman and Nagar-Aveli was forced to turn back on nearing Dadra (Reply, Annex 165).

(e) On 21 July 1954, all communications, even for private persons, were prohibited (Reply, Annex 166).

(f) The attack on Dadra by elements coming from Indian territory (as is admitted by India in paragraphs 227 and 228 of its Counter-Memorial) was carried out in the night of 21/22 July.

(g) As from that date, India ceased to grant visas for the transit of Portuguese Europeans or native subjects in the service of the Portuguese Government, even for the purpose of going to Nagar-Aveli, where the situation was still calm. This is confirmed by India in paragraph 211 of its Counter-Memorial.

(h) In a Note of 24 July, the Portuguese Government asked the Indian Government for authorization for the despatch of forces to re-establish order in Dadra. This request was rejected in a Note of 28 July, on purely political grounds: "The Government of India have made it clear", it is said in the Note, "that they cannot accept the continuance of foreign rule over any part of India" (Memorial, Annex 52, para. 12).

(i) On 26 July, the Portuguese Government asked for facilities to send to Nagar-Aveli three unarmed delegates of the Governor of Daman. This request was rejected in the same Indian Note of

28 July on the grounds that a state of tension had been created among the Indian population bordering on the enclaves and that that tension would be increased by the passage of Portuguese officials.

(j) All this happened, it must be stressed, before anything abnormal had occurred at Nagar-Aveli. It is essential to point this out in order to show that any argument by India to justify its attitude, based on the existence of an abnormal situation on Portuguese territory, is not valid in respect of transit between Daman and Nagar-Aveli.

(k) Reinforced police were placed by the Indian authorities around the enclaves before the latter were attacked. This fact is confirmed by the Indian Government in its press communiqué of 22 July. It seeks to justify it by the increased number of troops on Portuguese territory. But it contradicts itself, since in the same communiqué it indicates that in Daman, a town of 20,000 inhabitants, there was a military force of over 100 men (*sic*) (Memorial, Annex 44).

(l) At the end of July 1954 Nagar-Aveli too was attacked by elements coming from Indian territory, as India has acknowledged in paragraphs 227 and 228 of the Counter-Memorial, already referred to.

(m) Portuguese proposals for the sending to the enclaves of observers of third Powers were rejected.

Those are the facts. They reveal a manifest violation of Portugal's right of transit.

49. Even from the limited point of view of the right recognized by the Court in respect of the transit of private persons, civil officials and goods, the facts indicated in paragraphs (c), (d), (e), (g), (i) and (l) prove that even the right relating to those categories was violated.

50. By way of justification of certain of these facts, in particular the denial of passage to the delegates of the Governor of Daman seeking to go to Nagar-Aveli, some reliance may have been sought to be placed upon the state of tension existing in Indian territory at the time when the facts occurred. This cannot provide an acceptable justification for India, since that state of tension was the result of its own fault and, in particular, of the negligence of its authorities in the face of the preparation on its own territory of acts of aggression directed against Portuguese territory.

In saying this it is not my intention to differ from the view expressed by the Court that it is not called upon to deal with the facts in question since Portugal has not formulated any claim with regard to the responsibility of India by reason of its lack of diligence in preventing aggressive acts against Portugal prepared upon its territory.

But where the question arises of passing upon the validity of an excuse put forward by India for opposing the exercise of Portugal's right of transit; where it is necessary to determine whether that opposition, in the circumstances of the present case, falls within India's power of regulation and control, or whether, on the contrary, it constitutes an abuse or a misuse of that power, it does become necessary to determine the responsibility of India for the creation of the situations and facts upon which it purports to base its excuse. For, clearly, if it appears that it has such a responsibility, the excuse can no longer be valid. *Nemo alleget turpitudinem suam*. No one can rely upon the consequence of his own fault to escape the performance of a legal obligation.

51. So far as I am concerned, the careful study I have made of the record and of the evidence which it contains has led me to the conclusion, of which I am fully convinced, that India is responsible for the events which occurred at Dadra and at Nagar-Aveli in July-August 1954, and that that responsibility makes it impossible for it to justify its violations of the right recognized as belonging to Portugal.

All the evidence leads to the conclusion that the measures taken by the Indian authorities in respect of Portuguese transit between Daman and the enclaves were designed to facilitate the action of the armed bands which invaded the enclaves and to ensure their impunity. The police forces which were stationed around the enclaves did not allow anyone from Daman to enter but did not in any way oppose the entry of the invaders.

52. With particular regard to the refusal of passage to delegates of the Governor of Daman attention must be drawn to a flagrant contradiction. In its note of 28 July 1954 the Government of India gave as its reason for the refusal the state of tension which was allegedly created among the Indian population in consequence of what were called the repressive actions of the Portuguese authorities long before the attack on Dadra was under contemplation. But this tension—if it existed—did not prevent visas being granted to the Governor of Daman for a journey to and back from Dadra on the very day before the attack. If, in the circumstances alleged by India, passage by anyone was likely to excite the hostility of the Indian population, it would surely have been the passage of the Governor. Nothing of the kind occurred. Why should it be supposed that the passage of his delegates, who were unarmed, would have had different repercussions?

53. From all that I have said I conclude that:

(a) Portugal has proved that it is the holder of a right of transit through the territory of India for all that is necessary for the full exercise of its sovereignty over the enclaves of Dadra and Nagar-Aveli.

(b) This right cannot fail to include the passage of elements of the public forces and the arms necessary for the maintenance of internal order, that is, for the exercise of police functions in those territories.

(c) India has acted contrary to the legal obligations binding upon it by virtue of Portugal's right of passage.

*(Signed)* FERNANDES.