DISSENTING OPINION OF JUDGE ARMAND-UGON

[Translation]

I very much regret that, for the reasons set out below, I am unable to concur in the Judgment of the Court.

Enclaved within the territory of the commune of Baarle-Nassau (Netherlands), which extends over more than 4,000 hectares, is the commune of Baerle-Duc (Belgium), of an area of 200 hectares. In Section A, known as Zondereygen, of the commune of Baarle-Nassau, two plots shown in the survey and known, from 1836 to 1843, as numbers 91 and 92, are the subject of the present dispute and the Parties ask the Court to decide to which of the two this territory, of 14.378 hectares, belongs.

* * *

The Belgian Government bases its claims to sovereignty in respect of these plots on the express provisions of the minute reproduced in Article 90 of the Descriptive Minute of the Convention of 1843. This minute was drawn up in Dutch; the part relating to the plots is in the following terms:

> "The plots numbered 91 and 92 belong to the commune of Baerle-Duc" *(De parceelen nummer 91 en 92 behoren tot de gemeente Baerle-Hertog).*

The Dutch Government relies on two main propositions in asserting its sovereignty: the *status quo* laid down by the Treaty of 1842 and by the Convention of 1843, and, after that date, effective, notorious and peaceful possession of the plots. The Communal Minute of 1836-1841, of the commune of Baarle-Nassau, shows the two plots as belonging to that commune. Its text, which is in Dutch, is to the following effect:

> "Section A, known as Zondereygen:
>
> The plots numbers 78-111 inclusive belong to the Commune of Baarle Nassau" *(De parceelen van en met nummer 78 tot en met no. 111 behooren tot de Gemeente Baarle Nassau).*

* * *

The Court has to decide which of these two texts is that of the Convention of 1843.

The first text indicated by the Belgian Government would attribute—wrongly, according to the Dutch Government—the plots to Belgium. This text appearing in a certain minute inserted in the Descriptive Minute of Article 90 in no way expresses the consent and the will of the Contracting Parties; a mistake was made in

reproducing in Article 90 a minute which was not the Communal Minute of 1836-1841 upon which the Mixed Commission had decided. The burden of proving this allegation lies upon the Dutch Government.

* * *

An examination in their chronological order of the most important of the relevant documents facilitates an understanding of the discussions and changes of opinion within the Mixed Boundary Commission with regard to the plots. Such an examination will also lead to a decision in the present case. Certain facts adduced by the Parties, which may not be necessary to the decision on the question submitted to the Court, will not be dealt with here.

The Communal Minute, which was begun on 29 November 1836 and completed in 1839, being agreed and signed by the authorities of the two communes on 22 March 1841, occupies a position of cardinal importance in the present case. That document, indeed, was to become, as the result of a resolution of the Mixed Commission, the second part of Article 90 of the Descriptive Minute of the 1843 Convention.

The separation of Belgium and the Netherlands, in 1830, had made it necessary to draw up a minute recording the ownership of the plots making up the two communes of Baarle-Nassau and Baerle-Duc.

The authorities of the two communes and those who drew it up proceeded, in pursuance of instructions received from the respective authorities, to "ascertain as accurately as possible the boundaries which had long existed between the enclaved plots within the communes". This minute was drawn up after discussion on the bases of the Survey Register, the lists of plots, the Property Registers, and the testimony of the oldest inhabitants; all differences of opinion were settled with the assent of the owners (Counter-Memorial, Annex I, pp. 6-21). The document was completed in 1839 but signed by the authorities of Baerle-Duc only in March 1841, when the Mixed Boundary Commission had already begun its work. All the precautions indicated reveal the care and seriousness which went into the drafting of this important document, free of erasures or additions, stamped with the seals of the two communes, which was drawn up in two copies recording the official text, and deposited in the archives of each of the two communes. The original copies could not but be identical. The two Minutes follow the forms of a treaty or convention between the two communes. It is a single legal instrument, the work of the authorities of the two communes which it will not be possible to alter save by their agreement. It indicates who are the contracting parties; a preamble states the reasons which have determined its conclusion and the purpose in view, which is to record certain facts. The Minute

agreed by the two communes, which consists of fourteen pages and relates to 5,732 survey plots, constitutes an agreement between the communal authorities of the two States. Only the copy deposited in the archives of the commune of Baarle-Nassau has been put in in this case; the other copy, belonging to Baerle-Duc, has not been produced by the Belgian Government. This failure to produce it is to be regretted, for, clearly, either the missing copy agreed with that which has been put in, or it differed from it. In either event, the presence of the document would have cast decisive light upon the rights of the Parties. The present case would probably not have been submitted to the Court. The non-possession of this document, invoked by the Belgian Government, cannot create for that Government a more favourable situation. It has neither explained nor proved when and how this disappearance occurred; neither accident nor *force majeure* has been put forward by way of explanation. It is a mere assertion on its part, made in 1955.

In any event, no doubt has been raised by the Parties as to the authenticity of the Communal Minute and, as the only existing copy, it must be regarded as completely authoritative.

* * *

In order the better to understand the work of the Mixed Commission, it is convenient to divide it into two separate periods. The first period extends from 3 June 1839 until its adjournment on 18 January 1842, and the second from 23 February 1843, when its work was resumed, until 8 August of the same year, the date of the signature of the Descriptive Minute. One important fact occurred between the two periods of the Commission's work; that was the Treaty of 5 November 1842, ratified on 5 February 1843, which laid down the general lines to be followed by the Commission in the fulfilment of its mission.

When the Mixed Commission established by the Treaty of London of 19 April 1839 came, in the course of its work, to the sectors of the communes of Baarle-Nassau and Baerle-Duc, it encountered serious and special difficulties in continuing the frontier line which it had until then been able to draw. The Belgian Commissioners indicated that, in view of the instructions which they had received, they were obliged to maintain the *status quo* so far as the Belgian commune of Baerle-Duc was concerned (letter of the President of the Belgian Commission to the President of the Netherlands Commission of 4 September 1841).

The Commissioners deputed by the Mixed Commission, having met at Achel, on 26 October 1841 (175th meeting), recorded that being unable "to apply to the delimitation between the communes of Baarle-Nassau and Baerle-Duc the same methods and types of operations as had been used for the rest of the frontier line, [they] had agreed in these special circumstances to proceed in the following

way... They would confine themselves ... to ascertaining and recording which plots, whether built-up property, arable land, meadows, gardens, orchards, woods or heathland, etc., belonged to the Netherlands, and which to Belgium, that is, to the communes of Baarle-Nassau and Baerle-Duc." For the purpose of this work, the Communal Minute of 1836-1841 was "taken as the basis of the division of the territories of the two communes... Accordingly it was ... agreed by the delegates of the Mixed Commission that the territory of the ... commune of Baarle-Nassau included all the plots under the following numbers:

. . . . . .

Section A, known as Zondereygen.
1, 4, 5 and 62 to 67 inclusive; 78 to 111 inclusive; 113, 127 etc." (Counter-Memorial, Annex XXVII *a*, pp. 57-58).

By this decision, in which the Belgian Commissioner Viscount Vilain XIIII collaborated, the Sub-Commission attributed the disputed plots to Baarle-Nassau.

A letter of Viscount Vilain XIIII, of the following day, 27 October 1841, addressed to the burgomaster of Baerle-Duc, asked the latter to inform him whether plots 91 and 92 belonged to Baerle-Duc for, according to the boundary minute of the commune of Baarle-Nassau, they belonged to Baerle-Duc; the minute of our commune does not refer to them, added the letter (Counter-Memorial, Annex XXII, p. 51). The reply to that letter has not been placed before the Court.

The letter of Viscount Vilain XIIII, referring to a boundary minute of the commune of Baarle-Nassau, cannot have been alluding to that commune's Minute of 1836-1841, the original of which has been deposited in the Registry and establishes that plots 91 and 92 belong to Baarle-Nassau. The assertion in his letter that "the minute of our commune does not refer to them" shows that he recognized that according to that minute the plots in question were attributed to Baarle-Nassau. This letter is evidence corroborating the fact that the original copies deposited in the two communes were in agreement on this point.

In an Annex to a Report sent to the Minister for Foreign Affairs of the Netherlands on 31 October 1841, by the President of the Dutch Boundary Commission, it is said that it had been mutually agreed at Achel by the delegates of the Mixed Commission that the territories of the two communes consisted of the plots indicated in a table appended to the Report. According to this table, in Section A, known as Zondereygen, it is stated that plots 91 and 92 belong to Belgium. The Dutch President in so stating was not accurately reporting the decision which had been taken at Achel with regard to the disputed plots.

On 1 December 1841, the Mixed Commission studied the difficulty which prevented the Commissioners appointed from establishing a continuous frontier between Baarle-Nassau and Belgium. This difficulty arose from the particular character of the territories of Baarle-Nassau and Baerle-Duc which were made up of intermingled parcels. It was decided to proceed to a verification of the work of Sub-Commissions designated to record the sovereignty of each Power over the various plots making up the territories of the two communes (Counter-Memorial, Annex XXVI, p. 55).

One month after the Achel decision, on 2 December 1841, a plenary meeting of the Mixed Commission, after discussion and having regard to the proposals of the delegates of the Commission, decided upon the following provision for the division of the territories of the communes in question:

> "Paragraph 1.—It not being possible without the very greatest difficulty to effect a delimitation properly so called as between these two communes, all that can be done is to recognize and to designate the plots consisting of built or unbuilt property which belong respectively to the commune of Baarle-Nassau (Netherlands) and to the commune of Baarle-Duc (Belgium)." (Counter-Memorial, Annex XXVII, p. 56.)

The decision of 4 December 1841, by the Plenary Commission (176th meeting), in recording the plots which should belong respectively to each of the two States, designating them by their survey sections and numbers, included in Section A, known as Zondereygen, *inter alia* "the plots numbered 78 to 111 inclusive" as belonging to Baarle-Nassau (Memorial, Annex VI, p. 23).

Thus, at the time when the Mixed Commission adjourned its work on 18 February 1842, it had decided that the plots were Dutch (Counter-Memorial, Annex XXXI, p. 64). The doubts raised by the letter of Viscount Vilain XIIII had been entirely dissipated. There was no uncertainty, at that date, with regard to Dutch sovereignty over the plots.

* * *

The Mixed Commission resumed its work on 23 February 1843 (Counter-Memorial, Annex XXXII, p. 65). Its work was to be completed within three months; it went on, however, for four months. The Commission then had before it the Treaty of 5 November 1842, Article 14 of which laid down the maintenance of the *status quo* for the two communes. The question of the delimitation of the frontier remained open. It was decided to begin work with the definitive revision of the descriptive minutes of the boundary and that the Sub-Commissions should be entrusted with the task of revision (Counter-Memorial, Annex XXXII, p. 65).

At the meeting on 3 March 1843, the Mixed Commission adopted the following rules relating to the method to be adopted and the procedure to be followed:

> "(1) The Presidents shall take immediate steps for the preparation of accurate copies of the maps of plots necessitated as a result of the Treaty of 5 November 1842.
>
> (2) The descriptive minutes shall be revised and completed by one or more Sub-Commissions which shall submit the result of their work for the approval of the Mixed Commission.
>
> . . . . . .
>
> (5) In order to reduce writing as much as possible and to avoid very lengthy and often imperfect collating, the descriptive minutes, of which a considerable number of copies will be required, will be duplicated and run off, the costs being shared, in 50 copies, 25 for each Commission." (Counter-Memorial, Annex XXXIII, p. 66.)

The work was thus being divided. It should not be forgotten that the Descriptive Minute contains 142 articles and that the work was to be completed within three months.

On 4 April 1843 (225th meeting), the Commission adopted a resolution containing two articles of which the first alone is relevant to the case; the articles were to be annexed to the minutes of that meeting. As a result of that resolution, the decisions relating to the communes of Baarle-Nassau and Baerle-Duc, set out in the minutes of the 175th and 176th meetings, were cancelled. As a result, the decisions taken on 26 October and on 2 and 4 December 1841 were rendered ineffective. This cancellation was the immediate consequence of the adoption at that same meeting of the Communal Minute of 1836-1841, as a record of the *status quo*, which had to be maintained in virtue of Article 14 of the Treaty of 5 November 1842. The proclamation of the maintenance of the *status quo* obviously compelled the Mixed Commission to revise everything that had previously been agreed upon with regard to the plots of the two communes in derogation of the *status quo;* it maintained everything that had been decided on the basis of the *status quo*. The resolution of 4 April 1843—which will be set out in full having regard to its extreme importance, for it was to constitute the first part of Article 90 of the Descriptive Minute of the 1843 Convention—was as follows:

> "Article 90
> Communes of
> Baarle-Duc (Belgium) and
> Baarle-Nassau (Netherlands)
>
> Paragraph 1. The boundary line, after separating the commune of Poppel (Belgium) from the commune of Alphen (Netherlands) touches, at the point described at the end of the previous Article, the territory composing the communes of Baarle-Duc and Baarle-Nassau.

As regards these two communes, the boundary commissioners:

Having regard to Article 14 of the Treaty of 5 November 1842, worded as follows:

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

Whereas the present situation of these places, maintained by the provisions of Article 14 referred to above, does not allow of a regular delimitation of the two communes in question;

Whereas it may nevertheless be useful to record what was established, after discussion, by the Minute of 29 November 1836, agreed and signed on 22 March 1841 by the local authorities of the communes;

DECIDE:

(a) The above-mentioned Minute, recording the plots composing the communes of Baarle-Duc and Baarle-Nassau, is transcribed word for word in the present Article.

(b) A special map, in four sheets, showing the whole detailed survey plot by plot of the two communes, is drawn up on a scale of 1 : 10,000 and to this map are annexed two separate sheets showing, on a scale of 1 : 2,500, those parts of the communes which a smaller scale would not show sufficiently clearly.

(The Minute referred to above will here be inserted textually.)"

As a result of this resolution adopting the Communal Minute of 1836-1841, the disputed plots were incorporated in the commune of Baarle-Nassau. A provision of this minute stated in terms: "Plots 78 to 111 inclusive belong to the commune of Baarle-Nassau." The Mixed Commission, on 4 April 1843, in deciding to maintain the *status quo*, recognized Dutch sovereignty over the plots. In this resolution it irrevocably made its choice. After that date no other resolution was adopted by the Mixed Commission on this point.

The content of the *status quo* which had thus been adopted by the Mixed Commission was also accepted by the Belgian Minister at The Hague in a letter of 26 June 1843 to the Minister for Foreign Affairs of the Netherlands. He laid claim, on behalf of the inhabitants of the commune of Baerle-Duc, to a certain right to the use of heath in the possession of Prince Frederick of the Netherlands. The property in question included plot 91. The Belgian Minister added in his letter:

"If the question arose in respect of Belgian territory, its solution would be simple, as Articles 8 and 10 of the Law of 28 August 1792 would formally guarantee the rights of Baerle-Duc."
(Counter-Memorial, Annexes XLI and XLI *a*.)

* * *

In order to appreciate the legal scope of the resolution of 4 April 1843, from the point of view of the present dispute, it is necessary to analyze its content. The resolution is an agreement reached in accordance with the free and concordant wills of the authorities deputed by the two Governments to fix the *status quo* and the situation of the two communes, and it must exercise its full effects.

Once embodied in Article 90 of the Descriptive Minute, this resolution became a provision of the 1843 Convention. The same is true of the Communal Minute, the wording of which was to be exactly reproduced.

It is clear from the resolution that the Boundary Commissioners, in view of Article 14 of the Treaty of 5 November 1842, were to maintain the *status quo* in regard to the two communes. This method respected the local and pre-existing situation between them. It is the basis of the principle of *uti possidetis*, an obvious and convenient procedure. As from 4 April, the *status quo* for the plots of the two communes remained fixed.

Moreover, as was observed in that resolution, there was no possibility of demarcating the boundaries of the two communes in a regular way. This was impossible for two reasons—one legal (Article 14) and the other physical (the conformation of the two enclaved territories and the intermingling of the plots), and this decided the Mixed Commission to adopt the Communal Minute of 1836-1841 in order to determine which plots belonged to each of the two communes; this was to be transcribed "word for word" in the Descriptive Minute. The text of this Minute, despite a final note in the resolution of 4 April 1843, was never incorporated verbatim in the minutes of that meeting of the Mixed Commission.

The Communal Minute, which was to be transcribed word for word in Article 90 of the Descriptive Minute, was the one drawn up after discussion on 29 November 1836, and agreed and signed on 22 March 1841 by the two communes. It was an authentic copy of that Minute which was to be incorporated in Article 90, for that was the document which was authoritative and which evidenced the *status quo* of the plots as between the two communes—such was the intention of the Boundary Commissioners and it was to that that they had given their consent. Now that Communal Minute was not reproduced "word for word" in Article 90 of the Descriptive Minute of the delimitation between the Kingdoms of the Netherlands and Belgium, as had been decided by the Mixed Commission. In the Communal Minute, an original copy of which has been produced, the disputed plots are declared to belong to Baarle-Nassau, while the Minute in Article 90 assigns them to Baerle-Duc, as the result of the reproduction of a document which is not the Communal Minute of 1836-1841.

Article 90 of the Descriptive Minute is in two parts: the first is the text of the resolution of 4 April 1843, and the second is the insertion of the Communal Minute of 1836-1841. It is a compilation of two instruments originating from different authorities: the Mixed Commission and the authorities of the communes of Baarle-Nassau and Baerle-Duc. The second part was not carried out in conformity with the first part, which is the reproduction of the resolution passed on 4 April; instead of incorporating a copy of the original of the Communal Minute of 1836-1841, there was put in its place a copy of another communal minute differing from that which the Mixed Commission had decided to adopt. There was thus an incorrect and vitiating implementation of a provision of the Convention (Article 90 of the Descriptive Minute). The intention of the Parties was not respected. This incorrect implementation does not amount to a revision of this conventional provision, such revision not having been envisaged by the Mixed Commission, nor decided upon by it subsequently. The Mixed Commission did not go back upon its resolution of 4 April and no change was made in its text. Whenever it changed any of its decisions—as when it reconsidered Articles 50 to 112 of the Descriptive Minute at its meeting on 12 June 1843—the change was duly noted in the minutes of the meeting (see Counter-Memorial, Annex XXXVII, p. 76).

No evidence has been adduced to justify the modification of the original text by a later and different text. The copy invoked as having served as the basis for the Communal Minute inserted in Article 90 has not been produced. There is therefore no evidence of any intentional modification on this point, and the clear and formal resolution of the Mixed Commission incorporated in Article 90 was never at any time rescinded or revoked. It is therefore this conventional provision which must govern the discrepancy pointed out between the Communal Minute and the communal minute transcribed in Article 90 of the Descriptive Minute. The purely clerical error in the transcription of one text for another must be recognized in the light of the complete and decisive evidence adduced by the Netherlands Government. An authentic legal instrument was replaced by a non-authentic instrument differing from that which had been agreed by the Parties. The communal minute incorporated in Article 90 is a copy of a non-authentic instrument; there is no evidence of its existence. As to the existence of a discrepancy between the texts of the two minutes, no doubt is possible; the original text has only to be compared with the text transcribed; the original text has an exclusive and certain legal validity and must prevail over the text of Article 90.

A comparison of the two Dutch texts of this minute of Article 90 reveals another discrepancy in the paragraph relating to the plots in issue.

The text produced by Belgium reads: "*De parceelen nummer 91 en 92 behoren tot de gemeente Baerle-Hertog.*"

The text produced by the Netherlands is as follows: "*De parceelen no. 91 en 92 behooren tot Baarle-Hertog.*"

In the latter version, the words "de gemeente" have been omitted. This observation makes it possible to assert that the two communal secretaries certified two different texts and that the Commissioners deputed to collate the two texts did not perform their task with the requisite care.

This variation in the two texts of Article 90 of the Descriptive Minute, attributing the plots in one case *to the commune of Baerle-Duc*, in the other *to Baarle-Duc*, whereas, throughout the text of the Descriptive Minute, the plots are otherwise invariably assigned to a commune (gemeente), can only be explained as an interpolation inserted in the text of the Communal Minute of 1836-1841 which has been produced.

Once it had accepted the text of the Communal Minute of 1836-1841 as decisive on the *status quo*, the Mixed Commission could not alter that Minute without the intervention of the Communal authorities. The Commission referred to an intercommunal instrument for the purpose of establishing the *status quo* which it desired to be transcribed word for word in the Descriptive Minute; it prescribed the exact reproduction of that document. In principle, the organs which have drawn up a legal instrument are alone competent to modify or amend it. Furthermore, this Communal Minute indicated the procedure to be followed for the correction of mistakes which it might contain and the kind of evidence to be produced in such circumstances. The Mixed Commission, if it had had the intention of correcting the Communal Minute at the time of the incorporation of that inserted in Article 90 of the Descriptive Minute, should have described it as an amended minute recognizing the exact boundaries between the communes of Baarle-Nassau, province of North Brabant, and Baerle-Duc, province of Antwerp. The Commission did not do so. On the contrary, it secured the certification of a certain communal minute by the secretaries of the two communes. It is obvious that the Mixed Commission could not, without being guilty of material falsification, transcribe as a genuine copy of a given legal instrument an instrument which it had previously secretly altered. From that moment, the instrument transcribed and incorporated in Article 90 was no longer the Communal Minute of 1836-1841, but another minute the existence of which is unknown. It must be concluded that the Mixed Commission, though at the top of the hierarchy, was not competent to alter the Communal Minute and subsequently to pass it off as the Minute of 1836-1841. It is not permissible to state that one is going to make a specific and accurate quotation and then present under that name a text which does not accord with the original. The Mixed Commission had neither the intention nor the desire to act in this way.

* * *

It is beyond dispute—as the Parties recognize—that there is a discrepancy between the minute incorporated in Article 90 and the Communal Minute of 1836-1841 on the question of the attribution of the disputed plots.

The explanations submitted by the Parties with regard to the origin of this discrepancy do not get beyond the state of mere hypothesis. Neither of the two versions is supported by unquestionable and decisive evidence. All the time it is conjecture, inference and assumption on controversial facts. They cannot therefore be accepted.

On the other hand, for the decision of the present case, it is not necessary to know or to establish the genesis of the variation referred to between the two texts of the minutes; it is sufficient to note the existence of the discrepancy.

The Netherlands Government has proved its existence.

The Belgian Government contends that the departure from the authentic Minute was deliberate; its case is that the Parties decided to insert in Article 90 the text which was transcribed. Such an intention, if it ever existed, was never in any way recorded in any document. There is complete silence on the point, both in the minutes of the meetings of the Mixed Commission and in the Descriptive Minute.

The Belgian Government adds that the Parties reached agreement as to the adoption of the Minute in the form in which it was transcribed in Article 90. This assertion is contrary to the formal text of the resolution of 4 April 1843, which has become a conventional provision, and which decided that the minute to be transcribed in Article 90 was "the above-mentioned Minute", that is, the Communal Minute of 1836-1841 and no other minute. But what was in fact incorporated in the text of Article 90 was another non-authentic minute. As a result of this, the consent of the Parties given at the time of the resolution of 4 April was not respected. The 1843 Convention cannot serve as a cloak for the failure to implement a provision of Article 90 and thus give binding force to what was done. Its provisions cannot have the effect that a copy of an unknown instrument is to be regarded as authoritative and prevailing against the authentic copy of an instrument chosen by it as evidence of the *status quo*. The subject-matter of the consent of the Parties was the maintenance of the *status quo* recorded by the Communal Minute of 1836-1841; that consent was not given in respect of any other subject-matter.

* * *

On 14 July 1843, the President of the Netherlands Boundary Commission addressed a letter to the Councillor of State, the

Governor of North Brabant, transmitting to him two true copies of the description of the boundaries as definitively agreed by the Mixed Commission. Among the annexes to this letter was the text of Article 90 as referred to (resolution of 4 April 1843), but without the transcript of the Minute indicated at the end of that resolution. It doubtless appeared to be unnecessary to send a transcription in view of the fact that the Communal Minute of 1836-1841 was well known to the authorities of the commune of Baarle-Nassau. It must be inferred that the present text of the Minute of Article 90 was not at that time known to the authorities of that commune (Counter-Memorial, Annex XXXVIII).

In a letter of 29 April 1844, the Councillor of State, the Governor of North Brabant, informed the burgomaster of Baarle-Nassau of the impending placing of boundary marks in accordance with the Treaty with Belgium and told him which were the plots on which these boundary marks were to be placed. He attached to his letter a part of the boundary minute in so far as that minute related to that commune. The extract from the Annex to that letter consists only of the reproduction of the wording of the resolution of 4 April 1843 (which had become the first part of Article 90), without the text of the minute inserted in Article 90 of the Descriptive Minute. At this time the burgomaster of Baarle-Nassau could not have known the text of this minute as reproduced in Article 90; he had absolutely no need of the text of the Minute which the resolution of 4 April 1843 had decided upon because he knew it perfectly well.

It is clear from these two letters that neither the Governor of North Brabant, in July 1843, nor the burgomaster of Baarle-Nassau, in April 1844, had before them the aprocryphal text inserted in Article 90.

* * *

It is quite clear that the intentions of the Parties were not respected at the time of the implementation of the first part of Article 90, when there was inserted after that part a document other than that decided upon by the Boundary Commissioners. This part of the 1843 Convention should therefore be restored in accordance with the sole consent given. The minute of Article 90 is not that which was to fix the *status quo* of the disputed plots; this *status quo* is to be governed by the Communal Minute of 1836-1841. This had been irrevocably decided by the Mixed Commission and the 1843 Convention could not contain in its text something different.

* * *

If the matter be approached from the point of view that only the minute of Article 90 is authoritative, the claim of the Netherlands is still apposite.

It must be remembered that the Communal Minute of Article 90 of the Descriptive Minute, that to which the Convention refers, provides for the possibility of certain amendments. For that minute (of Article 90) in its penultimate paragraph provides that "mistakes which may later be discovered to have crept into this Minute may be corrected by the two Parties, provided however that the Party which requests or requires a correction shall accompany its claim by clear legal evidence" (Memorial, Annex IV).

This paragraph shows that the Minute of Article 90 was open to amendment. It even laid down upon whom should be the burden of proof and the kind of evidence to be adduced by the Parties in order to secure the correction of errors subsequently discovered. There was thus an express proviso relating to errors contained in the minute of Article 90, which can be relied upon either by the Belgian Government or by the Netherlands Government in order to show the existence of mistakes.

The approval of the 1843 Convention did not as such say the last word with regard to the *status quo* recorded in that instrument; mistakes subsequently discovered could still be alleged.

The evidence submitted by the Netherlands Government is effective and conclusive as showing a mistake contained in the communal minute of Article 90. This evidence is "clear" and "legal"; it is based on the very wording of the original Communal Minute of 1836-1841, a document the validity of which has not been challenged by the Belgian Government.

Furthermore, the Netherlands—as will be seen below—have over a long period of years exercised effective, notorious and peaceful possession of the disputed plots, since the 1843 Convention. This constitutes further evidence of the *status quo* of the Netherlands recognized by the Communal Minute of 1836-1841.

Reliance has been placed upon the principle of the upholding of treaties. But that principle—which in any event is not an absolute one—is in no way opposed, particularly when there is a clause expressly providing therefor, to the correction of clerical errors which they may contain, provided such errors be shown really to exist by genuine evidence of a clear and unchallengeable nature.

The principle of respect for treaties is thus fully applied; that principle does not require acceptance of a treaty which is not juridically valid in one of its parts.

* * *

For almost one hundred years the Convention of 1843 was applied in a manner which does not conform with the text of the Communal Minute included in Article 90 of the Descriptive Minute; although that article regards the plots as Belgian, these same plots have actually always been submitted to Netherlands sovereignty. Such

a situation appears to confirm, as maintained in the Netherlands argument, the fact that the authentic Communal Minute was replaced by another, the existence and contents of which are unknown. A divergence had arisen between the existing practice in respect of the disputed plots and the Descriptive Minute; this divergence was not drawn to the attention of the two Governments until 1890, at the time of the draft Convention of 1892. It was then that the oversight which had occurred in respect of Article 90 of the Descriptive Minute of the Convention of 1843 and which had passed unnoticed by the two Governments became apparent.

This effective possession of the plots, contrary to the Minute inserted in Article 90, constitutes supplementary evidence of the mistake alleged to have occurred by the Netherlands Government.

In a letter to the Minister of the Netherlands at Brussels dated 20 August 1890, the Minister for Foreign Affairs of Belgium stated: "the Treaty of 1842 having laid down the *status quo*, it seems preferable to refer to the Treaty rather than to the Convention of 1863"; he was no doubt referring to the Convention of 1843 (Counter-Memorial, Annex XLVII). The *status quo* was to prevail over the provisions of the Convention of 1843.

The map appended to the Minute of delimitation of the two Baarles of 1826 clearly shows that the plots in question did not belong to the commune of Baerle-Duc. The value of this map cannot be dismissed without examination (Rejoinder, Annex II).

In Article 3, the Convention of 1843 confers upon the topographical maps to a scale of 1 : 10,000, which were prepared and signed by the Commissioners, the same force and value as the provisions of the Convention. The map adduced by Belgium as supplementary evidence, which consists of a sheet from a special map, mentions in its legend plots belonging to Belgium, plots that were unallocated as between the two Kingdoms and plots belonging to the Netherlands. The first of these are coloured in brown, the second in pink and the third are not coloured. This map is not one of the maps referred to in Article 3 which has been cited above, for that map indicates many plots in pink without attributing them to one or the other of the two States. That map does not take into account the Minute which was adopted in Article 90 and in which the plots are attributed either to Baerle-Duc or to Baarle-Nassau; this Minute does not indicate that there were unallocated plots. This map remains outside the facts agreed to in the Communal Minute inserted in Article 90. This map should be considered as a whole and not in one of its parts alone; the probative value of this map is not conclusive. Moreover, the map annexed to the Minutes of the Boundary Commission of 5 September 1887 does not show the disputed plots as being Belgian territory (Counter-Memorial, Annex XLVI).

On the other hand, the well-established and conclusive legal facts relied upon below are in complete disagreement with what is shown

on the map in question. Such a circumstance deprives the map of any probative value.

What appears on the Belgian military staff map of 1871 does not have the importance attributed to it in the present case, since it has not been shown that the Netherlands authorities had knowledge of it (Memorial, Annex XIII, p. 31). On this map, the attribution to Belgium of the disputed plots constitutes no more than a repetition of the mistake already indicated in the Communal Minute inserted in Article 90. What is shown on the map cannot be regarded as having any effect with regard to sovereignty; nor can one attribute to it the value of an act of sovereignty.

* * *

It has also been contended by the Belgian Government that, at the time of the draft Convention of 1892, it was agreed that the disputed plots belonged to Belgium. The purpose of this Convention was to put an end to the enclaves and the draft confined itself to putting the enclaves back into one only of the two territories, without discussing to which of them the plots belonged, by effecting mutual cessions. In order to achieve their purpose of putting an end to Belgian enclaves in the Netherlands and Netherlands enclaves in Belgium, the Parties based themselves exclusively on the erroneous data in Article 90 of the Minute, without further examination. This unratified Convention cannot be invoked against the Netherlands. The settled case law of the Permanent Court of International Justice and of our own Court does not allow reliance to be placed upon proposals made in the course of direct negotiations which do not lead to a complete agreement. The admission made on that occasion by the Netherlands has not deprived it of its right to challenge that admission. The Netherlands did not make an outright admission; the draft Convention is a complex instrument and is therefore indivisible. Moreover, after 1892 the situation of the plots remained unchanged; Netherlands sovereignty continued to be exercised over this small territory without any claim being put forward on behalf of the Belgian Government; such a situation clearly shows that, in the opinion of both Governments, the alleged admission had no legal effect.

It has been asserted that the Convention of 23 April 1897 regarding the repurchase of the Tilburg-Turnhout railroad recognized Belgian sovereignty over the disputed plots. This Convention has not been produced before the Court; in support of this assertion reliance has been placed upon an extract from the Statement of Reasons for the Convention as laid before the Netherlands Parliament (Reply, Annex XII). But the evidence submitted by the Netherlands Government, cited in paragraphs 27 and 36 *d)* of the Rejoinder, despite the explanation given during the oral argument by Counsel for Belgium (Oral Proceedings, p. 113), enables it to

be maintained that the enclaves referred to in that Statement of Reasons are not the disputed plots. The dues paid by the Netherlands Government could not be exacted in respect of the property occupied by the railroad, for that property had been transferred to the Netherlands Government (Counter-Memorial, Annex LI, p. 152).

* * *

The Netherlands Government puts forward another title of sovereignty as against the claims of the Belgian Government. It maintains that it has exercised the functions of sovereignty over the plots during the years subsequent to the Convention of 1843.

The facts relied upon in support of this position are as follows:

1. The disputed plots belonged to different owners during the period from 1845 to 1957 and Annex LI of the Counter-Memorial gives the details regarding these changes. Reliance is placed upon conveyances, private or public, and upon distributions and cessions. In all these instruments it is expressly stated that the properties mentioned therein are a part of the commune of Baarle-Nassau. The following are the dates of these operations until 1921: 31 January 1845, 29 January 1845, 24 February 1845, 15 March 1856, 20 March 1860, 3 August 1863, 20 May 1863, 19 April 1866, 16 August 1866, 22 January 1867, 8 July 1867, 22 July 1867, 6 May 1895, 1 July 1898, 22 April 1904, 21 May 1904, 4 October 1904, 28 September 1904, 23 October 1905, 5 December 1913 and 16 January 1914. All these conveyances are entered in Dutch registers. They refer to Netherlands surveys as well as to their numbering therein. The tax payable on these conveyances is paid to Netherlands offices. These conveyances are made between the inhabitants of the two communes who are of Belgian and Dutch nationality. All these facts were undoubtedly publicized in so far as the officials of Baerle-Duc and Antwerp were concerned.

It is necessary to scrutinize more closely certain of these conveyances.

On 31 January 1845 Prince Frederick of the Netherlands ceded to the Government of the Netherlands certain heathlands which belonged to him, among which is included plot No. 91. By an Order of the Minister for Finance of the Netherlands, dated 23 December 1846, the rights of the Domain over this plot are recognized (Counter-Memorial, Annex XLIII). This same plot, as belonging to the Domain of the Netherlands State, was the subject of a public sale on 15 March 1856 (p. 109).

By a conveyance dated 16 August 1866, Hubert Antoine de Poorter of Antwerp sold to the *Société anonyme des Chemins de fer du Nord de la Belgique* property situated in the commune of Baarle-Nassau for the establishment of a railway from Turnhout to Tilburg. This was a part of the disputed plots.

2. In 1851, plot No. 91 was the subject of a sale by the Netherlands State Domain. The commune of Baerle-Duc claimed for its inhabitants, before the Breda Tribunal, a right of usufruct over this plot. It did not therefore claim that this plot was a part of its territory for in that case it would have had to apply to the Belgian courts. This is an exercise of civil jurisdiction by the Netherlands courts over one of the plots.

3. As is clear from the relevant documents, the plots were subjected to Netherlands land tax. This constitutes a prolonged and continuous manifestation of Netherlands sovereignty over the plots.

4. On 4 November 1864, the Minister for the Interior granted a concession relating to the Tilburg-Turnhout railway in so far as it had to cross Netherlands territory and the plots in question.

5. When this railway was being built, a portion of the plots had been indicated for expropriation by the Netherlands authorities in December 1866. Such a measure does indeed constitute a governmental act; a voluntary sale occurred subsequently.

After the draft Convention of 1892, the factual situation was maintained unchanged. New houses were built on the plots in 1904, former heathlands were brought into cultivation, and the inhabitants of the plots entered births, marriages and deaths in the registers of their commune at Baarle-Nassau. It was not until 1921 that the Belgian Government, for the first time, submitted to the Netherlands Government its claims of sovereignty over the plots.

* * *

Without formally challenging these facts, the Belgian Government urges against them that it had entered the plots on its survey and that it had included them upon a military map. It further relies upon the unratified Convention of 1892 and a further Convention of 1897 concerning the repurchase of the railroad. The plots are said to have been the subject of transfer deeds entered in the Belgian survey for 1896 and 1904.

The probative value of the military map of 4 October 1871 (Memorial, Annex XIII) and of the draft Convention of 1892 and of the Convention of 1897 have been dealt with above: it is not necessary to revert to this matter here.

The plots were to appear in the Belgian survey in 1847 (Memorial, Annex XII), but this entry had no practical consequences, as is clear from the letter of 10 July 1890 from a Belgian official (Reply, Annex VIII); plot No. 92 appeared only on the survey map of Baarle-Nassau and plot No. 91 bears the number 71 in the Belgian

survey but includes Nos. 189, 191, 193, 203, 205, 206, 207 and 208 of the Netherlands survey. The successive alterations of the plots on the Netherlands survey as well as the entry of transfer deeds on the Netherlands registers are confirmed beyond any doubt by the documents embodied in Annex LI of the Counter-Memorial. The transfer deeds made in 1896 and 1904 were also entered in the Netherlands registers (Counter-Memorial, Annex LI, pp. 149 and 168).

* * *

In all the foregoing cases, the Netherlands Government has exercised preponderant governmental functions in respect of the disputed plots, without these having given rise on the part of the Belgian Government to any protest or any opposition. This prolonged tolerance of the Belgian Government in this respect has created an indisputable right of sovereignty in favour of the Netherlands Government. There is no evidence that Belgium claimed restitution of the parcels before 1921, or that any Belgian activities occurred thereon. Reference may here be made to the importance which the Court gave, in the Fisheries case, to the absence of protests by a government in the consolidation of a right (*I.C.J. Reports 1951*, p. 138). In the Eastern Greenland case the Permanent Court did not consider that it could neglect governmental acts, even when the Norwegian Government had made certain protests or reservations (*P.C.I.J., Series A/B, No. 53*, pp. 62-63), for it recognized the existence of two elements required to establish a valid title to sovereignty, namely, the intention and the will to exercise such sovereignty, and the manifestation of State activity. Sovereignty over the Minquiers and Ecrehos was decided by this Court exclusively on the basis of facts similar to those relied upon by the Netherlands Government in the present case (*I.C.J. Reports 1953*, pp. 67-70).

Such an intention to exercise sovereignty is particularly notable after the Convention of 1843 and after the draft Convention of 1892. The Netherlands Government has continued to regard these plots as belonging to it, and to exercise there governmental functions in a public and peaceable way. These facts have established Netherlands sovereignty over the disputed plots.

* * *

In the final analysis, Article 90 of the Descriptive Minute which is annexed to the Convention of 1843 and which is a part of that Convention provides in the first part that the Communal Minute signed on 22 March 1841 shall be inserted "word for word" as a second part of Article 90. But the Minute which is reproduced is not a literal copy of the Communal Minute signed on 22 March 1841.

What is involved is a provision of the Convention of 1843 which is not legally valid. Such a provision cannot constitute a valid title of sovereignty.

On the other hand, the title which is based on the effective, peaceable and public exercise of State functions by the Netherlands over the disputed plots must be given preference over the title of sovereignty relied upon by Belgium, which has never really exercised the State competence which it regards itself as holding.

(Signed) ARMAND-UGON.