

SEPARATE OPINION OF JUDGE V. K. WELLINGTON KOO

I agree with the conclusion of the judgment of the Court in recognizing a right of passage for Portugal between Daman and the enclaves and between the enclaves as sanctioned by local custom in respect of private persons, civil officials and goods in general, but I regret to be unable to concur in excluding from the scope or content of this right the passage of Portuguese armed forces, armed police and arms and ammunition. This right admittedly is not an absolute right, since Portugal claims it only to the extent necessary for the exercise of Portuguese sovereignty over the enclaves and subject to the control and regulation of India. As thus qualified, the right of passage is, in my opinion, applicable to all the six categories.

I

1. Although the Government of British India never expressly recognized passage as a matter of right for any category, in fact such passage was always granted. As a general rule, after the coming into force of the Anglo-Portuguese Treaty of Commerce and Extradition of 26 December 1878, the British authorities required previous authorization for the passage of armed police, military units and arms and ammunition in each case, but in fact the practice of authorizing such passage was more uniform and constant than in the case of private goods. Throughout the 130 years of British rule in India, I am not aware of one single instance in the record before the Court of a Portuguese request for passage of armed police, military persons or units or arms and ammunition between Daman and the enclaves ever having been refused. On the contrary, in respect of ordinary goods there was enforced by the British a prohibition of such transit for certain goods at different times, such as rice, salt, liquor, spirits and ingredients for distilling liquor and spirits, and there was indeed a total prohibition of passage for all goods during the last war.

2. A brief review of the facts would clarify the point.

During the first 60 years of the British period no request for permission for entry of troops or armed police of either Portugal or Great Britain into the territory of the other was required. A practice had been established for such passage on a basis of reciprocity, which fact probably accounts for the paucity of documents relating to the question of passage (Rejoinder, I, p. 181).

It appears, however, that during this period whenever there was a need of passage for armed military personnel it was always granted.

An incident which arose in 1859 was revealing. When two Portuguese sepoys were escorting a Portuguese judge from Daman to Bassein, the British police deprived the sepoys of their bayonets. The Governor-General of Goa protested to the Governor of Bombay on 16 May 1859, stating that the two soldiers were furnished with the necessary passes bearing the Government seal on them, that in the territories of Daman and Goa English soldiers carrying arms were allowed to pass unmolested, and that "it is not to be expected that Portuguese soldiers will be stopped from doing the same within British territories, particularly as there is this additional circumstance connected with Daman, viz. that there are several Portuguese villages situated within the limits of the British territory" (Counter-Memorial, Annex C. No. 39). The Governor of Bombay in his reply stated that "the arms of the two Portuguese soldiers were detained through an inadvertence which this Government regrets and which I hope will not occur again" (*ibid.*, p. 195).

3. On this same subject of troops, Article XVIII, paragraph 3, of the Treaty of Commerce and Extradition of 26 December 1878 provided:

"The armed forces of one of the two High Contracting parties shall not enter the Indian dominions of the other, except for the purposes specified in former Treaties, or for the rendering of mutual assistance as provided for in the present Treaty, or except in consequence of a formal request made by the party desiring such entry to the other."

This provision requiring a formal request for authorization to send troops of one High Contracting Party across the territory of the other had originally been proposed by the Portuguese plenipotentiary and was only inserted in the treaty on his insistence because, as reported by the British plenipotentiary to the Secretary of State for Foreign Affairs, "its insertion or non-insertion might make the whole difference in the chances the (Portuguese) Government had of passing the Treaty itself through the Cortes". The explanation given by the Portuguese representative was that such a provision would enable the Portuguese Government to face the "great opposition on the part of the public" to the "customs union" and the "economic amalgamation of the Portuguese colonies with the system of the British Indian Empire", as provided for in the Treaty (Rejoinder, II, Annex 54).

4. This new practice was continued after the expiration of the treaty in 1892, with permission always granted on application. Thus, for example, one application on 13 January 1915 for passage of eleven soldiers from Daman to Nagar-Aveli (Counter-Memorial, Annex E. No. 25), and another of 22 March 1915 for passage of one soldier from Goa to Nagar-Aveli (*ibid.*, Annex No. 26) were granted without difficulty. During the year 1915, seventy-nine applications were made to the Government of Bombay for permission for Portuguese soldiers to pass through British territory. Between 29 December

1916 and 25 August 1917 also seventy-nine applications were made for the same purpose. Apparently, in no instance was permission refused.

5. Earlier, two cases of passage of Portuguese soldiers across British territory, though they do not bear directly on such transit between Daman and the enclaves, are particularly significant in considering the question of a local custom for such passage on the Indian peninsula. On 26 November 1901 the Portuguese Consul-General asked the Governor-General of India for permission to send a detachment of 20 soldiers from Daman by land through Bombay to Goa and requested him to issue "urgently" the necessary orders for the passage. This permission was given two days later in a reply of 28 November 1901 and confirmed on 30 November 1901, adding a request that:

"... on future occasions the date of the proposed movement of such detachments may be stated, and that sufficient notice may be given to enable the orders of the Government to be obtained and instructions to be issued to the local authorities" (Counter-Memorial, Annex C. No. 51).

Again, when there was a rebellion in 1912 against the Portuguese Government in Goa, permission was asked on 5 August 1912 of the Government of Bombay and it was granted by the Government of India the following day, stating that they "have no objection to their proposal to march one officer and sixty men across ten kilometres of British territory", "as a special case". This detachment did not travel as expected. In October of the same year, however, the Portuguese Government at Goa again requested permission to send sixty men in the charge of an officer for about thirty miles across country to the Portuguese border. The reply of the Government of India was again in the affirmative, stating: "In the opinion of His Excellency we should not allow them transport by train, but otherwise there is no objection." The passage of the detachment in question duly took place on the 15th and 16th November of the same year (Counter-Memorial, Annex C. No. 52).

6. The passage of armed police was provided for in Article XVIII, paragraph 2, of the same Treaty of 1878, which states:

"The revenue, magisterial and police authorities of the Indian dominions of the High Contracting Parties shall cordially co-operate with each other for the maintenance, on the common lines of traffic and elsewhere, of perfect security of persons and property; and in the pursuit of criminals and persons engaged in smuggling and contraband practices, the said authorities of the one High Contracting Party may cross the frontier and enter the dominions of the other High Contracting Party; Provided that in such dominions they shall act in accordance with the local laws and the provisions of this Treaty" (Counter-Memorial, Annex No. 40).

This provision relating to the passage of armed police and other authorities was evidently based upon the practice which had already been established during the years preceding the conclusion of the Treaty of 1878. Previous authorization was not expressly stipulated in the Treaty as necessary, nor was it always required, in practice, for such passage, as will be indicated later.

7. When the Treaty of 1878 expired in 1892, the reciprocal arrangement for passage of armed police continued in practice. By an arrangement of 1913 parties of Portuguese armed police were allowed "to travel across intervening British territory when it is necessary for them to do so in journeying from one part of Portuguese India to another, provided that previous intimation (not previous authorization) is given to the local authorities" (Counter-Memorial, Annex C. No. 53). By an agreement of 1920 armed police, as well as unarmed police of one party in actual pursuit of an offender, may continue the pursuit uninterrupted in the territory of the other. It also provided that armed police below a certain rank should not enter the territory of the other party without consent previously obtained. Apparently this restriction did not apply to those above that rank. Under an agreement of 1940, passage of Portuguese armed police over the Daman-Silvassa (Nagar-Aveli) road was free provided that the party did not exceed ten in number and that intimation of the passage was given to the British authorities within twenty-four hours of the passage. For any such party of more than ten in number travelling over the road it was necessary to obtain the concurrence of the British authorities, as heretofore, by prior notice.

8. In respect of the requirement of permission for passage of Portuguese troops and armed police over intervening British territory, it is useful to note what the practice in fact was. When the Governor-General of Portuguese India stated in a letter of 22 December 1890 to the Governor of Bombay that "Portuguese troops never cross British territory without previous permission", an investigation was ordered by the British authorities and the District Police Inspector of the Balsa Division reported on 28 February 1891 that "on a number of occasions Portuguese armed men had passed through British territory without permission", adding that "British police sometimes went armed into Portuguese territory, and were not subjected to any interference". He recommended that this state of affairs be allowed to continue. The Commissioner of the Northern District and the District Magistrate of Surat concurred in the view that this reciprocal understanding should be maintained. Accordingly, in reply to the Governor-General of Portuguese India, the Secretary to the Government of Bombay, after stating that an investigation found several instances of troops (Portuguese) escorting treasure from Daman to the railway station, taking a prisoner to Wapi from Daman, proceeding through British villages

from Daman to Dadra and back again, or again going from Ambli to Dadra, without any application or notice to the local authorities, and remarking that "these instances have doubtless not been reported to H.E. the Governor-General, and under the rule which he has laid down it would seem that notice of such transit should have been made to the District Magistrate of Surat", concludes:

"At the same time I am directed to observe that this Government has no reason to suppose that the parties or persons, who have passed armed through these strips of British territory, have not conducted themselves with perfect propriety; and the G. in C. has given orders that, in the absence of any special reason, they should not be interfered with. If such movements or transfers can be anticipated doubtless the Portuguese authorities on the spot will prevent the risk of any delay or of any further correspondence by adhering to the rule mentioned in H.E. letter 'that Portuguese troops never cross Br. territory without previous permission'. But as already stated by me the Dist. Mag. at Surat has been informed that this Government does not wish any interference exercised in the circumstances now reported." (Rejoinder, II, pp. 223-224.)

9. It is thus evident that for the passage of Portuguese troops on the Daman-Silvassa (Nagar-Aveli) road, previous authorization was not always required, in practice, notwithstanding the provisions of Article XVIII of the Treaty of 1878 to the contrary.

10. On the question of the passage of Portuguese armed police, reference has been made above to the agreement of 1940. The origin of this agreement and the discussions leading to its conclusion also appear significant in ascertaining the practice which prevailed and the considerations which lay behind it. Following an incident relating to the arrest of a German missionary in April, 1940, by a British force in British territory consisting of three unarmed military men and four armed men, on a bus going from Silvassa (Nagar-Aveli) to Daman, the Government of Portuguese India suggested:

"the possibility of coming to an understanding with the Government of Bombay, by which on this road, and only on this road, owing to its special nature, armed police forces of both the Governments may travel freely, independently of any previous authorization". (Counter-Memorial, II pp. 322-323.)

Before taking a decision on the proposal and replying to the Government of Portuguese India, the Government of Bombay consulted the various British authorities concerned. At first it was thought that

“in view of the reasons stated by the Government of Port. India, there seems *prima facie* no objection to agree to the understanding which the Govt. of Port. India have proposed”.

But some considered it

“desirable to have some sort of control or check over the movements of armed police forces. G.R., P.D. No. 4540 of 30.7.1913 (requiring previous notice of passage) is one way of securing this. The question is not one of mere administrative detail. If a general permission is to be given, it may have to be coupled with some restrictions, e.g. as to number, purpose, etc.”

The Political and Services Department of the Government of Bombay then recommended acceptance of the proposal,

“subject to the understanding that the number of the armed policemen of the Port. Govt/Br. Govt allowed to traverse through the British portion/Port. portion of the Daman-Silvassa road should be restricted to the actual requirements in each case and that intimation of the march of the armed police forces through the territories of the Port. Govt/Br. Govt should be given to the local authorities by the Br. Govt/Port. Govt as soon as possible after the march takes place”.

In the opinion of others consulted, “this would not achieve the object” and the “distrust” was shared by another who thought “that without check and control of a fairly easily exercisable type, the procedure is fraught with danger”. Hence the precisely worded formula which, finally suggested by the Commissioner of the Northern District, was incorporated in the agreement of 1940.

11. Thus it appears clear from the foregoing review of the facts that during the first sixty years of the British period, the prevailing practice of allowing passage of troops and armed police of one country through the intervening territory of the other was based upon reciprocity and it had already developed into a local custom. While military units thus travelling must be in possession of passes issued by their own Government, this requirement does not appear to have applied to armed police on duty. However, no previous authorization for either category of passage was necessary.

Even during the period when the Treaty of 1878 was in force, though Article XVIII of it expressly provided for the requirement of a formal request and permission for entry of the troops of one High Contracting Party into the territory of the other, Portuguese armed forces on a number of occasions, as indicated by the Government of Bombay in its reply to the letter of 22 December 1890 of

the Governor-General of Portuguese India, travelled on duty across British territory without having applied for and obtained previous authorization, especially on the Daman-Silvassa (Nagar-Aveli) road. What appears even more significant is the fact, as cited above, that the British authorities expressed their preference for the continuance of this practice of non-interference with such passages, obviously in recognition of the necessity for them as well as out of consideration for their own convenience on the reciprocal basis.

12. There is nothing in the record to show that this practice underwent any significant change after the lapse of the Treaty of 1878. The agreements of 1913, 1920 and 1940, while in one of them the requirement of previous authorization for the passage of armed forces was reaffirmed, formalized this customary practice with more precision as regards the passage of Portuguese armed police through intervening British territory.

13. During the post-British period, up to 1954, this practice was apparently also respected by India.

14. As regards arms and ammunition, etc., Section 17 of Act XXXI of 1860 required, for their importation into British territory, a licence from the Governor-General of India in Council, or from some officer authorized on his behalf by the Governor-General of India in Council. This Act was replaced by the Indian Arms Act of 1878 (Counter-Memorial, Annex C. No. 59). Section 6 provides that no person shall bring or take by sea or land into or out of British India any arms, ammunition or military stores except under a licence (with exceptions not relevant here). Section 10 empowers the Governor-General in Council to regulate or prohibit the transport of any description of arms, ammunitions or military stores. The Indian Arms Rules of 1879 (*ibid.*, No. 60) provides for the issue of licences for the import and export of arms, ammunition and military stores. In 1880, the Governor-General in Council added Rule 7 A to these Rules (*ibid.*, No. 60). Rule 7 A (a) provides that nothing in the Rules should be deemed to authorize the grant of a licence to import arms, ammunition or military stores from Portuguese India. Rule 7 A (b) provides that nothing in the Rules should be deemed to authorize the grant of a licence to export to Portuguese India any arms, ammunition or military stores, unless they were exported for the exclusive use of, or covered by a special import licence issued by, the Government of Portuguese India. This Rule 7 A (b) was made to conform to paragraph 4 of Article XVIII of the Treaty of 1878, one provision of which reads:

“The exportation of arms, ammunition or military stores from the Indian dominions of one of the High Contracting Parties into

those of the other shall not be permitted, except with the consent of, and under rules approved of by, the latter. The Government of British India and Portuguese India shall co-operate to enforce all such rules as are herein contemplated."

Although Rule 7 A (b) was repealed in 1895 after the Treaty of 1878 lapsed, Rule 7 A (a) remained in force and was re-enacted in new Rules in 1909 and in subsequent re-enactments (*ibid.*, No. 66).

15. But the significant point to note is that the effect of this Rule 7 A (a) was merely to make it necessary to address applications not to the Government of Bombay, which could grant a licence only for the export of arms and ammunition, but, as was the case under the Act XXXI of 1860 referred to above, to the Government of India, which alone could sanction importation of arms and ammunition from Portuguese India. Thus, when applications for authorization to transport arms and ammunition, whether they were from Daman to Nagar-Aveli, or from Goa to Nagar-Aveli, or from Nagar-Aveli to Goa, were so addressed, the requested authorization was always granted by the Government of India, regardless of whether the articles consisted of rifles or bandoliers, or "certain rifles and cartridges", or "certain guns and cartridges". For example, such applications were granted on 28 November 1898, and again on 28 January 1915 and 1 October 1917 (Counter-Memorial, Annex C. Nos. 64 and 65). Applications made on 11 January 1939 for free transit for three muskets being sent from Nagar-Aveli to Daman and three others to be sent from Daman to Nagar-Aveli (Counter-Memorial, Annex E. No. 40) and on 24 March 1939 for eight muskets with 400 cartridges and one revolver with 50 cartridges (*ibid.*, Annex No. 41), and on 17 April 1940 for free transit for 52,000 cartridges to be sent from Daman to Nagar-Aveli (*ibid.*, No. 42), were likewise all granted.

16. The conclusion to be drawn from the practice of the British authorities in regard to Portuguese arms and ammunition is that while their importation into British territory was nominally subject to the strict provisions of the Arms Act and Arms Rules for general application, special dispensation was always granted by the Government of India which was alone competent to authorize it. This was a natural and understandable practice, for the passage of arms and ammunition, like that of troops, was a matter of greater importance to the territorial sovereign in consideration of security than the passage of goods and civil officials, and therefore required more effective control. But the need of troops and arms and ammunition, whenever it arose, was also more imperative for the exercise of her sovereignty by Portugal over the enclaves and obviously this factor was fully realized by the British authorities. In order to obviate misinterpretation of the general provisions of the Arms Act and the Arms Rules, particularly Rule 7 A (a), and consequent

controversy and incidents with Portugal, the grant of authorization for such passage between Portuguese possessions in India, including that between Daman and the enclaves, was controlled and regulated directly by the Government of India instead of by the British local authorities. The fact that no application in the record for such passage over British territory to the Portuguese enclaves from Daman or from the enclaves to another part of Portuguese territory in the Indian peninsula was ever refused, clearly indicates, in my view, British recognition of the special situation involved in regard to the enclaves.

17. The Government of the Union of India respected and continued this practice up till 1954.

18. From the foregoing account of the British and Indian practice in regulating the passage of troops, armed police, and arms and ammunition from one Portuguese possession to another across intervening British and later Indian territory, it appears clear that such passage took place constantly and without difficulty, just as in the case of private persons, civil officials and ordinary goods. In fact, as pointed out above, the practice of authorizing passage of arms and ammunition was even more uniform and constant than in the case of ordinary goods.

19. The requirement of an application to, and a permission by, the British authorities for the passage of troops and arms and ammunition in each case only meant, in my view, a stricter measure of control and regulation and did not necessarily signify that the British considered themselves as warranted to refuse it at will and did not regard Portugal as entitled to effect such passage. The degree of control must naturally vary according to the nature of the passage desired. The relatively simpler and less formal procedure adopted for the passage of Portuguese armed police, under the various agreements referred to above for "control of a fairly easily exercisable type" in the words of the British authorities cited above, appears clearly to confirm this view.

For between the different categories of passage, as for example between civil officials and armed forces or armed police and between ordinary goods and arms or ammunition, the difference in the procedure of allowing passage between Daman and the enclaves was a matter of degree in the policy of control and regulation rather than intended to establish a distinction between what was considered warranted by local custom and what was not so warranted. The uniformity and constancy of the practice of granting passage to armed forces, armed police and arms and ammunition was, indeed, more marked than, for example, in the case of ordinary goods as

seen earlier. Nor was there, it appears to me, any evidence of less consciousness on the part of the British authorities of an obligation, *opinio juris sive necessitatis*, in regard to these three categories of passage than in regard to those of private persons, Portuguese civil officials and ordinary goods. In my view there was implicit recognition on the part of the British authorities of a local custom for permitting passage between Daman and the enclaves of all the six categories of persons and goods, without any legal distinction but all subject, if necessary, to the control and regulation of the intervening territorial State.

20. The right of passage, as claimed and defined by Portugal, has two concurrent features. Its content is to the extent necessary for the exercise of Portuguese sovereignty over the enclaves, and its exercise is, at the same time, subject to the control and regulation of India in so far as the passage takes place over the intervening Indian territory. These two elements are inherent in the principle of territorial sovereignty from which flows the right of passage on the one hand and the right of control and regulation on the other. It means that with the right on each side there also exists an obligation—that of India to accord passage and that of Portugal to respect the rules of procedure respecting the application for, and grant of, passage. In other words, the rights and obligations of both sides are concomitant and correlative. But they are reconcilable with each other in the light of how the problem was successfully dealt with in the past—in the long period before 1954; that is, on the basis of the local custom which had crystallized from the constant and uniform practice of both the British and Indian authorities before that year.

It appears clear to me that the basic element in the policy of control and regulation of passage by the intervening territorial State in the past was consideration in good faith of its own national interest. Where there was possible prejudice to such interest, passage was restricted or prohibited as was the case in regard to ordinary goods. But where there was no likelihood of such prejudice, passage was readily granted even in regard to armed forces, armed police, and arms and ammunition, as has been shown above. This element of interest was the common denominator in the policy of control and regulation applied to all categories of passage, whatever variations there were in the procedure adopted for granting it.

21. If a local custom had evolved, as it undoubtedly had, for a right of passage between Daman and the enclaves for private persons, Portuguese civil officials and ordinary goods, a similar custom, in my opinion based upon the consistent practice in the past, had likewise come into being for a right of passage in regard to Portuguese armed forces, armed police, and arms and ammunition. Whatever distinction was observed by the British and Indian Governments in granting passage between the enclaves and between them and coastal Daman for the different categories was a matter of degree in applying a common policy of control and regulation for all the categories of passage rather than a matter of studied differentiation of the scope or content of the right of passage as between one category and another.

22. It should also be noted that originally Portugal possessed an implicit right of access to the assigned villages to collect the granted annual revenue and this right necessarily included access of Portuguese troops, armed police, and arms and ammunition over the intervening Maratha territory from Daman to the villages. In fact Article 11 of the "Capitulations relating to the conditions in which Portugal receives the Pragana of Nagar-Aveli", dated 1785 (Annex 8 to Memorial) reads in part:

"... and the Portuguese will quell any rebellion of the Colys which might break out in the same Pragana".

True, this is of the character of an obligation imposed upon Portugal. But in order to be able to carry out this obligation, she was entitled, by necessary implication, to use all requisite and reasonable means. In other words, she had the implicit right to bring Portuguese troops, armed police, and arms and ammunition into the villages for the purpose of quelling rebellion. This right of access had, under the Marathas, as valid a basis as that for Portuguese civil officials and non-military goods for their use. Though not often invoked by Portugal during the Maratha period, it was more frequently exercised after the fall of the Maratha Empire as an essential attribute of Portuguese sovereignty over the enclaves. Like the right of passage for private persons, civil officials and ordinary goods, it also developed into a customary right in fact, as seen from the uniform and constant practice referred to above.

II

23. Moreover, there are additional grounds for recognizing the broader scope of the right of passage for Portugal.

Since Portugal bases this claim upon its title of sovereignty, it is equally justifiable under the principle of territorial sovereignty. For as to the validity of this title there is little ground for doubt. Although no such title was acquired under the Marathas, and although during the early years of British succession the attitude of the British authorities on the subject was obscure, their tacit recognition of Portuguese sovereignty over the enclaves became increasingly clear as time went on. The record of negotiations between the Portuguese and British Commissioners for "the exchange of a narrow piece of land which should unite the Pragana of Nagar-Aveli with the other Praganas adjacent to the Fort of Daman", though the project did not materialize, lends further support to this conclusion. It is also confirmed by the Treaty of 26 December 1878 concluded between Great Britain and Portugal which in its preamble states: "being equally animated by the desire ... to improve and extend the relations of commerce between their respective dominions...". No exception or exclusion was stipulated as regards the enclaves in the reference to the "respective dominions"; and British recognition of Portuguese sovereignty over the enclaves, as well as over the other parts of the Portuguese dominions, must have been equally implied. There was nothing in the record to indicate any modification of the British attitude after the termination of the treaty in 1891.

24. When India succeeded Great Britain and became an independent State, there was no indication in the conduct of her relations with Portugal that she had adopted a different attitude in regard to the Portuguese dominions on the Indian sub-continent, notwithstanding her known aspiration for "the re-establishment of her geographical and historical unity". It is true that Counsel for India asked in the oral pleadings: "When—where—by whom—did the Indian Union recognize Portugal's territorial sovereignty?" But under international law such recognition need not always be express or explicit. It does not always call for an open declaration; it may be tacit.

In all its dealings with the Portuguese authorities in the Indian Peninsula or at Lisbon, the Government of the Indian Union, until the events of 1954 occurred, appears to have always regarded the enclaves, as well as the other territories of Portuguese India, as belonging to Portugal. Indeed in the Aide-Memoire of the Indian Legation at Lisbon of 27 February 1950 to the Portuguese Ministry of Foreign Affairs, "the request for an immediate start of negotiations regarding the future of Portuguese colonies in India" was expressly stated to be for "the peaceful reunion of what is now Portuguese India with the Indian Republic". (Memorial, Annex 29.) Again, in a Note of 14 January 1953 from the Indian Legation to

the Portuguese Ministry of Foreign Affairs, it is stated in its final paragraph:

“The Government of India have suggested that the principle of direct transfer should be accepted first and that this should be followed by a *de facto* transfer of the administration... The legal sovereignty of Portugal would continue until the steps then considered appropriate had been taken to give effect to the decisions arrived at. The Government of India would be glad if the Government of Portugal would accept these suggestions as a basis for the proposed negotiations.” (Memorial, Annex 31.)

Thus it is beyond doubt that as late as 1953 India continued to consider all the Portuguese territories in India as under Portugal's *legal sovereignty* without making any exception concerning the enclaves of Dadra and Nagar-Aveli.

25. Since international law makes no distinction between one sovereignty and another, Portuguese sovereignty over the enclaves is as much entitled to exist as the sovereignty of the State by whose territory it is encircled. And the passage of troops, armed police, and arms and ammunition is as indispensable to the exercise of the Portuguese sovereignty as, if not more so than, the passage of private persons, civil officials and ordinary goods. Even though the situation of an enclave is a special one, it is inconceivable in international law that one sovereignty exists only by the will or caprice of another sovereignty. But on the other hand, while it is true that this right of passage imposes a correlative obligation binding on the State through whose territory it has to be effected, it is not an absolute, unrestricted right; in the nature of things its exercise must be subject to control and regulation by the sovereign of the intervening territory.

The existence of two conflicting rights, however, is not an uncommon phenomenon in international law. In the complexities of intercourse between nations such a situation is often unavoidable. It is, however, not an intractable problem; its solution only calls for mutual adaptation and adjustment. By reference to, and application of, the general principles of law as stipulated in Article 38, 1, (c), of the Statute, as well as to customary international law, similar situations have found solutions in the past.

26. In municipal law, as disclosed by a comparative study by Professor Max Rheinstein, the right of access to enclaved property is always sanctioned. Admittedly, there are important distinctions between a right of passage of an international enclave and that of an enclaved land owned by a private individual. But in whatever mould municipal law may be cast, in whatever technical framework it may be installed, in harmony with national tradition or out of preference for a particular legal fiction, the underlying prin-

ciple of recognition of such a right, in its essence, is the same. It is the principle of justice founded on reason.

27. Indeed, in the last analysis, the fact that an enclaved land in municipal law and an enclaved territory in the international domain has always been able to enjoy passage through the surrounding land of another owner or the surrounding territory of another State, is based upon reason and the elementary principle of justice. For such land or territory this transit is a necessity and it is reasonable to provide for this necessity both in municipal law and in customary international law. As the great Dutch juriconsult, Cornelius van Bynkershoek, has so well said: "In the law of nations, reason is sovereign..." It is reason which dictates the recognition of a rule of international customary law in application of the principle of justice. Only by the existence of this rule of customary law can it be explained that through the centuries, though many territorial enclaves have existed and disappeared in the course of the development of international relations, not a single case of disappearance has been due to denial of passage and the consequent geographical suffocation or strangulation. The reasonableness of according passage through the surrounding territory accounts for the constancy and uniformity of the usage which has ripened into a customary right of passage for international enclaves, however restricted or qualified it may be according to the circumstances of each case.

28. On the surface, the right of passage of the sovereign of an enclave and the right of the sovereign of the surrounding territory to uphold his territorial sovereignty appear to be conflicting, but, as I have already remarked, they are not incompatible or irreconcilable with each other. The fact that enclaves exist and thrive today in many parts of the world shows that whatever difficulties may have arisen between the enclaved and enclaving territories from time to time have always been satisfactorily arranged in good faith and with goodwill on both sides. The relations between the two territorial situations are not unlike the relations between the ocean and the rivers which empty their waters into it. Sometimes the necessity to exercise the sovereignty over the enclave is more pressing than the right of the enclaving State to protect its territorial sovereignty intact and sometimes the reverse is true; just as during the spring thaw a river rising high with water discharges it deep into the ocean and, during the flow of the tide, the ocean pushes its tide water well up the river, without denying the existence of either. They co-exist and perform their respective functions. There is no intrinsic conflict between them and there is none either between the right of passage of an enclave of one State and the territorial sovereignty of the enclosing State. For customary international law is no less resourceful than the law of geophysics.

29. For the reasons stated above, I hold that Portugal's right of passage between the enclaves and between them and coastal Daman embraces all the six categories, to the extent necessary for the exercise of Portuguese sovereignty over the enclaves and subject to control and regulation by India.

(Signed) WELLINGTON KOO.