THE ROLE OF PRESUMPTIONS IN INTERNATIONAL TRIBUNALS

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I. MAY WE PRESUME? ORIGINS OF AN INQUIRY

Our thinking about this subject has been triggered by what seems to us a counter-intuitive event in which one of the co-authors played a role.

In 2002, the International Court of Justice (ICJ) decided a case involving a territorial dispute between Indonesia and Malaysia.1 The subject of the dispute was two tiny islands off the east coast of Borneo: Pulau Ligitan and Pulau Sipadan. Relying on evidence of various marginal acts that appeared to display an element of purported sovereignty (effectivities), the Court decided the case in favor of Malaysia. Professor Franck, serving as a judge ad hoc in that case, urged the other judges to balance evidence of these effectivities against a proposed presumption that a line designated by treaty more than a century earlier to divide what were at that time vast Dutch and British colonial territories in Borneo,2 ought to be deemed applicable, also, to the two islands (not expressly mentioned in the treaty) situated about 50 miles off Borneo’s east coast. Such a presumption, Professor Franck had urged, was sustainable by a “common sense”3 that those who negotiated an 800-mile long line dividing the

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1 Case concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, 17 December, 2002.
3 We use the term as lawyers, not philosophers. By common sense we mean only this: that the proposition being stated (“Britain is north of France”) is one so generally accepted by persons anywhere that it need not be demonstrated empirically by travelling from the one country to the other with a compass in hand. The proposition need not be true in an absolute sense, but it must be widely
possessions of two powerful empires surely would have sought closure and that they would not have meant to leave title to these tiny dependencies unresolved.¹

That “common sense” presumption was not accepted by any other member of the 17-member bench,² thereby demonstrating eloquently that it had not captured a common sense of the judges.

accepted to be true at the time it is stated. Indeed, it can be a statement incapable of verification (“music soothes the troubled breast”), so long as it is generally believed to be true among the public to which it is addressed or within which it is commonly deployed. See G.E. Moore, “A Defense of Common Sense” in Contemporary British Philosophy, Vol. 2 and the discussion thereof in Paul Grice, Studies in the Way of Words, 154–170 (1989). The statement “We believe these truths to be self evident […],” is an example of an appeal to a common sense for the purpose of achieving normativity without having to adduce empirical proof of its validity as objective truth.

¹ Indonesia/Malaysia, dissenting op. of Judge Franck.

² The case was brought to the ICJ jointly by Indonesia (as successor to the Netherlands) and Malaysia (as successor to the British North Borneo Company). It required interpretation of a small provision of an 1891 Convention between Britain and Holland that established an agreed boundary line across more than 800 miles, above which belonged to the British North Borneo Company and below to Holland. Where the line reaches the east coast of Borneo, Article IV of the Convention stipulates that the allocation of the adjacent area shall follow the line of 4° 10’ latitude, proceeding in an easterly direction “across the Island of Sebittik. […].” But other off-shore islands, including Ligitan and Sipadan (both just south of the 4°10’ line), were not mentioned in the treaty. In dispute was whether the term “across” meant “across and no further”, or whether the parties expected or intended – or should be deemed to have wanted – the line to continue eastward so as to conclusively allocate any remaining disputed bits of offshore territory.

All the judges agreed that no definitive conclusion as to its meaning could be teased from the ambiguous word “across.” The majority took the sporadic regulatory activity – effectivities – by the British in the disputed areas to favour the “across and no further” interpretation. It relied on such rare and relatively trivial gestures as occasional visits to the islands by sea-plane or naval vessel, and the mention of the islands in an ordinance purporting to regulate seasonal turtle-egg harvesting by visiting Borneo fishermen. Both parties performed occasional acts pertaining to the islands. Neither party, however, paid them much attention.

Professor Franck thought that it stood to reason, the parties having drawn a line across this huge terrain to end disputation between two vast adjacent empires, that one could presume them not to have intended to leave unresolved any questions of title, but, rather, to have wanted the 4°10’ line to apply. The evidence of effectivities was incurably ambiguous and indecisive and Professor Franck opined that the majority’s decision rested on “weighing a handful of feathers