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CR 2001/3

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2001

*Public sitting*

*held on Thursday 28 June 2001, at 10 a.m., at the Peace Palace,*

*President Guillaume presiding*

*in the case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*

*Application for permission to intervene filed by the Republic of the Philippines*

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VERBATIM RECORD

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ANNÉE 2001

*Audience publique*

*tenue le jeudi 28 juin 2001, à 10 heures, au Palais de la Paix,*

*sous la présidence de M. Guillaume, président*

*en l'affaire relative à la Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*

*Requête à fin d'intervention déposée par la République des Philippines*

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COMPTE RENDU

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| *Present:* | President | Guillaume |
| | Vice-President | Shi |
| | Judges | Oda |
| | | Bedjaoui |
| | | Ranjeva |
| | | Fleischhauer |
| | | Koroma |
| | | Vereshchetin |
| | | Higgins |
| | | Parra-Aranguren |
| | | Kooijmans |
| | | Rezek |
| | | Al-Khasawneh |
| | | Buergenthal |
| | Judge *ad hoc* | Weeramantry |
| | | Franck |
| | Registrar | Couvreur |

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| *Présents :* | M. | Guillaume, président |
| | M. | Shi, vice-président |
| | MM. | Oda |
| | | Bedjaoui |
| | | Ranjeva |
| | | Fleischhauer |
| | | Koroma |
| | | Vereshchetin |
| | Mme | Higgins |
| | MM. | Parra-Aranguren |
| | | Kooijmans |
| | | Rezek |
| | | Al-Khasawneh |
| | | Buergenthal, juges |
| | | Weeramantry |
| | | Franck, juges *ad hoc* |
| | M. | Couvreur, greffier |

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***The Government of the Republic of the Philippines is represented by:***

H. E. Mr. Eloy R. Bello III, Ambassador of the Republic of the Philippines to the Kingdom of the Netherlands,

*as Agent;*

Mr. Merlin M. Magallona, Under-Secretary of Foreign Affairs, Government of the Republic of the Philippines,

*as Co-Agent and Counsel;*

Professor W. Michael Reisman, Yale Law School,

*as Counsel and Advocate;*

Dr. Peter Payoyo, University of the Philippines,

*as Counsel;*

Mr. Alberto A. Encomienda, Secretary-General, Maritime and Ocean Affairs Center, Department of Foreign Affairs,

Mr. Alejandro B. Mosquera, Assistant Secretary, Office of Legal Affairs, Department of Foreign Affairs,

Mr. George A. Eduvala, Attaché, Embassy of the Republic of the Philippines in the Netherlands,

Mr. Eduardo M. R. Meñez, Second Secretary, Embassy of the Republic of the Philippines in the Netherlands,

Mr. Igor G. Bailen, Acting Director, Office of Legal Affairs, Department of Foreign Affairs,

*as Advisers.*

***The Government of the Republic of Indonesia is represented by:***

H. E. Dr. N. Hassan Wirajuda, Director General for Political Affairs

*as Agent;*

H. E. Mr. Abdul Irsan, Ambassador of Indonesia to the Kingdom of the Netherlands

*as Co-Agent;*

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member of the International Law Commission,

Mr. Rodman R. Bundy, Avocat à la Cour d'appel de Paris, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris

*as Counsel and Advocates;*

***Le Gouvernement de la République des Philippines est representé par :***

S. Exc. M. Eloy R. Bello III, ambassadeur de la République des Philippines aux Pays-Bas,

*comme agent;*

M. Merlin M. Magallona, sous-secrétaire au ministère des affaires étrangères,

*comme coagent et conseil*;

M. W. Michael Reisman, professeur à la faculté de droit de Yale,

*comme conseil et avocat;*

M. Peter Payoyo, de l'Université des Philippines,

*comme conseil;*

M. Alberto A. Encomienda, secrétaire général du centre des affaires océaniques et maritimes du ministère des affaires étrangères,

M. Alejandro B. Mosquera, secrétaire adjoint au bureau des affaires juridiques du ministère des affaires étrangères,

M. George A. Eduvala, attaché à l'ambassade de la République des Philippines aux Pays-Bas,

M. Eduardo M.R. Meñez, deuxième secrétaire à l'ambassade de la République des Philippines aux Pays-Bas,

M. Igor G. Bailen, directeur par intérim du bureau des affaires juridiques du ministère des affaires étrangères,

*comme conseillers.*

***Le Gouvernement de la République d'Indonésie est representé par :***

S. Exc. M. Hassan Wirajuda, directeur général des affaires politiques,

*comme agent*;

S. Exc. M. Abdul Irsan, ambassadeur d'Indonésie aux Pays-Bas,

*comme coagent*;

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre, membre de la Commission du droit international,

M. Rodman R. Bundy, avocat à la cour d'appel de Paris, membre du barreau de New York, cabinet Frere Cholmeley/Eversheds, Paris,

*comme conseils et avocats*;

Mr. Alfred H. A. Soons, Professor of Public International Law, Utrecht University,

Ms Loretta Malintoppi, Avocat à la Cour d'appel de Paris, Member of the Rome Bar, Frere Cholmeley/Eversheds, Paris,

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

*as Counsel;*

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,

Mr. Donnilo Anwar, Director for Treaties and Legal Affairs, Department of Foreign Affairs,

Mr. Major General Djokomulono, Territorial Assistant to Chief of Staff for Territorial Affairs, Indonesian Armed Forces Headquarters,

Mr. Rear-Admiral Yoos F. Menko, Intelligent Assistant to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

Mr. Eddy Pratomo, Head of Sub-Directorate for Territorial Treaties, Department of Foreign Affairs,

Mr. Abdul Kadir Jaelani, Officer, Embassy of the Republic of Indonesia, The Hague

*as Advisers.*

***The Government of Malaysia is represented by:***

H. E. Tan Sri Abdul Kadir Mohamad, Secretary General of the Ministry of Foreign Affairs,

*as Agent;*

H. E. Ms Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands,

*as Co-Agent;*

Professor Sir Elihu Lauterpacht C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*,

Professor Jean-Pierre Cot, Emeritus Professor, Université de Paris I, Advocate, Paris and Brussels Bars,

Professor James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member, International Law Commission,

Professor Nico Schrijver, Professor of International Law, Free University Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration,

*as Counsel and Advocates;*

M. Alfred H. A. Soons, professeur de droit international public à l'Université d'Utrecht,

Mme Loretta Malintoppi, avocat à la cour d'appel de Paris, membre du barreau de Rome, cabinet Frere Cholmeley/Eversheds, Paris,

M. Charles Claypoole, *Solicitor* à la Cour suprême d'Angleterre et du Pays de Galles, cabinet Frere Cholmeley/Eversheds, Paris,

*comme conseils*;

M. Hasyim Saleh, chef adjoint de la mission à l'ambassade d'Indonésie à La Haye,

M. Donnilo Anwar, directeur des traités et des affaires juridiques au ministère des affaires étrangères,

Le général de division Djokomulono, assistant pour les questions de territoire auprès du chef d'état-major chargé des affaires territoriales, quartier général des forces armées indonésiennes,

Le contre-amiral Yoos F. Menko, assistant auprès du chef d'état-major pour les affaires générales (service de renseignements), quartier général des forces armées indonésiennes,

M. Kria Fahmi Pasaribu, ministre conseiller à l'ambassade d'Indonésie à La Haye,

M. Eddy Pratomo, chef de la sous-direction des traités territoriaux au ministère des affaires étrangères,

M. Abdul Kadir Jaelani, fonctionnaire à l'ambassade d'Indonésie à La Haye,

*comme conseillers.*

***Le Gouvernement de la Malaisie est representé par :***

S. Exc. M. Tan Sri Abdul Kadir Mohamad, secrétaire général du ministère des affaires étrangères,

*comme agent;*

S. Exc. Mme Noor Farida Ariffin, ambassadeur de la Malaisie aux Pays-Bas,

*comme coagent;*

Sir Elihu Lauterpacht, C.B.E., Q.C., professeur honoraire de droit international à l'Université de Cambridge, membre de l'Institut de droit international,

M. Jean-Pierre Cot, professeur émérite à l'Université de Paris 1, avocat aux barreaux de Paris et de Bruxelles,

M. James Crawford, S.C., F.B.A., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de la Commission du droit international,

M. Nico Shrijver, professeur de droit international à l'Université libre d'Amsterdam et à l'Institut d'études sociales de La Haye, membre de la Cour permanente d'arbitrage,

*comme conseils et avocats;*

Datuk Heliliah Yusof, Solicitor-General of Malaysia,

Mrs. Halima Hj. Nawab Khan, Acting State Attorney-General of Sabah, Malaysia,

Mr. Athmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers, Malaysia,

*as Counsel;*

H. E. Ambassador Hussin Nayan, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

Mr. Muhamad bin Mustafa, Deputy Director-General, National Security Division, Prime Minister's Department, Malaysia,

*as Advisers;*

Mr. Zulkifli Adnan, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

Mr. Raja Aznam Nazrin, Counsellor of the Embassy of Malaysia in the Netherlands,

Mr. Nik Aziz Nik Yahya, First Secretary of the Embassy of Malaysia in the Philippines,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Division, Department of Survey and Mapping, Malaysia,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

Mr. Shaharuddin Onn, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

*as administrative staff.*

Datuk Heliliah Yusof, *Solicitor General* de la Malaisie,

Mme Halima Hj. Nawab Khan, *Attorney General* par intérim de l'Etat du Sabah (Malaisie),

M. Athmat Hassan, juriste au cabinet de l'*Attorney General* de l'Etat du Sabah (Malaisie),

*comme conseils*;

S. Exc. M. Hussin Nayan, ambassadeur, sous-secrétaire au département des affaires territoriales et maritimes du ministère des affaires étrangères,

M. Muhamad bin Mustafa, directeur général adjoint du département de la sécurité nationale, cabinet du premier ministre,

*comme conseillers;*

M. Zulkifli Adnan, secrétaire adjoint principal au département des affaires territoriales et maritimes du ministère des affaires étrangères,

M. Raja Aznam Nazrin, conseiller de l'ambassade de la Malaisie aux Pays-Bas,

M. Nik Aziz Nik Yahya, premier secrétaire de l'ambassade de la Malaisie aux Philippines,

M. Tan Ah Bah, sous-directeur principal de la topographie du service des frontières, département de la topographie et de la cartographie de la Malaisie,

Mme Haznah Md. Hashim, secrétaire adjoint au département des affaires territoriales et maritimes du ministère des affaires étrangères,

M. Shaharuddin Onn, secrétaire adjoint au département des affaires territoriales et maritimes du ministère des affaires étrangères,

*comme personnel administratif.*

LE PRESIDENT : Veuillez vous asseoir. La séance est ouverte. Nous sommes réunis aujourd'hui pour entendre le deuxième tour de plaidoiries de la République des Philippines et je donne immédiatement la parole au professeur Michael Reisman. Professor Reisman, you have the floor.

Mr. REISMAN:

1. Mr. President, Members of the Court, Professor Magallona and I appreciate the opportunity to respond to learned counsel for Indonesia and Malaysia and to correct certain misunderstandings or distortions of our position and differences with respect to the law. Let me begin by stating a fundamental difference. The Court will recall that we emphasized the dual function of Article 62: for the State which considers that it has an interest that may be affected by a decision in a case between two other States and, equally, if not more important, as a mode by which the Court can inform itself of possible consequences of a decision for a third State that the immediate parties will not bring to its attention. Article 62 is as vital to the Court in its application of justice as it is to the third State in its pursuit of justice.

2. The Philippines believes that in this case, one or both of the Parties may rely on treaties and agreements and press interpretations of these instruments that could affect its interest of a legal nature, specifically its long-standing claim to territories in North Borneo. It is that concern and not a claim to the islands in dispute that has stimulated the request for the pleadings and documents and the opportunity to submit written and oral observations. After Tuesday, it is plain that, in spite of the fact that the Philippines does not challenge the claim of either Party, both are utterly disdainful of the Philippine interest, such that without its intervention, its interest and view will simply not be before the Court. The Parties to this case oppose intervention for different reasons: Indonesia acknowledges that there is a "long-standing claim" to territory in North Borneo, on which it takes no position but it objects to intervention on the ground of timeliness. Malaysia simply denies that there is an interest or that the Philippines has failed to demonstrate such an interest. The presentations by Malaysia and Indonesia on Tuesday do demonstrate one common ground: the last thing that both States wish is for the Court to be informed of the Philippine interest and the way it might be affected. We believe that we have now fully complied with the requirements of

Article 62 and Rule 81 and should be permitted to intervene, for without allowing intervention, the Court will not be fully informed of effects that may flow from its decision which could prejudice Philippine interests of a legal nature.

**The preliminary character of the Article 62 procedure**

3. As we understand the procedure contemplated by Article 62, it is not an intervention in its own right, but a preliminary determination by the Court as to whether a party should be permitted to intervene. If this preliminary procedure yields an affirmative decision by the Court, then the intervener receives copies of the pleadings and documents and is entitled to submit a written statement to which the parties may respond in writing and to submit observations in the oral proceedings, but *only* "with respect to the subject-matter of the intervention". Under Article 62, the Court does not decide on the interest and how it may be affected by the decision, but only whether the applicant for intervention has shown that it has an interest of a legal nature and that it *may* be affected by a decision of the Court. We do not suggest, for a moment, as Professor Pellet intimates and Professor Cot said, that the Court does not make this decision. But we do say that in the absence of a jurisdiction *ratione materiae* and *ratione personae,* the Court perforce gives great weight to the subjective assessment of the requesting State in deciding whether to allow intervention. Thereupon, and only thereupon, the intervener, now supplied with pleadings and documents, participates in the very limited way prescribed in Rule 85. It is the Court that then decides how, if at all, to deal with the intervener's interest of a legal nature in its own judgment. Professor Magallona and I had the feeling on Tuesday that our learned friends assumed and acted as if we had received the pleadings and documents and were already arguing about them and were obliged to make the case which we would — and could only — make in the merits phase when we are permitted to take the carefully circumscribed role of the intervener. But, of course, we have not received the documents and do not know their contents. As petitioners for the right to intervene, that is one of the things we are asking for.

**The interest of a legal nature**

4. In the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene*, the Chamber said:

> "[I]t is clear, first, that it is for a State seeking to intervene to demonstrate convincingly what it asserts, and thus to bear the burden of proof; and, second, that it has only to show that its interest 'may' be affected, not that it will or must be affected." (*Judgment, I.C.J. Reports 1990*, p. 117, para. 61.)

We believe that we have demonstrated to a level required by Article 62 our interest of a legal nature. *First*, there is a dispute. Indonesia acknowledged it on Tuesday, characterized it as a long-standing dispute. Professor Pellet called it "an ancient and recurring dispute". Malaysia, long involved in the dispute, its Agent even announcing in open court that its own position was non-negotiable, insisted — in defiance of logic — that there was no dispute, and, in any case, that the Philippines had no legal rights in the matter. This, in itself, seems dramatic evidence of a dispute but, more to the point, all three Parties have issued joint declarations confirming the dispute. *Second*, the dispute is not a recent, frivolous invention designed to complicate this case, but is long-standing and based upon very serious legal and factual arguments. *Third*, the Parties to the case have acknowledged the Philippines claim and in a solemn international declaration confirmed the common position that it should be resolved in accordance with international law. This declaration constituted an important internationalization of the dispute, from which flow procedural implications that are not irrelevant to a request under Article 62. *Fourth*, we have shown that certain of the treaties, upon which we believe — with even more confidence after hearing the arguments on Tuesday — that the Parties are relying upon, are critical to the rights which we claim in certain territory in North Borneo. The fact that counsel for Indonesia states that some of these treaties are being relied upon and counsel for Malaysia states that they are not, gives us even greater cause for disquiet. *Fifth*, we have shown that interpretations which the Court may be invited to adopt to support the claim of one of the Parties could affect the interests of the Philippines. In sum, we submit that we have shown, as required by Article 62, that we have an interest of a legal nature.

5. Professor Cot says that the interest we have described is "political" and has no legal basis. His authority for this conclusion is the statement to that effect made immediately prior to his appearance by the Malaysian Agent. Professor Pellet contends that the Philippine interest does not amount to an interest in the sense in which the term is used in Article 62 of the Statute. We agree entirely with the jurisprudence of the Court in *Tunisia/Libya* and *Nicaragua* that a concern about rules and general principles of law does not constitute sufficient interest under Article 62. The

issue here, however, is not general principles of law, but specific treaties about territory which have an effect on us. None of those other cases deals with a situation in which an interpretation of a territorial treaty upon which one of the parties is relying will affect — and possibly profoundly — the interest of a third State and with respect to which the third State wishes to inform the Court of the risk. We do not agree with Professor Cot's statement that the *Nicaragua* Judgment speaks to this particular issue at all.

**Is the interest affected?**

6. Could our legal interest be affected by the decision in this case? The standard which Article 62 applies is conditional. The applicant for permission to intervene need only show that a decision *may* affect its interest. In a maritime boundary dispute, a third State can point to a chart to show the vector of a provisional equidistant line. In this case, things are more complicated. We asked for the documents but were denied, so we must be speculative. Professor Pellet is quite right that Malta, too, was denied the documents before it sought to intervene, but that was a maritime case and charts and minimum familiarity with "equitable principles" was enough to give them a sense that they believed their interests were threatened. That is not our situation. The Parties who denied us the documents insist that there is no relation between their case and our interest. If that is so, why were they, having solemnly declared that there was a dispute, still so loath to allow a neighbouring State to see the documents to assuage its real concerns? This was not, as Professor Pellet suggests, an exercise of curiosity or an "academic" mission. An intervention under Article 62 is too serious an endeavour — not to speak of being too expensive politically — to be undertaken for idle curiosity.

7. What burden with respect to specificity must we discharge in the specific circumstances of this case? Here, Mr. President, Members of the Court, I must return for a moment to the rejection of our request for documents under Rule 53. We are not, incidentally, engaged in an appeal from that decision, as Mr. Bundy contended, but, given the nature of this case, there are certain procedural and substantive consequences that inevitably flow from the denial of the pleadings and documents. This is not, as I said, a case in which the third State need only look at a public chart. We need information and if we have been denied access to the pleadings and submissions, it is a

caricature of law for the States that denied the access to tell us to "guess" what is in the documents and then to fault us for not being precise. In the circumstances of this case, the "may" in Article 62's "may be affected" has to be more elastic.

8. In fact, the presentations of Indonesia and Malaysia on Tuesday only confirmed our suspicions that the Philippines interest may indeed be affected. In paragraph 31 of his pleading, Professor Cot cited four treaties and agreements relied upon or challenged by one or both of the Parties to prove their title to the contested islands, and he contended, in paragraph 32, that the Philippines "does not cite any of these texts to advance its territorial claim on North Borneo". The Court will recall that Professor Magallona on Monday dealt with three of those four treaties. Professor Cot proceeds to argue, in paragraph 33, that neither Indonesia nor Malaysia has founded its territorial claim on the grant of the Sultan of Sulu of 1878. But Mr. Bundy's tracking of the chain of succession at page 8 of his pleading tells a different story. The statements made by Indonesia and Malaysia on Tuesday provide evidence that the Court will be presented with many of the treaties and agreements upon which the Philippines claim is based and will be pressed to adopt interpretations that will certainly affect the Philippine interest.

9. Professors Cot and Pellet, in different ways, assert that the interest of a legal nature of the State requesting permission to intervene must be related to the dispute between the parties to the case and that it is the parties' submission that determines the permissible scope of the third State's interest. Because the Philippines disavows an interest in the outcome of the dispute over the islands, they conclude that the Philippine interest does not relate to the case at bar and, hence, fails the test of Article 62. For authority, they cite the 1984 Maltese request, and the 1990 Nicaraguan intervention. Those Judgments support us. The lawful purpose of an intervention under Article 62 is, indeed, not to graft a new case onto the one before the Court, rather, as the Chamber said in 1990, "[i]ntervention under Article 62 of the Statute is for the purpose of protecting a State's 'interest of a legal nature' *that might be affected* by a decision in an existing case already established between other States . . ." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 133, para. 97; emphasis added).

10. We find nothing in the precedents about the permissible scope of an intervention being determined by the language of the submission, but rather by the possible consequence of the Court's decision. The test is not *connective*, but *consequential*; not whether there is a "connection" to the submission — whatever that means — but whether the decision of the Court could affect the interest of a legal nature of a third State. Malaysia insists that, while its argument for the islands may rely on some treaties which the Philippines might rely upon, its arguments have no connection with the Philippine claim to North Borneo. But if its theory of the case imports a chain of title that is inconsistent with the claim of title upon which the Philippines bases its claim to territories in North Borneo, that interpretation will affect interests of a legal nature. If the Court is later seised of the Philippine claim to North Borneo — as proposed on many occasions by the Philippines — how will the Court deal with the Philippine claim if it has already decided it — in the absence of the Philippines?

11. Professor Cot seems to acknowledge that the test is consequentiality when he states at paragraph 24 that "the interest of a legal nature . . . must be affected by the decision of the Court and not just by the reasoning". I do not wish to go into an enquiry of the extent to which the reasoning of a judgment is part of its *res judicata*, a venerable problem in this Court which Judge Anzilotti originally took up in its predecessor. Suffice it to say that the Court's reasoning is the very stuff of international law. Treaties about territorial title and their interpretations "necessarily imping[e] upon third States", as the *Eritrea/Yemen* Tribunal said.

12. We submit that, on the basis of that part of the record to which we have been allowed access, the probability of consequences for the interests of the Philippines meets the "may" requirements of Article 62 and justifies Philippine intervention.

**What is the quantum required?**

13. Rule 81 (2) *(b)* requires the application to intervene to state "the precise object of the intervention". Given the handicap that we laboured under in the unique circumstances of this case, in contrast to, let's say, a maritime delimitation case, and having been denied the documents, the Philippine Application stated, in sections *(a)* and *(b)* of its objects:

> "*(a)* First, to preserve and safeguard the historical and legal rights of the Government of the Republic of the Philippines arising from its claim to dominion and

sovereignty over the territory of North Borneo, to the extent that these rights are affected, or may be affected, by a determination of the Court of the question of sovereignty over Pulau Ligitan and Pulau Sipadan.

*(b)* Second, to intervene in the proceedings in order to inform the Honourable Court of the nature and extent of the historical and legal rights of the Republic of the Philippines which may be affected by the Court's decision."

Some six weeks ago, Indonesia and Malaysia filed their observations on our Application, which supplied us with a little more information. Thanks to that addition, Professor Magallona on Monday was able to explain in further detail our concerns and objectives. We thank Professor Pellet (at page 4) for acknowledging that our objective of intervening to *inform* the Court is, as the Chamber said in the Nicaragua intervention, a legitimate object under Article 62. Indeed, the full Court in its Order of 1999, allowed Equatorial Guinea to intervene "to state its views as to how the maritime boundary claims of Cameroon or Nigeria may or may not affect the legal rights and interests of Equatorial Guinea". In the case concerning *Land, Island and Maritime Frontier Dispute* the Chamber said: "It is for the State seeking to intervene to identify the interest of a legal nature which it considers may be affected by the decision in the case, and to show in what way that interest may be affected . . ." And the Court acknowledged the idiosyncratic character of each case: "What needs to be shown by a State seeking permission to intervene can only be judged *in concreto and in relation to all the circumstances of a particular case.*"

14. We submit that the Application, supplemented by Professor Magallona's scholarly review of the historical claim, amply demonstrates the object of the intervention for the purpose of a decision under Article 62.

15. Now Sir Eli says that that is still not enough and, on Tuesday, he recounted the numbing detail with which, 20 years ago, *he* presented to the Court the objects of Malta's Application to intervene. Considering that Malta's Application was then denied, Sir Eli's model does not seem like one to emulate, though we can certainly understand why he would urge it on us. We submit that the objects *(a)* and *(b)* in the Application make clear the objectives of the Philippines in applying to the Court for permission to intervene under Article 62, are consistent with the Court's jurisprudence; and amply fulfil the requirements of the Statute.

**Timeliness**

16. Mr. President, Members of the Court, I turn briefly to the issue of timeliness raised by Mr. Bundy. In appraising the general issue of timeliness, it is important to relate the Application to intervene to the prior request for access to the submissions, the written submissions, under Article 53. As I mentioned on Monday, the present Application might well have been obviated, had access not been opposed.

17. The Philippines could not have been more timely under Rule 53 or Article 62. Other than in the obvious case of a maritime boundary, the logical sequence for a State considering that an interest may be implicated in a case between two other States is to request the documents in the case under Article 53 of the Rules. When would Indonesia expect the request under Article 53 to come? Before the Parties had made their written submissions? That would be absurd, there would be nothing to request. The proper time is when the bulk of the written submissions have been made. And this is precisely when the Philippines requested — and requested a second time — copies of the pleadings under Article 53.

18. In the nature of the case, the Philippines could hardly have requested permission to intervene under Article 62 before it tried to secure the documents. And it was only when it became apparent that the request for the documents was not going to be granted, that the Philippines requested permission to intervene. So the fact is that not only is the Philippines within all the time-limits, it could not, as a logical and practical matter, have submitted its request any sooner.

19. So we submit that under the prudential calculus of timeliness, the equation is positive in favour of the Philippines. We do not agree that our intervention — if approved by the Court — will impose any procedural hardships on the Parties or the Court. As we have said, we are not requesting a restructuring of the case or the Bench or the scope of the submission and will accept whatever timetable the Court may wish to prescribe.

20. Mr. President, Members of the Court, on Monday, I submitted to you that this is a case of first impression for three, interrelated reasons: the character of the interest, the character of the case in which it may be engaged and the denial of pleadings and documents. I suggested that Article 62 is as important for the Court as it is for the would-be intervener and that, in the instant case, it is even more important for the Court, given the nature of the case, and the handicaps under

which the Philippines labours. We submit that the Philippines has fulfilled the requirements of Article 62 and that it should be permitted to intervene.

21. Mr. President, Members of the Court, we appreciate that from the standpoint of the parties to the litigation and, to an extent, from the standpoint of the Court, an application to intervene under Article 62 is always awkward and likely to be greeted with less than enthusiasm. The intervener is seen as an intruder, an interloper, an uninvited guest, an ill-mannered "party-crasher", a troublemaker. In this sense, intervention is never "timely". The paradigm of the Statute is binary, bilateral: a dispute between two parties and, even if there are more than two, then only two groups of interests. But the drafters of the Statute appreciated that that paradigm is not always true to reality. Even a bilateral dispute may involve the interests of third parties, in the sense that some possible decisions of the Court could affect those interests. When those interests are of a legal nature, the drafters of the Statute decided, in their wisdom, that it is better that the Court, as the principal judicial institution of the world, be informed than remain ignorant of and oblivious to those interests.

22. As we read the recent jurisprudence of the Court, there is a new appreciation of the utility of Article 62 and an acceptance, in a world of interdependence, more and more of whose disputes are appearing in the docket, that intervention is the other side of interdependence. It reflects a fact of life and has a place — a normal place — in the procedure of the Court, both to protect the interests of a legal nature of the third State and to protect the judicial function.

23. Mr. President, Members of the Court, thank you for your attention. Mr. President, I now ask you to call upon Professor Magallona.

Le PRESIDENT : Je vous remercie, professeur Reisman. I will now give the floor to Professor Merlin Magallona.

Mr. MAGALLONA: Mr. President, Members of the Court:

1. During the oral presentations by Indonesia and Malaysia last Tuesday 26 June 2001, several points were raised on the matter of the definition of the Philippines "interest of a legal nature which may be affected by the decision of the case". As we have endeavoured to explain in the course of our initial arguments, the Philippines "interest of a legal nature" is founded on the

interpretation, application and appreciation by this Court of specific treaties, agreements and other documents adduced by Indonesia and Malaysia which could affect the Philippines outstanding territorial claim to certain territories in North Borneo. It should be beyond argument now that there is a serious and long-standing dispute about these interpretations and their consequences.

**Reply to Indonesia**

2. The Agent of Indonesia has stated that his Government does not wish to express any views at this time on the merits of the Philippines historic claim to North Borneo[1]. Counsel Pellet has further stated that Indonesia does not wish to comment on what he calls the "long-standing dispute between the Philippines and Malaysia"[2]. My Government respects these views taken by Indonesia. As we said last Monday, it is not, and it was never, the intention of the Philippines to ventilate the merits of its claim in these proceedings, nor to seek an endorsement of its substantive views regarding this claim on the part of any government or party. May I stress, though, that Indonesia by its statements has expressly acknowledged that there is a historic claim that has been asserted, and that there is, in its own words, a "long-standing and recurrent dispute between Indonesia and Malaysia" occasioned by this claim. These statements are a reiteration of the judicious stand taken by Indonesia as reflected in the Manila Accord of 1963, to which I have already referred in my presentation last Monday.

3. And yet, while Indonesia attempts to project an attitude of disinterestedness on the merits of the Philippine claim to North Borneo, Indonesia has invoked these same merits of the Philippine claim in its case against Malaysia. In the discussion on the "Implications of the Application for the Merits of the Dispute between Indonesia and Malaysia", counsel Bundy[3] says that Malaysia's claim to the islands of Sipadan and Ligitan has been undermined by the substantive merits of the Philippine claim to North Borneo. Thus, Indonesia recognizes the positive merits of the Philippine claim to North Borneo that "flow from the Philippines Application and Malaysia's reaction to it *which have a fundamental bearing on the issue of sovereignty over the islands of Ligitan and Sipadan* as between Indonesia and Malaysia". We understand Indonesia to be saying that the

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[1]CR 2001/2, p. 10 (Wirajuda).

[2]CR 2001/2, p. 13 (Pellet).

[3]CR 2001/2, p. 33 (Bundy).

determination of sovereignty over Sipadan and Ligitan cannot but make reference to (1) pivotal aspects of the Philippine claim to North Borneo; and (2) the Philippine view that the legal status of North Borneo is necessarily implicated in the determination of the issue of sovereignty in the case between Indonesia and Malaysia.

4. Evidently, the chain of title which Malaysia asserts to defend its territorial claim to Sipadan and Ligitan, based as it is on its own interpretations of, and representations on, specific treaties, agreements and other documents, is linked to the chain of title which the Philippines relies on to defend its territorial claim to North Borneo. Allow me to elaborate on and explore the details of this "ramification", as counsel Bundy has described it.

5. Malaysia has specified at least four treaties and agreements which it argues have a direct bearing on the sovereignty issue involving Sipadan and Ligitan. If we relate Malaysia's submission to Indonesia's regarding the chain of title alleged by Malaysia to support the Malaysian claim, then we will have a fair view of what the prejudice to the Philippine interest would look like. I say *if*, because the Philippines has not seen the pleadings of Malaysia.

6. Indonesia[4] says that Malaysia's sovereignty claim over Sipadan and Ligitan is based on a theory of ownership, or chain of title, which follows this chronology: originally, the two islands in question belonged to the Sultan of Sulu. Sometime in the nineteenth century, the Sultan's title was transferred to Spain, who in turn transferred its title to the United States via the Treaty of 7 November 1900. And then, through the 1930 Anglo-United States Convention, the United States transferred its title to Great Britain, the predecessor-in-interest of present-day Malaysia.

Now Malaysia says[5] that the Parties have submitted four legal instruments, among many others we presume, in order to prove their respective claims before the Court. These legal instruments are:

— the 1891 Anglo-Dutch Agreement;

— the 1900 Spain-United States Convention;

— the 1907 United States-United Kingdom Exchange of Notes; and

— the 1930 United States-United Kingdom Convention.

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[4]CR 2001/2, p. 33 (Bundy).

[5]CR 2001/2, p. 51, para. 31 (Cot).

Two points in the Malaysian chain of title described by Indonesia, 1900 and 1930, correspond to two agreements cited by Malaysia: the 1900 United States-Spain Convention and the 1930 United States-United Kingdom Convention. Now what if the Court upholds the interpretation of these international agreements suggested by Malaysia?

7. Let us focus on the 1930 United States-United Kingdom Agreement. This is a crucial legal instrument because *if* the Malaysian submission as alleged by Indonesia is correct — and we need to verify this from the Malaysian pleadings — then Malaysia is claiming that Britain obtained title to Sipadan and Ligitan by way of cession from the United States in 1930. This is of course the presumed Malaysian interpretation of the 1930 Agreement. The Philippines opposes this interpretation and submits the following.

8. First, the Philippines has a direct legal interest in the interpretation of the 1930 United States-United Kingdom boundary, being the successor-in-interest of one party to that agreement, the United States.

9. Secondly, the 1930 Agreement cannot be construed in any way as an instrument of cession. As we have explained, the purpose and overall intention of this Agreement was simply to delineate boundaries between, on the one hand, United States territory[6] and territory that "belong to the State of North Borneo which is under British protection", on the other hand. The question of United Kingdom title over territory referred to in the 1930 Convention, or the Exchange of Notes accompanying it, never arose. The legal situation, as we illustrated last Monday, parallels the one obtaining when the 1891 Anglo-Dutch Agreement was concluded. The 1891 Agreement draws a boundary line between, or segregates, "Netherlands possessions" on the one hand, and the territory of the "States under protection", on the other. The independent State of Sabah under British protection in 1891 was the same independent State of Sabah under British protection referred to in the 1930 United States-United Kingdom Agreement. The Philippines also clearly demonstrated that the independent State of Sabah from 1891 up to 1930, and beyond, was under the administration of the British North Borneo Company by virtue of delegated authority from the Sultan of Sulu, in whom the sovereignty of North Borneo vested.

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[6]Or, "the Philippine archipelago".

10. Thirdly, neither the Agent nor counsel for Malaysia in their presentation last Tuesday dwelt on the question of the legal capacity of the United Kingdom to enter into agreements respecting North Borneo from 1878 up to 1946. The Philippines, therefore, takes this to mean that Malaysia accepts *(a)* the Philippine characterization of the legal status of the United Kingdom Government in North Borneo during this period, and *(b)* the fact that North Borneo was territory under the indisputable sovereignty of the Sultan of Sulu, which was administered by the BNBC, and *(c)* the understanding expressly made in the 1907 Exchange of Notes that "the privilege of administration" on the part of the BNBC "does not carry with it territorial rights". No amount of selective memory can modify or revise the intent of the 1930 Agreement. Britain could not have acquired sovereignty over Sipadan and Ligitan by virtue of the interpretation placed by Malaysia on the 1930 United States-United Kingdom Agreement.

11. Because, as the Philippines contends, the Sultan of Sulu enjoyed continuous, uninterrupted and internationally recognized *de jure* sovereignty over North Borneo during the whole period of 1878 and 1962, then it follows that the two islands in question were acquired by the United Kingdom in 1930 for and on behalf of the Sultan of Sulu. The two islands which were lost to the Sultan as part of his dominion in the nineteenth century reverted back to the Sultanate in 1930!

12. May I state that the territory ceded by the Sultan to the Philippines in 1962 covered only those territories which were included and described in the 1878 Sulu-Overbeck lease agreement. The present Application for permission to intervene is based solely on the rights of the Government of the Republic of the Philippines transferred by and acquired from the Sulu Sultanate. If at all there are other territories appertaining to the Sultanate not covered by the Sulu-Overbeck lease of 1878, the Philippines, as agent and attorney for the Sultanate, has reserved its position on these territories[7].

**Reply to Malaysia**

13. May I now turn to Malaysia's arguments against the Philippines formulation of its interest of a legal nature. The Malaysian arguments rest on the critical proposition that the

[7]This reservation was first made during the Anglo-Philippines Ministerial Talks held in London in 1963. See The Philippine Claim to North Borneo, Vol. II (Manila: Bureau of Printing, 1968), p. 2.

Philippines does not have any relevant "interest of a legal nature" in the present proceedings because ultimately the Philippine claim to North Borneo is unfounded and has no legal basis[8]. I believe that I have already laid down before the Court the most salient elements of the Philippine claim and its historic rights to North Borneo, which we considered are necessary to fulfil the substantive requirements under Article 62. I have shown prima facie that there is a legal dispute between Malaysia, as successor-in-interest to Great Britain, on the one hand, and the Philippines, on the other, on the matter of the legal status of North Borneo. I need not go over this ground again. Allow me, however, to make three observations in reply to specific points raised by Malaysia last Tuesday about the validity of the Philippine territorial claim to North Borneo.

**The scope of the dispute on North Borneo**

14. First, may I emphasize that the Philippines claim is not about the legitimacy of the Republic of Malaysia or of its constituent state Sabah or a claim that the latter's self-determination is invalid or somehow being put into question. The Republic of the Philippines accepts the validity of the State of Malaysia and its political components as evidenced by its diplomatic relations, in particular its participation in the ASEAN. The Philippine claim is a territorial claim on a portion of Sabah which properly belongs to the Philippines on the basis of a sound title *jure gentium* and which Malaysia is improperly occupying on the basis of a faulty title which had been transferred to it by a prior faulty titleholder. Nothing in the confirmation of self-determination of the people of Sabah by the Secretary-General of the United Nations or the admission of Malaysia to the United Nations imported more than a confirmation by the international community of Malaysia's political identity. This is the case of every admission to the United Nations. None of those actions signified an international confirmation of Malaysia's claims to territory that may have been contested. So Malaysia's arguments about self-determination, or the non-negotiability of the "future of the people of Sabah", are irrelevant, as they are not in issue in the Philippine claim, and Malaysia's attempts to attribute designs against its political character by the Philippines are unfounded. In sum, the Philippines is not claiming all of Sabah or contesting its political legitimacy. The Republic of the

[8]CR 2001/2, p. 39 (Mohamad); CR 2001/2, p. 48, para. 16 (Cot); CR 2001/2, p. 55, para. 6 (Lauterpacht).

Philippines is claiming a piece of territory in North Borneo. At its core, that claim must be assessed by examination of the chain of title.

**Agreements on the legal status of North Borneo**

15. Secondly, there seems to have been a misreading of the Philippine arguments presented last Monday regarding the Philippine position on the legal status of North Borneo. For instance, counsel Cot identifies four legal instruments[9] which, according to Malaysia, have been relied upon by one or both of the Parties to prove their case: (1) the 1891 Anglo-Dutch Boundary Agreement as supplemented by agreements in 1915 and 1928; (2) the 1900 United States-Spain treaty; (3) the 1907 Anglo-United States Exchange of Notes; and (4) the 1930 United States-United Kingdom boundary agreement. It is not true that we have failed to refer to any of these legal instruments in the course of our explanation of the Philippine claim on North Borneo[10]. We have cited three of these agreements in the context of the overall argument that we wanted to make, namely, that these agreements are part of an interconnected set of legal instruments which if appreciated in their proper normative context would definitely oppose any title of sovereignty over North Borneo on the part of Britain, or its successor-in-interest, Malaysia.

16. The assertion has also been made that the Philippines has acknowledged in four instances British title over North Borneo[11]. Counsel Lauterpacht cites the fact that the Philippines had done so when it entered into several arrangements with the United Kingdom: the two on air services, one on labour employment, and a fourth one which consists of an Exchange of Notes regarding a British Government request to the Philippines concerning a lighthouse situated on a certain island under Philippine sovereignty. The Philippines does not see how specialized bilateral agreements with respect to air services or labour employment, or a proposal on the maintenance of a lighthouse, variously taking place in the period 1948 to 1955, can possibly be invoked against the Philippines as a recognition of, or acquiescence to, British title over North Borneo. Moreover, this misconstrues the basic theory behind the Philippine claim to North Borneo. As I have explained last Monday, the title of the Philippines to North Borneo is based on the cession effected by the

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[9]CR 2001/2, p. 51, para. 31 (Cot).

[10]See CR 2001/2, p. 51, para. 32 (Cot).

[11]CR 2001/2, p. 56, para. 11 (Lauterpacht).

Sultanate of Sulu in favour of the Philippines of certain territory in North Borneo. Legally and logically, the Philippines can only be in a position to question British pretensions to sovereignty over North Borneo *after* that cession has taken place in 1962.

**The Philippines theory of sovereign title over North Borneo**

17. This leads me to my third point: the Philippines claim to North Borneo could only have been possible in 1962, after the Sultanate of Sulu finally ceded North Borneo to the Philippines. Of course, this position is drastically opposed to the Malaysian contention that the Sultanate of Sulu "disappeared" as a legal entity several times. According to counsel Lauterpacht, the Sulu Sultanate "disappeared" or was "abolished" as an entity in 1878 as a result of Spanish conquest, again in 1915 under unknown circumstances during the American régime, and then again in 1936 by an undefined act on the part of the United States, and then once again in 1936, with the death of the Sultan[12]. We may add another date of demise of the Sultan — in 1946, when Britain unilaterally abolished the Sulu Sultanate by annexing North Borneo to become a British colony.

18. An awareness of the critical date when North Borneo was ceded to the Philippines will necessarily dispose of the argument further put forward by counsel Lauterpacht that the Philippines slept on its rights or could have protested against Britain but then chose to remain silent. Counsel Lauterpacht mentions that the Philippines could have opposed British pretension of title to North Borneo in 1947, when an American adviser to the Philippine President urged the Philippine Government to repudiate the British North Borneo Cession Order of 1946. Also in 1947, according to him, the Philippine Constitution was ratified in a plebiscite. All these instances of alleged neglect of right took place *before* the Philippine Government had acquired the territorial rights over North Borneo from the Sultanate. Many of the assertions are, in addition, wrong.

19. Counsel Lauterpacht has faulted the Philippines for enacting the Baseline Law in 1961 with "no mention of any Philippine claim to North Borneo". It should be obvious now why this claim could not have been provided in that law, at that time, for it was not until 1962 that title to territory in North Borneo became vested in the Philippines. The Philippines duly amended

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[12]See CR 2001/2, pp. 57 and 58, paras. 12 and 15 (Lauterpacht).

this 1961 law in 1968. Republic Act 5446, amending Republic Act 3046 of 1961, now provides that the "Philippines has acquired dominion and sovereignty" over Sabah, situated in North Borneo.

20. Starting in 1962, the Philippine claim to sovereignty and dominion over a portion of North Borneo became a legal right. If asserted before that date, it could have been rightly characterized as a political claim. After the act of cession from the Sultanate, the Philippines acquired rights over the territory of North Borneo which the Philippines was duty-bound as a sovereign to protect and preserve.

**The absence of a basis for Malaysian title to North Borneo, Malaysia's recognition of the Philippine claim, and its obligation to settle the North Borneo dispute by peaceful means**

21. Allow me, Mr. President, Members of the Court, to go into some specifics regarding Malaysia's attitude to the Philippine claim. In our pleadings last Monday 25 June 2001, we outlined to the Court as briefly as we could the historical basis of the Philippine claim to certain territories in North Borneo, because the legal basis of that claim is intricately intertwined with that history. As the same time, in doing this, we have shown that the British Government, as well as its successor-in-interest, Malaysia, on the same historical and legal considerations could not have acquired sovereign title to North Borneo.

22. Now, counsel Lauterpacht, tells us that in such an effort "the Philippines misunderstands the basis of British and now Malaysian title to North Borneo". He thus rejected reference to the past and would now rely on contemporaneous support for British and/or Malaysian title. He said "that title is not now dependent in any way upon nineteenth century grants or treaties". Unable to explain how the British Government derived its sovereign title to North Borneo, it is of course convenient for him to dismiss the past.

23. Counsel Lauterpacht enumerated a number of points in an attempt to provide a contemporaneous basis for such assumed title. However, these points are based largely on a misconception of the nature of the Philippine claim.

24. For example, counsel Lauterpacht has charged the Philippines not only of sleeping on its rights since 1946 but of making a claim based on "a hundred years of absence" from North Borneo. In response, we again have to recall our basic proposition that the Philippine territorial claim is based on the transfer of dominion and sovereignty over a portion of North Borneo to the Philippine

Government by the Sultanate of Sulu in 1962. Hence, reference to events and transactions before this cession in 1962 by way of imputing to the Philippines failure to assert territorial rights is misplaced.

25. Secondly, counsel Lauterpacht also refers to a Constitution of 1947 which does not exist, and to a plebiscite on national territory — but there was none.

26. Thirdly, in connection with the 1930 United States-United Kingdom Convention, even if it were timely for the Philippines to have affirmed its territorial claim by refraining from making reference to the said United States-United Kingdom treaty in this Constitution, there was not much good reason to do so, because, as admitted by counsel Lauterpacht, the treaty mentions the "State of North Borneo" as merely "under British protection", not under "British title".

27. Fourthly, counsel Lauterpacht should have referred to the 1935 Constitution which provided reference to the aforementioned United States-United Kingdom treaty, but at that time, the Philippines did not have the status of an independent and sovereign State and could hardly make a claim. Moreover, the 1935 Constitution came about 27 years before the cession of North Borneo by the Sultan of Sulu in favour of the Philippines, and while lease payments were still being made.

28. So now we know that the title of Malaysia over Borneo is fragile, and that the Philippine claim has been asserted at the most appropriate time. What does the history of the claim further tell us about the merits of the claim? According to counsel Lauterpacht, the claim is "so manifestly defective", but if he takes the time to study the Malaysian posture towards the claim, the conclusion we reach is otherwise. Malaysia had, on many occasions not only acknowledged that there is a claim, but that it is a claim that should be settled as soon as possible, and not precluding reference to the International Court of Justice.

29. Thus, in February 1964, the Malaysian Prime Minister reached an understanding with the Philippine President to discuss — according to their communiqué — "as soon as possible the best way of settling the dispute, not precluding reference to the International Court of Justice". In August 1964, the Malaysian and Philippine Governments agreed, in an exchange of aides-mémoires to a meeting of their representatives in Bangkok for the purpose of clarifying the Philippine claim and of discussing the means of settling the dispute. In February 1966, the

Philippines, responding to Malaysia's diplomatic Note reiterating its assurance to abide by the Manila Accord and the Joint Statement, proposed "that both Governments agree as soon as possible on a mode of settlement that is mutually acceptable to both parties". In June 1966, the two Governments, in a joint communiqué, agreed once again to abide by the Manila Accord and the Joint Statement, and they reiterated their common purpose to clarify the Philippine claim and the means of settling it. In August 1968, again in a joint communiqué, the two Governments agreed that talks on an official level would be held as soon as feasible regarding the Philippine claim to Sabah. In May 1968, the two Governments exchanged diplomatic Notes in which they agreed to hold talks on an official level on the Philippine claim and the best means of settling the dispute between them. On the occasion of the Bangkok talks, in July 1968, the Philippine delegation presented the Malaysian delegation with a written question: "Will you discuss with us the modes of settlement of our claim at this conference here in Bangkok, irrespective of your own unilateral assessment of the sufficiency of the clarification given?" The answer of Malaysia was unqualifiedly in the affirmative.

30. These efforts are *not* marked by unilateral acts on the part of the Philippines. They are recorded as undertaken jointly by Malaysia and the Philippines. They repeatedly convey Malaysia's recognition of the existence of a Philippine claim to North Borneo and Malaysia's willingness to settle the dispute occasioned by this claim peacefully and amicably.

31. And last but not the least, what do we make of counsel Lauterpacht's allegation that the Philippines is "unwilling to face up to the implications of proper litigation proceedings to a judgment by which as a party it would be bound"[13]? We only have to check the historical record to prove that his allegation is wrong.

32. What really happened? In the face of the growing demand in the Philippines to take steps towards the enforcement of the Philippine claim to a portion of North Borneo, it was the British Government, in an aide-mémoire to the Philippine Government dated 24 May 1962, who expressed firm resistance — and I quote from the aide-mémoire — "to any claim to part of North Borneo, whether advanced by the Philippine Government or by private persons in the Philippines".

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[13]CR 2001/2, p. 61, para. 25 (Lauterpacht).

This was accompanied by a threat, in the same aide-mémoire, that a public dispute with the Philippine Government about North Borneo — and I quote again from the aide-mémoire — "could impair the present friendly relations between Great Britain and her ally, the Philippine Republic". These are not words that a small new State can treat lightly.

33. In the Anglo-Philippines Talks held in London in February 1963, on the initiative of the Philippines, the Philippine and British delegations devoted extensive discussion to the Philippine claim to North Borneo. In these talks, the Philippines proposed that the legal dispute over North Borneo be submitted to the International Court of Justice. This proposal was reiterated a month later in meetings between the two governments held in Manila. In August 1963, the Philippine Secretary of Foreign Affairs, formally proposed once again submission of the dispute to this Court[14].

34. Again in 1963, the Philippine Secretary of Foreign Affairs sent a Note to the Malaysian Ambassador in Manila requesting assistance "to secure the agreement of the British Government to the submission of the dispute over North Borneo to the jurisdiction of the International Court of Justice". A similar note was addressed to the Indonesian Ambassador in Manila.

35. In a policy statement before the Twenty-Fourth Session of the United Nations General Assembly, the Philippine Secretary of Foreign Affairs reiterated the proposal to submit the claim to North Borneo to the International Court of Justice. The following year in 1970, the Philippine Secretary of Foreign Affairs, again before the United Nations General Assembly, expressed the hope that Malaysia would agree to submit the Philippine claim to North Borneo to the International Court of Justice.

36. Earlier, in October 1968 at the United Nations General Assembly, the Philippines challenged Malaysia to go to the International Court of Justice with the Philippines for the settlement of the claim. This was in response to Malaysia's attack on the Philippine claim, describing it, to quote the Malaysian delegate: "a composite of fantasy, fallacy and fiction". Those are words echoed last Tuesday by counsel Lauterpacht, who described the Philippine claim as a

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[14]It was proposed "that the two governments agree to enter into a special agreement to refer the dispute between them to the International Court of Justice, so that it should decide whether the sovereignty and dominion over North Borneo belong to the Republic of the Philippines or to Her Majesty's Government"; Philippine Note, dated 21 August 1963, addressed to Theo Peters, *Chargé d'Affaires*, British Embassy, Manila. Text in Philippine Claim to North Borneo, Vol. II, Manila: Bureau of Printing, 1968), pp. 112-113.

"pretence" and so "manifestly defective". But what do the facts establish? The "pretence" is Malaysia's avowal that it recognizes the Philippine claim as well as its duty to settle the North Borneo dispute in a peaceful manner.

**Conclusion**

37. Mr. President, Members of the Court. I would like to close by recalling a remark of Mr. Lauterpacht in his presentation to you on Tuesday. He quoted to you a Latin maxim to the effect that *ex factis jus*. It is a chilling and cynical maxim, the very antithesis of law, for what it says is that might makes right. Judge Lauterpacht, formerly of this great Court, said the opposite. His maxim was *ex delicto non oritur jus*. Rights do not rise from delicts. My country believes in international law and has turned to the International Court of Justice with confidence that it is the Court's mission to ensure that law, and not naked power, prevail. Allow me, Mr. President, Members of the Court to request you to hear our Agent, Ambassador Eloy Bello, in his closing statement on behalf of the Republic of the Philippines. Thank you for your kind attention.

Le PRESIDENT : Je vous remercie beaucoup Monsieur le professeur. I now give the floor to Ambassador Eloy Bello, Agent of the Republic of the Philippines.

Mr. BELLO:

1. Mr. President, Members of the Court. On behalf of the Republic of the Philippines, I would like to thank the Court for the opportunity to present my Government's reasons for its Application for permission to intervene in the case concerning *Sovereignty over Pulau Sipadan and Pulau Ligitan*. As I said in my opening remarks, this is a matter of great importance to the Republic of the Philippines and it is deeply conscious, as am I, of the honour to appear before the Court.

2. Counsel for the Philippines have dealt with the legal arguments that have been lodged against our Application to intervene, but one argument by our adversaries involves a political criticism of my Government, to which I feel I am duty bound to respond. It has been alleged, not that the Philippines violated a deadline prescribed by the Court, which is not correct, but rather that it submitted its requests, both for documents and then to intervene, in an untimely way. While our

counsel have refuted that allegation, I should like to say that my Government proceeded in a careful and deliberative manner, consistent with our respect for the Court and our amicable relations with Malaysia and the Republic of Indonesia and our appreciation that intervention in the International Court of Justice is a momentous step. I reject, and I know that the Court will reject, any intimation that the Philippines request is some sort of adventure or part of a political propaganda.

3. On behalf of the Republic of the Philippines, I should like to restate the remedy which my Government requests from the Court in this intervention. Accordingly, we ask for the remedy in Article 85,

— paragraph 1: "the intervening State shall be supplied with copies of the pleadings and documents annexed and shall be entitled to submit a written statement within a time-limit to be fixed by the Court"; and

— paragraph 3: that "the intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention".

As counsel have said, if our examination of the documents dispels the concerns that have been raised by the Special Agreement and several paragraphs in the Malaysian observations, the Philippines will inform the Court of that fact and will not exercise either of the remedies made available to it.

4. Mr. President, Members of the Court, in closing, I wish to invite the attention of the Court to the fact that the Philippine Application for permission to intervene arises out of the broad setting of unsettled territorial disputes in our region which are a dim legacy of Western imperial and colonial rule. This should be a reminder to countries like Indonesia, Malaysia and the Philippines that the meaningful resolution of these issues very much involves the challenge of creatively applying and patiently pursuing legal and pacific approaches to the settlement of inherited political disputes. It is in this context that the Philippines appreciates the role of the Court as doubly significant: providing not only a venue for the authoritative vindication of claims but also a forum for inclusive dialogue and comprehensive conflict resolution in the post-colonial world of the twenty-first century. Thank you, Mr. President, Members of the Court.

The PRESIDENT: Thank you, Mr. Ambassador. Ceci conclut le deuxième tour de plaidoiries de la République des Philippines. La Cour prend acte des conclusions finales dont vous avez donné lecture au nom des Philippines. La Cour se réunira à nouveau demain vendredi 29 juin à 10 heures pour le second tour de plaidoiries de l'Indonésie et de la Malaisie. Je vous remercie. La séance est levée.

*L'audience est levée à 11 h 10.*

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