SEPARATE OPINION OF JUDGE FRANCK

Intervention under Article 62 of the Statute of the International Court of Justice — Interest of a legal nature which may be affected by the decision in the case — Scope of Court's role in determining the "legal nature" of the interest advanced by the Applicant — Whether Philippine claim of historic title over North Borneo amounts to a "legal" interest — Impact of self-determination of the people of North Borneo on historic title.

1. I wholly support the Judgment of the Court and entirely agree with its disposition of the legal issues considered by it.

2. At the same time, I wish to explicate a legal basis for the Court's decision which, while consistent with it, has not been advanced by the Court, perhaps because it was insufficiently advanced by the Parties, although discussed in passing by Malaysia (CR 2001/2, p. 56, para. 10 (Lauterpacht)) and the Philippines (CR 2001/3, p. 23, para. 14 (Magallona)). I shall endeavour to demonstrate why that legal basis is of some importance and why the Court need not have been deterred from making this clear. The point of law is quite simple, but ultimately basic to the international rule of law. It is this: historic title, no matter how persuasively claimed on the basis of old legal instruments and exercises of authority, cannot — except in the most extraordinary circumstances — prevail in law over the rights of non-self-governing people to claim independence and establish their sovereignty through the exercise of bona fide self-determination.

1. The Nature of the "Legal Interest" Claimed by the Philippines

3. In the present case, the Application for permission to intervene admits to having no interest in the precise subject-matter of the case (CR 2001/1, p. 17, para. 2 (Reisman); p. 27, para. 28 (Reisman); see also Diplomatic Note from the Government of the Philippines to the Government of Malaysia dated 5 April 2001, Written Observations of Indonesia, para. 13), which comes before this Court as a territorial dispute over two islands, the ownership of which is contested by Indonesia and Malaysia (Special Agreement jointly notified to the Court by Indonesia and Malaysia on 2 November 1998). The basis of the Philippine intervention, in sharp contrast, is its claim to historic sovereignty over much of North Borneo. The Philippines has sometimes characterized this as a ter-

ritorial claim (CR 2001/3, pp. 23-24, para. 14 (Magallona)) but, in fact, throughout the pleadings it is clear that what the Philippines seeks to protect by intervention is its claim that the sovereign title of the Sultan of Sulu has become the sovereign title of the Philippines (see, for example, CR 2001/1, p. 37, para. 15 (Magallona); CR 2001/3, pp. 25-26, paras. 17-20 (Magallona)). What the Philippines seeks to preserve is not simply its rights in a territorial dispute with Malaysia about a mutual boundary, but its sovereign title to most of what is now a federated Malaysian state. The Philippines states in its Application for permission to intervene that

> "[t]he interest of the Republic of the Philippines is solely and exclusively addressed to the treaties, agreements and other evidence furnished by Parties and appreciated by the Court which have a direct or indirect bearing on the matter of *the legal status of North Borneo*" (para. 4 *(a)*; emphasis added).

The object of the requested intervention is said to be

> "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" (*ibid.*, para. 5 *(a)*).

4. In essence, the Philippine claim is to North Borneo (CR 2001/1, pp. 33-35, paras. 5-9 (Magallona); see also *Philippine Claim to North Borneo*, Vol. 1, 1963, Preface by Emmanuel Pelaez, Vice-President and concurrently Secretary of Foreign Affairs, and pp. 5-38 by President Diosdado Macapagel) and not to bits of it. This is not a boundary dispute to which evidence of historic title and evidence of texts and efficacies might well be relevant. This is, in effect, a claim by the Philippines to one of the federated states of Malaysia. It is in essence a claim to a territory that had been administered as a British dependency, an interest in reversing that territory's decolonization almost 40 years ago.

2. Court's Role in Determining the Philippine Application for Intervention

5. The role of the Court is therefore to determine whether the Philippines claim of title to territories in North Borneo amounts, under international law, to a "legal interest" which justifies its intervention in the main action.

6. What interest does the Philippines advance? It wishes to ensure that this Court is aware of, and duly respects, its interest in sovereignty over

most of North Borneo. In exercising its discretion, the Court must consider, and has considered, whether that interest is sufficient and has been demonstrated. But the Court may also consider whether the interest is one which, even if it had been found both weighty and amply demonstrated, is also an interest that is barred by international law.

7. In making that determination, the Court is not confined to the Parties' submissions. Under Article 62, paragraph 2, of the Statute of the Court, it is for the Court itself to decide whether the applicant-intervener possesses a "legal interest" in the main action to be decided by the Court (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 12, para. 17). That the applicant-intervener has the right and obligation to demonstrate such legal interest does not end the matter. It remains for the Court to satisfy itself that international law does not bar the very interest that the Philippines seeks to have protected.

8. In this regard, it does not matter whether the Parties themselves have fully argued the legality of the interest the Applicant seeks to protect. It is important to draw a distinction between (i) cases in which the Court proceeds to decide issues not raised in the parties' submissions (which would likely be precluded by the *non ultra petita* rule), and (ii) those cases in which, precisely in order to deal correctly with an issue which has been referred to it, the Court must take into account considerations of fact or of law other than those relied upon by the parties (Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, p. 531). The present case falls into category (ii). It is essential — in determining whether the Philippines has a legal interest in protecting its claim of historic sovereignty over most of North Borneo — that the Court take into account all the relevant international law, including the modern law of decolonization and self-determination. The mere fact that this law was but passingly raised by the Parties does not preclude Members of the Court taking judicial notice of the impact of so vital a legal principle, one that profoundly bears on the Applicant's claim to possess a "legal interest". As was stated by the Court in the *Fisheries Jurisdiction* case:

> "The Court . . . as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for

> the law lies within the judicial knowledge of the Court." (*I.C.J. Reports 1974*, p. 9, para. 17.)

While this statement was made in the context of applying Article 53, the principle is equally applicable when giving effect to Article 62.

3. The Impact of Self-Determination on Historic Title

9. Under traditional international law, the right to territory was vested exclusively in rulers of States. Lands were the property of a sovereign to be defended or conveyed in accordance with the laws relevant to the recognition, exercise and transfer of sovereign domain. In order to judicially determine a claim to territorial title *erga omnes*, it was necessary to engage with the forms of international conveyancing, tracing historic title through to a critical date or dates to determine which State exercised territorial sovereignty at that point in time. Under modern international law, however, the enquiry must necessarily be broader, particularly in the context of decolonization. In particular, the infusion of the concept of the rights of a "people" into this traditional legal scheme, notably the right of peoples to self-determination, fundamentally alters the significance of historic title to the determination of sovereign title.

10. Previous judgments of this Court (in particular, its Advisory Opinion of 26 January 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, pp. 31-32, paras. 52-53, and its Advisory Opinion of 16 October 1975 in *Western Sahara, I.C.J. Reports 1975*, pp. 31-33, paras. 54-59) contribute to and recognize the development of the right of non-self-governing peoples to self-determination which "requires a free and genuine expression of the will of the peoples concerned" (*Western Sahara, ibid.*, p. 32, para. 55). The Court recognized in the *Namibia* case that, "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them" (*I.C.J. Reports 1971*, p. 31, para. 52). In the case concerning *East Timor (Portugal* v. *Australia)*, the Court recognized the principle of self-determination to be "one of the essential principles of contemporary international law" (*I.C.J. Reports 1995*, p. 102, para. 29).

11. The decisions of this Court confirm the prime importance of this principle of self-determination of peoples. The firm basis for the principle is also anchored in universal treaty law, State practice and *opinio juris*. Article 1, paragraph 2, of the United Nations Charter indicates that one of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". The principle also finds express and implied

reflection in other provisions of the Charter, namely Article 55, Article 73 and Article 76 *(b)*. Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights provides that "[a]ll peoples have the right of self-determination", and emphasizes in Article 1 (3) that "States Parties to the present Covenant . . . shall respect [the] right [of self-determination], in conformity with the provisions of the Charter of the United Nations".

12. This treaty law has been affirmed, developed and given more tangible form by numerous resolutions of the General Assembly, which have consistently received broad support. General Assembly resolution 637 (VII), adopted on 16 December 1952, was an early recognition that "every Member of the United Nations, in conformity with the Charter, should respect the maintenance of the right of self-determination", a right which was stated to be a "prerequisite to the full enjoyment of all fundamental human rights". The "Declaration on the Granting of Independence to Colonial Countries and Peoples", General Assembly resolution 1514 (XV), adopted without dissent on 14 December 1960, is regarded as fundamental to the process of decolonization. It is applicable to all "territories which have not yet attained independence" and establishes that "[a]ll peoples have the right to self-determination" while insisting that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations". In General Assembly resolution 1541 (XV), adopted with only two dissents on 15 December 1960, the General Assembly contemplated more than one method of self-determination for non-self-governing territories, including "[i]ntegration with an independent State". General Assembly resolution 2131 (XX), "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty", adopted by 109 countries without dissent on 21 December 1965, declared that, "[a]ll States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms". The principle of self-determination was further included among the "basic principles of international law" set out in the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations", adopted by consensus as the Annex to resolution 2625 (XXV) on 24 October 1970. According to this document, "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, *and every State has the duty to respect this right in accordance with the provisions of the Charter*" (emphasis added).

13. The independence of North Borneo was brought about as the

result of the expressed wish of the majority of the people of the territory in a 1963 election. The Secretary-General of the United Nations was entrusted under the Manila Accord of 31 July 1963 with the task of ascertaining the wishes of the people of North Borneo, and reported that the majority of the peoples of North Borneo had given serious and thoughtful consideration to their future and:

> "[had] concluded that they wish to bring their dependent status to an end and to realize their independence through freely chosen association with other peoples in their region with whom they feel ties of ethnic association, heritage, language, religion, culture, economic relationship, and ideals and objectives" (quoted by the Representative of Malaysia to the General Assembly, 1219th meeting, 27 September 1963, *Official Records of the General Assembly, Eighteenth Session*, UN doc. No. A/PV.1219).

14. In 1963, Britain filed its last report to the United Nations on North Borneo as an Article 73 *(e)* Non-Self-Governing Territory (Note by the Secretary-General, *Political and Constitutional Information on Asian Territories under United Kingdom Administration*, UN doc. No. A/5402/Add.4 (4 April 1963)). Thereafter, the United Nations removed North Borneo from the list of colonial territories under its decolonization jurisdiction (see *Yearbook of the United Nations*, 1964, pp. 411-435, which omits North Borneo from the Committee's list of territories), thereby accepting that the process of decolonization had been completed by a valid exercise of self-determination.

15. Accordingly, in light of the clear exercise by the people of North Borneo of their right to self-determination, it cannot matter whether this Court, in any interpretation it might give to any historic instrument or efficacy, sustains or not the Philippines claim to historic title. Modern international law does not recognize the survival of a right of sovereignty based solely on historic title; not, in any event, after an exercise of self-determination conducted in accordance with the requisites of international law, the bona fides of which has received international recognition by the political organs of the United Nations. Against this, historic claims and feudal pre-colonial titles are mere relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium.

16. The lands and people claimed by the Philippines formerly constituted most of an integral British dependency. In accordance with the law pertaining to decolonization, its population exercised their right of self-determination. What remains is no mere boundary dispute. It is an attempt to keep alive a right to reverse the free and fair decision taken almost 40 years ago by the people of North Borneo in the exercise of

their legal right to self-determination. The Court cannot be a witting party to that.

17. In so far as the Philippines has claimed a legal interest in protecting its claim to sovereign title on the basis of the historic rights of the Sultan of Sulu, that legal interest, however fascinating historically, has no modern purchase. It is, beyond reasonable disputation, barred by a legal principle firmly established in modern texts, judicial decisions and State practice. There is no point, therefore, in encouraging its further ventilation. As the Court said in the case concerning the *Northern Cameroons*:

> "The Court must discharge the duty to . . . safeguard the judicial function . . . [Where] adjudication [is] . . . devoid of purpose, . . . for the Court to proceed further in the case would not . . . be a proper discharge of its duties.
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> The answer to the question whether the judicial function is engaged may, in certain cases where the issue is raised, need to wait upon an examination of the merits. In the present case, however, it is already evident that it cannot be engaged." (*Preliminary Objections, Judgment, I.C.J. Reports 1963,* p. 38.)

4. Conclusion

18. To allow the Philippines to proceed to intervene in the merits phase of this case, when the legal interest it claims would have no chance of succeeding by operation of law, cannot discharge the Court's duties. Even if the probity of all the Applicant's evidence were to be wholly confirmed, its interest would still be solely political: perhaps susceptible of historic, perhaps of political, but in any event not of judicial, vindication.

19. For this and for all the other reasons stated in the Court's Judgment, I concur in the decision of the Court.

(Signed) Thomas Franck.