SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN (INDONESIA *v.* MALAYSIA) (Permission to intervene by the Philippines)

Judgment of 23 October 2001

In its Judgment on the Application of the Philippines for permission to intervene in the case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), the Court found that the Application of the Republic of the Philippines, filed in the Registry of the Court on 13 March 2001, for permission to intervene in the proceedings under Article 62 of the Statute of the Court, could not be granted.

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Weeramantry, Franck; Registrar Couvreur.

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Judge Oda appended a dissenting opinion to the Judgment of the Court; Judge Koroma appended a separate opinion to the Judgment of the Court; Judges Parra-Aranguren and Kooijmans appended declarations to the Judgment of the Court; Judges ad hoc Weeramantry and Franck appended separate opinions to the Judgment of the Court.

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The full text of the operative paragraph of the Judgment reads as follows:

"95. For these reasons,

THE COURT,

(1) By fourteen votes to one,

Finds that the Application of the Republic of the Philippines, filed in the Registry of the Court on 13 March 2001, for permission to intervene in the proceedings under Article 62 of the Statute of the Court, cannot be granted.

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Weeramantry, Franck;

AGAINST: Judge Oda."

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History of the proceedings
(paras. 1-17)

The Court recalls that by joint letter dated 30 September 1998, Indonesia and Malaysia filed at the Registry of the Court a Special Agreement between the two States, which was signed in Kuala Lumpur on 31 May 1997 and entered into force on 14 May 1998. In accordance with the aforementioned Special Agreement, the Parties request the Court to "determine on the basis of the treaties, agreements and any other evidence furnished by the Parties, whether sovereignty over Pulau Ligitan and Pulau Sipadan belongs to the Republic of Indonesia or to Malaysia".

The Parties agreed that the written pleadings should consist of a Memorial, a Counter-Memorial and a Reply, to be submitted by each of the Parties simultaneously within certain fixed time limits as well as of "a Rejoinder, if the Parties so agree or if the Court decides ex officio or at the request of one of the Parties that this part of the proceedings is necessary and the Court authorizes or prescribes the presentation of a Rejoinder".

The Memorials, Counter-Memorials and Replies were filed within the prescribed time limit. In view of the fact that the Special Agreement provided for the possible filing of a fourth pleading by each of the Parties, the latter informed the Court by joint letter of 28 March 2001 that they did not wish to produce any further pleadings. Nor did the Court itself ask for such pleadings.

By letter of 22 February 2001, the Philippines, invoking Article 53, paragraph 1, of the Rules of Court, asked the Court to furnish it with copies of the pleadings and documents annexed which had been filed by the Parties. Pursuant to that provision, the Court, having ascertained the

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views of the Parties, decided that it was not appropriate, in the circumstances, to grant the Philippine request.

On 13 March 2001, the Philippines filed an Application for permission to intervene in the case, invoking Article 62 of the Statute of the Court. According to the Application, the Philippine interest of a legal nature which may be affected by a decision in the present case "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". The Philippines also indicated that the object of the intervention requested was:

> "(*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.
>
> (*c*) Third, to appreciate more fully the indispensable role of the Honourable Court in comprehensive conflict prevention and not merely for the resolution of legal disputes."

The Philippines further stated in its Application that it did not seek to become a party to the dispute before the Court concerning sovereignty over Pulau Ligitan and Pulau Sipadan, and that the Application "is based solely on Article 62 of the Statute, which does not require a separate title of jurisdiction as a requirement for this Application to prosper".

As both Indonesia and Malaysia, in their written observations, objected to the Application for permission to intervene submitted by the Philippines, the Court, in June 2001, held public sittings pursuant to Article 84, paragraph 2, of the Rules of Court to hear the views of the Philippines, the State seeking to intervene, and those of the Parties in the case.

At the oral proceedings, it was stated by way of conclusion that:

On behalf of the Government of the Philippines,

at the hearing of 28 June 2001:

> "The Government of the Republic of the Philippines seeks the remedies provided for in Article 85 of the Rules of Court, namely,
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> - 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: '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'."

On behalf of the Government of Indonesia,

at the hearing of 29 June 2001:

> "The Republic of Indonesia respectfully submits that the Republic of the Philippines should not be granted the right to intervene in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*."

On behalf of the Government of Malaysia,

at the hearing of 29 June 2001: "[Malaysia requests] that the Court should reject the Philippines Application."

Timeliness of the Application for permission to intervene
(paras. 18-26)

The Court first addresses the argument of both Indonesia and Malaysia that the Philippine Application should not be granted because of its "untimely nature".

The Court refers to Article 81, paragraph 1, of the Rules of Court, which stipulates that:

> "[a]n application for permission to intervene under the terms of Article 62 of the Statute ... shall be filed as soon as possible, and not later than the closure of the written proceedings. In exceptional circumstances, an application submitted at a later stage may however be admitted."

The Court indicates that the Philippines had been aware that the Court had been seized of the dispute between Indonesia and Malaysia for more than two years before it filed its Application to intervene in the proceedings under Article 62 of the Statute. By the time of the filing of the Application, 13 March 2001, the Parties had already completed three rounds of written pleadings as provided for as mandatory in the Special Agreement — Memorials, Counter-Memorials and Replies — , their time limits being a matter of public knowledge. Moreover, the Agent for the Philippines stated during the hearings that his Government "was conscious of the fact that *after* 2 March 2001, Indonesia and Malaysia might no longer consider the need to submit a final round of pleadings as contemplated in their Special Agreement". Given these circumstances, the time chosen for the filing of the Application by the Philippines can hardly be seen as meeting the requirement that it be filed "as soon as possible" as contemplated in Article 81, paragraph 1, of the Rules of Court.

The Court notes, however, that despite the filing of the Application at a late stage in the proceedings, which does not accord with the stipulation of a general character contained in Article 81, paragraph 1, of the Rules, the Philippines cannot be held to be in violation of the requirement of the same Article, which establishes a specific deadline for an application for permission to intervene, namely "not later than the closure of the written proceedings". The Court recalls that the Special Agreement provided for the possibility of one more round of written pleadings — the exchange of Rejoinders — "if the Parties so agree or if the Court decides so ex officio or at the request of one of the Parties". It was only on 28 March 2001

that the Parties notified the Court by joint letter "that [their] Governments ... ha[d] agreed that it is not necessary to exchange Rejoinders". Thus, although the third round of written pleadings terminated on 2 March 2001, neither the Court nor third States could know on the date of the filing of the Philippine Application whether the written proceedings had indeed come to an end. In any case, the Court could not have "closed" them before it had been notified of the views of the Parties concerning a fourth round of pleadings, contemplated by Article 3, paragraph 2 (*d*), of the Special Agreement. Even after 28 March 2001, in conformity with the same provision of the Special Agreement, the Court itself could ex officio authorize or prescribe the presentation of a Rejoinder, which the Court did not do. The Court therefore concludes that it cannot uphold the objection raised by Indonesia and Malaysia based on the alleged untimely filing of the Philippine Application.

Failure to annex documentary or other evidence in support of the Application
(paras. 27-30)

The Court notes further that Article 81, paragraph 3, of the Rules of Court provides that an application for permission to intervene "shall contain a list of documents in support, which documents shall be attached". After referring to the observations of Indonesia and the Philippines on this point, the Court confines itself to observing that there is no requirement that the State seeking to intervene necessarily attach any documents to its application in support of its claims. It is only where such documents have in fact been attached to the said application that a list thereof must be included. It follows that the Philippine Application for permission to intervene cannot be rejected on the basis of Article 81, paragraph 3, of the Rules of Court.

The Court therefore concludes that the Philippine Application was not filed out of time and contains no formal defect which would prevent it from being granted.

Alleged absence of a jurisdictional link
(paras. 31-36)

The Court recalls that, under the terms of Article 62 of the Statute:

> "1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
>
> 2. It shall be for the Court to decide upon this request."

As a Chamber of the Court has already had occasion to observe:

> "Intervention 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, namely the parties to the case. It is not intended to enable a third State to tack on a new case ... An incidental proceeding cannot be one which transforms [a] case into a different case with different parties." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, pp. 133-134, paras. 97-98)

Moreover, as that same Chamber pointed out, and as the Court itself has recalled:

> "It ... follows ... from the juridical nature and from the purposes of intervention that the existence of a valid link of jurisdiction between the would-be intervener and the parties is not a requirement for the success of the application. On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party." (Ibid., p. 135, para. 100; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Application to Intervene. Order of 21 October 1999, I.C.J. Reports 1999*, pp. 1034-1035, para. 15)

Thus, such a jurisdictional link between the intervening State and the parties to the case is required only if the State seeking to intervene is desirous of "itself becoming a party to the case". The Court finds that that is not the situation here. The Philippines is seeking to intervene in the case as a non-party.

Existence of an "interest of a legal nature"
(paras. 37-83)

In relation to the existence of an "interest of a legal nature" justifying the intervention, the Court refers to the Philippines contention that:

> "Under Article 2 of the Special Agreement between Indonesia and the Government of Malaysia, the Court has been requested to determine the issue of sovereignty over Pulau Ligitan and Pulau Sipadan 'on the basis of treaties, agreements and any other evidence' to be furnished by the Parties. The 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. The legal status of North Borneo is a matter that the Government of the Republic of the Philippines considers as its legitimate concern."

The Court also recalls that the Philippines refers to the fact that access to the pleadings and to the annexed documents filed by the Parties was denied to it by the Court. It contends that it therefore could not "say with any certainty whether and which treaties, agreements and facts are in issue". The Philippines asserts that as long as it does not have access to the documents filed by the Parties and does not know their content, it will not be able to explain really what its interest is.

The Philippines emphasizes that "Article 62 does not say that the intervening State must have a 'legal interest' or 'lawful interest' or 'substantial interest'", and that the "threshold for the invocation of Article 62 is, as a result, a

subjective standard: the State requesting permission to intervene must 'consider' that it has an interest". The Philippines asserts that "[t]he criteria are not to *prove* a legal or lawful interest, but to 'identify the interest of a legal nature' and 'to show in what way [it] may be affected'". The Philippines further indicates that the statements made by Indonesia and Malaysia during the public hearing "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". It submits that, on the basis of that part of the record to which it has been allowed access, "the probability of consequences for the interests of the Philippines meets the 'may' requirements of Article 62 and justifies Philippine intervention".

The Philippines points out that it "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", that "the 1930 Agreement cannot be construed in any way as an instrument of cession", and that "Britain could not have acquired sovereignty over Pulau Sipadan and Pulau Ligitan by virtue of the interpretation placed by Malaysia on the 1930 United States-United Kingdom Agreement"; it follows from this that "the two islands in question were acquired by the United Kingdom in 1930 for and on behalf of the Sultan of Sulu". The Philippines further states 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", and that its "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".

The Philippines concludes that:

> "Any claim or title to territory in or islands near North Borneo that assumes or posits or purports to rest a critical link on the legitimate sovereign title of Great Britain from 1878 up to the present is unfounded. Similarly, the interpretation of any treaty, agreement or document concerning the legal status of North Borneo as well as islands off the coast of North Borneo which would presume or take for granted the existence of British sovereignty and dominion over these territories has no basis at all in history as well as in law and, if upheld by the Court, it would adversely affect an interest of a legal nature on the part of the Republic of the Philippines."

For its part, Indonesia denies that the Philippines has an "interest of a legal nature". It states that "the subject matter of the dispute currently pending before the Court is limited to the question whether sovereignty over the islands of Ligitan and Sipadan belongs to Indonesia or Malaysia". It recalls that on 5 April 2001, the Philippines sent a diplomatic Note to Indonesia in which, referring to the ongoing case between Indonesia and Malaysia, it wished to reassure the Government of Indonesia that the Philippines does not have "any territorial interest on Sipadan and Ligitan islands". Indonesia contends that "It is evident from this [note] that the Philippines raises no claim with respect to Pulau Ligitan and Pulau Sipadan" and maintains that

> "The legal status of North Borneo is not a matter on which the Court has been asked to rule. Moreover, the desire of the Philippines to submit its view on various unspecified 'treaties, agreements and other evidence furnished by the Parties' is abstract and vague."

With reference to the question of the Philippine interest of a legal nature which may be affected by the decision in the case, Malaysia argues that

> "[t]hat legal interest must be precisely identified, then compared with the basis of [the Court's] jurisdiction as it appears from the document of scisin, in the present instance the Special Agreement"

and contends that:

> "the Philippines does not indicate how the *decision* ... that the Court is asked to take on the issue of sovereignty over Ligitan and Sipadan might *affect* any specific legal interest. It is content to refer vaguely to the 'treaties, agreements and other evidence' on which the Court might 'lay down an appreciation'. But ... the interest of a legal nature must, if affected, be so affected by the *decision* of the Court and not just by its *reasoning*. Such appreciation as the Court may be led to make of the effect of a particular legal instrument, or of the consequences of particular facts, as grounds for its decision cannot, in itself, serve to establish an interest of a legal nature in its decision in the case."

Malaysia further contends that "the issue of sovereignty over Ligitan and Sipadan is completely independent of that of the status of North Borneo", and that "[t]he territorial titles are different in the two cases".

The Court sets out by considering whether a third State may intervene under Article 62 of the Statute in a dispute brought to the Court under a special agreement, when the State seeking to intervene has no interest in the subject matter of that dispute as such, but rather asserts an interest of a legal nature in such findings and reasonings that the Court might make on certain specific treaties that the State seeking to intervene claims to be in issue in a different dispute between itself and one of the two Parties to the pending case before the Court.

The Court first considers whether the terms of Article 62 preclude, in any event, an "interest of a legal nature" of the State seeking to intervene in anything other than the operative decision of the Court in the existing case in which the intervention is sought. From an examination of the English and French texts of that Article, the Court concludes that the interest of a legal nature to be shown by a State seeking to intervene is not limited to the *dispositif* alone of a judgment. It may also relate to the reasons which constitute the necessary steps to the *dispositif*.

Having reached this conclusion, the Court then considers the nature of the interest capable of justifying an intervention. In particular, it considers whether the interest

of the State seeking to intervene must be in the subject matter of the existing case itself, whether it may be different and, if so, within what limits.

The Court observes that the question of whether a stated interest in the reasoning of the Court and any interpretations it might give as an interest of a legal nature for purposes of Article 62 of the Statute, can only be examined by testing whether the legal claims which the State seeking to intervene has outlined might be affected. Whatever the nature of the claimed "interest of a legal nature" that a State seeking to intervene considers itself to have (and provided that it is not simply general in nature) the Court can only judge it "*in concreto* and in relation to all the circumstances of a particular case". Thus, the Court proceeds to examine whether the Philippine claim of sovereignty in North Borneo could or could not be affected by the Court's reasoning or interpretation of treaties in the case concerning Pulau Ligitan and Pulau Sipadan. The Court adds that a State which, as in this case, relies on an interest of a legal nature other than in the subject matter of the case itself necessarily bears the burden of showing with a particular clarity the existence of the interest of a legal nature which it claims to have.

The Court recalls that the Philippines has strongly protested that it is severely and unfairly hampered in "identifying" and "showing" its legal interest in the absence of access to the documents in the case between Indonesia and Malaysia and that it was not until the oral phase of the present proceedings that the two Parties publicly stated which treaties they considered to be in issue in their respective claims to Pulau Ligitan and Pulau Sipadan. The Court observes, however, that the Philippines must have full knowledge of the documentary sources relevant to its claim of sovereignty in North Borneo. While the Court acknowledges that the Philippines did not have access to the detailed arguments of the Parties as contained in their written pleadings, this did not prevent the Philippines from explaining its own claim, and from explaining in what respect any interpretation of particular instruments might adversely affect that claim.

In outlining that claim the Philippines has emphasized the importance of the instrument entitled "Grant by Sultan of Sulu of territories and lands on the mainland of the island of Borneo" (hereinafter "the Sulu-Overbeck grant of 1878"). This instrument is said by the Philippines to be its "primal source" of title in North Borneo. The Philippines interprets the instrument as a lease and not as a cession of sovereign title. It also acknowledges that the territorial scope of the instrument described in its first paragraph ("together with all the islands which lie within nine miles from the coast") did not include Pulau Ligitan and Pulau Sipadan.

The Court observes, however, that the Philippine claims as shown on the British map submitted to the Court by the Philippines during the oral proceedings, do not coincide with the territorial limits of the grant by the Sultan of Sulu in 1878. Moreover, the grant of 1878 is not in issue as between Indonesia and Malaysia in the case, both agreeing that Pulau Ligitan and Pulau Sipadan were not included in its reach. Also, the question whether the 1878 grant is to be characterized as a lease or a cession does not form part of the claim to title of either Party to the islands in issue. Neither Indonesia nor Malaysia relies on the 1878 grant as a source of title, each basing its claimed title upon other instruments and events. The burden which the Philippines carries under Article 62, to show the Court that an interest of a legal nature may be affected by any interpretation it might give or reasoning it might adduce as to its "primal source" of title, is thus not discharged.

The Philippines supplements its contention that sovereignty of North Borneo was retained by the Sultanate of Sulu by means of cited extracts from British State papers of the late nineteenth century and the first part of the twentieth century. The Court observes however that neither of these agreements is regarded by the Parties to the main proceedings as founding title to Pulau Ligitan and Pulau Sipadan.

Certain other instruments to which the Court was referred by the Philippines do appear to have a certain relevance not only to the Philippine claims of sovereignty in North Borneo, but also to the question of title to Pulau Ligitan and Pulau Sipadan. The Philippine interest in the 20 June 1891 Convention, concluded between Great Britain and the Netherlands for the purpose of defining boundaries in Borneo, lies in noting that while the Convention set boundaries defining "Netherlands possessions" and "British Protected States", the "State of North Borneo" was indeed one of the British Protected States. However, in resolving the interpretation of Article 4 of that Convention, the Court has no need to pronounce upon the precise nature of the British interests lying to the north of latitude 4° 10', mentioned in this article. Notwithstanding that the 1891 Convention may be said to have a certain relevance for Indonesia, Malaysia and the Philippines, the Philippines has demonstrated no legal interest that could be affected by the outcome or reasoning in the case between Indonesia and Malaysia.

The precise status of the legal ties in 1907 as addressed in the Exchange of Notes on 3 July and 10 July 1907 between Great Britain and the United States, relating to the administration of certain islands on the east cost of Borneo by the BNBC, is not central to Malaysia's claims. Accordingly, no interest of a legal nature that requires an intervention under Article 62, to present their interpretation of the 1907 Exchange of Notes, has been shown by the Philippines.

The Court also notes that the 1930 Convention between Great Britain and the United States, regarding the boundary between the Philippine Archipelago and North Borneo, has as its particular object the determination of which of the islands in the region "belong" to the United States on the one hand and to the State of North Borneo on the other. This Convention does not appear to the Court at this stage of the proceedings to concern the legal status of the principal territory of North Borneo.

The Court further finds that any interest that the Philippines claims to have as to references that the Court

might make in the case between Indonesia and Malaysia to the 1946 North Borneo Cession Order in Council is too remote for purposes of intervention under Article 62.

The Court considers that the Philippines needs to show to the Court not only "a certain interest in ... legal considerations" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1981*, p. 19, para. 33) relevant to the dispute between Indonesia and Malaysia, but to specify an interest of a legal nature which may be affected by reasoning or interpretations of the Court. The Court has stated that a State seeking to intervene should be able to do this on the basis of its documentary evidence upon which it relies to explain its own claim.

Some of the instruments which the Philippines has invoked, and the submissions it has made as to them, may indeed have shown a certain interest in legal considerations before the Court in the dispute between Indonesia and Malaysia; but as regards none of them has the Philippines been able to discharge its burden of demonstrating that it has an interest of a legal nature that may be affected, within the sense of Article 62. The Philippines has shown in these instruments no legal interest that might be affected by reasoning or interpretations of the Court in the main proceedings, either because they form no part of the arguments of Indonesia and Malaysia or because their respective reliance on them does not bear on the issue of retention of sovereignty by the Sultanate of Sulu as described by the Philippines in respect of its claim in North Borneo.

The precise object of the intervention
(paras. 84-93)

In respect of "the precise object of the intervention" which the Philippines states, the Court first quotes the three objects cited above.

As regards the first of the three objects stated in the Application of the Philippines, the Court notes that similar formulations have been employed in other applications for permission to intervene, and have not been found by the Court to present a legal obstacle to intervention.

So far as the second listed object of the Philippines is concerned, the Court, in its Order of 21 October 1999 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Application to Intervene*, recently reaffirmed a statement of a Chamber that:

> "[s]o far as the object of [a State's] intervention is 'to inform the Court of the nature of the legal rights [of that State] which are in issue in the dispute', it cannot be said that this object is not a proper one: it seems indeed to accord with the function of intervention" (*I.C.J. Reports 1999, p. 1034, para. 14*).

As to the third object listed in its Application, the Court observes that every occasional mention was made of it during the oral pleadings. But the Philippines did not develop it nor did it contend that it could suffice alone as an "object" within the meaning of Article 81 of the Rules. The Court therefore rejects the relevance under the Statute and Rules of the third listed object.

The Court concludes that notwithstanding that the first two of the objects indicated by the Philippines for its intervention are appropriate, the Philippines has not discharged its obligation to convince the Court that specified legal interests may be affected in the particular circumstances of this case.

Dissenting opinion of Judge Oda

Judge Oda voted against the operative part of the Judgment, as he firmly believed that the Philippine request for permission to intervene in the case between Indonesia and Malaysia should have been granted.

He recalled the four previous rulings given on applications for permission to intervene under Article 62 of the Statute, in 1981, 1984, 1990 and 1999. He stated that his position had remained unchanged throughout these four cases. In his view, Article 62 of the Court's Statute should be interpreted liberally so as to entitle a State, even one not having a jurisdictional link with the parties, which shows "an interest of a legal nature which *may* be affected by the decision in the case" to participate in the case as a *non-party*. He recalled that he had also enunciated that view in a lecture given to the Hague Academy of International Law in 1993.

Judge Oda was further of the view that where participation as a *non-party* is permitted, it is not for the intervening State to prove in advance that its interest will be affected by the decision in the case. He considered that without participating in the merits phase of the case, the intervening State has no way of knowing the issues involved, particularly when it is refused access to the written pleadings. Thus, if a request for permission to intervene is to be rejected, he considered that the burden should be placed on the parties to the principal case to show that the interest of the third State will not be affected by the decision in the case.

In Judge Oda's view, the question of whether, in fact, an intervening State does or does not have an interest of a legal nature can only be considered in the merits phase. He said that after having heard the views of the intervening State in the main case, the Court might, after all, find in some cases that the third State's interest will not be affected by the decision in the case.

Judge Oda then went on to say that present proceedings had been dealt with in a way widely at variance with the foregoing. The Philippines had learned of the subject matter of the dispute between Indonesia and Malaysia specified in Article 2 of the Special Agreement of 31 May 1997, but still did not know how the two Parties would present their position concerning sovereignty over the two islands. At best, the Philippines could speculate that its interests in North Borneo *might* be affected depending on what Indonesia and Malaysia would say in the principal case about the two islands. As a result of the objections by

Indonesia and Malaysia, the Philippines had been refused access to the Parties' written pleadings and thus was still not in a position to know whether or not its interests may, in fact, be affected by the decision of the Court in the principal case. In seeking permission to intervene, all the Philippines could do, as it did in its Application, was to make known its claim to sovereignty in North Borneo, which *may be* affected by the decision in the case.

Judge Oda considered that the burden was not on the Philippines but on Indonesia and Malaysia to assure the Philippines that its interests would not be affected by the Judgment to be rendered by the Court in the principal case. He questioned whether it was really reasonable — or even acceptable — for Indonesia and Malaysia to require the Philippines to explain how its interest *may* be affected by the decision in the case, while they concealed from it the reasoning supporting their claims in the principal case. He said that at the time it filed its Application for permission to intervene, and at least until the second round of oral pleadings, the Philippines could not have known how the respective claims of Indonesia and Malaysia to the two islands in question would relate to its own claim to sovereignty over North Borneo. He stated that the whole procedure in this case struck him as being rather unfair to the intervening State. He believed that the argument concerning "treaties, agreement and any other evidence" could not, and should not, have been made until the Philippines had been afforded an opportunity to participate in the principal case.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma stated that, although he had supported the Judgment, he could not express unqualified adherence to some of the positions reached in the Judgment.

From his perspective, the wider meaning given by the Court to "decision" in Article 62 as including not only the *dispositif* but the reasoning of the Judgment, though it may not be wrong, is not free from creating doubts and difficulties and could restrain the Court from declaring the law or giving full interpretation to the legal instrument or issues before it in a particular case, for fear that a previous interpretation of a legal instrument may come to haunt it in a future claim yet to be submitted to it.

In Judge Koroma's view, it is the role of the Court, in performing its judicial function to declare the law and every case should be decided on its merits, taking into consideration all the issues of law and fact before it. For him, the Court's decision resides in the *dispositif*, as it is the *dispositif* which embodies the findings of the Court in response to the submissions made by parties in a particular case. He also observed that whether an application to intervene in a particular case is successful or not, the decision of the Court in that particular case cannot be considered *res judicata* for a State not a party to the dispute before the Court and in the light of Article 59 of the Statute of the Court that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case".

If the decision is considered non-binding for a State not a party to the dispute, it follows that the Court's reasoning cannot be considered of a binding nature either.

Judge Koroma concluded that Article 62 should therefore not have been interpreted in such a way that it may prevent the Court from properly performing its judicial function or require a State to exercise undue vigilance regarding the reasoning of the Court in reaching its decision in a case in which that State is not a party.

Declaration of Judge Parra-Aranguren

Notwithstanding his vote for the operative part of the Judgment, Judge Parra-Aranguren considers it necessary to state that, in his opinion, Article 62 of the Statute refers only to the *dispositif* part of the Judgment in the main case. The findings or reasoning supporting the future Judgment of the Court in the main case are not known at this stage of the proceedings. Therefore, it is impossible to take them into consideration, as the majority maintains (para. 47), in order to determine whether they may affect the legal interest of the State seeking for permission to intervene. Consequently, Judge Parra-Aranguren cannot agree with other paragraphs of the Judgment which, after examining certain documents, conclude that the Philippines' legal interest may not be affected by their interpretation.

Declaration of Judge Kooijmans

Judge Kooijmans fully concurs with the Court's finding that the Philippines has not demonstrated that its legal interest may be affected by the Court's decision in the case between Indonesia and Malaysia on sovereignty over Pulau Ligitan and Pulau Sipadan and that consequently its Application for permission to intervene cannot be granted.

He is, however, of the opinion that the Court could and should have given more attention to the requirement it formulated itself, when it said that the Philippines "must explain with sufficient clarity its own claim to North Borneo and the legal instruments on which it is said to rest" (paragraph 60 of the Judgment). He feels that the Philippines, by not addressing highly relevant issues which were raised during the oral proceedings, failed to provide the Court with sufficient clarity regarding its claim and that the Court should have said so explicitly.

This point is not only of importance from a legal point of view, it also has practical implications.

It is sometimes said that third-party intervention basically is at odds with the system of consensual jurisdiction; in order to allay fears that States might be less inclined to submit disputes to the Court if they run the risk of a third State being granted too easily permission to intervene, the Court should for reasons of judicial policy give special attention to the specificity of the legal interest mentioned in Article 62, paragraph 1, of the Statute and to the plausibility of the claim which is at its origin.

Separate opinion of Judge ad hoc Weeramantry

Judge Weeramantry agreed with the decision of the Court but considered this an appropriate occasion to examine the question of intervention in international law because of the dearth of judicial authority on the question and the increasing importance of intervention procedures will acquire in the more closely interrelated world of the future. The opinion examines the wide discretion of the Court under Article 62 and the principles to be extracted from comparisons and contrasts between domestic and international law relating to intervention. It notes value of such principles to the Court in the exercise of its discretion under Article 62. The opinion concludes with observations on the problem of a jurisdictional link, an interest of a legal nature, the precise object of intervention, the lateness of the intervention and the confidentiality of pleadings.

Separate opinion of Judge ad hoc Franck

Judge Franck agrees with the Judgment of the Court and with its reasoning. He adds, however, that the Philippine Application is also barred by a supervening legal principle: the right of non-self-governing people to exercise their right of self-determination. This right has been confirmed by treaties, judgments of this Court and resolutions of the General Assembly. It is, quite simply, pre-eminent in modern international law.

In the instance of North Borneo's decolonization, Judge Franck believes, this right was implemented in 1963 through elections observed by the representative of the United Nations Secretary-General, who certified the fairness and conclusiveness of the popular choice made by the voters in favour of federation with Malaysia. This was acted upon by the United Nations General Assembly's Committee on Non-Self-Governing Territories.

In Judge Franck's view, the Court is bound to take judicial notice of the momentous international legal development brought about by the adoption and implementation of the right of self-determination. Accordingly, whatever interest the Philippines might have inherited from the Sultan of Sulu — even were it to be fully demonstrable — cannot now be held to prevail over a validated exercise of so fundamental a right. Since the claim is barred by law, the Philippines cannot possibly be said to have a legal interest in further ventilating it in this forum.