DECLARATION OF JUDGE BENNOUNA

[Translation]

1. Although I voted in favour of the operative clause of the Judgment, I am not entirely convinced by all the Court's reasoning. That is why I thought it might be useful to explain my thinking by means of this declaration.

2. In general, whenever the Court has had to rule on a territorial dispute rooted in the colonial period of which the current protagonists are more or less victims, it has been faced with a real dilemma. This is why it has often wondered whether that period should be viewed through the lens of concepts current at the time, and which are those of the dominant colonial Powers, or whether it should reinterpret them in the light of subsequent developments in international law, above all since the adoption, in 1960, of United Nations General Assembly Declaration 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples, regarded as the decolonization charter. While that concerns the problem of the application of international law in time, or "intertemporal law", here that problem arises in a situation not of the simple development of the rules and principles but of a genuine break characterized by the advent of the right of peoples to self-determination and the definitive condemnation of the distinction, perhaps dating back to the Roman Empire, between so-called "civilized" and so-called "barbarian" peoples, the former being destined to rule the latter.

3. So it is understandable that the Court should have shown some hesitation about venturing into the realm of colonial law as such for possible conclusions to the present situation, for fear that, as the principal judicial organ of the United Nations, the finger might be pointed at it for having sanctioned or legitimized this law *a posteriori*. This is how it found itself having to reinterpret the "mandate" system instituted by the League of Nations in favour, precisely, of the right of peoples to self-determination:

> "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and

> this the Court, if it is faithfully to discharge its functions, may not ignore." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, para. 53.)

4. This same desire to interpret and apply certain concepts of colonial law in the light of the upheavals the world has seen with the phenomenon of decolonization and the emergence of a large number of new States onto the international stage led the Court to reassess the concept of *terra nullius* in its Advisory Opinion of 16 October 1975 in the *Western Sahara* case: "the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*" (*Advisory Opinion, I.C.J. Reports 1975*, p. 39, para. 80).

5. From this the Court concluded that "in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers" (*ibid.*, p. 39). It was accepted that colonial law introduced the category of *terra nullius* to organize the apportionment of a number of non-European territories, which were open to colonization and thus regarded as "without a master", the inference being without a declared European master. As E. Milano rightly noted:

> "*terra nullius* was used as a device to justify control and jurisdiction of areas, which were very often populated by indigenous people, who were not considered equals. Much of the international law of those times was based on the idea of the standard of civilization, by which an entity could enter into the realm of international society. Such standards were nearly exclusively European, and they did not allow the participation of any other form of social organisation." (E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, 2006, p. 72.)

6. Moreover, whether colonization was by agreement with local tribes or not had no bearing on the title to the territory of the European Power concerned, as the Court would emphasize in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria*. After pointing out that "during the era of the Berlin Conference the European Powers entered into many treaties with local rulers" and that "Great Britain concluded some 350 treaties with the local chiefs of the Niger delta" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 404, para. 203), the Court adds:

> "Even if this mode of acquisition does not reflect current international law, the principle of intertemporal law requires that the legal consequences of the treaties concluded at that time in the Niger delta be given effect today, in the present dispute." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 405, para. 205.)

This same ambiguity, under cover of intertemporal law, is reflected in the way the structure of non-European States is taken into account in the colonial period, since the Court has accepted their specificity while nevertheless submitting them to the Westphalian criteria of sovereignty. I needed to draw attention to these hesitations between colonial law and contemporary law, which the mere reference to intertemporal law is insufficient to justify, in order to explain how far I could not fully share the Court's reasoning in this case between Malaysia and Singapore on the issue of sovereignty over certain islets in the Straits of Singapore.

7. Hence the Court, on the assumption "that it is not disputed that the Sultanate of Johor, since it came into existence in 1512" (Judgment, para. 52), established itself as a sovereign State with a "certain" though indeterminate territorial domain under its sovereignty, took the view that its authority was exercised through ties of "allegiance" with the "Orang Laut, who inhabited or visited the islands in the Straits of Singapore, including Pedra Branca/Pulau Batu Puteh" (*ibid*., para. 79).

8. The special structure of Johor (predecessor of Malaysia) in the colonial period was discussed in this case by reference to the Advisory Opinion on *Western Sahara* (*ibid*., paras. 76-79), according to which:

> "That the Sherifian State at the time of the Spanish colonization of Western Sahara was a State of a special character is certain. Its special character consisted in the fact that it was founded on the common religious bond of Islam existing among the peoples and on the allegiance of various tribes to the Sultan, through their caids or sheikhs, rather than on the notion of territory." (*I.C.J. Reports 1975*, p. 44, para. 95.)

9. The Court, having thus paid tribute to the special character of the Moroccan State in 1884, which was part of a different history to that enshrined in Europe by the Treaties of Westphalia in the seventeenth century, nevertheless took no account of this as regards the proofs of sovereignty, since it ultimately decided to base itself on the proofs of effective and continuous control over the territory.

10. In the case which concerns us, Malaysia also based itself on the "ties of loyalty that existed between the Sultanate and the Orang Laut, 'the people of the sea'" (Judgment, para. 70). From this the Court concluded that

> "the Sultan of Johor's authority exercised over the Orang Laut who

> inhabited the islands in the Straits of Singapore, and who made this maritime area their habitat, confirms the ancient original title of the Sultanate of Johor to those islands, including Pedra Branca/Pulau Batu Puteh" (Judgment, para. 75).

Is the meaning here that this sovereignty of Johor, founded on a historic title and on the loyalty of the peoples, will be protected from the vicissitudes of relations between the European Powers in the region? Apparently not, since the Court accepts that the Anglo-Dutch Treaty of 1824, delimiting spheres of influence in the region, resulted in the dismemberment of the old Sultanate of Johor and the creation of two Sultanates, of Johor and of Riau-Lingga, in the context of the rivalry between the two colonial Powers "vying for hegemony . . . in this part of the world" (*ibid*., para. 98). These practices were also well known in Africa, in the nineteenth century for example, when the ancient kingdoms were carved up between European Powers.

11. As for the Sultanate of Johor, under the Crawfurd Treaty of 2 August 1824, it would have to cede the island of Singapore and the surrounding islands within 10 miles to the East India Company under British control. On the basis of the preparations for the construction of a lighthouse on Pedra Branca in the 1840s, the Court went on to examine the conduct of Johor and the Singapore authorities in order to determine whether the sovereignty of the first country over the islet concerned passed to the second. The Court embarked on this analysis, although there was no independent expression of will either in Johor, whose sovereignty revealed itself to be fictitious, or *a fortiori* in Singapore, a British colony. While it is true that the two Parties, before the Court, each sought to draw advantage from the colonial history, is that any reason to follow them on this ground? Did the Court not decline to hold that South Ledge, a low-tide elevation, could not form the object of an autonomous appropriation, detached from the delimitation of the territorial sea, even though this had been argued by the two Parties?

12. Admittedly, when the Court is expressly mandated to pass judgment on the basis of *uti possidetis juris*, as in a number of territorial disputes between African or Latin American countries, it is hard for it not to venture into colonial law, even if only to assess what the administrative boundaries drawn by the colonial Power or Powers were on the attainment of independence by the two Parties to the dispute before it. But this is not so in this case between Malaysia and Singapore, in which the Court held that the critical date for Pedra Branca was 14 February 1980, and 6 February 1993 for Middle Rocks and South Ledge.

13. Hence, it is the conduct of Singapore following independence in 1965 after its separation from the Federation of Malaysia, constituted in 1963, and the conduct of that State itself, which will be decisive for determining sovereignty with respect to the islands concerned, in other words

for almost 15 years in the case of Pedra Branca and 28 years for Middle Rocks and South Ledge. For all that period, we are here dealing with two independent States in control of their own foreign relations. The Court would thus have avoided losing its way in the labyrinth of the colonial night and its numerous fictions and among the shadowy figures of its alleged actors. On the critical dates the Court fixed, the result would in any case have been the same.

14. Relating the practice for over a century, from the mid-nineteenth to the mid-twentieth century, the Court finds only that Great Britain did as it pleased on Pedra Branca without a thought for the title of sovereignty over this islet. It is nevertheless significant that the 1953 correspondence, of which much is made in the Judgment (paras. 192-229) as proof of the acceptance by the Parties of Singapore's sovereignty (para. 229), was exchanged between the British Colonial Secretary of Singapore (Singapore being a British colony) and the Acting Secretary of State of Johor (Great Britain having control of that country's defence and foreign relations).

15. It is difficult to draw any conclusion from the Court's summary of all these colonial practices in the settlement of the dispute submitted to it by special agreement in 2003, and concerning which it ought, in my view, essentially to have relied on the conduct of the Parties as independent States. The legal categories of the colonial period cannot be recycled to make them presentable today as though it were just a matter of words.

(Signed) Mohamed BENNOUNA.