THE PHILIPPINES' CLAIM TO SABAH

Its Historical, Legal and Political Implications

M. O. ARIFF



Oxford in Asia Current Affairs

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Y.A.B. Tun Haji Abdul Razak bin Dato Hussein, S.M.N.

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To

The People

of Sabah (North Borneo)

PERKHIDMATAN ARKIB NEGARA MALAYSIA
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C O R R I G E N D U M

Pages	Columns	Paragraphs	Lines	Amendments
ix	2	2	6	add after the word "book" - "to both Tan Sri Haji Abdul Kadir bin Yusof, PMN, PJK, Attorney-General, Malaysia who had taken his valuable time to read my original manuscript and kindly written a Forward, and to Dato' Salleh bin Abas DPMT, JMN, SMT, the Solicitor-General, Malaysia who had given me his blessing for the publication of this book I wish to express my many thanks."
10		(iv)	3	delete the word "Born".
18		1	7	insert "in" between the words "and" and "perpetuity".
32	2	3	6	print the words "American claim through the Brunei Sultanate" in italic.
40		2	14	substitute "1878" for "1873" before the word "Agreement".
45		2		print the word "the" after the word "so" in small alphabet. Substitute comma for fullstop after the word "so".
53	2		20	substitute the word "complete" for "compelte".
66	2	2	11	delete the word "politi".

FOREWORD

Ever since I knew Enche Mohamed Ariff bin Dato' Othman in his student days in England I have observed his keen interest in international law. When the need to establish an International Law & Foreign Affairs Division in the Attorney-General's Chambers arose he was specially chosen to do a two-year postgraduate course in International Law at Cambridge University where he had earlier graduated in law. Subsequently, he was awarded a Certificate of the Council of Legal Education in International Law after having been called to the Bar at Lincoln's Inn.

I was therefore extremely delighted when subsequently I received news from him in Cambridge that he had chose this particular subject, 'The Historical, Legal and Political Aspects of the Philippine Claim to Sabah (North Borneo)', as his dissertation for the Diploma in International Law course which he was undertaking. In choosing this subject I note that he was fully aware of the need to avoid indulging in impassionate polemics or special pleadings. Coming from the pen of a citizen of a country which is a party to the recent dispute, it must have been difficult for this work to be completely unbiased. It is therefore remarkable that he has succeeded in making his work free of cant and of any appearance of bias. The main reason, I think, is that this is a research study for his diploma and not for an official publication on behalf of the Government of Malaysia. As such, I am confident that this learned work will be greatly appreciated by those who profess a true concern not only for the welfare of the peoples of Malaysia and the Philippines but also for the maintenance of peace and security of the South-East Asian region.

Enche Ariff's work is, perhaps, the first full-length and up-to-date study by a Malaysian of the current dispute between Malaysia and the Philippines that attempts to explain objectively, in a logical and analytical fashion, the points of view of both parties based on the historical, legal and political aspects of the dispute. The work is comprehensive. The task of marshalling all the necessary facts of the case and the relevant authorities to support the principles of international law involved appears to be a considerable undertaking. His views and conclusions, I observe, are mature and sound. I feel this book would be of great interest not only to the student of international law as such, but also to members of the general public and to those readers who wish to know and learn more about the dispute which at present seems to threaten the peace of the South-East Asian region. It is a useful attempt by the author, to quote him, to 'alleviate the anxiety that might very well surround such a territorial dispute' between the two countries. Although the author's approach is academic, I feel the book makes lively and interesting reading.

Tan Sri Haji Abdul Kadir Bin Yusof
PMN, PJK
Attorney-General, Malaysia

Kuala Lumpur
14 November 1968

PREFACE

In April 1962, while the concept of an enlarged Federation of Malaysia embracing the former colonies of North Borneo (Sabah)[1] and Sarawak, the Protected State of Brunei and the self-governing island state of Singapore and the Federation of Malaya was being debated, the Philippine Government[2] issued an official announcement of the Philippine claim to Sabah. This announcement came as a surprise to most, if not all, of the Malayan people, both the private individuals as well as the official circles. It threw into consternation the leaders of Malaya and Singapore as well as those of the three Borneo States.[3]

The concept of the Federation of Malaysia had already sparked off a short-lived revolt by Sheik Azahari in the British Protected State of Brunei. Moreover, since several treaties, conventions and agreements concluded by Great Britain on behalf of the North Borneo Company had affected, among other things, the State boundaries, the announcement of the Philippine claim naturally complicated the issue and imposed further strains on the political situation in the South-East Asian region.

For international lawyers, who are only too eager to seek the legal basis of the Philippine claim, since it came at a time when international order had been firmly established and the *status quo* seemed permanent and beyond challenge, this belated claim posed a very interesting international legal problem which represented a stimulating intellectual exercise. At this time, I had to present a paper for the Diploma in International Law and I felt that the Philippine claim would be an appropriate subject for my dissertation. It was a great challenge, and the practical experience of studying the problem was useful for any postgraduate research student. Above all, the result could embody a useful attempt to clarify the situation and alleviate the anxiety that might very well surround such a territorial dispute. The encouragement of Mr. E. Lauterpacht, my supervisor, provided me with even greater impetus and helped to allay my doubts that I would not prove capable of the task, and to overcome my fear that there would not be available a sufficient amount of relevant material to work on.

Having decided that I had chosen the right subject, the first step in the undertaking was to choose a title appropriate for the dissertation. Finally a title which read 'The Historical, Legal and Political Aspects of the Philippine Claim to Sabah (North Borneo)' was phrased with the blessing of Dr. D.W. Bowett.

The next step was to find the relevant documents and materials for the subject. My task was considerably simplified by the invaluable information found in Mr. E. Lauterpacht's *The Contemporary Practice of the United Kingdom in the Field of International Law*, which also provided a useful framework for my own research. It is not surprising therefore that the layout of Chapter I should be considerably influenced by the sequence of events set out in Mr. Lauterpacht's work.

I further sought the guidance of Dr. Clive Parry who introduced me to the relevant papers and historical documents relating to the affairs of Sulu and North Borneo as contained in the Parliamentary Papers.[4] After months of careful study and patient analyses of the relevant documents and materials I was at last ready to consult Professor R.Y. Jennings whose profound knowledge of and guidance on the subject of the acquisition of territories (among other things) was of no little help in putting me on the right track.

Consequently my task grew considerably lighter day by day. Aided by close supervision, constructive criticism and the kind encouragement of Mr. Lauterpacht, who had the unenviable task of reading the first draft of my work, I was able to pursue with increasing interest my research on the subject which at the beginning had seemed so difficult, if not impossible, and quite beyond my ability to tackle. To him, therefore, I owe a great debt of gratitude.

To him and to all those persons who so kindly gave me help and guidance, which I badly needed at the outset, I wish to express my gratitude. To

the librarians of the Squire Law and University Libraries and in particular to Mr. Steiner of the Squire Law Library, whose help and assistance have facilitated my research effort, I am most grateful.

My thesis for the Diploma in International Law was submitted and approved by the Degree Committee of the Faculty of Law, University of Cambridge, in June 1967. I wish here to record my thanks to the University for releasing lien on the thesis, which was to form the nucleus of this book.

After June 1967, however, there have been some significant developments on the dispute in the international political arena. General elections were held in the independent and sovereign Malaysian state of Sabah in 1967; a talk at official level was held in Bangkok from 17 June-15 July 1968 between the Governments of Malaysia and the Philippines. There has been respective withdrawals of diplomats from the capitals of Malaysia and the Philippines. The Philippines have also passed a statute re-defining the baselines of the territorial sea of the Philippine Archipelago. Under this new law, the Philippines acquired for themselves dominion and sovereignty over the territorial sea around Sabah. This has resulted in further withdrawal of the last few remaining Malaysian diplomatic representatives in Manila.[5] These developments have necessitated my adding a chapter on 'The Modes of Settlement' in order to bring the book up-to-date and accommodate the events which had developed since I last put my pen down in June 1966.

M.O. Ariff

The Attorney-General's Chambers,
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November 1968

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2. A map of British North Borneo, 1886

3. A map of British North Borneo, 1894

4. A map of the state of North Borneo, 1919

5. State of Sabah, 1962

ABBREVIATIONS

AC	Appeal Committee or Appeal Court
AER	*All England Report*
AJIL	*American Journal of International Law*
AO	Advisory Opinion
BYBIL	*British Yearbook of International Law*
FO	Foreign Office
ICJ	*International Court of Justice (Report)*
JCL	*Journal of Common Law*
JRASMB	*Journal of the Royal Asiatic Society Malayan Branch*
LJ	*Law Journal*
LNOJ	League of Nations Official Journal
PCIJ	Permanent Court of International Justice
PRO	Public Records Office
QB	Queen's Bench Division
RIAA	*Report of the International Arbitral Award*
RIAT	*Report of the International Arbitral Tribunal*
SR & O	Standing Rules and Orders
UN Doc.	United Nations Documents

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1. Anglo-Norwegian Fisheries case (1951)
   ICJ Report p.184
2. Baden-Baden Agreement (1949)
   RIAA UN Vol. III p.564
3. Brazilian Loan case (1929)
   PCIJ Series A No. 2 p.114
4. British Guiana Boundary Arbitration (1904)
   BFSP Vol. 99 pp.782-833.
5. The Chamizal Arbitration (1911)
   AJIL
6. Columbia-Venezuela (1922)
   Annual Digest 1919-22 Case No. 54
7. Duff Development Company v. Government of Kelantan (1924)
   Appeal case p.797
8. Government of Morocco v. Laurence
   Annual Digest 1920-30 Case No. 75
9. Gouldenberg v. Roumania (1928)
   RIAA UN Vol. 11 1949 p. 907
10. In the Bathori (1933)
    P. 22
11. In the Aalands Islands Dispute (1920)
    League of Nations Official Journal, Special Supplement, pp. 3-19
12. Island of Palmas Arbitration (1928)
    RIAA UN Vol. II
13. John H. Williams v. Venezuela (1903)
    More on Arbitration Case, 1903, p. 4196
14. Legal Status of Eastern Greenland (1933)
    PCIJ Report Series A/B No. 53 pp.45-6.
15. Lusitania case (1923-4)
    Annual Digest case No. 198 p.340
16. Mighell v. Sultan of Johore (1894)
    Q.B. p.149
17. Miniquiers Case
    ICJ Pleading Vol. 2 pp. 68-69
18. Mixed Arbitral Tribunal in Kunkel *et al.* v. Polish State (1925-6)
    Annual Digest Case No. 279
19. On the Nationality Decree in Tunis and Morocco
    ICJ Report Series B No. 4
20. Reparation Commission v. German Government (1924)
    Annual Digest 1923-4 Case No. 199
21. Rex v. Crewe (1910)
    LJ 847
22. Right of United States' Nationals in Morocco (1952)
    ICJ Report p.185
23. Roman-German Mixed Arbitral Tribunal (1926)
    RIAT
24. Sch. v. Germany (1931-2)
    Annual Digest Case No. 206
25. Sultan of Johore v. Abu Bakar (1952)
    I *AER* p. 1261
26. Witzenhoffer v. Germany
    Annual Digest 1925-6 Case No. 278

1
The Background to the Dispute

The Territory under Dispute

The Philippine claim to North Borneo has been pressed with varying degrees of vigour over the past few years, and the fact that the issue is at rest for the moment does not deprive the attendant legal problems of their inherent interest.

The claim made by the Philippine Government was over the 'sovereignty, jurisdiction and proprietory ownership, as successor to the heir of the Sultan of Sulu', of the whole territory of the former British Crown Colony of North Borneo,[1] now the independent sovereign state of Sabah and one of the constituent states of the Federation of Malaysia.[2] The geographical extent of this disputed territory is about 29,388 square miles.[3] It comprises the total areas of the present West Coast, Interior, Sandakan and Tawau Residencies which were specified in the 1877-8 grants and commissions to Gustavus Baron de Overbeck and Alfred Dent co-jointly and their heirs, successors, associates or assignees, by Sultan Mumin and Pengiran Temmengong of Brunei and Sultan Al Alam of Sulu.[4] It also includes the islands of Banggi and Balembangan and the territories subsequently acquired by the British North Borneo (Chartered) Company in the grants and cessions of 1884-1903.[5]

The territories specified in the 1877-8 grants and commissions, together with the islands of Balembangan and the river territories subsequently acquired by the British North Borneo (Chartered) Company between 1883 and 1885, were called Dent, Keppel, Alcock and East-Coast Provinces.[6] Between 1885-9 more river territories were added to those already acquired by the Company in the previous grants and commissions. Altogether they formed one territorial unit with a total area of about 31,000 square miles and comprised what was in 1894 called the Dent, Keppel Cunliffe, Alcock, Dewhurst, Martin, Elphistone, Myburgh and Mayne Provinces.[7] The Sibuco River (now part of the Indonesian state of Kalimantan) named in the 1877-8 grant and commissions was the southern boundary limit. The adoption of a parallel latitude of 4° 10″ South, to the north of the Sibuco River, as the final boundary between the British North Borneo and the Dutch possessions to the South by the Anglo-Dutch Treaty of 1915, reduced the territory into its present geographical area.[8] This comprised, in 1919, the West Coast, the Interior, Kudat, Sandakan and the East-Coast Residencies including the islands of Banggi (Banguay) and Balembangan (Balambangan).[9]

In the Brunei grants and commissions of 1877,[10] which are not disputed by the Philippines, the territories assigned to Overbeck and Dent *et al.* were the whole of North Borneo. This comprised the West Coast, Sandakan, Tawau, as well as the Interior Residencies, including those to the South of the Sulaiman River i.e. the harbours and the coast of Gaya, Spangar, the District of Papar, Benoni and Kimanis on the west to Sibuco on the east. On the other hand, though the Sultan of Sulu in fact owned the country from Kimanis to Balik Papan, south of Sibuco River (i.e. the territories ceded to the Sulu Sultanate in 1704 by the Sultan of Brunei),[11] the actual territories granted to Overbeck and Dent *et al.* in the 1878 grants and commissions (now disputed by the Philippines) extended only from the Padassan River on the West Coast to the Sibuco on the east, including the harbours of Muludu and Sandakan and the Bays of Darvel and Sibuco.[12] Therefore

the geographical extent of the territory granted to Overbeck and Dent *et al.* in the 1878 grants somewhat overlapped with part of the territories referred to in the 1877 Brunei grants and commissions and correspond roughly to part of the present West Coast, Sandakan and Tawau Residencies and the Island of Banggi areas, but excluding the Interior Residency.[13] Legally the territories disputed by the Philippines should be confined only to those which are the subject of the 1878 grants and commissions i.e. the east-coast territories, including the part of the territory of the Indonesian Kalimantan between the Sibuco River and the present boundary between Sabah and Kalimantan, and the claim should not cover the whole of the present territory of North Borneo, otherwise there would be some contradiction between the various parts of the Philippine Government's claims.

The Parties to the Dispute

On 22 June 1962, whilst North Borneo was still a British Crown Colony, the Philippines preferred their claim against the United Kingdom Government.[14] The basis of their claim, among others, was that

> ... the sovereignty over the Territory had remained vested in the Sultanate of Sulu. The occupation of the territory first by Messrs. Overbeck and Dent [*et al.*] and later by the British North Borneo Company had been occupation by lessee or an administrator, not occupation by an owner or sovereign.

The subsequent possession of the Territory by the United Kingdom Government, the successor to the British North Borneo Company, was also possession by a lessee or administrator, not possession by an owner or sovereign.[15] The Philippines alleged that in 1957, Sultan Esmail Kiram (though the last Sultan of Sulu in the long line of the Sultanate died only in 1936)[16] had issued a proclamation cancelling the 'lease' granted to Overbeck and Dent *et al.* in 1878 and had vested the Philippines with the sovereignty and domain over North Borneo, as successor-in-interest of the Sulu Sultanate.[17]

The United Kingdom-Philippine talks in London failed to settle the dispute,[18] and as a result of the formation of Malaysia on 16 September 1963[19] the new Federation inherited the United Kingdom's external sovereighty over North Borneo.[20] This dispute is therefore at present one between the Republic of the Philippines and the Federation of Malaysia.

The basic issue is whether the Philippines or Malaysia is sovereign over the territory. As each of the respective contending States claims to have derived its territorial sovereignty through devolution, the solution to the dispute depends on the answer to the question: which one of the predecessors of the contending States was sovereign over North Borneo? Was it the United Kingdom, the heirs of the Sulu Sultanate or the United States, as successor to Spain? *Prima facie*, the issue is therefore between the right of sovereignty of the United Kingdom, as predecessor in title to Malaysia and that of the United States, as predecessor to the Philippines. However, the matter is further complicated: first, by the fact that the United States was itself the successor of Spain; and second, by the consideration that one of the heirs of the last Sultan of Sulu claims to have retained his independent sovereignty throughout and to have only recently transferred his sovereignty directly to the Philippines. If, as alleged by the Philippines, the Sulu Sultanate had retained its sovereignty over the territory, or alternatively, if the United States was the successor to the Spanish sovereignty over the Sulu, the Philippines could claim territorial sovereignty either through the Sultan by virtue of the alleged recent cession to the Philippines[21] and/or through the United States by virtue of the treaty of inheritance.[22]

The United Kingdom too had acquired her sovereignty over the territory through devolution. The territories, which were jointly granted to Overbeck and Dent *et al.* in the 1877-8 grants and commissions and subsequently changed hands[23] were eventually ceded by the Company to the Crown under the Agreement of 26 June 1946. As from 15 July 1946 they were annexed to, and formed part of, the British dominions and was called the Colony of North Borneo. Indeed, as indicated in Chapter II below, there is a continuous chain of documentary evidence stretching from 1877 to 1946 upon which the United Kingdom could base her territorial sovereignty.

The legal basis of the United Kingdom's territorial sovereignty over the territory and the basis of the Philippine claim; the grounds for the Philippine challenge to the United Kingdom's sovereignty, which involves the interpretations of the terms of the Sulu and the Brunei grants

and commissions of 1877-8 and the grants and cessions of 1883-1946, are discussed in Chapter III. In addition, or as an alternative to the various grants and cessions, it is also necessary to consider whether the United Kingdom had acquired a prescriptive title to sovereignty over the territory as a result of her continuous display of authority and *de facto* and *de jure* control over the territory for this considerable length of time. This is discussed in Chapter V.

Nevertheless any assumption that the United Kingdom could not have acquired sovereignty over the territory under the 1877-1946 grants, commissions and cessions and/or the principle of prescription does not necessarily affect Malaysia's existing sovereignty over the territory. Malaysia's sovereignty was acquired not only through devolution by virtue of the treaty of cession[24] (discussed in Chapter VI below) but also through the principle of self-determination.[25] Indeed, there is ample evidence of this principle at every stage of the formation of Malaysia, at municipal (state) as well as at international levels. It was under such a principle that North Borneo accelerated its own independence and later formed one of the constituent states of Malaysia together with the other eleven independent sovereign states of the former Federation of Malaya. The basis of, and the evidence for the application of this principle are also discussed in Chapter VI.

[1] The Resolution of the Philippine House of Representatives of 1950; See also: N.G. Rama 'Congressman Diosaldo Macapagal in North Borneo', *Philippine Free Press,* 21 April 1962, pp. 6, 90-91; for full text of the Resolution see *Philippine Claim to North Borneo*, Manila, Bureau of Printing, 1964, Vol. I, pp. 144-6, App. No. 26; the Special Statute *ex abundante cautela* of the Philippine Congress stating that any possible extension of the Philippine Consular relations in Singapore to North Borneo was no waiver of the Philippine claim to North Borneo; the Ramos Resolution of the Philippine House of Representatives of 24 April 1962, calling for the recovery of certain portions of the Island of Borneo and adjacent islands which appertain to the Philippines. For full text of the Resolution, see *Philippine Claim to North Borneo,* op.cit. p. 149, App. No. 28; the Philippine Aide-Memoir of 22 June 1962 to the UK Ambassador in Manila. See also *Contemporary Practice of the United Kingdom in the Field of International Law*, 1962, by E. Lauterpacht, Vol. II pp. 176-7; and the *Philippine Claim to North Borneo,* op.cit. pp. 151-3, App. No. 30; Statement of the Philippine Secretary for Foreign Affairs at the Plenary Meeting of the UN General Assembly on 27 September 1962; The Statement of the Philippine delegate to the debate in the UN General Assembly 17th Session 1177th Plenary Meeting, 27 November 1962, Prov. Verbatim Records A/P. V. 1177th, pp. 51-52; the Statement of the Philippine Representative during the debate in the Fourth Committee of the General Assembly, A/C–4/SR. 1420, pp. 14-16, 12 December 1962; Statement of the Philippine Vice-President Emmanuel Palaez at the opening Meeting of the Anglo/Philippine Talks of 28 January 1963, for full text of which see *Philippine Claim to North Borneo*, op.cit. pp. 8-20; State-of-the-Nation message of the Philippine President Diosaldo Macapagal, for excerpt see ibid. pp. 5-7.

[2] See *The Malaysia Agreement Concluded Between the Federation of Malaya, United Kingdom of Great Britain and Northern Ireland, North Borneo, Sarawak and Singapore.*

[3] *Statemen's Year Book 1965-1966,* ed. by S.H. Steinberg, p. 489; see Map I. Much was completed and drawn by the Directorate of Overseas Surveys.

[4] Hereinafter the names Gustavus Baron de Overbeck and Alfred Dent, their heirs, successors, associates or assigns will be abbreviated as Overbeck & Dent, *et al.* The terms, grants and commissions of the Sultan and Pengiran Temenggong of Brunei and the Sultan of Sulu will be abbreviated as the 1877-8 grants or sometimes as the Brunei and Sulu grants and commissions.

For the English version of the original Malay text see S.G. Maxwell and W.S. Gibson, *Treaties and Engagements affecting the Malay States and Borneo,* London, 1924, pp. 154-83. See also *The Laws of North Borneo*, Vol. VI by G.B. Kellagher, 1953, pp. 3-37; Parliamentary Papers Vol. LXXXI, 'The Affairs of the Sulu, 1882,; and Map I.

[5] See pp. 8-10 below. The English version is in Maxwell & Gibson, op.cit. pp. 172-83, and Kellagher, op.cit. pp. 23-37.

[6] See Map II. This map of North Borneo in 1886 was compiled from the English Admiralty Charts and from 'Surveys and Explorations' of F.X. Witti, W.B. Pryer, F. Hatton, H.J. Walker and D.D. Daly, published by E. Standford for the British North Borneo Company.

[7] See Map III. This map of North Borneo in 1894 was also compiled from the same sources as Map II, and brought out by the same publishers.

[8] K.G. Tregonning, *A History of Modern Sabah, 1881-1963,* 2nd edition, Singapore, University of Malaya Press, 1965, p. 23.

[9] See Map IV. This map of the State of Borneo, 1919, was published by the Standford Geographical Establishment.

[10] For English version of the original Malay text see Maxwell & Gibson, op.cit. pp. 154-6, and pp below, and also Kellagher, op.cit. pp. 3-6.

[11] Tregonning, op.cit. and A. Dalrymple, *A Full and Clear Proof that the Spaniards Can Have No Claim to Balembangan,* London, 1774, p. 31.

[12] For the English version of the original Malay text see Kellagher, op.cit. pp. 7-8; Maxwell & Gibson, op.cit. pp. 58-59; Letter No. 118 from the British Acting Consul-General Treacher at Labuan to the Earl of Darby, *Parliamentary Papers,* Vol. LXXXI, op.cit.

[13] See Map I.

[14] The Philippine Aide-Memoir of 22 June 1962 on the North Borneo Question, to the British Ambassador in Manila: For full text see the notes of the *Philippine Claim to North Borneo,* op.cit. pp. 151-3, Appendix No. 30 and also E. Lauterpacht, op.cit. pp. 176-7. See also Malaysia, *Malaya-Philippines Relations,* Kuala Lumpur, 1963, Appendix IV p. 22.

[15] The Statement of Edward Quantero, Philippine Representative, during the debate in the fourth Committee of the UN General Assembly A/C, 4/SR, 1420, pp. 14-16, 12 December 1962.

[16] See *Philippine Claim to North Borneo,* op.cit. p. 28.

[17] Statement of the Philippine delegate during the debate in the UN General Assembly, 17th Session, 1177th Plenary Meeting 17 November 1962, Provisional Verbatim Records, A/P 1177 pp. 51-52. For full text of the Proclamation by the Sultan of Sulu dated 25 November 1957, terminating the lease of 1878, see *Philippine Claim to North Borneo,* op.cit. pp. 147-8, Appendix No. 27. Statement of the Vice-President Emanuel Palaez, the Secretary for Foreign Affairs at the Opening Meeting of the UK/Philippine talks held in London between 24 January and 1 February 1963, published in the *Philippine Claim to North Borneo*, op.cit. pp. 8-20 and also in the *Philippine International Law Journal* (January-June 1963) pp. 323-4.

[18] The Philippine and UK Governments held talks in London between 25 January and 1 February 1963 dealing with, among other things, the Philippine claim. The talks failed to resolve the dispute. In a communique, signed by the leaders of the two delegations, both Governments agreed, on the recommendation of a Legal Committee to which the question was referred, to exchange copies of certain documents for the purpose of further clarification of the issue. See Lauterpacht, op.cit. p. 188; Keesing's Contemporary Archives, 1963-1964, 'North Borneo, Philippine Territorial Claims', 'UK/Philippine talks on Security Situation in South-East Asia and Philippine Claim to North Borneo', London, January 1963, p. 19266A and 19261A.

[19] Keesing's *Contemporary Archives,* 18-25 August 1963, 'Malaysia Agreement on Establishment of Malaysia Federation in 1963'; K.G. Tregonning, *Malaysia*, Donald Moore, Singapore, 1965, pp. 45-46; Harry Miller, *A Story of Malaysia*, London, Faber & Faber, 1965, pp. 39, 53.

[20] Art. V of the *Malaysia Agreement* of 9 July 1963 provides that the Government of the United Kingdom was to be relinquished by Act of Parliament, the sovereignty and jurisdiction in respect of North Borneo and the other constituent states and vest it on the Federation of Malaysia.

[21] The Declaration of the Government of the Republic of Philippines. (See Footnote 1 to this Chapter.)

[22] USA Declaration of the Philippine Independence, 4 July 1946. For full text of the Proclamation see *BFSP,* Vol. 146, p. 899.

[23] I.e. first acquired by Dent's North Borneo Provisional Association from Overbeck in 1881, and later devolved on the British North Borneo (Chartered) Company, together with those territories acquired by the Company itself under the grants and commissions of 1883-1903.

[24] *The Malaysia Agreement of 9 July 1963,* in particular Art. V.; Keesing's *Contemporary Archives,* 12 August 1963, 'Agreement on Establishment of Malaysia and Federation in 1963; Tregonning, *Malaysia*, op.cit. pp. 45-6,[2] pp. 241-7; Miller, op.cit., pp. 39-53.

[25] At a Tripartite Summit Meeting of the Heads of States of the Republics of Indonesia and the Philippines and the Prime Minister of the former Federation of Malaya held in Manila in August 1963, an agreement was reached between them that there was to be prior determination of the wishes of the people of Sarawak and North Borneo by the UN Secretary-General or his representatives according to the principle of self-determination as embodied in the UN General Assembly Resolution 1540, Appendix (f). See Keesing's *Contemporary Archives*, p. 19715A and Malaysia, 'Malaya-Philippine Relations, 1957-1963, pp. 11-12.

2
Documented Basis of the British Title to Sabah

1. Treaties and Engagements affecting Sabah prior to the 1877-8 Grants and Commissions

The 1763 Treaty of Cession between Sultan Amir of Sulu and the British East India Company

In the Treaty of 1763, Sultan Amir of Sulu ceded his Borneo possessions to the East India Company. This consisted of the land from the River Kimanis on the north-west coast and River Kinabatangan on the north-east coast, which he had acquired from the Sultan of Brunei in 1704,[1] together with the islands of Balembangan and Palawan.[2] However in 1805, the Company's trading settlement at Balembangan was abandoned and there appears to have been no territorial claim by the United Kingdom on the basis of this treaty.

The 1847 Treaty between the Sultan of Brunei and the British Government

The island of Labuan was ceded by the Sultan of Brunei to Great Britain in 1846. This cession was ratified by treaty in 1847.[3] By this treaty the Sultan undertook not to alienate the island or any of his territorial possessions on the mainland of Borneo without the consent of the British Government.[4]

The 1850 and 1865 treaties between Sultan Omar Ali of Brunei and the American Trading Company

In 1865 the American Trading Company of Borneo too succeeded in obtaining a concession of a large tract of North Borneo territory, together with the islands of Balembangan and Palawan, which Claude Lee Moses, the American-General, had earlier secured from Sultan Omar Ali of Brunei. This right was additional to their having freedom of trade, their right as United States citizens to acquire property in Brunei, and the right of the most favoured nations treatment, already conferred on the United States by the Treaty of 1850.[5] However, the Company's settlement, the 'Ellena' at Kimanis, was later abandoned. In February 1880, Commander Schufeldt of the United States navy attempted to stake a territorial claim against the Sultan on the basis of this treaty but without success.[6] Thereafter no further territorial claim was preferred by the United States on the basis of this treaty.

Legal Significance of the Treaties of 1763-1865

Apart from this attempt by Commander Schufeldt to assert territorial claim on behalf of the United States Government, there appears to have been no other formal claim, and the British Government did not seem to have forced territorial claims to North Borneo on the basis of their Treaty of 1763. Nevertheless, with the conclusion of the Treaty of 1847 between the Sultan of Brunei and the British Government, the British sphere of interest became firmly established in certain parts of the Sultan's possessions in Borneo. Further, the treaties of 1865 proved to be the forerunner, and indeed the foundation of, the subsequent treaties of grants and cessions through which Overbeck and Dent gained their footing in North Borneo, and upon which, in turn, the British title to the territory subsequently rested.

2. The 1877-8 Grants and Commissions

The three grants by Sultan Mumin of Brunei on 29 December 1877[7]

When Joseph W. Torrey, the President of the American Trading Company, found that he

lacked the capital to revive the 1865 concession, he sold his rights to the Austria/Hungary Consul-General in Hong Kong, Gustavus Baron de Overbeck, for a sum of $15,000, in January 1877.[8] On 21 June 1877, Overbeck secured a renewal of the concession for ten years from the Pengiran Temenggong of Brunei for $1,000. However, the refusal of the Sultan to endorse the document (on the advice of the British Consul-General of Brunei, Hugh Low) compelled Overbeck and Alfred Dent, his partner, to secure an entirely new concession from the Sultan himself.[9] On 29 December 1877 Overbeck and Alfred Dent acquired from Sultan Mumin of Brunei, in three grants, the following territories:

(i) ... all the territory and land on the west coast of Borneo comprising Gaya Bay from Gaya Head to Loutot Point including Spangar Bay and Gaya Bay and Spanger Island Gaya Island and all other islands within the limits of the harbour and within three marine leagues of the Coast [including] the provinces and territory of Pappar adjoining the Province of Benomi ... in consideration of the sum of $4,000 per annum;[10]

(ii) ... all the territories from the Sulaiman River on the north-west coast of the island containing twenty-one states together with the island of Banguey and all other islands within three marine leagues of the coast.... in consideration of the sum of $6,000 per annum; and

(iii) ... all the territories comprising the states of Paitan, Sugut, Bangaya, Labuk, Sandakan, Kinabatangan, Mumiang, and all the territories as far as the Sibuco River with all the islands within three leagues of the coast ...

which were 'declared vested in the said Baron de Overbeck and Alfred Dent their successors or assigns for so long as they shall chose and desire to hold ...'. In consideration of these grants, Overbeck and Alfred Dent promised to pay severally and co-jointly to the Sultan, his heirs or successors, the fixed annual compensation of $2,000.[11] In those grants the Sultan reserved the right to resume the control and government of these territories if the fixed annual payment was not paid for three successive years.

The grant by Pengiran Temenggong of Brunei of 29 December 1877[12]

From Pengiran Temenggong of Brunei, Overbeck and Dent acquired the grant of 'the provinces of Kimanis and Benoni on the north-west coast of Borneo with all the islands, belonging thereto, within three marine leagues of the coast', in consideration of the sum of $3,000 per annum. These provinces were also declared 'vested in the said Baron de Overbeck and Alfred Dent, their heirs, associates successors or assigns for as long as they shall choose or desire to hold them'. Unlike the Sultan's grant this grant contained no proviso on the right of the Pengiran Temenggong to resume control and government of the territory for non-payment of the fixed annual compensation by the grantees.

Commission from the Sultan of Brunei appointing Overbeck as Maharaja of Sabah and Raja of Gaya and Sandakan, 29 December 1877[13]

In addition to the grants the Sultan also appointed, by commission; Gustavus Baron de Overbeck the Supreme Ruler of the territories, and granted to him the titles of Maharaja of Sabah and Raja of Gaya and Sandakan. He was also vested with the power of life and death over the inhabitants and with all the absolute rights of property including the rights to their disposal. In addition the Sultan also delegated to him all other 'powers and rights usually exercised by and belonging to sovereign rulers'.[14] The commission further declared that in the case of the death or retirement from office of the Maharaja, 'his duly-appointed successor in the office of Supreme Ruler and Governor-in-Chief of the Company's territories in Borneo shall likewise succeed to the office and title of Maharaja of Sabah and Raja of Gaya and Sandakan.'

Grant by Sultan Jamal Al Alam of Sulu on 22 January 1878[15]

Overbeck soon learned that the north-east coast of Borneo, a large portion of the territory ceded to him in the Brunei grants, was in fact in the possession of the Sultan of Sulu. He decided to secure a further grant from the Sultan. Consequently in January 1878 Overbeck and Alfred Dent acquired from Sultan Jamal Al Alam, in consideration of the sum of $5,000 per annum, the grant and cession of

... all the territories and lands on the mainland of the island of Borneo, commencing from the Padassan River on the north-west coast and extending along the whole coast as far as the Sibuco River in the South and comprising among others the States of Paitan, Sugut, Bangaya, Labuk, Sandakan, Kinabatangan, Mimiang, and all the other territories and States to the southward thereof bordering on Darvel Bay and as far as the Sibuco River with all the islands within three marine leagues of the coast...

As in the previous grants from the Sultan and Pengiran Temenggong of Brunei, the territory granted were also 'declared vested on the said Baron de Overbeck and Alfred Dent co-jointly their heirs, associates, successors or assigns for as long as they choose or desire to hold them'. As in the Pengiran Temenggong's grant there was no provision concerning the Sultan's right of resumption of the control and government of the specified territories should the annual compensation not be paid for three successive years. Instead there were two additional restrictive clauses. One stipulated that the 'rights and privileges conferred by the grant shall never be transferred to any other nation or company of foreign nationality without the sanction of the British Consul-General of Borneo'. The other provided that any disputes between His Highness the Sultan, his heirs or successors, and Overbeck or his company should be submitted for settlement to Her Majesty's Consul-General for Borneo.[16]

Commission from Sultan of Sulu appointing Overbeck as Bendahara and Raja of Sandakan, 22 January 1878[17]

In addition to the grant, the Sultan also conferred on Gustavus Baron de Overbeck the title of Supreme and Independent Ruler of the territories, and, with the title of Dato Bendahara and Raja of Sandakan together he had absolute power of life and death over the inhabitants and all absolute rights of property over the soil of the country. He had the sole power of legislation, coining money, creating an army and navy, and all other powers and rights usually only exercised by and belonging to sovereign rulers. These rights were moreover declared delegated to him by the Sultan of his own free and sovereign will.

The Sultan also proclaimed the appointment of Overbeck as Dato Bendahara and Supreme Ruler to all foreign nations with whom he had negotiated friendly treaties or formed alliances and commanded all the *datoos* (ministers), nobles governors, chiefs and people owing allegiance to him, to receive and acknowledge the Dato Bandahara as Supreme Ruler and to obey his commands and respect his authority as his own. As in the 1877 Brunei commission the title of Dato Bandahara and Raja of Sandakan and all the power and rights which went with the titles were to pass to Overbeck's duly-appointed successor in office on Overbeck's death or retirement from office.

3. Royal Charter, Grants, Cessions, Boundary Treaties Affecting Sabah after the 1877-8 Grants and Commissions

Overbeck's original object was the disposal of the concessions (the right of which was acquired under the above grants) to the Austrian Government.[18] Although it would appear that he was entitled to do so under the 1877 grants and commission, the 1878 Sulu grant stated that 'any transfer to other nations or Company of foreign nationality is subject to the prior sanction of the British Government'.

The interference of W.H. Treacher at Labuan[19] and the lack of capital compelled Overbeck to sell all his rights to Alfred Dent who then went on to acquire all the remaining interests of the former American Trading Company of Borneo.[20] From thenceforth, all the interests and powers of the grantees under the 1877-8 grants and commissions became vested in Alfred Dent. With Overbeck and Torrey out of the venture, Dent's company acquired a purely British nationality. He then formed a Provisional Association and transferred to it all his interests and powers in consideration for a sum of £120,000 in order to acquire a Royal Charter to promote a British company and to develop the North Borneo territories.[21] Dent's application for a Royal Charter was approved by letters patent granted on 1 November 1881.

The Royal Charter of 1 November 1881[22]

The Royal Charter empowered the Company to acquire by purchase or other lawful means from the British North Borneo Provisional Association Ltd. the full benefit of the several grants and commissions or of any one of them, including all interests and powers vested in that Association, over or affecting the territories specified in the several grants and any territories, lands or property in Borneo or in any island lying nearby, including Labuan. It also empowered the Company to hold and utilize these territories within the purposes specified in the terms of the Charter.[23] The Charter then went on to stipulate that the Company, as representing the original grantees under the several grants, should be bound to fulfil the promises made in the grants and commissions,[24] and must remain British in

character and domicile.[25] It had not the power to transfer wholly or in part the benefit of the grants and commissions except with the consent of one of the Principal Secretaries of State.[26] Should differences arise between the Sultans of Brunei and Sulu and the Company, the Company was bound to submit the case to the decision of the British Secretary of State if he was willing to decide on it.[27] The appointment of the British Company's representatives in Borneo was to be subject always to the approval of the Secretary of State.[28] The Charter also authorized the Company to use on its boundary and elsewhere in Borneo and on its vessels at sea a distinctive flag to indicate the British nationality of the Company.[29] It was also authorized and empowered to acquire by purchase, cession, or other lawful means, the interests or powers over the territories and property comprised in the several grants. It was not precluded from acquiring any interests or powers over other territories or property in the region, and to utilize these rights within the purpose and terms of the Charter,[30] so long as it was lawful and conducive to the interests of the Company.[31]

Territorial Acquisitions of the British North Borneo (Chartered) Company, 1881-8

During the next seven years whilst its foreign relations were handled by the British Government the British North Borneo Company absorbed further territories[32] under the general powers authorized by the Royal Charter.[33] These territories were:

i. *The uninhabited islands of Balembangan*, ceded to the British East India Company by Sultan Amir of Sulu in the Treaty of 1703 and abandoned by the Company in 1805. This was annexed by W.H. Treacher, the British Consul-General of Labuan at the suggestion of the Admiralty.[34]

ii. *The Pangalat River*, which Treacher acquired for the Company in 1883 for an annual payment of $300.[35]

iii. *The Putatan River,*[36] *'from its source to its mouth and of the Country drained by the said river'*, together with all the islands within six marine leagues of the shore with all the absolute rights of property which was vested in the Pengiran Muda Damit Tajuddin of Brunei in the grant of 20 March 1884. The Pengiran also delegated to the Company, of his own free will, powers and rights usually exercised and belonging to sovereign rulers. These territories and rights specified in the grants were declared vested in the Company for as long as the Company chose or desired to hold, in consideration of an annual payment of $1;000. In this grant the word 'The Pengiran', unless the contract specifically precluded it, was extended to, and meant, the Pengiran, his heirs, successors, executors, administrators and assigns, and that wherever the words 'The Company' occurred it was extended to mean the Company, its successors and assigns unless the context precluded it from being so construed. In other words, the grant was not only intended as a personal grant from the Pengiran to the Company but also as one made on behalf of his heirs, successors, executors, administrators and assigns in favour of the Company's successors and assigns.

iv. *The 'whole country, from and including Si Potong on the South to and including Kuala Paniow and the country drained by it on the North'*, which the Company secured for itself and its successors and assigns by cession on 5 November 1884[37] from Sultan Abdul Mumin, Pengiran Bandahara and Pengiran di Gadong of Brunei, their heirs, successors and assigns was theirs to hold for as long as they chose. Also included in the cession were the Bangawan and Tawaran Rivers and the District drained by them, and all the islands within nine miles of the coast. In addition to the territories the Company, its successors or assigns were also vested with the rights and powers which were similar in every way to those granted by the Sultan of Brunei to Overbeck and Dent *et al.* in the 1877 commissions. In consideration of the grant of these territories the Company and its representatives were to pay the Sultan or his heirs the sum of $3,000 per annum.

v. *Confirmation of the cession of Palawan Island* on 6 April 1885.[38] Sultan Abdul Mumin ratified the omission of the island of Palawan in the Deed of Cession of Territory and Government which was made to Alfred Dent and Overbeck, and declared that thenceforth, the island was to be considered as having been included in the Deed of Cession of 1878.

Madrid Protocol between Great Britain, Germany and Spain affecting British sovereignty in Sabah, 7 March 1885[39]

On the basis of the treaty of annexation con-

cluded by the Sulu Sultanate with Spain after its defeat and reduction into a Spanish vassal, Spain claimed all the Sultan's possessions including North Borneo although that treaty had omitted North Borneo in the description of the Sultan's territories. The Spanish claim to North Borneo led to a protracted correspondence between Britain and Spain and the conclusion of a Convention between those two States and Germany.[40]

In Art. I of the Protocol

The Government of Great Britain and of Germany recognized the Sovereignty of Spain over the Archipelago of Sulu which comprises under Art. II all the islands which are found between the western extremity of the island of Mindanao on the one side, and the Continent of Borneo and the island of Paragua on the other, with the exception of those indicated in Art. III.

By Art. III the Spanish Government renounced the following:

... as far as regards the British Government, all claims of Sovereignty over the territories of the continent of Borneo, which belong, or which have belonged in the past to the Sulu Sultanate, and which comprise the neighbouring islands of Balembangan, Banguey, and Malawali as well as those comprised within a zone of three marine leagues from the coast, i.e. the territories administered by the Company and styled the 'British North Borneo Company'.

Protectorate Agreement between the United Kingdom and the British North Borneo Company of 12 May 1888[41]

As a result of the policy of expansion adopted by Raja Brooke of Sarawak and the British North Borneo Company, struggles developed not only between the Raja of Sarawak and the Sultan of Brunei over the River Limbang (along which lies Brunei)[42] but also between the Raja of Sarawak and the British North Borneo Company over the Trusan, the Limbang and the Padas Kalias. This led to the British Government's intervention and its subsequent proclamation creating a protectorate over the whole of North Borneo, including Brunei and Sarawak.[43] On 12 May 1888 a separate treaty, establishing a British protectorate over North Borneo, was signed by the British North Borneo Company.[44]

The Agreement states in the preamble that:

... by virtue of certain grants and commissions from the Sultans, Chiefs and Rulers of the territories in North Borneo all rights of sovereignty over the territories of North Borneo are vested in the British North Borneo Company and that Company, having been authorized and empowered to assume the Government of the said territories under the Royal Charter of Incorporation of November 1881, now governed and administered the territories as an independent State of North Borneo. Article II of the Agreement declared that the State of North Borneo shall continue to be governed and administrated as an independent State by the Company in conformity with the provisions of the said Charter, under the protection of Great Britain, but such protection shall confer no right on British Government to interfere with the internal administration of that State further than that stated in the Royal Charter,[45] and that relations between the States of North Borneo and all foreign States, including the States of Brunei and Sarawak, shall be conducted by the British Government.[46] Further the British Government shall have the right to establish British Consular Offices in any part of the said territories, who shall receive exequaturs in the name of the Government of North Borneo.[47]

There is also a provision in the Agreement restricting any cession or alienation of the territory of the State of North Borneo by its Government to any foreign State or its subjects or citizens without the consent of the British Government except in the case of ordinary grants or leases of lands or houses to private individuals for purposes of residence, agriculture, commerce, or other business.[48]

The Protected State of North Borneo; Territorial Acquisitions 1888-1946

In the remaining years of the nineteenth, and the early years of the twentieth centuries, the protected state of North Borneo itself acquired additional river territories from the Sultan and territorial chiefs of Brunei.[49] The British Government, which had charge over the state's external relations, also concluded treaties, conventions and agreements which affected the state boundaries of the protected state. The territories were acquired under the following grants and cessions:

(i) In the Treaty of Grant of 2 March 1889, concluded between the Pengiran Shahbandar, the Ruler of Padas Damit and the British North Borneo Company in settlement of a dispute, the Ruler ceded to the Company '... its successors and assigns all his territory of Padas Damit and its dependencies and all and every of his rights, powers and privileges and jurisdiction including the right ... to exercise all the

powers of Government therein' in consideration of an annuity of $2,130 which the Company agreed to pay to the Pengiran Shahbandar during his lifetime, and after his death, an annuity of $1,650, payable half-yearly on 31 August and 28 day of February in each year, to his heirs.

(ii) In 1896, after a long negotiation with the Company, the Sultan of Brunei surrendered his sovereign rights over the independent Rivers of Manam, Mengakabong, Menggatal, Api Api, Simbulan and Nafas Tambalan for an annuity of $1,200 whilst the various chiefs of the rivers sold their territorial or *tulin* rights for yearly payments which ranged from $200 to $2,000. Consequently these territories became part of North Borneo.[50]

(iii) In 1897, the Kinarut (a river which jutted into North Borneo territory) was acquired by the Company. It fell under British protection after the inhabitants had driven out the agent of their absentee owner[51] who had come to exact taxes and slaves.

(iv) In the Agreement of 7 September 1901, concluded between Sultan Hashim Jalilul Alam of Brunei and the British North Born Borneo Company, the Sultan ceded to the Company, their successors and executors, all sovereign rights in and powers over the districts lying between River Sepitong and Trusan including Rivers Marintaman, Mengalong, Merapok, Lawas, Sari, Punang, Lumut (Siang Siang), Kebak Putus, Pelait, Bumbun and Langari, together with all the lands, waters, bays and rivers lying on the North of Trusan; in consideration of which the British North Borneo Company agreed to pay the Sultan, his heirs and successors in perpetuity the sum of $600 per annum payable on the seventh of September every year.[52]

(v) In 1902 the Company purchased the Membakut River for $2,400.[53]

(vi) Finally, on 22 April 1903 Sultan Jamal Al Alam of Sulu, by deed of confirmation, ceded all the islands near the territory of North Borneo from Banguey Island as far as Sibuco Bay. They had been omitted from the 1878 grant but it 'was known and understood between the two parties that the islands were included in the cession of districts and islands mentioned in the Agreement'. These were the islands Muliangin, Muliangin Kechil, Malawali, Tebabu, Bilian, Tegaypil, Lang Kayen, Boan, Lehiman, Bakungan, Bakungan Kechil, Libaran, Taganack, Beguan, Mantanbuan, Caya, Omadel, Si Amil, Mabol, Kepalai, Dinawan, and the other islands that were situated alongside, or around, or between them.[54]

Convention between the United Kingdom and the Netherlands delimiting the boundary of Borneo signed on 20 June 1891 and ratified on 11 May 1892.[55]

The acquisition of the territories of North Borneo by a British concern caused a strong reaction from the Dutch[56] who had founded a few scattered outposts on the southern coast of Borneo and were moving northwards beyond the Sibuco River. The Dutch claimed that the British settlements in Borneo were a violation of the Anglo-Dutch Treaty of 1824 which had stipulated that the British could settled on no island in the East Indies south of the equator. The British argued however that the treaty did not apply to the island of Borneo. The territorial dispute between the two nations was finally settled in 1891 when a boundary convention was concluded. It provided that the boundary between the Netherlands' possessions in Borneo and those of the British protected states on the same islands should start from 4° 10′ north latitude on the east coast of Borneo.[57] This boundary line should continue eastward across the island of Sebitik.[58] The exact position of the boundary line (as described in the first four Articles of the Convention) was to be determined by mutual agreement at such times as the Netherlands and the British Governments thought fit.[59] Subsequently another agreement between the two countries relating to the boundary between the state of North Borneo and the Netherlands' possessions in Borneo was signed in London on 28 September 1915.[60]

Treaty between Great Britain and the Netherlands relating to the boundary between the State of North Borneo and the Netherlands' possessions in Borneo, 28 September 1915[61]

This agreement confirmed the joint report, prepared and signed by the Boundary Commissioners of the two countries at Tawau on 17 February

1912, in compliance with the provision of Article V of the convention of 20 June 1891. The purpose of the treaty was to delimit the boundary line between the states in the Island of Borneo: those under British protection, and those occupied by the Dutch, in compliance with the provisions of Articles I to III and V to VIII and also that of Article IV of the 1891 Convention.[62]

Convention between the United Kingdom and the United States regarding the boundary between the Philippine Archipelago and North Borneo ratified at Washington on 13 December 1932[63]

The 1877 grant of territories by the Sultan of Brunei to the Overbeck and Alfred Dent partnership brought on a protest from Schufeldt, American Commander of the United States Navy, on behalf of his Government, which refused to acknowledge the competency of the Sultan to cede or lease any portion of his dominion under a treaty which he had concluded with the United States in 1850. The Commander's protest was not entertained by the Sultan and it was subsequently dropped.[64]

After the collapse of the Spanish Government in Manila, the United States assumed the Spanish sovereignty over the Philippines and all but two of the islands of the Sulu Archipelago. However, under an agreement in 1907, concluded with England, the United States waived its rights to administer the islands lying off Sandakan. But under the Boundary Convention of 1930[65] they were again included within the United States' sphere of influence. Article I of the Convention also delimited, in detail, the boundary between the Philippine Archipelago (the territory acquired by the United States under the Treaty of 10 December 1898[66] and 7 November 1900[67] concluded with Spain) and the state of North Borneo which was under British protection.

Agreement between the British North Borneo Company and the British Government for transfer of the Borneo sovereign rights and assets from the Company to the Crown 26 June 1946[68]

Immediately after the liberation of North Borneo Borneo, following three and a half years of Japanese military occupation, the state was administered by the British Military Administration. In London, Sir Mallock, the President and Fellow Members of the North Borneo Company Court of Directors, realizing that the costs of re-establishing the state on a sound footing were quite beyond their means, approached the British Government with the object of handing the state over to the Crown. Following informal discussions and formal talks the British Government subsequently agreed to take over the Company's territories, along with Brunei and Sarawak. A separate Agreement was concluded between the British North Borneo Company and the British Government for the cession of the state of North Borneo to the Crown.[69]

By this Agreement the British North Borneo Company transferred and ceded to the Crown the interests, powers, and rights in respect of the territories and lands of the 'State of North Borneo' and over those territories which were subsequently granted, ceded, assured to or conferred upon the Company by certain instruments which were set out in the first Schedule to the Agreement.[70] These were the territories from Sipotong to Kuala Paniow, acquired by the Company from the Sultan of Brunei and Pengiran di-Gadong on 5 November 1884, the Island of Palawan, also from the Sultan of Brunei, on 6 August 1885; the territory of Padas Damit from Pengiran Shahbandar on 2 March 1889; the territory between the Sepitong and Trusan Rivers on 7 September 1901; and several islands from the Sultan of Sulu on 22 April 1903.

In consideration of the payment to the Company of a sum by way of compensation, the Crown assumed direct responsibility for the government of the state of North Borneo. For that purpose it acquired from the Company full sovereign rights over, and titles to, the territory of the state of North Borneo which thenceforth became part of the British dominions.

North Borneo Cession Order-in-Council, 10 July 1946[71]

The Agreement for the transfer of the Borneo sovereign rights was followed by the Cession Order-in-Council which provided, among other things, that with effect from 15 July 1946 the state of North Borneo should be annexed to form part of the British dominions and would be called, together with the settlements of Labuan and its dependencies, the Colony of North Borneo.

Declaration of Philippine Independence from the United States of America, 4 July 1946[72]

The liberation of the Philippines from the Japanese military occupation was followed by a brief interlude of American Administration of that state. Its independence from America was proclaimed in 1946. In the Preamble to the Proclamation of Independence, there were specific references to the fact that the United States had acquired sovereignty over the Philippines from Spain by the treaty of 10 December 1898[73] (i.e. Treaty of Paris), and of 7 November 1900.[74] The United States also agreed with Great Britain on the delimitation of boundary between the Philippine Archipelago and the state of North Borneo in the Convention of 2 January 1930.[75] This implies that the United States and its successors, the Philippines, renounced any possible claim over the territory of North Borneo. It is significant that Clause 1 of the Philippine Constitution itself, which delimits the territories of the Republic of the Philippines, did not include Sabah as being within the Republic's territorial jurisdiction.[76] In spite of this it did not prevent the Philippines from passing a Statute redefining the baselines of the territorial sea of the Philippine Archipelago and purporting to acquire dominion and sovereignty over the territorial sea around Sabah.

Conclusion

Apart from the international conventions, boundary treaties and agreements affecting the state of North Borneo, there seems to be a continuous chain of documents of title stretching from 1877 to 1946, upon which the United Kindgom's territorial rights over North Borneo could rest. However, the probability of British title being founded on any or all of these documents needs to be ascertained. This is discussed in the next chapter.

[1] Willi of Gaia, *Early Relations of England with Borneo, to 1805,* Langensaba, 1805; K.G. Tregonning, *A History of Modern Sabah, 1881-1963,* 2nd edition, Singapore, Donald Moore Books, 1965, p. 11.

[2] Steven Runciman, *The White Rajahs: A History of Sarawak from 1841-1946,* Cambridge, The University Press, 1960, p. 26.

[3] Tregonning, op.cit. p. 4.

[4] See Art. X of the Treaty of 1847 in S.G. Maxwell & W.S. Gibson, *Treaties and Engagements affecting the Malay States and Borneo*, London, 1924, p. 146.

[5] Treaty between the United States and Brunei, 23 June 1850. See *Pacific Historical Review* (November 1954) 'American Activities in North Borneo 1865-81; Runciman, op.cit. p. 179; Tregonning, op.cit. pp. 5-7.

[6] Tregonning, op.cit. pp. 23-24.

[7] Ibid. pp. 13-14; Runciman, op.cit. p. 182. For full text, see *Parliamentary Papers,* 'The Affairs of the Sulu and Borneo', Vol. LXXXI (1882) inclosure 15, pp. 83-84; Maxwell & Gibson, op.cit. pp. 154-6; G.B. Kellagher *The Laws of North Borneo,* Vol. VI, 1953, pp. 3-4.

[8] Runciman, op.cit. p. 181; Tregonning, op.cit. pp. 9-10.

[9] Loc. cit.

[10] For English version of the original Malay text, see *Parliamentary Papers,* op.cit. Inclosure No. 15, p. 83; Maxwell & Gibson, op.cit. p. 154; Kellagher, p. 3.

[11] For English version of the original Malay text, see *Parliamentary Papers,* op.cit. Inclosure No. 15, p. 84; Maxwell & Gibson, op.cit. pp. 155-6; Kellagher, op.cit. p. 4.

[12] Runciman, op.cit. pp. 181-2; Tregonning, op.cit. p. 14. For full text see, *Parliamentary Papers,* op.cit. p. 84; Maxwell & Gibson, op.cit. pp. 156-7; Kellagher, op.cit. p. 5.

[13] Tregonning, op.cit. p. 14; *Parliamentary Papers,* op.cit. Inclosure No. 15, p. 84; Maxwell & Gibson op.cit. pp. 156-7, Kellagher, op.cit. p. 6.

[14] Runciman op.cit. p. 182; Tregonning, op.cit. p. 14; *Parliamentary Papers,* op.cit. Inclosure No. 15, p. 85; Maxwell & Gibson, op.cit. p. 158; Kellagher, op.cit. p. 6.

[15] Runciman, op.cit. p. 182; Tregonning, op.cit. p. 158.

[16] PRO FO 12/54 W.H. Treacher to Foreign Office, 22 January 1878.

[17] Runciman, op.cit. p. 182. For full text see *Parliamentary Papers,* op.cit. pp. 85-86; Maxwell & Gibson, op.cit. pp. 159-60; Kellagher, op.cit. p. 8.

[18] From Overbeck to A. Dent. 12 May 1880. See Runciman, op.cit. p. 181; Tregonning, op.cit. p. 13.

[19] Tregonning, op.cit. p. 20.

[20] Runciman, op.cit. p. 185; Tregonning, op.cit. p. 25.

[21] Tregonning, op.cit. pp. 26-27.

[22] For full text, see *Parliamentary Papers,* op.cit. Inclosure in No. 193, pp. 515-23 and also Maxwell & Gibson, op.cit. pp. 160-71; Kellagher, op.cit. p. 10; *Hertslets Commercial Treaties,* 31 vols., London, HMSO, 1840-1925, Vol. 15, p. 85.

[23] Article 1 of the Royal Charter. See Runciman, op.cit. p. 185; Tregonning, op.cit. p. 27. See also *Parliamentary Papers,* op.cit. Inclosure in No. 193, pp. 515-23 and also Maxwell & Gibson, op.cit. pp. 166-7; Kellagher, op.cit.

pp. 17-18; *Hertslet's Commercial Treaties,* op.cit. Vol. 18, p. 225.

[24] Article 2 of the Royal Charter. See Runciman, op.cit. p. 185; Tregonning, op.cit. p. 27; Maxwell & Gibson, op.cit. p. 167; *Parliamentary Papers,* op.cit. Inclosure in No. 193, pp. 515-23; Kellagher, op.cit. p. 18; and Hertslet, op.cit. p. 225.

[25] Art. 3 of the Royal Charter. See *Parliamentary Papers,* ibid, Maxwell & Gibson, ibid., and Hertslet, ibid.

[26] Art. 4 of the Royal Charter. Ibid. See *Parliamentary Papers,* ibid. and Kellagher, op.cit. p. 18.

[27] Art. 5 of the Royal Charter. Ibid.

[28] Runciman, op.cit. p. 185; Tregonning op.cit. p. 27. Art. 13 of the Royal Charter. See *Parliamentary Papers,* op.cit. Inclosure No. 193 pp. 515-23 and also Maxwell & Gibson op.cit. p. 168; Kellagher, op.cit. p. 20; Hertslet, op.cit. p. 225.

[29] Art. 14 of the Royal Charter. See *Parliamentary Papers,* op.cit. Inclosure No. 193 pp. 515-23 and also Maxwell & Gibson, p. 169; Kellagher, op.cit. p. 20; Hertslet, op.cit. p. 225.

[30] Art. 15 (i) of the Royal Charter. Ibid.

[31] Art. 15 (xvii) of the Royal Charter; see *Parliamentary Papers,* op.cit. Inclosure in No. 193, pp. 515-23 and also Maxwell & Gibson op.cit. p. 170; Kellagher, op.cit. p. 21 Hertslet, op.cit. p. 225.

[32] Tregonning, op.cit. p. 32.

[33] Ibid. p. 41.

[34] Ibid. p. 32.

[35] Ibid.

[36] Ibid., Maxwell & Gibson, op.cit. pp. 172-3; Kellagher, op.cit. pp. 23-24.

[37] Runciman, op.cit. p. 187; Tregonning, op.cit. pp. 32-33; Maxwell & Gibson, op.cit. pp. 173-4; Kellagher, op.cit. p. 25.

[38] Kellagher, op.cit. p. 37; Maxwell & Gibson, op.cit. p. 177.

[39] Kellagher, p. 27; Maxwell & Gibson, pp. 174-7; Hertslet, op.cit. Vol. 17, p. 1016. See also E. Lauterpacht, *Contemporary Practices of the United Kingdom in the Field of International Law,* 2 Vols., Vol. I, p. 185.

[40] Runciman, op.cit. p. 182; Tregonning, op.cit. p. 22.

[41] Kellagher, op.cit. p. 30; Maxwell & Gibson, op.cit. pp. 178-9; Hertslet, op.cit. Vol. 8, p. 225; Lauterpacht, op.cit. pp. 185-6.

[42] Tregonning, op.cit. p. 34; Runciman, op.cit., pp. 186-91.

[43] Tregonning, op.cit. pp. 34-37; Runciman, op.cit. pp. 186-91.

[44] Tregonning, op.cit. p. 38; Runciman, op.cit. p. 192.

[45] See Maxwell & Gibson, op.cit. p. 178; Kellagher op.cit. p. 31.

[46] Art. III of the Protectorate: see Maxwell & Gibson, op.cit. 179; Kellagher, op.cit. pp. 31-32.

[47] Art. IV of the Protectorate. Ibid.

[48] Art. VI of the Protectorate Agreement. Ibid.

[49] Kellagher, op.cit. p. 33; Maxwell & Gibson, op.cit. pp. 180-2; Runciman, op.cit. pp. 192-3; Tregonning, op.cit. pp. 39-40; Lauterpacht, op.cit. p. 186.

[50] Tregonning, op.cit. p. 43.

[51] Ibid.

[52] Kellagher, op.cit. p. 35; Maxwell & Gibson, op.cit. pp. 182-3; Tregonning, op.cit. pp. 43-44; Lauterpacht, op.cit. p. 186.

[53] Tregonning, op.cit. p. 44.

[54] Kellagher op.cit. p. 37; Maxwell & Gibson, op.cit. p. 183; Lauterpacht, op.cit. p. 186.

[55] Hertslet, op.cit. Vol. XIX, p. 755-6.

[56] Runciman, op.cit. p. 182; Tregonning, op.cit. p. 23.

[57] Art. I of the Convention: see Hertslet, op.cit. Vol. XIX, p. 755.

[58] Art. IV of the Convention: see ibid. p. 756.

[59] Art. V of the Convention: see ibid.

[60] *Parliamentary Papers;* Treaties Series No. 12 (1955); Hertslet, op.cit. Vol. XXVII, p. 970.

[61] Treaties Series No. 12 (1915); Hertslet, op.cit. Vol. Vol. XXVII, p. 970.

[62] Art. I of the Boundary Treaty of 1915 provides that the frontier line between the Netherland territory and the State of North Borneo follows the parallel of 4°10′ north latitude after traversing the island of Sebitik, as fixed by Art. IV of the Boundary Convention of 1891 and marked on the east and west coasts by boundary pillars.

[63] Treaties Series No. 2(1933), Cmd. 4241; BFSP, Vol. 132; p. 367; Statutes of the USA, 1932-3, pp. 410-13 with map.

[64] Runciman, op.cit. p. 183; G. Irwin, *Nineteenth-Century Borneo,* The Hague, 'S-Gravenhage—Martinus Nijhoff, 1955, pp. 198-201; Tregonning, op.cit. pp. 23-24.

[65] Tregonning, op.cit. p. 46.

[66] BFSP, Vol. XC, p. 328.

[67] Ibid. Vol. XCII, p. 814.

[68] Colonial No. 202.

[69] Tregonning, op.cit. p. 222.

[70] First Schedule of the Agreement for the Transfer of the Borneo Sovereign Rights and Assets of 26 June 1946.

[71] The North Borneo Cession Order, 1946 (SR & O Rev. 1948 Vol. XVI, p. 919); Kellagher, op.cit. pp. 49-50.

[72] BFSP, Vol. 146, p. 899.

[73] BFSP, Vol. XC, p. 328.

[74] BFSP, Vol. XCII, p. 148.

[75] BFSP, Vol. CXXXVII, p. 690.

[76] A.J. Peaslee, *Constitution of Nation,* New York, 1961 Vol. 3. See Chapter VII below.

3

The British Claim to Sabah: Its Legal Basis

As in most questions involving title to property, whether in municipal or public international law, the governing maxim is *nemo dat quod non habet*. Malaysia's present title is dependent upon previous British title; this depends upon that of Overbeck and Dent; and their title in turn depends upon that of the Sultans of Brunei and Sulu and the Pengiran Temenggong at the time of the execution of the 1877-8 grants and commissions.

As to the title of the Sultans of Brunei and of Sulu to the territories under their control there is no doubt. The Philippines' case has never rested on a suggestion of any defect in title on the part of the Sultans, the original grantors. Too, it would be difficult, if not impossible, after all these years to get any information on their lack of title or otherwise. Moreover, since the Philippines' claim itself rests upon an alleged grant made by the Sultan of Sulu, the Philippines has no interest in asserting an absence of title on the part of the authority from whence their own claim flows. Indeed they actually assert his title.

It is possible, therefore to focus our attention immediately on the central point of interest: namely the validity of title by the Sultans to Overbeck and Dent in the grants and commissions of 1877-8, and their effects.

This central point consists of three elements: (1) a consideration, in international law, of the capacity of the Sultans and Pengiran to hold and dispose of territorial sovereignty, in the grants and commissions; (2) the capacity of Overbeck and Dent to acquire the subjects of the grants and commissions; and (3) an examination of the terms of the grants and commissions themselves to ascertain the objects and the intentions of the grantors.

The right of the Sultans of Brunei and Sulu and the Pengiran Temenggong of Brunei to hold and dispose of territorial sovereignty

The capacity of these grantors to hold and dispose of territorial sovereignty as rulers and owners of their respective territories in international law is beyond doubt, in view of the overwhelming evidence of 'usage' obtained from the practice of the Member-States of the Family of Nations.[1] The practice of these States has been to recognize the sovereign rights of the politically less advanced peoples[2] who do not form, or have not been recognized, as Member-States of the Family of Nations. Even some of the publicists,[3] who deny the sovereign rights of such peoples, do recognize their rights to hold and transfer property in order to confer a valid title on the donee or recipient.[4]

As evidence of their recognition of these rights the more advanced States and Governments have always dealt with such peoples, on treaty basis, especially in the acquisition of territories.[5] Indeed, as early as the sixteenth century the Portuguese augmented their commercial dealings with the Sultan of Brunei with the Treaty of Commerce of 1526.[6] Between 1761 and 1769 the British East India Company concluded similar treaties with the Sultan of Sulu for the establishment of the Company settlements on the Island of Balembangan and for the cession to Britain of the Sultan's territories in North Borneo and the islands adjoining his dominion.[7] Following the annexation of the Island of Labuan on the order of Palmerston,

Great Britain had to conclude a treaty of cession with the Sultan of Brunei in 1847.[8] In 1737, 1805 and 1836 and subsequently in 1878 Spain concluded treaties of alliance, protection and capitulation with the Sultan of Sulu,[9] and similarly with the United States in 1850. Later in 1865, Charles Lee Moses, the United States Consul-General in Brunei, secured all the privileges of the most favoured nation, and obtained the cession of a large tract of Brunei territory in North Borneo from the Sultan and the Pengiran Temenggong respectively, on treaty basis.[10] Again, in 1899, the United States concluded a treaty with the Sultan of Sulu acknowledging his rights and duties.[11] Even the Sultan's subsequent relinquishing of his territorial sovereignty over the Philippine Archipelago in 1915 was accomplished through treaty.[12]

In view of such evidence of the practice of the more advanced States in the last five centuries, a principle of customary international law, recognizing the capacity of rulers of the less advanced States to hold and dispose of territorial sovereignty, may be said to have been firmly established. Accordingly, the Sultans of Brunei and Sulu and the Pengiran Temenggong could divest their sovereign rights over their territories in North Borneo by means of grants and commissions on any grantees[13] who have the capacity to acquire them.

Capacity of Overbeck and Dent to acquire territorial sovereignty

International law, being rules governing relations between States, does not generally recognize the rights of individuals to acquire territorial sovereignty for their personal benefit.[14] Only States have the capacity under international law to acquire sovereignty over a territory which has neither gained independent status nor has been recognized and admitted as a Member-State of the international community. Where a state municipal law[15] rules that any territorial sovereignty, acquired and exercised by one of the subjects of the State, belongs to the State, international law will take cognizance of such law and regard the State, and not the individual, as the true sovereign.[16] If the subject of the State claims absolute territorial sovereignty, not merely as an agent of his State, but for himself, on the grounds of his having acquired it by virtue of a treaty he concluded with the rulers of the territories, he will not be recognized as the *de facto* sovereign by the other States as long as he remains a subject of, and owes allegiance to, the State of his origin.[17] The position of Raja Brooke is a precedent under this principle. He was granted the government of Sarawak with territorial sovereignty by the Sultan of Brunei in 1842 upon payment of annual tribute in return for his aid in suppressing a rebellion against the Sultan's authority. 'Eleven years later the Sultan remitted the tribute and gave the Raja the right to nominate his successor, each succeeding as Raja,[18] or ruler of Sarawak.' Prior to 1888 his position was uncertain under both municipal and international law.[19] It seems that 'in 1855, as far as foreign powers were concerned Sarawak formed part of the dominions of the Sultan of Borneo [Brunei] and that at sometime between that date and 1888 it became independent. From the time that the sovereignty of the Sultan disappeared until the State was placed under British Protection' the Rajah was regarded as 'a British subject exercising independent sovereignty', a status which international law cannot recognize.[20] As from 1888 Sir Charles Brooke was recognized by Great Britain and described as 'the Rajah and lawful Ruler of the independent State of Sarawak', which was to be governed and administered by him and his successors under the protection of Great Britain.[21]

The position of Overbeck and Dent, the promoters of the British North Borneo Company, therefore, appears to be on all counts similar to that of Rajah Brooke. As individuals, they had no capacity to acquire absolute territorial sovereignty for themselves. Any territorial sovereignty which Dent, a British subject, purported to acquire from the rulers of North Borneo would be (under British constitutional law) for the Crown, which is the true sovereign over the territories unless it chooses to disclaim its sovereignty. In the event, it would remain vested in the rulers of the territories. Overbeck and Dent would then be in a position of vassals (as Rajah Brooke was to the Sultan of Brunei prior to the proclamation of a Protectorate over Sarawak).[22]

The position of Overbeck, an Austrian subject, would seem at first glance, to be a special one, and it would seem necessary to examine

the principle of the Austrian constitutional law pertaining to the capacity of its subjects to make territorial acquisitions. However the indifference of the Austrian Government to his enterprise in North Borneo,[23] his appointment as chief representative of a British concern und under the management and control of a British subject (Alfred Dent) who in fact financed his enterprise,[24] together with the official influence of the British Acting-Consul General, W.H. Treacher (who was instrumental in getting him to conclude new treaties with the Sultans of Brunei and Sulu):[25] all seem to suggest that the undertaking was initially a British one[26] and Overbeck himself was only an agent of a British concern.

Furthermore the object of the Dent-Overbeck association was to form a company to exploit the resources of the country.[27] The principle of international law governing the status and capacity of a group of individuals or a corporation to acquire and exercise territorial sovereignty is relevant. The principle is that 'as long as an Association of individuals or a company does not possess any nationality by obtaining a charter from a State which bestows upon it privileges in respect of commerce, settlement or industrial exploitation of land, coupled with powers and duties of government,[28] it has the capacity to acquire territorial sovereignty by setting up a proper government over any territory not previously belonging to a State of the Family of Nations, as a prelude to its being recognized as an independent State.[29] But as soon as the association or company begins to work under a Charter granted by a State, it at once acquires that State's nationality, and loses its independent status. It can then only acquire territorial sovereignty for the benefit of the State which granted it the charter, as in the case of any other single individual subject of a State.[30] Any territory purported to be acquired by the company will accrue to its State and when it actually exercises sovereign rights, it is acting as the delegate or agent of its own State.[31] In *Re Island Palmas Arbitration*[32] (US vs. Holland) it was asserted that 'unless the corporation in question is invested by its State with the public powers of requisition and administration, any acquisition of territory and sovereignty by a corporation is outside dominion of the Law of Nations'.[33]

It follows therefore that the Dent-Overbeck partnership had the right in international law to acquire territorial sovereignty and any territory acquired by the association by means of a treaty could receive international recognition, provided it declared the existence of a new State and invited its recognition by *other States* (as in the case of the former Congo Free State) or sought the acknowledgement of its territorial acquisition as an Act of State.[34]

Having ascertained the capacity of the Sultans and the Pengiran to dispose of their sovereign rights and that of Overbeck and Dent to acquire such rights for their country as her subjects or agents, it is now necessary to look into the terms and provisions of the 1877-8 grants and commissions themselves. This should serve to ascertain their object and the grantors' actual intentions i.e. whether they had intended to confer actual sovereignty, or mere leasehold rights, to the grantees.

Examination of the terms of the 1877-8 grants and commissions

A perusal of the terms and provisions of the 1877-8 grants and commissions and Article X of the Treaty of 1847[35] (concluded between Great Britain and Brunei) suggests that the intention of the grantors was to vest upon the grantees co-jointly and their heirs all their absolute interests over the territories including the rights and powers of sovereignty. In all these grants, the objects, declared vested in the grantees as well as in their 'heirs, associates, successors and assigns [were] all the grantors' territory, lands, rights and powers', [for their] 'own exclusive uses and purposes' for as long as they chose or desired to hold them. By means of commissions the Sultan of Brunei conferred on the grantees all their absolute rights of property including the rights to dispose of them if they so chose to do. In addition, upon the chief representative of the company, Baron de Overbeck, was 'conferred the powers of life and death over the inhabitants of the territories, all the absolute and vested rights of the grantees over the soil of the country' including 'the right of making laws, coining money, creating an army and navy and levying taxes'. By the same commissions the Baron was also appointed and nominated Supreme and Independent Ruler of the respective territories of both the Sultanates. On his death or retirement from office all the rights and powers including

the titles mentioned above were to devolve on his duly-appointed successor of the governor-in-chief of the company's territories.

There were also stipulations both in the Treaty of 27 May 1847[36] (which Sultan Omar Ali Saifudeen of Brunei concluded with Great Britain) and the Sulu Grant of 22 January 1878, which made it binding upon both the Sultans of Brunei and Sulu respectively not to make any cession 'either of an island or any settlement on the mainland [of Borneo], in any part, of his dominions or any transfer of the privileges conferred by the grant respectively, to any other nations or their subjects or citizens or a company of a foreign nationality without the consent or sanction of the Government of United Kingdom'.

These terms and provisions at once suggest that the powers conferred on the Dent and Overbeck association by the grantors were sovereign rights over the grantor's territories in North Borneo. On the other hand, there are also provisions in the grants and commissions which suggest that they are more consistent with the terms of leases or concessions than an outright grant of territorial sovereignty. Thus no definite conclusion can be reached. In every grant it is stated that the grantee should undertake to pay fixed annual compensation or tributes to the grantors and their heirs or successors. In the Brunei grants, in contrast with that of the Sulu[37] grant, the Sultan reserved his right to resume the control and government of the territories if the annual compensation was not kept up for three successive years. Furthermore in both the Sultans' commissions, the transfers of territory, which might be deducted from the grants themselves, appear to be somewhat restricted. The sovereign powers and rights stated in them were only declared to be delegated to Overbeck, the nominated Supreme Ruler.[38]

Moreover, the terms and provisions of these grants were almost identical to the grants of fifty-year leases by the Sultan of Zanzibar to the British East Africa Company (of May 1857, October 1888 and March 1890) over that part of the strip adjoining the British territory there and the Benadi ports.[39] The grants to that company include full powers of administration to be exercised in the Sultan's name, under his flag and subject to his sovereign right. The company, like its counterpart in North Borneo, was also given the sole right of levying taxes and customs duties in return for certain annual payment to the Sultan with sovereignty remaining vested in the Sultan. Accordingly, it is also possible to deduce from some of the terms of the 1877-8 grants and commissions that the grantor's actual intention was *either* to create leasehold rights over the territory in favour of the grantees *or* to grant sovereignty over them.

In view of these two equally possible interpretations, i.e. they could either be leases or cessions of territory, it is necessary to examine the circumstances surrounding their conclusion.

Circumstances surrounding the preparation of the Brunei and Sulu Grants and Commissions

British officials (including W.H. Treacher, who was mainly responsible for the conclusion of the grant[40]) have sometimes referred to these documents as 'concessions'[41] and at other times as 'leases'.[42] The references to the 1877-8 documents as leases could possibly be regarded as evidence of the grantors' intention to grant their leasehold rights over their North Borneo territories to the grantees. The grant was for their 'own exclusive uses and purposes' and for the development of the natural resources of the country.[43] However, as the documents have also been referred to by the same officials, and the grantees themselves as 'cessions',[44] reference to terminology alone does not provide conclusive evidence of the grantors' real intentions.

Contemporary opinions of the British Government have indicated that the 'undertaking' was exclusively of a commercial and private character without any 'political bearing'[45] and that 'Territory ceded to Mr. Dent would only be administered by the Company under the suzerainty of the Sultan of Borneo [Brunei] and Sulu, to whom they have agreed to pay a yearly tribute,[46] and in whom the sovereignty remains vested.'[47] This fact was confirmed by the Prime Minister of the day who acknowledged in the House of Commons that 'the remarkable powers obtained by the Company included the essence of sovereignty but they were covered by the suzerainty of the native chiefs'.[48]

The grantees themselves indicated that the grants of territories were accompanied by the 'commissions of explanation and delegation of powers and rights of Government and privileges'.[49] However, in their despatch of 12 February 1878 to the Marquis of Salisbury, then the British

Foreign Minister, they declared that the Sultan of Sulu had, by their 'convention and commissions', distinctly ceded and granted to the British North Borneo Company all the rights and powers over all the territories and islands belonging to him on the mainland of the island of Borneo with full sovereign powers for ever in and perpetuity.[50]

Since the British Government officials and the grantees' own explanations of the purpose of the 1877-8 grants and commissions are not very clear, they also cannot satisfactorily be used to determine the grantors' true object.

Contra proferentem as a guide to the interpretation of the 1877-8 grants and commissions

In view of the above, it would seem that recourse might profitably be had to the maxim *contra proferentem* as a guide to the interpretation of the terms of these grants and commissions. The principle that a drafting party is responsible for any mistake of the other party[51] 'in case of ambiguity in the provision of a contract or treaty [i.e. the ambiguity must be construed against the drafting party] *contra proferentem*[52] may fairly be regarded as [a generally accepted] principle of law.[53] It may be summoned as an aid to the interpretation of the meaning of the terms of legal documents or agreements which are difficult or ambiguous.[54] One instance of its application is as in the case of the Treaties of Versailles,[55] where one of the parties handed a prepared text to the other for signature. Another instance which may be quoted is where there is 'an imperative reason to credit the drafting party with a degree of ingenuity and foresight which cannot be matched by the other party, and which therefore permits the implication that the *proferens* has provided fully for his own interest....'[56] In such instances the principle may be applied so that 'by way of compensation the interest of the other could be guarded by the tasks of interpretation'.[57]

The question now is whether this principle could justifiably be applied to interpret the 1877-8 grants and commissions. The evidence surrounding their negotiation i.e. the *travaux preparatoir* indicates that Overbeck himself had succeeded in persuading the Sultan of Brunei to omit from the Brunei grants and commissions (against the advice of W. Hood Treacher) the clause stipulating that the grant was not assignable to the citizens of a foreign State without British approval.[58] Moreover, these documents are said to have been drawn up and signed by the aged Sultan on 29 December 1877 on the mere receipt of Overbeck's money and persuasion of influential Chinese who were in Overbeck's favour.[59] Considering the meagre yearly payment of $15,000, which the Sultan was to receive in consideration of a grant of territories with an area of 28,000 square miles covering 900 miles of the North Borneo coast-line,[60] and the sophistication of the form and the legal terms of the documents, there is every reason to credit Overbeck with a degree of ingenuity and foresight which the Sultan could not hope to have matched.[61] These circumstances taken together would therefore justify a recourse to the maxim as an aid to interpretating the 1877 grants and commissions in favour of the grantor, the Sultan of Brunei.

Somewhat similar conclusions may be drawn from the circumstances under which the Sulu grant and commission were concluded. They were signed after rounds of negotiations with the Sultan who was hard-pressed by the Spanish invasion and the capitulation of Jolo, the main island of Sulu Archipelago, the capital of which, Membong, had already been captured.[62] As in the Brunei grants and commissions, the consideration of $5,000 annual rent, which the Sultan was to receive in return, was very meagre for so vast a territory, with an area extending from Maludu in the north to River Sibuco in the east. Moreover, unlike the Brunei grants and commissions, a clause was inserted in the Sulu grant, on the advice of W.H. Treacher, stipulating that the territory could not be transferred to other nations without the sanction of Great Britain, to whom all disputes between the Sultans, his heirs and successors, and Overbeck, were to be submitted.[63] The form, style and terminology used in the Sulu grant and commission were similar to, and almost identical with, those of the Brunei grant. Under these circumstances it is unlikely that the Sultan, who was being advised by a British Agent,[64] completely realized the full legal implication of the terms of the grant and commission drawn up under English law. Besides, it is inconceivable that he should have been willing to part with such a vast tract of land and the sovereign rights over them for so small a consideration.

Accordingly it would also not be unjustified to interpret the 1877-8 grants and commissions in favour of the grantors and thus to infer from the circumstances that the grantors' intention wa

to create leasehold over the territories specified in the various grants whilst delegating the sovereign rights over them to the grantees. Such an inference is not only in accord with the views of the British Government of the day but also with the grantees' own explanation of the purpose of the commissions which delegated the sovereign powers. Moreover, the terms of these instruments are also nearly identical with the leases concluded by the Sultan of Zanzibar with the British East Africa Company in the 1800's. These leases, as indicated earlier, did not confer territorial sovereignty on the company.

Nevertheless though these agreements did not purport to confer on the grantees' sovereignty in international law, they are not entirely without indirect effects on a situation governed by international law, since international law recognizes the fact that they had created leases coupled with delegated sovereign powers in favour of the grantees.

The validity and legal basis of the transactions concluded subsequent to 1878

(i) The validity of the instruments transferring the objects, rights and powers specified in the 1877-8 grants and commissions executed by Dent and Overbeck

As pointed out earlier, all the 1877-8 grants and commissions had declared the territories specified therein, to be vested in Overbeck and Dent co-jointly and 'on their heirs, associates, successors or assigns', for them to hold as 'long as they choose or desire'. In the Sulu grant the territories specified therein were declared vested on them 'for ever and in perpetuity'. Both the commissions conferred on Overbeck and on his 'duly appointed successor', among other things, the right to dispose of the 'absolute rights of property' over the territories. The only restriction was that any 'transfer of rights and privileges' under the Sulu grant and/or 'cession of an island, or of any settlement in any part of the dominion of the Brunei Sultanate[65] to any other nations, or their citizens, or foreign company, must receive the sanction or consent of the British Government'.

These terms indicate that both Overbeck and Dent were empowered not only to effect valid transfer of these rights and privileges to another British association, but that each could also assign his own rights and privileges to the other *inter-se* or to another 'bona fide' purchaser, provided he was a British national or belonged to a British association. Therefore the sale by Overbeck of his share of the rights and privileges in the leases or under the 1877-8 grants and commissions to his partner, Alfred Dent, and the subsequent assignment by the latter of all his acquired rights and privileges to the Association constituted a valid transfer within the meaning of the grants and commissions. By virtue of the same commissions Sir Rutherford Alcock, who were appointed Chairman of the Association and successor to the office of Supreme Ruler, legally assumed Dent's delegated powers of government of the territories.

(ii) The effect on the territorial sovereignty of the Sultan of Brunei and Sulu of the grant of the Royal Charter to the Provisional Association

When the Provisional Association was incorporated by a Royal Charter into the British North Borneo Company the latter was 'authorized and empowered by the Charter to acquire by purchase, or other lawful means, the full benefit, privileges including all the interests and powers of the Association over the territories [and] any territories lands or islands' in the vicinity of North Borneo (including Labuan) from the Provisional Association. In consideration of these powers and privileges the Company, as representative of the original grantees under the several grants, 'was bound to fulfill' the promises of payment made by the grantees.

Therefore it would appear that there was no formal transfer of the rights and obligations of of the Association to the Company and no substitution of one legal person by another as holder of the rights of government. The Association merely merged into the Company. As the Foreign Secretary said, 'the Royal Charter merely conferred upon the person associated the status and incident of a body corporate'.[66] Accordingly it would seem plain that the Company acquired all the rights previously vested in the Association as a successor to the powers conferred on the original grantees in the 1877-8 grants and commissions.

The question is whether the territorial sovereignty of both the Sultans was in any way affected by the grant of the Charter to Dent's Provisional Association. The Charter provides that all the powers of government, the administration of justice to the local inhabitants of the territories and the rights to maintain army and police force, which were to be exercised by the Company, were subject, in all important political

matters, to the approval of the British Secretary of State. On matters relating to the Company's dealings with foreign powers the suggestion of the Secretary of State had to be acted upon by the Company.[67] This would suggest that, in practice, sovereignty really resided in the British Govern-

Moreover it has been asserted, in relation to companies similar to the North Borneo Company, that though 'from the point of view of [British] Constitutional Law the Charter did not bring the area acquired by the East India Company' within the territory of the Crown,[68] which merely 'reserved to itself sovereignty over' them,[69] and in the 'eyes of international law, responsibility is the true test of sovereignty'.[70] It was also the general principle of British constitutional law that chartered companies were not independent authorities but were subordinate bodies controlled by the appropriate department of the Supreme Government.[71] It was suggested that the function of the Royal Charter, among others, was merely to ratify or authorize the Companies' previous or future territorial acquisitions.[72] The North Borneo Company would also be on the same footing as the East India Company,[73] the Hudson's Bay Company[74] or the British East African Companies[75] in the sense that it was merely acting as an agent[76] for the Crown to whom sovereignty over all the Company's territorial acquisitions would accrue.[77]

The common and essential features of most protectorates are the duty, on the part of the Protecting State, of giving protection and, on the part of the Protected State, 'of abstaining from all foreign relations not permitted by the Protecting State'. These features which are commonly incumbent upon the protectorate and protected states also appear in the terms of the Charter acquired by the Company from the Crown. It may therefore be suggested that even before the protectorate was formally declared over North Borneo in 1888, the territory could have been regarded, in practice, as having been under the external sovereignty of Great Britain,[78] who was a party to the 1885 Convention concluded with Spain. The latter renounced her sovereignty over the territories of North Borneo[79] in favour of the former.

The position is however complicated by the views of the British Government of the day which indicated that the Charter granted to the North Borneo Company differed essentially from the previous Royal Charter acquired by the East India Company, the Hudson's Bay Company, the New Zealand Company and other associations of that character.[80]

> The Crown in the present case i.e. North Borneo Company, assumes no domain or sovereignty over the territories occupied by the Company, nor does it purport to grant to the Company any powers of government thereover. It merely confers upon the person associated the status and incidents of a body corporate, and recognizes the grants of the territory and the powers of government made and delegated by the Sultans in whom the sovereignty remains vested.[81]

In view of such disclaimer of sovereign powers over the territories dealt with in the Charter granted to the North Borneo Company, the only possible conclusion is that the Charter did not affect the sovereignty of both the grantors over the territories specified in the 1877-8 instruments. The Company was in the somewhat curious position of being an administrator administering the territories under delegated powers from the Sultans, but, as a measure to prevent any possible abuse by the Company of these powers, its proceedings were subject to the control of the British Secretary of State.[82] Perhaps a plausible explanation for this is that the Crown's disclaimer of territorial sovereignty was an exercise of its royal prerogative but that otherwise, internationally, Great Britain was responsible for the territories' external relations.

(iii) The basis of the (Chartered) Company's territorial acquisitions of 1881 to 1888 and their effect on the Sultan's sovereign rights

The basis of the Company's subsequent territorial acquisitions is undoubtedly the Charter itself which authorized and empowered it to acquire 'lands and islands within the vicinity of North Borneo' in addition to those already acquired under the earlier grants and commissions. As these later acquisitions were outside the area granted to Overbeck and Dent, their acquisition would not strictly affect the sovereignty of both the Sultans over territories specified in the earlier instruments. In any case, with the exception of the Island of Balembangan (which was annexed by W.H. Treacher) the tributaries of the Pangalat Putatan Bangawan and Tawau Rivers were also owned by the chiefs and Sultan Mumin of Brunei, the grantors of the territories from Si-Putong to Kuala Paniow in 1884, and the Island of Palawan in 1885. As in the earlier

instruments, the terms of the subsequent grants also declared that all the territories and absolute rights of property over them were vested in the Company, its heirs, successors or assigns 'for as long as it chooses or desires to hold' in consideration of a fixed annual compensation. Similarly the Sultan in conjunction with the Pengirans also delegated to the Company the rights and powers of sovereign ruler.

Therefore all the foregoing conclusions relating to the interpretation of the earlier agreements as territorial concessions and the effect of the Charter of incorporation on the territorial sovereignty of the grantors may be applied *mutatis mutandis* to these subsequent grants. As such it may be concluded that sovereignty over these territories as well as over the river territories owned by the territorial chiefs (who were under the Sultan's jurisdiction), would have remained vested in the grantors, as in the 1877-8 grants.

Nevertheless, as the British Government's disclaimer of sovereign powers was only in reference to the territories specified in the 1877-8 grants, the question of sovereignty over the company's additional territories acquired between 1881-8 could be treated as a separate question. By virtue of the principle of British constitutional law whereby colonial development companies are regarded as agents of the Crown, to whom sovereignty over all the Company's territories would accrue, the Crown would be regarded as having acquired sovereignty over the companies' additional territories specified in the 1881-8 grants. Indeed the sovereignty over the Island of Balembang would, by virtue of its annexation, remain vested in the Crown.

(iv) The effect of the Protectorate Agreement of May 12, 1888 on the territorial sovereignty of the Sultans of Brunei and Sulu

The preamble of the Protectorate Agreement concluded between the North Borneo Company and the United Kingdom in 1888 declared that 'all the rights of territorial sovereignty were vested in the British North Borneo Company by the Sultan's grants and commissions'.[83] This may be contrasted with the preamble of the Royal Charter[84] and the statements of the British Foreign Minister, Earl Granville, that these powers were only *delegated.* The Agreement further declared that the Company was authorized and empowered by the Royal Charter of Incorporation 'to assume the Government and administration of the territories as an Independent State under British Protection'. Again Earl Granville had earlier declared that the powers of government were only 'delegated' to the Company by the Sultans and the Crown did not purport to grant them to the Company.

The position was further complicated by the fact that (unlike that in the Protectorate of Brunei and Sarawak) no ruler was officially designated over the Company's new independent State unless he was designated by the Sultan's commissions, in which case the duly-appointed Governor-in-Chief of the Company's territories could be regarded as the Supreme Ruler. But then he would only hold sovereign rights and powers of government by delegation. In such a case the Company's chairman and representative, Sir Rutherford Alcock, who signed the Protectorate Agreement for the Company, would assume the nominated office of Supreme Ruler.[85]

The Protectorate was also a somewhat unusual one in that it consisted of the fragments detached from part of the Brunei Sultanate together with the Sulu possessions.[86] It became a protectorate by virtue of an agreement concluded between a chartered company and the British Government without either of the Sultans being a privy. In view of the anomalous position of the North Borneo Protectorate it is difficult to determine whether the territorial sovereignty of the Sultans had actually been superseded by the Company or whether it remained vested in the Company only by delegation.

The North Borneo Protectorate Agreement appears to represent the common feature of the British Protectorate in that without losing the whole of its independence, the new State, administered by the Company, handed over the conduct of its external affairs to Great Britain (the protecting State) who consequently assumed a certain measure of control over the protected State which was left free to conduct its own internal affairs.[87] As such, the sovereignty, which by right belongs to the Sultans, appears to have been shared between Great Britain and the Company: the external sovereignty being vested in the former and the internal sovereignty in the latter.[88] As these powers were originally delegated to the original grantees, Dent and Overbeck and their successors, the North Borneo Company, the question then is whether the Company's a action was *intra vires* the terms of the 1877-8

concessions when they surrendered partially the sovereign powers of the Sultans to the British Government.

Strictly the British Government may be regarded only as a 'successor' and 'assignee' of the Association within the meaning of the terms of the concessions and as such the Protectorate Agreement could be regarded as *inter alios acta*. As such the British Government may be said to have assumed the external sovereignty of the Company by way of continuous delegation from both the Sultans of Brunei and Sulu. The Agreement itself is silent on this point and the position cannot therefore be ascertained positively. However, by concluding a separate agreement with the British Government, without either of the Sultans being a privy, the Company appears to have acted *ultra vires* the terms of the original concessions. Accordingly, the Agreement could be regarded as *void ab initio*.

Nevertheless, in international law an arrangement whereby a powerful State acquires the sovereignty of a weaker state piecemeal i.e. first the external sovereignty and then the internal sovereignty, has been favourably and extensively adopted by many European states in the spread of their dominions and as a means of excluding other powers.[89] 'The use of the term protectorate, which is still consistent with the retention of considerable amount of internal sovereignty by the protectorate ruler'[90] is calculated to form a transitional stage between independence and absorption. The ultimate aim of these states being to confer upon the protecting state the exclusive rights eventually, or when circumstances warrant, of incorporating the territories into their dominions.[91] International law would then recognize the sole right of the protecting State, as against other States, within the protected State.[92]

The proclamation of protectorate over North Borneo could therefore be regarded as another transitional stage, after the establishment of the British sphere of influence, towards annexation of the protected state. Indeed the Agreement itself even stipulated that the government of the protectorates was not to make any 'cession or other alienation of any part of the territory to any foreign State or its subjects or citizens without the consent of the British Government'. When favourable circumstances presented themselves in 1946, the territory was actually ceded to, and annexe annexed by the Crown, to form part of its dominions.

Though for the purpose of municipal law the protected state is regarded as being sovereign and independent,[94] enjoying internal personality[95] and its territory considered a foreign country,[96] and its head of state is accorded diplomatic immunity and dignity:[97] for the purpose of international law the territory of the protected state has often been regarded as being part of the protecting states,[98] in so far as international law regards the protecting power as being responsible for the efficient administration of the protected state 'within a reasonable time after the establishment of the Protectorate'.[99]

Accordingly it seems clear that though the proclamation of North Borneo as an Independent State under the British Government protection was inconsistent with the terms of the 1877-8 concessions and did not strictly render the territory as part of the Crown's dominion, however international law would recognize the exclusive right of Great Britain, as the protecting power, to control and administer the territory as if it formed part of the Crown's dominion itself.[100]

(v) The basis of the Chartered Company's territorial acquisitions of 1889 to 1903 and their effect on the Sultans territorial sovereignty

As indicated earlier, between 1889 and 1903 the British North Borneo Company acquired from the Sultan and Pengirans of Brunei additional river territories and from the Sultan of Sulu the confirmation of the cession of all the islands in the vicinity of the territory of North Borneo stretching from Banguey Island as far as Sibuco Bay. As in the 1881 to 1888 grants these territories were acquired under the general powers conferred on the Company by the Royal Charter. The terms and form used therein are similar to those of the previous grants and commissions. In consideration of the grant of territories and powers to the Company the Sultans and rulers of the various territories were to receive specified annual payments. It follows therefore that all the conclusions pertaining to the effect of the 1881-8 instruments on the sovereignty of the rulers apply *mutatis mutandis* to these subsequent instruments, i.e. sovereignty accrues to the Crown under British

principles of constitutional law, and international law, recognizing this principle, will take cognizance of the fact that the Crown is sovereign over the territories.

International implications of the Protocol, Agreements and Convention concluded with and for the Protected State of North Borneo by the British Government

(i) The effect of the Protocol (Madrid) of 7 March 1885, on the sovereignty of the Sultans of Brunei and Sulu

As indicated earlier under Article I of the Protocol, the Governments of United Kingdom and of Germany recognized the Spanish sovereignty over the Sulu Archipelago, whilst under Article III the Spanish Government, as far as regards the British Government, renounced all claims of sovereignty over the territories of Borneo, which belong, or which have belonged in the past, to the Sultan of Sulu, and the islands administered by the British North Borneo Company.

An international agreement containing similar provision as that of the Madrid Protocol of 1885, in which two or more Member-States of the Family of Nations agreed *inter-se* to recognize the sovereignty of the other over the territories of a third State or any unrecognized area, and to refrain from doing anything that might lead to the acquisition of sovereign rights in an area where the other is said to have established a 'sphere of influence'.[101] In the event, no territorial rights of a legal nature should accure to the influencing State,[102] nor are the rights of the sovereign rulers of the territories in any way affected[103] by the mere establishment or existence of a sphere over the area of the State in question. The only legal effects which arise directly from such an arrangement is that the interested 'Power ... obtain the contractual rights' of forebearance of the other party or parties to the contract.[104] This arrangement, commonly adopted by the colonial powers, seems to be the usual stepping stone preceding the establishment of colonial protectorates in the process of territorial acquisition by these Powers.[105]

From this premise it could be argued that the Madrid Protocol of 1885 would not have affected the sovereign rights of the Sultans of Brunei and Sulu. Between Great Britain and Spain it merely imposes upon Spain a legal duty to refrain from interfering with the political or other activities of the British Government and to abstain from any political action which might be regarded as a step towards the acquisition of sovereignty over the territories administered by the North Borneo Company. Similarly Great Britain was under a corresponding duty and obligation towards Spain in the Sulu Archipelago.

(ii) The international implication of the Boundary Treaties and Conventions concluded between the United Kingdom, the Netherlands and the United States in 1898, 1915 and 1930

Whilst the Protocol of 1885 concluded between United Kingdom and Spain constituted a mutual agreement between the two States that the territory of North Borneo was to be exclusively within the British sphere of influence, the Boundary Treaties and Conventions of 1898, 1915 and 1930 confirmed the British sphere as being distinct from that of the Netherlands and the United States. They indicated that these specified areas were earmarked for potential acquisition by the British Crown. They also ironed out the previous differences, on the one hand between the United Kingdom and the USA arising out of the Brunei grant of 1877 to the Overbeck-Dent Association, and on the other hand, between the United Kingdom and Spain, and the United Kingdom and the Netherlands, over the grant of the Royal Charter to Dent's Provisional Association. Thenceforth, the United Kingdom acquired title which, though somewhat inchoate, was good against these three States which previously had an interest in North Borneo. Since these disputes were settled by treaties and conventions, international law would take cognizance of this development as being another stage towards the crystallization of British title to the territory.

(iii) The effect of the Agreement of 26 June 1946 for the transfer of the 'North Borneo Rights' and assets from the British North Borneo Company to the Crown on the sovereignty of the Sultanates of Brunei and Sulu and its international implication

The 1946 Agreement declared, among other things that the 'Borneo Sovereign Rights' which consisted of all the benefits of the grants and commissions of 1877 and 1878, the instruments concluded between 1881 and 1903 and the assets and liabilities of the Company, should be transferred and ceded to the Crown. This Agreement appears to have gone beyond the terms of the Protectorate Agreement of 1888 in that, whilst the latter merely conferred on the Crown the external sovereignty

over the territory, the former purported to transfer and cede to the Crown all the residual powers as well i.e. the internal sovereignty of the Company over the territory. It would seem it had also exceeded the terms of the 1877-8 territorial concessions which merely delegated the sovereign powers of the Sultans to the original grantees, their heirs, associates and successors. It is therefore questionable whether the Company, as a successor to the Dent Provisional Association, had any right to divest the Sultans of these delegated powers and cede them to the Crown by an act in which neither of the Sultans was a privy.

It is possible, no doubt, to contend that the British Government was only a 'successor' or 'assignee' of the original grantees and as such the 1946 Agreement was *intra-vires* the terms of the 1877-8 grants. But this argument would hold only if the British Government is regarded as having the sovereign powers assumed from the Company by virtue of continuous delegation from both of the Sultanates. But perusal of the terms of the Agreement indicates that the position is otherwise, i.e. the British Government appeared to have intended to take over the internal sovereignty of the Sultans in 1946. As such, the only reasonable conclusion under the circumstances is that the Agreement was concluded in contravention of the terms of the instruments of 1877-8.

Nevertheless the Agreement, having been concluded between two States, the United Kingdom and the 'Independent' Protectorate State administered by the North Borneo Company, would not only constitute proper cession[106] under international law, but would also confer on the former a good international title.

(iv) International implications of the North Borneo Cession Order-in-Council of 10 July 1946

This Order, among other things, declared that the state of North Borneo 'shall be annexed to and form part of the British dominions and shall be called together with the Settlement of Labuan and its dependencies the Colony of North Borneo'.

This was the first time since the territories of the state of North Borneo were conceded to the Overbeck-Dent Association that the Crown had categorically asserted domain over them, though in 1888 it had superceded external sovereignty through the Protectorate Agreement and internal sovereignty by the Agreement of 26 June 1946. As annexation confers an international title on an annexing State where there is clear manifestation of an intention to annex,[107] the Cession Order-in-Council may be regarded as evidence of the Crown's intention to acquire North Borneo.

(v) International implications of the Proclamation of the Philippine Independence by the United States of 4 July 1946

In the preamble to the Proclamation of the Philippine Independence made by the USA[108] there were specific references to the terms of the Treaties of 10 December 1898 and 7 November 1900 (by which the United States acquired sovereignty over the Philippine Archipelago from Spain)[109] and to the Boundary Convention (concluded with Great Britain and the United States) whereby the line separating the Philippine Archipelago from the State of North Borneo was delimited.[110]

However there does not appear to be any evidence of official protests from the Philippine Government against the terms of the USA Proclamation even though in effect it denied the Philippines legal right to claim sovereignty over North Borneo. Moreover the Constitution of the Republic of the Philippines, ratified in 1947, confirmed the terms of these treaties. It may therefore be assumed that, under the circumstances, the Philippines had adopted the terms of the treaties in their entirety and hence renounced any claims over North Borneo. However it was in order to offset the implication of the Proclamation and the terms of its constitution that probably prompted the present Philippine Government to pass a statute redefining the base lines of the territorial sea of the Philippine Archipelago and thus purporting to acquire dominion and sovereignty over the territorial sea around Sabah. Consequently it was left open to the United Kingdom to annex the territory as part of the dominions of the Crown on 15 July 1946, eleven days after the Proclamation of the Philippine Independence.

It may therefore be concluded that though British title to the territory of North Borneo arose from the Brunei/Sulu grants and commissions, *it did not depend on them*. The municipal law principle, recognized by international law, that sovereignty over the territories acquired by a chartered company accrues to the State which grants the Charter and acknowledges the acquisition as an Act of State, operates in the United Kingdom's favour. The early disclaimer of

sovereignty and dominion over the territories specified in the 1877-8 grants and commissions by the Crown precludes the operation of the rule in the first place in favour of the United Kingdom.

Nevertheless, by virtue of the Treaty of 1847 concluded with the Sultan of Brunei, the Treaty of 1849 with the Sultanate of Sulu, the Madrid Protocol of 1885 with Spain, the proclamation of protectorate over the territory in 1888 and the boundary treaties and conventions of 1889 and 1930 with the Netherlands and the USA, Great Britain acquired an inchoate title over the territories. The first two treaties established her sphere of interest and the subsequent treaties and conventions, her sphere of influence against the other States. The inchoate titles over the territory were gradually transformed into absolute titles by virtue of the Agreement for the transfer of the 'Borneo Sovereign Rights' of 26 June 1946 which, as indicated earlier, constituted cession under international law, whilst the North Borneo Cession Order of 10 July 1946 signified Britain's intention to annex the territories of North Borneo to form part of the dominions of the Crown.

[1] 'Any rule of international law which regarded the territory of independent backward peoples as being under no sovereignty and belonging to nobody would not only *not* be based upon evidence of usage to be obtained from action of Nations (per Lord Alverstone CJ in West Rand etc. Co v. Rev (1905) p. 401) but would be in direct conflict therewith'. F.M. Lindley, *The Acquisition and Government of Backward Territory in International Law: a Treatise on the Law and Practice Relating to Colonial Expansion,* London, Longmans, Green, 1926, p. 46.

[2] Ibid.

[3] The opinions of publicists on the subjects are divided into three schools of thought: (a) Those (Victoria, Gentilis, Puferndorff, Grotius and Ayala) favouring the sovereignty of the politically less advanced people. Ayala stated that 'sovereignty over the earth was not given originally to the faithful alone but to every reasonable creature' (Hallam, Vol. II; Chapter IV, p. 58). (b) Those (Vattel, Philimore and Martens) who give a limited or conditional recognition to the sovereignty of these peoples. (c) And those (Westlake, Hall, Oppenheim and Lawrence) the publicists of the comparatively recent periods who deny the sovereignty of these peoples. In fact, a doctrine has emerged in modern times which denies that International Law recognizes any right of such people to the territory they inhabit, and in its most extreme form demands that such people shall have progressed far enough in civilization as to enable them to be recognized as Members of the Family of Nations before they can be allowed such rights (Lindley, op.cit. p. 20.) This view, though widely expressed, is not generally adopted by the Continental jurists and derives little support in international law (ibid. p. 45). Moreover there have not been wanting, authorities who maintain that International Law does, or should, extend its protection to independent peoples who are not of its community. Philimore, for instance, referred to the doctrine 'that International Law as confined in its application to European territories is a detestable one' and maintained that 'the principle of International Justice do govern or ought to govern dealings with the infidel community (ibid. pp. 45-46).

[4] J. Westlake, *International Law,* 2nd edition, 2 vols., Cambridge, The University Press, Vol. I, Chapters II & IX; Lindley, op.cit. p. 20. Even Judge M. Huber, who asserted that 'contract between a State ... and native princes or chiefs of people not recognized as members of the Community of Nations are not, in the international law sense, treaties and conventions capable of creating rights and obligations' had to admit that they are nevertheless facts which International Law must, in certain circumstances, take into account. See Max Huber in *Island of Palmas Arbitration (1928) U.N. Reports on Int. Arbitral Award Vol. 2.*

[5] Lindley, op.cit. p. 40.

[6] Steven Runciman, *The White Rajahs: A History of Sarawak from 1841 to 1946,* Cambridge, The University Press, 1960, p. 17.

[7] Ibid. pp. 25-27; K.G. Tregonning *A History of Modern Sabah, 1881-1963,* 2nd edition, Singapore, University of Malaya Press, 1963, p. 11; *Parliamentary Papers,* Vol. LXXXI, Appendices 1-5, pp. 530-6.

[8] Runciman, op.cit. p. 4; S.G. Maxwell & W.S. Gibson, *Treaties and Engagements Affecting the Malay States and Borneo,* London, 1924, pp. 143-7.

[9] *Philippine International Law Journal,* Vol. I (January–June 1963), p. 83; *Parliamentary Papers,* op.cit. Appendix 176, p. 505.

[10] Tregonning, op.cit. p. 5; *The Pacific Historical Review,* 'American Activities in North Borneo, 1865' by K.G. Tregonning.

[11] 'The Bates Treaty' of 1899, *The Philippine International Law Journal,* Vol. I (January-June), p. 98.

[12] The Carpenter Agreement, 1915, ibid. p. 98.

[13] There is much to be said for a doctrine which recognizes the sovereignty of the less politically advanced people. After all sovereignty does not necessarily involve 'the complicated arrangements of a modern State, and there would seem to be no reason for saying that the backward people have not as good an understanding of the powers which in practice constitutes the simple form of sovereignty which they exercise, or to which they sub-

mit ....' It is in fact not necessary to the possession of powers which are in fact sovereign powers that the nature of the sovereignty as a political concept should be understood. If the nations are to be regarded as capable of possessing and transferring property, they should also be considered competent to hold and transfer sovereignty which they actually exercise (Lindley, op.cit. p. 21).

[14] An individual can only acquire the *dominium title* as distinguished from *dominium eminens*; he cannot arrogate to himself an exclusive right to the country, or to reign over it. Per T. Twiss, The Oregon Question examined, in respect of facts and the Law of Nations, London, 1846. Lindley, op.cit. p. 84.

[15] A British subject acquiring dominion over a country or its inhabitants acquires such dominions solely and entirely for the Crown. To assume sovereignty over a country so acquired or occupied in his own right and as a British subject, would be illegal, as it would be a direct violation and invasion of the rights and prerogatives of the Crown. He can do so, however, with the assent and concurrence of the Crown, as did the King of Belgium and the King of Hanover, in which case they would unquestionably retain, and can transmit to their children, the right and privileges of British subjects. (The Opinion of Law Officers. See Smith, *Great Britain and the Law of Nations,* Vol. II, p. 86. *Cf.* Keith in *JCL,* 3rd Series, (1926), p. 306 and Lindley, op.cit. See also Westlake, op.cit. Vol. I, Chapter X; pp. 213-14.)

[16] Lindley, op.cit. p. 83. For 'the independent activities of a private individual' lies outside the domain of international law (see L.F.J. Oppenheim, *International Law: a Treatise,* ed. H. Lauterpacht, 8th edition, London, Longmans, 1952, Vol. 1, p. 544) and 'is of little value unless it can be shown that they have acted in pursuance of a license or some other authority received from their Government or some other way their Governments have asserted jurisdiction through them (see judgement of Lord McNair in the Anglo-Norwegian Fisheries Case: *ICJ* Report: 1951, p. 184). See also Smith, op.cit. Vol. II, p. 87. 'The assumption of sovereignty by a subject is illegal unless made expressly or impliedly with the consent of the sovereign.' The Opinion of Law Officer, FO 83/2292.

[17] Lindley, op.cit. pp. 85-86.

[18] Ibid. p. 86.

[19] 'Two Commissions were set up by the British Government in 1855 to enquire *inter alia* whether the position of Sir James Brooke at Sarawak, either as holding that possession of the Sultan of Borneo (Brunei), or as he now alleges, as an independent Rajah, holding it by free choice of the people, be compatible ... with his character of a British subject.' One of the Commissioners reported that he did not find the position of Sir James Brooke to be any more inconsistent with his character of a British subject 'than the ordinary and frequent case of British subject engaging in the service of a foreign Power, from which they may legally be re-called by their native sovereign on pains of outlawry'. Sir James was, in his opinion, a vassal of the Sultan, although he held a tenure which, Sarawak as part of the Sultan's dominion or as an independent State. In the former case, he pointed out, the chief difficulties of the position vanished, especially those that might arise in connection with the Rajah's relations towards foreign States. On the other hand, if independence were admitted to be complete and absolute, it was possible that the duties which attach to a British subject must regulate the position as a ruler. In the face of the Act of 1813, 53 Geo. III c. 155, declaring 'the undoubted sovereignty of the Crown over the territorial acquisition of the East India Company', he was not inclined to uphold the opinion that Sir James Brooke, or *any other British subject,* could attain to the position of being an independent ruler of a foreign territory. (Lindley, op.cit. pp. 86-88; Smith, op.cit. Vol. II, pp. 77-83.)

[20] Lindley, op.cit. p. 88.

[21] See Maxwell & Gibson, op.cit. p. 194, for the full text of the Protectorate Agreement.

[22] See Footnote 19 above.

[23] Tregonning, op.cit. p. 25.

[24] Ibid. p. 12; *Parliamentary Papers,* op.cit. Letter No. 120: Mr. E. Dent to the Under-Secretary of State FO 16 May 1878; Letter No. 137, p. 453 from Alfred Dent & Overbeck to Marquis of Salisbury.

[25] Tregonning, op.cit. p. 13; *Parliamentary Papers,* op.cit. Letter No. 118: Acting Consul-General to the Earl of Darby, 22 January 1878.

[26] *Parliamentary Papers*, op.cit. Letter No. 137, p. 453; No. 120, E. Dent to the Under-Secretary of State, FO p. 444.

[27] *Parliamentary Papers*, op.cit. Letter No. 118: Acting Consul-General, W.H. Treacher to the Earl of Darby; Letter No. 120 E. Dent to the Under-Secretary of State, FO p. 444, 16 May 1878; Letter No. 122.

[28] Lindley, op.cit. p. 91.

[29] The former Congo Free State was founded by an association of individuals and recognized by the Berlin Congo Conferences of 1844-5. See Protocol 9 of that conference in Martens, *NRG*, 2nd Series X, p. 353.

[30] Lindley, op.cit. p. 113. As early as 1683 it was made clear that the Crown reserved to itself the sovereignty over all territorial acquisition of the East India Company. This principle was formally enunciated in a resolution passed by the House of Commons in 1773.

[31] Ibid. pp. 99. See also Hall, *International Law,* 4th edition, pp. 133-4, in which he stated that territory acquired by the Royal Niger Company is part of the British Dominions, and in the note on p. 110, he supported the proposition that the acts of such a company as the East Africa Company are to be classified in point of competence with those of Commissioned Agents of the State. Opinions of two Law Officers, see McNair in *BYBIL,* Vol. 26 (1949), pp. 41-44.

[32] 1928 A.D. 1927-8, Case No. 70; M. Huber's Award in the *Island of Palamas Arbitration in Scott, Hague Law Reports,* 2nd Series (1932) pp. 115-17.

[33] Opphenheim, op.cit. p. 427.

[34] Ibid. p. 545.

[35] Maxwell & Gibson, op.cit. p. 146.

[36] Art. X of the Treaty of Friendship and Commerce between Her Majesty Queen Victoria and the Sultan of Borneo (Brunei) 27 May 1847. For full English text see Maxwell & Gibson, op.cit. pp. 142-7.

[37] The English translation of the Sulu grant states that 'We ... hereby grant and cede all the territories and land being tributary to us on the mainland of the island of Borneo' forever and in perpetuity, with no rights of the grantors 'to resume control and government of the territories' if the annual compensation was not kept up.

[38] *Parliamentary Papers*, op.cit. Letter No. 137, pp. 453-9.

[39] Lindley, op.cit. pp. 237-8.

[40] Runciman, op.cit. pp. 181-2; Tregonning, op.cit. pp. 13-15; *Parliamentary Papers*, op.cit. Letter No. 118, Acting Consul-General Treacher to the Earl of Darby, informing him that 'to the best of my belief, the Baron represented a bona fide British Company or co-partnership with sufficient capital and capacity of raising it to carry out an undertaking of the kind, and that *if His Highness thought fit to make the desired concessions* it would be well for him to have a clause inserted rendering it not transferable to other than British subjects without the consent of the British Government and that he should insist that any differences which may hereafter arise between himself and the British Company should be referred for decision to the Consul-General in Borneo'. (Italics are mine.)

[41] Runciman, op.cit. pp. 181-2: 'By the grant in consideration of the annual payment to the Sultan of the sum of $5,000/- the representatives of the proposed Company obtain *concessions* of the country extending from Padasan River in the West to the Sibuco River in the East'. *Parliamentary Papers*, op.cit.: 'Her Majesty's Govt. will reserve the question of the *concession* of certain territory in Borneo to a British Company'. Letter No. 122 Sir Paunceforte to Mr. E. Dent: 'The Treaty made with the consent of our Dato in Sulu which has reference to the concessions of Sandakan in the mouth of Moharam' (literal translation of letter from the Sultan of Sulu) Letter No. 132, Inclosure I, p. 449: 'the occupation of a concession have full territorial powers from the Sultan of Sulu and Brunei'. Sir Rutherford Alcock, ibid: 'To authorize in the meanwhile to hoist British flag on our concessions', per Messrs. Overbeck & Dent. 'I have since succeeded in obtaining the text of the concessions ... until he had some knowledge of the nature of the concessions ....' Baron de Lynden to Count de Bulandt (communicated to Earl Granville by Count de Bylandt) 27 January 1881, ibid. Letter No. 15, pp. 81-82. (Italics are mine.)

[42] W.H. Treacher 'advised Overbeck to negotiate for an entirely new lease' (Runciman, op.cit. p. 181; Tregonning op.cit. p. 13); 'The new lessees thus become possessed of all the harbours in Borneo' (per Acting Consul-General Treacher to the Earl of Darby, Labuan, January 1878; Inclosure No. 2 of Letter No. 174). The title bears the following words: 'Copies of Ten Documents relative to the correspondence between Baron de Overbeck and the Governor of Sulu respecting the *contract of lease* to the Baron by the Sultan of the said Archipelago of Sandakan and other ports belonging to him', ibid. p. 459; 'We have to execute the *contract of lease* of Sandakan. We have agreed from this day for the lease of the said port with the Governor, Baron de Overbeck and Alfred Dent, ... if by chance, one of the leases should remain, the lease shall not be transferred to foreigners or another company without the consent of the King ...' per excerpts from copy of the interpretation of the Moorish Idiom of Mindanao of the contract which the very Excellent Sultan of Sulu entered into with Baron de Overbeck. Ibid. Letter No. 174, Inclosure No. 2 p. 495; '... Her Majesty's Government do recognize our right to lease the territories specified in the title deeds granted by the Sultan' per Mr. Dent to Marquis of Salisbury; ibid. Letter No. 179, p. 506; 'Her Majesty will recognize the rights of Dent & Overbeck Company to *lease the territories* specified in the title deeds granted to them by the Sultan of Sulu & Brunei', per Lord Teuden to Mr. Dent, p. 507, ibid. Letter No. 180, p. 507. (Italics are mine.)

[43] Marquis of Salisbury to Mr. Stuart, Minister to Netherlands, *Parliamentary Papers*, op.cit. correspondence respecting the Claim of Holland, Letter No. 5, p. 73.

[44] 'A company of which Baron de Overbeck is representative on the East has recently acquired from the Sultan of Brunei and Sulu a *cession of territory* in North Borneo. I mention that the document relating to the *cession* of the aforsaid territory has been made out in the name of Baron de Overbeck and Alfred Dent jointly', E. Dent to Under-Secretary of State, Foreign Office, 16 May 1878. Ibid, Letter No. 20: 'Consequently the question of *cession* of Sandakan ...' per Acting Consul-General Treacher to the Marquis of Salisbury 24 August 1878. Ibid. Letter No. 132. Copy of our Convention with the Sultan of Sulu and the commissions issued by him, both dated the 22 January 1878 whereby he distinctly *'ceded and granted all his rights* and powers over all the territories and islands belonging to him on the mainland of the island of Borneo with full sovereign powers for ever and in perpetuity to the British North Borneo Company': per Messrs Dent & Overbeck, to the Marquis of Salisbury 12 February 1878; Ibid. p. 459.: '...the pretence of the territories having been *ceded* by the Sultans of Brunei and Sulu', per The Marquis de la Nega de Arunio to the Marquis de Case logesia; Ibid. Letter No. 194; 'I would not therefore conceive that the material interests of Spain were really injured by the Cession made to the Company'. per Earl of Granville to Mr. Morier 7 Dec. 1881. Ibid. 5 letter No. 195, p. 524.; 'Mention had been made of a *cession of territory* in the part of the Sultans of Brunei and Sulu to Overbeck ...' (Ibid) Correspondence relaying the claim to Holland Letter No. 3 Inclosure 3. p. 69; It appears from the latest evidence that *sovereign rights have been ceded* to that Gentlemen by the Sultans of Brunei and Sulu 'Inclosure No. 20. pp. 89-91. The territory which has been *ceded* to Mr. Dent'. Ibid. Letter No. 24 Inclosure 2, p. 100. (Italics are mine.)

[45] Mr. de Rochussen to Count de Bylandt; in *Parliamentary Papers,* op.cit. Letter No. 26 Inclosure No. 26, p. 101.

[46] Earl of Granville to Count de Bylandt; *Parliamentary Papers,* op.cit. Letter No. 23, p. 95.

[47] Earl of Granville to Mr. Morier; *Parliamentary Papers,* Letter No. 197, pp. 526-9.

[48] Mr. Gladstone, *Hansard,* 17 March 1882, p. 1191. Lindley, op.cit. p. 106.

[49] Alfred Dent, Statements of application addressed to Marquis of Salisbury, *Parliamentary Papers,* op.cit. Letter No. 137, pp. 453-9.

[50] Per Messrs. Overbeck & Dent to the Marquis of Salisbury, 12 February 1878; *Parliamentary Papers,* op.cit. Letter No. 26, Inclosure No. 26, p. 459.

[51] H. Lauterpacht in *BYBIL*, Vol. 26, p. 57.

[52] See *Annual Digest,* 1931-32, Case No. 206 Sch. v. Germany, decided by the German Supreme Court in respect of the Treaty of Versailles.

[53] H. Lauterpacht, op.cit. p. 57. See also S. Williston, *The Law of Contracts,* revised ed., 1936, Vol. III, p. 621. The same view is expressed in the American Law Institute's *Restatements of Law: Contract,* Vol. I, 4932 p. 328 S. 236 where the rule is laid down that 'terms must be interpreted against the party from whom they proceed unless their use by him is prescribed by law': a contract if ambiguous will be interpreted in favour of the promisee; Williston, op.cit. p. 621; R. Anson, *Principles of the English Law of Contract,* 13th edition by Mauria L. Gwyer, Oxford, Clarendon Press, 1912, Chap. XI, p. 1. For the suggestion that the clause is to be interpreted in favour of the party in whose interest it was inserted regardless of who inserted it, see Oertmen, *Interests and Concepts: The Jurisprudence of Interest,* ed. by Nag dalema Schoch, 1948, p. 63. See the Judgment of German Polish Mixed Arbitral Tribunal in Kunkel *et al.* v. Polish State, A.D. 1925-6, Case No. 279, which applied the principle.

[54] *PCIJ* relies upon it on one occasion in the Brazilian Loan Case, Ser. A. No. 21, p. 114: 'There is a familiar rule for the construction of instruments that, where they are found to be ambiguous they should be taken *contra proferentem*'. See also the opinion of Parke Umpire in Lusitania Case, A.D. 1923-4, Case No. 198 p. 340. The decision of Rouman-German Mixed Arbitral Tribunal (1926) Witzenhoffer v. Germany A.D. 1925-6 Case No. 278; *Gouldenberg* v. *Roumania* (1928) *RIAA* UN Vol. II (1949) p. 907.

[55] The interpretation of the Baden-Baden Agreement concerning officials illustrates this aspect of the rule, *RIAA* UN Vol. III (1949) p. 1564.

[56] Lauterpacht, op.cit. p. 64.

[57] Ibid. p. 64.

[58] Runciman, op.cit. p. 181; Tregonning, op.cit. pp. 13-14.

[59] Tregonning, op.cit. p. 14.

[60] Ibid.

[61] Lauterpacht, op.cit. p. 64.

[62] Tregonning, op.cit. p. 14.

[63] Ibid. pp. 14-15.

[64] *Parliamentary Papers,* op.cit. Acting Consul-General W.H. Treacher to the Earl of Darby, 22 January 1878, Letter No. 118.

[65] Article X of the Treaty of 1847 concluded by the Sultan of Brunei with the British Government.

[66] Earl Granville to Mr. Morrier, FO 7 January 1882; *Parliamentary Papers,* op.cit. pp. 562-9.

[67] Article 6 of the Royal Chater; *Parliamentary Papers,* op.cit. Inclosure 193; pp. 515-23; also Maxwell & Gibson op.cit. p. 167; G.B. Kellagher, *The Laws of North Borneo,* Vol. VI, 1963, p. 18. p

[68] Smith, op.cit. p. 83.

[69] Ibid. p. 77; 'As early as in 1683 it was made clear that the Crown reserved to itself the sovereignty over all the territorial acquisitions of the East India Company'. This principle was formally enunciated in a resolution passed by the House of Commons in 1773.

[70] Ibid. p. 83.

[71] 'Like Janus of old it had two faces. On that which looks towards the native tribes all the linements and attributes of sovereignty are majestically outlined. On that which is turned towards the United Kingdom is written subordination and submission.... They are sovereign in relation to the barbarous or semi-barbarous inhabitants of the district in which they bear sway. They are subjects as regards the Government of their States.' T.J. Lawrence, *The Principles of International Law,* 7th ed., London, 1929, p. 42.

[72] Lindley, op.cit. pp. 284-91.

[73] See Footnote 69 above.

[74] In the case of the Hudson's Bay Company which received the Charter in 1670, the rights of the King were asserted by declaring the lands of the Company to be held 'as our Manor of East Greenwich in our County of Kent, in free and common Soccage'. Smith, op.cit. p. 77.

[75] Lindley op.cit. pp. 101-2.

[76] Ibid. pp. 108, 284-91.

[77] Ibid. p. 291.

[78] Lindley, op.cit. p. 108.

[79] *Parliamentary Papers,* op.cit. Letter No. 192, pp. 526-9.

[80] Ibid.

[81] Earl of Granville to Mr. Morrier, F.O. 7 January 1882. Mr. Gladstone, the Prime Minister of the time, acknowledged that the powers 'obtained by the Company involved the essence of Sovereignty but they were covered by the suzerainty of the Native Chiefs'. Pauncefort, who 'had secured one of its lawyers to prepare the Charter for Dent, was called to reassure Lord Kimberly

that the Charter did not vest the sovereignty of the territory in the British Government' (Tregonning, op.cit. p. 27). The Marquis of Salisbury declared that the object of Her Majesty's Government was not to set up any dominions or to enter upon controversy with respect to territorial claims but it simply saw an opportunity to promote the development of the resources of the country (*Parliamentary Papers*, op.cit. Letter No. 5, p. 73). In his Letter to Mr. Stuart, Earl of Granville again declared that 'the Charter would be similar to those which had been granted to the other Trading Companies and would have no political character (*Parliamentary Papers,* op.cit. No. 7, p. 75). The Earl also went into 'great length to explain to Count de Bylandt of the Netherlands that the real object of the Charters and the meaning and intention of each article (*Parliamentary Papers,* op.cit. Letter No. 23 p. 95).

[82] Earl of Granville to Mr. Morrier, FO 7 January 1882.

[83] Maxwell & Gibson, op.cit. p. 187; Kellagher, op.cit. p. 30; Hertslet, *Commercial Treaties,* 31 vols., London, HMSO, 1840-1925, Vol. 18, p. 225.

[84] Maxwell & Gibson, op.cit. pp. 62 & 64; Kellagher, op.cit. pp. 12 & 15.

[85] Lindley, op.cit. p. 178; Kellagher, op.cit. p. 30; Hertslet, op.cit. p. 225.

[86] North Borneo was proclaimed an Independent Protected State in the same year as Brunei and Sarawak (Tregonning, op.cit. pp. 37-38).

[87] Lindley, op.cit. p. 181: 'A British Protectorate is not within the British Dominions but as regards its foreign relations is under the exclusive control of the King, so that its government cannot hold direct communication with any other foreign power, nor a foreign power with that government.' Jenkins, *British Rule and Jurisdiction beyond the Sea,* p. 165; Reimsch, *Colonial Government,* p. 191, E.J. Payne, *Colonies and Colonial Federations,* p. 1954, *Encyclopaedia Britannica,* Vol. 22, 11th ed. p. 470; see also W.E. Hall, *Foreign Jurisdiction of the British Crown,* Oxford, Clarendon Press, 1894, p. 28.

[88] I. Westlake, *International Law,* 2nd edition, 2 vols., Cambridge, The University Press, 1910-13, p. 128. On the divisibility of sovereignty, see Oppenheim, op.cit. pp. 120-2 for the orthodox theory whereby sovereignty is one and indivisible and the right of the protecting State to interfere in all matters of external affairs constitutes a definite loss of sovereignty.

[89] Lindley, op.cit. p. 182.

[90] Lindley classified 'protectorate' into three categories: The first category is 'the institution whereby a comparatively powerful State assumes the duty of protecting a weaker State which might gain advantage of protection without losing its sovereignty'.
The second category is where 'the essential feature of the arrangement is that the Protected State has handed over the conduct of its external affairs to the Protecting Power or accept its dictation in regard to those affairs and has thus parted with part of its sovereignty, without however, losing the whole of its independence'.
The third is the more 'modern protectorates which have been established over political societies of very varied degrees of advancement'. They have been usually intended or destined to result in the incorporation of the protected region into the domain of the protecting Power, or at all events, in an increasing control by that Power over the internal affairs of the protected country. Sovereignty is to be acquired piecemeal, external sovereignty first. This is generally patent.
Ibid. pp. 181-2. See also Baty's classification in protectorates and mandates, *BYBIL*, Vol. III, pp. 114-15.

[91] Lindley, op.cit. pp. 182-3, 203. See also *Encyclopaedia Britannica,* 11th ed. Vol. 22, p. 470.

[92] Lindley, op.cit. p. 203.

[94] 'What the idea of a protectorate excludes the idea of annexation on the other hand would include is that absolute ownership which was signified by the word *dominion* in Roman Law and which, though not quite satisfactory, is sometimes described as territorial sovereignty'. L.J. Kennedy, Rex v. Crewe, ((1910)) *LJ* 847. 'Many writers adhere to the doctrine that there is no impairment of sovereignty of the weaker State and have gone so far as to state that the arrangement is *res acto alios acta* [a thing done between others] and concerns only the parties to it. But the trend of recent policy and purport of much recent legislation are against this view': *Encyclopaedia Britannica,* p. 470. It is now generally accepted that the relationship of protectorates must be recognized by third parties. 'The right of a protecting State to interfere in all matters of external affairs constitutes a definite loss of sovereignty and since in *orthodox theory* sovereignty is one and indivisible such a situation must imply a loss of sovereignty on the part of the protectorate State....' Furthermore, it was equally clear that on the asumption of the status of Protectorate the protected state ceases to qualify for membership in the UN.

[95] Oppenheim, op.cit. pp. 192-3. 'Morocco, even under a Protectorate, retained its personality as a State in International Law' Rights of US Nationals in Morocco, *ICJ Report,* 1952, p. 185.

[96] Oppenheim, op.cit. p. 193. In Rex v. Crewe ((1910)) 79, *LJ* 847 'The Court of Appeal decided that Bechuanaland Protectorate was not a foreign country' per L.J. Kennedy; *Encyclopaedia Britannica,* Vol. 22, p. 468; see also Lindley, op.cit. pp. 187-8; AO of the *PCIJ*, On the Nationality Decrees in Tunis and Morocco, Ser. B, No. 4; Lindley op.cit. pp. 304-6.

[97] Oppenheim, op.cit. p. 193; see also the case of Mighell v. Sultan of Johore (1894) I. QB, 149; Duff Development Co. v. Government of Kelantan (1924) AC 797; Government of Morocco v. Laurence, *Annual Digest,* 1920-30 Case 75; Sultan of Johore v. Abu Bakar (1952) I. *AER*, 1261.

[98] The Air Navigation Convention of the 13 October 1919 provides that the territories and nationals of protectorates shall, for the purpose of that Convention, be assimilated to the territory and nationals of the protecting

States; Great Britain in proceeding by way of Order-in-Council had often treated her African protectorates as if they were Crown Colonies; the British Parliament has also in certain cases legislated for all her Protectorates as if they formed part of the British dominions. The Federated Malay States were regarded as British Colonies for the purpose of the Anglo/Persian Commercial Convention of February 1903.

[99] Lindley, op.cit. p. 203; for 'any State which undertakes to protect another assumes towards the rest of the world responsibilities for its good behaviour...', Coolidge, 'United States as a World Power', p. 167. See *Encyclopaedia Britannica*, Vol. 22, 11th ed. p. 470. Smith, op.cit. p. 83.

[100] Lindley, op.cit. pp. 203 & 212.

[101] Ibid. pp. 207-36.

[102] Ibid.

[103] Thus when the Sultan of Zanzibar objected that part of the region in South East Africa allotted to Portugal by the Agreement between that country and Germany of 30 December 1886, had already been recognized by Germany and Great Britain as belonging to Zanzibar, the German Government replied that their arrangement with Portugal did not affect the Sultan's rights. 'It merely provided, they said, 'that the Imperial Government would not interfere with regard to any arrangement which the Portuguese Government might come with the Sultan or others as to territory lying beyond the sphere of German interests'. Ibid. p. 11.

[104] Ibid. p. 236.

[105] Ibid. p. 207.

[106] Oppenheim, op.cit. pp. 547-8.

[107] Ibid. pp. 567-8; Lindley, op.cit. p. 284.

[108] *BFSP* Vol. 146, p. 899.

[109] *BFSP* Vol. 90 p. 382 and Vol. 92 p. 814 respectively.

[110] Treaties Series No. 2(1933) cmd. 4241; *BFSP*, Vol. 132, p. 367.

4

The Philippine Claim to Sabah: Its Legal Basis

The Philippine Government's aid-memoire to the British Government of 12 September 1962 indicates that the Republic's challenge to the British title to North Borneo stemmed mainly from the different interpretations of the Sulu grant of 22 January 1878. The Philippine Government alleges that it was a 'lease' and not a 'Deed of Cession'.[1] However it is difficult, if not impossible, to ascertain positively the true basis of the Philippine Government's own claim. An attempt will therefore be made to survey the circumstances upon which the Philippine claim might be found. The claim itself will then be analysed to test its validity.

Circumstances governing the possible basis of the Philippine claim

North Borneo, once part of the territories of the Brunei and Sulu Sultanate, had never been within the domain of the Philippine Archipelago. Therefore, the Philippine Government must prove its title through inheritance, if any, either from the United States (the successors to Spanish sovereignty over the Philippine and Sulu Archipelago) or directly from both the Brunei and Sulu Sultanates.

Whether the Philippines acquires good title to the territory of North Borneo from the United States depends on whether Spain had any valid title in the first place to pass on to the United States. Similarly the Philippine title to North Borneo through either the Brunei or Sulu Sultanate depends on whether any title had been conferred on her by the Sultanates.

(i) The basis of Spanish title to North Borneo

Spanish activities in Borneo date back to 1521 when the remainder of Ferdinand Magellan's fleet called at Brunei harbour.[2] These grew more vigorous after a second expedition to Brunei led by Don Fransisco do Sanda, who succeeded in 1578 in establishing temporary Spanish influence at the Sultan's Court when, following the death of Sultan Abu Bakar, the Spanish protégé was installed on the throne.[3]

Spain had also concluded treaties of alliance and friendship in 1747[4] and 1805[5] respectively with the Sultan of Sulu who had ruled the territory of north-eastern Borneo as his dependency ever since the territory was ceded to the Sultanate by the rulers of Brunei in 1704.[6] Nevertheless it was not until 1851 that Spain became really interested in North Borneo on the basis of the Act of Re-Submission of 17 April 1851 by the Sulu Sultanate to the Spanish Crown.[7] Spain claimed this territory though the Act did not specially mention it as the dependency of the Sulu Islands,[8] and indeed expressly excluded it in the Treaty of 1836. In that Treaty, it may be recalled, Spain claimed jurisdiction over the whole of the Sulu Archipelago which 'extended from the western point of Mindanao (Magindanao) to Borneo and the Paragus (Palawan)', excluding 'Sandakan and the other countries, tributary to the Sultan, on the continent of Borneo'.[9] North Borneo was not even mentioned in the stipulations annexed to those of 23 September 1836 which the Sultan and the Chiefs (Dattoos) of Sulu concluded with the Spanish Government on 30 August 1850.[10]

Nevertheless in 1877 the Spanish authorities attempted to extend their claims to North Borneo by hoisting the Spanish flag at various points on the islands.[11] In September 1878, following the ultimate subjugation of the Sulu Sultanate and

its conclusion of the Treaty of Capitulation of Peace of 22 July,[12] the Spaniards claimed the Sultan's Borneo possessions which he had conceded to the Overbeck-Dent Association only in January of that year. A Spanish gunboat, the *El Dorado*, steamed into Sandakan Harbour and under threat of bombardment from the Captain of the Spanish vessel, the Spanish flag was hoisted in the village.[13] Protracted correspondence ensued between the British and Spanish Governments over the Spanish claim which led to the signing of the Madrid Protocol of 1885, by which Great Britain and Germany recognized Spanish sovereignty over Sulu, whilst Spain renounced her claim to North Borneo in favour of the United Kingdom.

Subsequent to the collapse of the Spanish Government in Manila, Spain ceded all her sovereignty over the Philippine Archipelago and its dependencies to the United States by the Treaties of 10 December 1898[14] and November 1900;[15] but she could not vest on the United States sovereignty over North Borneo, which she had previously renounced in favour of Great Britain in 1885. Accordingly, the Philippines cannot claim North Borneo by inheritance from the USA, the successor to Spain over the Sulu Archipelago and its dependencies.

(ii) The Basis of the United States Title to North Borneo

American claim through the Sultan of Sulu. The United States too had concluded separate treaties with the Sulu Sultanate. In 1848 Commander Charles Silker negotiated with the Sultan a treaty for fostering trade in the area.[16] On 10 August 1899 Brigadier General J.C. Bates of the United States Volunteers negotiated with the Sultan and his principal chiefs an agreement by which the Sultan recognized American sovereignty over the whole Archipelago of Jolo (Sulu) with its dependencies.[17] In return for its recognition the United States undertook to give the Sultan full protection against any attempt by foreign nations to impose upon him, and 'not to sell the island of Jolo or any other island of the Archipelago to any foreign nations' without his consent.[18] In 1904 another treaty was concluded between the United States and the Sultanate in which the former recognized the rights and duties of the Sultan and his Chiefs.[19] Finally, under an Agreement of 22 March 1915 concluded between Governor Carpenter and the Sultan the latter ratified and confirmed his recognition of the United States' sovereignty in Mindanao and Sulu.[20] Nevertheless, none of these treaties affected the Sultan's sovereignty over North Borneo.[21] Accordingly, when the United States concluded a boundary convention with Great Britain in 1930 the line separating the islands of the Philippine Archipelago and those of the British protected State of North Borneo, over which the United States had no claim, was clearly demarcated.[22]

Moreover, in the preamble to the Proclamation of the Philippine Independence[23] there were specific references to the fact that the United States had acquired sovereignty over the Philippines from Spain and had agreed with Great Britain on the delimitation of the boundary between the Philippine Archipelago and the State of North Borneo. These references imply that the United States and its successor, the Philippines, had renounced all possible claim over the territory of North Borneo.

It follows therefore that the Philippines, too, could not claim sovereignty over North Borneo by inheritance from the United States either as a successor to Spain or the Sulu Sultanate since she had no rightful claim over the territory.

American claim through the Brunei Sultanate. The Treaty of 1850 and the grant of territorial concessions in 1865 had conferred on Claude Lee Moses, the American Consul, and J.W. Torrey, the President of the American Trading Company of Borneo, respectively, the rights of the most favoured nation and had given them the concession of a large tract of North Borneo territories including the islands of Balembangan, Banggi and Palawan.[24]

The possibility of the United States staking claim over North Borneo through the Sultan of Brunei on the basis of these treaties cannot be dismissed entirely if it was assumed that these rights had continued to subsist and crystallize into an international title through the traditional process of consolidation, as in the case of the concessions to the Overbeck-Dent Association. However, since all these rights had been bought over by the Overbeck-Dent Association,[25] any trace of the United States' claim over the territory through the Brunei Sultanate would also have disappeared. In any case, the United States, through the Treaties of 1898 and 1900 which she

concluded with Spain, the Boundary Convention of 1930 with the United Kingdom and the Proclamation of the Philippine Independence of 1946, had renounced her claim over North Borneo. Consequently, she too could not acquire any title to North Borneo directly from the Sultan of Brunei which could be passed on to the Philippines in 1946.

(iii) The basis of the Philippine title to North Borneo through the Sulu Sultanate

There remains only one other possible basis in which the Philippine claim could rest i.e. a direct claim through the Sulu Sultanate, once the *de jure* and *de facto* sovereign over north-east Borneo itself. Indeed the Philippine Government has asserted that it is a successor to the Sulu Sultanate. They have placed reliance upon the decision of Justice Macaskie of the High Court of North Borneo in the case of Dayang Dayang Hadji Piando of Jolo, Philippine and Eight Others vs. The Government of North Borneo and Others in 1939,[26] in which Justice Macaskie had pronounced, *inter alia* that 'it is abundantly clear that the successors in sovereignty of the Sultan are the Government of the Philippine Islands'. This decision, the Philippine Government alleges, 'impelled' Sultan Esmail Kiram, one of the heirs of the Sultan Jamalul Alam of Sulu, to cancel the 1878 lease in 1957 and send formal notice of the cancellation to the United Kingdom Government, the British North Borneo Company and the UN Secretary General.[27] The Philippine Government further claimed that the Sultan of Sulu had continued in the meanwhile to exist until the Philippines by virtue of the title it had acquired from the Sultanate became vested with sovereignty and dominion over North Borneo.[28]

However, it is not clear what is meant by the claim of 'title it had acquired from the Sultanate' Presumably, 'the title' refers to a document i.e. the letter of 5 February 1962 which was addressed to the Philippine Department of Foreign Affairs by the attorney for the heirs of the Sultan of Sulu. This letter purported to contain the communication of the 'heirs' claim of proprietary rights over the North Borneo territory and their desire to see the territory included as part of the natural territory of the Republic of the Philippines.[29] If the Philippine title rests solely on this document the assumption is that, but for the document, she would have no claim whatsoever over the territory. Since the Philippines have also purported to base their claim on the decision of Justice Macaskie of the High Court of North Borneo, it may well be that they have intended to rely on the High Court decision as well as on the document from the attorney of the surviving heirs of the Sulu Sultanate as bases for legal claim. Such an assumption would not be mere conjecture since the Philippine Government has given the impression that its claim has been a long, outstanding affair and 'not a matter of recent interest'. Its 'deep and continuing concern [has been] aroused by the proclamation and publication of the North Borneo Cession Order in 1946, six days after the declaration of the Philippine Independence'.[30] As a result the Philippine Government has stated 'that prolonged enquiries and careful studies [have been] undertaken in the Philippines and abroad' and have led to the passing of two Resolutions, the Macapagal Resolution in 1950 to initiate 'the formal institution of the claim',[31] the Ramos Resolution of 1962 and a Statute of *ex abundante cautela* of the Philippine Congress of the intervening period i.e. 1951. The Philippine Government clarified that this Statute contained a provision which eliminates any conjecture that an extension of the Philippine Consulate in Singapore to North Borneo may be regarded as a waiver of the Philippine claim to the territory;[32] whilst the Ramos Resolution authorized the President of the Republic 'to take all the necessary steps consistent with international law procedure for the recovery of North Borneo'.[33]

But the Philippine Government did not seem to have made it absolutely clear whether the passing of these Resolutions or the 1951 Statute were prompted by the proclamation of the North Borneo Cession Order-in-Council in 1946 and/or the Justice Macaskie decision. The passing of the 1962 Resolution immediately following the receipt of the letter from the attorney of the Sultan's heirs suggests that it was this document which led to their passage. This suggestion would support the former Philippine Vice-President's proposition that the Sulu Sultanate had resumed the status of *de jure* sovereign over the territory following the termination of the Overbeck-Dent concession in 1957 and that the sovereignty over the territory subsequently became vested in the Philippines by reason of its cession to her.[34] Nevertheless there is no evidence of the conclusion of any treaty of cession between the Republic

of the Philippines and the Sultanate of Sulu at any time after the date of Proclamation of Independence. This makes it more difficult to determine the true basis upon which the Philippines may be said to have derived their claim from the Sulu Sultanate. Thus, as it stands, the Philippine Government does not appear to have any positive legal basis for its claim.

Analysis of the Philippine claim

As indicated earlier[35] the Philippine Government contended that the terms of the 1878 Sulu grant and commission could be construed as a 'lease'. When the original lessees, Messrs. Overbeck and Dent, transferred their rights over the territory to the British North Borneo Company (a private concern) they were transferring rights in the leasehold and 'not sovereign rights because the Company could not transfer rights it did not itself have'. The sovereignty over the territories therefore remained vested in the Sultan who merely delegated the rights to exercise governmental powers to the original lessees and its successors, the British North Borneo Company. In addition, the Philippine Government alleged that in granting to the Company a Royal Charter, the United Kingdom had not purported to vest the Company with governmental powers. Consequently, the United Kingdom, which claimed to have acquired sovereign rights from the British North Borneo Company by virtue of the Agreement for the 'Transfer of the Borneo Sovereign Rights', had in reality succeeded only to the leasehold rights of the Company whilst the powers delegated by the Sultan of Sulu to the original grantees remained vested in the Sultanate.[36] This position was maintained throughout until the heir of the Sulu Sultanate, Sultan Ismail Kiram, issued a proclamation cancelling the lease[37] and by the letter of 5 February 1962 vested the Philippines with 'sovereignty and domain over North Borneo'.[38]

The Philippine challenge to the British title to North Borneo stems mainly from the different interpretations which the present heirs of the Sulu Sultanate and the Philippine Government have placed on the 1878 Sulu grant and commission. This was challenged despite the fact that the State of North Borneo had been formed into one territorial unit from territories which were originally conceded to the Overbeck-Dent Association and those specified under several grants and commissions from 1877 to 1903. Whilst 'representatives of the British Government' have described the Deed of 1878 as a 'Deed of Cession' and the 5,000 Malayan dollars as cession money,[39] the heirs of the Sulu Sultanate and the Philippine Government maintain that the 1878 Deed was a lease and that the annual payment of 5,000 Malayan dollars (or the equivalent in Mexican pesos) was an annual rental.[40]

In support of its argument the Philippine Government contends that the 1878 agreement was written in Malay with Arabic characters. The English translation of the agreement used the Malayan (Malay) word '*pajak*'[41] while the Spanish document expressly use the term '*arrendamientos*',[42] the Malay and Spanish equivalent of the term 'lease'. The Philippines further contends that there are some documents in its possession 'under the signature of Dent himself and written after the contract had been signed', which referred 'to the contract of 1878 as lease and the Sultan as lessor'.[43]

The Philippine Government also states that the reports of Treacher, the British Consul who accompanied Overbeck to Sulu and acted as instrumental witness, 'characterized the contract after its signature as a lease and referred to the money payment as annual rentals'.[44] It is asserted by the Philippines that even the Royal Charter itself states that what was given to the Sultan was an annual compensation of 5,000 dollars and that this sum was not a 'purchase price'. The terms of the grant and commission, the Philippine Government indicates, would be 'consistent with the concept of lease and inconsistent with that of purchase'.[45] On this ground the Philippines contend that Overbeck and Dent had only acquired leasehold rights and not sovereign right or domain over North Borneo. They also assert that 'the terms of the contract the grants and commissions, the Statement and Application for Royal Charter [dated 2 December 1878, addressed by Alfred Dent to the Marquis of Salisbury, the British Secretary of State for Foreign Affairs of the day], the express provision of the Charter granted to the Company in 1881 and the various contemporary acts and correspondence of high evidentory value'[46] support such a proposition. Indeed, it has been claimed that Overbeck and Dent could not have acquired sovereignty or domain over the territories, for sovereignty can be ceded only to sovereign entities or to individuals acting for sovereign entities. Neither Overbeck nor Dent

was acting for any sovereign entity.[47] Since Overbeck himself did not acquire rights of sovereignty or domain over North Borneo the Philippines allege that his transferees, the British North Borneo Company, could not possibly acquire any. Overbeck and Dent could not have transferred more than they had, *nemo dat quod non habet.*[48] Indeed 'the British North Borneo Company did not acquire, as in fact it was not authorized to acquire, sovereignty or domain over North Borneo'. The British Government not only 'consistently barred the British North Borneo Company from acquiring' but itself disclaimed sovereignty or domain over North Borneo by maintaining that the same had been vested in the Sulu Sultanate.[49] Consequently:

> ... the transfer of rights, powers of interests by the British North Borneo Company in favour of the British Crown, under the Borneo Cession Order of 1946, could not possibly have vested in the Crown any right to claim dominion or sovereignty over North Borneo. ...The Cession Order was a unilateral act which did not produce legal results in the form of a new title.

As such

> ... the Sultanate of Sulu which in 1957 publicly and formally repudiated the Cession Order and terminated the lease contract of 1878, continued to exist, in reference to North Borneo until the Philippines, by virtue of the title it had acquired from the Sultanate, became vested with sovereignty and domain over North Borneo.[51]

In addition there is reason to believe that the Philippine Government was claiming North Borneo on the ground of geographical contiguity as well as historical continuity. For they declared that·

> ... it is hardly possible to draw even the smallest and most restricted map of the Philippines without including precisely the portion of the island of Borneo and that a glance at the map shows how naturally the northern tip of the island forms the fourth side of the quadrilateral that is the Sulu Sea and falls into place as a necessary link in the chain of islands turning clockwise from Palawan to the western Visayan islands, Mindanao and the Sulu Archipelago. The fact of geography is confirmed by the fact of history in that from time immemorial the Sulu Archipelago had constituted a single economic and cultural unit; and when in 1704 North Borneo became part of the dominion ruled by the Sultan of Sulu, this merely lent political sanction to an accepted historical fact. In our time, this natural and ancient link between our Southernmost islands and North Borneo has been disturbed by political barriers. Even so the ties remain.[52]

Arguments Against the Philippine Contentions

(i) Material Issues

It would seem that if the Sulu grant and commission can be interpreted by the Philippine Government as a 'lease', its findings are consistent with the view expressed above. However, the material issue is not whether the grant and commission is a lease or a cession. For in any case the agreement, having been concluded between an independent private association, a non-authorized agent of the State, and the Sultan, will not be recognized outright as a cession under international law, and therefore will not confer on the original grantees title to the territory[53] except the benefits, rights and privileges stated in the Sulu grant and commission. What really matters is whether the United Kingdom, the *de facto* sovereign over North Borneo prior to the formation of Malaysia, had actually acquired sovereignty over the territory by one of the recognized modes of international acquisition in international law. It is in this light that the British title to the territory must be examined.

(ii) International Law Practice

There is no principle of international law which bars an agent of a State, whether an individual subject or a corporation, from seeking the acknowledgement of its own State that any territory it had acquired is for that State. Indeed, international law would recognize the constitutional law of any State which permits it to assume sovereignty over any territories acquired by its authorized agent e.g. a chartered company[54] and by *an independent association of stateless individuals.* In other words, international law does not bar any State from claiming sovereignty or domain over territories acquired by its agents.

Conversely, international law cannot prevent a State disclaiming sovereignty or domain over any territories acquired by its agents. Under British constitutional law the Crown is endorsed with a prerogative to assert or disclaim sovereignty or domain over any territories acquired by its agents.[55] Accordingly, if the Crown had not, through its Ministers, disclaimed sovereignty over territories occupied by the North Borneo Company, and instead affirmed its recognition of the sovereignty of the rulers, the grant of the

Royal Charter to the Dent's Provisional Association would have amounted to an acknowledgment of the Company's territorial acquisition for the Crown. In any case both the Sultanates had only purported earlier to grant to the Overbeck-Dent Association territorial concession with delegated rights and sovereign powers and the question of British sovereignty did not arise at this early stage of the transaction.

(iii) Stages of Consolidation in Territorial Acquisition

In the absence of strong diplomatic protests from any interested States and/or the original ruler of a State, international law is indifferent to any attempt by a State to acquire sovereignty over territories leased out or administered by its agents through the gradual process of consolidation by stages and/or by annexation. These stages are the establishment or the creation of a 'sphere of interest' as a corollary to obtaining territorial concessions; the 'sphere of influence' followed by the proclamation of protectorate status; and finally, by annexation itself.[56]

The first stage in the process of consolidation of British title over the Sultan of Sulu's territories in Borneo was completed in 1849[57] when the Sultan undertook by agreement, and in 1878 by grant, 'not to cede his territory to a foreign Nation or their subjects without the sanction of the British Government'. However, at this stage, sovereignty over the territory did not automatically become vested on the British Crown. The establishment of the second stage in the process follows the Spanish renouncement of all her claim of sovereignty over the territories in favour of Great Britain as contained in the Madrid Protocol of 1885.

The Philippine Government, while admitting that 'the Protocol [had] acknowledged North Borneo to be within the British sphere of influence' asserts that in international law, creation of a sphere of influence is not a mode of acquisition either of territory or of right of sovereignty.[58] They were doubtless quite right. But a sphere of influence is definitely a stage, and it is an advanced stage, in the process of consolidation of title under international law.

When a British protectorate was declared over North Borneo in 1888 (which strictly was still legally within the sovereignty and domain of the Sultanates of Brunei and Sulu) the third stage of the process of consolidation of title was established. Under the municipal law of the protecting state i.e. British constitutional law, the Crown assumed the external, whilst the Company continued to exercise the internal, sovereignty over North Borneo. As indicated above, the separate agreement between the Company and the British Crown, by which the sovereign powers of the Sultanates were superseded jointly by the Crown and the Company without either of the Sultans being a privy, would seem to be *ultra vires* the powers conferred on the original grantees.

This breach would have provided the Sultans of Brunei and Sulu or their heirs a cause for dispute with the British North Borneo Company and the British Government, and is a matter for determination or judgement before the British Consul-General in Borneo in accordance with the terms of the Sulu commission.

As any dispute regarding the terms of the leasehold would be of a private nature, the situation is outside the province of international law which would, in any case, regard the establishment of the protectorate as another stage in the process of consolidation of British title to North Borneo and would expect the United Kingdom, the protecting state, to be responsible for the efficient administration of the State. The absence of diplomatic protest either from the Sultan of Brunei or from that of Sulu against the British Government and the Company for their usurpation of the Sultans' sovereignty over the territory is evidence to suggest that the Sultans had acquiesced to the transfer of the external sovereignty to the British Crown.

As for the Deed of 1903, being only a confirmation of the grant of territories omitted in the Sulu Grant of 1878, it would not affect the sovereignty of the Sultan over the Sulu Archipelago itself. In any case its terms appear to be consistent with the concept of lease and the situation is therefore similar to that of the Sulu grant in that only sovereignty over the islands remained vested in the Sultan. Nevertheless the inclusion of these islands as part of the protected state of North Borneo would mean that the external sovereignty over them would be vested in the British Crown whilst the internal sovereignty was to be exercised by the North Borneo Company.

The Agreement for the transfer of the North Borneo sovereign rights of 26 June 1946 is, as stated above, *ultra vires.* This proposition would

support the Philippine Government's assertion that the heirs of the Sultan of Sulu had merely claimed a 'Proprietory right over North Borneo'. However, the breach of the terms of the original territorial concessions by the North Borneo Company (the successor to the Association) in collaboration with the British Government still would not justify the Philippine Government—a stranger to the original concession—instituting a territorial claim.

As indicated earlier the 1946 Agreement itself, having been concluded between two States governed by international law, would constitute cession under international law and would confer on the United Kingdom international title.

As for the North Borneo Cession Order-in-Council of 10 July 1946, as pointed out above this was a manifestation of the Crown's intention to annex the territory, and that annexation as a mode of territorial acquisition, would confer on the United Kingdom international title to the territory of North Borneo. Therefore the Philippine Government's proposition that 'the Cession Order was a unilateral act which did not produce legal results in the form of a new title' cannot hold.

(iv) The Proclamation by Sultan of Sulu's Heirs of 25 November 1957

It has been alleged by the Philippine Government that the heir of Sultan Jamal Al Alam, Sultan Esmail Kiram, has publicly and formally repudiate the 1946 British Cession Order-in-Council and had cancelled the lease of 1878 with effect from 22 January 1958.[59] However, as the cession of the territory to the Crown under the Agreement for the transfer of North Borneo sovereign rights had, in point of time, *preceded* the Proclamation, the repudiation by the heir would not be valid. Moreover, as the Proclamation was issued almost seventeen years after the conclusion of the 1946 Agreement and the issue of the Cession Order-in-Council, and twenty-one years after the declaration by the Philippine Government[60] that the Sulu Sultanate ceased to exist on the death of Sultan Jamal Al Alam, the last Sultan of the Sulu line in 1936, it is difficult to determine what legal effects the Proclamation could have in the present century. Even if it can be maintained that the effect of the Sultan's Proclamation was to revoke the lease of 1878, such an opinion could only affect the territories specified in the Sulu grant and commission. It is difficult to understand the motive which had prompted the 1962 Philippine Government to claim the validity of such a Proclamation so late in the day. It is also difficult to understand the Philippine Government's contention that Sultan Jamal Al Alam could have been succeeded by one of his heirs, the so-called Sultan Esmail Kiram, in view of the fact that during the Commonwealth period President Quezon had categorically declared that the Philippines no longer recognized the existence of the Sulu Sultanate after the death of Sultan Jamal Al Alam in 1936.[61]

No doubt it is argued by the Philippine Government that 'the control and direction of foreign relations during the [Philippine] Commonwealth period did not reside in the Commonwealth Government'.[62] Moreover, it is also contended that 'withdrawal of recognition'—even if it could be remotely implied from 'any act that may be imputed to the Commonwealth President'—does not in international law 'terminate or extinguish the existence of the entity affected by the withdrawal.... On the other hand, the reference in the Argument to President Quezon may probably be in connection with his Three-Point Policy'. From the full context of the Memorandum it is argued that no 'inference of withdrawal can be fairly drawn'.

Contrary to this argument the Memorandum is nothing but a continuation of the *modus vivendi* established under the Carpenter Agreement. It therefore amounts to a recognition of the status of the Sultan as the sovereign of North Borneo.[63] Therefore, it seems that the 1962 Philippine Government, in its endeavour to support the validity of the 1957 Proclamation, has advanced the theory of a still-surviving Sultanate even after the death of a Sultan i.e. the demise of the sovereign institution does not terminate the institution itself: 'The King never dies' (*Rex nunquam moriter*).[64] Whatever the merit of such theory, it cannot hold in the absence of any territory under the *de facto*, if not *de jure* control of the Sulu Sultanate. This would hold true, either in 1957, when the newly-proclaimed Sultan purported to cancel the lease of 1878; or even in 1962 when he purported to cede North Borneo to the Philippines.[65]

Nevertheless, the fact remains that during the period of the administration of the protected state from 1888 to 1942, and of the Colony of

North Borneo by the British Crown from 1946 to 1957, there is no evidence of any attempt by either the Sultan of Brunei or the Sultan of Sulu or the heirs of the Sultan of Sulu to protest or cancel the territorial concession for a breach of the terms of the 1877-8 grants caused by the Proclamation of Protectorate over the territory which certainly seems to have superseded the sovereignty of both the Sultans. In the meanwhile, internal order and stability were firmly established and securely maintained whilst British title was gradually but firmly established and consolidated, though, no doubt, at the beginning it was at the expense of both Sultans' sovereignty. Moreover, the duration of the period of the activities of the British North Borneo Chartered Company; the administration of the territories by the British Crown itself; and the corresponding inactivity of both Sultans themselves, would warrant the suggestion that both the Sultans' private claim for breach of the terms of the leases and their territorial claim had lapsed.[66] Even if it is firmly maintained that the effect of the Proclamation by the Sultan of Sulu's heirs was to revoke the lease of 1878 it could only affect the territories specified in the Sulu grant and commissions and that contained in the Proclamation itself.[67] These would be the 'mainland of the Island of Borneo commencing from the Padasan River in the West' and the areas 'along the whole west coast as far as Sibuco River in the South' including all the territories on the Padassan River and in the coastland areas, known as Paitan, Sugut, Banggi, Labuk, Sandakan, Kinabatangan, Muniang, and all other territories and coastal lands to the south, bordering on Darvel Bay, and as far as the Sibuco River, together with all the islands which lay within nine miles from the coast which were originally leased out to the Overbeck-Dent Association. However the territories of North Borneo comprise these territories and also those specified in the grants and commissions of the Sultan and Pengiran of Brunei from 1877 to 1901. Moreover since the Proclamation only purported to revoke a private lease, it could not affect international title, which had been gradually but firmly consolidated and established by annexation.

(v) The Macapagal Resolution of 1950, statute ex abundante cautela of 1951 and the Ramos Resolution of 1962

The Philippine Government claimed that the Proclamation of the North Borneo Cession Order-in-Council of 1946 had aroused the Philippine's 'deep and continuing concern' and resulted in the initiation of 'prolonged enquiries and careful studies in the Philippines and abroad'. It also prompted the passing of the Macapagal Resolution in 1950, the statute *ex abundante cautela* of the Philippine Congress in 1951, the Ramos Resolution in 1962 and led to the presentation of a formal claim of the territory to the United Kingdom in the Note of 22 June 1962.[68] Nevertheless the passing of these Resolutions and the Statute merely represent the steps taken by the Philippine Government after 1946 to keep up its interests in the territory and the measures which it took to present its claim. They do not in any way constitute the Philippine title to North Borneo.

(vi) The Documents of the Philippine Claim

The Philippines also relied on the letter of 5 February—alleged to contain a communication from the heirs of the Sultan of Sulu stating their claim to the proprietary rights over North Borneo and their desire to see the territory included as part of the national territory of the Republic of the Philippines[69]—and on the documents of April and September 1962, as the bases of their claim.[70] However, no treaty of cession in the true international sense has ever been concluded between the Sulu Sultanate and the Philippine Government at any time since the Proclamation of Protectorate over North Borneo in 1888 until in 1962, when the Philippines produced a purported deed of cession and subsequently presented its claim to the territory to the United Kingdom in 1962. This letter by itself cannot be regarded as a proper document of title, and least of all, a treaty. As such it cannot therefore 'provide a sufficient justification for calling in question a state of affairs that has been accepted by successive Governments of the Philippines for three-quarters of a century'.[71]

Even assuming that the April and the September 1962 documents, alleged to be the basis of the Philippine title to Sabah, do constitute treaties of cession, their validity would still be open to question because of the defunct or non-existence of the Sulu Sultanate and therefore of a Sultan with capacity under international law to transfer territories. Even if we further accept the theory that there was a properly proclaimed Sultan of Sulu with capacity to transfer territorial sov-

ereignty in 1962 there is still the question of the existence of territory which the Sultan could by right transfer to the Philippines in that year. In other words, the Sultan or Sultanate must satisfy at least the conditions laid down in Article I of the Montevideo Convention on Rights and Duties of States of 26 December 1933:

> The State [i.e. Sultanate] as a person of international law should possess the following qualifications:
> (a) a permanent population;
> (b) a defined territory;
> (c) government; and
> (d) capacity to enter into relations with the other States.[72]

In reality it is difficult to conceive the existence of a Sulu Sultanate satisfying the conditions as laid down in this Convention. Therefore the only logical conclusion would be that the theory of the Sulu Sultanate or Sultan ceding Sabah as a sovereign state to the Philippines in 1962 must remain, at best, wishful thinking on the part of the previous and the present Philippine Governments.

It may be accepted that 'a political existence of the State is independent of recognition by other States [and that] before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administers its services and to define the jurisdiction and competence of its courts'.[73]

As such, international recognition by other States is not a prerequisite of the political existence of the Sulu Sultanate as a State under the sovereignty of the Sulu Sultan. However, it is still the condition that the Sultanate must at least be in *de facto* if not *de jure* control of an organized State with a seat of Government upon whose interests it could legislate, administer services and define the jurisdication and competence of its courts. None of these conditions in relation to the Sulu Sultanate was in existence either in 1957 or in 1962. Therefore the fallacy of the theory of the Sulu Sultanate ceding to the Philippines the territory of Sabah, over which it had no control whatsover in 1957 and/or 1962, is exposed at its very root and the premise remains a mere piece of legal and academic fiction.

It is indeed strange that the Philippine Government should have contended the existence of the September 1962 documents when it is supposed to have already completed its research on the legality of its claim to Sabah.[74] It had in fact preferred a formal claim to the British Government in June 1962.[75] In a civil suit, where title to a property is the subject of the suit, it is assumed that, when the plaintiff files his statement of claim (or counterclaim), he has already beforehand prepared his case. All the evidence and documents necessary and relevant in support of his case are geared, and that no further document will be required to substantiate his title. Similarly, one would have expected that other than the existing pre-June 1962 documents no other documents would be required to substantiate the Philippine claim after completion of its researches. Yet, the Philippines presented fresh subsequent documents of 11 and 12 September 1962, on which they further relied as the bases of their title to Sabah. One is therefore compelled to regard these documents as the creation of the fertile imagination of an ingenious, legal brain, and their validity must remain open to question.

(vii) The Juridical Aspects of the Philippine Claim

The Philippine Government also bases its claim on the pronouncement of Chief Justice Macaskie of the High Court of the State of North Borneo in 1939. The Chief Justice was alleged to have stated that 'it is abundantly clear that the successors in sovereignty of the Sultan are the Government of the Philippine Islands'.[76] It must be remembered, however that the Philippines was already under American administration in 1939, and the effect of the pronouncement would only be a mere confirmation of the *status quo* i.e. the United States had assumed the sovereignty of Spain over the Philippines and the Sulu Archipelago under the terms of the Treaties of 1898 and 1900 (concluded between Spain and the United States), the Bate Treaty of 1898, the Carpenter Agreement of 1915 and the Boundary Convention of 1930 (concluded between the USA and the United Kingdom). The terms of these treaties and conventions were subsequently adopted in the Philippine Proclamation of Independence in 1946 under which the Republic of the Philippines inherited the sovereignty of the United States over the Philippines as well as the Sulu Archipelago. However, in all these agreements and boundary conventions, North Borneo had never been the object of the pronouncement of the

Chief Justice who did not specify in categorical terms that the Philippine Government was sovereign over North Borneo. The Chief Justice only proclaimed that the 'successors in sovereignty of the Sultan [of Sulu] are the Government of the Philippine Islands' i.e. the USA. As such the decision could never be the true basis of the Philippine claim to the territory of North Borneo.

Besides, the case also involves the question of the distribution of the estates of the late Sultan of Sulu's heirs. The Chief Justice had to determine in his judgment the rightful heirs who were to take the cession monies. The plaintiffs in that case had sought a declaration that they were entitled to claim the cession monies as the beneficiaries under the will of the late Sultan. The first and second defendants i.e. the Government of North Borneo and the Company, admitted that the monies were payable to someone whilst the third defendant contested the rights of the plaintiffs to receive the monies. In their pleadings the plaintiffs claimed that the 1873 Agreement, concluded between Messrs. Overbeck & Alfred Dent and the Sultan of Sulu, had granted and ceded the rights and powers of the Sultan in North Borneo to the former and that the lands and territories were already vested in the Company. Nevertheless, in his judgment the Chief Justice found *inter alia* that the 'the Deed of Cessions was a complete and irrevocable grant of territory and the right reserved was only the right to an annual payment, a right which is in the nature of moveable property', and that the successors in sovereignty (the government of the Philippine Islands) did not claim the cession monies and therefore the claims of the plaintiffs as the private heirs of the Sultan were valid.

The fact that the plaintiffs, as heirs of the Sultan, had a rightful claim to the cession monies, had never been contested by the British Government which had succeeded the British North Borneo Company by virtue of the Agreement of 26 June 1946. The British Government in fact continued to pay the cession monies to the rightful heirs under the terms of the 1878 Agreement. The Malaysian Government which had, in turn, succeeded the British Government, too did not contest this right.

Therefore, it is difficult to see how this case could be the basis of the Philippines claim to the territory of North Borneo when all the Chief Justice's decision did, *inter alia*, was to make a pronouncement over the rights of certain heirs of the late Sultan to succeed to the cession monies under the terms of the 1878 Agreement. Therefore it would seem that at best, the Philippines could only rely on this case as the basis for her lawful claims to the sovereignty of the Sultan of and the Sulu Archipelago, but not her claim to the Sultan's sovereignity over North Borneo.

(viii) The Contiguity and Continuity Doctrines as Bases of the Philippine Claim

The statements of Philippine Vice-President Emanuel Palaez implied that the Philippine Government was also purporting to rely on the doctrine of geographical contiguity and historical continuity as the basis of their claim to North Borneo. Their claim on the ground of geographical contiguity would fail at the outset since this doctrine, though it was 'much in vogue in the nineteenth century primarily to mark out areas claimed for future occupation [had been] decisively rejected as legal roots of title by international law 'which had made effective occupation the sole test of establishments of title to new lands'.[77] In the *Island of Palmas Case (1928)* Judge Max Huber had even gone so far as to declare categorically that 'the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in International Law'.[78] However the doctrine is still relevant as 'evidence raising some sorts of presumption of effective occupation'[79] which 'may be rebutted by contrary evidence [of] a continuous and peaceful exercise of sovereignty in the disputed area by another State'.[80] Thus, in this case, the United States' contention—that the Island of Palmas belonged geographically to the Philippine group—was defeated by the evidence of undoubted exercise and display of Spanish sovereignty over the Islands.[81] Similarly, in the *Eastern Greenland Case* the fact of geographical contiguity itself 'would not have availed Denmark in the least if she had not established State activities displayed in regard to the whole island.[82] Thus, for similar reasons, the Philippine claim based on this doctrine would not hold for lack of strong evidence of Philippine state activities and the existence of strong evidence of continuous display of British sovereignty over the territory of North Borneo.

The principle of historical continuity i.e. the principle that what has at some time in the past been a territorial unit of nationhood or a unit

'of administration by a colonial power should persist under a new sovereignty' has sometimes been the basis of claims for a change of title.[83] Examples are to be found in the Indonesian claim to West New Guinea;[84] the Moroccan claim to incorporate the newly indepent territory of Mauretania;[85] and the Iraq claim to Kuwait.[86]

This principle has several limitations.[87] It may conflict with the principle of self-determination (this may especially be applied to the Philippine claim to the present state of Sabah[88] or North Borneo). Being essentially a political principle,[89] its application 'calls for a political decision'.[90]

Nevertheless since North Borneo had experienced the British system of administration, which is somewhat parallel if not identical to that experienced by the former states of the Federation of Malaya, the principle may be reasonably adopted to substantiate the British, and subsequently the Malaysian Government's, arguments for having incorporated the territory into the enlarged Federation of Malaysia rather than that of the Republic of the Philippines. In any case the Philippines has been governed under a system of administration different from that enjoyed by the Malay States and had never at any time exercised sovereignty over North Borneo.

Analysis of the Philippine claim therefore shows that it has no positive basis. The Resolutions and the Macaskie decision upon which the Philippines base its claim were not proper deeds of title. Moreover, no treaty of cession was ever concluded between the heirs of the Sultan of Sulu and the Philippine Government unless the April and September 1962 documents could be regarded as such. However, there was no Sultan with capacity to conclude a treaty of cession under international law in 1957 or 1962. Even if, as the Philippines claim, there is a Sulu Sultanate, there is no territory under its control which is capable of being transferred to the Philippines.

On the other hand, there are several grants of territorial concessions, a Protectorate Agreement and boundary conventions which establish, among other things, a British *sphere of interests* at the outset; and later on a British *sphere of influence* in North Borneo, upon which British *title* subsequently grew. The conclusion of these treaties, etc. were not protested by either the Sultans or their heirs for a considerable length of time during which order and efficient administration were gradually but firmly established in the territory. In particular, the British title can be said to hinge on the Agreement for the Transfer of the North Borneo Sovereign Rights of 26 June 1946 which constitutes cession in international law; and the North Borneo Cession Order-in-Council of 10 July 1946, which is the manifestation of the Crown's intention to annex the territory as part of the Crown's dominion.

Even if the argument that the United Kingdom could not derive any title from the Agreement the fact that the territories of North Borneo had been administered by a British agent, the British North Borneo Chartered Company, from 1888 until 1946 under the protection of the British Crown, which itself assumed its administration from 1946 until 1963, warrants the proposition that the United Kingdom had acquired prescriptive title to the territory. This principle, and the evidence for its operation is examined in the following chapter.

[1] The Aide-Memoir of 12 September 1962 from the Philippine Secretary of Foreign Affairs to the British Ambassador. See full text in Appendix 32 in *The Philippine Claim to North Borneo (Sabah)* 2 Vols. Manila, Bureau of Printing, 1964, Vol. I, pp. 155-6, reproduced in E. Lauterpacht, *Contemporary Practice of the United Kingdom in the Field of International Law*, 2 vols., 1962, Vol. II, pp. 178-9; Statements of the delegates of the Philippine Government in the UN Assembly Debates on the situation with regard to the implementation of the Declaration contained in Resolution 1654 (XVI) UN General Assembly, 17th Session 1177th Plenary Meeting, 27 November 1962, Provisional Verbatim Records A/pv. 1177, pp. 51-52.

[2] Steven Runciman, *The White Rajahs: A History of Sarawak from 1841-1946*, Cambridge, The University Press, 1960, pp. 17-18; K.G. Tregonning, *A History of Modern Sabah 1881-1963*, 2nd edition, Singapore, University of Malaya Press, 1965, p. 3.

[3] See Runciman, op.cit. p. 20; R.R. Boxer, *South China in the Sixteenth Century: being the Narratives of Gabote Pereira, Fr. Gaspar da Cruz [and] Fr. Mantin de Rada*, London, Hakluyt Society, 1953, pp. Lxxxvi, Lxxx.

[4] N.M. Saleeby, *The History of Sulu*, Manila, Filipiniana Book Guild, 1963, p. 72; See *Philippine International Journal* (January-June 1963) p. 83.

[5] Saleeby, op.cit. p. 85; *Philippine International Journal,* op.cit. p. 83.

[6] Tregonning, op.cit. p. 22.

[7] Ibid. p. 22.

[8] For full text see *Parliamentary Papers* (1882) Lxxx App. 6, pp. 442-543; *BFSP*, Lviii, 493, see also Smith, *Great Britain and the Law of Nations,* Vol. II, pp. 35-45.

[9] For full text see *Parliamentary Papers,* op.cit. App. No. 2 pp. 536-8. *BFSP*, xxiv, p. 807.

[10] For full text see *Parliamentary Papers,* op.cit. App. 5, p. 542 *BFSP* Lxxiii, 1064.

[11] Smith, op.cit. p. 78.

[12] See *Parliamentary Papers,* op.cit. App. 8, pp. 547-8 for full text of the 'Basis for Peace and Capitulation presented by the Sultan of Jolo and the Dattoos to the Spanish Crown'.

[13] K.G. Tregonning, 'The Claim for North Borneo by the Philippines', *Australian Outlook,* Vol. 16 (December 1962), pp. 283-91; and K.G. Tregonning, 'William Pryer: the Founder of Sandakan', *JRASMB*, Vol. xxvii (May 1954).

[14] *BFSP* Vol. xc, p. 328.

[15] Ibid. Vol. xcll p. 814.

[16] K.G. Tregonning, 'American Activity in North Borneo 1865-1881', *Pacific Historical Review,* Vol. xxiii (November 1954). See also *Philippine International Law Journal* (January-June 1963), p. 83.

[17] Art. I. See Moore, *Digest of International Law,* Vol. I, p. 531.

[18] Art. II. See Moore, loc. cit.

[19] Memo of Edward Quentero. See *Philippine International Law Journal* (January-June 1962), p. 83.

[20] *Philippine Claim to North Borneo*, op.cit. p. 28; *Philippine International Law Journal,* Vol. I (January-June) p. 98.

[21] The Philippine Government alleged that Governor Carpenter in a communication to the Director of Non-Christian Tribes on 4 May 1920, respecting the Sultan's sovereign rights over North Borneo pointed out that 'the termination of the temporal sovereignty of the Sultanate of Sulu within American territory is understood to be wholly without prejudice of effect as to the temporal sovereignty and ecclesiastical authority of the Sultanate beyond the territorial jurisdiction of the United States Government especially with reference to that portion of the Island of Borneo which as a dependency to the Sultanate of Sulu is understood to be held under lease by the chartered company which is known as the 'British North Borneo Government' See also the Statement of Governor-General Francis B. Harrison, *Philippine Claim to North Borneo,* op.cit.

[22] Treaty Series No. 2(1933). cmd. 4241; *BFSP*, p. 132 & p. 367.

[23] *BFSP*, Vol. 146, p. 899.

[24] Runciman, op.cit. p. 178. Tregonning; 'American Activity in North Borneo', op.cit. p. 5.

[25] Runciman, op.cit. pp. 180-1, 185; Tregonning, 'American Activity in North Borneo', op.cit. pp. 7, 9-10.

[26] Decision of the High Court of the States of North Borneo in Civil Suit No. 189/39, 18 December 1939.

[27] UN General Assembly, 17th Session, 1177th Plenary Meeting No. 27, 1962 Provisional Verbatim Records, A/PV. 1177, pp. 51-52.

[28] See Statement of the Philippine Vice-President, at the Opening Meeting of the British-Philippine Talks, 28 January 1963. See *Philippine Claim to North Borneo,* op.cit. p. 13.

[29] Philippine Government Aide-Memoir of 22 June. See *Philippine Claim to North Borneo,* op.cit. App. No. 30, pp. 151-2. See also Lauterpacht, op.cit., pp. 176-7.

[30] Statement of Vice-President of the Philippines at the opening of the Anglo-Philippine talks: *Philippine Claim to North Borneo,* op.cit. pp. 13-14.

[31] For full text see *Philippine Claim to North Borneo,* op.cit. Appendix 26, pp. 144-6.

[32] See Statement of the Vice-President of the Philippines at the opening of the Anglo-Philippine talks: *Philippine Claim to North Borneo,* op.cit. App. 26, p. 14.

[33] For full text, see *Philippine Claim to North Borneo,* op.cit. App. 28, p. 149.

[34] See the Statement of the Vice-President: *Philippine Claim to North Borneo,* op.cit. App. 28, p. 13.

[35] See Footnote 17 to Chapter I of this book.

[36] Statement of E. Quintero during the debate in the fourth Committee of the UN General Assembly on the transmission of information on non self-governing territories under Art. 73e of the Charter A/G 4/SR, 1420, pp. 14-16, 12 December 1962.

[37] Statement of the Philippine Delegates in the UN General Assembly debate on a situation regarding the implementation of the Declaration contained in the Resolution 1954 (XVI) on the granting of independence to colonial countries and peoples. UN General Assembly 17th Session 1177th Plenary Meeting A/pv 1177, pp. 51-52.

[38] Statement of the Philippine Vice-President: see *Philippine Claim to North Borneo*, op.cit. p. 13.

[39] UK Aide-Memoir of 24 May 1962. See Lauterpacht, op.cit. pp. 175-6 and also the *Philippine Claim to North Borneo* op.cit. App. 29, pp. 150-1. See also *Philippine International Law Journal*, (January-June 1963) pp. 79-81.

[40] The Philippine Government Aide-Memoir of 12 September 1902. See *Philippine Claim to North Borneo* App. 32, pp. 155-9; op.cit. also Lauterpacht, op.cit. pp. 178-80; see also the Statement of the Philippine

delegate in the UN General Assembly debate on the situation with regard to the implementation of the Declaration contained in Resolution 1954 (XVI); UN General Assembly Session 1177 Plenary Meeting, 27 November Provisional Verbatim Records, A/pv. 1177, p. 61; of *Vice-President Palaez* in the Anglo/Philippine talks published in *Philippine Claim to North Borneo,* op.cit. p. 11 and Jovito Salonga, Chairman of the Legal Committee of the Philippine Panel on North Borneo, in ibid. p. 25. See also *Philippine International Law Journal* (January-June 1963), pp. 19, 231-4, 240 & of Art. A. Alatriz, Philippine Solicitor-Gen. and Juan M. Arreglado, Counsellor of Political and Cultural Affairs, Philippine Department of Foreign Affairs, in ibid. pp. 79-81 and 101 respectively; and also of Bernabe Africa, former Under-Secretary of the Philippine Foreign Affairs in the *Philippine International Law Journal* (July-September 1963), pp. 394-5.

[41] See the Statement of the Philippine delegate: UN General Assembly, 17th Session 1177th Plenary Meeting, 27 November 1962, Prov. Verbatim Records A/pv. 1177, pp. 51-52; see also Lauterpacht, op.cit. p. 180; *Philippine Claim to North Borneo*, op.cit. p. 23 *Philippine International Law Journal* (January-June 1963), p. 80 and (July-September 1963), p. 394.

[42] *Philippine Claim to North Borneo,* op.cit. pp. 23 & 25; *Philippine International Law Journal* (January-June 1963), pp. 24 & 88.

[43] Statement of J. Salonga: see *Philippine Claim to North Borneo* op.cit. p. 25, and *Philippine International Law Journal* (January-June 1963) p. 240.

[44] Ibid.

[45] *Philippine Claim to North Borneo,* op.cit. p. 25; *Philippine International Law Journal* (January-June 1963), pp. 89 & 240.

[46] Statement of Vice-President Palaez; *Philippine Claim to North Borneo,* op.cit. p. 11 and also *Philippine International Law Journal* (January-June 1963) p. 232.

[47] Statement of Vice-President Palaez, p. 11; *Philippine Claim to North Borneo*.op.cit. p. 232; see also the Statement of J. Salonga op.cit. p. 24 & pp. 101, 92, 211 & 240.

[48] Statement of J. Salonga, op.cit. p. 25; *Philippine Claim to North Borneo*, op.cit. p. 241; and Statement of Palaez, op.cit. p. 12 and *Philippine International Law Journal* (January-June 1963), p. 233.

[49] *Philippine Claim to North Borneo* op.cit. pp. 12, 23 & 26 and also *Philippine International Law Journal* (January-June 1963), pp. 233 & 91.

[50] Statement of Palaez, op.cit.; *Philippine Claim to North Borneo,* op.cit. p. 12; and also *Philippine International Law Journal* (January-June 1963), p. 232-4.

[51] Statement of Palaez, op.cit. p. 13 and *Philippine International Law Journal* (January-June 1963), pp. 232-4.

[52] Statement of the Vice-President at the Anglo-Philippine Ministerial Conference: see *Philippine Claim to North Borneo,* op.cit. p. 17.

[53] L.F.J. Oppenheim, *International Law: a Treatise,* 2 vols. edited by Hush Lauterpacht, London, Longmans, 1952, Vol. 1: 8th edition; Vol. 2: 7th edition; Vol. I, pp. 547-8.

[54] Oppenheim, op.cit. p. 545.

[55] As Lord Halsbury has remarked, you cannot 'force a Sovereign to take territory' and if the State refuses to accept international responsibility for territory over which sovereignty has been acquired by one of its subjects a somewhat difficult situation arises. See F.M. Lindley, *The Acquisition and Government of Backward Territory in International Law: a Treatise on the Law and Practice relating to Colonial Expansion,* London, Longmans, Green, 1926, p. 85.

[56] Lindley, op.cit. pp. 182-3 & 207-36.

[57] Papers relating to the Affairs of the Sulu and Borneo and to the grant of Charter of incorporation to the British North Borneo Company (1883) Lord Harrison & son; 'State of North Borneo 1881-1946, *Far Eastern Quarterly,* 43 (1947).

[58] Statement of J. Salonga, *Philippine Claim to North Borneo,* op.cit. p. 27.

[59] Statement of Vice-President Palaez: *Philippine Claim to North Borneo,* op.cit. p. 13, and of the delegate of the Philippines in the UN General Assembly 17th Session 1177th Plenary Meeting, 27 November, 1962 Provisional Verbatim Records, A/pv. 1177, pp. 51-52.

[60] *Philippine Claim to North Borneo,* op.cit. p. 28.

[61] Ibid; Statement of the leader of the Malaysian delegation on the Philippine Claim to Sabah Official Talks on 15 July 1968, 'Malaysia's Stand on Sabah', *Straits Times,* 19 July 1968.

[62] *Philippine Claim to North Borneo,* op.cit. pp. 28 and 29.

[63] Ibid. p. 29.

[64] R.H. Kersley, *Broom's Legal Maxims,* 10th edition, 1939, p. 19.

[65] *Philippine Claim to North Borneo,* op.cit. p. 13.

[66] See B.K. King, 'Prescription of Claims in International Law, *BYBIL*, Vol. 15 (1934), pp. 83-97.

[67] See the text of the Proclamation in the *Philippine Claim to North Borneo,* op.cit. App. 27, pp. 147-8.

[68] Statement of Vice-President Palaez; see *Philippine Claim to North Borneo,* op.cit. p. 14.

[69] Aide-Memoir of the Philippine Government of 22 June 1962. See the *Philippine Claim to North Borneo,* App. 30, pp. 151-3; also Lauterpacht, op.cit. pp. 176-7.

[70] Statement of the leader of the Malaysian delegation on the Philippine Claim to Sabah Official Talks on 15 July 1968; see the *Straits Times*, 19 July 1968 in an

article 'The Answer to Manila's Claim' and 'Malaysia's Stand on Sabah'.

[71] Aide-Memoir of the British Government of 3 August 1962; see Lauterpacht, op.cit..p. 177.

[72] See T.S., No. 881; Hudson International Legislation VI, 620 and also H.W. Briggs, *The Law of Nations: Cases, Documents and Notes,* 2nd ed., New York, Appleton-Century-Crofts, 1952, p. 89.

[73] Article 3 of the Montevideo Convention on Rights and Duties of States, 26 December 1933.

[74] See Footnote 68 to this Chapter.

[75] 'The Answer to Manila's Claim' and 'Malaysia's Stand on Sabah', op.cit.

[76] Philippine Aide-Memoir of 12 September 1962. See also *Philippine Claim to North Borneo,* op.cit: App. 32 pp. 155-9; Lauterpacht, op.cit. pp. 178-80; Statement of the Philippine delegate in UN General Assembly Debate, UN General Assembly 17th Session 1177th Plenary Meeting 27 November 1962, Provisional Verbatim Records, A/pv. 177, pp. 51-52.

[77] Per Prof. S.H. Waldock in the *BYBIL*, Vol. 25 (1948), p. 342 and *ff*. See also R.Y. Jennings, *The Acquisition of Territory in International Law,* 1963, p. 74.

[78] *AJIL*, 22 (1928) p. 710. Judge M. Huber expressed the modern view as follows. 'It is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms *terra firma* (nearest continent or island of considerable size) ... but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular state, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of contiguity admissable as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results.' See also Jennings, op.cit. pp. 867, 893. See also Waldock, op.cit. pp. 342-3.

[79] Jennings, op.cit. p. 75; Waldock, op.cit. pp. 344-5.

[80] Ibid.

[81] Waldock, op.cit. p. 343.

[82] Ibid. p. 344.

[83] Jennings, op.cit. p. 76.

[84] Indonesian Explanatory Memorandum of 18 August 1954, UN Doc. M. 2694 to the UN Secretary General states that 'West Irian (West New Guinea) is and always has been historically as well as constitutionally (legally) an integral part of the territory of Indonesia, that is to say also of the former Netherlands East Indies'. Col. Mr. Borrington (Burma) speaking in the General Assembly Committee, 9th Session, 1954 UN Doc. K/CSR p. 25: 'It has been claimed by the debate that logically New Guinea was not part of Indonesia. That belated discovery did not bear scrutiny, since for more than a century the Dutch had treated West Irian as part of Indonesia.' See Jennings, op.cit. footnote 3 on p. 76.

[85] See UN Doc. A/4445/Add. I. 14 September 1960: 'As the Government of Morocco sees it, the dispute is essentially of a territorial nature; that is to say, Mauretania, within the borders as present assigned to it by France, has always been an integral part of natural territory.' Jennings, op.cit. p. 77.

[86] See UN Doc. S/PV. 957. See also Jennings, op.cit. p. 77.

[87] The limitations of the principle or argument were made apparent by the reply of the Netherlands delegate in the debate on West New Guinea in the General Assembly First Committee, when he stated that 'other speakers had not ventured so far back in history but had simply contended that, as Netherlands New Guinea was part of the former Netherlands East Indies, it was therefore now legally part of Indonesia. He wondered whether they realized for example, that Ceylon had also formed part of the Netherlands East Indies until the Treaty of Amiens in 1802. A logical consequence of their argument, would be that Ceylon should also be incorporated in Indonesia.' See Jennings, op.cit. p. 77.

[88] Jennings, ibid. North Borneo became a constituent State of Malaysia after a thorough investigation of the wishes of the peoples of the territories by an independent Cobbold Commission which incorporated the views of the political parties of North Borneo in favour of the formation of Malaysia, the Inter-Governmental Committee which drew up the constitutional arrangements of the proposed State of Malaysia, the Debate in the North Borneo Legislature Council of August 1963 which reaffirmed the decision of Sabah to secure its independence through Malaysia and the finding of the UN Secretary-General within the requirements of the UN General Assembly Resolution 1541 (XX) Principle IX of the Annex, which confirmed the finding of the UN Mission to the territories of North Borneo. Tregonning, 'The Claim for North Borneo', op.cit. pp. 242-4.

[89] In relation to the dispute over West New Guinea in 1951, the Netherlands proposed that the question be submitted to the International Court of Justice. But this proposal was rejected by Indonesia on the ground that she considered the problem, in substance, to be of a political nature and not of a juridical nature.

[90] Jennings, op.cit. p. 78.

5
Possession and Consolidation:
The Bases of the British Title to Sabah

Prescriptive title to sovereignty i.e. title acquired through possession and occupation, arises, it is said

> ... in cases where no title or sufficient title can be shown by way of occupation, conquest or cession of territory which has remained under continuous and undisturbed sovereignty of the claimant for so long a period that the position has become part of the established order.[1]

Therefore even if one were to accept the Philippine argument that neither the Agreement for the transfer of Borneo sovereign rights nor the North Borneo Cession Order could constitute cession in international law but that they formed only an unilateral act which did not produce legal results in the form of a new title,[2] there still remains the argument that the United Kingdom had acquired its title to North Borneo through prescription or the gradual process of historical consolidation.[3]

In order to support the United Kingdom title based on prescription, the evidence supporting the various elements of this mode of acquisition of territory needs to be examined. Since

> ... title by prescription arises out of long continuous possession, where no original source of proprietory rights can be said to exist or whose possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his rights or has been unable to do so.[4]

The United Kingdom need only supply evidence of her long, continuous possession of the territory or if that possession is charged to be wrongful in the first place, to prove that the original owner, namely the Sultan of Sulu, had neglected to assert his right. In such a case, lapse of time will operate in creating the United Kingdom's, and simultaneously in destroying, the Sultan's rights.[5] In other words, since the Sultan of Sulu's claim was not presented within reasonable time, it must be held to have lapsed.[6] This is called the the 'extinctive' aspect of prescription, to be distinguished from the 'acquisitive' aspect, whereby substantive legal validity can be given to titles that are either originally invalid or the origin of which are impossible to prove.[7] In the case of acquisitive prescription

> ... the party who succeeded in establishing a title under this doctrine obtains a substantive right whilst in the case of extinctive prescription the substantive rights if any of the previous possessor (if there is one) are abolished.[8]

In other words the effect of acquisitive prescription is the encroachment and ultimate abolition of the right of the original sovereign by an acquiring State through the process of extinctive prescription.[9] Therefore, failure on the part of the plaintiff government, the injured party,[10] to present its claim promptly[11] and so place the defendant government at a disadvantage in the establishment of its defence[12] will operate as a defence in itself.[13] This negligence will act as defence in favour of the defendant government, and as a bar to the right of the plaintiff government to pursue its claim. The fact that the United Kingdom had wrongly displaced the Sultanate is of little consequence in international law as long as she had continued in adverse possession of the territory for a long time.[14]

Evidence of long, continuous possession required for acquisitive prescription must necessarily vary in each case. The exercise of State

authority[15] or activities publicly[16] in a continuous, uninterrupted and peaceful manner[17] over any territory 'for a sufficient period of time[18] with the acquiescence of all other interested and affected States', in particular, the previous possessor, would constitute possession. Such acquiescence may be implied in cases where the interested and affected States have failed, within a reasonable time, to refer the matter to the appropriate international organization or international tribunal; or exceptionally, in cases where no such action was possible, have failed to manifest their opposition in a sufficiently positive manner through the instrumentality of diplomatic protests, or any other means available to them. These activities 'must be carried out *a titre de soverain* [i.e. act of State] and not those of mere individuals or even of subordinate divisions of the State'.[19] It must be the act of its accredited agents or authorities or persons specially authorized to act under special licence on its behalf[20] e.g., that of the Companies which were generally empowered by the Charters to acquire and administer vast territories for the Crown. This is essential because only a State can have the intention and the will to act as sovereign.'[21] It was the continuous and peaceful display of State authority, not the act of the individual Dutchman, that made the decision in the Island of Palmas Case go in favour of the Netherlands.[22]

A glance at the Company's Charter of incorporation reveals the powers of the North Borneo Company and hence its activities from its inception in 1881 until it wound up in 1946, as being those of the Crown's Agent, since they appear to have received the prior authorization, or at least the subsequent ratification, of the Crown itself. Its Charter, for instance, empowered the Company *inter alia* to acquire the full benefits of the grants and commissions from both the Sultans of Brunei and Sulu.[23] The 1877-8 grants and commissions in turn vested on Overbeck and Dent the delegated powers of sovereign rulers or governmental powers. This included, among other things, the right of the Company to make law, coin money, create an army and navy, levy customs and dues and taxes on the inhabitants. Though they were originally delegated to the Company's promoters, the exercise of those rights and powers by the Company was considerably curtailed by the Charter itself[24] which stated that the territory administered by the Company was inalienable without the consent of the British Secretary of State,[25] to whom also any dispute between the Company and either of the Sultans was to be submitted for decision.[26]

The Company's foreign relations[27] and the appointment of its principal representatives in Borneo[28] were under the control of the Secretary of State. Through him, the Crown reserved its right to establish extra-territorial jurisdiction in North Borneo by Order-in-Council.[29] Further he also had the right to object to the exercise by the Company of any authority or power within any part of the territories specified under the 1877-8 grants and commissions or those acquired later under the Charter if there was an adverse claim to such authority. The Company had to defer to that objection.[30] Above all, the Crown was to have the last say over the internal affairs of the Company. The Secretary of State had also the right to dissent or object to any part of the Company's proceedings or system relating to the people of North Borneo or inhabitants in matters of slavery, religion or the administration of justice. He could, if he wished, make any suggestion founded on that dissent or objection.[31]

Nevertheless despite the Crown's powers to intervene in matters pertaining to the Company's internal administration of the territory, actual sovereignty did not lie with the Crown which had, as indicated earlier, disclaimed it. In theory, it should have remained vested in the Company.[32] Nevertheless the wide powers of control which may be exercised by the Secretary of State over the Company's affairs suggest that in practice, the Company was not entirely independent of the Crown when discharging the function of administration over the territories; but, to all intents and purposes, it was a mere agent, with duties and obligations towards its principal i.e. the Crown, which had conferred upon it a corporate status. The status of the North Borneo Company therefore was somewhat parallel with, if not identical to, that of the Dutch East India Company, in that its activities could be assimilated into the acts of the British Crown itself, just as the acts of the Dutch East India Company were assimilated into those of the Netherlands Government.[33] In theory these governmental activities of the British North Borneo Company could be more appropriately assimilated into those of the Brunei and Sulu Sultans, who had in fact, delegated the governmental powers to the Com-

pany, than to the British Government. However, in practice, neither of the Sultans seemed to have retained any control over their exercise by the Company. Moreover, even before protectorate was declared over the territory, the political control of the State which, though in theory lay exclusively with the Company's Court of Directors in London, was still subject to a potential review by the British Government through its Secretary of State, who continued to retain the powers to intervene in the internal administration of the State provided it was not *ultra vires* the Company's Charter.[34] When British protectorate was declared over North Borneo the ultimate residual powers of the Sultans were completely usurped by the Company and by the British Government which subsequently assumed the powers to conduct the Company's foreign relations.[35] Henceforth the executive and legislative powers of the Company's Court of Directors were delegated to a Governor, the Crown's representative in Borneo. All ordinances were since enacted by the Governor with the advice of a Legislative Council established in 1912. Powers of repeal and amendments were reserved to the Court of Directors.[36] The enactment of ordinances by the Governor have undoubtedly satisfied the requirements that possession must be exercised by a prescribing State or its agent *a titre de soverain* in the sense that the prescribing State or its agent has legislated for the territory with the acquiescence of the other State or States concerned.[37]

The State activities of a prescribing State (i.e. here the United Kingdom or its agent) must be continuous and uninterrupted.[38] This is said to be 'of the essence of the prescription process[39] [for] possession maintained in the teeth of constant opposition did not amount to prescription'.[40] In the Island of Palmas Case (1928)[41] in which the arbitrator had to decide whether sovereignty over the Island of Palmas or Miangas belonged to the Netherlands or to the United States (as successor to Spain), the United States claim, 'based' on discovery of the Island by Spain and on its contiguity to the Philippines, was rejected 'in favour of the Netherlands on the basis of: (i) continuous and peaceful display of sovereignty by the Netherlands; (ii) acquiescence by the United States'.[42]

Considering that the State of North Borneo had been administered by the British North Borneo Company for almost fifty-five years under the aegis of the British Government without any interruption from any other States, except for internal uprisings,[43] and when the State was invaded and occupied by the Japanese military régime from 1942-5, it is apparent that these conditions as laid out above also have been fulfilled. This is substantiated by the fact that during this period of the Company's administration, the Company was engaged in various activities such as the building of schools; the construction of cross-country telegraph systems connecting the island of Labuan and Sandakan between 1894-7; the construction of railways connecting Beufort and Weston and the extension to Jesselton town and Tenom between 1896 and 1905; the establishment of towns at Tawau, Kota Belud; the creation of a Legislative Council in 1912; and the conclusion of international conventions and treaties affecting the State boundaries with Spain, the Netherlands and the United States. These conventions and treaties were concluded by Britain, the protecting State on behalf of the Protectorate.

Another condition to be fulfilled by a prescribing State[44] is that the display of State activities must be peaceful. This had been interpreted to mean no more than that 'the first assertion of sovereignty must not be a usurpation of another subsisting occupation nor contested from the first by competing acts of sovereignty'.[45] In the Island of Palmas Case and the Eastern Greenland Case, Justice Max Huber and the Court respectively 'pointed out that proof of peaceful possession in the most recent period before the rival claimant attempts to assume the sovereignty is sufficient by itself to establish a title to the territory without proof of a long historic possession'.[46] Therefore the facts that the British North Borneo Company had displayed State activities for more than fifty years after protectorate was established in 1888, without any protest by the original rulers of the territories, merely indicate that this condition too has been fulfilled. Silence on the part of both the Sultans, despite the fact that their sovereignty over the territories had been jointly superseded by the British North Borneo Company in conjunction with the British Government by the proclamation of protectorate, a fact which gave them the right to refer any dispute to the British Secretary of State under Sections 4 and 5 of the Charter incorporating the Company, imply that they had, in fact, endorsed the Company's activities in the territory. In other words,

there had been acquiescence, one of the complimentary elements[47] of prescription.

There is also the time element which must be satisfied by a prescribing state. It is necessary for the State to establish the fact that possession of a territory by a prescribing State must have endured for a considerable length of time. This varies according to the facts of each case.[48] 'Adverse holding or prescription during a period of fifty years' has been held to make good title.[49] This case, however, cannot be regarded as constituting a general rule[50] governing the time-limit required for every prescribing State. Nevertheless, since fifty years of adverse holding has been held sufficient for prescription to operate (and in this case, there had been fifty-five years of continuous display of State activities or even of adverse holding[51] by the British North Borneo Chartered Company) this length of time for prescription to operate must perforce be held to be in the Company's favour. This is provided there is also evidence of acquiescence or indifference on the part of both the Sultans of Brunei and Sulu to such activities. Otherwise, the principle that the passage of time will run in favour of a prescribing State, and as a bar against the right of the displaced State to pursue its claim against the prescribing State, cannot apply. In other words, silence, or acquiescence of the latter is attributable to negligence on its part; i.e. its indifference or complacency is the cause of its delay in manifesting its disapproval through protest or presentation of a claim. International law can be said to aid the vigilant and not the indolent State, irrespective of whether the former is the prescribing or the prescribed State. As indicated earlier, the effect of the Proclamation of protectorate régime over the territories of both the Sultanates of Brunei and Sulu amount to usurpation of the sovereignty of the Sultans of Brunei and Sulu by the Company and the British Crown. This situation should have given them reasonable cause to manifest their disapproval by protesting to the Company and/or by resorting to the machinery provided by the Company's Charter of incorporation i.e. by referring the disputes to the British Secretary of State[52] for judgment or decision. Yet there was no evidence of any positive action ever having been taken by either Sultan. The protectorate régime was allowed to continue for fifty-five years, until the outbreak of the Pacific War in 1941; and this was to be subsequently replaced by the British Colonial Administration for another eleven years, before one of the Sultan's heirs, Prince Ismail Kiram, surprisingly decided, in 1957, to cancel the 1878 territorial concessions. This belated action can only be attributed to indifference i.e. negligence and therefore acquiescence, of the early Sultans of Brunei and Sulu themselves to the state of affairs existing then. Such acquiescence would therefore operate to bar the right of the Sultans' subsequent heirs to pursue their claim against the United Kingdom.

On the other hand, the United Kingdom, having in practice displayed its State activities continuously through its agent, the British North Borneo Company, which had held the territories under the Sultan's grants and commissions for more than fifty-five years, and itself administered the territories for another eleven years as a Crown Colony, would acquire prescriptive title by virtue of the acquiescence of both the Sultans or their heirs during both these periods.[53]

The Critical Date

It would seem that in the event of a territorial dispute between the Sultan of Sulu and the United Kingdom being brought to the International Court of Justice, the critical date[54] for the purpose of litigation would likely be 22 January 1958, the date when the Proclamation issued on 25 November 1957 by Sultan Muhamad Ismail Kiram came into force. However, this date is by no means conclusive. If the United Kingdom was relying on prescription as the basis of her title to part of the territories of North Borneo, she would most probably elect the 31 August 1963 as the critical date. This date is referred to as 'Malaysia Day' under Article II of the Malaysian Agreement when the Act of the United Kingdom Parliament, providing 'for the relinquishment of British Sovereignty and jurisdiction' in respect of Borneo, Sarawak and Singapore,[55] became operative, and the three territories were 'federated with the existing States of the Federation of Malaya' into a larger federation called 'Malaysia'.[56] On the other hand, the heir of the Sultan of Sulu or the Philippines, if they were relying on prescription, would certainly prefer 22 January 1878 as the critical date. The choice of such an early date for the purpose of prescription is likely to bring a strong reaction from the United Kingdom since the effect would be to 'place a premium' on the Sultan's 'Paper claim'[57] on the ground that most

British activities in North Borneo took place subsequent to this date. It would appear that the fixing of 22 January 1958 as the critical date would be the most practical choice under the circumstances.

Consolidation of Title as a basis of British Title

It has been suggested that territories may also be acquired by a legal process of consolidation 'which is said to comprise all the various factors i.e. recognition in varying forms, aquiescence and estoppel' contributing to building a title.[58] The foundation of this mode of acquisition is said to be

> ... proven long use which represents a complex of interests and relations which themselves have the effect of attaching territory or an expanse of sea to a given State. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into account by the judge to decide *in cocreto* on the existence or non existence of a consolidation by historic titles.[59]

Consolidation, as a mode of acquisition of territories, can easily be accomplished not only by acquiescence, in which the time factor can have no part, but more easily by a sufficiently prolonged absence of opposition: in the case of land, on the part of States interested in disputing possession; or in maritime waters, on the part of the generality of States.[60]

> The notion of consolidation [is said to introduce] something over and above the notion of evidence of sovereign possession; for factors of repute, acknowledgement ... becomes ... not merely evidence of a situation apt for prescription but becomes themselves distinctive ingredients in the process of creating title.[61]

Nonetheless

> ... the process of consolidation cannot begin unless and until actual possession is already an accomplished fact, and that, although no time is laid down, it remains true that it cannot be completed until after a considerable period of possession as a sovereign.[62]

The fact that United Kingdom was in *de facto*, if not in *de jure*, possession of the territory of North Borneo through peaceful and continuous display of State activities and her interests and relations in the territory, coupled with fact of acquiescence on the part of both the Sultans of Brunei and Sulu and of the other States of the state of affairs existing then, would justify the suggestion that she had acquired title to the territory through the process of consolidation.

Weighing of the counter claims

Since the United Kingdom is disputing the Philippine claim to North Borneo with some justification and as each State can only base its claim on its being the successor-in-title of the original sovereign rulers, the United Kingdom needs only prove that she had a better title than the Republic.[63] This proposition appears *mutatis mutandis* whether both the rival claimant States intend to rely on prescription or consolidation of title as the basis of their territorial claim. Consequently, the issue—which of the two States has a better title?—may be resolved quite simply by resorting to a comparison of the evidence of the activities displayed (if any) by each of the States. The onus on the United Kingdom to prove her title to North Borneo appears lighter when her claim is considered vis-a-vis the Philippines'. The onus is heavier when her claim is considered vis-a-vis that of the sovereign rulers.[64]

It may be concluded that there is overwhelming evidence of British State activities in North Borneo over a considerable length of time: first by the British North Borneo Chartered Company; and later by British officials under the aegis of the Colonial Office. These activities were with the acquiescence of both the Sultanates of Brunei and Sulu. These circumstances would support the United Kingdom's prescriptive title or alternatively, they would form the basis upon which she could rest her claim of title through the process of consolidation. By contrast, there is little evidence of the Philippines' state activity in the territories to support the Republic's title, either prescriptive or consolidative. Accordingly, the United Kingdom, having validly acquired her title to North Borneo under the general principles or modes of acquisition of territories acceptable in international law, have the right subsequently to cede the territory to the new enlarged Federation of Malaysia[65] on the basis of the maxim *nemo plus juris transfere potest quam ipse habet.*[66]

In addition to acquiring title through devolution, the evidence of vigorous political activities within the State of North Borneo itself, following the announcement of the concept of Malaysia,[67] would support the operation of the principle of self-determination in favour of Malaysia. This principle is discussed below.

[1] F.M. Lindley, *The Acquisition and Government of Backward Territory in International Law: a Treatise on the Law and Practice Relation to Colonial Expansion,* London, Longmans, Green, 1926, p. 178.

[2] E. Palaez at the Anglo-Philippine Ministerial London Talks. See *Philippine Claim to North Borneo (Sabah)*, 2 vols., Manila, Bureau of Printing, 1964, Vol. I, p. 13.

[3] R.Y. Jennings, *The Acquisition of Territory in International Law*, 1963, pp. 23-28.

[4] W.E. Hall, *A Treatise on International Law,* 8th ed. by A. Pearce Higgins, Oxford, Clarendon Press, 1924, p. 143.

[5] B.E. King, 'Prescription of Claims in International Law', *BYBIL*, Vol. 15, p. 82.

[6] D.H. Johnson, 'Acquisitive Prescription in International Law', *BYBIL*, Vol. 27, p. 332.

[7] Ibid. p. 333.

[8] Ibid. p. 323.

[9] Jennings, op.cit. 21.

[10] John H. Williams v. Venezuela, 1903; Moore, *International Arbitration,* p. 4196. See King, op.cit. pp. 88-89.

[11] In the Venezuela Arbitration, 1903 Plumley, the Umpire's dictum states: 'When a claim is internationally presented for the first time after a long lapse of time, there arise both a presumption and a fact, the presumption, more or less strong according to the attending circumstances, is that there is some lack of honesty in the claim, either that there was never a basis for it or that it has been paid. The fact is that by the delay in making the claim the opposing party—in this case the government ... is prevented from accumulating the evidence on its part which would oppose the claim, and on this fact arises another presumption that it could have been adduced. In such a case the delay of the claimant, if it did not establish the presumption just referred to, would work injustice and inequity in its relation to the respondent government.' (pp. 90-94). See also King, op.cit. p. 92.

[12] Venezuela Arbitration 1903, Ralston's Report, p. 730. See also King, op.cit. p. 90.

[13] King, op.cit. pp. 94-95. 'In the British Guiana Boundary Arbitration [*BFSP*, Vol. 99, 1904, pp. 930-2] between Great Britain and Venezuela, the Parties to the dispute agreed that the Tribunal should apply the following rule: 'Adverse holding or prescription during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription'.

[14] Brierly, *The Laws of Nations: an Introduction to the International Law of Peace,* 6th edition by C.H.M. Waldock, Oxford, Clarendon Press, 1963, pp. 169-70.

[15] 'The possession of the prescribing State must be exercised *titre de soverain* i.e. Acts of State not of private individuals unless under a commission from, or subsequently adopted and ratified by the State. Thus in the Island of Palmas Case it was the continuous and peaceful display of State authority, not the acts of individual Dutchman that decided the case in favour of the Netherlands. Similarly in the Case concerning the Legal Status of Greenland (1933) see A/B No. 53 at pp. 45-46 the *PCIJ* declared that a claim to sovereignty based upon not particular acts or title such as treaty of cession, but merely upon the continued display of authority, involves two elements each of which must be shown to exist: the intention and the will to act as sovereign, and some actual exercise or display of such authority. As only a State can have the intentions and the will to act as sovereign it follows that the acts of authority relied upon must be those of the State or international person, not of those mere individuals or even of a subordinate division of the State.' Johnson, op.cit. pp. 344-5; 'The Law and Procedure of the International Court of Justice 1951-54, General Principles and Sources of Law', Part I, by Sir G. Fitzmaurice, *BYBIL*, Vol. 30, 1953, p. 48, Note 2.; Part II, *BYBIL*, Vol. 32, 1955-6, pp. 55-58.

[16] D.H. Johnson, op.cit. p. 347.

[17] In the Island of Palmas Case Prof. M. Huber referred to 'a continuous and peaceful display of State authority (so-called prescription)'. In the Chamizal Arbitration, the Commissioners insisted that possession maintained in the teeth of constant opposition did not amount to prescription. Display of authority by the one party, acquiescence to that display by the other party: these are the *sine qua non* of acquisitive prescription. Johnson, op.cit. p. 345.

[18] There is a complete lack of agreement as to the time required for the establishment of a prescriptive title. Grotius favoured more than a hundred years, River required 'immemorial possession'. The majority of writers conclude that the time varies with the facts of each case. 'The fixing of a fifty-year period by the treaty of 1897 in the British Guiana Venezuela Boundary dispute cannot be regarded as having laid down a general rule'. Ibid. p. 347.

[19] Fitzmaurice, op.cit. p. 48. Johnson, op.cit. p. 345. In the case concerning the Legal Status of Eastern Greenland, Series A/B, No. 53, at pp. 45-46, *PCIJ* declared that 'a claim to sovereignty based not upon, some particular act or title such as a treaty of cession but merely upon the continued display of authority, involves two elements each of which must be shown to exist: the intention and the will to act as sovereign, and some actual exercise or display of authority'.

[20] Fitzmaurice, op.cit. p. 48.

[21] Johnson, op.cit. pp. 344-5.

[22] Ibid. p. 344.

[23] G. Mct. Kahin, 'The State of North Borneo', *Far Eastern Quarterly Review*, Vol. 7 (1947-8) p. 44.

[24] Ibid.

[25] Sect. 4 of the Charter.

[26] Sect. 5.

[27] Sect. 6.

[28] Sect. 13.

[29] Sect. 11.

[30] Sect. 16.

[31] Sect. 10.

[32] Kahin, op.cit. p. 46.

[33] Island of Palmas Case (1928) *RIAA*, UN Vol. 20.

[34] Kahin, op.cit. pp. 46-47.

[35] Art. 3 of the Protectorate Agreement.

[36] Kahin, op.cit. pp. 46-47.

[37] Johnson, op.cit. p. 345.

[38] Thus in the Chamizal Arbitration (USA v. Mexico) 5, (1911) *AJIL* pp. 782-833. The United States claimed title to the tract *inter alia* on the ground of prescription, i.e. undisturbed, uninterrupted and unchallenged possession, of the territory since the Treaty of 1848, which constituted the Rio Grande as the boundary line between the two countries. The Arbitrators were unanimous in holding, on this point, that the claim of the United States failed. The reason for this failure was simply that on the fact possession had not been 'undisturbed, uninterrupted and unchallenged'. See also D.H. Johnson op.cit. pp. 340 and 345-6; Prof. (Sir) C.H. Waldock, 'Disputed sovereignty in the Falkland Islands Dependencies' (1948) *BYBIL* p. 337.

[39] Fitzmaurice, op.cit. p. 67.

[40] The Commissioners in the Chamizal Arbitration, *AJIL*, Vol. 5 (1911).

[41] *AJIL*, 22 (1925) pp. 867-912.

[42] Johnson, op.cit. p. 342.

[43] The Mat Salleh and the Rundum Rebellion, both of which were successfully crushed. K.G. Tregonning, *A History of Modern Sabah, 1881-1963*, 2nd edition, Singapore, University of Malaya Press, 1965, pp. 196-242

[44] The Island of Palmas Case (1928).

[45] Brierly, op.cit. p. 335.

[46] Ibid. p. 169.

[47] 'Display of authority by the one party, acquiscence in that display by the other—those are the *sine quo non* of acquisitive prescription', Johnson, op.cit. p. 345.

[48] Ibid. p. 347.

[49] British Guiana Boundary Arbitration (1904) *BFSP*, Vol. 99, pp. 930-2.

[50] Johnson, op.cit. p. 347.

[51] 'If certain territory is already, in law, under the sovereignty of another State, any act of taking possession of it on behalf of another is invalid and void, and therefore incapable of ratification. Such an act by an agent of the State, though invalid in itself, may count towards the ultimate establishment of a prescriptive claim because at least it is the act of the State and the whole essence of a prescriptive claim is *adverse* possession, invalid until by the passage of time and the absence of protest on the part of the true owner a valid title is acquired.' Fitzmaurice, op.cit. p. 8. note 2.

[52] Articles 4 and 5 of the Royal Charter of Incorporation.

[53] 'No amount of activity on the part of the prescribing state would avail, without the passivity and inaction of the original sovereign. It is this, amounting in the end to tacit abandonment, surrender, or acquiscence, that constitutes the operative factor in the acquisition of the title by prescription'. Fitzmaurice, op.cit. p. 31, note 1; p. 36; and 32 note 3.

[54] Ibid. pp. 20 ff.

[55] Article IV of the Malaysia Agreement.

[56] Ibid. Article I.

[57] Sir G. Fitzmaurice in his speech in the Miniquiers Case, *ICJ* pleading, Vol. 2, pp. 68-9. See Jennings, op.cit. p. 33.

[58] Jennings, op.cit. pp. 23 and 26.

[59] Ibid. p. 24.

[60] Ibid. p. 24.

[61] Ibid. p. 25.

[62] Ibid. p. 26: 'Prof. Johnson says [Article by Prof. Johnson article in the *Cambridge Law Journal*, 1955, p. 219] Prof. de Visscher has embraced under a single heading the notion of straightforward possession on the one hand and of adverse possession on the other hand ... Under the single heading of "consolidation" it is now possible ... to include both "straightforward possession" and "adverse possession".'

[63] 'In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to sovereignty, and the tribunal has had to decide which of the two is the stronger....' Eastern Greenland Case, *PCIJ* Rep. Ser. A/3 No. 53, at p. 46. See also Jennings, op.cit. p. 6.

[64] 'It is impossible to read the records of the decision in cases to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights, provided that the other States would not make out a superior claim'. Eastern Greenland Case, *PCIJ*, Rep. Ser. A/3 No. 53, at p. 46. See also Jennings, op.cit. p. 6.

[65] Of which North Borneo forms a part under the treaty of cession. See Art. IV of the Malaysia Agreement, of 9 July 1963.

[66] Jennings, op.cit. p. 16.

[67] Tregonning, op.cit. chapter 13.

6

The Bases of Sabah's Independence and Integration within Malaysia

I. The 1963 Malaysia Agreement

The treaty of cession—the means whereby one State renounces its rights and title or sovereignty over a territory in favour of another State[1] —is said to be the essential requirement for 'the cession of a territory'. However, certain conditions must be complied with for a valid cession to operate in international law. One of these is that cession must be concluded by States, the subjects of international law.[2] The Malaysia Agreement, by which the United Kingdom undertook to relinquish its sovereignty and jurisdiction in respect of its former Colonies of North Borneo, Sarawak and the State of Singapore[3] under the terms of the Agreement and the annexed constitutional instruments[4] would without any doubt constitute a treaty of cession in international law.

Another condition is that the treaty of cession must clearly express an intention of the ceding State to transfer its actual sovereignty.[5] This condition too was fulfilled in the Agreement because of the insertion of a provision therein prescribing the procedure for the relinquishing of British sovereignty and jurisdiction over North Borneo and the other two States in accordance with constitutional requirements.[6]

The condition that a treaty of cession must be accompanied by handing over of the territory to the acquiring State, though one of the prerequisites of cession is not, however, the basis of its validity.[7] A cession is usually completed by ratification of the treaty,[8] or under certain circumstances, only becomes completed on the date when the treaty comes into force.[9] The 31 August 1963 or 'Malaysia Day', marks the day on which the United Kingdom agreed under the Malaysia Agreement to secure an Act of Parliament to relinquish its sovereignty and jurisdiction over North Borneo and the other three States[10] which, together with the former States of the Federation of Malaya, formed Malaysia.

Nevertheless, as cession invariably affects the status and rights of the subjects of the ceded State it has become the practice to stipulate, in most treaties of cession, a condition whereby the wishes of the subjects of the territories or State affected be first ascertained by constitutional means in the form of a plebiscite, or a referendum.[11] However it is not necessarily a condition of every treaty of cession that it must be ratified as such.[12] The Malaysia Agreement itself did not specify the holding of a plebiscite in the territories of North Borneo though elections were held in the state with the formation of Malaysia as an issue. A joint Commission[13] was specially appointed by the United Kingdom and the Federation of Malaya to ascertain the wishes of the peoples of the Borneo territories, prior to the conclusion of the Malaysia Agreement, under the principles of self-determination. Moreover, on the joint request of the Heads of States of the Republic of Indonesia and the Philippines and the Prime Minister of the Federation of Malaya, at the Summit Conference in Manila from 30 July-5 August 1963, the United Nations' Secretary-General sent a team to the Borneo territories with similar terms of reference. (These points will be discussed fully in the concluding chapter.) Thus, if the process of ascertaining the wishes of the people

of the territories is a condition precedent to the validity of a treaty of cession, even this requirement would also have been complied with, both at municipal as well as at international levels.

A title acquired by cession being derivative, its validity depends, at the outset, upon the validity of the original title of the ceding State, *nemo plus juris transfere potest quam ipse habet.*[14] Therefore proof of the United Kingdom's sovereignty over North Borneo is vital to the Malaysia title. As has already been indicated, the United Kingdom had assumed sovereignty over North Borneo through cession by the Agreement for the transfer of North Borneo sovereign rights of June 1946, and the annexation by Order-in-Council of July 1946.

In addition, or as an alternative to this Agreement and the Order-in-Council, the United Kingdom had also acquired her title over the territory through prescription or the process of consolidation. Having thus acquired a valid title through one, if not all, of these modes, legally she could transfer such title to Malaysia, the successor State.

Thus it may be concluded that since the Malaysia Agreement has satisfied all the conditions necessary for the validity of the treaty, the transfer of British sovereignty over North Borneo to Malaysia under it would constitute cession proper in international law, and the treaty forms the legal basis, *inter alia,* of Sabah's independence and integration into Malaysia.

II. The Principle of Self-determination

Traditionally the term self-determination refers to 'the desire of a race for independence and to take over the powers of government and remove the foreign ruling groups'.[15] It has sometimes been equated with the right of the majority within an accepted political unit to exercise power.[16] Recently there has been a tendency to use the term 'self-determination' and 'independence' interchangeably.[17] This confusion in terminology is further aggravated by the disagreement among international lawyers as to the *locus standi* of the principle in international law. For instance it has been regarded by a few as an essential political principle,[18] and by others as an international legal right.[19] Whatever its characterization, it has been resorted to both by States and by the United Nations on a number of occasions. It is even embodied as a principle in the United Nations Charter[20] and the International Covenants on Human Rights.[21] There have been several draft resolutions dealing specifically with the principle at one time or another,[22] which culminated in the adoption of a a resolution of a Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960.[23] This 1960 Declaration stated, *inter alia,* that:

> ... all peoples have the right to self-determination, by virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development ...[24] [and] immediate steps shall be taken, in Trust and Non-Self-Governing Territories, or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy compelte independence and freedom.[25]

This Declaration was supplemented by another General Assembly Resolution establishing a seventeen-member committee to make recommendations on the implementation of the 1960 Declaration.[26]

The relevance of the 1960 Declaration on the question of title of territories has been admitted even by the jurists who regard the principle of self-determination as 'essentially political' in the sense that it only forms an ingredient in the process of consolidation of title.[27] Moreover 'a great Majority of States in the United Nations believe that a legal right of self-determination exists'; that the General Assembly has found it permissible 'not just to call negotiations for self-determination, but to make observations on specific national constitutions and recommendations for their improvement'.[28] Besides, the principle of self-determination has also been invoked by the constitution of many States.[29] As such it would not be unjustified for North Borneo to rely on the principle as a basis of her independence and integration into Malaysia especially since the process of ascertaining the wishes of the Borneo peoples, a prerequisite of the principle, has been complied with both at municipal or State, and international levels.

(a) Application of the principle of self-determination on municipal level

On 27 May 1961, Tengku Abdul Rahman, the

Prime Minister then of the Federation of Malaya, in his speech delivered on the occasion of a press luncheon party given in his honour in Singapore, announced,

> Sooner or later Malaya should have an understanding with Britain and the peoples of Singapore, North Borneo, Brunei, and Sarawak. It is premature for me to say now how this closer understanding can be brought about, but it is inevitable that we should look ahead to this objective and think of a plan whereby these territories can be brought closer together in political and economic co-operation.[30]

Before Malaysia was established the first task undertaken by the States concerned was to ensure that the process of ascertaining the wishes of the Borneo peoples were properly and officially conducted. This was first ascertained at municipal (state) plane, and subsequently, when opposition and criticisms were levelled against the concept by the Republics of Indonesia and the Philippines, at international level as well.

Soon after the anouncement of the concept of the new enlarged Federation, on 27 May 1961, a prominent Member of the North Borneo Legislative Council, Donald Stephens, formed the Malaysia Solidarity Consultative Committee (MSCC) with representatives from Sabah and the other two states, and observers from Brunei.[31] This Committee met under his chairmanship at various capitals of these states to consider the implications of the Federation generally,[32] and in particular, to collect views and opinions concerning the creation of Malaysia and to foster activities that would promote and expedite the realization of Malaysia.[33] The Committee met four times. While reiterating its acceptance of, and support for, the concept, it recognized at the outset the need for the widest dissemination of all information relating to Malaysia among the people of the territories so that all would appreciate the vital necessity for the realization of Malaysia as soon as possible.[34] Consequently the Committee drew up a Memorandum which constituted the basis on which a joint British-Malayan Commission began on-the-spot investigation of the wishes of the Borneo peoples.[35] Following his announcement of the desirability of the association of the Borneo territories with Malaya and Singapore in a larger Federation, the Malayan Prime Minister went to London for discussions with the object of reaching an understanding on the broad issues and to prepare the way for consultation with the Borneo territories without which no committment could be entered into.[36] Among the agreements reached between the British and Malayan Governments was that *before* any final decision on the formation of Malaysia was reached, it was necessary to ascertain the views of the peoples of North Borneo and Sarawak on this question. Accordingly a Commission was to be set up to carry out the task and to make recommendations in the light of their assessment.[37] In the meanwhile both the Governments of North Borneo and Sarawak issued Papers explaining the purpose of the Commission and setting out the idea of Malaysia in simple terms in order to assist the peoples of the territories to understand the issue on which their views would be sought.[38] A Commission, headed by Lord Cobbold, was appointed on 16 January 1962. It visited Sabah and Sarawak between 19 February to 18 April 1962. While in these territories it invited all persons who wished, to submit written memoranda. No less than 2,200 letters and memoranda from town boards, district councils, associations of many kinds, political parties, chambers of commerce, trade unions, religious leaders, members of executive and legislative councils, Native chiefs and community leaders and large numbers of individual members of the public were received by the Commission. From these communications the Commission obtained valuable material and assistance.[39]

An open invitation to appear before the Commission was also extended to all persons who wished to give oral evidence. As a result the Commission was able to meet and talk with large numbers of representatives of individuals and bodies, many of whom had submitted written memoranda, and the Commission was able to discuss these with them.[40]

The Commission also met many organizations including the newly formed political parties which Malaysia had galvanized into existence. These included the United National Kadazan Organization (UNKO) formed in August 1961 under Donald Stephens.[41] Members of these parties had earlier been elected in the first election (in December 1961) to the State Legislative Council, which had debated the Malaysia proposal. As these parties had formed an Alliance, led by Donald Stephens who supported Malaysia

in principle while affirming the decision of Sabah to secure its independence through Malaysia, their views would therefore correctly reflect those of the Sabah peoples.[42]

While in Borneo the Commission also had recourse to the Official Papers published by the Governments of Sabah and Sarawak.[43] After travelling extensively in North Borneo and Sarawak, gathering and assessing all the evidence of individual and representatives at its disposal, the Commission arrived at a general consensus of opinion that about one-third of the population in each territory of Sabah and Sarawak strongly favoured the early realization of Malaysia without too much concern about terms and conditions.[44] Another third favoured Malaysia, but asked with varying degrees of emphasis for conditions and safeguards varying in nature and extent.[45] The remaining third was divided in opinion. Some insisted on independence before Malaysia could be endorsed; and others strongly preferred to see British rule continue for some years to come.[46] However the Commission was of the opinion that if the conditions and reservations which they had put forward could be substantially met, the second category referred to above would generally support the proposal.[47] Moreover, according to the Commission, once a firm decision was taken, quite a number of the third category would be likely to abandon their opposition and decide to make the best of a doubtful situation. There remained a hard core, vocal and politically active, of less than 20 per cent of the population of Sabah, which opposed Malaysia on any terms unless it was preceded by its separate independence and self-government.[48]

In view of the favourable report of the Commission, which as a whole, unanimously agreed that the Federation of Malaysia would be in the best interests of North Borneo: the British and Malayan Governments decided in principle that, subject to the necessary legislation, the proposed Federation of Malaysia should be brought into being by 31 August 1963.[49] An Inter-Governmental Committee, on which the British, Malayan, North Borneo and Sarawak Governments were to be represented, was established.[50] Its task was to make out the future constitutional arrangements, including safeguards for the special interests of North Borneo, including Sarawak, to cover such matters as religious freedom, education, representation in the Federal Parliament, the position of the indigenous races, control of immigration, citizenship and the State Constitution.[51]

Therefore at municipal level there is ample evidence to support the suggestion that the principle of self-determination was the true basis, among others, of Sabah's independence through Malaysia.

(b) The application of the principle of self-determination on international plane

The Malaysia Proposal had been the subject of stern criticism and opposition by the Republics of Indonesia and the Philippines, and was the cause of a rebellion in the British Protected State of Brunei.[52] Whilst the revolt was easily crushed[53] the Indo/Philippine criticisms and oppositions triggered the former's policy of confrontation against the then Federation of Malaya and strained relations between Malaya and the Philippines.[54] In an all-out effort to restore peace and harmony in the region and to iron out the differences between Malaya and Indonesia, and Malaya and the Philippines, the Malayan Prime Minister agreed to attend a Summit Meeting, proposed by the Philippine Vice-President (then E. Palaez) with President Sukarno of Indonesia and President Macapagal of the Philippines.[55]

Consequently, tripartite talks at sub-ministerial level were held from 9-12 April 1963 at Manila[56] to pave the way for a tripartite Foreign Ministers Conference which was held in Manila from 11 to 17 June 1963.[57] At the end of the Conference the Foreign Ministers of the three countries issued a report and recommendation known as the Manila Accord.[58] This contains, among other points, the Foreign Ministers' re-affirmation of their countries' adherence to the principle of self-determination for the peoples of non-self-governing territories. In this context, both Indonesia and the Philippines welcomed the formation of Malaysia provided the support of the people of North Borneo territories was ascertained by an independent and an impartial authority, the United Nations Secretary-General or his representative.[59]

Subsequently a Summit Conference of the Heads of State of the Republics of Indonesia and the Philippines and the Malayan Prime Minister was held in Manila from 30 July-5 August 1963.[60] The Joint Communique of the Conference revealed that the two Heads of States and the Prime Minister had approved and accepted the

Prime Minister then of the Federation of Malaya, in his speech delivered on the occasion of a press luncheon party given in his honour in Singapore, announced,

> Sooner or later Malaya should have an understanding with Britain and the peoples of Singapore, North Borneo, Brunei, and Sarawak. It is premature for me to say now how this closer understanding can be brought about, but it is inevitable that we should look ahead to this objective and think of a plan whereby these territories can be brought closer together in political and economic co-operation.[30]

Before Malaysia was established the first task undertaken by the States concerned was to ensure that the process of ascertaining the wishes of the Borneo peoples were properly and officially conducted. This was first ascertained at municipal (state) plane, and subsequently, when opposition and criticisms were levelled against the concept by the Republics of Indonesia and the Philippines, at international level as well.

Soon after the anouncement of the concept of the new enlarged Federation, on 27 May 1961, a prominent Member of the North Borneo Legislative Council, Donald Stephens, formed the Malaysia Solidarity Consultative Committee (MSCC) with representatives from Sabah and the other two states, and observers from Brunei.[31] This Committee met under his chairmanship at various capitals of these states to consider the implications of the Federation generally,[32] and in particular, to collect views and opinions concerning the creation of Malaysia and to foster activities that would promote and expedite the realization of Malaysia.[33] The Committee met four times. While reiterating its acceptance of, and support for, the concept, it recognized at the outset the need for the widest dissemination of all information relating to Malaysia among the people of the territories so that all would appreciate the vital necessity for the realization of Malaysia as soon as possible.[34] Consequently the Committee drew up a Memorandum which constituted the basis on which a joint British-Malayan Commission began on-the-spot investigation of the wishes of the Borneo peoples.[35] Following his announcement of the desirability of the association of the Borneo territories with Malaya and Singapore in a larger Federation, the Malayan Prime Minister went to London for discussions with the object of reaching an understanding on the broad issues and to prepare the way for consultation with the Borneo territories without which no committment could be entered into.[36] Among the agreements reached between the British and Malayan Governments was that *before* any final decision on the formation of Malaysia was reached, it was necessary to ascertain the views of the peoples of North Borneo and Sarawak on this question. Accordingly a Commission was to be set up to carry out the task and to make recommendations in the light of their assessment.[37] In the meanwhile both the Governments of North Borneo and Sarawak issued Papers explaining the purpose of the Commission and setting out the idea of Malaysia in simple terms in order to assist the peoples of the territories to understand the issue on which their views would be sought.[38] A Commission, headed by Lord Cobbold, was appointed on 16 January 1962. It visited Sabah and Sarawak between 19 February to 18 April 1962. While in these territories it invited all persons who wished, to submit written memoranda. No less than 2,200 letters and memoranda from town boards, district councils, associations of many kinds, political parties, chambers of commerce, trade unions, religious leaders, members of executive and legislative councils, Native chiefs and community leaders and large numbers of individual members of the public were received by the Commission. From these communications the Commission obtained valuable material and assistance.[39]

An open invitation to appear before the Commission was also extended to all persons who wished to give oral evidence. As a result the Commission was able to meet and talk with large numbers of representatives of individuals and bodies, many of whom had submitted written memoranda, and the Commission was able to discuss these with them.[40]

The Commission also met many organizations including the newly formed political parties which Malaysia had galvanized into existence. These included the United National Kadazan Organization (UNKO) formed in August 1961 under Donald Stephens.[41] Members of these parties had earlier been elected in the first election (in December 1961) to the State Legislative Council, which had debated the Malaysia proposal. As these parties had formed an Alliance, led by Donald Stephens who supported Malaysia

in principle while affirming the decision of Sabah to secure its independence through Malaysia, their views would therefore correctly reflect those of the Sabah peoples.[42]

While in Borneo the Commission also had recourse to the Official Papers published by the Governments of Sabah and Sarawak.[43] After travelling extensively in North Borneo and Sarawak, gathering and assessing all the evidence of individual and representatives at its disposal, the Commission arrived at a general consensus of opinion that about one-third of the population in each territory of Sabah and Sarawak strongly favoured the early realization of Malaysia without too much concern about terms and conditions.[44] Another third favoured Malaysia, but asked with varying degrees of emphasis for conditions and safeguards varying in nature and extent.[45] The remaining third was divided in opinion. Some insisted on independence before Malaysia could be endorsed; and others strongly preferred to see British rule continue for some years to come.[46] However the Commission was of the opinion that if the conditions and reservations which they had put forward could be substantially met, the second category referred to above would generally support the proposal.[47] Moreover, according to the Commission, once a firm decision was taken, quite a number of the third category would be likely to abandon their opposition and decide to make the best of a doubtful situation. There remained a hard core, vocal and politically active, of less than 20 per cent of the population of Sabah, which opposed Malaysia on any terms unless it was preceded by its separate independence and self-government.[48]

In view of the favourable report of the Commission, which as a whole, unanimously agreed that the Federation of Malaysia would be in the best interests of North Borneo: the British and Malayan Governments decided in principle that, subject to the necessary legislation, the proposed Federation of Malaysia should be brought into being by 31 August 1963.[49] An Inter-Governmental Committee, on which the British, Malayan, North Borneo and Sarawak Governments were to be represented, was established.[50] Its task was to make out the future constitutional arrangements, including safeguards for the special interests of North Borneo, including Sarawak, to cover such matters as religious freedom, education, representation in the Federal Parliament, the position of the indigenous races, control of immigration, citizenship and the State Constitution.[51]

Therefore at municipal level there is ample evidence to support the suggestion that the principle of self-determination was the true basis, among others, of Sabah's independence through Malaysia.

(b) The application of the principle of self-determination on international plane

The Malaysia Proposal had been the subject of stern criticism and opposition by the Republics of Indonesia and the Philippines, and was the cause of a rebellion in the British Protected State of Brunei.[52] Whilst the revolt was easily crushed[53] the Indo/Philippine criticisms and oppositions triggered the former's policy of confrontation against the then Federation of Malaya and strained relations between Malaya and the Philippines.[54] In an all-out effort to restore peace and harmony in the region and to iron out the differences between Malaya and Indonesia, and Malaya and the Philippines, the Malayan Prime Minister agreed to attend a Summit Meeting, proposed by the Philippine Vice-President (then E. Palaez) with President Sukarno of Indonesia and President Macapagal of the Philippines.[55]

Consequently, tripartite talks at sub-ministerial level were held from 9-12 April 1963 at Manila[56] to pave the way for a tripartite Foreign Ministers Conference which was held in Manila from 11 to 17 June 1963.[57] At the end of the Conference the Foreign Ministers of the three countries issued a report and recommendation known as the Manila Accord.[58] This contains, among other points, the Foreign Ministers' re-affirmation of their countries' adherence to the principle of self-determination for the peoples of non-self-governing territories. In this context, both Indonesia and the Philippines welcomed the formation of Malaysia provided the support of the people of North Borneo territories was ascertained by an independent and an impartial authority, the United Nations Secretary-General or his representative.[59]

Subsequently a Summit Conference of the Heads of State of the Republics of Indonesia and the Philippines and the Malayan Prime Minister was held in Manila from 30 July-5 August 1963.[60] The Joint Communique of the Conference revealed that the two Heads of States and the Prime Minister had approved and accepted the

Manila Accord.[61] Pursuant to paragraphs 10 and 11 of the Accord

... the United Nations Secretary-General or his representative was required to ascertain, prior to the establishment of Malaysia, the wishes of the people of Sabah (North Borneo) and Sarawak within the context of General Assembly Resolution 1541 (15) principle IX of the annex by a fresh approach which in the opinion of the Secretary-General is necessary to ensure complete compliance with the principle of self-determination within the requirements embodied in principle IX taking into consideration certain questions in relation to recent elections in Sabah and Sarawak ....

He was further to verify and satisfy himself, among other things, as to whether Malaysia was a major issue, if not the main issue.[62]

Pursuant to paragraphs 10 and 11 of the Manila Accord the Secretary-General was also requested to send working teams to carry out the task required of him or his representative.[63] It was also agreed that the three countries should send observers to witness the execution of this task and the Federation of Malaya was to endeavour to obtain the co-operation of the British Government and the Governments of Sabah and Sarawak in extending to the Secretary-General the necessary facilities to enable him to carry out his task.[64]

In addition to the Joint Communique the representatives of the three countries also issued a declaration known as the Manila Declaration which reaffirmed the leaders' adherence to the principles of equal rights and self-determination of peoples as enunciated in the United Nations Charter and the Bandung Declaration.[65] In accordance with the Agreement reached at the Conference, the UN Secretary-General was invited to send his teams to carry out the task envisaged by the Summit Meeting.[66] The invitation was accepted and accordingly two teams were appointed, each consisting of four Members from among his staff, under the chairmanship of Mr. Lawrence Michaelmore.[67] Prior to this, the Secretary-General indicated that he would undertake his task only with the consent of the British Government,[68] that his teams would be 'directly and exclusively responsible to himself alone': and that the report of his representatives and his own conclusions were to be treated as final and conclusive.[69] These conditions were accepted by the three Governments concerned.[70]

Disagreements at the outset due to the limitations imposed by the administering authorities in the territories over the question of the number of observers sent from each country to witness the function of the United Nations Team unnecessarily delayed their arrival in Borneo.[71] However the two teams soon settled down to their task.

The Mission accordingly arranged for consultations with the population through the elected representatives of the people, leaders of political parties and other groups and organizations, and with all persons who were willing to express their views. Every effort was also made to ascertain the wishes of the special groups (political detainees and absentees) mentioned in the Manila Joint Statement.[72]

The Mission gathered and studied all available documents, reports, and other material of the governmental institutions, political organizations, electoral processes in the two territories, and other matters relevant to its terms of reference.[73] The Mission recorded all its hearings available for the use of the observer teams, to better inform themselves as fully as possible of what had occurred before their arrival.[74]

In the meanwhile the Malayan Government, on 29 August 1963, announced its intention to postpone the date of establishing Malaysia from 31 August 1963 to 16 September 1963, in order to await the completion of the task of the United Nations Mission and the Secretary-General's report of his conclusion, scheduled for 14 September 1963.[75] On 16 September 1963 the Secretary-General reported the conclusion of the Mission's task in the following words:

Concerning the integration of a non-self-governing territory with an already independent State, Principle IX provides:

Integration should have come about in the following circumstances:

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its people would have the capacity to make a responsible choice through informed and democratic processes;

(b) The integration should be the result of the freely expressed wishes of the peoples of the territories acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems necessary, supervise these processes.[76]

I have given consideration to the circumstances in which the proposals for the Federation of Malaysia have

been developed and discussed, and the possibility that the people progressing through the stage of self-government may be less able to consider in an entirely free context the implications of such changes in their status than a society which has already experienced full self-government and the determination of its own affairs. I have also been aware that the people of the territories are still striving for a more adequate level of educational development.

Having reflected fully on these considerations, and taking into account the framework within which the Missions' task was performed, I have come to the conclusion that the majority of the peoples of Sabah (North Borneo) and of Sarawak, have given serious and thoughtful consideration to their future, and to the implications for them of participation in a Federation of Malaysia. I believe that the majority of them have 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. Not all of these considerations are present in equal weight in all minds, but it is my conclusion that the majority of the peoples of the two territories, having taken them into account, wish to engage, with the people of the Federation of Malaya and Singapore, in an enlarged Federation of Malaysia through which they can strive together to realize the fulfillment of their destiny ....

Bearing in mind the fundamental agreement of the three participating Governments in the Manila meetings, and the statement by the Republic of Indonesia and the Republic of the Philippines that they would welcome the formation of Malaysia provided that the support of the peoples of the territories was ascertained by me and that, in my opinion, complete compliance with the principle of self-determination within the requirements of the General Assembly resolution 1541 (XV), Principle IX of the Annex, was ensured, my conclusion, based on the finding of the Missions, is that on both of these counts there is no doubt about the wishes of a sizeable majority of the peoples of the territories to join the Federation of Malaysia ....

The emergence of dependent territories by a process of self-determination to the status of self-government, either as independent sovereign States as autonomous components of larger units, has always been one of the purposes of the Charter and the objective of the United Nations. Whatever the origins of the proposal of Malaysia may have been, it seems to me in the light of actual events, including the present exercise, that we have witnessed in Sarawak and North Borneo the same process leading to self-government.

In view of such pronouncement of the impartial United Nations' highest official on the findings of his teams, there should be no further doubt in the mind of even a sceptic, that the formation of Malaysia which involves the independence of the British Colony of North Borneo, *was brought out as a result of the wishes of the overwhelming majority of the people of the territory.*

The subject of the Philippine claim may therefore be concluded with the following note. The effect of the Treaty concluded between the Sultan of Brunei and the British East India Company in 1847 was to establish a British sphere of interest in Brunei; that of the Treaty of 1849, concluded between Sir James Brooke and the Sultan of Sulu, created a British sphere of interest in the Sulu territories. The Treaty of 1865 concluded between Sultan Omar Ali and the American Trading Company of North Borneo proved to be the forerunner of the 1877-8 grants, which in turn gave Overbeck and Alfred Dent a foothold in North Borneo. Upon this foothold, the United Kingdom's title subsequently grew. Henceforth there was a continuous chain of documents stretching from 1877 to 1946 upon which the United Kingdom could rely upon as her source of title. There were also the Madrid Protocol of 1885, the Boundary Treaties and Conventions of 1892, 1915 and 1930 and the Protectorate Agreement of 1888 concluded between the United Kingdom and Spain, the United Kingdom and the USA and the United Kingdom and the North Borneo Company respectively. All these established the United Kingdom's sphere of influence and inchoate title to the territory of North Borneo. This incomplete title became absolute by the conclusion of the Agreement for the Transfer of the North Borneo Sovereign Rights of 26 June 1946, which constitutes cession in international law, and the passing of the North Borneo Cession Order of 10 July 1946, which signified the Crown's intention to annex the territory as part of its dominion.

By contrast there does not appear to be a single possible basis for the Philippine claim. The Proclamation of the heirs of the Sultan of Sulu of 1957; the Macapagal and Ramos Resolutions of 1950 and 1962; the letter of the attorney for the heirs of the Sultan of Sulu of 1962; the April and September Documents of 1962; and the pronouncement of C.J. Macaskie of the High Court of Borneo—upon which the Philippines base their claim—were no deeds of title but were mere declarations of intention. Moreover, no treaty of cession was ever concluded between the

heirs of the Sultan of Sulu and the Philippine Government unless one were to regard the 1962 Documents as such despite the absence of either the Sultanate or territories under its control.

The fact that the territory of North Borneo had been administered by a British Agent, the British North Borneo Company, from 1881, with the apparent acquiescence of both the Sultans of Brunei and Sulu and their successive heirs for this considerable length of time, during which period, order and efficient administration was gradually and firmly established in North Borneo, would entitle the United Kingdom to rely on the principle of prescription and/or the process of consolidation of title as a mode of acquiring territory. The Philippine argument—that the deed of 1878 concluded between Overbeck and Dent and the Sultan of Sulu, was a lease and not a cession—would be academic. Furthermore, there is not a single shred of evidence of Philippine State activities (apart from mere statements of declaration of its claim to North Borneo) to support the Philippine title *vis-à-vis* the United Kingdom.

Consequently, the United Kingdom, having validly acquired her title to North Borneo through the traditionally recognized modes of acquisition of territories in international law, could, on the basis of the maxim *nemo plus juris transfere potest quam ipse habet*, legally cede the territories to the new enlarged Federation of Malaysia, of which North Borneo forms a constituent state, under a treaty of cession such as the Malaysia Agreement of 12 July 1963.

In addition to acquiring title through devolution the evidence of vigorous political activities within the state of North Borneo itself, following the concept of Malaysia, would merely support the operation of the principle of self-determination in favour of Malaysia on municipal (State) level. The task of ascertaining the wishes of the Borneo people, being entrusted to the United Nations Secretary-General,[77] ensured that the formation of Malaysia and the independence of the state of North Borneo was in complete compliance with the principle of self-determination in view of the favourable findings of the UN Secretary-General. This certainly served to strengthen Malaysia's case *vis-a-vis* Indonesia and the Philippines on an international level.

It is encouraging to note that with the signing of an Agreement ending the Indonesian confrontation against Malaysia in August 1966, Indonesia decided (*vide* the Agreement) to welcome Malaysia, provided general elections were held in the Borneo territories. An election was held in Sabah in 1967 whilst one is still pending in the other Borneo State of Sarawak. It is hoped that in not too distant future, the Philippines would come to see the wisdom of dropping entirely its territorial claim to Sabah which, through the formation of the Malaysian Federation, has been elevated from the status of being a British Colony to that of an independent sovereign state within Malaysia.

It is most appropriate therefore to conclude this chapter by quoting the words of the Yang di-Pertuan Negara of Sabah (Head of State of Sabah) in his address to the first elected Sabah Legislative Assembly on 29 May 1967. He declared

> The course of events has demonstrated that there is no future for Sabah except as a part of Malaysia.... Nor is there any desire on the part of our people to surrender our newly-won independence to the Government of the Philippines.... The result of the election attests to these expressions and let no one over think that we will ever surrender our independence to another country.... We have been subject to more than a century of foreign rule. It is through Malaysia that we have attained our independence and with Malaysia therefore we shall remain.[78]

[1] Reparation Commission v. German Government, 1924, *Annual Digest*, 1923-4, Case No. 199. See also R.Y. Jennings, *The Acquisition of Territory in International Law*, 1963,p. 16.

[2] L.F.J. Oppenheim, *International Law: a Treatise*, ed. by Hush Lauterpacht, 2 vols., London, Longmans, 1952, pp. 547-8.

[3] Singapore ceased to be a State of Malaysia on 9 August 1965 (Singapore Day) and became an independent and sovereign State and nation separate from and independent of Malaysia: see Article 3 of the *Constitution of Malaysia (Singapore Amendment)*, Act No. 53 of 1965 of the Parliament of Malaysia.

[4] Art. IV of the Malaysia Agreement.

[5] Jennings, op.cit. p. 16 and note 2.

[6] Art. IV of the Malaysia Agreement provides that the Government of the United Kingdom will take steps as may be appropriate and available to them to secure the

enactment by the Parliament of the United Kingdom of an Act providing for the relinquishment, as from Malaysia Day, of 'Her Britannic Majesty's sovereignty and jurisdiction in respect of North Borneo, Sarawak and Singapore so that the said sovereignty and jurisdiction shall on such relinquishment rest in accordance with the Agreement' and the constitutional instruments annexed in the Agreement.

[7] Oppenheim, op.cit. p. 550; Columbia v. Venezuela, an arbitration by the Swiss Fed. Council, 24 March 1922; *Annual Digest,* 1919-22, Case No. 54. See also Jennings, op.cit. pp. 17-18.

[8] Oppenheim, op.cit. p. 550, note 4; in the Bathori (1933) p. 22.

[9] Jennings, op.cit. p. 18.

[10] Art. IV of the Malaysia Agreement.

[11] Oppenheim, op.cit. p. 551.

[12] Ibid. pp. 551-2.

[13] Malaya, *Report of the Commission of Enquiry: North Borneo and Sarawak* (Chairman: Rt. Hon. Lord Cobbold), Kuala Lumpur, Government Press, 1962, pp. 179-82. (Hereafter referred to as *Cobbold Report*.)

[14] 'In the Island of Palmas Case the United States based its claim partly on the Treaty of Paris of 1898, which transferred to the United States all rights of sovereignty which Spain might have possessed in a certain region said to include the disputed island. But the Arbitrator held that the treaty could not be regarded as conclusive, for it is evident that Spain could not transfer more rights than she herself possessed.' *AJIL*, Vol. 22 (1928) p. 879. See also Jennings, op.cit. p. 16.

[15] Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations,* London, Oxford University Press, 1963.

[16] Ibid. pp. 104, 105.

[17] Ibid. p. 106.

[18] 'It must be emphasized, however, that though this [the principle of self-determination] has legal overtones it is essentially a political principle which may be a useful guide in the making of political decisions': Jennings, op.cit. p. 78. 'The principle of national self-determination is a formative principle of great potency but not part and parcel of international customary law': G. Schwarzenberger, *A Manual of International Law,* 4th ed. published under the auspices of the London Institute of World Affairs, London, Stevens, 1960, p. 67. In the Aalands Islands Dispute (Sweden v. Finland), the report of the Commission of Jurors, dealing with the substance of the dispute, observes that positive international law 'did not recognize the right of self-determination of people to separate themselves from the State to which they belonged' (League of Nations Official Journal (1920), Special Supplement 3, pp. 3-19).

[19] 'It therefore seems inescapable that self-determination has developed into an international legal right and is not an essential domestic matter': Higgins, op.cit. p. 103.

[20] See Articles I, 55 and Art. 73 of Chapter XI of the United Nations Charter.

[21] The Draft of the International Covenants on Human Rights adopted the following text:

> 1. All peoples have the right to self-determination ....
> 2. All States parties to the Covenant, including those having responsibilities for the administration of Non-Self-Governing and Trust Territories, should promote the realization of the right of self-determination and shall respect that right in conformity with the provision of the United Nations Charter.

(GAOR, 10th Session, 3rd Committee, 676th Meeting, para. 27, annexures a-i 28 (pt. I), p. 30 (A/3177, para. 77)). See also Higgins, op.cit. p. 99, note 10.

[22] The UN General Assembly at its 7th session adopted a resolution on 'the right of peoples and nations to self-determination' and recommended that:

> 1. The States-Members of the United Nations shall uphold the principle of self-determination of all peoples and nations. 2. It shall recognize and promote the realization of the right of self-determination of the peoples of non-self-governing and Trust Territories who are under their administration and shall facilitate the exercise of this right by the peoples of such Territories according to the principle and spirit of the Charter of the United Nations in regard to each territory and to the freely expressed wishes of the peoples concerned the wishes of the peoples being ascertained through plebiscites or other organized democratic means, preferably under the auspices of the United Nations. 3. The States-Members of the U.N. responsible for the administration of Non-Self-Governing and Trust Territories shall take practical steps, pending the realization of the right of self-determination and in preparation thereof, to ensure the direct participation of the indigeneous populations in the legislative and executive organs of government of the territories and prepare them for complete self-government or independence.

General Assembly, Resolution 637A VII. See also Higgins, op. cit. 91 and *Whitemen's Digest of International Law,* Vol. 5, pp. 9-70.

[23] Resolution 1514 (XV) Dec. 14. 1960. See Higgins, op.cit. p. 100; *Whiteman's Digest,* op.cit. pp. 79-80.

[24] Declaration (XV), Dec. 2.

[25] Declaration, 1514 (XV) Dec. 2, p. 5.

[26] Higgins, op.cit. p. 107.

[27] Jennings, op.cit. pp. 85-86.

[28] Higgins, op.cit. p. 103.

[29] The rights of self-determination incorporated in the Constitution of the Fifth Republic of France, 4 October 1948, in the fundamental principle predicting all relations between France and her former overseas territories.

[30] Willard A. Hanna, *The Formation of Malaysia,* p. 7; K.G. Tregonning, *A History of Modern Sabah, 1881-1963* 2nd edition, Singapore, University of Malaya Press,

1965, op.cit. p. 241; Malaysia, *Malay-Philippine Relations,* Kuala Lumpur, 1963, p. 2; *A New Factor in World Politics*, New York, American Universities Field Staff Inc., 1964, *Cobbold Report*, op.cit. p. 1.

[31] Tregonning, op.cit. p. 241; Hanna, op.cit. pp. 17-19.

[32] Tregonning, op.cit. p. 242.

[33] Memorandum for Malaysia of 3 February 1962, in *Cobbold Report,* Appendix F, p. 118.

[34] Ibid. p. 119.

[35] Hanna, op.cit. pp. 17-18.

[36] *Cobbold Report,* p. 1.

[37] The Cobbold Commission terms of reference: see ibid. p. vx. See also Annex A of Cmnd. 1563.

[38] *Cobbold Report,* p. 2.

[39] Ibid. p. 3.

[40] Ibid.

[41] Tregonning, op.cit. p. 242.

[42] Ibid. p. 243.

[43] For full text see, *Cobbold Report,* Appendix E p. 108.

[44] Ibid. p. 50.

[45] Ibid.

[46] Ibid.

[47] Ibid.

[48] Ibid.

[49] Malaysia, *Report of the Inter-Governmental Committee,* Kuala Lumpur, 1962, p. 1.

[50] Ibid. p. 1.

[51] Ibid. p. 7.

[52] Tregonning, op.cit. pp. 244-6; Hanna, op.cit. pp. 1-6.

[53] Tregonning, op.cit. pp. 244-5.

[54] *Malaya-Philippine Relations,* op.cit. pp. 3-8.

[55] Ibid. pp. 8-9.

[56] Ibid. p. 9.

[57] Ibid. p. 10.

[58] For full text of the Manila Accord: see ibid. Appendix X, p. 32.

[59] Paragraph 10 of the Manila Accord.

[60] *Malaya-Philippine Relations,* op.cit. p. 11.

[61] Ibid. p. 11.

[62] Ibid. p. 12.

[63] *Malaya-Philippine Relations,* op.cit. p. 12.

[64] Ibid. p. 12.

[65] For full text, see ibid. Appendix VIII p. 28.

[66] Ibid. p. 12.

[67] Ibid. p. 13.

[68] Ibid. p. 13.

[69] International Bank for Reconstruction & Development (IBRD), *Economic Development of Malaya*, Baltimore, John Hopkins Press, 1955.

[70] *Malaya-Philippine Relations* op.cit. p. 13.

[71] Ibid. p. 13.

[72] IBRD, op.cit. p. ii.

[73] Ibid.

[74] Ibid. p. iii.

[75] *Malaya-Philippine Relations,* op.cit. p. 13.

[76] IBRD, op.cit. pp. iii-viii.

[77] General Assembly Resolution 1541 (XV) principle IX of the Annex

[78] *The Straits Times,* 30 May 1967, p. 7.

7
The Alternative Modes of Settlement

It is perhaps a natural phenomenon that all kinds of disputes, international or otherwise, no matter how vigorous they are, must in the ultimate analysis, face the inevitable, logical and the only possible outcome i.e. settlement. Settlement may be brought about by parties to the dispute through machinery provided for and agreed to by the parties themselves. In international disputes, State parties to the dispute have often chosen one or the other form of machinery for settlement. This may be through good offices, by negotiation, conciliation, arbitration or even judicial settlement and may include other peaceful means of the parties' own choice. The history of international relations has not been lacking in instances in which disputes have been settled by one of such modes.[1]

Machinery for Settling the Malaysia/Philippine Territorial Dispute

The announcement of the formation of Malaysia and the subsequent launching of the Indonesian policy of confrontation against the then Federation of Malaya[2] culminated in the holding of the tripartite Foreign Ministers' Conference in Manila from 7-11th June 1963.[3] This Conference issued a report and recommendations known as the Manila Accord[4] which was considered approved and accepted by the Heads of States of the Republics of Indonesia and the Philippines and the Prime Minister of the then Federation of Malaya.[5] The report and recommendations of the Foreign Ministers state, *inter alia,*

> ... the Foreign Ministers' reaffirmation of their countries' adherence to the principle of self-determination for the people of non-self-governing countries. In this context both Indonesia and the Philippines welcome the formation of Malaysia provided a support from the people of the North Borneo territories is ascertained by an independent and impartial authority by the United Nations Secretary-General or his representative.[6] ... Pursuant to paragraphs 10 and 11 of the Manila Accord, the United Nations Secretary-General or his representative should ascertain prior to the establishment of Malaysia the wishes of the people of Sabah (North Borneo) and Sarawak within the context of General Assembly Resolution 1541 (15), principle IX of the Annex by a fresh approach, which in the opinion of the Secretary-General is necessary to ensure complete compliance with the principle of self-determination within the requirements embodied in principle IX, taking into consideration certain questions relating to the recent elections in Sabah and Sarawak but nevertheless further examining, verifying and satisfying himself, 'among other things', as to whether Malaysia was a major issue, if not the main issue.[7]

Included in the report and recommendations of the Foreign Ministers was the Philippine clarification of its position (in paragraph 12) to the effect 'that the inclusion of North Borneo in the Federation of Malaysia is subject to the final outcome of the Philippine claim to North Borneo'.[8] It was also stated that the Ministers took note of the Philippine claim and their right 'to continue to pursue it in accordance with international law and the principle of pacific settlement of disputes. They agreed that the inclusion of North Borneo in the Federation of Malaysia would not prejudice either the claim or any right thereunder.'[9] Moreover, in the context of their close association, the three countries agreed to exert their best endeavour to bring the claim to a just and expeditious solution by peaceful means such as negotiations, conciliation, arbitration or judicial settlement as well as other

peaceful means of the parties' own choice, 'in conformity with the Charter of the United Nations and the Bandung Declaration'.[10]

Upon the normalization of relations between Malaysia and the Philippines in 1966, the Governments of both countries agreed, under the 3 June 1966 Communique, to abide by the Manila Accord of 31 July 1963 and the joint statement of the three Heads of Governments which accompanies it, for the peaceful settlement of the Philippine claim to Sabah. In this Communique the two Governments further expressed their recognition of the need to sit together as soon as possible for the purpose of clarifying the claim and discussing the means of settling it to the satisfaction of both parties in consonance with the said Manila Accord and Joint Statement.[11]

Malaysia/Philippine Commitments and their Discharge

It would appear that both Governments have undertaken, in the Manila Accord and the Joint Statement of the three Heads of Governments, to adopt the measures for settlement indicated in these agreements. There was no question of Malaysia not satisfying the requirements of paragraphs 10 and 11 of the Manila Accord as a condition precedent to Indonesia's and the Philippines' welcome for the formation of Malaysia. The fact that Malaysia had continuously abided by the provisions of these agreements is not in doubt and it had declared in a Note (dated 7 February 1966) 'that it has never moved away from the Manila Accord of July 31st, 1963 and the Joint Statement that accompanies it'.[12] In particular, it had also reiterated the assurance that it will abide by the agreements, particularly paragraph 12 of the Accord and paragraph 8 of the Joint Statement, under which the three Heads of Governments had taken cognizance of the position regarding the Philippine claim to Sabah after the establishment of the Federation of Malaysia.[13] Under the 3 June 1966 Communiqué both Governments had in fact committed themselves further to abide by the Manila Accord and Joint Statement.

It was as a result of this Communiqué and the Exchange of Notes of April and May 1968 that both Governments agreed to hold talks in Bangkok for the purpose of clarifying the Philippine claim and discussing the means of settling it. These talks started on 17 June 1968 and ended on 16 July 1968 (after five weeks of intermittent sessions) with the Malaysian delegation rejecting the Philippine claim on the ground, among others, that the Philippines had not completed its exercise of clarifying the claim as undertaken in the 3 June 1966 communiqué. Apparently, in the course of the talks, the Philippines had undertaken to answer questions on the 11th and 12th September 1962 Documents which they alleged were vital to their claim. This is because by the former the President of the Philippines had purported to authorize his Vice-President to accept cession of the territory of North Borneo and by the latter a Sultan of Sulu had purported to cede the territory to the Philippine Government. However, for one reason or another best known to themselves, they refused to entertain further questions from the Malaysian delegation.[14] The Malaysian delegation therefore alleged that as the Philippine delegation had 'unilaterally determined to put an end to further clarification' of the claim and had refused to answer any question on the September 1962 Documents, it had prevented the Malaysian delegation measuring 'the areas of agreement and disagreement' between the two delegations. The Malaysian delegation stated that until both delegations were clear in their minds as to what actually constituted their differences they could not go on to discuss 'ways and means of resolving them'.[15] The Malaysian delegation further pointed out that it was 'anxious to understand the limits and bases' of the Philippine claim 'both in legal and political terms'.

The Malaysian delegation felt that the Philippines had deliberately closed the door against further negotiation because of the following factors:

(i) The Philippines had unilaterally decided that even one more meeting on clarification[16] would be too much for the Philippine delegation.

(ii) Despite the fact that the Malaysian delegation had assured the Philippines that no more than two or three more meetings on clarification were necessary the Philippines insisted that the number of meetings on this 'was enough'; and the Philippine delegation would refuse to provide any further clarification.

Because of these factors, the Malaysians felt that this particular mode of settlement was meaningless.[17]

The Philippine delegation, on the other hand, felt that the Malaysian delegation was unilaterally responsible for bringing the talks to an abrupt end. This happened, they alleged, when the Malaysian delegation unilaterally rejected the Philippine suggestion that the two delegations proceed with discussions on the mode of settlement.[18]

Undoubtedly, both countries cannot afford to indulge in further allegations and counter-allegations in view of the fact that much is at stake, and particularly the peace and harmony of this region. Perhaps the formula can be found in the Manila Accord and Joint Statement of the three Heads of Governments themselves. As stated earlier, through the Manila Accord and the Joint Statement, the three countries had agreed 'to exert their best endeavours to bring the claim to a just and expeditious solution by peaceful means such as negotiations, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties' own choice in conformity with the Charter of the United Nations and the Bandung Declaration'. As both parties are in fact committed to one or any of the several techniques or machinery for settlement provided under the United Nations Charter and the Bandung Declaration, logically there is no reason why they should not resort to one or any of them depending on which is the most appropriate under the circumstances.

(i) The International Court of Justice as the tribunal for settling the Malaysia/Philippines territorial dispute

The Philippine Government has persistently urged that Malaysia should refer the dispute to the International Court of Justice whilst Malaysia is reluctant, or appears to be reluctant, to do so. Malaysia's reluctance appear to be based on two reasons: political and legal. Politically, it seems that Malaysia fears the reaction of certain elements within Malaysia which might interpret Malaysia's willingness to submit the case to the Court as evidence of her doubt on the sovereignty and independent status of the state of Sabah within the Malaysian Federation; so much so that she was willing to have the question of the state's sovereignty contested and decided by a third party. Indeed, such fears are not unfounded because of the constitutional implications involved if Malaysia were to bring the dispute before the International Court of Justice, especially since the people of Sabah 'have strenuously protested at even the prospect' of holding talks on the Philippine claim.[19] Besides, the people of Sabah have reiterated unambiguously, and repeatedly reaffirmed time and again, their determination to be part of, and remain within, Malaysia. They attested to this expression during the pre-Malaysia formation period, in the 1967 elections[20] and again in the expression of solidarity to remain within Malaysia after the failure of the Bangkok Talks.[21] On the other hand the Philippines argue that if Malaysia had such a water-tight case she would have no cause for alarm and should be prepared to go to the International Court of Justice.

The Malaysian Government also believed that on its part, it had lived up to its obligations under paragraphs 10 and 11 of the Manila Accord and paragraph 8 of the Joint Statement. The Philippine Government, though they had undertaken to welcome the formation of Malaysia provided that the support of the peoples of the Borneo territories was first ascertained by an independent and impartial authority (the Secretary-General of the United Nations or his representative) had not done so. Therefore, Malaysia could not understand the Philippine's unwillingness to abide by the ascertainment exercise just because the result was not to the Philippines' liking.

Legally, Malaysia's reluctance to go to the International Court of Justice rests on the obvious reason that they had not made any declaration to accept the Court's compulsory jurisdiction in all cases referred to it. Nor has Malaysia made any declaration under Article 36 (vi), either unconditionally or upon conditions, that it will accept the jurisdiction of the Court as being compulsory in relation to any State (and least of all the Philippines) accepting the same obligation. In view of the attendant disadvantages on political grounds and perhaps also on technical legal grounds, it is unlikely that Malaysia would, in the near future, make such declaration of acceptance, or have the current territorial dispute with the Philippines submitted to the International Court of Justice.

(ii) Negotiation, conciliation, arbitration and other modes of settlement of the parties' own choice as the means for settling the dispute

Malaysia's reluctance to go to the International

Court of Justice could also be because it feels that the Court is not the only machinery to which the parties should have recourse. As stated earlier, the Manila Accord has also indicated other means, i.e. negotiation, conciliation, and arbitration including other peaceful means of the parties' own choice in conformity with the Charter of the United Nations and the Bandung Declaration. As to which is the most appropriate or suitable mode under the present circumstances, it is difficult to say. It would appear from the present trend of events that Malaysia would be most reluctant to have the sovereignty of the people of Sabah judged upon by the Philippines, or any other third party for that matter, especially when it is fully convinced that the people of Sabah themselves had time and again 'unambiguously and repeatedly' reaffirmed their desire to remain within Malaysia. They have, by the process of self-determination held under the auspices of the United Nations' Secretary-General, given themselves a Constitution[22] and independence[23] through Malaysia. No doubt, the Philippines will continue to insist that Malaysia should resort to the machinery for settlement provided for in the Manila Accord and the 3 June 1966 Communique, and would probably continue to hold, for many more years to come, that it has a case for challenging the independence of the people of Sabah 'in legal terms on the faith of a laboured interpretation of ancient documents or the ingenious creation of new ones'.[24]

The Formula for Settlement

No doubt, each party will continue to insist that she is sovereign over the territory. If this state of affairs continues it will certainly provide a constant source of potential danger. Their differences, which at present are confined merely to verbal dialogue, might, if they are not settled, escalate into a military conflict. This is highly undesirable if peace and harmony are to be maintained in the region of South-East Asia. Such a catastrophe could be easily avoided if both countries sincerely put their minds to resolving the dispute, each with an offer of a new formula of peace.

Perhaps one does not have to look far to find the answer to this controversy. It is, after all, already provided for in the Manila Accord itself in the shape of paragraph 13 which may have been overlooked in the heat of the moment. This paragraph states that:

> ... considering the close historical ties between the peoples of the Philippines and North Borneo as well as their geographical propinquity, the Ministers agreed that in the event of North Borneo joining the proposed Federation of Malaysia the Government of the latter and the Government of the Philippines should maintain and promote the harmony and the friendly relations subsisting in their region to ensure the security and the stability of the area.[25]

This is perhaps the only formula or appropriate means of settlement left to the parties under the present circumstances, and they would accept it if they are at all concerned with the peace, prosperity and the well-being of the peoples of their respective countries. Both countries are among the founder members of ASA[26] and ASEAN[27] which hold great promise for the economic, technical, scientific and social well-being of the peoples of the member countries.

Adoption of the formula would require the Philippines to drop the claim and concentrate all their efforts to work closely and co-operate with Malaysia within the context of ASA and ASEAN. Otherwise, it is difficult to visualize any other suitable or appropriate means of settlement in view of the unambiguous and repeated affirmation of the people of Sabah to remain an independent sovereign state within Malaysia under the principle of self-determination, an aspiration the Philippines itself had in fact subscribed to in the Manila Accord.

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[1] L.F.J. Oppenheim, *International Law: A Treatise*, edited by H. Lauterpacht, 2 vols., London, Longmans, Green, 1952, pp. 6-128.

[2] Malaysia, *Malaya-Philippine Relations*, Kuala Lumpur, 1963, pp. 3-8.

[3] Ibid. p. 10.

[4] Ibid. pp. 32-33.

[5] Ibid. p. 11.

[6] Paragraph 10 of the Manila Accord.

[7] *Malaya-Philippine Relations*, op.cit. p. 12.

[8] Paragraph 12 of the Manila Accord. See *Malaya-Philippine Relations*, op.cit. p. 33.

[9] Ibid.

[10] Ibid.

[11] Joint Statement Issued on the Resumption of Diplomatic Relations on 30 June 1966.

[12] Ibid.

[13] See paragraph 12 of the Manila Accord in *Malaya-Philippine Relations*, op.cit. p. 33 and paragraph 8 of the Joint Statement, op.cit. p. 29.

[14] Statement of the leader of the Malaysian Delegation to the Malaysia-Philippines official talks on the Philippines' claim to Sabah of 15 July 1968. See the *Straits Times*, Friday, 19 July 1968, an article on 'The Answer to Manila's Claim', and 'Malaysia's Stand on Sabah' published by the Department of Information, Malaysia, pp. 9-10.

[15] 'Malaysia's Stand on Sabah', op.cit.

[16] 'The Answer to Manila's Claim' and 'Malaysia's Stand on Sabah', op.cit. p. 10.

[17] Ibid.

[18] Statement of the leader of the Philippine Delegation in Bangkok on 16 July 1968.

[19] 'The Answer to Manila's Claim' and 'Malaysia's Stand on Sabah', op.cit. p. 4.

[20] 'Malaysia's Stand on Sabah', p. 19.

[21] Ibid.

[22] 'The Answer to Manila's Claim', and 'Malaysia's Stand on Sabah', op.cit. p. 13.

[23] Ibid. p. 17.

[24] Ibid.

[25] *Malaya-Philippine Relations*, op.cit. Appendix X, pp. 33-34.

[26] ASA: Association of South-East Asia.

[27] ASEAN: Association of South-East Nations.

POSTSCRIPT

On 16 December 1969, diplomatic relations between the Republic of the Philippines and Malaysia were again resumed for the second time in a decade.[1] It is hoped that the return to the *status quo* following the happy resumption of diplomatic relations between the two countries in December 1969[2] will mark the end of a chapter of the unhappy episode in the territorial dispute between the two countries. It is also hoped that the normalization of diplomatic relations will augur the opening of a new chapter for the two countries in the 1970s and thereafter, and bring them much closer together than they were ever before the territorial dispute. Henceforth, it is earnestly hoped that there will be closer co-operation between the two countries in every field of endeavour so that both can continue to pursue their educational, technical, scientific, cultural, social and other activities in the true and sincere spirit of friendship,[3] understanding, goodwill and harmony in the context of ASA and ASEAN and the principle embodied in paragraph 13 of the Manila Accord.[4] It is most encouraging to note that the Philippine President himself, judging from his State of the Nation message, has finally seen the wisdom of settling the territorial dispute in the spirit of goodwill, friendship and co-operation in the manner befitting a true Statesman. He stated:

> As for the Sabah problem it is our expressed desire and intention to settle it by peaceful means in consonance with the philosophy of our Constitution and by our commitment to the United Nations Charter.... By agreement with the Government of Malaysia, the normalization of relations was reached without pre-conditions, on their part or ours.... As regards the Sabah problem, studies are in progress on how the conflict between Malaysia and the Philippines may be successfully resolved in the context of previous agreements.... Although the formula is elusive, there is no reason to fear that the issue will remain in permanent deadlock.... In the spirit of the new friendship between Malaysia and the Philippines, I continue to hope that the two countries can, in co-operation rather than as adversaries, find a solution to an intractable problem.[5]

Therefore it is a fitting tribute to the people of Sabah that this book could be concluded on a happy note with the resumption of diplomatic relations between the two countries. The fact that the territorial dispute seems for the moment to be a thing of the past will not, it is hoped, deprive the legal problems involved of their inherent interest. It is also hoped that this book will continue to be a source of reference for future historians, an interesting legal study for lawyers and a guide to the solution to the politi political enigma which has been the cause of concern to the leaders and diplomats of the two countries for almost a decade.

[1] Diplomatic relations between the Republic of Philippines and the Federation of Malaya were severed on Malaysia Day on 16 September 1963 and were not restored until 1966, only to be suspended again in August 1968 following the breakdown of the Malaysia/Philippine Bangkok Talks and the passing of the statute redefining the baselines of the territorial sea of the Philippines Archipelago. See *The Straits Times* 3-5 and 17-19 December 1969.

[2] Full diplomatic relations were resumed on 16 December 1969 following discussions between Malaysian officials of the Ministry of Foreign Affairs and Mr. Romeo Busuego, President Marcos' envoy, who was reappointed the Philippine Ambassador to Malaysia.

[3] President Marcos said in his State of the Nation message that he hopes to find a solution to the Sabah problem in the spirit of the 'new friendship' between Malaysia and the Philippines. See *The Straits Times*, 27 January 1970.

[4] Paragraph 13 of the Manila Accord provides '...considering the close historical ties between the peoples of the Philippines and North Borneo as well as their geographical propinquity, the Ministers agreed that in the event of North Borneo joining the proposed Federation of Malaysia the Government of the latter and the Government of Philippines should maintain and promote the harmony and the friendly relations subsisting in their region to ensure the security and the stability of the area'. Malaysia, *Malaya-Philippine Relations*, Appendix X. pp. 33-34.

[5] See *The Straits Times*, 27 January 1970.

TREATIES, GRANTS, CESSIONS, STATUTES, AGREEMENTS, DECLARATIONS AND RESOLUTIONS

DATE	PARTIES	TERMS IN BRIEF
	Treaties and Grants 1763-1865	
1763	Sultan Amir of Brunei and British East-India Company.	Cession of Sultan's Borneo possessions, the land from River Kimanis to River Kinabatangan and the Island of Balembagan.
1847	Sultan of Brunei and British Government.	Cession of the Island of Labuan with stipulation for non-alienation of the island and all the Sultan's possessions on the main land of Borneo without British Government consent.
1850-1865	Sultan Omar Ali of Brunei and American Trading Company of North Borneo.	Cession of a large tract of North Borneo with the islands of Balembangan and Palawan including trading rights and rights of the most favoured nations.
	Treaties and Grants of 1877-8	
29 Dec. 1877	Sultan and Pengiran Temenggong. Three grants: — of Brunei and Overbeck & Alfred Dent.	(1) Land on the West Coast of Borneo for an annual payment of $4,000. (2) Grant of territories on the North West Coast of Borneo with the Islands of Banguey and others within 3 marine leagues of the coast for $6,000 annual payment. (3) Grant of territories as far as Sibuco River with all the Islands within 3 leagues of the coast for $2,000.
	Pengiran Temenggong of Brunei and Overbeck and Alfred Dent.	Grant of Provinces of North West coast of Borneo with all the islands within 3 marine leagues of the coast for $3,000 annual payment.
	Sultan of Brunei and Overbeck.	Commission from the Sultan of Brunei appointing Gustavus Baron de Overbeck Maharaja of Sabah and Raja of Gaya and Sandakan.
22 Jan. 1878	Sultan Jamal Alam of Sulu & Overbeck and Alfred Dent.	Grant and concession of Borneo territories on the North West coast extending along the whole coast as far as Sibuco River in the South within 3 marine leagues of the coast for $5,000 annual payment.
	Sultan Jamal Alam & Overbeck.	Commission from Sultan Jamal Al Alam appointing Overbeck Dato' Bendahara & Raja of Sandakan.
	Royal Charter, Grants & Cessions 1880 & 1881	
1880	Overbeck and Dent.	Transfer of Overbeck shares under the 1877-8 Grants to Alfred Dent.
1881	Alfred Dent and Joseph Torrey of the American Trading Company. Alfred Dent and North Borneo Provisional Association.	Dent's acquisition of the interest of the American Trading Company. His founding of the British North Borneo Provisional Associa-

		tion and transfer of all his interest and power under the 1877 & 1878 grants for £120,000 to the Provisional Association.
1 Nov. 1881	Grant of Royal Charter by Letters Patent to the British North Borneo Provisional Association Ltd.	Power of British North Borneo Company to purchase the benefit interest and powers of the British North Borneo Provisional Association.
	Territorial Acquisition of the British North Borneo Chartered Company 1883-5	
1883	The British North Borneo Company and the Sultan of Brunei.	Annexation of Balembangan by William H. Treacher for the Company from the Sultan of Brunei.
1883	The British North Borneo Company.	W.H. Treacher acquired the Pengalat River for the Company for an annual payment of $300.
20 March 1884	The British North Borneo Company and Pengiran Muda Damit Tajuddin of Brunei	W.H. Treacher purchased the Putatan District for an annual payment of $1,000.
5 Nov. 1884	Sultan Abdul Mu'min, Pengiran Bendahara & Pengiran di-Gadong of Brunei.	Cession of the whole country from Sipotong on the South to Kuala Paniow as in the 1877 grant for $3,000 annual payment.
6 April 1885	Sultan Abdul Mu'min & the British North Borneo Company.	The confirmation of Palawan Island in the Grant of 1878.
	Protocol & Protectorate Agreement 1885-8	
7 April 1885	Great Britain, Germany and Spain.	British & German recognition of Spanish sovereignty over the Archipelago of Sulu and Spanish renunciation of British sovereignty over the Sultanate of Sulu possession in Borneo.
12 May 1888	The United Kingdom & the British North Borneo Company.	The State of North Borneo placed under British protection.
	Territorial Acquisition of the Protected State of North Borneo 1889-1903	
2 March 1889	Pengiran Shah Bandar, Ruler of Padas Damit.	The cession of the territory of Padas Damit and its dependencies with all rights and powers, privileges and jurisdiction for an annual payment of $2,130.
1896	The Sultan of Brunei and the North Borneo Company.	Surrender of the Sultan sovereign rights over certain territories of Borneo for an annual payment of $1,200 and the sale of *tulin* rights over these rivers by various chiefs for yearly payment ranging from $2,000 to $2,600.
1897	The British North Borneo Company.	Kinarut River fell under the British protection on the request of its inhabitants to Beaufort.
7 Sept. 1901	Sultan Jalilul Alam of Brunei & the Protected State of North Borneo.	Cession of sovereign rights and powers over the district lying between certain Rivers in Borneo for $600 annual payment.
1902	The British North Borneo Company.	The Company purchased the Membakut River for $2,400.
22 April 1903	Sultan Jamal Al Alam of Sulu and the British North Borneo Company.	Cessions of all the islands from Banguey to Sibuco Bay.

Boundary Agreements & Conventions 1891-1932

30 June 1891 Ratified 11 May 1892	United Kingdom and the Netherlands.	Agreement laying down the boundary line between the Netherlands possessions in Borneo and the British protected States of Borneo.
28 Sept. 1915	Great Britain and the Netherlands.	Delimitation of boundary line between the British Protected States of Borneo and those occupied by the Dutch.
2 Jan. 1930 Ratified 13 Dec. 1932	United Kingdom and United States of America.	Delimitation of boundary line between the Philippines Archipelago (the territory acquired by USA under the Treaties of 10 Dec. 1898 and 7 Nov. 1900 from Spain) and the British protected States of North Borneo.

Declaration & High Court Decision 1936 & 1939

1936	President Quezon of the Philippines.	Non-recognition of the Sultanate of Sulu on the death of the last Sultan of Sulu, Sultan Esmail Kiram, in 1936
18 Dec. 1939	Dayang Dayang Hadji Piando of Jolo, Philippines & Eight others v. The Government of North Borneo and Others.	Decision of Maclaskie J. affecting the right of the heirs of the Sultan of Sulu to receive annual payment under the 1878 grant.

Treaty of Cession & Order-in-Council 1946.

26 June 1946	The British Government and the British North Borneo Company.	Transfer and cession to the British Crown of the interest powers and rights of the British North Borneo Company in the State of North Borneo.
10 July 1946	The British Crown.	Cession Order-in-Council providing for the annexation of North Borneo as a colony to form part of the British Dominions together with the Settlement of Labuan.

Proclamation, Resolutions & Statutes 1946-63

4 July 1946	USA and the Republic of the Philippines.	Proclamation of Independence of the Republic of the Philippines containing preamble referring to American acquisition of sovereignty over the Philippines from Spain under the Treaties of 10 Dec. 1898 and 7 Nov. 1900 and the Agreement of 2 Jan. 1930 on the delimitation of the boundary between the Philippines Archipelago and the British Protected States of North Borneo.
28 April 1950	Senator Macapagal.	Macapagal Resolutions to initiate the formal institution of the Philippines claim to Sabah.
1951	The Philippines Congress.	Passing of a Statute of *ex-abundante cautela* providing that the extension of the Philippines Consulate in Singapore was not to be regarded as a waiver of the Philippines' claim to Sabah.
25 Nov. 1957	Heirs of the Sultan of Sulu.	Formal and Public Proclamation repudiating the 1946 British Cession Order-in-Council and cancelling the lease of 1878 with effect from 22 Jan. 1958.

27 May 1961	The Prime Minister of the Federation of Malaya.	Tengku Abdul Rahman, the Prime Minister of the Federation of Malaya announced the concept of Malaysia in Singapore.
5 Feb. 1962	Heirs of the Sultan of Sulu and the Republic of the Philippines.	Letter of 5 Feb. 1962 containing communication from the Heirs of the Sultan stating their claim to the proprietary rights over North Borneo and their desire to see the territory included as part of the national territory of the Republic of the Philippines.
24 April 1962	Ramos Resolution.	Ramos Resolution authorizing the President of the Republic of the Philippines to take all steps to recover North Borneo.
24 April 1962	The Heir of Sultan Jamalul Kiram and the Republic of the Philippines.	Philippines President recognition of an authority in favour of the Republic of the Philippines to initiate, institute and prosecute the Sultanate claim over Sabah.
22 June 1962	The Republic of the Philippines & United Kingdom.	Official filing with the United Kingdom of th the Philippine claim of sovereignty, jurisdiction and proprietary ownership over North Borneo as successor-in-interest of the Sultanate of Sulu.
12 Sept. 1962	The Sultan of Sulu, Sultan Mohammad Esmail Kiram & the Republic of the Philippines.	Cession or transfer of sovereignty over the territory of North Borneo to the Republic of the Philippines.
25 January - 1 February 1963	The Governments of United Kingdom and the Republic of the Philippines.	The London official talks on the territorial dispute.

Agreement, Accord, Report & Statute 1963-8

12 July 1963	United Kingdom and the Federation of Malaya, Singapore, North Borneo and Sarawak.	British undertaking in the Malaysia Agreement to relinquish its sovereignty and jurisdiction over North Borneo, Sarawak and Singapore in favour of Malaysia.
31 July 1963	The Republics of Indonesia & the Philippines, & the Federation of Malaya.	Re-affirmation of the three countries' adherence to the principle of self-determination for the peoples of non-self-governing territories and Indonesia and the Philippines undertaking to welcome Malaysia subject to the result of the ascertainment exercise by the Secretary-General of the UN of the wishes of the people in the Borneo territories.
29 Aug. 1963	Malaysian Government.	Malayan Government's announcement of its intention to postpone the date of the establishment of Malaysia to 16 Sept. 1963 originally secheduled for 31 August 1963.
16 Sept. 1963	U.N. Secretary-General.	Publication of the UN Report on the conclusion of the Mission's task indicating the wishes of a sizable majority of the people of the Borneo territories to join Malaysia.
3 June 1966	The Government of the Philippines & Malaysia.	Agreement to abide by the Manila Accord of 31 July 1963 and to hold talks in order to seek clarification of the Philippines' claim and find the mode of settlement of the dispute.

29 May 1967	The Head of State of Sabah.	Address by the Head of State of Sabah to the Sabah State Legislative Assembly on the States' desire to remain within the Malaysia Federation.
16 June- 17 July 1968	Governments of Malaysia & the Republic of the Philippines.	The Bangkok Official Talks on the territorial dispute.
18 Sept. 1968	The Philippines Congress.	The passage of a new Bill by the Philippines Congress (now signed by President Marcos) to define the base lines of the territorial seas of the Philippines Archipelago.
16 Nov. & 29 Nov. 1968	Malaysia & Philippines	Diplomatic Representatives left Manila & Kuala Lumpur respectively.
16 Dec. 1969	Malaysia & Philippines	Diplomatic relations resumed

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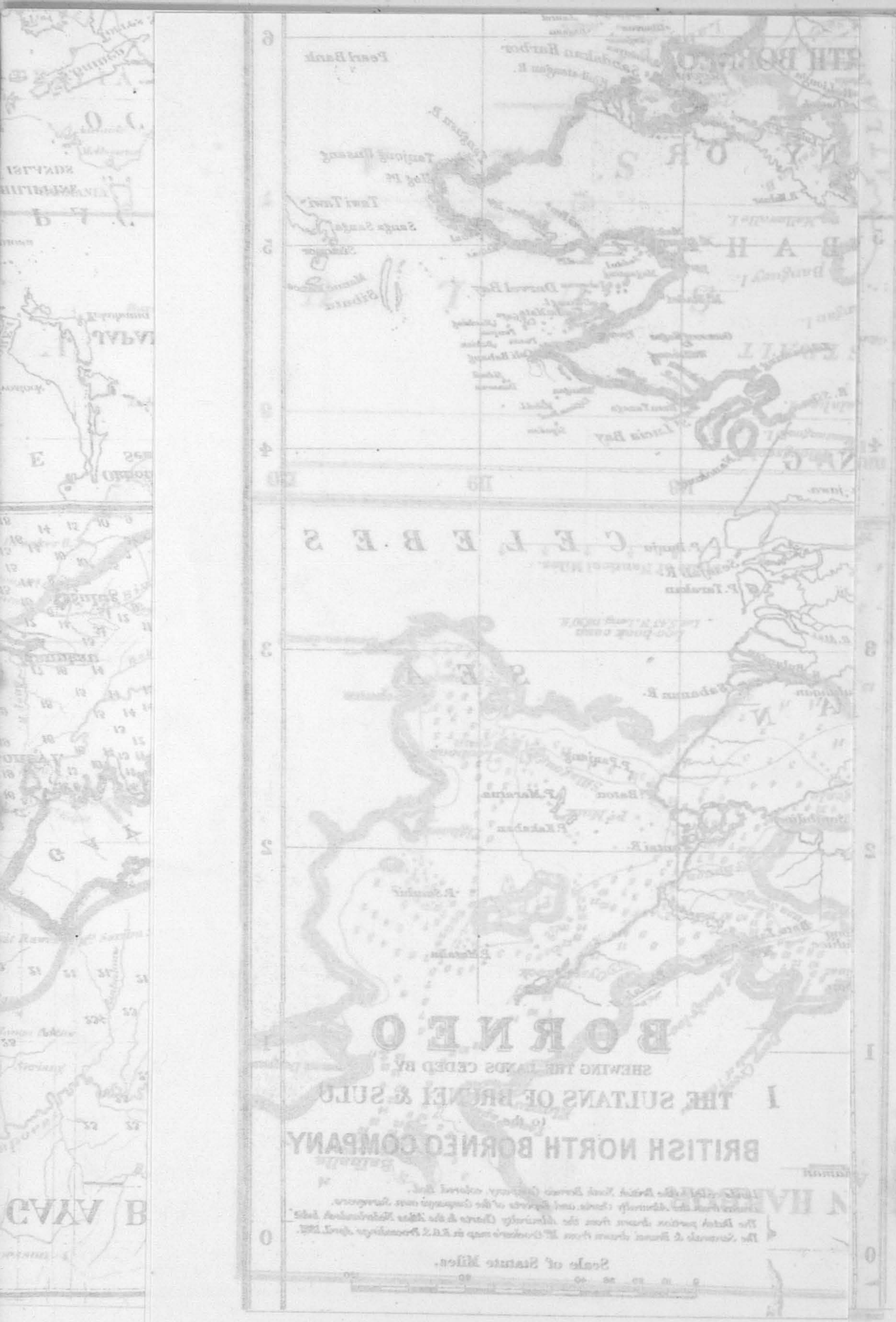
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AMBONG BAY

ABAIE AND USUKAN HARBORS.

Tampassuk R. 6 feet dry about 12 feet at H.W.

Usukan

Slime R. dry at L.W.

Abaie Point and old Fort

Abaie R. admits vessels of 9 feet at L.W., and 12 feet at H.W.

Sunk

USUKAN BAY

Soundal Pt.

Mt. Roberton 1500

Water.

Soundal Bay

Jaga

Tangah Pt.

Tangah Bay

AMBONG BAY

Bijuk Pt.

C. Amboina

AMBONG

Scale of Nautical Miles.

0 1 2 3 4

GAYA BAY

Gaya Head

Kaetan Peak

Good passage for ships in the Middle Channel

Gantison

Tani Kaan

Udar Pgs.

Udar Kichuli

Udar

Beacon

Sapangar

SAPANGAR BAY

Kabatuhan R. A small Creek enters the principal trading river.

GAYA BAY

GAYA I.

Lonely I.

Manukau

Sulug

Lounut Pt.

Tanaman R. Difficult for boats.

240 F.

Scale of Nautical Miles.

0 1 2 3

SANDAKAN HARBOR

Balhalla Fresh Water

Tang Tapi

Elopura

Dogan Creek

Booby-loo-loo

Oyster Rock

Po Buttons

Village

W. Ningcala

E. Ningcala

Po Muck

Tighown

Sillagan R.

Loobook caun

Loopaun

Scetopoo

Dom-on-doung

Loo-book caun
Lat. 5.45 N. Long. 116.10 E.

Scale of Nautical Miles.

0 1 2 3 4 5 6

EUROPE

RUSSIAN EMPIRE

ASIA

BRITISH ISLES

MEDITERRANEAN SEA

Gibraltar Str.

PERSIA

ARABIA

Suez

Red Sea

Aden

Socotra

INDIA

Bombay

Madras

Calcutta

Ceylon

Galle

Arabian Sea

Bay of Bengal

CHINESE EMPIRE

Pekin

Vladivostock

Oldhotsk Sea

JAPAN

Yokohama

Shanghae

Amoy

Formosa

Canton

Hong Kong

PHILIPPINE ISLANDS

Saigon

Palawan

China Sea

Labuan

Sulu

BORNEO

Celebes

PACIFIC OCEAN

Equator

Seychelles

Sumatra

Java

New Guinea

Torres Strait

Fiji Is.

AFRICA

ATLANTIC OCEAN

Ascension

St. Helena

INDIAN OCEAN

Madagascar

Mauritius

Bourbon

C. of Good Hope

AUSTRALIA

Perth

Brisbane

Adelaide

Sydney

Melbourne

TASMANIA

NEW ZEALAND

115 116 117 118 119 120

8 7 6 5

Course recommended to Hong Kong in the North East Monsoon

Bougsook I.

Mantangoule I.

Balabac I.

BALABAC STRAIT

Balambangan I.

Maruda Bay

Banguey I.

Mallawalle I.

Sampaumango Pt.

Cagayan Sulu

SULU SEA

Kaliga Pt.

Agal B.

Mantanani Is.

Casap Pt.

Kranga Pt.

Tampassuk R.

Usukan Bay

Ambong B.

Sulaman R.

Mangalum I.

Gaya I.

Paitan B.

Seemaddal

Billibilwan Rock

Mambahinawan

Tanjong Sugut

Labuk Bay

Libarran

Bagaan

Sandakan Harbor

Kinabatangan R.

Pearl Bank

BRITISH NORTH BORNEO COMPANY OR

Kimanis B.

Tegal I.

Nosong Pt.

Papar

Kimanis

Bethune Pt.

Sakat Pt.

LABUAN

Padas R.

Mt. Morapoke

BRUNEI

Tungku B.

Tanjong Unsang

Hog Pt.

Tawi Tawi

Sanga Sanga

SABAH

Darvel Bay

Sibutu

Mt. Madai

BORNEO

SHEWING THE LANDS CEDED BY

THE SULTANS OF BRUNEI & SULU

to the

BRITISH NORTH BORNEO COMPANY

Lands ceded to the British North Borneo Company, colored Red.
Drawn from the Admiralty Charts, and Reports of the Company's own Surveyors.
The Dutch portion drawn from the Admiralty Charts & the Atlas Nederlandsch Indië.
The Sarawak & Brunei drawn from Mr Cooke's map in R.G.S. Proceedings April 1881.

Scale of Statute Miles.

0 10 20 30 40 80 120

KUDAT HARBOR

Scale of Nautical Miles.

0 1 2 3 4

Maps 4.21. 88

A MAP OF

BRITISH NORTH BORNEO

COMPILED FROM THE ENGLISH ADMIRALTY CHARTS
AND FROM THE SURVEYS & EXPLORATIONS OF
MESSRS. F.X.WITTI, W.B.PRYER, F.HATTON, H.J.WALKER AND D.D.DALY
in the service of
THE BRITISH NORTH BORNEO COMPANY.

Extent of Territory about 31,000 square miles.

Date of Concession by the Sultan of Brunei 29th Dec.r 1877.
Date " " Sulu 22nd June 1878.
" Confirmed by Royal Charter 1st November 1881.

Explanation

Boundar.	Bay	Brake R.	Mouth of River
Delta	Bank	Labuan.	Anchorage
Desert	Laron	Marsh	Reef
Dubil. Red R.	Bail	Pade. P.	Island
Dumun.	Lake	Sungei. S.	River
Gunong Gt.	Mountain	Tanjong Pt.	Point or Cape
Gunong S.	Village	Teluk.	Bay
Ketchil.	Small	Trusan.	Passage or Channel

The Heights are given approximately in feet.

The soundings are taken from the Admiralty Charts, but this map is not intended for navigating purposes.

Published by Edward Stanford, for
THE BRITISH NORTH BORNEO COMPANY
1886
1886

Price 2s 6d in Sheets

BALAMBANGAN I.
BANGUEY I.
NORTH PUROIUS SHOALS
SOUTH PUROIUS SHOALS
MANTANANI I.
PAITAN BAY
MARCHESA BAY
LABUK BAY
DARVEL BAY
SIBUCO OR ST LUCIA BAY
SULU SEA
CHINA SEA
SEMPORNA PENINSULA
KIMANIS BAY
BRUNEI BAY
VERNON BANK
SAMARANG BANK
SARAWAK
BRUNEI
D E N T
PROVINCE
WEST COAST PROVINCE
EAST COAST RESIDENCY
Sandakan Harbour
Sulong Delta
Approximate boundary of British North Borneo Company's Territory
Note: This map is divided into two minute squares.
Soundings given to the depth of 20 fathoms.

London Published by Edward Stanford, 55, Charing Cross, February 15, 1886.

Maps 4x. 89. 2

A MAP OF

BRITISH NORTH BORNEO

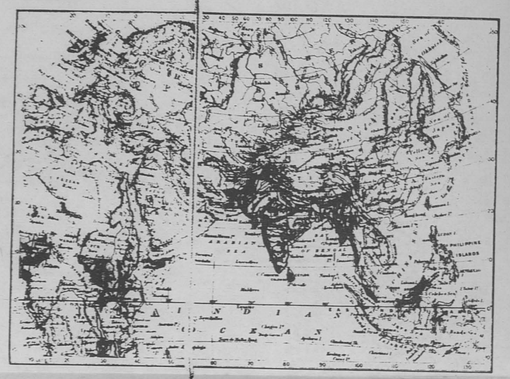
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Date " " Sulu 22nd Jan^y 1878.
Confirmed by Royal Charter 1st November 1881.

Published by Edward Stanford, for
THE BRITISH NORTH BORNEO COMPANY
1894
Price 2s 6d in Sheets



Explanation

Bandar,	— Town	Brala, R.	— Mouth of River
Batu,	— Rock	Labuan,	— Anchorage
Bunut,	— Large	Merah,	— Red
Bukit, Bod. P.	— Hill	Pulo, P.	— Island
Danau,	— Lake	Sungei, S.	— River
Gunong, Gn.	— Mountain	Tanjong, Tk.	— Point or Cape
Kampong, K.	— Village	Teluk,	— Bay
Ketchil,	— Small	Tuasan,	— Passage or Channel

The Heights are given approximately in feet
The soundings are taken from the Admiralty Charts but this map is not intended for navigating purposes

Scale. 1 : 63,500. 10 English Miles to 1 Inch

Longitude East of Greenwich

North Latitude

London: Published by Edward Stanford, 26 & 27 Cockspur Street, Charing Cross, S.W. 18 89.

Henry Walker
Commissioner of Lands

Note. This map is divided into two minute squares.
Soundings are given in fathoms.
The portions left white, about 300,000 acres, represent the land sold to subsidiary companies and others.
The portion coloured pink represents the 20000,000 acres available for sale.

MAP
OF THE
STATE OF NORTH BORNEO

WITHOUT HILLS

Scale, 10 Miles to 1 Inch

Explanation

Bandar – Town	Labuan – Anchorage
Batu – Rock	Morah – Red
Besar – Large	Pulo, P. – Island
Danau – Lake	Sungei, S. – River
Kampong, K. – Village	Tanjong, T. – Point or Cape
Kechil – Small	Teok – Bay
Kuala, K^a – Mouth of River	Trusan – Passage or Channel

Wireless Station
Lighthouse
Railway
Telegraph Line
Telephone Line
Bridle Paths
Boundary of British North Borneo

Soundings are given in fathoms

1919

BALAMBANGAN
BANGUEY I.
MALUDU BAY
PAITAN BAY
Kudat
KUDAT RESIDENCY
Timbang Batu
Pandasan
Bkota Belud
Ntas
Long
Kinabalu
GAYA I.
JESSELTON
Putatan
Kinarut
KIMANIS BAY
Kimanis
BEAUFORT
Lumadan
Kenuit
Melalap
TENOM
BRUNEI BAY
Sipitang
Padas R.
Lokan R.
Kanaan I.
LABUK BAY
Puru Puru I.
Kawang I.
Kinabatangan R. (Sugut)
Kinabatangan R. (Bestar)
Darvel Bay
Tambu Mata Island
Simporna
Silam
COWIE HARBOUR
TAWAO
East Nunukan
Tibuko
Sembakong
Ahoos
SERO EKOE OR ST LUCIA BAY
DUTCH TERRITORY
SANDAKAN
SEARCHER
Kinabatangan R. (Sugut)
Kinabatangan R. (Bestar)
Darvel Bay
Dewhurst Bay
Tanjong Labian
Tambu Mata Island
Simporna
Silam
COWIE HARBOUR
TAWAO
East Nunukan
Tibuko
Sembakong
Ahoos
SERO EKOE OR ST LUCIA BAY
DUTCH TERRITORY

116° Longitude East of Greenwich
117°
118°
119°

STATE OF SABAH

1 116° 2 117° 3 118° 4 119° 5

A B C D E 7° 6° 5° 4°

SOUTH CHINA SEA

SULU SEA

CELEBES SEA

SARAWAK KALIMANTAN (REPUBLIC OF INDONESIA)

BRUNEI

Balabac Strait

Lumbucan Channel

Balabac

BALABAC I.

Cape Melville

P. BALEMBANGAN

Tg. Siagut

Tg. Kalutan

Tg. Samarang

Tamagas

Tg. Butan

PULAU BANGGI

P. Bankawan

Limbuak

P. Panokaran

P. Balak

P. Maliangin Besar

P. Malawali

Tg. Sempang Mangayau

CAGAYAN SULU I.

Suang Pai

Tajau

Tg. Bangau

Bangau

AIRFIELD KUDAT

Kudat Harbour

Tiga Tarak

P. Mandidarah

Ismit

Lokapas

P. Tigabu

Tg. Tambuluran

Sikuati

Bahru

Telaga

P. Musa

Sandy I.

Tg. Dandulit

Nangka

Indarasan

Senaja

Konibongon

P. Mantanani Besar

Matunggong

Rosok

Pitas

Taringai

Kusilad

P. JEMBONGAN

Sibaran

Jambongan

Tg. Semangut

Dudar

Tigaman

Tg. Makarang

Taritipan

Dandon

GN SUGUT

Rampayan

Bandau

Tandik

Langkon

WEST COAST RESIDENCY

Pandasan

G MADALON

Rakit

Tg. Sugut

Trusan

P. Usukan

Kuala Abai

Goshen

Simpangan

Ambong Bay

Abai

AIRSTRIP

Surob Agricultural Station (Cattle)

Agricultural Station (Rice)

Belud

Tuaran

Narinang

Inghilan

Agricultural Station

Tamparuli

P. Mengalum

P. Sapangar

Teluk Kulu

Tegupeh

Sungei Sungei

P. Puru Puru

P. Kaniogan

Lingkabau

Labuk Bay

P. Boaan

Baguan I.

P. Taganak

Tg. Pisau

Tg. Lari Lari

P. Gaya

Gaya Bay

Menggatal

JESSELTON

Inanam Agricultural Station (Rice)

AIRFIELD

Donggongon

Kasigui

Penampang

Kundasang Agricultural Station

Ranau Agricultural Station

Putatan

Gaar

Segindai

Kinarut

GN. ALAB

Kirokot

Patau

Baing

Tampias

P. Lyang Lyang

Kawang

Mehontion

Sensuron

Luibu Tiang

Namkatan

Bitone

Meliau

Bayok

Klagan

Kuala Labuk

Kolapis

Beluran

Bantuni

Sapi

Samawang

P. Nunuyan Laut

P. Berhala

SANDAKAN AIRFIELD

Sandakan Harbour

Sekong Bay

Tg. Aru

Mumiang

Tg. Bidadari

Abai

Dewhurst Bay

PAPAR

Agricultural Station (Rice)

Buis

Telupid AIRSTRIP

SANDAKAN RESIDENCY

P. Tiga

Tg. Nosong

Kimanis Bay

Kiau

Tenambak

Kuala Penyu

Palu Palu

Kimanis

Tambunan

GN TRUS MADI

Tubau

Pudan

Munsor

Parayon

Seroi

GOMANTON CAVES

Sukau

Bilit

Malapi

Lamag

Batu Puteh

Pintasan

BT KRETAM

Tangusu Bay

P. Tambisan

Tambisan

Tg. Unsang

BT MARUAP

Evans I.

Litang

Hog Pt.

Dent Haven

MT. HATTAN

Menunggang

Mansud

Karukan

Bundu

Pimping

Kota Klias

Membakut

Bongawan

Apin Apin

Kitau

Lumat

Belanot

Kiaru

PULAU LABUAN

VICTORIA AIRFIELD

P. Kuraman

Padas Damit

BEAUFORT

Agri. Sta.

Menumbok

Bukau

Jumadan

Weston

Batu Batu

Lingkungan

Pang

Rayoh Halt

Melalap

Agricultural Station (Rice)

Kauran

Tenom

Tumantalik

Paal

Bingkor

KENINGAU AIRFIELD

Agri. Sta.

Live Stock Station

Tulid

Lanas

Lungkat

Limpada

Pinangah

Tampasak

Tongod

Sinaropa

Tamoi

Tangkulap

Baka

Tungka

Kbamut

Palars

Buttock Batu

Mapud

Nabawan

Sook

Tg. Nosong

Brunei Bay

Tg. Pelompong

Kuala Mengalong

Tg. Sundar

Sipitang

Marintaman

Pantai

Mendolong

Malaman

Sindumin

Sundar

Lawas

Trusan

Lumbang

Batu Apoi

Tg. Tambisan

Unsang

Hog Pt.

Dent Haven

Tg. Labian

Litang

Evans I.

Tambisan

Tangusu Bay

BT MARUAP

MT. HATTAN

AIRFIELD Lahad Datu

BAGAHAK RA

Dusun

Manakaian

Tungku

Tg. Tungku

Makuau

Tg. Membatu

Kennedy Bay

Darvel Bay

MT. SILAM

STEWART PK.

P. Sakar

Tg. Melandong

TAWAU RESIDENCY

Madai Caves

Kunak

P. Bohian

P. Tabauwan

P. Batik Kulambu

P. Batik

P. TIMBUN MATA

Baturong Caves

MT. MOSTYN

COOK HILL

P. Gaya

P. Bohey Dulang

Omapui

SIBUTU I.

Tumindao

Alice Channel

Kemabong

GN NAPOTONG

Tomani

Pandewan

Susul

Matiku

Rundum

BT TAMBUNAN

Sapulut

Bole

Meligan AIRSTRIP

GN ANTULAI

Batu Punggul

Pensiangan

Sigattal

Sumakit

Long Pa Sia AIRSTRIP

Long Semado AIRSTRIP

Loembis

Limpagna

Tabak

Salang

Sesiboe

Tg. Pakis

Serudong

Silimpopon

Cowie Harbour

Wallace Bay

P. Simandalan

PULAU SEBATIK

Namukan

TAWAU AIRFIELD Agricultural Station

Indarasabak

Sibuko or St Lucia Bay

P. OOST NOENOEKAN

Kalabakan

Merotai

MT. MAGDALENA

MT. LUCIA

MT. MABEL

Quoin Hill Cocoa Station

MT. PYRAMID

MT. WULLERSTORF

MT. HEWETT

MT. SIGALONG

MT. POCK

Semporna

Lihak

Baja

P. Silawa

Labuan Haji

Bum Bum

P. BUM BUM

P. Omadal

Gusong Melanta

Trusan Baharu

P. Manampilek

Tg. Tutup

P. Kalumpang

P. Si Amil

P. Dinawan

Pa Padi

Lg. Berang

Peladjoe

Warat

L. Rongan

Malinau

P. MANDOEL

P. BOENJOE

P. BANGKOE

S. Sesajap

Ma Serban

Ma Sca

S. Semantan

S. Sapriari

S. Tagul

S. Tulid

S. Tabalong

S. Sebakis

S. Sebuku

S. Sembakong

S. Ular

S. Babi

S. Baliu Apoi

S. Bubu

S. Deat

S. Padas

S. Klias

S. Darat

S. Kalias

S. Tagul

S. Tulid

S. Tabalong

S. Sesayap

Gaya Bay

Ambong Bay

Brunei Bay

Kimanis Bay

Sandakan Harbour

Sekong Bay

Dewhurst Bay

Tangusu Bay

Kennedy Bay

Darvel Bay

Cowie Harbour

Wallace Bay

Alice Channel

Indarasabak

Sibuko or St Lucia Bay

CROCKER RANGE

CROCKER RANGE RESIDENCY

INTERIOR RESIDENCY

MAIN RANGE

SIR JAMES BROOKE RA

BRASSEY RANGE

TAWAU RESIDENCY

SANDAKAN RESIDENCY

PENAMBO RANGE

GN MELIAU

GN TAMBUYUKON

MT. KINABALU 13455

GN. ALAB

GN TRUS MADI

GN NAPOTONG

GN ANTULAI

BT TAMBUNAN

Marudu Bay

Paitan Bay

Tuhuban

Labuk Bay

Kuala Labuk

Sandakan Harbour

Sekong Bay

Dewhurst Bay

Tangusu Bay

Kennedy Bay

Darvel Bay

Cowie Harbour

Wallace Bay

Alice Channel

Indarasabak

Sibuko or St Lucia Bay

Scale of Miles

10 0 10 20 30 40 50

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INDIAN OCEAN

CELEBES

INDONESIA

In 1962 President Macapagal of the Philippines laid his government's claim to Sabah, a British colony then due for independence. When in 1963 Sabah joined the Federation of Malaysia the claim was preferred against the new Federation. The tension that has resulted from the dispute has sorely tried the patience of both Governments, and the relationship between the two countries has never been the same again.

Up to now, besides the official White Papers by the respective Governments, only fragmented discussions of various aspects of the problem have appeared. The claim, however, represents a very real and interesting problem to the historian, the legalist in international law and the political scientist, all of whom are no less intrigued by the validity of the claim than by the formulation of a solution to the dispute.

In this book, the author tackles this task by first examining the very foundations upon which the dispute rests: the treaties and conventions of a past era. He presents the dispute against the background of the relevant historic facts and then establishes the validity of the bases of each treaty's stand against accepted international law practice. His findings are dispassionately set out, as are the possible solutions to a quarrel that has brought about so severe a strain on the relationship between these two neighbouring countries and which has cast so dark a shadow on the South-East Asian international scene.

The author was until recently Senior Federal Council (International Law Division) of the Attorney General's Chambers in Malaysia, and is now the Treasury Solicitor attached to the Ministry of Finance, Malaysia.



This series is planned as a collection of Monographs which will reflect current academic thinking in contemporary affairs in Asia, particularly in the fields of politics, economics and sociology. It is hoped that the series will be of interest both to the student and to the layman anxious to keep abreast with what is going on in Asia today.

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