The Sabah Question in International Law

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I. Introduction

The relationship between Malaysia and the Philippines has not reached its full potential mainly due to a lingering dispute over a territory that was once known to Filipinos as North Borneo, and currently, to the Malaysians as Sabah. While both countries have diplomatic relationship, the Philippines has not set up a consular office in the State of Sabah, a member of the Federation of Malaysia, to the disadvantage of thousands of Filipino migrants in that place. They are the directly affected sector of the Filipino nation being deprived of their government's consular services and protection which they deserve much like anyone in the Philippine diaspora.

To better understand the Sabah Question, it should be viewed in bifurcated perspectives; one is proprietary in nature, the other is political. The proprietary perspective of the Sabah Question deals with private ownership of the territory by the heirs of the Sultan of Sulu; whether or not the controversial Deed of 1878 was a lease or a cession of territory. The Deed of 1878 was a contract between a landowner, and a sovereign at the same time, and private individuals. The political perspective of the Sabah Question deals with sovereignty; whether or not Sabah or North Borneo forms part of the territory of Malaysia or the Philippines. The Philippines does not assert ownership of Sabah; the heirs of the Sulu sultan do, and rightly so. The heirs of the Sulu sultan being private individuals cannot lay claim on sovereignty which the Philippines does. Thus, their claims are mutually exclusive.

This modest paper tackles the Philippine claim of territorial sovereignty vis-a-vis relevant international law principles. The paper humbly advocates for the official dropping of the claim of territorial sovereignty because it will not anyway pass muster scrutiny in public international law. The thousands

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of Filipino migrants in Sabah deserve the attention and consular protection of the Philippine government which it has failed to do for almost three decades now.

II. The Sultanate of Sulu - A historical perspective

The Sultanate of Sulu was an Islamic Tausug state that ruled over many of the islands of the Sulu Sea, parts of Mindanao and certain portions of present-day Sabah (then North Borneo). The sultanate was founded on 17 November 1405 by a Johore-born Arab explorer and religious scholar, Sayyid Abu Bakr Abirin, after he settled in Banua Buansa Ummah, Sulu. Ummah is an Arabic term for "community." After the marriage of Abu Bakr and local *dayang-dayang* (princess) Paramisuli, he founded the sultanate and assumed the title Paduka Mahasari Maulana al Sultan Sharif ul-Hashim. At its peak, the sultanate stretched over the islands that bordered the western peninsula of Mindanao in the East to Palawan in the North. It also covers the area in northeastern side of Borneo, stretching from Kimanis in now Sabah, to Tepian Durian in now Kalimantan.[1]

North Borneo was in the sovereign possession of the Sulu sultan who, from time immemorial, through a series of treaties of peace, friendship and commerce, had been recognized by Spain, Great Britain, and other European powers as a sovereign ruler in his own right.[2]

On 22 January 1878, the Sulu sultan leased a portion of the territory of North Borneo to Hong Kong-based businessman Gustavos Baron von Overbeck, to whom the sultan conferred the title Datu Bendahara, Raja of Sandakan. Overbeck later transferred his rights over North Borneo to Alfred Dent. The portion of the leased territory was ceded in 1675[3] (or 1704) by the Sultan of Brunei to the Sulu sultan for the latter's help in successfully quelling rebellion Brunei.[4]

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[1] *See* Henry Keppel, THE EXPEDITION TO BORNEO OF H.M.S. DIDO FOR THE SUPPRESSION OF PIRACY 385 (Forgotten Books, Classic Reprint, 2024); and Lawrence Dundas Campbell & E. Samuel, THE ASIATIC ANNUAL REGISTER, OR, A VIEW OF THE HISTORY OF HINDUSTAN, AND OF THE POLITICS, COMMERCE AND LITERATURE OF ASIA 53 (Volume 6, 2007).

[2] Ortiz, S.J., Pacifico A., LEGAL ASPECTS OF THE NORTH BORNEO QUESTION, Bureau of Printing, Manila 1963, at 22.

[3] Maul, Cesar Adib, MUSLIMS IN THE PHILIPPINES, 1999.

[4] *Id*.

On 22 July 1878, the Sultan of Sulu and Spain signed the Treaty of Capitulation of 1878. Sulu became a protectorate under the suzerainty of Spain.[5]

On 1 November 1881, the British Crown awarded Alfred Dent a provisional charter to form the British North Borneo Provisional Association, Ltd.[6] Upon protestation from the Dutch Government, British officials clarified that "x x x the grant of provisional charter was not an assumption of sovereignty or dominion which attributes remained with the sultanate, and the association was just a mere delegate of the sultan."[7] The Provisional Association eventually became the British North Borneo Company.

In 1885 Spain, Great Britain, and Germany signed the Madrid Protocol or the Protocol of Sulu of 7 March 1885 wherein Spain recognized British sovereignty over North Borneo.[8]

In 1888 North Borneo together with Sarawak and Brunei became a protectorate of Great Britain. The administration of the territory, however, remained entirely in the hands of the British North Borneo Company, with the crown reserving power over foreign relations.[9]

On 10 December 1898 Spain and the United States signed the Treaty of Paris wherein the former ceded to the latter the Philippine archipelago, including the Sulu archipelago but not North Borneo.

On 20 August 1899 the Sulu sultan and General John Bates of the U.S. Military Authority signed the Bates Treaty whereby the sultan recognized the sovereignty of the U.S. subject to the sultan's right to internal sovereignty. The Bates Treaty was not ratified by the U.S. Senate, thus, it was abrogated.[10]

On 22 March 1915 the Sulu sultan and Governor General Frank Carpenter signed the Carpenter Agreement whereby the sultan's temporal

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[5] Ortiz, S.J., supra note 2 at 25,29.
[6] *Id.* at 31.
[7] *Id*. at. 32-33.
[8] *Id*. at. 35.
[9] *Id*. at. 21.
[10] *Id*. at. 39.

sovereign authority over the Sulu archipelago ceased but not over North Borneo.[11]

III. The Sulu sultan's ownership of North Borneo

North Borneo came under the control of various regimes. It was originally part of the domain of the Sultan of Brunei. In 1704 it was ceded in return for aid extended to suppress a rebellion to the Sultan of Sulu and became part of the domain of the independent sultanate which in the 18th century included the Sulu Archipelago, Palawan, and Basilan. North Borneo remained under this regime for more than a century and a half.[12]

North Borneo is now called the State of Sabah having been incorporated into the Federation of Malaysia. The portion of North Borneo claimed by the Philippines refers to those territories which constituted — since the beginning of the 18th century — a domain of the Sultanate of Sulu, or which the sultan in 1878 enumerated in a contract as "x x x *all territories and lands tributary to us on the mainland of the Island of Borneo, commencing from the Pandassan River on the east, and thence along the whole east coast as far as Sibuku River on the south, and including all territories, on the Pandassan River and the coastal areas, known as Paitan, Sugut, Baggai, Labuk, Sandakan, Chinabatangan, Mumiang, and all other territories and coastal lands to the south, bordering on Darvel Bay, and as far as the Sibuku River, together with all the islands which lie within nine miles from the coast."*[13]

Aware of the cession of North Borneo by the Brunei sultan to the Sulu sultan, the Austrian Consul General at Hongkong, Gustave Baron von Overbeck, entered into negotiations with the Sulu sultan for the lease of the territory. Overbeck represented an English merchant, Alfred Dent, who had advanced 10,000 pounds for the venture.[14] The Philippine government and the heirs of the Sulu sultan assert that the deed was of lease; while the British government maintains that the deed was of cession.[15]

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[11] *Id*. at. 39-40.
[12] Marcos, Ferdinand E., BREAKING THE STALEMATE Towards a Resolution of the Sabah Question, UP Main Library, DS 686.6 M37 A5725, at 10.
[13] *Id*.
[14] PHILIPPINE CLAIM TO NORTH BORNEO, Vol. 1, Bureau of Printing, Manila, 1964 at 22.
[15] Marcos, supra note 12 at 10.

The archives of the Spanish Ministry of Foreign Affairs in Madrid have series of letters which — taken together with the reports of Treacher, Overbeck and Dent contained in the affairs of Sulu and Borneo — would give a full picture of the circumstances under which Sultan Jamalul Alam signed the contract with Baron von Overbeck.[16]

Alfred Dent subsequently bought out Overbeck, and in turn transferred the rights to the British North Borneo Company of which he was a founding member.[17]

In 1888 the British North Borneo Company and the British government signed a Protectorate Agreement which placed the territory under the protection of the British government and its foreign relations under the direction of the same government. The preamble of the agreement alluded to "all rights of sovereignty over the territories as being vested in the British North Borneo Company and referred to the territory as an independent state and named it the "State of Borneo." The British North Borneo Company continued to administer the territory until 1946, interrupted by a brief period; the Japanese Occupation during the Second World War.[18]

The British North Borneo Company that succeeded Overbeck over the North Borneo territory religiously complied with its undertakings under the 1878 document and the 1903 Confirmatory Deed in terms of the annual payments of 5,300 Malayan dollars. After the death of Sultan Jamalul Kiram on 7 June 1936, a dispute arose among his heirs. Their inability to agree on a settlement of the estate led to a litigation in the High Court of the State of North Borneo. In a decision rendered by Chief Justice C.F. Macaskie on 18 December 1939, he ruled that ten heirs were entitled to the monies payable under the deeds of 22 January 1878 and 22 April 1903.[19]

Aside from partitioning the estate which was the main subject matter of the civil action, the Macaskie court made an *obiter dictum* characterizing the 1878 deed signed by Sultan Jamalul Kiram and Overbeck as a "complete and

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[16] ORTIZ, supra note 2 at 23.
[17] Marcos, supra note 12 at 11.
[18] *Id*.
[19] *Id*. at 13.

irrevocable grant of territory and the right reserved was only the right to an annual payment of a right which is in the nature of movable property."[20]

On 26 June 1946, the British North Borneo Company signed the *"Agreement for the Transfer of the Borneo Sovereign Rights and Assets from the British North Borneo Company to the Crown"* in return for the advance payment of 860,000 sterling. On 10 July 1946, barely 6 days after the birth of the Philippine Republic, the British Crown issued the *"The North Borneo Cession Order in Council"* which ordered that as of 15 July 1946, the state of North Borneo shall be annexed to and shall form part of the His Majesty's dominions and shall be called, together with the settlement of Labuan and its dependencies, the Colony of North Borneo. North Borneo remained a British colony until 1963 when it was incorporated into the Federation of Malaysia.[21]

The first time that the Sulu sultan's heirs requested the intercession of the Department of Foreign Affairs in collecting the unpaid rentals was on 29 July 1947 when their attorney sent a written communication to the foreign office. The Department of Foreign Affairs transmitted it to the British legation in Manila on 15 September 1947. In acknowledgement of the endorsement, the British legation wrote back that the claim was "erroneously described as "rent" due to the attorney's clients from the government of British Borneo."[22]

The second intervention by the Department of Foreign Affairs on the proprietary interests of the heirs is a first person note addressed by Acting Secretary of Foreign Affairs Felino Neri to the British minister in Manila Mr. L.H. Foulds, on 4 September 1950, asking the "good offices of the British Legation whether an arrangement could be made with the appropriate authorities of the Government of North Borneo at Jesseltown whereby the British Legation in Manila would be authorized to effect the payment of the rentals in Manila directly to the recognized heir."[23]

In a reply dated 11 September 1950, the British minister categorically disputed the legal characterization of the agreement on North Borneo as

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[20] *Id*.
[21] *Id*. at 12.
[22] *Id*. at 14.
[23] *Id*. at 16.

"lease" and the nature of the payment as "rentals" in clear and explicit terms.[24]

Sulu sultan Muhammad Esmail Kiram issued Proclamation of 25 November 1957 terminating, as of 22 January 1958, the deed executed by his ancestors in 1878. The proclamation was sent to the Department of Foreign Affairs for transmittal to the British government and the United Nations secretariat. The Philippine foreign office, however, did not transmit the document.[25]

On 5 February 1962, certain attorneys of the Sulu sultan's heirs wrote to Department of Foreign Affairs about their desire to have the territory included as part of the national territory of the Republic of the Philippines; and regain proprietary rights to North Borneo and that sovereignty be turned over to the Philippine Republic. On 24 April 1962 the heirs ceded sovereignty rights over Sabah to the Philippine government.[26]

On 25 April 1962 President Macapagal called Sultan Mohammad Esmail Kiram to Malacañan Palace to discuss the Philippine claim on North Borneo.[27]

On 29 April 1962, the Ruma Bechara advised Sultan Esmail Kiram to cede to the Republic of the Philippines the territory of North Borneo, and the full sovereignty, title and dominion over the territory, without prejudice to such proprietary rights as the heirs of Sultan Jamalul Kiram may have.[28] Acting Secretary of Foreign Affairs Salvador P. Lopez accepted on behalf of the Philippines the cession and transfer of territory of North Borneo form the sultan's heirs.

IV. The Philippine territorial claim over Sabah

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[24] *Id.* at 17.
[25] *Id*. at 19.
[26] Manuel L. Quezon III, *North Borneo (Sabah): An annotated timeline 1640s-present*; INQUIRER, http://globalnation.inquirer.net/66281/north-borneo-sabah-an-annotated-timeline-1640s-present (March 2, 2013 04:48 PM) .
[27] *Id*.
[28] *Id*.

Ian Brownlie writes that "[t]he x x x competence of states in respect of their territory is usually described in terms of sovereignty and jurisdiction". In brief, "sovereignty" is legal shorthand for legal personality of a certain kind, that of statehood; "jurisdiction" refers to particular aspects of the substance, especially rights (or claims), liberties, and powers. The legal competence of a state includes considerable liberties in respect of internal organization and the disposal of territory. This general power of government, administration, and disposition is *imperium*, a capacity recognized and delineated by international law. *Imperium* is thus distinct from *dominium* either in the form of public ownership of property within the state or in the form of private ownership recognized as such by the law.[29]

Sovereignty implies equality with and among the states. The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality. The dynamics of state sovereignty can be expressed in terms of law, and — as states are equal and have legal personality — sovereignty is, in a major aspect, a relation to other states defined by law. The principal corollaries of the sovereignty and equality of states are: 1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; 2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and 3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.[30]

The Philippine claim of territorial sovereignty over North Borneo — or Sabah from the Malaysian context — was officially launched in public on 23 June 1962 when then President Diosdado Macapagal read in a press statement the diplomatic note delivered to the British ambassador to the Philippines which expressed "the desire of the Philippine Government to have conversations started either in Manila or London between the representatives of our two Governments in order that the matter of ownership, sovereignty and jurisdiction and other relevant points at issue in the North Borneo question may be fully discussed."[31]

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[29] Brownlie, Ian, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, Third Edition, Clarendon Press, Oxford, Reprinted 1987, at 110 – 111.
[30] *Id*. at 287.
[31] Ortiz, supra note 2 at 18.

The diplomatic note was in reply to the British aide memoire handed to the Philippine ambassador in London on 24 May 1962, which asserted that "the British Crown is entitled to and enjoys sovereignty over North Borneo and that no valid claim to such sovereignty could lie from any quarter, whether by inheritance of rights of the Sultan of Sulu (the only rights of his heirs being to continue to receive their shares of cession money) or by virtue of former Spanish and American sovereignty over the Sulu Archipelago in the Philippine Islands."[32]

The Philippine argument for its claim of territorial sovereignty over North Borneo was clearly outlined by then Congressman Jovito Salonga during a ministerial meeting with the British representative. According to Salonga, the Philippines acquired sovereignty over North Borneo for the following reasons:

a. The contract of January 1878 [between the Sultan of Sulu and Gustavos Baron von Overbeck and Alfred Dent] serves as a starting point.
b. In international law, sovereignty can be ceded only to sovereign entities or to an individual acting for a sovereign entity. Dent and Overbeck were not sovereign entities.
c. The contract of 1878 was one of lease, and not the transfer of ownership or sovereignty. This thesis is adequately documented.
d. The annual compensation is consistent with the concept of lease and inconsistent with the concept of purchase.
e. Since Overbeck and Dent did not acquire rights of sovereignty or dominion over North Borneo, their transferee, the British North Borneo Company, could not possibly have had acquired them. Overbeck and Dent could not have had transferred more than what they had.
f. The British Crown is barred from contending that the British North Borneo Company could acquire dominion or sovereignty over North Borneo because of the pronouncement of British Foreign Minister Lord Granville in answer to Dutch and Spanish protests that the

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[32] *Id*.

exact status or position of the British North Borneo Company vis-a-vis the territory of North Borneo is merely that of an administrator.

g. The Granville statement was, in a way, affirmed by a similar statement of Prime Minister William Gladstone in his speech in the debates in the House of Commons which is a matter or record.
h. On the basis of the declarations made by the British Government, the British North Borneo Company merely acquired "grants of territory and powers of government" as delegate of the Sultan of Sulu, and the sovereignty remained with the sultan.
i. Against the British proposition that the Sultan of Sulu lost sovereignty or dominion by virtue of the Treaty of Capitulation with Spain on 22 July 1878; the British Government is estopped from raising such point because she has always asserted that Spain's control over Sulu and its dependencies was merely nominal, and that such claims were merely "paper claims" and "sovereignty remains in the Sultan of Sulu."
j. Against the British proposition that under the Madrid Protocol of 1885 — whereby the Spanish Government renounced her "claims of sovereignty over the territories of the mainland of Borneo which belong to or may have belonged to the Sultan of Sulu . . . and which are part of the territories administered by the Company known as the British North Borneo Company" — Britain acquired the sovereignty over North Borneo; the Protocol merely acknowledged that North Borneo is within British sphere of influence which is not a mode of acquisition of either territory or rights of sovereignty in international law. If under the Protocol of 1885, the British Crown had indeed acquired the sovereignty over North Borneo, there would be no need for the transfer of sovereign rights in 1946 between the British Crown as transferee and the British North Borneo Company as transferor.
k. Against the British argument that the Protectorate Agreement of 1888 between the British Government and Overbeck, the British Crown acquired sovereignty over North Borneo; the Protectorate Agreement, in light of the 1878 contract, could not have had possibly divested the Sultanate of Sulu of its sovereignty over North Borneo.
l. On the British argument as to the effect of the Carpenter Agreement of 1915 between the Sultanate of Sulu and the United

States Government in the Philippine Islands; the Philippine Government cannot be bound by the Agreement, but holds the view that the United States government recognized the Sultanate of Sulu. Under the Agreement, the Sultan of Sulu agreed to relinquish his temporal powers [and sovereignty?] over Sulu but retained his sovereignty over North Borneo as articulated by Governor Carpenter's communication to the Director of Non-Christian Tribes on 4 May 1920, and by Governor General Francis B. Harrison that the treaty of 1915 . . . deprived the Sultan of his temporal sovereignty in the Philippine Archipelago but this did not interfere with the Sultan's status of sovereignty over British North Borneo lands.

m. On the ramifications of the 1930 Convention [the Boundaries Treaty of 1930 between the United States and Britain]; the United States never purported to succeed to North Borneo, it did not claim North Borneo, and could not have had possibly ceded or waived anything in favor of the British Crown.
n. On the reference to Commonwealth President Manuel Quezon's memorandum; the Three-Point Policy is a continuation of the *modus vivendi* established under the Carpenter Agreement and amounted to a recognition of the status of the Sultan as sovereign of North Borneo. [33]

The foregoing narrative outlined by Congressman Salonga encapsulates the so-called "historic and legal title" of the Philippines as basis of its claim of territorial sovereignty over North Borneo.

V. Critique of the Philippine claim of sovereignty

A. When did the Philippines acquire sovereignty over North Borneo?

The question might be answered that since the Philippine claim is based on historic right and legal title, the attribution of Philippine sovereignty over North Borneo would retroact to the time that the sovereignty of the Sultan of Sulu pervaded. The Philippine position is: the sovereignty of the Sulu Sultanate over North Borneo would have to be spun off from its sovereignty

[33] PHILIPPINE CLAIM TO NORTH BORNEO, Volume I, Bureau of Printing, Manila, 1964, at 24 to 29.

over the Sulu archipelago that was lost when the Sulu sultan capitulated to the United States of America under the Carpenter Agreement of 1915. The proponents of the Philippine claim of territorial sovereignty over North Borneo advance the theory that since the Americans did not assume sovereignty over North Borneo; it was retained by the Sulu sultan, albeit without foreign relations powers.

This proposition would be readily shot down by the formal cession to the Republic of the Philippines of the territory of North Borneo, and the full sovereignty, title and dominion over the territory in April 1962 by the heirs of Sultan Jamalul Kiram, with the express reservation of their proprietary rights. To paraphrase the Philippine argument against the British Cession Order of 1946; if the Philippines already had had acquired the sovereignty over North Borneo upon the creation of the Republic in 1946, there would have had been no need for the heirs of the Sulu sultan to extend the formal cession in favor of the Philippines.

Interestingly, while the cession document refers to a turn-over of "dominion" over the North Borneo territory, the heirs expressly reserved their private proprietary rights in the territory. Therefore, what the heirs actually turned over to the Philippine government which the latter accepted was the purported *imperium* of the Sulu sultanate only.

In 1962 the Sulu sultanate was no longer sovereign, and there was no existing sovereign Sultanate of North Borneo in reality because the Sulu sultan continued to reside in Sulu archipelago within the jurisdiction and protection of the United States of America, and eventually the Philippines. The sultan could not even be considered in exile vis-à-vis his so-called sovereignty over North Borneo. Quite interestingly, neither the Sulu sultan nor his successors ever assumed the title of Sultan of North Borneo post-Carpenter Agreement. Thus, the sultan never exercised jurisdiction as a sovereign over North Borneo even as he never wielded foreign relations powers vis-à-vis the territory.

B. Can private individuals transfer imperium or sovereignty to a state?

Sovereignty is an attribute of statehood. Perforce only states may transfer territorial sovereignty. The maxim *nemo dat quod non habet* is a

principle of international law. This principle was applied by the International Court of Justice in the Palmas case[34] as articulated by arbitrator Max Huber: "it is evident that Spain could not transfer more rights than she herself possessed."[35]

The effect of the principle, however, is in practice very much reduced by the operation of the doctrines of prescription, acquiescence, and recognition.[36]

In 1962 none of the heirs of the Sulu sultan, or anyone who might have had held the non-political title of sultan, possessed sovereignty over North Borneo or had an attribute of a sovereign. They were all nationals of the Republic of the Philippines and none of them may be considered a national of North Borneo, which is already then known as State of Sabah within the Federation of Malaysia. Not being possessed of sovereignty over North Borneo, the heirs could not have had transferred it to the Republic of the Philippines. They could not have had given to the Philippines what they did not have in 1962 or what they never have had even before. Thus, the Philippines did not acquire sovereignty over North Borneo pursuant to the formal cession extended by the heirs of the Sulu sultan and received by the Philippines in April 1962.

The same thing could be said of the so-called historic right over North Borneo. The heirs in 1962 did not own such historic right. They could not have had transferred it to the Philippines. *Nemo dat quod non habet.*

C. Can the Philippines attribute unto itself the historic right or legal title that the Sulu sultan once enjoyed over North Borneo?

The attribution of history of sovereignty from one sovereign or state to another sovereign or state could be tricky. There must be a nexus between the transferor and the transferee as in state succession. To attribute the history of sovereignty of North Borneo to the Philippines, the latter must acquire it as a successor state. A piece of history is not like a piece of personal

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[34] ISLAND OF PALMAS CASE, 4 April 1928; http://legal.un.org/riaa/cases/vol_II/829-871.pdf (last accessed 15 August 2018) [hereinafter referred to as Las Palmas].
[35] Brownlie, supra note 28 at. 128.
[36] *Id*.

property that can be the object of conventional transfer between a non-state transferor and a state transferee. Thus, the so-called cession to the Republic of the Philippines of the territory of North Borneo, and the full sovereignty, title and dominion over the territory — "without prejudice to such proprietary rights as the heirs of Sultan Jamalul Kiram may have"[37]— would have no significant juridical benefit in favor of the Philippines insofar as the history of North Borneo is concerned.

It should be noted that the cession document executed by the heirs of the Sulu sultan gave up their claim of dominion but retained their proprietary rights. The conveyance was nothing more than what the right hand gave, the left hand took back. The Philippines thus acquired from the heirs of the Sultan neither the *imperium* nor the *dominium* over North Borneo.

Philippine sovereignty was descended from the United States of America upon the declaration of the former's independence on 4 July 1946. In turn, the United States of America acquired sovereignty over the Philippine islands including the Sulu archipelago from Spain under the Treaty of Paris of 1898. The Treaty of Paris did not include North Borneo even as the United States categorically eschewed taking over the territory from the British North Borneo Company. Spain, notwithstanding the Madrid Protocol of 1888, did not acquire territorial sovereignty over North Borneo. In effect, North Borneo could not have been descended to the Philippines from Spain through the United States of America.

Under the Carpenter Agreement of 1915, the Sulu sultanate capitulated its sovereignty over the Sulu archipelago to the United States of America, then already a sovereign state. Thus, the sovereignty of the Sulu sultanate did not descend to the Philippines through the United States. There was no transfer of history of sovereignty of the Sulu sultanate with regard to North Borneo by succession from the sultanate to the US, and eventually to the Philippines. The Philippines is far detached in history to the sovereignty of North Borneo. The former could not attribute unto itself such history of sovereignty and claim territorial right as successor state.

[37] Ortiz, supra note 2 at 43.

For lack of nexus of history between the so-called sovereignty of the Sulu sultan over North Borneo and the sovereignty of the Philippines since 1946 up to the present, or even with the history of its predecessors, the US and Spain, it is difficult to comprehend under what juridical regime could such historic right over North Borneo be attributed to the Philippines.

Residual Sovereignty

By analogy, the sovereignty possessed by the Sultan of Sulu over North Borneo after he ceded it to Overbeck and Dent — which right was later transferred to the British North Borneo Company — may be considered, at best, a *residual or nominal sovereignty* in light of the fact that the full administration of the territory was handed over to private individuals. By another loose analogy, residual sovereignty may be likened to *naked ownership* under the law on private property.

Thus, the interest of the Sulu sultan over North Borneo may be bifurcated into the following: with regard to his *imperium*, the Sultan had the residual sovereignty, and with regard to his *dominium*, the Sultan had the naked ownership of the property. While it is difficult to interject the notion of private law into international law and elicit a comparative application of both, it is inevitable that the bifurcation of interests in this case must be looked into because in the cession by the heirs of the Sulu sultan in favor of the Philippines certain private proprietary rights were explicitly reserved by the transferors.

It would have had made significant difference had the sultan succeeded in taking up residence in North Borneo as suggested by the governors of the British North Borneo Company, who induced Sultan Jamalul Kiran to take up his residence in Sandakan where a palace was offered to him, and from there wielded the powers of sovereignty over North Borneo. On two occasions, however, Gov. Carpenter of the Department of Mindanao and Sulu had to send the Chief of Police of Jolo to bring the sultan back from Sandakan.[38] Thus, the sultan might have had owned North Borneo but never ruled over it.

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[38] *Id.* at 27.

The Philippine claim of historic right or legal title obviously faces a tough hurdle. Residual or nominal sovereignty of the Sulu sultan or Brunei, even if transferable to the Philippines, would not be enough. There must be proof that the sultan, aside from having the residual or nominal sovereignty over North Borneo, must have had effective administration and control over the territory and the people permanently residing therein or what is referred to in international law as the *principle of effectivités*.

It may be recalled that the United States of America claimed historic right over the island of Palmas (Miangas) against the Netherlands. By virtue of the Treaty of Peace of 10 December 1898, Spain ceded the Philippine Islands to the United States. This archipelago of the Philippines included a small island named Island of Palmas (or Miangas), located between the archipelago and the Dutch East Indies. In 1899, the Treaty of Paris was notified to the Netherlands, which did not make any observations as to the delimitation of the Philippines. In 1906, an official of the United States paid a visit to the island which led to the conclusion that the island was considered by the Netherlands as forming part of the territory of its possessions. The United States informed the Netherlands by diplomatic correspondence that the United States claimed sovereignty over the island based on the cession by Spain. The Dutch Government also claimed sovereignty of the island on the basis of having exercised sovereignty there for more than 200 years. They could not reach an agreement and the Parties agreed to submit the claims to an arbitral tribunal composed of a sole arbitrator.[39]

The United States lost the case because the Netherlands was able to prove that it has the effective administration and control of the islands, or what the arbitrator referred to as "continuous and peaceful display of the functions of State".[40] This effective administration and control is wanting either on the side of the Sulu sultan, or much less, the Philippines with regard to its claim of sovereignty over North Borneo. Thus, residual sovereignty alone without the principle of *effectivités* would not entitle the Philippines to a right of sovereignty over North Borneo.

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[39] *The Island of Palmas (or Miangas),* HAGUE JUSTICE PORTAL, http://www.haguejusticeportal.net/index.php?id=6142 (last accessed: 18 August 2018)

[40] Las Palmas, supra note 34 at 840.

The Philippine claim of residual or nominal sovereignty over North Borneo may also suffer the same fate as the French claim over the islets and rocks known as Minquiers and Ecrehos[41] that France and the United Kingdom disputed over and agreed to bring to the jurisdiction of the International Court of Justice. France claimed sovereignty because it fished in the waters and it had historic sovereignty over the area from the 11th century's Duchy of Normandy. The United Kingdom claimed that Jersey had historically exercised legal and administrative jurisdiction over them.

The International Court of Justice held that sovereignty over the Minquiers and Ecrehos belonged to the United Kingdom on the basis of effective control and administration of the territory.

The International Court of Justice attached probative value to various acts relating to the exercise by Jersey of jurisdiction and local administration and to legislation, such as criminal proceedings concerning the Ecrehos, the levying of taxes on habitable houses or huts built in the islets since 1889, the registration in Jersey of contracts dealing with real estate on the Ecrehos.[42]

With regard to the Minquiers, the Court noted that in 1615, 1616, 1617 and 1692, the Manorial court of the fief of Noirmont in Jersey exercised its jurisdiction in the case of wrecks found at the Minquiers, because of the territorial character of that jurisdiction.[43]

Other evidence concerning the end of the eighteenth century, the nineteenth and the twentieth centuries concerned inquests on corpses found at the Minquiers, the erection on the islets of habitable houses or huts by persons from Jersey who paid property taxes on that account, the registration in Jersey of contracts of sale relating to real property in the Minquiers.[44]

These various facts show that Jersey authorities have, in several ways, exercised ordinary local administration in respect of the Minquiers during a

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[41] Minquiers and Erechos, Summaries of Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice, 1992 P.C.I.J (Ser. F.) No. 1, at 28-29.
[42] *Id* at 28.
[43] *Id*.
[44] *Id*.

long period of time and that, for a considerable part of the nineteenth century and the twentieth century, British authorities have exercised State functions in respect of this group.[45]

D. Is the Philippines entitled to a territory greater than that handed to it by the United States which the latter, in turn, acquired from Spain under the Treaty of Paris of 1898?

There are five modes of acquisition of a territory in international law — occupation, accretion, cession, conquest, and prescription.[46] The Philippine territory, as it is known today, was acquired through cession by Spain to the United States of America pursuant to the Treaty of Paris of 1898. The Philippine territory defined in the 1935 Constitution is circumscribed by the so-called Philippine treaty limits, namely, Treaty of Paris of 1898, the Cession Treaty of 1900, and the Boundaries Treaty of 1930. The acquired territory did not include North Borneo. The Philippines, thus, did not acquire North Borneo pursuant to any of the foregoing modes of acquisition of territory.

The Boundaries Treaty of 1930 was an agreement between the governments of the United Kingdom of Great Britain and the United States of America to definitely delimit the boundary between North Borneo (then a British protectorate) and the Philippine archipelago (then a U.S. territory). In this agreement, the United States expressly recognized the suzerainty of the United Kingdom over North Borneo. It is an explicit acknowledgment by the United States that the United Kingdom exercised effective control and administration over North Borneo.

Recognition is an act of state which in international law has the effect of diminishing or rendering *functus officio* the principle of *nemo dat quod habet*. The notion that the British North Borneo Company could not have had transferred sovereignty to the United Kingdom is thus diminished by the recognition of the United States of the actual exercise of sovereignty by the United Kingdom. The recognition would also legitimize the unlawful annexation of North Borneo by the United Kingdom when she issued the Cession Order of 1946. The recognition would also diminish the residual or nominal sovereignty of the Sultanate of Sulu over North Borneo.

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[45] *Id*.

[46] Brownlie, supra note 28 at 134.

The Philippines agreed with the United States — when they signed the Treaty of General Relations between the United States of America and Republic of the Philippines on 4 July 1946 — that she would be bound by the Treaty of Paris which specified the limits of the territory handed over to her by the United States. The Philippines cannot assert for a greater territory at the time of its independence other than what was circumscribed in the Treaty of Paris. The *uti possidetis juris* in international law could be an effective bar to a territorial claim over North Borneo.

Uti possidetis juris is a principle of customary international law that serves to preserve the boundaries of colonies emerging as States. Originally applied to establish the boundaries of decolonized territories in Latin America, it has become a rule of wider application, notably in Africa. The policy behind the principle has been explained by the International Court of Justice in the Frontier Dispute (Burkina Faso/Mali) Case: "*Uti possidetis juris"* purpose is "to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power." [47]

Today, it is generally accepted that the borders of newly formed states are determined by application of *uti possidetis juris* as a matter of customary international law. The doctrine even applies when it conflicts with the principle of self-determination. Summarizing the operation of the rule, Steven Ratner explains, "Stated simply, [the doctrine of] *uti possidetis* [*juris*] provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence."[48]

The territorial claim of sovereignty over North Borneo foisted by the Philippines would partake the nature of a boundary dispute because it seeks to enlarge the territory of the Philippines beyond what was conferred upon her by the Treaty of Paris and diminish the territory of Malaysia ceded by the United Kingdom.

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[47] *Uti Possidetis Juris*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/uti_possidetis_juris (last accessed August 20, 2018).
[48] Bell & Kontorovich, ARIZONA LAW REVIEW, Vol. 58:633 at 635.

A successor state is one which has sovereignty over a territory and populace which was previously under the sovereignty of another state.[49] Under the Theory of Universal Succession, the Philippines as successor state could be bound by the same rights and obligations of her predecessor state, the United States, especially as regards the latter's obligation under the Boundaries Treaty of 1930.

The Theory of Universal Succession is the first and perhaps oldest theory of succession of state. It was Grotius who for the first time propounded this theory by inducting Roman law analogy of succession on the death of natural person. According to this theory, upon change of sovereignty over a given territory, the new sovereign, i.e. successor state, succeeds all the rights and obligations of the predecessor state in relation to the territory affected by such change, without exceptions and modifications. The introduction of this theory into the field of international law had a remarkable strong influence upon the development of the rule of international law with reference to the change of sovereignty. Many European writers influenced with this theory, opined that the new sovereign succeeded to all the obligations as well as to the rights of the predecessor sovereign. This theory was in vogue in Europe up to the middle of the nineteenth century. However, the acceptance of this theory by the European states was not because of its jurisprudential merit, but for its suitability in the prevailing circumstances of the contemporary Europe.[50]

The theory was the prevailing view around the time that the Treaty of Paris of 1898 was signed by Spain and the United States. Applying by analogy the "principle of intertemporal law," the Universal Succession Theory would be applicable to the Treaty of Paris to which the Philippines bound her fidelity to keep it. Thus, the Philippines would be bound by the Boundaries Treaty of 1930 which recognized the suzerainty of the United Kingdom over North Borneo. Upon this premise, the Philippines is not entitled to have a territory greater than that circumscribed by the Treaty of Paris of 1898.

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[49] Cowger Jr., RIGHTS AND OBLIGATIONS OF SUCCESSOR STATES: AN ALTERNATIVE THEORY, Case Western Reserve Journal of International Law, Volume 17 | Issue 2 (1985).

[50] Vijai Kumar, Critical analysis of law of state succession in respect of matters to the exclusion of treaties (1991), (Thesis, Himachal Pradesh University) at 16.

E. Can the Philippines avail herself of the compulsory jurisdiction of the International Court of Justice to recover the claimed territorial sovereignty over North Borneo?

With the long impasse over the controversy between the Philippines and Malaysia, the North Borneo issue may not be laid to rest except through the compulsory jurisdiction of the International Court of Justice. The exercise of which compulsory jurisdiction, however, requires the mutual consent to such jurisdiction as enunciated by *Article 36, paragraph 1, of the Statute of the International Court of Justice*.[51] Malaysia had already made clear its position that it would not agree to bring the dispute over North Borneo — a territorial one — before the International Court of Justice.

Pursuant to *Article 36, paragraph 2, of the Statute of the International Court of Justice*, the Philippines, through then Foreign Affairs Secretary Carlos P. Romulo, on 18 January 1972, filed a declaration recognizing the compulsory jurisdiction of the International Court of Justice. The Philippines, however, made an express reservation to the compulsory jurisdiction of the International Court of Justice on a dispute "x x x (ii) in respect of the territory of the Republic of the Philippines, including its territorial seas and inland waters;".[52] The Philippines thus cannot bring to the International Court of Justice a dispute involving North Borneo which the Philippines claims to be part of her territory.

With the foregoing legal hurdles, it is highly improbable that the territorial dispute over North Borneo between the Philippines and Malaysia might see the light of being resolved or settled before the International Court of Justice.

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[51] Statute of the ICJ, Art. 36, para. 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.; http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf (last accessed 30 August 2018).

[52] International Court of Justice, *Declarations recognizing the jurisdiction of the Court as compulsory*; (18 January 1972) https://www.icj-cij.org/en/declarations/ph (last accessed 30 August 2018).

VI. Conclusion

Doubtless it is from the foregoing disquisition that the Philippines acquired neither sovereignty nor any proprietary right over North Borneo or Sabah. The Philippine claim of territorial sovereignty over Sabah will not stand a Chinaman's chance before public international law. After almost three decades of officially laying that non-existent claim of sovereignty, it is time for the Philippine government to hang the gloves for good. The thousands of Filipino migrants in Sabah deserve better and more attention from their government. Malaysia and the Philippines can then fully develop the full potential of their amity as neighbors and members of the Association of Southeast Asian Nations and forge a strong common stand against any maritime interloper within their adjacent exclusive economic zones. As for the British Government, it owes the people of Sulu, at the very least, an apology for the unconstitutional taking of the private property of the Sultan of Sulu in 1946.