

**SABAH DISPUTES:  
IS THERE A LEGAL SOLUTION FOR SABAH?**

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**MASTER OF SCIENCE  
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SABAH DISPUTES:  
IS THERE A LEGAL SOLUTION FOR SABAH?

By

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College of Law, Government and International Studies,  
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(Strategic Studies)

Jun 2014

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## **ABSTRAK (Bahasa Melayu)**

Sabah merupakan sebahagian daripada komponen negeri dalam Malaysia sejak penggabungannya dengan Persekutuan Malaysia pada 16 September 1963; namun peraturan pilihan bebas oleh rakyat Sabah telah diabaikan dan masih dipertikaikan kedaulatannya oleh Filipina. Wujud juga isu wang penyerahan yang kekal dibayar oleh kerajaan Malaysia sehingga kini, walaupun Surat Ikatan 1878 digubal semasa zaman penjajahan British. Situasi bertambah buruk akibat serangan oleh pengikut Kesultanan Sulu di Lahad Datu pada bulan Mac 2013, yang dilihat sebagai satu cara penggunaan kekerasan untuk menuntut Sabah sehingga membawa kepada pertumpahan darah, dan kesan yang buruk. Penyelesaian melalui dari segi perundangan mengenai penentuan masa depan Sabah jarang dibincangkan walaupun ianya sangat relevan bagi mencapai penyelesaian ke atas pertikaian yang telah lama berlaku di antara Filipina dan Malaysia. Kertas ini akan mengakses kesahihan '*penentuan sendiri*' oleh rakyat Sabah dan menganalisis isu '*wang penyerahan*' dari perspektif undang-undang, khususnya melalui prinsip undang-undang antarabangsa dan peruntukan undang-undang lain yang berkaitan. Penyelesaian melalui Mahkamah Keadilan Antarabangsa (ICJ) dianggap perlu bagi mendapatkan keputusan muktamad untuk mengikat kedua-dua pihak dan secara tidak langsung memberi harapan baharu bagi masa depan Sabah.

*Katakunci:* Pertikaian Sabah, Konflik Sabah, Isu Sabah, Penyelesaian Pertikaian Wilayah, Penyelesaian Undang-undang, Undang-undang Antarabangsa, Penentuan Kendiri, Common Law, Peraturan Menentang Keabadian.

## ABSTRACT

Sabah is part of the component states of Malaysia since its merger with the Federation of Malaysia on September 16, 1963; however the rule of independent choices by the people of Sabah were ignored and its sovereignty is still disputed by the Philippines. There is also an issue of cession money paid by the Malaysian government until today despite the fact that the Deed of 1878 has long been enacted during the British colonial era. Situation worsened as a result of incursion of the Sultanate of Sulu in Lahad Datu in March 2013, which may be seen as a form of use of force to claim over Sabah leading to bloodshed and severe adverse impact. A legal solution on the future determination of Sabah was rarely discussed although it is very much relevant in order to achieve settlement on disputes that have long occurred between the Philippines and Malaysia. This paper will access the validity of '*self-determination*' by the peoples of Sabah and analyze the issue of '*cession money*' from the legal point of view through the principles of International Law and other related legal provision. Solution through the International Court of Justice (ICJ) is deems necessary in order to obtain a final decision which will bind both parties and indirectly bring new hope to the future of Sabah.

*Keywords:* Sabah Disputes, Sabah Conflict, Sabah Issue, Territorial Disputes Settlement, Legal Solution, International Law, Self-Determination, Common Law, Rule Against Perpetuities.

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## **LIST OF ABBREVIATIONS**

ACLR	Assistant Collector of Land Revenue, Sabah.
ESSCOM	Eastern Sabah Security Command.
ESSZONE	Eastern Sabah Security Zone.
Deed of 1878	Agreement between Sulu Sultanate and Overbeck on 22 Jan 1878.
DOSM	Department of Statistics Malaysia.
ICJ	International Court of Justice.
LUC	Land Utilisation Committee of Sabah.
NCL	Native Customary Land of Sabah.
NCR	Native Customary Rights of Sabah.
SLO	Sabah Land Ordinance.
SUHAKAM	Suruhanjaya Hak Asasi Manusia, Malaysia.
UN	United Nations.
US	United States of America

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## **CHAPTER ONE**

### **INTRODUCTION**

#### **1.1. Chapter Overview**

This is an introduction chapter that involved the background of the study and background of the disputes, problem statement, research question, objective of the study, significant of the study, study limitation, conceptual framework that divide into subsection, chapterization and the summary for this chapter.

#### **1.2. Background of the Study**

Sabah also referred to as North Borneo, fell into the hands of the British under Anglo-Dutch Treaty in 1824 (IDE Asian Law, 2003). Generality is about 73,620 square kilometers<sup>1</sup> and 3,496,600 total of population (Department of Statistics Malaysia [DOSM], 2013). The island is very title of economic value and strategic location in Asia Pacific.

North Borneo was an independent state and a British protectorate under the sovereign of the British North Borneo Company since 1882 to 1946, and subsequently a crown colony of the United Kingdom from 1946 to 1963 (Starner, 1963). In the meantime, the Sultanate of Sulu ceded North Borneo to Baron De Overback in 1878. In 1963, people will of Sabahans to join the Federation of

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<sup>1</sup> Source: Lands and Surveys Department, Sabah. Figures extracted from Sabah Area, by Administrative District 2012 (DOSM 2013). The figures not include the island of Labuan, 92 Sq. Km - because Labuan considered the Federal State of Labuan since 1 February 1984.



Malaysia, this end the decolonization. However, the Philippines announced their claim to Sabah sovereignty in 1962 (Fernandez, 2007; Wright, 1966; and Green, 1971).

### **1.2.1. The Early History of Sabah**

The history of the emergence of the rule of the Sultanate of Sulu starts since 1450 CE. In 1704, Sultan of Sulu became sovereign ruler of most of North Borneo by virtue of a cession from the Sultan of Brunei whom he had helped in suppressing a rebellion (this even accepted but some rejected by scholars, Umar [2007]). However, North Borneo was formally handed over the British under the terms of The Anglo-Dutch Treaty, 1824 between the Dutch which showed the western sector of North Borneo came under British control (IDE Asian Law, 2003). Convention of Commerce 1849, between Britain and the Sultanate of Sulu, Sultan of Sulu will not cede any territory without the consent of the British. On Treaty of 1851, whereby signed with Spain by the Sultan of Sulu, Mohammed Pulalun, the Sultanate of Sulu was incorporated into the Spanish Monarchy. With this, Sulu Sultanate seen that had disobeyed the treaty of 1849.

Accordingly, on January 22, 1878, Baron De Overback obtains sovereign control over North Borneo for \$5,000 from the Sultans of Sulu, M. Jamalul Alam (Tregonning, 1958; Meadows, 1962). Since that, North Borneo was occupied by British Company. On November 1, 1881, the Queen Victoria grants Charter of Incorporation to the British North Borneo Company, actually exist “as a territorial power” and not “as a trading company”. While, on March 22, 1915 Carpenter

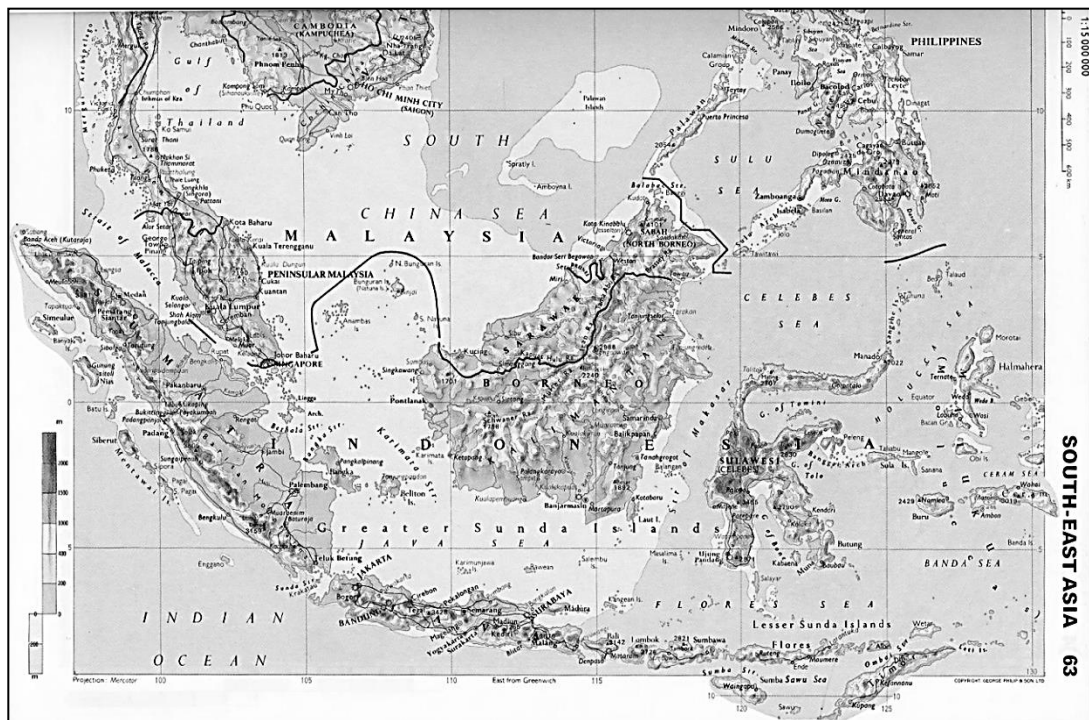
Agreement: Governor of Mindanao and Sulu Frank W. Carpenter signs an agreement with the Sultan of Sulu which relinquishes the Sultan's, and his heirs', right to temporal sovereignty, tax collection, and arbitration laws (Tregonning, 1970). In exchange, the Sultan gets an allowance, a piece of land and recognition as religious leader. For information purposes, Sultan Jamalul Kiram II rules the Sultanate of Sulu since 1894-1936.

In addition, on December 18, 1939, the High Court of the State of North Borneo hands down decision in Civil Suit No. 169/39 in it, North Borneo Chief Justice C.F.C. Mackaskie state that the heirs of the sultan were legally entitled the payment for North Borneo, which the decision calls "cession payment" on the basis of an English translation by Maxwell and Gibson, [London: 1924] (Wright, 1966). In the same decision, Mackaskie renders an *obiter dictum* opinion or side note, that the Philippine Government is the successor-in-sovereignty to the Sultanate of Sulu. This *obiter dictum* however, does not establish a legal precedent, and was furthermore based on a report from the British Consul in Manila, claiming that the Commonwealth Government had abolished the Sultanate of Sulu.

As a postscript, the first to challenge the Maxwell and Gibson translation used by the High Court of the State of North Borneo is Francis Burton Harrison, who pointed out in 1946-47 that Chief Justice Mackaskie used the British translation of the North Borneo agree which expressed that the land was ceded; he submits a different translation by Prof. Conklin, obtained through H. Otley Beyer (Ortiz, 1963). This shows that, the history of Sultanate of Sulu in Sabah in the past is the basis of the Philippines' claim on Sabah.

Since its merger with the Federation of Malaysia on September 16, 1963, nowadays Sabah is a part of the component states of Malaysia. Malaysia national boundaries, involving mainland Peninsula of Malaysia, Sabah and Sarawak can be seen as attached, Figure 1.1. This delineation was accepted internationally.

**Figure 1.1**  
**Map of Malaysia year 2014**



Source: Map of Malaysia by George Philip & Son Ltd (2014) in Maps of the World. Available at: <http://www.vidiani.com>

### 1.2.2. The Philippines Claim to Sabah

Initial of Philippines claims arise when on April 24, 1962, whereby heirs of the Sultan of Sulu ceded sovereignty rights over Sabah to the Philippine Government. Under Resolution No. 321 unanimously adopted by House of Representatives,

urging President Macapagal to take the necessary steps for the recovery of North Borneo. Whereas, on August 29, 1962, a Resolution of the Ruma Bechara of Sulu, authorizing the Sultan in council to transfer his *title and sovereignty over the inhabitants*; and *territory of North Borneo* to the Republic of the Philippines (Ortiz, 1963). Once again, on September 12, 1962, the heirs of the Sultan of Sulu cede all rights, proprietary, title, dominion and sovereignty to the Republic of the Philippines.

The next, on September 27, 1962, Vice-President Emmanuel Pelaez addresses the United Nations General Assembly their desire that the issue be settled by peaceful means and without prejudice to the exercise of the right of self-determination by the *inhabitants* of North Borneo, preferably under United Nations auspices (Fernandez, 2007). On September 16, 1963, the Federation of Malaysia came into being as a sovereign state, with North Borneo as one of the component states. Since September 17, 1963, the Philippines refused to recognize Malaysia. Both the Philippines and Indonesia rejected the UN findings and broke off diplomatic relation with Kuala Lumpur.

In addition, on January 28, 1963, referred to notes of SONA by President Macapagal, does mentioned about the principle of self-determination that laying claim to North Borneo in pursuance of the legal and historic rights and the security interests of the Philippines:

“...the people of North Borneo should be given an opportunity to determine whether they would wish to be independent or whether they would wish to be a part of the Philippines or be placed under another state. Such referendum, however, should be authentic and bona fide by holding it under conditions, preferably supervised by the United Nations that would insure effective freedom to the people of North Borneo to express their true and enlightened will” (Fernandez, 2007).

This fact shows that the Philippines been very seriously and strive to reclaim Sabah, although knowing that Sabah is part of Malaysian territory. Furthermore, what is the Malaysian government response to address this issue?

### **1.2.3. Malaysia's Policy Towards Sabah Issue**

Another case on behalf of Malaysia, whereby on June 26, 1946, the British North Borneo Company had cedes colony to the Crown, annexing North Borneo to the British Empire (Starner, 1963). On May 27, 1961, the Prime Minister Tunku Abdul Rahman, plan to bring the Federation of Malaya, Singapore, North Borneo, Brunei and Sarawak into a form of political and economic cooperation (proposes the establishment of Malaysia) UK Talks 1961.

While, on July 9, 1963, Malaysia Agreement was signed. Article 1 provided for the creation of the Federation of Malaysia which included the colonies of Singapore, North Borneo, and Sarawak. Other facts refer to July 31, 1963; Manila Accord is signed, whereby Indonesia, the Federation of Malaya, and the Philippines sign a policy statement agreeing to *peacefully resolve* the issue on North Borneo (Green, 1971). The Ministers of the country agreed to the creation of Malaysia with the support of the people of North Borneo to be ascertained by an independent body as emphasized by UN Secretary General, [1963]. On August 5, 1963, refer to Join Statement by Philippines, Federation of Malaysia and Indonesia, state the United Nations Secretary-General or his representative should ascertain prior to the establishment of the Federation of Malaysia the wishes of the people of Sabah (North Borneo) and Sarawak within the context of *General Assembly*.

Furthermore, on August 16 to September 5, 1963; the United Nations Malaysia Mission was sent to Sabah and Sarawak in order to assess if their population agreed in joining Malaysia. Refer to Cobbold Commission final report on September 12, 1963; Deputy Representative of the Secretary-General; and Mr. Neville Kanakaratne, whereby Glasgow Herald reported Commission's findings: *100 per cent of the population of North Borneo and 75 per cent of the population of Sarawak supported formation of the federation*" (Department of Information, Malaysia 1963).

In addition, on September 14, 1963, the UN Secretary, Gen. U Thant concluded General Assembly: acknowledged that there were "certain irregularities" in the procedure of the UN mission but nevertheless said there is no doubt of the wishes of a sizeable majority of the peoples of these territories to join the Federation of Malaysia (Tregonning, 1970). This shows that, majority of the peoples of the two territories, having taken them into account, wish to engage, with the peoples of the Federation of Malaya.

Next, on September 16, 1963, the Federation of Malaysia came into being as a sovereign state, with North Borneo as one of the component states. To date, Malaysia continues to consistently reject Philippine calls to resolve the matter of Sabah's jurisdiction to the ICJ. Sabah Chief Minister, Datuk Musa Aman sees the claim made by the Philippines' Moro leader Nur Misuari, in Davao in the Philippines on Sunday to take Sabah to ICJ as a *non-issue* and thus dismissed of the claim (The Star Online, 2008); therefore Sabah sovereignty should not be disputed.

### 1.3. Problem Statement

As seen in international perspective, Sabah was one of the states in the Federation of Malaysia since 1963, but the problems related to this study is their sovereignty still claimed by the Philippines until now. The charge of '*cession money*' to the heirs of the Sultanate of Sulu should be stopped but still continued payment by the Malaysian government (Ranjit Singh, 2013).<sup>2</sup> Furthermore, the lawyer Karpal Singh<sup>3</sup> also argued:

“the government should immediately stop paying the annual regional delivery of RM5,300 to the individual who claimed to be descendants of the Sultanate of Sulu and the such payment is a mistake, especially after Sabah became independent as the Sultanate’s descendants had no *locus standi* to receive payment in respect of” (Bernama, 12 March 2013).

The issue of consent is valid, because the Philippines do not renounce its claim on Sabah in a formal setting. The Deed of 1878, during British colonial force even after Sabah’s attained independence. This categorized an important issue for a certainty of the peoples and the Malaysia-Philippines diplomatic harmoniously relations. It is considered critical issue and need urgent solution, to avoid bloody incursion scene repeated in Lahad Datu, which occurs in March 2013. As a result of the attack resulted deaths of 63 Sulu Sultanate followers, 10 Malaysian authorities and 1 from the public which 74 total of deaths, total injuries 16 and 149 being arrested (Astro Awani, 2013). There are also issues related to the past, incident that occurred on March 18, 1968 known as *Jabidah Massacre* (Vitug and Gloria, 2013), and recorded in history as the Bangsa Moro “*Jubaidah Events*” at which a group of

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<sup>2</sup> As Prof. Ranjit Singh said “Malaysia should immediately stop paying the so-called quit rent or cession money to the heirs of ancient Sultanate of Sulu (Kadir Mohamad, 2013).” Prof. Emeritus Dr. Ranjit Singh is an Academia and Historian Expert at COLGIS, UUM Sintok, Kedah, Malaysia; also specializes on Sabah and Sarawak history.

<sup>3</sup> Karpal Singh s/o Ram Singh (1940-2014) was a Malaysian lawyer and politician, who was the Member of Parliament for the constituency of Bukit Gelugor in the state of Penang since 2004.

about 300 soldiers Filipino Muslims killed by their superiors in Corregidor Island for refusing to attack and invade Sabah (Utusan Online, 01 July 1968).

In terms of that, this research proposed Sabah dispute resolution through authorized third party to end the issue that has been lingering for a long time without end, seems peaceful settlements took in about 52 years since Philippines announced their claims in 1962. The ICJ judgment will decide the sovereignty of Sabah, whether under the Federation of Malaysia or the Philippines; and other provisions of the law expected to reach final decision on '*cession money*' payments to the heirs of the Sultanate of Sulu.

#### **1.4. Research Questions**

With relevance to the topic, the research question that arises in this study is as follows:

- (1) To what extend the peoples of Sabah willingness to join Federation of Malaysia in 1963 deny the principle of '*self-determination*' causing the Philippines to maintain their claims?
- (2) What are the relevant laws that maybe used to resolve the issue of Deed of 1878, which contains the requirements of '*cession money*' that need to be paid annually by the Malaysian government to the heirs of the Sultanate of Sulu?



### **1.5. Research Objectives**

The objective of this study is as follows:

- (1) To determine whether the decision of the peoples of Sabah to join the Federation of Malaysia as a sovereign state satisfy the principle of '*self-determination*' under international law in 1963.
- (2) To identify the relevant laws that may apply to resolve the issue of Deed of 1978 and consequently determine to what extent Malaysia needs to take the Philippines government to ICJ so as to end the payment of '*cession money*' to the heirs of Sulu Sultanate and ultimately confirm the issue of sovereignty over Sabah.

### **1.6. Significance of the Study**

This issue covers the general interests of society, particularly the people of Sabah and Malaysia in general. It also has significant impacts on both Malaysian and Philippine governments where the 2013 incident took place in Lahad Datu and Semporna, Sabah; which limits led to a bloody clash between the Malaysian armed forces and the militants. Crisis in Sabah made headlines of local newspapers, the mass media and electronic media, as well as extensive coverage. Freedom of the press at the international level to give the Philippines or the heirs of Sulu Sultanate chances to sensationalize the issue of the claim.<sup>4</sup> Malaysia should stop any future

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<sup>4</sup> e.g. Sultan Esmail Kiram II wrote a letter to Prime Minister Mahathir, by President Aroyo to raise the rent of \$ 855 million a year in January 2001 (Quezon III, 2013); and the Sulu provincial government told Malaysia to raise the annual rent to Jamalul Kiram III of \$ 500 million (USD) to be published on the internet (see Appendix F and Appendix G).

annual cession payment to the Sultanate and bring to close the issue by coming up with a strong policy to protect the sovereignty of Sabah (Bernama, 22 March 2013).

This study is very interesting, whereby Filipino daily “Philippine Star” has reported that the Philippine government has taken this matter seriously in their effort not to give up Sabah by way of engaging a team of lawyers to study its claims on Sabah (New Sabah Times, 2013). For that, this research is timely and significant in determining the Sabahans desire in 1963, and the legal impact due to the colonial behavior pursuant to the agreement made between British and the Sultanate of Sulu in 1878 that effective till present day.

The study is also important in order to understand the application of the principles of international law approach that uses a third party settlement to resolve the territorial dispute in the present situation, as the preparation of the relevant arguments from the legal perspective. Moreover, this study will also look into the relevance of the common law, to solve problems of ‘Deed of 1878’ which stipulates that the Malaysian government pay a certain amount of money in perpetuity to the heirs of the Sultanate of Sulu.

### **1.7. Scope of the Study**

This work will describe some of the history of Sabah, and then focus on the various public instruments such as treaties, agreements, and court rulings pertaining to relate legal perspective, particularly international law. This study will also analyze the ‘Deed of 1878’, and determine the provisions of common law for legal solutions on this matter.

### **1.8. Limitation of the Study**

The study faces certain limitations in terms of obtaining the original documents, especially the 'Deed of 1878' as well as the difficulties in determining its originality or interpretation that really shows the true meaning of the agreement. Moreover, relevant references from the Malaysian government are also limited and hard to obtain. Other than that, international law principles such as the issues of self-determination are open to various views and interpretation; therefore a clear and conclusive statement cannot be finalized easily.

Last but not least, the time allocated for the project paper is too short, given six months for each semester (one semester to research topics of proposals and the final semester to complete the task) thereby allowing in sufficient time to perform a thorough research.

### **1.9. Theoretical Framework**

As the basis of the research, this section define the operational of theoretical framework that refers to theoretical structure of assumptions, principles, and rules that holds together the ideas comprising a broad concept. The appropriate theory used is Securitization Theory. Next, conceptual framework will be developed to explain how the problems, conflicts and territorial disputes that happens, and how it should be resolved. The framework will use the Theory of Conflict Management as a basis for settlement, and modified as appropriate in this study together with the Mediation Framework. Accordingly, the parties involved in the conflict will appoint legal experts, the 'Mediators' as representative (on behalf of) the issue of settlement.

Initially, the issue of dispute will be seen as important issues related to national security. Security means survival in the face of existential threats (Buzan, Wæver & Wilde, 1998). Strategic studies are an integral part of the security branch, which deals with the use of military force, thus securitization to strengthen national security. The main argument of securitization theory is that security is a *speech act*, that alone by uttering 'security' something is being done. It is by labeling something a security issue that it becomes one (Wæver, 2004).

A securitizing actor by stating that a particular *referent object* is threatened in its existence claims a right to extraordinary measures to ensure the referent objects survival. The social conditions are regarding the position of authority for the securitizing actor (Buzan et al., 1998). The issue is then moved out of the sphere of normal politics into the realm of emergency politics, where it can be dealt with swiftly and without the normal (democratic) rules and regulations of policy making. For the content of security this means that it has no longer any given meaning but that it can be anything a securitizing actor says it is. Thus, security understood in the way of social construction, with the meaning of security dependent on what is done with it.

Securitization theory makes use solely of the illocutionary speech act. Wæver (1989) defines the security and the illocutionary speech act as the particular case as one belonging to a specific category ('security') where the state tends to use all available means to combat it. It is partly a threat but also a kind of promise since more is staked on the particular issue. The sovereign 'himself' (the regime) is potentially put into question.

Securitization is conceptualized as a performativity act never exhaustively explained by its conditions, something happens at this exact point and therefore the act can never be reduced to a transmission belt of casual chains (Buzan et al., 2003). In using securitization theory, the analyst must not focus on what security is, but rather on what it does – because what security *does* is tantamount to the meaning of security. This is consistent with theoretical issues in Sabah, as the attack made by the heirs of the Sultanate of Sulu in March 2013, and the securitization act committed by the government as a result of the incident.

#### **1.9.1. Conceptual Framework**

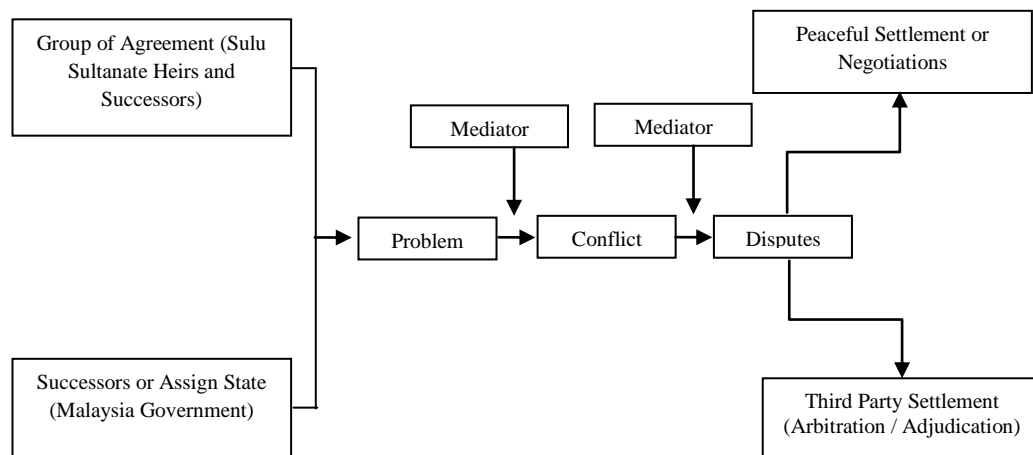
This is an illustration of how the solution when a problem arises, will be the next conflict and disputes, and actions taken by the parties involved, namely Malaysia and the Philippines.

Conflict Management Theory refers to “*conflict continuum*” (Wall, Stark & Standifer, 2001), there is usually a gradation whereby a group of agreement (heirs of Sulu Sultanate) devolves to the identification of a problem; then to a conflict arising from that problem, and then to a dispute arising from that conflict. Problem is the situation that affects the interests of the successor and assigns state (territory of Sabah, Malaysia); conflict is an unattended problem (self-determination, Deed of 1878); and dispute is an unattended conflict.

In addition, both parties will appoint their own legal experts to gain the solutions to the path argument in between of problem and conflict; and the conflict and the

disputes. This role can be referred to as the mediators; and the situation can be described as the following figure – Figure 1.2.

**Figure 1.2**  
**Conceptual Framework**



*Source:* Modified from “The Mediation Framework” (Wall et al., 2001), p.372.

In this situation, a negotiation over the peaceful settlement is seen as ineffective, or does not lead to settlement of the dispute between the Philippines and Malaysia. The following will be explores on the meaning of territorial disputes, the principles of international law that are closely associated with the study to gain settlements through International Court of Justice, and the provision of the common law as it thinks fit to be enforced on the Deed of 1878 to gain resolutions on it.

### **1.9.2. Territorial Disputes and Settlement**

The territorial dispute begins when the official executive state leaders of one state claim the territory of another state or contest its sovereignty, and (in response) the

targeted government's leadership rejects the territorial claims of the adversary (Kocs, 1995). This refers to the dissatisfaction with the territorial *status quo*. Next, it will proceed over a series of interrelated stages. Under disputes resolution, it can be settled by peaceful means or negotiated settlements as provided under Article 2(3)(4) of the UN Charter,<sup>5</sup> other than using force for allowing the dispute to persist. Huth, Croco and Appel (2011), found that legally advantaged challengers are more likely to revise the status quo through peaceful means than challengers who lack a strong legal claim. After talks have opened, the two states can then attempt to reach a final negotiated settlement. But, in this initiative terms it seems to take a long time to reach the final agreement.

In addition, disputes can be settled outside of bilateral negotiations either by arbitration or adjudication. This third-party institutions settlement results are even stronger for legal claims variable when re-estimated (Huth, Croco and Appel, 2013), decision to reach final agreement compare to the peaceful pathway. For this reason, international law is more suitable to this proposal to gain the disputes solution.

International law consists rules and principles of general application dealing with the conduct of states and international organizations in International Relations (private individual, minority groups and transnational company). Under legal perspective, international law, by virtue of being formalized in various public instruments such as treaties, agreements, and court rulings related to territorial disputes (Huth et al., 2013). Leaders then will have incentives to investigate and assess the merits of their

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<sup>5</sup> The UN Charter - Art 2(3) All Members shall settle their international disputes by peaceful means in such manner that international peace and security, and justice, are not endangered. Art 2(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the UN.

legally based claims to disputed territory and parties will typically have reason to make the legal merits of rival claims to disputed territory public knowledge.

The next fact is the basis for opposing the challenger as a part of legal arguments to engage in negotiations:

- (1) The establishment of the features of states under international law, where states should cover the permanent population, defined territory and government. The remaining states also must fully independence and recognized by other states. Only states have access to the ICJ and individuals are not regarded as legal person under international law. In any parts of international organizations are established by states through international agreement;
- (2) The principles of sovereignty, whereby contrast the states right to exercise supreme political authority through their concept of political independence. But, in other words, sovereignty also can transfer to another state '*by cession*' and it can be ceded by treaty;
- (3) Self-determination considered the legal right of people to decide their own destiny: (a) it is a core principle of international law (arising from customary international law) and enshrined in a number of international treaties; (b) protected in the *United Nations Charter, Article 1(2)* and the International Covenant on Civil and Political Rights as a right of 'all peoples'.

The sources on international law, refer to *Article 38(1)* of the *Statute of the International Court of Justice* is widely recognized as the most authoritative statement as to the sources of international law. According to Shaw (1997), the



Court, whose function is to decide in accordance with international law such disputes are submitted to it, shall apply:

- (a) *International conventions*, whether general or particular, establishing rules expressly recognized by the contrasting state;
- (b) *International custom*, as evidence of a general practice accepted as law;
- (c) The *general principles* of law recognized by civilized nations;
- (d) Subject to the provision of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Under the *United Nations, Charter of 1945*, provides that: (a) the judicial organ is the International Court of Justice; (b) the power of International Court of Justice is to make binding decision to the warring parties. Thus, no party would question the decision of the court if the dispute issues are brought to justice.

### **1.9.3. Common Law Provisions**

Malaysia is one of the countries that adopt the Common Law,<sup>6</sup> as under the provision of *Section 3, Civil Act 1956*,<sup>7</sup> which provides for the acceptance of the common law of England, the rules of equity and statutes of general application. In situations where there is no law governing a particular circumstances, Malaysian

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<sup>6</sup> The laws of Malaysia can be divided into two types of laws - written law and unwritten law. Written laws are laws which have been enacted in the constitution or in legislations. Unwritten laws are laws which are not contained in any statutes and can be found in case decisions. This is known as the *common law* or *case law*.

<sup>7</sup> Civil Law Act 1956 (Act 67, the Rev. 1972), Part II, General, Application of U.K. common law, rules of equity and certain statutes. Section 3 (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall - (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;

case law may apply. If there is no Malaysian case law, English case law can be applied.<sup>8</sup>

Under common law, there are provisions rules relating to against perpetuity; which state the perpetuity period applies to future interests in assets (interests that do not take effect immediately) that are subject to the rule against perpetuities. Under the *Perpetuities and Accumulations Act 2009*, which come into force on April 6, 2010 in the UK; the perpetuity period is prescribed as a statutory period of 125 years.<sup>9</sup> Furthermore, *Section 12, Perpetuities and Accumulations Act 2009*,<sup>10</sup> state that the trustees of a trust created before April 6, 2010 with a perpetuity period defined by reference to 'lives in being' will be able to apply to replace that perpetuity period with a 100 year fixed period, if they can demonstrate that it is difficult to ascertain whether the relevant lives in being have ended.

On previous act, there is an optional statutory period of up to 80 years, under the *Perpetuities and Accumulations Act 1964*, the common law period, which is the lifetime of the last to die of certain individuals alive when the interest is created (known as 'lives in being' or 'measuring lives'), plus 21 years. Common law relating to rules against perpetuities was first enforced in England by the provisions

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<sup>8</sup> As Ambiga Sreenevasan, Bar Council Chairman argued in her speech, state that the Common law had pride of place in the supreme law of the land, the Constitution formed the basis of Malaysia which was established on Sept 16, 1963, then when the North Borneo (Sabah) and Sarawak joined the Federation (Koshy, 2007). Dato' Ambiga Sreenevasan is a prominent Malaysian lawyer and human rights advocate, and is one of the eight recipients of the US International Women of Courage Award in 2009.

<sup>9</sup> Perpetuities and Accumulations Act 2009, Chapter 18. An Act to amend the law relating to the avoidance of future interests on grounds of remoteness and the law relating to accumulations of income. The provisions: Section 5(1) The perpetuity period is 125 years (and no other period) (legislation.gov.uk, 2014).

<sup>10</sup> Perpetuities and Accumulations Act 2009 – Section 12, Pre-commencement instruments: period difficult to ascertain. Subsection (1) If— (a) an instrument specifies for the purposes of property limited in trust a perpetuity period by reference to the lives of persons in being when the instrument takes effect; (b) the trustees believe that it is difficult or not reasonably practicable for them to ascertain whether the lives have ended and therefore whether the perpetuity period has ended; and (c) they execute a deed stating that they so believe and that subsection (2) is to apply to the instrument, that subsection applies to the instrument. Subsection (2) If this subsection applies to an instrument—(a)the instrument has effect as if it specified a perpetuity period of 100 years (and no other period); (b)the rule against perpetuities has effect as if the only perpetuity period applicable to the instrument were 100 years; (c) sections 6 to 11 of this Act are to be treated as if they applied (and always applied) in relation to the instrument; (d) sections 1 to 12 of the Perpetuities and Accumulations Act 1964 (c. 55) are to be treated as if they did not apply (and never applied) in relation to the instrument. Subsection (3) A deed executed under this section cannot be revoked.

of the Law of Property Act 1925. Thus, the issue of '*assigns forever and in perpetuity*' stipulated in Deed of 1878 might be resolved based on the related legal provisions.

### **1.10. Chapterization**

Addressing the project paper title "Sabah Disputes: Is there a Legal Solution for Sabah?"; this study aims to achieve the objectives by dividing it into five chapters:

#### **(1) Chapter One: Introduction**

The beginning chapter that contains the background of the study and background of the disputes, problem statement, research questions, objectives of the study, significant of the study, scope of the study, limitation of the study, theoretical framework and the conceptual framework that divide into subsection related to legal perspective as the foundation of this study to be developed, and chapterization.

#### **(2) Chapter Two: Literature Review**

This chapter includes a critical review of literature related to the topic regarding to Sabah disputes. It covers the basis and empirical literature for an analytical section of the study. The past literature are selected and related to the research as the basis of research questions, analysis and logically constructed relevant to the issues that divided into two topics, and each of it focusing on the different perspective such as historical facts of the disputes and legal perspective regarding this issue.

(3) Chapter Three: **Research Methodology**

This chapter includes the methods used in the study, and the techniques that are applied to show the relevance of the research. As this is a qualitative study base on desk research, the method use is content review, content analysis, data comparison and some bibliographic survey (on status of Sulu Sultanate) that interdependent functions to the legal arguments on international law, and legal arguments on common law to obtain the answers of research questions.

(4) Chapter Four: **Analysis of Related Arguments**

The chapter consists of the analytical related issues of the study in the form of contents, figures, tables and text to highlight the key information on international law and common law perspective; although there is a separate sub-headings, but it will be covered in the next chapter. Further discussions are separated and formed in the next chapter as the title of this study requires a more systematic and consistent.

(5) Chapter Five: **Results and Discussion**

This chapter consists of research findings and present complete results of the study. In this chapter the results of the analysis, will then be incorporated into two main perspectives namely: (a) international law approach that are significant in this issue in order to attain third party settlements with the support of case law in which the binding decision by the ICJ will end the disputes; and (b) the application of common law provisions which will solve

the cession money issues for which the purpose content of Deed of 1878 to be emphasized.

(6) Chapter Six: **Conclusion and Recommendations**

The last chapter; covers the summary of the whole chapter in this study. Explaining the solutions through legislation, that international law and common law is relevant in this study to give answers regarding research questions. Malaysia has a strong facts from the legal arguments compared the Philippines related to case law given. Therefore, Malaysia government should take this matter seriously, and require actions by third parties settlement.

## **CHAPTER TWO**

### **LITERATURE REVIEW**

#### **2.1. Introduction**

This chapter consider for critical review of literature related to the topic regarding to Sabah disputes. It covers the basis and empirical literature for an analytical section of the study. The past literature are selected and related to the research as the basis of research questions, analysis and it is logically constructed relevant to the issues. It is divided into sections, and each of it focusing on the different perspective to form the entire body of the literature. The first section reviews on Historical Facts of the disputes. The second section is the reviews of the empirical literature regarding to the revitalization of the Legal Perspective on this issue.

In past research, there are journal articles and monographs collected for reference basis of this research. The methods used by past researchers are bibliographic survey, content review, and content analysis. In this literature review, the study will be start in general and then to the focus point so that it will be easier to understand. The next section is review inferences, to conclude all works on this chapter.

To understand the cause of this dispute, a literature survey would focus on the factors that are pertinent to the issue from the perspective of the history of Sabah. With this, it can be turned upside down main reasons why the Philippine government chooses to claim Sabah, also the nature and the basis of the Philippine

claim and the background of the dispute on historical, legal, and political implications.

## **2.2. Historical Facts on Sabah Disputes**

There is an argument to state Sabah was an integral part of Sulu territory as a dependency of the Sulu Sultanate before and after the Deed of 1878. However, before 1675, Sabah belonged to the Sultanate of Brunei and as such, Sabah was crucial in the historical and political development of Brunei as a sultanate. Although the British North Borneo Company assumed the territorial rights over Sabah from 1878 to 1946, which period was interrupted only by the outbreak of World War II, still Sabah's historical development before and after 1878 should be situated in the context of Sulu's history (Fernandez, 2007). Majul (1973) also states that referred to a letter from Sultan Jamalul Azam of Sulu to the Governor General of Spain on 17 September 1879, the coast area from Kimanis to Balikpapan was to pay tribute to the Sultan which he said proved that the Brunei territory facing Suluk was ceded to Suluk.

However, some scholars not agreed with this statement, such as Umar (2007) noted that he did not deny the fact that the Sulus were invited and promised the northern Brunei territory by Sultan Muhydin if they helped him win the civil war against Sultan Abdul Mubin. These argument may referred during the battle for Pulau Cermin, the Sulu forces who were supposed to attack the island from Pulau Keingaran and from the sea, did not do so. Sulu's were terrified by the resistance of Sultan Abdul Mubin's forces in Pulau Cermin. It was only after Sultan Muhydin

had won the battle did the Sulu forces landed and took the opportunity to seize a number of war booties, and these arguments countered the Sulu views.

In addition, Overbeck succeeded in obtaining a concession in North Borneo from the Sultan of Sulu in January, 1878 (Meadows, 1962). While in March, 1881, Dent sold his North Borneo interests to the North Borneo Provisional Association, Ltd., which he controlled; in November of that year the new Gladstone government granted the Association a royal charter (the first royal charter granted since the East India Company received one in 1600); and the British North Borneo Company was established in March, 1882. While, in 1885, Spain relinquished all claim to North Borneo in return for British recognition of Spanish sovereignty over Sulu.

Furthermore, in May, 1888, North Borneo became a British protectorate, with sovereign rights vested in the British North Borneo Company. The latter sold its interests to the British government in 1946, at which time North Borneo became a Crown Colony. To complete the historical background, the United States took over the Philippines under the terms of the Treaty of Paris of 1898, and by this treaty most of the Sulu Islands came under American control. Treaty for cession of outlying islands of the Philippines was done between Spain and the United States in 1900 (Lotilla, 1995). The article stated that:

“Spain relinquishes to the United States all title and claim of title, which she may have had at the time of the conclusion of the Treaty of Peace of Paris, to any and all islands belonging to the Philippine Archipelago, lying outside the lines described in Article III of that Treaty and particularly to the islands of Cagayan, Sulu and Sibutu and their dependencies, and agrees that all such islands shall be comprehended in the cession of the Archipelago as fully as if they had been expressly included within those lines.”

This is a fact that North Borneo did not included in this treaty, and the treaty is valid only between Spain and the US, involving the Philippines and the Sultanate of Sulu.



This Treaty does not affect the British, and the Spain also has renounced its claim on North Borneo in 1885.

### **2.2.1. Issues on Philippines Claim**

The Sulu claim to North Borneo dates from the early eighteenth century. Sometime late in the previous century rivals for the throne of Brunei, Abdul Mobin and Muaddin, were involved in civil war (Wright, 1966). According to Hughes-Hallett (1940), it is not clear whether Brunei ceded northern Borneo to Sulu or whether the latter claimed it as the reward for military aid. The Sulu claim has been disputed by successive Sultans of Brunei who have denied that a cession of North Borneo to Sulu ever occurred (Umar, 2007). Sulu had little success, if indeed an effort was made, in establishing her rule over the area.

The Philippine government had formally filed a claim to Sabah during the administration of President Diosdado Macapagal on the basis of a *historical and legal fact* in 1962 (Fernandez, 2007), and efforts recommended by the Philippines to resolve this claim through the ICJ, but later agreed to a peaceful solution. However, there are no solid facts that demonstrate the effectiveness of the Sultanate of Sulu colonies of Sabah land, nor the fact that clearly shows Sabah under the sovereignty of the Philippines. As this is a task of Fernandez through the bibliographic survey, he pointed to a reference to the compilation of the study and other writers who describe the position of Sabah. The fact that featured are too general, emphasize only on specific issues but not to the overall purpose of the study, and of course in favor of the Philippine government.

The positive Philippine approach of claims is that North Borneo not only geographically closer to the Philippines than to Malaya, its inhabitants have more in common with the people of the southern Philippines - in customs, religion, race and tradition – than with the people of the proposed Federation (Meadows, 1962). In this regard, the Philippines assert that an over – whelming majority of the Moslems of North Borneo are in favor of Philippine control, which would reunite them with their co-religionists in the Sulu Islands and elsewhere in the southern Philippines. Furthermore, North Borneo would fare much better under the Philippines than it has under Britain, which allegedly has done little in the way of promoting North Bornean education and political development.

The Philippine claim to North Borneo is based upon the facts that Sulu, formerly a separate state, owned much of the present colony of North Borneo; that the latter territory was leased rather than ceded, as evidenced by the actions of the British North Borneo Company in negotiating treaties with the Sultan of Sulu, paying him annual rent and greeting him with honors due a sovereign; and that, since Sulu is now part of the Philippines, the latter has succeeded to the sovereign rights of the former (Meadows, 1962). This means that, the basis of the present Philippine claim is the nature of the grant of territory to Dent and von Overbeck by the Sultan of Sulu (Wright, 1966).

It is not the Philippines which should have to prove its claim to North Borneo; rather, the burden is on Britain to demonstrate how it could have taken over sovereign rights to North Borneo from individuals who did not have, and could not have acquired, such rights (Meadows, 1962). If the British are as confident of their position as they claim to be, they should welcome the opportunity to submit the

matter to an international body, a solution which the Philippines would support. But this argument is less precise because, according to Powell (1970), on his comment to Dr. Leifer's monograph state that the writer did not concerned on legal merits but merely with the history of Philippine claim to North Borneo, even it is fair throughout all parties concerned. Powel contrast that the issue is very contemporary history as the Philippine claim to Sabah pursuit during Macapagal's presidency in 1962 due to diplomatic prominence, and it became most questionable in 1968, thus the monograph needs clearing up.

Thus, the Philippines claim to Sabah based on historical facts was too general, and only in accordance with the Deed of 1878 was signed by the Sultan of Sulu to Overback of British Company in the past 135 years as the successors in sovereignty to the Sulu Sultanate. Whether Sulu ever held sovereignty over North Borneo is open to dispute, and a claim to Sabah did exist on the part of Sulu.

### **2.2.2. Policy Interest of Certain Parties in Philippines**

The question of political sovereignty over British North Borneo occurred when press statement given on June 23, 1962, by President Macapagal in believes that disputes between Philippines and Malaysia can be settled peacefully (Ortiz, 1963). The reasoned might interest to most Filipinos are North Borneo's resources are abundant; its exports, the total value of which exceeded that of its imports by nearly \$27,000,000 in 1960, include timber, rubber, copra and hemp Meadows (1962). For now, the sultanate of Sulu has delegated its claim to Sabah to the Philippine government, which had not formally dropped its interest on the oil-rich territory

(Nawal, 2013). Therefore, conflict over the status of North Borneo is of considerable significance in that it may well constitute an obstacle to the formation of the proposed Federation of Malaysia, which is to comprise North Borneo, Malaya, Singapore, Brunei, and Sarawak in the past.

Political interest seen as the factor relates to disputes because it was the victory of Diosdado Macapagal in the presidential election of November, 1961 (Meadows, 1962). Macapagal has been involved in the North Borneo affair since 1947, when, as a division chief in the Department of Foreign Affairs, he was assigned the task of negotiating with Great Britain for the return to Philippine control of the Turtle Islands, located near North Borneo. As a result of his role in effecting the transfer of the Turtle Islands in 1948, Macapagal soon entered politics and won election to the House of Representatives of the Philippine Congress in 1949. While in Congress Macapagal drafted and co-sponsored a resolution calling upon the government to claim North Borneo.

In addition, relations between the two countries deteriorated still further when President Marcos of the Philippines signed a 'Senate Bill 954' on Sept 18, 1968. This was passed by the Philippine House of Representatives on Aug 26 - stipulated 'Sabah within the national boundaries of the Philippine Republic' (Keesing's Record of World Event, 1968). In line with that, Tunku Abdul Rahman (Prime Minister of Malaysia) issued a statement on Sept 18, 1968, denouncing the Philippine legislation as "a violation of Malaysia's sovereignty and territorial integrity, and, as such, a highly provocative act tantamount to aggression."<sup>11</sup>

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<sup>11</sup> A mob of several hundred Philippine students, protesting at British support for Malaysia, broke on Sept 27, 1968, into the compound of the British Embassy in Manila, set fire to the home of the butler's lodge in the Embassy grounds, smashed

Consequently, the Philippine Foreign Secretary demand that the Sabah question should be referred to the International Court and his Government would accept the Court's judgment; until the question was settle, however, the Philippines could not recognize the authority of the Malaysian Government to represent the people and territory of Sabah. As a result, the Malaysian Government decided not to take part in the proposed Tokyo talks in October 1968, which were accordingly abandoned.

Other factor stemmed from the efforts of the Philippines Free Press, a respected and influential Manila weekly (Meadows, 1962), article in its series on the North Borneo matter appeared in its issue of December 30, 1961. The claim has been active in the Philippines since 1961 by newspaper campaigns, the lobbying business men, the political opportunists, the Presidential involvement and the characterized of conferences with Britain and Malaysia; even the claim has no validity whatever (Tregonning, 1970).

The British government honored a contract drawn up in 1903 between the Sultan of Sulu and the British North Borneo Company, by a supplement to the 1878 agreement, leased the Turtle Islands to the Company for additional payments of \$300 annually (Meadows, 1962). The Paris Treaty of 1898 placed the Turtle Islands within Philippine boundaries, but the Company continued to administer them under an agreement signed with the United States in 1907. Britain returned the islands to the Philippines in 1948 in accordance with the terms of the Anglo-American Boundary Convention of 1930. The Free Press maintains that by this action Britain "recognized the Sultan of Sulu as the owner of the property and as having leased it to the British North Borneo Company," but at the end Philippines failed to show any

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furniture, and tried to set fire to the Ambassador's car; the demonstrators did not succeed in breaking into the Embassy, however, and were eventually dispersed by riot police.

connection between the terms pertaining to the Turtle Islands and those affecting North Borneo.

The Philippines claim for Sabah, based on Sulu Agreement, built up by an irresponsible Press and fostered by politicians. The word used in agreement was *padjak*, the meant not to *cede* but to *lease* the rivers. The word still in doubt compare to language of Malaysia today and Sulu language 100 years ago, what is the intended of Sulu Sultanate while signing the agreement, as British part was cession (Tregonning, 1970).

On January 20, 1962, the Manila *Free Press* also asserted “North Borneo is ours” and become part of Filipino politics. Finally, on June 22, President Macapagal revealed at a press conference that the Philippine government had informed Britain of its intent to formally claim North Borneo. Further evidence in support of the Philippine case is adduced by the Free Press from the fact that Britain did not incorporate North Borneo as a Crown Colony until July 10, 1946, a significant date in that the Philippines became independent six days previously.

In short, there are two main parties in the Philippines that are genuinely interested in this matter namely the President of Philippines, purposed for political interest; and the heirs of Sultanate of Sulu or Filipinos who proclaimed himself a Sultan, that was influenced by the Philippines press.

### **2.2.3. Cession Money**

Most observers of the last and present century refer to the cession as complete. Wright (1966) mentioned about the fact that the Sultan received very little benefit from his claim of over lordship over North Borneo, by accepting an annual payment of \$5,000 (Malay) from von Overbeck some monetary gain could be realized. Britain and Malaysia have never denied a financial obligation to the descendants of Sultan Mohammad Jamalul Alam with regard to the “cession” money. This is undoubtedly the true issue pending at the present time. It involves questions such as, which of the heirs of the Sultan are entitled to money, should it continue to be paid annually or should a lump sum settle the question.

According to Meadows (1962) as enunciated by the Free Press, the Philippine argument encompasses a number of additional points such as the annual payments made to the heirs of the Sultan of Sulu indicate that North Borneo was leased, because payment of rental constitutes an explicit admission of ownership on the part of the lessor by the lessee. The British North Borneo Company paid the yearly rental from 1878 until the death in 1936 of Sultan Alam’s successor, Sultan Jamalul Kiram.

In addition, a civil suit was made by Dayang-Dayang Hadji Piandoao Kiram and eight other heirs to the High Court of North Boneo after the death of Jamalul Kiram in 1936, against the Government of North Borneo to obtain declaration that they were entitled to receive the yearly rentals, “cession monies”, under the Deed of 1878. No adverse claim will come from the Philippine Government, thus the Court gave favorable decision to the petitioners by Chief Justice C. F. Macaskie on December 18, 1939 (Ortiz, 1963).

Moreover, the British High Court of North Borneo decided that Sultan Kiram had eight joint heirs and the Company had resumed its yearly payments. The High Court decision also state that Sultan Alam in 1878 was an international person with sovereign rights and could not have sold such rights to private parties; although legally the Philippine government should succeed to the sovereign rights of the late Sultan Kiram, it could not do so because it no longer recognized the existence of the Sultanate of Sulu (Meadows, 1962), seems the question this ruling is open to argument.

Once the Borneo issue ceases to be a highly charged political question, perhaps the Philippines and Malaysia can settle down to resolving this financial claim, which is the only real point of contention in the Borneo dispute (Wright, 1966). But this situation may be otherwise, if Malaysia resorting to negotiate, because the payment was stipulated in the agreement. The Malaysian government should be looking at other initiatives related to the legislation.

#### **2.2.4. Sovereignty**

Sabah territorial controversy emerged on the international scene when, in June, 1962, the government of the Philippines announced its decision to claim ownership and sovereignty over the British Crown Colony of North Borneo and seemed likely to be *settled peacefully* (Meadows, 1962). The claims were of sovereignty, jurisdiction and proprietary ownerships over North Borneo.

People seriously questioned the British North Borneo Company's rights of sovereignty until the Philippines pressed their claim in 1962 (Wright, 1966).



Indeed, Britain in reply to the Philippine claim state, “Her Majesty’s Government are convinced that the British crown is entitled to and enjoys sovereignty over North Borneo...” The British and Malaysian view, of course, is that the Republic of the Philippines is the successor to the United States and Spain in the Philippine Islands. As Spain abandoned her claim to North Borneo in the protocol of 1885, and as a line of demarcation was agreed to by the United States and Britain in 1930, the Philippines could not possibly sustain a claim of sovereignty over North Borneo.

As for the Philippine argument that sovereignty over North Borneo having been vested in the Sultan of Sulu was thence transferred to the Philippines by cession in September 1962, such an argument falls down when it is considered that the Sultan of Sulu relinquished his sovereignty to Spain in July 1878 (Wright, 1966). While, Green (1971) in “The Philippines’ Claim to Sabah: by M. O. Ariff”, state that the Government of Philippines put forward with the great determination of British North Borneo (Sabah) was under Philippine sovereignty and could not be ceded to the Government of Malaya to become a part of Malaysia. But, it is still in doubt, which treaty does mentioned that North Borneo was under Philippine sovereignty?

Sulu Sultanate intended that the British company should possess and rule North Borneo as sovereign, when it is further considered that von Overbeck’s commission from the Sultan of Sulu as Dato, and Raja of Sandakan appointed him “supreme and independent ruler... with all powers and rights usually exercised by and belonging to sovereign rulers” it would seem that the intention of the Sultan was clear. Wright (1966) further agreed, in effect, to place the foreign relations of North Borneo in the hands of the British crown by stipulating that the company should not transfer the country to a foreign power without Britain’s consent. But in this case, Britain was

the self-governing of North Borneo, it is not necessary to request permission unless it involves superpowers from other countries.

Moreover, North Borneo became a crown colony after World War II. The Sulu Islands and North Borneo has become respectively part of the Republic of the Philippines and the Federation of Malaysia, the successors to Spain and the United States on the part of the Philippines, and of the British North Borneo Company and Britain with respect to Malaysia. Sulu Sultanate never held *de facto* control although recognized as sovereign over the Sulu Archipelago, it is not at all certain that the Sulu Sultans held sovereignty over any part of North Borneo (Wright, 1966).

In addition, Wright (1966) also claims that the question of sovereignty is not the real issue because the fact is that a British sponsored company legally acquired and effectively ruled the territory, and that Sulu and Spain acquiesced in the scheme. This can be seen by an explanation from the British Foreign Office to the government opposition in Parliament that the company held the territory under the suzerainty of the Sultans of Brunei and Sulu quieted opposition to the granting of a royal charter to the British North Borneo Company, however they does not negate the contention that sovereignty was effectively held by the company.

Ortiz (1963) state that, from the historical data shows that Sultan of Sulu from the previous to the Deed of 1878; was the sovereign ruler of North Borneo. The only question to be resolve is whether by the Deed of 1878, or agreement, or subsequent fact that the Sultan of Sulu lost his sovereignty over North Borneo. This, even it not have involved sovereign, but mere proprietary rights. Although the Sultanate was not extinguished nor the North Borneo territory ever abandoned in a manner that

would entitle Great Britain to acquire it by occupation or prescription under international law. Therefore, the successors of Sultan Jamalul Alam since 1878 continue in possession of Borneo; and after ceded North Borneo to the Philippine Government would then become the rightful sovereign.

“The Republic of the Philippines has acquired dominion and sovereignty over Sabah” viewed as provocative act and most dangerous element into quarrel, whereby the President of the Philippine signed into law Senate Bill 954 on September 18, 1968 (Tregonning, 1970). This shows that the Philippines violate the sovereignty and territorial integrity of Malaysia. However, the study by Prof. Tregonning of the Singapore University was showed that they are fair – not in favor of any party, which he wrote about the “Philippine Claim to Sabah”.

Overall, the issue of the Philippines claim on Sabah is an interesting issue, and shows many of the authors are questioning the sovereignty of Sabah, which makes this issue so sensation to the Philippines and the heirs of the Sultanate of Sulu.

### **2.3. Legal Aspects on Sabah**

Not many studies have been conducted relating to the legal aspects of the issue at hand except for a few studies conducted by the Philippines and British authors. Ortiz (1963) puts on the historical facts of the case by the sovereign possession of the Sultan of Sulu in North Borneo before 1878, which from time immemorial, through a series of treaties, friendship and commerce, had been recognized by Spain, Great Britain and other European powers as a sovereign ruler. Given that the study

made by Ortiz of the Philippines is a proper study and enough to assist, however it appeared biased towards Philippines favor.

Opposing the Philippines claim, the British strongly argued that Spain has surrendered all claim to North Borneo in the 1885 agreement with Britain. In addition to that, the United States has also acknowledged the British claim to North Borneo in the terms of the Anglo-American Boundary Convention of 1930 (Meadows, 1962). Moreover, the Philippine Constitution itself recognized British sovereignty over North Borneo, in that Article 1 of the Constitution accepts the Boundary Convention of 1930, thus in effect excluding North Borneo from its delineation of Philippine territory.

Hence, under proposal of Malaysian Federation, the British contend that North Borneo was one of the units in the Federation. This bound to the other units by common ties and institutions, since all of them were or still are under British control; and it was adopted until today.

### **2.3.1. Related Treaties**

There are many authors addressed about the treaties between Sultan of Sulu and Spain that were claimed to have some relation to the issue, but these treaties may not involves and affected British colonialism in North Borneo. Therefore this study will focus only on the relevant treaties between British and other European powers especially Spain, Germany and United States that gives full impact to North Borneo. However, we must first look at the consequences of any treaty put forward by the

authors to identify an authentic relationship from a legal standpoint, as it is the requirements of international law.

Previously, North Borneo was a part of the Sultanate of Brunei until 1704, but in that year the Sultan of Brunei, in return for assistance from the Sultan of Sulu in quelling an insurrection, ceded North Borneo to the latter (Meadows, 1962). This cession laid the foundation for the involved history of North Borneo. According to Umar (2007), Sultan Muhydin refused to cede the territories claimed by Sulu, and noted that the area was only “claimed” and not “ceded”; this can be refers to Sir Stamford Raffles, in his book “History of Java” (1830), had noted “on the north-east of Borneo proper (Brunei) lies a very considerable territory (Sabah), the sovereignty of which has long been claimed by Sulu Government”. Furthermore, Spanish forces invaded the Sulu Islands in 1851 and compelled the Sultan to sign a treaty recognizing Spanish sovereignty. Previously Spain had negotiated a treaty of friendship and commerce with Sulu in 1836.

Monograph by Powell (1976), on his review of “The Origins of British Borneo by L.R. Wright: The Philippine Claim to Sabah by Michael Leifer”, note that Dr. Wright discusses progressive involvement of Great Britain in Borneo in the years 1860 to 1888, but during 1840s and 1850s the writers agreed that agreement was hesitant and faltering. Later, what he calls:

“The Scramble for Brunei, 1882-1888 and the making of the Anglo-German-Spanish protocol of 1885. By this agreement Spain was at last recognized by Great Britain and Germany as sovereign in the Sulu Archipelago, and the Spanish Government, for its part, now renounced 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 Sultan of Sulu, ...and which form part of the territories administered by the company styled the “British North Borneo Company”. Three years later Sarawak, Brunei and North Borneo became British protectorates.

For Wright (1966) in his study of “Historical Notes on the North Borneo”, a look at the background and the analysis of the status of North Borneo from the past; whereby in January 1878 Sultan Mohammed Jamalul Alam, granted a portion of North Borneo, which he claimed, to an international syndicate headed by Alfred Dent, a London businessman, and the Austrian Baron Gustav von Overbeck. A few weeks before this grant was made, in December 1877, the Sultan of Brunei had ceded North Borneo, including the whole of the area claimed by Sulu, to von Overbeck and Dent. Under a charter from the British crown, the company administered North Borneo until 1946 when it became a crown colony.

The new protocol was signed in Madrid in March 1885, the State of North Borneo was the fruit of British success in diplomacy which culminated in the protocol of 1885. By it, Spain renounced:

“as far as regards the British government, all claims of sovereignty over the territory of the continent of Borneo, which belong or have belonged in the past to the Sultan of Sulu”, Britain and Germany recognized Spain as supreme in the Sulu Islands (Ortiz, 1963; Wright, 1966).

Thus the British and Spanish spheres were defined. Britain ended this phase by granting a protectorate over the state three years later. The line of demarcation between the Philippines and North Borneo was drawn by treaty between Britain and the United States, the successor to Spain in the Philippines (Ortiz, 1963); and in 1930 Britain was acting in her role as protecting power of North Borneo (Wright, 1966).

According to Green (1971), state as Mr. Ariff points out, although the United States entered treaties with the Sultan, none of these affected the British title. The 1930 Anglo-American Boundary Convention clearly demarcated the line of partition

between British Borneo and the American Philippines, and Philippine was a member of the United Nations that declared support for the principle of self-determination, and also the United Nations mission which was sent to Sabah affirmed that it was the desire of the local population that the territory become part of Malaysia in 1963.

While, Tregonning (1970) state that, Sabah before joining Malaysia in 1963 was a dependency of Britain and the occupation of Sabah begins by British with a sense of James Brooke in 1841 the cession from Sultan of Brunei. Brooke was a private individual, not connected to the British Government. In 1846, for a secured from Sultan of Brunei the island of Labuan, British make an off-shore island settlement by moving east from India to China. On December 29, 1877, the Sultan of Brunei ceded with all the powers of sovereignty four grants of territory to Baron de Overback, from Gaya Bay on the west coast (Kota Kinabalu today) to the Sibuco River on the east. Although the Sultan of Brunei claimed the east coast of Borneo, but Sulu was securing *de facto* and *de jure* in actual possession of that area. The east cost of Borneo was uninhabited swamp or virgin jungle, no state existed, just natives villages far up the rivers where possible from the Suluk, Brunei and other pirates who prowled for slaves. When realized that Brunei had theoretical sovereignty and Sulu claim to east coast, Overback decided to be on safe side and secure an identical cession deed from both.

Refer to related treaties, in 1885 and confirmed in 1888, in 1930 and in 1946. It is clear that the Sulu claim to North Borneo is not yet proved; that chaotic conditions along the coasts and the weakness of Brunei and Sulu prevented either state from maintaining control over the area; that pirates were the only effective power over large areas of North Borneo; and it was consistent as Wright (1966) emphasized that

the effective rule only came to the area with the assumption of control by the British North Borneo Company.

Therefore, only two significant treaties that is relevant for the purpose of this project paper. The first important treaty is *Protocol of Sulu of March 7, 1885* which stipulated that Spanish Government renounced all claims of sovereignty over the territories of the mainland of Borneo within three maritime leagues zone from the coast which are administered by the British NBC. The second related treaty is the *Convention of January 2, 1930*, by Great Britain and United States that defined the geographical demarcation of the Philippines state.

Thus, the Philippines claim based upon the Sulu claim is not proved and unchallenged the international agreements, such as Spanish Convention of 1885, the Treaty of Paris in 1898 and the Washington Treaty of 1900, the Anglo-American Treaty of 1930, the Constitution of the Republic of the Philippines in 1947 itself defined the boundary of Philippine Islands – done after attaining independence from the US on 4 July, 1946.

From the literature review, clearly reveal the existence of historical factors Sultanate of Sulu but does not indicate *de facto* of North Borneo. Factors that highlighted inadequate inhabitants showed the *de jure* government of Sulu, no study describes the population of Sulu, also, there are no remains of the palace of the Sultanate of Sulu in Sabah at present. Through observation, if it is true that North Borneo was ceded by the Sultan of Brunei to Overbeck in 1877, Malaysia should not entertain any claim of the Philippines or the Sultanate of Sulu. The question of the content of the agreement between the Sultan of Brunei and Overbeck was never debated by any writer to date.



### 2.3.2. Agreement of 1878

The basis of Philippine contention was the conveyance by Sultan of Sulu in 1877, which British North Borneo Company succeeded in 1884 as lease, not full conveyance, but it is doubtful either leasehold or freeholds (Green, 1971). This issue is related to the agreement made in grant 1878.<sup>12</sup> While, Tregonning (1958) express that North Borneo was ceded to Sultan of Sulu by Sultan of Brunei in 1704, in return for help in suppressing a rebellion. In addition, accompanied by William H. Treacher, acting British Consul-General a Labuan, Overbeck, representing Alfred Dent, went to Sulu in early part of January 1878 to obtain the lease of North Borneo for \$5,000 (Malayan) rental a year from Sultan of Sulu. There is no reason to doubt about document on January 22, 1878 whether a *deed of lease* or *cession*? Whereby on behalf of Sultan of Sulu granted to Overbeck and Dent – assigns in perpetuity, his rights and powers over the territory tributary to him on the Borneo mainland along with the islands within three marine leagues of the coast (Ortiz, 1963).

In English translation as found in *Treaties and Engagements Affecting the Malay States and Borneo*, by Maxwell and Gibson, interprets the key word “*padjak*” as cession. In 1946, a translation of the same document was made by Harold Conklin, then research assistant to Dr. H. Otley Beyer of the University of the Philippines, latest a Professor of Anthropology at Yale University, and he renders the word “*padjak*” as lease; in the context, a lease in perpetuity. Whether lease or cession, Dr. Beyer is inclined to consider the Deed of 1878 without legal validity (Borneo Records, DFA, Manila).

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<sup>12</sup> The agreement between the Sultan of Sulu and Overbeck will be referred to as a ‘Deed of 1878’ – Overbeck had secured a grant of all the rights and powers Sulu claimed on Sabah for annual rental of \$5,000 on 22 January, 1878 (Tregonning, 1958; Meadows, 1962).

Consequently, the real intention of Sultan was to lease, not to cede and supported by the letter wrote to Baron von Overbeck on the same day Sultan signed the treaty by cancelling the contract, but this action did not approve by British (Ortiz, 1963). However, in 1903, a confirmatory stipulating certain islands not specifically mentioned in the Deed of 1878, Sultan of Sulu for additional \$300 (Malayan) per year. Thus the total amount was \$5,300 paid to the Sultan every year.

The issue is further complicated by the grant, whereby the Philippines argue that their claim rests on the interpretation of the Sulu grant to von Overbeck and Dent of January 22, 1878, as a *lease* and *not a cession* translated by Prof Harold Conklin of Yale University (Wright, 1966). The grant of 1878, written in Arabic script and translated in the English version found in the British North Borneo Company papers uses the phrase *grant* and *cede* by Maxwell and Gibson.

According to Meadows (1962), Philippines claim to North Borneo involves the terms of the treaty which Baron Overbeck negotiated with Sultan Mahomet Jamal Al Alam of Sulu in 1878. In that treaty the latter agreed either to *lease* or to *cede* North Borneo for annual payments of 5,000 Malayan dollars. The British government contends that, according to its copy of the treaty, the Sultan *ceded* the territory *in perpetuity*. The heirs of Sultan Alam maintain that the British copy is forged, and that the Sultan merely *leased* North Borneo. Overbeck, however, was unaware that, under the 1851 treaty between Spain and Sulu, the Sultan had agreed not to enter into any treaty, commercial agreement or alliance with any European power, company or individual. Thus the 1851 agreement nullified the contract which Overbeck negotiated. The heirs of Sultan Alam insist that North Borneo was *leased*, but the original copy of the contract, which belonged to Sultan Alam, was stolen

under strange circumstances when his son and successor visited Singapore to try to negotiate more favorable annual rental payments (Chicago Tribune, 1945).

For its part, the British government declares that North Borneo was ceded, but it refuses to permit any Filipino or third party to examine its copy of the contract (Meadows, 1962). Prior to 1946 the British government explained that it could not force a private company - the British North Borneo Company - to open its files; yet, although the British government acquired those files when it bought out the Company in 1946, it has continued to reject requests by the Philippine government and by the heirs of Sultan Alam to inspect the British copy of the contract (Rivera, 1962).

The Deed of 1878 was a lease, although a lease in perpetuity; because the word "*padjak*" means "*lease*" rather than "sale" or "cession" as given in English version (Ortiz, 1963). The payment of consideration is made annually in perpetuity. It is also not stipulated uncertain terms, the "rights and privileges" may not transferred to third party (Great Britain), and provided for the manner in which disputes may be settled.

In the case of North Borneo all versions of the grant indicate that North Borneo was transferred, not for a period of years, but "forever and in perpetuity," as in the Conklin translation, or "forever and until the end of time" as in the English version. North Borneo never dishonored the agreement, nor has Sabah, even the word "ceded" or "leased"; but the agreement mentioned "in perpetuity" (Tregonning, 1970). Whether the correct term for the Sulu grant of North Borneo is lease as the Philippines contend, or cession, is not the central issue of the North Borneo question (Wright, 1966).

Still there are doubts especially before an agreement is concluded, when a region is obtained by Overbeck of the Sultanate of Brunei. In fact, the area to which the agreement mentioned does not cover the entire territory of Sabah. Although the Deed of 1878, was not signed by a sovereign government, but the agreement between the individual legally entitled to the disputed territory. The use of the word “*cede*” or “*lease*” is not the main issue, given that the purpose of the agreement is to provide its period authenticity “forever and in perpetuity” that is the focus and needs to be solved through other legal provisions that is applicable in Malaysia.

### **2.3.3. Self-Determination**

In general, the claims of self-determination are invariably raised whenever one state invades and occupies another, or territory belonging to another (Margalit & Raz, 1990). However the claims of a people who have been for many years rule by another cannot be based on the possessory right that applies only against a recent occupier. Furthermore, under the principle of international law – the occupation of some uninhabited island, do violate the possessory right, but not the right of self-determination.

The Philippines consider their claim to be legally valid and historical grounds by peaceful settlements without prejudice to exercise the right of self-determination by inhabitants of North Borneo (Ortiz, 1963). The request for intervention was made by the heirs on February 5, 1962, after Great Britain and Malaya had announced to the world their intention to incorporate North Borneo, Brunei and Sarawak into the Federation of Malaysia which intend to set up by August 1963.

The Philippines also maintains that the Federated States of Malaya and the self-governing state of Singapore are much more favorably inclined toward the idea of a Malaysian Federation than are the less advanced Bornean units of North Borneo and Sarawak, both Crown Colonies, and Brunei, a protectorate (Meadows, 1962). It is noted, too, that the Federation might produce increased racial tension between Malays and Chinese; since one objective of the Federation is to strengthen the position of Malays relative to that of the large Chinese population, this might prompt a Chinese appeal to Red China for protection from possible discrimination and persecution.

Moreover, Alfred Dent finally secured the qualified support of British Government that conferred a Royal Charter on Dent's British North Borneo Company, whereby permitted the company to administer the territory over North Borneo in 1881 (Tregonning, 1970). In May, 1888, North Borneo became a British protectorate, with sovereign rights vested in the British North Borneo Company (Meadows, 1962); and by treaties with Sarawak, Brunei and North Borneo that recognized the boundaries over three states, and never challenged by any other party. Innumerable Atlases, maps and charts, embodied territorial units in Toto. The agreements were the basis of affairs, constituting position in international law until 1945 (Tregonning, 1970). In 1819, the parallel of latitude 4° coastal boundary accepted, and inland boundary finally demarcated by mixed Boundary Commission and agreed to by the Dutch and British Government in 1915.

Apart of that, Spain had renounced all its claims to the Sulu possessions on the mainland of North Borneo in March 1885, by Madrid Convention between Spain, Germany and Great Britain, and Spain; the latter two recognized Spanish

sovereignty over Sulu (Meadows, 1962). After Spanish left the East, United States become *de jour* successor to Spain as the Government of the Philippine Islands. By Treaty of Paris in 1898, the Spanish surrendered their territory; the boundary was stipulated to be nine miles off the coast of North Borneo, according to Manila Convention of 1885 (Tregonning, 1970).

Sabah, with the British and from 1963 onwards as a part of Malaysia, for nearly 100 years developed without being possessed by the Philippines. According to Tregonning (1970), the United Nation Mission (requested by Philippine Government and Indonesia) sent in 1963 to Sabah state a report:

“The Mission found that the great majority of the people of North Borneo have strongly supported the proposed Federation of Malaysia from the high degree of unity reflected by national leaders” United Nation, Malaysia Mission Report (Department of Information, Malaysia 1963). The report was accepted.

Based on the literature searches, it is clear that the Philippines clear dispute the issues of ‘self-determination’ over the peoples of Sabah which in turn will threaten the sovereignty of Sabah, and questioned the agreement relating to the ‘Deed of 1878’ of dubious validity.

## **CHAPTER THREE**

### **RESEARCH METHODOLOGY**

#### **3.1. Introduction**

This chapter refers to the methods used in the study, and the techniques that are applied to show the relevance of the research. The method use is content review, content analysis, data comparison and some bibliographic survey approach to associate with the legal perspective in terms of international law and common law in relation to research question.

#### **3.2. Study Design**

Based study design to reveal the solution to the question in this study. Therefore the scope of the project will focus on the approach that uses in this works. There are earlier works on this project paper, such as collecting materials, reviews on book, journal articles, theses, dissertations, monograph, newspaper reports, and related data collection.

The system requirements specification such as Information Technology supports; and office automation are much associated. The language used in this project paper is English (US), with the APA (American Psychological Association) format.

Some related data to support this project paper as follows:

- (a) the population of North Borneo during the colonial period;
- (b) current population of Sabah, distribution by ethnicity;
- (c) map during colonial period (Figure 4.1);
- (d) map of Sabah, showing the current boundaries (Figure 4.2);
- (e) related treaty, agreements, international conventions and protocol as a legal arguments of the disputes with illustration of gazette map;
- (f) Cobbold Commission report, August 1962;
- (g) United Nations Malaysia Mission report of June 1963;
- (h) Deed of 1878 and its translation (Appendix B, C, D and E);
- (i) History of Sultanate of Sulu

Content review and data review will be discussed in the next subsection that consist the legal arguments on international law and common law.

### **3.3. Related Legal Arguments**

This paper will focus on the legal perspective and its application to the issue of self-determination as well as the status of the Deed of 1878. Focus will be made on the establishment of the features of a state under the principle of international law. This will thus analyze the population of Sabah before or in the early years, as none of these studies has been conducted before. This will clarify the facts with ‘historical’ and ‘inhabitants’ of Sulu a little while ago, compared to the people of Sabah’s population in present, for the purpose of greater clarity.

Meanwhile, Sabah map is pertinent to the protocol and the convention agreed by previous rulers. There are also reports of relevant United Nations. Related content



of 'Deed of 1878' will also be reviewed in more detail for reference in terms of its meaning either authentic or not.

### **3.3.1. Arguments on International Law**

The methods include content review and data review which is pertinent to answer the first question, i.e. to determine the validity of people will Sabah to join Federation of Malaysia in 1963 denial the 'self-determination' causing the Philippines in order to maintain their claims. It is including the permanent population on Sabah, related treaties and agreements, and the United Nations reports.

- (a) Permanent population on Sabah – as a base of emergence states, territorial should cover the permanent population, defined territory, and government (Huth et al., 2013). The remaining states also must fully independence and recognized by other states. This is a fundamental principle of international law, and if associated with the population of Sabah, logically, if true rule of Sulu and North Borneo were once mastered, is certainly the majority of the population in Sabah is the people of Sulu.
- (b) Sabah boundaries – related maps showing the boundaries of North Borneo internationally agreed during the British colonies, and the latest border after Sabah became part of Malaysia since 16 September 1963; and its relation to the contents of the Deed of 1878.

- (c) Related treaty, agreements, international conventions and protocol – as this is a public instruments related to territorial disputes (Huth et al., 2013). It selected based on the basic requirements of the legislation, which was signed together and affect the ruler such as; Protocol of Sulu of March 7, 1885, by Great Britain, Germany and Spain in Madrid Convention whereby Spain relinquished all claim to North Borneo in return for British recognition of Spanish sovereignty over Sulu (Article III, Madrid Protocol of 1885); and Convention of January 2, 1930, by Great Britain and United States, defines the geographical demarcation of the Philippines.
- (d) United Nations reports – that insure the effective freedom to the people of North Borneo to express their true and enlightened will to join the Federation of Malaysia in 1963, as it was relates to principles of self-determination under international law.

### **3.3.2. Arguments on Common Law**

In order to achieve the second objective, i.e. to propose the issue resolution on ‘in perpetuity’ which stipulated in the ‘Deed of 1878’; this research will undertake a content review method. The differences in the agreement can be seen as follows:

British version quoted as;

“...hereby *grant and cede* of our own free and sovereign will to Gustavus Baron de Overbeck of Hong Kong and Alfred Dent, Esquire, of London as representatives of a British Company co-jointly their heirs, associates, successors, and assigns forever and in perpetuity...”

While the version of Sulu was;

“...do hereby desire to *lease* of our own free will and satisfaction, to Gustavus Baron de Overbeck of Hong Kong, and to Alfred Dent, Esquire, of London, who act as representatives of a British Company, together with their heirs, associates, successors, and assigns forever and until the end of time...”

Treaty of Cession was signed by Overbeck and the Sultan of Sulu (letter in the Public Record Office in London) attach as the Appendix B. As Tregonning (1958) emphasized on 22 January, 1878, Overbeck secured a grant of all the rights and powers Sulu claimed on Sabah for annual rental of \$5,000. Most observers of the last and present century refer to the cession as complete.

The leases made by Brunei and Sulu to Dent and Overbeck in 1877-8, '*held for as long as the leases wished.*' The Borneo protectorates followed in 1888 (as early 1880), Dent hoped to end the \$5,000 annual payment to the sultan of Sulu, possibly by outright Spanish annexation of the sultanate beyond (Bassett, 1980). But, there is a doubt about the status of the Sultanate of Sulu in this decade and their relationship from the legal perspective.

### **3.4. Technique of Analysis**

There is technique for interpreting analysis such as specific of key information related to international law and common law perspective, to relate the legal solution for this issue.

## **CHAPTER FOUR**

### **ANALYSIS OF RELATED ARGUMENTS**

#### **4.1. Introduction**

This chapter will describe the analytical related issues on this research, present analysis of the main study to highlight the analysis of international law perspective, an analysis of local laws and common law perspective to be adopted in this study from a legal perspective.

#### **4.2. Analysis on International Law Perspective**

As this section related to international law perspective, for ease of understanding, analysis will be divided into three parts, namely the permanent population on Sabah, related treaties and agreements, and the UN reports.

##### **4.2.1. Permanent Population on Sabah**

According to Lee (1962), which state that before the beginning of the twentieth century, accounts of the population of British Borneo were vague although there was some degree of certainty on one point; the population was scanty. Author works mostly relates to the population changes that caused by the migration. For that, just relevance scope with the population will point out. The indigenous group is

unaffected by immigration except for inter-district migrations. Since 1931 there arrived in North Borneo between 15,000-25,000 Chinese and some hundreds of Malays, Europeans and others; whilst at the same time, owing to the slump there was an emigration of 2,000 Indonesians. The result of all these movements over 20 years was a net gain of about 16,000, which brings the natural increase down from 56,665 (20.4 per cent) to 40,165 (14.5 per cent) only.

**Table 4.1**  
**Growth of Population by main communities North Borneo**

Year	Indigenous	Chinese	Others	Total	Percentage increase
1921	203,041	39,156	20,955	263,252	-
1931	205,218	50,056	22,202	277,476	5.4
1951	243,009	74,374	16,758	334,141	20.4

*Source:* Census Reports – North Borneo, 1951 in *The Population of British Borneo* (Lee, 1962), p. 230.

From present statistics, the indigenous people appear to occupy a predominant position (71.9 per cent), but a careful examination of the different groups shows that immigrants form a far larger proportion than indicated by statistics. The obvious immigrants, Chinese, Europeans, “Others” and “Other Non-Indigenous Asiatic”, form only 28.1 per cent of the population, but if the Bajaus, Malays and certain groups like the Sulus are added, the percentage is nearer forty than thirty. The early indigenes and aboriginal tribes were, in a way, displaced at the beginning into the interior by the coastal “invaders” - first, the Malays, Bajaus, Sulus, Bruneis and Indonesians and later the Chinese and other coastal trading and colonizing elements. These “alien” elements, many of whom have been classified as “indigenous”, have remained to a large degree unassimilated. Consequently, all along the coasts of

British Borneo there are Muslim peoples who do not have much contact with the interior peoples. At this point, Sulu is not included in the study because the amount is too little.

**Table 4.2**  
**Composition of the British Bornean Population**

	<b>Group</b>	<b>North Borneo</b>
1	Malay Group	
	(a) Malays	22,312 <sup>[a]</sup>
	(b) Para-Malays <sup>[b]</sup>	32,910
	(c) Bajau	44,728
	Total	99,950
2	Chinese	74,374
3	Sea Dayak	-
4	Dusun	124,335
5	Land Dayak	-
6	Murut / Kelabit	18,724 <sup>[c]</sup>
7	Others <sup>[d]</sup>	14,543
8	Kenyah-Kayan-Kajang	-
9	Misc. Indigenes <sup>[e]</sup>	1,002
10	Europeans	1,213

[a] A North Bornean ethnic groups known as “Brunei and Kedayan” in the census definition.

[b] Not a census definition. After Leach, *Social Science Research in Sarawak* (H.M.S.O., London 1950) p. 16.

[c] Known as Tagals in Sarawak.

[d] Not a census grouping.

[e] Not a census grouping.

*Source:* Census Reports – North Borneo, 1951 in *The Population of British Borneo* (Lee, 1962), p. 236.

What is significant about these figures is that the Chinese form the largest single ethnic group in British Borneo. The second important point is that the original indigenous peoples (i.e. 3, 4, 5, 6, 8, 9) actually form a minority (44 per cent) in the total population. However, according to the census definition, the indigenous population still formed a big majority (71.9 per cent) in spite of the influx of Chinese and other immigrants.

The indigenous peoples have been displaced into the interior, and large groups like the Muruts, Kelabits and others have remained isolated and primitive. The 1921 North Borneo census reported that although the indigenes still form a majority, “the

productive and industrial value of the alien races is as yet far greater than that of the natives of Borneo” and that “it will be a very long time before the natives become, individually, as valuable assets to the state as the alien races”. In 1960s, this statement still holds true (Lee, 1962). At this point, Sulu is not part of the census, but is included in the “Others”; and also the amount is too little of the total.

Next is the current population for comparison to show its relation to factor the Philippine claim. It was the latest data from the Department of Statistics, Malaysia, to explain the status of the ethnic group of Sulu.

**Table 4.3**  
**Population by Ethnic Group, Sabah 2013**

	<b>Ethnic Group</b>	<b>Sabah (*000)</b>
	<b>Total</b>	3,496.6
1	Malay	252.3
2	Kadazan / Dusun	597.3
3	Bajau	477.4
4	Murut	109.5
5	Others Bumiputera	680.5
6	Chinese	303.0
7	Indians	12.1
8	Others	111.1
9	Non-Malaysian Citizen	953.3

*Source:* Department of Statistics Malaysia (DOSM, 2013).

*Notes:* The added total may differ due to rounding.

Sabah population is made up of 33 groups of indigenous people who communicate in over 50 languages and 80 dialects of ethnic groups. Kadazan-Dusun<sup>13</sup> is the largest ethnic group in Sabah which made up almost 30 per cent of the total population; Bajau<sup>14</sup> and Murut<sup>15</sup> ethnic group are the second and third largest in the

<sup>13</sup> Kadazan-Dusun is the term given to the union classification of two indigenous tribes in Sabah. They are also the largest ethnic group, comprising about one third of the population - the Kadazan and Dusun. Traditionally, most of them are traditional farmers who cultivate paddy rice and upland rice, as well as fishing and hunting.

<sup>14</sup> The Bajau people are an indigenous ethnic group living in the West Coast (Putatan, Tuaran, Kota Belud, Kota Marudu, Papar) and the East Coast of Sabah (Kudat, Sandakan, Lahad Datu, Kunak, Semporna, Tawau). They worked as farmers and fishermen. Besides being an expert diver, they are also popular with horseback riding.

state (the State Government, 2014). Other tribes include indigenous tribes<sup>16</sup> such as Bisaya, Brunei Malay, Bugis, Kedayans, Lotud, Ludayeh, Rungus, Suluk, Minokok, Bonggi, Ida'an, and more.

Therefore, with reference to Table 4.3, Suluk (modern terms, formerly known as Sulu) is only a part of the group of 'Others', the overall share of the 4.4 percent of the total population of Sabah, and this show that the Suluk are in minority population as well as the total population of Sulu before (Table 4.1 and Table 4.2). This is consequence of the fact that the moral significance of a group's interest is its service to individual that depend on the size of the group (Margalit & Raz, 1990).

In shorts, the fortunes of a larger group by Kadazan/Dusun, Bajau, Malays and others Bumiputera is a material to the well-being of larger number of people; not by Suluk.

#### **4.2.2. Related Treaties and Agreements**

The related treaties and agreements showed the geographical demarcation on Sabah territory refers to protocol and convention that assume as strong evidence on legal perspective with illustrated map of the gazette that affecting the states. First, *Protocol of Sulu of March 7, 1885* whereby "the Government of Germany and Great

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<sup>15</sup> Murut are an indigenous ethnic group, consisting of 29 sub-ethnic groups inhabiting the interior of northern Borneo. The literal translation of the Murut is "the hill". Traditionally, they are growers of upland rice and cassava. In addition, they also do activities such as hunting and fishing. Murut people also lived in long houses near the river, and also use the river to move anywhere. Ethnic Murut Sabah is the last to renounce headhunting. This is due to collect an enemy's head is traditionally an important role in the spiritual beliefs of the Murut people.

<sup>16</sup> Other indigenous people in the state, including Rungus, Iranun, Bisaya, Tatana, Lun Dayeh, mysticism, Sino, Ida'an, Bugis, Kagayan, Tindal, Tobilungm Lobu, Bonggi, Tidong and more. Bumiputera in Malaysia is a term to describe the Malays and natives of Southeast Asia, especially in Malaysia. Bumiputra in Sabah mean if one of the parents is a Muslim Malay or indigenous native of Sabah as stated in Article 160A (6)(a) Constitution of Malaysia; thus his child is Considered as a Bumiputra. This term can be translated literally as "son of the soil".



Britain recognized the sovereignty of Spain over Sulu Archipelago” and Spanish Government renounced as far as regards the British Government “all claims of sovereignty over the territories of the mainland of Borneo which belonged or may have belonged to the Sultan of Sulu, and all those within three maritime leagues zone from the coast – which are part of the territories administered by the Company known as the British North Borneo Company”.

Second, *Convention of January 2, 1930*, by Great Britain and United States, defines the geographical demarcation of the Philippines. The agreement also indicates North Borneo at the time were isolated from the territory of the Philippines, and the United States and Great Britain respectively dominant in their colony.

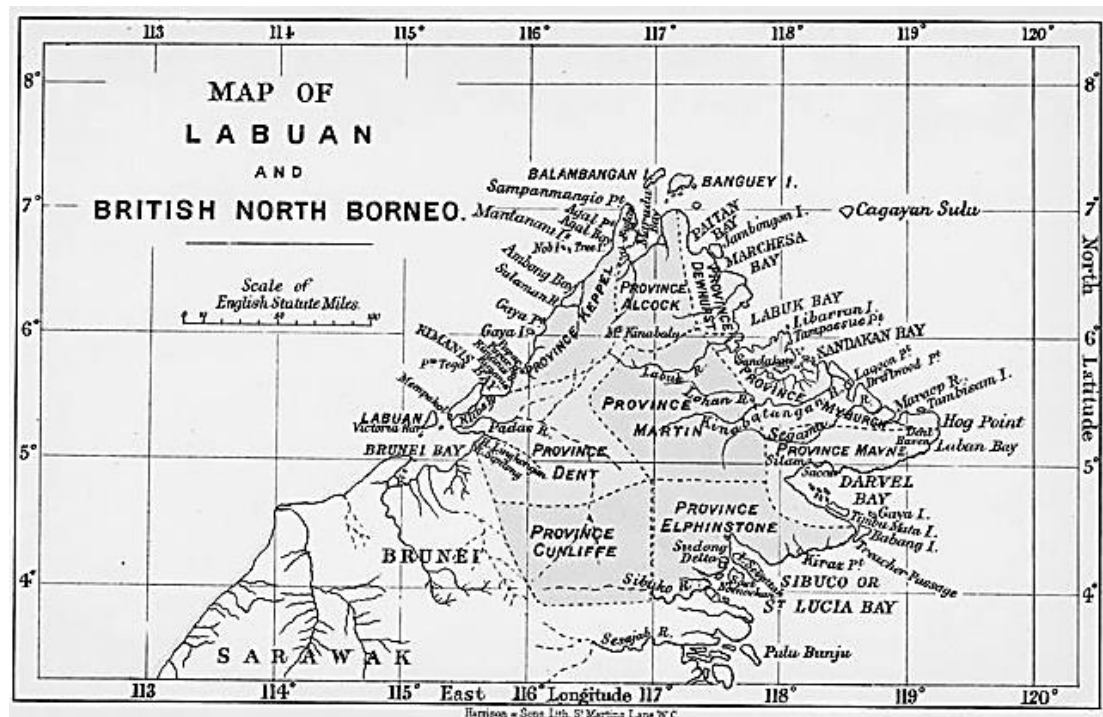
In addition to this, there is also supporting evidence as referred by the Kocs (1995), when Indonesia was questioned and demanded Sabah and Sarawak in 1963, but the matter was settled in 1966 where the results of “key to settlements” are “the existing boundary or territorial arrangement was clearly delimited under colonial rule and was therefore legally binding on the claimant state under the rules of territorial secession.”<sup>17</sup>

After observation on the content and comparison of the map is made, the Sibucu River which mentioned in the Deed of 1878 is part of Indonesia, now the name of the Sebuku River, East Kalimantan, Indonesia. This can be seen by comparing the current map and the map of the British colonies of Sabah (as well as the Indonesian border) nowadays, see maps attached as Figure 4.1 and Figure 4.2.

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<sup>17</sup> Reports are available from Table 2, Previously Resolved, Contiguous Territorial Disputes, 1945-1987 (Kocs, 1995). Source: Braveboy-Wagner (1984), Brownlie (1979), Butterworth (1976), Chang (1982), Day (1987), Finnie (1992), Goldstein (1992), Prescott (1987), Qureshi (1966), Sharma (1976), Shaw (1986), Tillema (1991) and Tzow (1990).

**Figure 4.1**  
**Map of Labuan and British North Borneo (1888)**



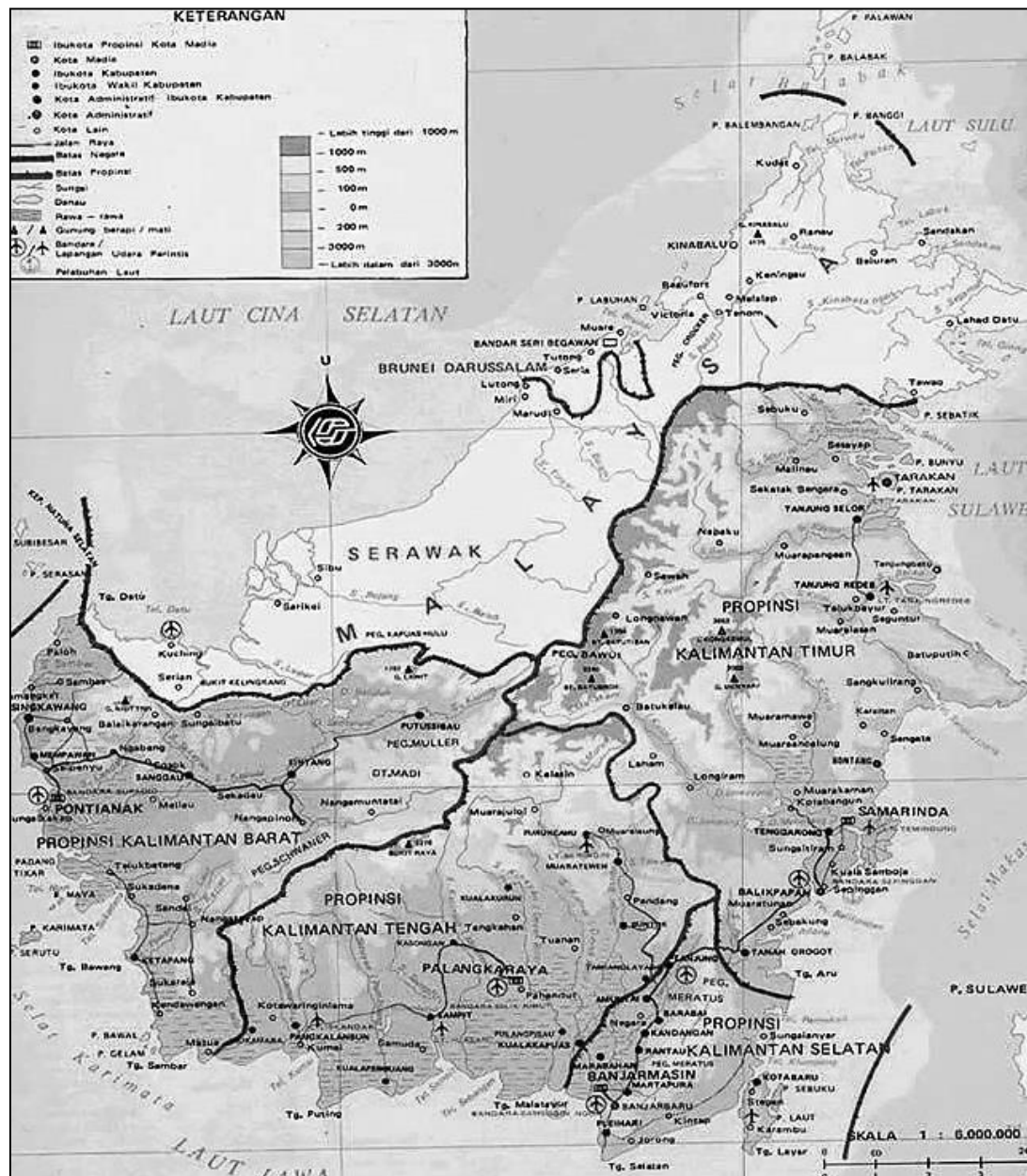
Source: Map of Labuan and British North Borneo by Harrison & Sons (London, 1888). Available at: <http://www.pennymead.com>

This issue has not been debated and never been challenged by the Sultan of Sulu, nor his heirs till now, which should recover the part of the Government of Indonesia. Moreover, Philippines should question why the Indonesian government to take the region during the delimitation carried out between Kalimantan, Sabah and Sarawak; as part of the province is in the possession of the Sultanate of Sulu stipulated in grants of Deed of 1878?

In short, all this relevance treaties and agreements proved that North Borneo was under sovereign of the British North Borneo Company from 1882 to 1946, and subsequently a crown colony of the United Kingdom from 1946 to 1963. Philippines shall incorporate the relevant treaty and meaning of the content of each

agreement to strengthen their claims from the legal perspective. Some content of the agreement is not relevant for the time being (see e.g. Figure 4.2 on the validity of Sebuku River, now under the sovereignty of Indonesia).

**Figure 4.2**  
**Map of Kalimantan: Sebuku River**



Source: East, West, Centre and South Province of Kalimantan, Indonesia by Adel Kuptsoff (2014): Company KGIS. Available at: <http://big-big-city.com>

#### **4.2.3. The United Nations Reports**

The United Nations reports referring to the Cobbold Commission final report on September 12, 1963; as stated by the Deputy Representative of the Secretary-General; and Mr. Neville Kanakaratne, with clarification by Glasgow Herald that reported in Commission's findings: *100 per cent of the population of North Borneo and 75 per cent of the population of Sarawak supported formation of the federation.* This is the fact that proved the peoples will of Sabah to join Federation of Malaya in 1963.

In addition, on September 14, 1963, the UN Secretary, Gen. U. Thant concluded in General Assembly reports: acknowledged that there were "certain irregularities" in the procedure of the UN mission but nevertheless said there is no doubt of the wishes of a sizeable majority of the peoples of these territories to join the Federation of Malaysia. This showed that the majority of the peoples of the two territories (Sabah and Sarawak), having taken them into account, wish to engage, with the peoples of the Federation of Malaya.

In further examination, the members of the UN Missions in 1962, is an independent body to oversee the principles of justice and the choices made by the people of Sabah and Sarawak before entering the Federation of Malaya in 1963. Final report clearly states that it is the will of the majority and there is no objection from the people of Sabah or Sarawak during that time, and this was in line with the international law of self-determination.

#### 4.2.4. Effective Control Doctrine

The characteristics of statehood are routinely said to be those four listed in art 1 of the 1933 Montevideo Convention on Rights and Duties of States: ‘(a) a permanent population; (b) a defined territory; (c) a government; (d) the capacity to enter into relations with other states’.<sup>18</sup> This also expressed in Article 3 of the Montevideo Convention, thus affirms that:

‘[t]he political existence of the state is independent of recognition by the other states’, and ascribes to the state ‘[e]ven before recognition ... the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts’.

Apart from historical facts, the Sulu Sultanate and the Philippines had in fact lost their sovereignty rights of Sabah to Malaysia based on the principle of effectivity (Ranjit Singh, 2013). These conditions may be referred to the *Resolution 1514, of UN Charter* which issued without a dissenting vote, fatefully stated: ‘All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’. Moreover, Sabah’s first election was held on December 16, 1962 under the Local Government Elections Ordinance for the 118 wards in the local authority. Meanwhile, the first general elections were held in April 1967, the State Assembly has 32 seats, four years after achieving independence, and participate in the formation of Malaysia in 1963 (Sabah State Election Office, 2014). Later, Sabah was recognized by Indonesia, and Malaysia has also been recognized internationally.

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<sup>18</sup> Montevideo Convention on Rights and Duties of States – opened for signature 26 December 1933, 165 LNTS 20 (entered into force 26 December 1934) (Montevideo Convention, 1934).

The delineation of Sabah state that recognized internationally after joining the Federation of Malaysia since 1963, is can be seen as Figure 4.3.

**Figure 4.3**  
**Map of Sabah year 2009**



Source: Borneo (Sabah) map by Alexander Mauskop and Barry Fox (2009). Available at: <http://www.ssl.sabah.gov.my>

Consequently, the British government showed effectivity on administered North Borneo, and Malaysia is the next government as a substitute after Sabah gained independence on 16 September 1963. No facts showing the Sultan of Sulu, or Spain or the US govern the Sabah territory; deducted that the nation-states cannot exist without the people and territory, thus to have territory is to control the territory. Other question that arises is, whether the Sultan of Sulu is the legal entity or

individual from the standpoint of international law? In this matter, further discussions will be made after reviewing the latest status of the Sultan of Sulu.

#### **4.3. Analysis on Domestic Law**

The Federal Constitution was amended to include special provisions applicable to the states of Sabah and Sarawak after the formation of Malaysia in 1963. Some federal Acts of Parliament apply to these states differently on a number of matters, particularly on issues related to immigration, land and natural resource management.

For example, in the Peninsular Malaysia, the National Land Code governs most of the laws relating to land; while in Sabah, the main legislation is the Sabah Land Ordinance; and in Sarawak, the Sarawak Land Code. Provision also found in Sec. 3 Civil Act 1956, stipulated the use of common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951 may be applied in situations where there is no law governing a particular circumstances in Sabah.

##### **4.3.1. State Ordinance**

The natives of Sabah tend to rely on individual land applications for land tenure rights (communal land rights are recognized in the form of native reserves and communal titles under the Sabah Land Ordinance [SLO]), either by native

communities or individuals for state land provided under section 12 of the SLO.<sup>19</sup> Any Native Customary Right (NCR) claimant is entitled to make a claim for unalienated country land by himself or through the village head or the Assistant Collector of Land Revenue (ACLR) in writing. According to Section 14, Native Customary Land (NCL) claims can be made through a letter to the ACLR by the headman, where the ACLR would then make a decision. Based on the SLO, NCR under Section 15,<sup>20</sup> as well as customary tenure under Section 65<sup>21</sup> confer upon the holder a permanent, heritable and transferable right of use and occupancy in the land.

The State Attorney General's public statement that there should be a cut-off point on Native Customary Rights at 1930 means that new NCR claims after 1930 could not be considered or do not exist (SUHAKAM Kundasang Public Inquiry Report, 2013). State laws are often referred to as enactments or ordinances, in the meantime under Article 75 of the Malaysia Constitution, states that a federal law shall prevail over any inconsistent of state laws, including the sharia laws.

Based on the legislation facts described, it appears that the Sultan of Sulu, or his heirs are not enshrined in domestic law. Such rights are only for resident population and the people of Sabah alone.

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<sup>19</sup> Approval for such applications is dependent on the availability of land and is subject to comments from at least 12 departments in the Land Utilisation Committee (LUC). Native Customary Rights (NCR) and Native Customary Land (NCL) are provided for under section 4(2) of the National Land Code 1965.

<sup>20</sup> According to Section 15 of the Sabah Land Ordinance Chapter 68, there are seven criteria Native Customary Rights land (NCR) is: (1) Acquisition of land according to custom grip / race; (2) Land planted with fruit trees, where the trees were between 50 or more on a per hectare; (3) Separation of fruit trees, sago, cane or other crops that have a commercial value which can be proved by the claimant to the Collector (DS) without hesitation; (4) Land farming / livestock; (5) Land that has been developed or undertaken in three consecutive years; (6) The cemetery or sacred place; (7) common entrance for people and animals.

Native Customary Rights land (NCR) is also a right of ownership or lasting for generations as stated under Section 65 and Section 66 of the Sabah Land Ordinance Chapter 68.

<sup>21</sup> Section 65 - "Customary tenure" means lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years or by title under this Part or under the Poll Tax Ordinance, or Part IV of the Land Ordinance, 1913.



#### **4.4. Analysis on Common Law Perspective**

As shown on previous facts, Overback had secured a grant of all the rights and powers Sulu claimed on Sabah for annual rental of \$5,000 on 22 January, 1878 (Tregonning, 1958; Meadows, 1962). Treaty of Cession attached as the Appendix B, but in this analysis, Maxwell and Gibson's version will be used, as it is the first translation and adopted by the High Court of North Borneo in 1939, attached as Appendix D.

Thus, the great issues debated by the heirs of the Sultanate of Sulu or many writers is the word 'lease' but the purpose of the agreement is different to the British that considered it 'cede'. When examined, both versions stated 'forever and in perpetuity' – this meaning supposed to be addressed to find a solution. However, in order to complete this study, there is a need to know the history of the Sultanate of Sulu. In the next sub-topic, a brief of bibliographic survey are selected to provide a clear picture of the status of the Sultanate of Sulu in this decade and their relationship from the legal perspective.

##### **4.4.1. Status of Sulu Sultanate**

History of Sultanate of Sulu began in 1450 and 1936, but in between there were 32 people who participated by the title of "Sultan", starting with Abu Bakar, who was the founder of the Sulu Sultanate. He founded the Royal Sultanate of Sulu in 1457 and renamed himself Paduka Maulana Al-Sultan Mahasari Sharif Ul-Hashim. The

32<sup>nd</sup> holder, Sultan Jamalul Kiram II virtually surrendered his political powers to the United States government on March 22, 1915 under Carpenter Agreement.<sup>22</sup>

On the previous facts also, under the Treaty of 1851 between Spanish and Sulu, place Sulu dependencies under Spanish flag and forbade the Sultan and Datus of Sulu to make treaties with other European powers that bearing on the Dent-Overbeck concessions of 1878 (Bassett, 1980). According to Tarling (1978), North Borneo was certainly more controlled by Sulu than Brunei in the century before 1878, but in doubt whether the Sulu sultanate was '*an organization for war or piracy*' because its connections seems to have strengthen with the Bajau people of North Borneo only in the later eighteen century, this challenged Brunei's suzerainty successfully in the area from Marudu to Sandakan. Under Protocol of Sulu of March 7, 1885, the Government of Germany and Great Britain recognized the sovereignty of Spain over Sulu Archipelago (Ortiz, 1963).

Jamalul Kiram II died in 1936 without leaving any children (The Sunday Times, 1937); subsequently President Quezon of the Philippines decided to end recognition of the sultan and sultanate of Sulu, and stopped the government pension, but the Company decided to pay its lease money to proven heirs of the dead sultan (Bassett, 1980). The means of Philippine government not to recognize the ranch existence of the Sulu Sultanate may referred to a letter to the Governor of North Borneo dated July 28, 1936, from His Britannic Majesty's Consul General in Manila. However, the abolition of the Sultanate of Sulu did not abolish the sultan nor his line of succession. Tregonning (1970) also agreed about the abolishment of Sulu Sultanate

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<sup>22</sup> Governor of Mindanao and Sulu Frank W. Carpenter signs an agreement with the Sultan of Sulu which relinquishes the Sultan's, and his heirs', right to temporal sovereignty, tax collection, and arbitration laws. In exchange, the Sultan gets an allowance, a piece of land and recognition as religious leader (Tregonning, 1970).

political powers appeared, but did not eliminate the Sultan that secured pension and remained the spiritual head of the Suluks.

In fact, from 1950 to 1986, there were two holders of the title “Sultan” such as Sultan Muhammad Esmail E. Kiram I (1950-1974), followed by 34<sup>th</sup> Sultan Muhammad Mahakuttah A. Kiram (1974-1986) who were officially recognized by the Philippines. After the death of Sultan Muhammad Mahakuttah Kiram in 1986, the Philippine government failed to formally recognize a new Sultan. Hence subsequent Sultans were not crowned with the support of the government. However, there have several claimants to the Sulu Sultanate over the years as reported by Philippines Daily Inquirer.<sup>23</sup> To complicate matters, the Philippine government, from time to time and on a case-to-case basis, deals with one or more of these claimants regarding issues concerning the Sultanate and therefore granting some sort of recognition (Nawal, 2013).

In reality, Sulu Sultanate is no longer recognized by any state as a sovereign entity. Even titles of Datus and Sultans are recognized but have no Official Rights and Powers<sup>24</sup> since their political power of the Kingdom has been diminished in 1915. According to a report by the Manila Times, the Sulu throne claimant involvement in politics will make a claim to the throne void. After 1986, the Sultan’s throne showed that most of claimant involved in politics, and resulted in the Philippine government failed to recognize the true heirs of the Sultan.

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<sup>23</sup> As reported by the Philippine Star stated that Jamalul Kiram III is the new successor to the throne. Datu Esmail Kiram, 73, is the new sultan of the Sultanate of Sulu and North Borneo succeeding his elder brother Jamalul, who died last October 19 at the Philippine Heart Center. Therefore, Esmail will be known as Sultan Esmail Kiram II (Frialde, 2013).

While other news by Daily Zamboanga Times (26 Sept 2012), stated that Raja Muda (Crown Prince) Muedzul-Lail Tan Kiram succeeds his late father Sultan Moh. Mahakuttah A. Kiram as 35th Sultan of Sulu. Raja Muda Muedzul-Lail Tan Kiram has been proclaimed as Sultan of Sulu by Rumah Bichara (council of elders), bangsa Suluk (people of Sulu) and bangsa Sabah (people of Sabah; previously known as North Borneo) on September 20, 2012.

<sup>24</sup> Memorandum on Administration of Affairs in Mindanao of President Quezon to Secretary Quirino as stated on September 20, 1937. Jorge Vargas also communicates President Manuel L. Quezon's policy to recognize the titles of Datus and Sultans but no official rights and powers on October, 1937.

#### **4.4.2. Deed of 1878**

Analysis on the contents of Deed of 1878, relates to their meaning in legal perspective with reference to words of “cede”, “*padjak*” or “lease” and “in perpetuity”. Refer to modern dictionary, “*pajak*” means lease; contract allowing the use of land or building for a specified time, whereby “cede” means surrender (territory etc), and “perpetuity” means forever.

Furthermore, the British nevertheless takes the word “*padjak*” to mean “grant and cede”. It can be argued however, that “*padjak*” means “mortgage” or “pawn” or even “wholesale”, as per the contemporary meaning of “*padjak*” in Sulu. This indicates that the agreement was actually a contract in which the Sultan of Sulu placed the land as mortgage or perpetual lease in return for a loan of Malayan Dollar 5,300 per year until perpetuity. Every year, the Malaysian Embassy in the Philippines issues a check in the amount of 5,300 ringgit (about 77,000 Philippine pesos) to the legal counsel of the heirs of the Sultan of Sulu (refer to Appendix F). Malaysia considers the amount an annual “cession” payment for the disputed state, while the sultan’s descendants consider it “rent.”

Moreover, the Sultan lines of succession not abolish, therefore the successor was not the Government of the Philippines, but heirs of the Sultan are not clear to anyone since 1936 after the death of Jamalul Kiram and the question of the perpetuation of Sultanate is raised. The court case in Kota Kinabalu deliberated just to identify the Sultan, the heirs still disagree, so the cession money continues to bank up in Sabah (Tregonning, 1970).

Also, the purposes specified in 'Deed of 1878' compare to present situations. Whereby, the rivers on east coast of Borneo side, named in the agreement, never been dispute and not equal to Sabah as well (Tregonning, 1970). The west coast stream was ceded by Brunei between 1877 and 1902. Nobody oppose Brunei controlled and no one dispute cession agreements have not been accepted and honored, therefore Sulu Sultanate had no possible interest or claims.

Other points are, the agreement named the Sibuco River, this now part of Kalimantan, Indonesia, and the Philippine Government should claim this river as well (Tregonning, 1970). Sabah also includes the Island of Labuan, ceded by Brunei to British in 1846. What is the rationale of the Philippines' claim on Sabah to include the island? This argument shows the Philippines' claim is too general and not specific.

Notwithstanding the issues raised by the Philippines or the heirs of the Sultanate of Sulu, grants say 'forever and in perpetuity'. Content of sentence is the most important, describing the purpose of the implied and should be resolved through legislation. If the specified period, perhaps a payment of \$5,300 a year is over, because the experts' opinion that the contract is legally valid at the time it was signed. But from the point of the latest legislation, the contract can be voidable because it was seen bias. Nor does the Sultan of Sulu will take back possession at a certain time, otherwise mention 'grant and cede... forever and in perpetuity'.

In summary, the content of the 'Deed of 1878' has relevant to the provision under the Rule Against Perpetuities specified in Common Law since there is no other law, in any circumstances directly related to the issue of this agreement.

## **CHAPTER FIVE**

### **RELATED DISCUSSION**

#### **5.1. Introduction**

This chapter present complete results of the study in the form of text to highlight the key information of international law approach, and common law applications related to the research question.

But first, to relate with the theoretical framework have to discuss government action regarding to the issue of the claimants to Sabah by the self-proclaimed of Sulu Sultanate. Next, further discussions will be made with the supporting of case law, relevance treaties, agreements, and court rulings pertaining to relate legal perspective. Based on the analysis, all matters will be compiled and discussed in terms of international law and common law, which is fundamental to this study.

#### **5.2. Securitization Response**

Maintaining peace and security of the federation, is a key part of the security enforcement. Security is not just any kind of speech-act, not just any form of social construction or accomplishment; it is a specific kind of act [because it] calls for extraordinary measures beyond routines and norms of everyday politics (Williams, 2003). In other words, just as the nature of ‘the political’ is determined by the division between friend and enemy, the nature of ‘security’ is determined by the

division between normal democratic rule obeyed politics and extraordinary politics beyond rules and regulations.

In line with Art 21(3) of the 1948 Universal Declaration of Human Rights demanded that ‘the will of the people shall be the basis of the authority of government’<sup>25</sup> - consequently, the government took measures to defend the sovereignty of Sabah,<sup>26</sup> after the Sulu terrorist attacks in March 2013. Malaysian government has established an ESSZONE and ESSCOM<sup>27</sup> in Sabah to curb recurrent attacks, especially from Sulu followers. Act in accordance with the securitization measures to maintain peace and security in the states of Malaysia as precautionary measures of action regarding the claim to Sabah by the self-proclaimed of Sulu Sultanate.

By that, the self-proclaimed of Jamalul Kiram III, Sulu Sultanate can be attributed with *do* take identities as socially constituted but not radically more so than other social structures (Wæver and Buzan, 2003). Identities as other social constructions can petrify and become relatively constant elements to be reckoned with. At specific points this “inert constructivism” enables modes of analysis very close to objectivist. Accordingly, Malaysia classifies attacks by followers of the Sultan of Sulu in March, 2013 as the ‘national security issue’ and it is not related to Article 51

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<sup>25</sup> International Bill of Human Rights, GA Res 217, UN GAOR, 3rd Comm, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217(III)[A-E] (10 December 1948), art 21(3).

<sup>26</sup> Nonintervention put means that sovereigns have the right to be free from interference by others in their domestic affairs. The doctrine of formal equality was also codified in Article 2 of the UN Charter. "The Organization is based on the principle of the sovereign equality of all its Members."

<sup>27</sup> Regulations Preservation of Public Security in 2013, recognizing the Safe Zone Committee Sabah East as the ultimate authority for ‘East Sabah Safe Zone’ (ESSZONE) applicable in 10 districts (Kudat, Kota Marudu, Pitas, Beluran, Sandakan, Kinabatangan, Lahad Datu, Kunak, Semporna and Tawau) as a basis for implementing; and ‘East Coast Sabah Special Security Area’ (ESSCOM) as the enforcement agents covering 10 districts. Whereas, Part 2 of 5 Subregulations 1 (Conservation Regulations Public Safety 2013) stated that a committee be established, and known as the Safe Zone Eastern Sabah - headed by the Chief Minister, and monitored by the Monitoring Committee chaired by the Prime Minister.

of the UN Charter,<sup>28</sup> which requires the Security Council to take measures in accordance with Articles 41 and 42 of the UN Charter.<sup>29</sup>

Schmitt (1996) in 'decisionist theory of sovereignty' argues that the political – i.e. the distinction between friend and enemy - is strongest in the case of emergency, when the decision making powers of the sovereign elevate 'he who is sovereign' above the rules and regulations of the legal system. On the issue of aggression and terrorist attacks by Sulu followers, Malaysia has accused the suspects as waging war against the Yang di-Pertuan Agong, Section 121 of the Penal Code (Act 574); and to the terror group under Section 130 (c) of the same Code; among others detained under the Security Offences (Special Measures) Act 2012 (SOSMA).

An extension of securitization as well, "it is in the realm of emergency that the essence of sovereignty as decision is most clearly illustrated" and clearly present in the process of securitization, where a securitizing actor is at its most efficient exactly because of operating 'legitimately' beyond otherwise binding rules and regulations (Williams, 2003). If the setting linked with Sabah issue, with the Surveillance Committee, the implementation and performance of the Safe Zone of Eastern Sabah will be observed. The committee will provide advice and direction, on what to do for the welfare of the people in the state - and this shows the Prime Minister (as the state actor) is concerned about the safety of the people on the east coast of Sabah.

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<sup>28</sup> Article 51 of the UN Charter states – Nothing in the present shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security (United Nations, 1945).

<sup>29</sup> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security (United Nations, 1945).



### **5.3. International Law Approach: Self-Determination**

Philippine Sulu Sultanate nor never do anything, did not administer and does not pass any law in Sabah, so they lost the title since Sabah was put under the administration of the British North Borneo Company in 1878 and later the British Empire, before being Granted independence to form the Federation of Malaysia with Sarawak and Malaya in 1963. This condition may be referred to Pulau Batu Puteh case whereby Malaysia lost its rights over the island to Singapore because, despite being the title holder, it had never administered by Malaysia or was present physically on the island.

Inter alia, case law of Island of Palmas case - between the Netherlands and the United States which was heard by the Permanent Court of Arbitration (Scott. Hague Court Reports, 1932). The question before the arbitrator was whether the Island of Palmas (Pulau Miangas), was a part of the territory of the United States or the Netherlands. The legal issue presented was whether a territory belongs to the first discoverer, even if they do not exercise authority over the territory, or whether it belongs to the state which actually exercises sovereignty over it. The Arbitrator's decision made by referring to the title based on contiguity has no standing in international law; the title by discovery is only an inchoate title. In turn, if another sovereign begins to exercise continuous and actual sovereignty, (and the arbitrator required that the claim had to be open and public and with good title), and the discoverer does not contest this claim, the claim by the sovereign that exercises authority is greater than a title based on mere discovery. Finally, Palmas was declared to be a part of the Netherlands East Indies, and is now part of Indonesia.

Referring to the issue of the Philippines' claim on Sabah, in the propose of right by historical, Spain held *inchoate title* when Sultanate of Brunei cede North Borneo to Sultanate of Sulu, then had to actually exercise authority that give meaning to relatively weak grounds. Therefore, even Sultanate of Sulu cede all rights, proprietary, title, dominion and sovereignty to Philippines government, they have no actual title to Sabah. Contiguity has no standing in international law that North Borneo was closer to Sulu Island, approach of *terra firma*, proximity was not an adequate claim to land.

Likewise, the peoples of Sabah in their will to join Federation of Malaya in Sept 16, 1963, within the context of *General Assembly Resolution 1541 (XV)*, *Principle IX of the Annex* is valid and complete compliance with the principles of self-determination under international law. The decision to reach and the outcome of third party settlements, through this acceptance of solution shows the ability of international law to exert a meaningful influence without an enforcement mechanism; thus international law has a powerful role to play (Huth et al., 2013).

The relevant reference case, ICJ 2001 judgment reject Philippines intervene in Malaysia-Indonesia case of Sipadan and Ligitan Island disputes emphasized that there is no application from Philippine Government (Mohamad, 2001). ICJ 2002 judgment, Sipadan and Ligitan Island awarded to Malaysia – there is implicit of self-determination in the judgment.<sup>30</sup> In this case also, the court cites the administration

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<sup>30</sup> ICJ ruling Sipadan and Ligitan Island, and the Philippine claims. Para 1 - It is this: historic title, no matter how persuasively claimed on the basis of old legal instruments and exercises of authority, cannot - except in the most extraordinary circumstances - prevail in law over the rights of non-self-governing people to claim independence and establish their sovereignty through the exercise of bona fide self-determination.

Para 15 - Accordingly, in light of the clear exercise by the people of North Borneo of their right to self-determination, it cannot matter whether this Court, in any interpretation it might give to any historic instrument or efficacy, sustains or not the Philippines claim to historic title. Modern international law does not recognize the survival of a right of sovereignty based solely on historic title; not, in any event, after an exercise of self-determination conducted in accordance with the requisites of international law, the bona fides of which has received international recognition by the political organs of the United Nations.

in a region, even with just waving flags in the region. Here it is obvious, since the British colonial era, the next time when Sabah became part of Malaysia, there is no flag waved by the Sultan of Sulu, Spain, the United States or the Philippines. In fact and under international law principles, the Philippines' claim to Sabah is totally lacked in foundation.

Continuous and peaceful display of sovereignty by British North Borneo, no evidence that North Borneo was a part of judicial or administrative organization of the Spanish government or even United States, or the Philippines. The US also had recognized the ownership of Malaysia over Sabah, though when RA 5446<sup>31</sup> was signed as statement made by US State Department Press Officer Robert J. McCloskey, but this issue has been resolved whereby President Gloria Macapagal-Arroyo signed the RA 9552,<sup>32</sup> amending the RA 5446 on March 10, 2009.

However, British Colonial showed that the British North Borneo Company had negotiated with the Sultanate of Brunei and Sultanate of Sulu since 18<sup>th</sup> century and had exercised sovereignty including the denial of other nationals on the territory – if actually exercised, there would be conflicts, but no relevant evidence occurred. No other sovereign begins to exercise continuous and actual authority – thus, no need to be open and public and with good title of Sabahans. Inhabitants and historical facts does not contest the Philippines claim, the claim by the sovereign that exercises

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Against this, historic claims and feudal pre-colonial titles are mere relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium.

Para 16 - The lands and people claimed by the Philippines formerly constituted most of an integral British dependency. In accordance with the law pertaining to decolonization, its population exercised their right of self-determination. What remains is no mere boundary dispute. It is an attempt to keep alive a right to reverse the free and fair decision taken almost 40 years ago by the people of North Borneo in the exercise of their legal right to self-determination. The Court cannot be a witting party to that.

<sup>31</sup> Congress approves Senate Bill No. 954 that delineates the baselines of the Philippines and provides that “the territory of Sabah, situated in North Borneo, over which the Republic of the Philippines has acquired dominion and sovereignty.” Upon the recommendation of the Foreign Policy Council, President Marcos signs Senate Bill No. 954 and became Republic Act No. 5446 on Sept 18, 1968.

<sup>32</sup> In fulfillment of the second Malaysian stipulation, President Gloria Macapagal-Arroyo removes mention of Sabah or North Borneo in the archipelagic Baselines of the Philippines law.

authority is greater than a title based on mere historical facts as in the case of Palmas Island.

For overall, in this connection the Philippines have not respected the ‘self-determination’ of Sabah, indirectly questioning the sovereignty of Sabah; but the situation is clearly shown through the Cobbold Commission of 1962 as the will of the Sabahans had chosen to form Malaysia with Sarawak and Malaya – this was consistent to Article 1 of the UN Charter.<sup>33</sup> Under the international law, the right to self-determination must always override any past historical claim, thus this issue was non-negotiable.

#### **5.4. Common Law Application: Deed of 1878**

Physically, there is little difference in the copy of the ‘Deed of 1878’ (see Appendix B and Appendix C). The validity of this grant authenticity cannot be proven, unless the original grant obtained from the British or the Malaysian government. However, as both the translation (see Appendix D and Appendix E) states that ‘forever and in perpetuity’, thus the purpose clearly shows its relation to the Rule Against Perpetuities under Common Law of England.

In early discussions, the application of English law or common law is specified in the statutes, Section 5 of the Criminal Procedure Code<sup>34</sup> states that English law shall be applied in cases where no specific legislation has been enacted. Similarly, in the

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<sup>33</sup> Article 1 of UN Charter – friendly relations of nations should be based on “respect for the principle of equal rights and self-determination of peoples.”

<sup>34</sup> Section 5 of the Criminal Procedure Code (Act 593) - Laws of England, when applicable, provides “As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law being in force the law relating to criminal procedure in force in England shall be applied as the same shall not conflict or be inconsistent with this Code and can be auxiliary thereto” [Amendment Act 324].

context of civil law, Sections 3 and Section 5<sup>35</sup> of the Civil Law Act allows for the application of English common law, equity rules, and statutes in Malaysian civil cases where no specific laws have been made. Although the court is only bound by the common-law and equity of England and the statutes of general application (Sabah and Sarawak) effective on the date specified, but the principles of English law has developed since that date.

In 2007, the Chief Justice of Malaysia, Ahmad Fairuz Abdul Halim questioned the need to resort to the English common law despite Malaysia having already been independent for 50 years (The Star, 22 August 2007) and proposed to replace it with Islamic law jurisprudence or sharia law (The Star, 24 August 2007). However, the Malaysian Bar Council responded by saying that the common law is part of Malaysian legal system and that there is no basis to replace it (The Star, 23 August 2007); though the court appeals to the Privy Council in England have already been abolished in 1985. Refer to Steve Shim CJ (2006):

“In *Jamal bin Harun v. Yang Kamsiah & Anor* [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) 11 (PC), a ‘running down’ case in which the issue of itemization of damages was in question, Lord Scarman, delivering the judgment of the Board, *inter alia*, said: Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the courts will have regard to the circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so.”

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<sup>35</sup> Section 5 of the Civil Law Act 1956 (Act 67) - Application of English law in commercial matters, provides “5(1) In all questions or issues which arise or which have to be decided in the States of Peninsular Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law; (2) In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.”

The principle of *stare decisis*<sup>36</sup> also applies in Malaysian Law; an application of this doctrine is based on their application in the UK. This means that any decisions by a court higher in the hierarchy will be binding upon the lower courts. For more information, Common Law applied in; Peninsula Malaysia - the law as far as 7 April 1956; Sabah - the law as far as December 1, 1951; and Sarawak - the law as far as December 12, 1949. Means - any amendments to English law after the dates are only persuasive in nature (can be referenced but not used directly). The application of these principles is subject to: it is used only if there was no statute in Malaysia regulating, or providing for the matter; and only the principles of English law to suit local conditions can be used. Though, the Rule Against Perpetuity is found in Part VII, Sections 17 to 25 of the Civil Law Act 1956 (George, 2001), but this is an act relating to the civil law to be administered in Malaysia [Peninsular Malaysia, 7 April 1956; Sabah and Sarawak, 1 April 1972, PU (A) 424/1971] related to Disposal and Devolution of Property for the moment, therefore, it cannot be associated with the agreement made by Overbeck and the Sultan of Sulu in 1878 ago.

Common Law and the rules of equity and statutes of general application shall be applied as far as consented to by the states in Malaysia and its inhabitants, and subject to adjustment by the local conditions. Even though the effects of the provisions under Common Law in Sabah are cut-off on 1 December 1951, but, besides that the Common Law of England and the rules of equity, statutes of general application are also applicable. The proceedings by way of habeas corpus or for an order of mandamus, an order of prohibition, an order of certiorari or for an

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<sup>36</sup> The court shall follow previous decisions of higher courts and its decisions itself earlier (in some cases), and the courts are equivalent (in the present and the past, if any, as long as the courts are located in the hierarchy/order the same).

Note: In the application of the doctrine of stare decisis or binding precedent, only the ratio decidendi of the case and not binding on later cases obiter dictum or side judge reality. The ratio decidendi are the principles of law which is the basis / foundation of the decision of the case.

injunction shall be available in Sabah in the same way as they are available in England (Mohamad, 2004). In other words, a case decided after the cut-off date can make the principles of the earlier judgment, because there is not a judgment that does not refer to the earlier precedents; as an example in the case of *Hedley Byrne & Co Ltd v. Heller & Partners* [1964] AC (HL) 465.

As an extension of the arguments, there is no “local circumstances” or “local inhabitants” indirectly to “perpetuity terms” (as stated in Deed of 1978) if referred to Malaysia law, thus common law is relevant and can be applied to the settlement of ‘Deed of 1878’ through the provision under *Section 12, Perpetuities and Accumulations Act 2009* indicate the trustees of a trust created before April 6, 2010, rules against perpetuity provides to trustees that shall be apply to replace that perpetuity period with a 100 year fixed period. Refer cases, Rule Against Perpetuities as emphasized in *Re Tan Lip Buoy’s Will* [1996] 2 SLR 663-12 [1448]. This is an example of a case related to the Rule Against Perpetuities, and the applicable provisions of the Common Law in Singapore.<sup>37</sup>

Since there is no statutory provisions under the local laws, thus by Section 3 of the Civil Law Act 1956 (Act 67) the Courts of Malaya could apply the common law of England (George, 2001). However, the application of the common law in England can be done by the local government of Sabah through the application of a civil suit in the High Court of Sabah, against the heirs of the Sultanate of Sulu, because the agreement does not involved neither the Malaysia government nor the Philippine government when it was signed on 22 January, 1878. Whether Overbeck or the Sultan of Sulu in 1878, do not represent their respective governments, and the

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<sup>37</sup> The English statutes are in force in Singapore. The Application of English Law Act (Cap 7A) lists the UK statutes (as applied in England and Wales) that are applicable in Singapore. Section 4 and the First Schedule are the operative provisions. Section 3 applies English common law and equity as of 12th November 1993 (Singapore Institute of Legal Education, 2013).

agreement is carried out not in the knowledge of the British Crown and Spain, nor United States. Refer to previous case on December 18, 1939, the Civil Suit No. 169/39, held in High Court of the State of North Borneo; it presents no problem if the case is carried out in the High Court of Sabah nowadays. If the latest issue involves the governments of Malaysia and the Philippines, then it can be resolved through the ICJ, but on the other hand, it will be costly.

### **5.5. Evaluation**

The state of Sabah has been under the effective control of Malaysia and its predecessors in title since the late 19<sup>th</sup> century (Mohamad, 2001); and never been under control of the Philippines or its predecessors in title, nor *de facto* of the Sultanate of Sulu. The Philippines' claim to Sabah was first raised in 1962, but it was never presented to the British North Borneo Company neither to Britain Crown. Philippines were a leader of the decolonization movement and a regular member of the Committee when Great Britain was reported on North Borneo to the Committee established under *Article 73(e), United Nations Charter in 1946*, but never raised any claim that time and in fact never recorded by United Nations (UN Yearbook).

The British North Borneo Company clearly manifested occupation and prescription of the territory of North Borneo accordance to international law, especially after getting the grant of the Royal Charter from Great Britain in 1881. Recognition from Spain in 1885 was also clear, when Spain relinquish claims over North Borneo and set the zone's three maritime leagues from the coast to the British North Borneo Company. Convention in 1930 also reflects well on the geographical demarcation



of the Philippines. North Borneo joined the Federation of Malaya in 1963, with the title of Sabah through the formation of Malaysia.

Peaceful settlement took place for a long period, failed to reach a final decision. Malaysia should agree to bring this case to ICJ. The wishes of the peoples of Sabah within the context of *General Assembly Resolution 1541 (XV)*, *Principle IX of the Annex* is necessary to ensure complete compliance with the principles of self-determination. The settlement of 'Deed of 1878' through the provision under *Section 12, Perpetuities and Accumulations Act 2009* is relevant as there are no provision has been made by statute law. The application of the common law in England can applied such as the case of *Jamal bin Harun v. Yang Kamsiah & Anor* [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) 11 (PC).

International law approach is significance in this issue to gain solution through third party settlements. The binding decision by the ICJ will end the disputes, and the common law provisions will resolve the problem of cession money issues, where the real issue actually is the meaning implicit in the grant and content of Deed of 1878 itself.

## CHAPTER SIX

### CONCLUSION AND RECOMMENDATIONS

#### 6.1. Introduction

As this is the last chapter, all information found for the study will address the main findings which eventually answer the two research questions, highlight the significance of the study, and most importantly propose a legal solution for Sabah disputes. This project paper demonstrates the continuing fascination of scholars by Malaysian, Filipinos and foreign nationals. However, it is only an introduction to the works available as a desk research, and not includes other pertinent sources to undertake study of the subject. Some important works have been included and significant to knowledge, but need to explore other relevant materials.

#### 6.2. Legal Solution for Sabah Disputes

This subsection is a solution to the research questions related to Sabah disputes. Relating to first question, “to what extend the peoples of Sabah willingness to join Federation of Malaysia in 1963 deny the principle of ‘*self-determination*’ causing the Philippines to maintain their claims?” This research find that the *General Assembly Resolution 1541 (XV)*, *Principle IX of the Annex* is valid with the principles of self-determination under international law. As arguments from the legal perspective of the Malaysian government, *Protocol of Sulu of March 7, 1885*, by Great Britain, Germany and Spain in Madrid Convention, whereby Spain

abandoning all claim to the portions of North Borneo which are included in the British North Borneo Company; as a results the treaty lines did not include North Borneo under Treaty of Paris when Spain cedes the Philippines Island to the United States in 1898; and *Convention of January 2, 1930*, by Great Britain and United States, defines the geographical demarcation of the Philippines, is meant to strengthen the argument because North Borneo was governed by British.

As regards to the second question, “what are the relevant laws that maybe used to resolve the issue of Deed of 1878, which contains the requirements of ‘cession money’ that need to be paid annually by the Malaysian government to the heirs of the Sultanate of Sulu?” The findings is through the settlement of ‘Deed of 1878’ by the provision under *Section 12, Perpetuities and Accumulations Act 2009* that is relevant as provided under Section 3 of the Civil Act, 1956, stipulated the acceptance of the common law of England, the rules of equity and statutes of general application. In this situations, there is no law governing a particular circumstances related to Malaysian law. Under Section 12, state that the trustees of a trust created before April 6, 2010 with a perpetuity period defined by reference to ‘*lives in being*’ will be able to apply to replace that perpetuity period with a 100 year fixed period, if they can demonstrate that it is difficult to ascertain whether the relevant lives in being have ended.

In other words, these two questions in this study have been answered in this sub-section, and it shows the most relevant findings.

### **6.3. Conclusion and Recommendations**

The decision of the peoples of Sabah to join the Federation of Malaysia in 1963; as a sovereign state clearly satisfy the principle of ‘self-determination’ under international law, and that is the end of British colonialism. The author opines that Malaysian option to solve the Philippines’ claim on Sabah issues through peaceful settlements is possible, except that it should also be strongly supported by legal arguments and factual circumstances. Although the issue of Deed of 1878 can be resolved in the High Court of Sabah through the provisions under common law, to avoid injustice, then the other must be a higher body, to make a final decision and will not be disputed.

Malaysia needs to take clear decision and other judgment of ICJ to review the content of Deed of 1878, which stated word ‘in perpetuity’ to end the payment of ‘cession money’ to the heirs of Sulu Sultanate; and indirectly will terminate the Philippines claim. From another point of view, Malaysia is also possible, through the High Court asking for opinions or reviews in writing to the ICJ without directly involving the Philippine government, and then publicized after the results obtained.

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## APPENDICES

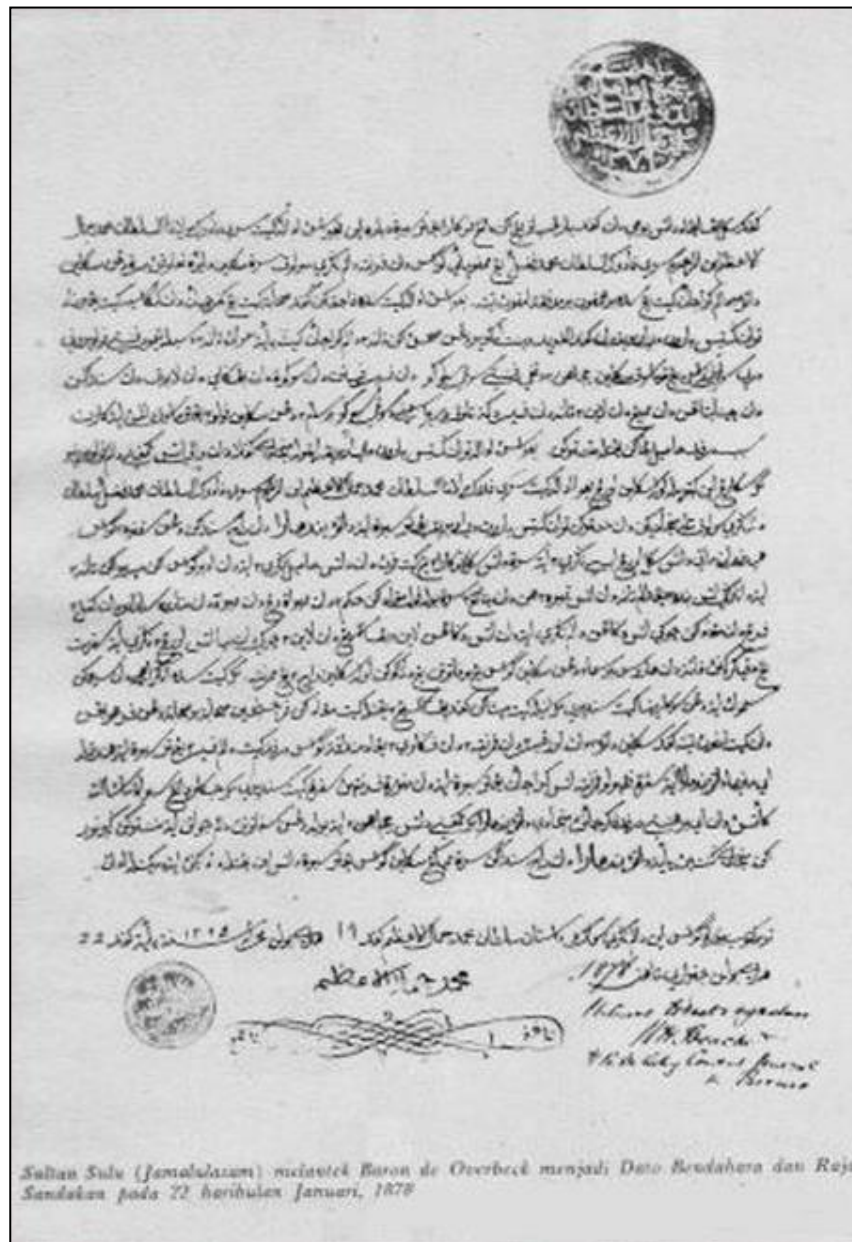
### Appendix A Grant of Brunei and Overbeck (in Arabic letters)



Source: Brunei Times, under the Golden Legacy column (21 September 2008). Also available in "Sabah, Brunei's Former Northern Territory" posted by Rozan Yunus on September 24, 2008 at <http://bruneiresources.blogspot.com>

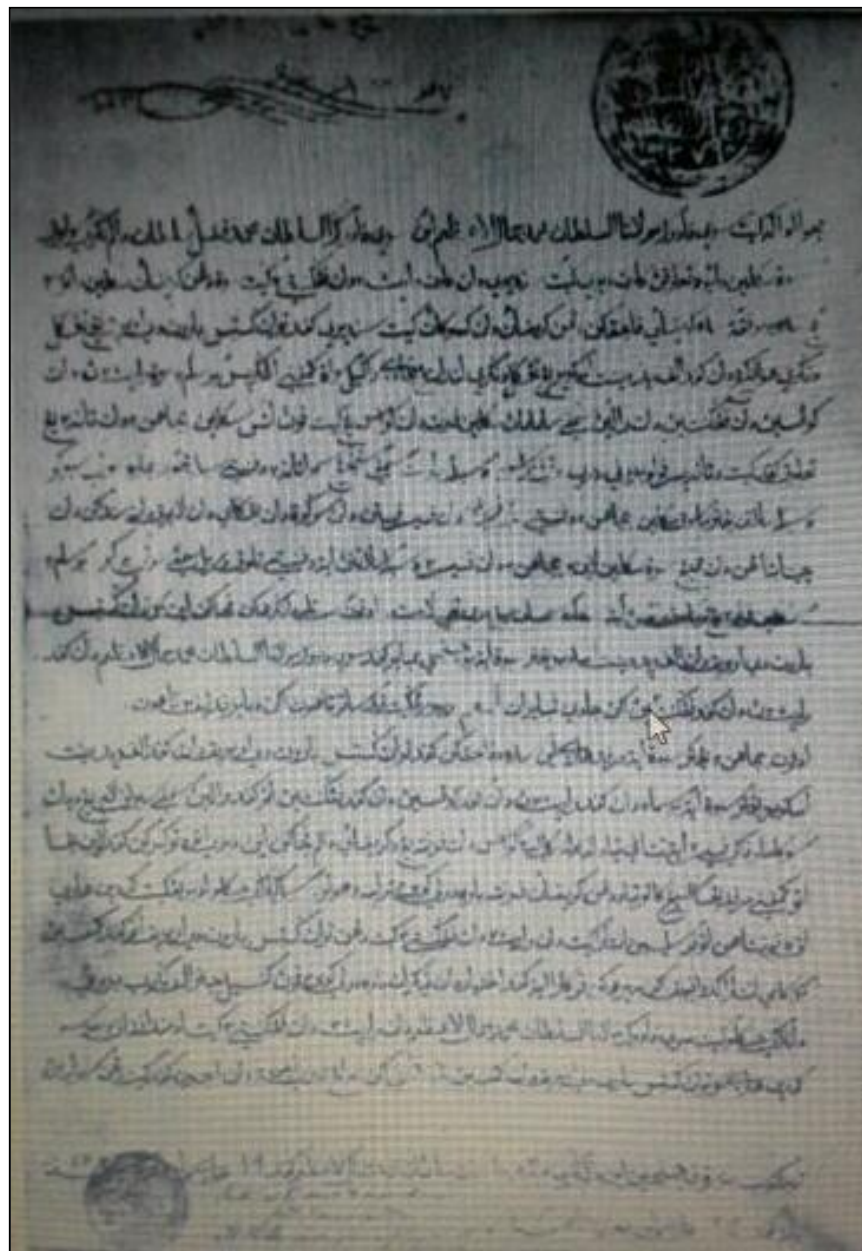
## Appendix B

### Deed of 1878 (in Arabic letters)



*Source:* Brunei Times, under the Golden Legacy column (21 September 2008) – grant of Sulu Sultanate and Overbeck, 1878. Also available in “Sabah, Brunei’s Former Northern Territory” posted by Rozan Yunos on September 24, 2008 at <http://bruneiresources.blogspot.com>

**Appendix C**  
**Deed of 1878 (in Arabic letters)**



Source: The original photocopy of 'Deed of 1878' by Ortiz (1963) in *Philippines Studies* – grant of Sulu Sultanate and Overbeck, 1878.

**Appendix D**  
**Translation of Deed of 1878 (British Version)**

**GRANT BY SULTAN DE SULU OF TERRITORIES AND LANDS ON THE  
MAINLAND OF THE ISLAND OF BORNEO.**

**Dated 22nd January, 1878.**

We Sri Paduka Mauh Al Sultan Mohamet Al Alam Bin Sri Paduka Almarhom Al Sultan Mohamet Fathlon Sultan of Sulu and the dependencies thereof on behalf of ourselves our heirs and successors and with the consent and advice of the Datus in council assembled hereby grant and cede of our own free and sovereign will to Gustavus Baron de Overbeck of Hong Kong and Alfred Dent, Esquire, of London as representatives of a British Company co-jointly their heirs, associates, successors, and assigns forever and in perpetuity all the rights and powers belonging to us over all the territories and lands being tributary to us on the mainland of the island of Borneo commencing from the Pandassan River on the northwest coast and extending along the whole east coast as far as the Sibuco River in the south and comprising amongst others the States of Paitan, Sugut, Bangaya, Labuk, Sandakan, Kina Batangan, Muniang, 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.

In consideration of this grant the said Baron de Overbeck and Alfred Dent promise to pay as compensation to His Highness the Sultan Sri Paduka Maulana al Sultan Mohamet Jamal Al Alam, his heirs or successors the sum of five thousand dob per annum.

The said territories are hereby declared vested in the said Baron de Overbeck and Alfred Dent, Esquire, co-jointly their heirs, associates, successors, or assigns for as long as they choose or desire to hold them. Provided however that the rights and privileges conferred by this grant shall never be transferred to any other nation or company or foreign nationality without the sanction of Her Britannic Majesty's Government first being obtained.

In case any dispute shall arise between His Highness the Sultan, his heirs or successors, and the said Gustavus Baron de Overbeck or his, Company, it is hereby agreed that the matter shall be submitted to Her Britannic Majesty's Consul-General for Borneo.

The said Gustavus Baron de Overbeck on behalf of himself and his Company further promises to assist His Highness the Sultan, his heirs or successor with his best counsel and advices whenever His Highness may stand in need of the same.

Written in Likup in Sulu at the Palace of his Highness Mohamet Jamalul Alam on the 19th Moharam A.H. 1295, answering to the 22nd January, A.D. 1878.

*Source:* Ortiz (1963), Philippines Studies in a translation of 'Deed of 1878', by Maxwell and Gibson, (London 1924) in Treaties and Engagements Affecting the Malay States and Borneo.

**Appendix E**  
**Translation of Deed of 1878 (Sultanate of Sulu Version)**

**GRANT BY THE SULTAN OF SULU OF A PERMANENT LEASE  
COVERING HIS LANDS AND TERRITORIES ON THE ISLAND OF  
BORNEO.**

**Dated January 22, 1878.**

We, Sri Paduka Maulana A1 Sultan Mohammed Jamalul Alam, Son of Sri Paduka Marhum A1 Sultan Mohammed Pulalum, Sultan of Sulu and of all dependencies thereof, on behalf of ourselves and for our heirs and successors, and with the expressed desire of all Datus in common agreement, do hereby desire to lease, of our own free will and satisfaction, to Gustavus Baron de Overbeck of Hong Kong, and to Alfred Dent, Esquire, of London, who act as representatives of a British Company, together with their heirs, associates, successors, and assigns forever and until the end of time, all rights and powers which we possess over 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 the Sibuku River on the south, and including all territories, on the Pandassan River and in the coastal area, known as Paitan, Sugut, Banggai, 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.

In consideration of this (territorial?) lease, the honorable Gustavus Baron de Overbeck and Alfred Dent, Esquire, promise to pay His Highness Sultan Maulana Mohammed Jumalul Alam and to his heirs and successors, the sum of five thousand dollars annually, to be paid each and every year.

The above mentioned territories are from today truly leased to Mr. Gustavus Baron de Overbeck and to Alfred Dent, Esquire, as already said, together with their heirs, their associates (company) and to their successors and assigns for as long as they choose or desire to use them; but the rights and powers hereby leased shall not be transferred to another nation, or a company of other nationality, without the consent of Their Majesties, Government.

Should there be any dispute, or reviving of old grievances of any kind, between us, and our heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter will be brought for consideration or judgment to Their Majesties, Consul-General in Brunei.

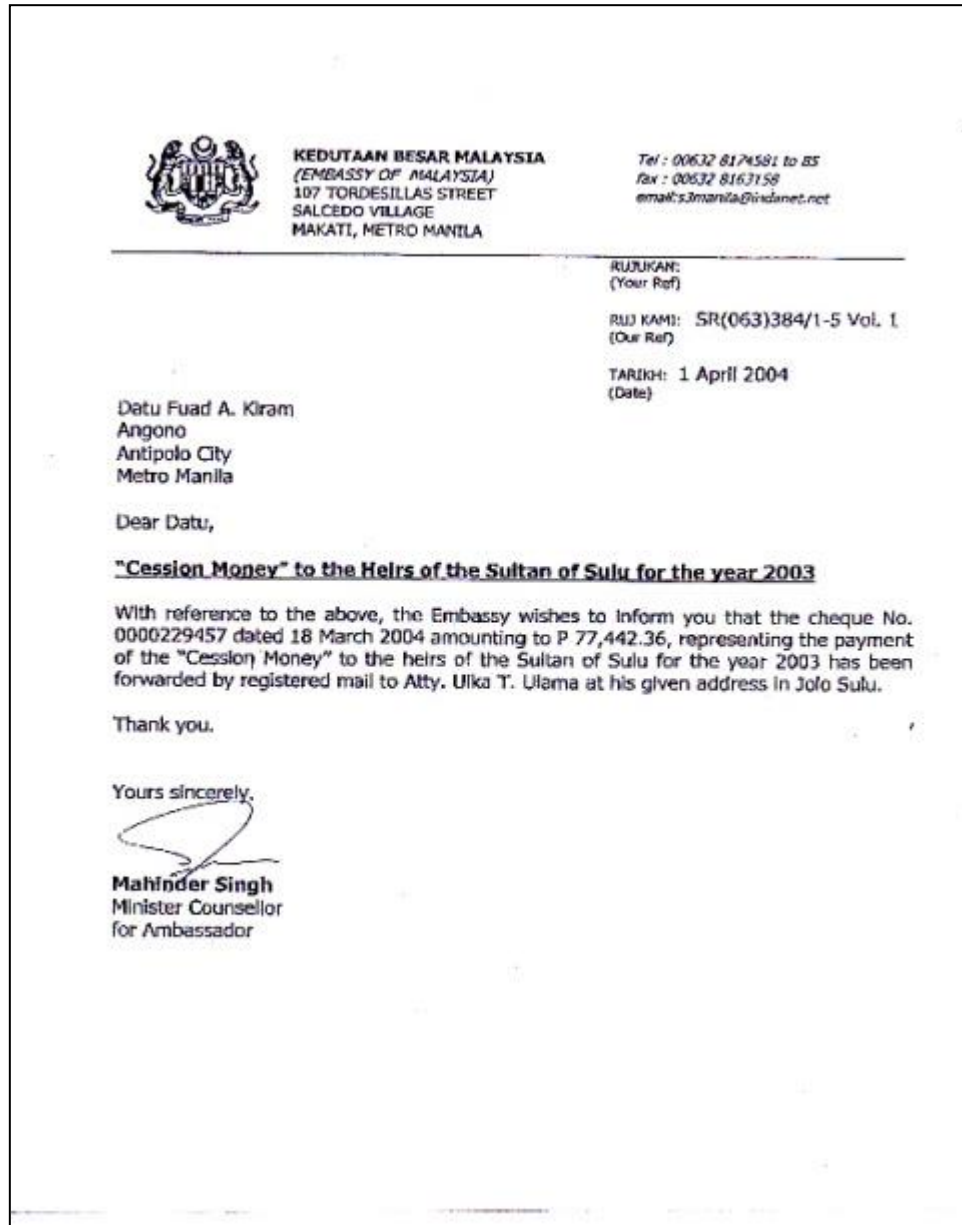
Moreover, if His Highness Maulana A1 Sultan Mohammed Jamalul Alam, and his heirs and successors, become involved in any trouble or difficulties hereafter, the said honorable Mr. Gustavus Baron de Overbeck and his company promise to give aid and advice to us within the extent of their ability.

This treaty is written in Sulu, at the Palace of the Sultan Mohammed Jamalul Alam, on the 19th day of the month of Muharam, A.H. 1295; that is on the 22nd day of the month of January, year 1878. Seal of the Sultan Jamalul Alam. Witness to seal and signature (Sgd.) W. H. Treacher H.B.M. Acting Consul General in Borneo.

*Source:* Ortiz (1963), in *Philippines Studies*, a translation of 'Deed of 1878' by Prof. Harold C. Conklin of Yale University in 1946.

## Appendix F

### Malaysian 'Cession Money' Payment for Sabah year 2003





Source: Annual "Cession Money" payment by Malaysian Embassy to the heirs of Sultanate of Sulu as posted by Drs. Khalil Idham in "Hentikan Segera Bayaran Ufti Kepada Kesultanan Sulu - Karpal Singh" (Bernama, 12 March 2013). Available at: <http://www.idhamlim.com>



## Appendix G

### Resolution urging Malaysian Government to settle the Proprietary Rights of the legal heirs of the Sultan of Sulu

 Republic of the Philippines Autonomous Region in Muslim Mindanao <b>PROVINCE OF SULU</b> Patikul <b>Sangguniang Panlalawigan Ng Sulu</b>	 Republic of the Philippines Autonomous Region in Muslim Mindanao <b>PROVINCE OF SULU</b> Patikul <b>Sangguniang Panlalawigan Ng Sulu</b>		
<p style="text-align: center;"><b>RESOLUTION NO. 27-2008</b> 10<sup>th</sup> Session</p> <p style="text-align: center;">Sponsored by: <i>Hon. Hector M. Buclao</i></p> <p><b>RESOLUTION URGING THE MALAYSIAN GOVERNMENT TO SETTLE THE PROPRIETARY RIGHTS OF THE LEGAL HEIRS OF THE SULTAN OF SULU AS EMBODIED IN THE 1939 JUDGEMENT OF CHIEF JUSTICE C.F.C. MACASKIE OF DECEMBER 18, 1939.</b></p> <p>WHEREAS, the Sulu Sultanate has been in existence as an independent Sovereign State since 14<sup>th</sup> Century;</p> <p>WHEREAS, North Borneo known as the <b>SABAH</b>, became part of Sulu, and has been under the dominion of the Sulu Sultanate since 1705;</p> <p>WHEREAS, in January 22, 1875, the Sabah has been leased by the Sultan of Sulu to Gustavos De Overbeck and Alfred Dent of the North Borneo Company;</p> <p>WHEREAS, Sultan Jamalul Kiram II had succeeded to the Sultanate of Sulu in the year 1894, he died on June 7, 1936 without any children but survived by heirs;</p> <p>WHEREAS, in the year 1939, Dayang-Dayang Hadji Piandao, Putih Tarhata Kiram, Putih Sakinur-in Kiram, Esmail Kiram, Punjungan Kiram, Siti Mariani Kiram, Siti Rada Kiram, Siti Jahara Kiram and Mora Napsa filed a Civil Suit against the Government of the North Borneo and others;</p> <p>WHEREAS, in the judgement of Chief Justice C.F.C. Macaskie of 1939, all the above heirs of the Sultan of Sulu were named as the successors to the Sultan of Sulu and has since then been receiving the Annual Customary Payment from the North Borneo Government in the amount of 5,300 ringgits or equivalent to Seventy Thousand Pesos (P70,000.00);</p> <p>WHEREAS, the heirs of the Sultanate of Sulu through counsel has been demanding for the increase of the Annual Customary Payment to at least Five Hundred Million USD (USD 500,000,000.00), but Malaysian Government has never entertained such request;</p> <p>WHEREAS, Sabah became part of the Federation of Malaysia since 1963, and has since then been renting the Annual Customary Payment to the heirs of the above mentioned names heirs but only RM 5,300 annually;</p> <p>WHEREAS, last May 25, 2008, during the meeting of the MNLF in Davao City, attended by MNLF all over Mindanao, MNLF Chairman Nur P. Misuari call the attention of the Malaysian Government to settle the Sabah issue, or he will ask this matter be brought to the International Court of Justice;</p> <p>WHEREAS, the statement of MNLF Chairman Misuari has triggered various reactions from the Sabahans, and therefore require immediate resolution to avoid any repercussion in the future;</p>	<p style="text-align: right;">Page 2/Res. 27-2008</p> <p>NOW THEREFORE, in view of all foregoing considerations and in the interest of permanent peace in this jurisdiction and untoward in incident;</p> <p><b>RESOLVED, AS IT IS HEREBY RESOLVED</b>, that the Sulu Provincial Government urge the Malaysian Government to resolve the Sabah proprietary rights claim of the Sultan with legal heirs of the Sultan of Sulu embodied in the Macaskie Judgement of 1939;</p> <p><b>RESOLVED FURTHER</b>, that this resolution be officially presented to the proper authority of the Malaysian Government;</p> <p><b>RESOLVED FURTHERMORE</b>, the sum of Five Hundred Million USD (USD500,000,000.00) be appropriated to fully implement this Resolution</p> <p><b>CARRIED UNANIMOUSLY.</b></p> <p><b>ADOPTED</b> this 24<sup>th</sup> day of June 2008 at the SPS Session Hall, Provincial Capitol, Jolo, Sulu.</p> <table style="width: 100%;"> <tr> <td style="width: 50%;"> <p><i>[Signature]</i> <b>HON. NADZALY H. MALDISA</b> Board Member, 1<sup>st</sup> District</p> <p><i>[Signature]</i> <b>HON. AL KHADAR T. LOONG</b> Board Member, 1<sup>st</sup> District</p> <p><i>[Signature]</i> <b>HON. LYNDEN S. TULAWIE</b> Board Member, 1<sup>st</sup> District</p> <p><i>[Signature]</i> <b>HON. NURIHATA M. SALAHUDDIN</b> Board Member, Rep. Women Sector</p> </td> <td style="width: 50%;"> <p><i>[Signature]</i> <b>HON. KHALIL T. HAJIBIN</b> Board Member, 2<sup>nd</sup> District</p> <p><i>[Signature]</i> <b>HON. HECTOR M. BUCLAO</b> Board Member, 2<sup>nd</sup> District</p> <p><i>[Signature]</i> <b>HON. MALCON T. TULAWIE</b> Board Member, FACB President</p> <p><i>[Signature]</i> <b>HON. BASARON M. BURAHAN</b> Board Member, Rep. Urban Poor, Indigenous People &amp; Disabled Sector</p> </td> </tr> </table> <p><b>CERTIFIED CORRECT:</b></p> <p><i>[Signature]</i> <b>ESTHER U. HASSAN</b> Provincial Board Secretary</p> <p><b>APPROVED:</b></p> <p><i>[Signature]</i> <b>HON. ABDUSKUR M. TAN</b> Provincial Governor Date: <i>09-08-08</i></p> <p><b>TESTED:</b></p> <p><i>[Signature]</i> <b>HON. AL-BAKIL D. JIKIRI</b> Board Member, 1<sup>st</sup> District Temporary Presiding Officer</p> <p><b>Certified true xerox copy from the original:</b></p> <p><i>[Signature]</i> <b>AIDA S. ABURAKAR</b> Board Secretary II</p>	<p><i>[Signature]</i> <b>HON. NADZALY H. MALDISA</b> Board Member, 1<sup>st</sup> District</p> <p><i>[Signature]</i> <b>HON. AL KHADAR T. LOONG</b> Board Member, 1<sup>st</sup> District</p> <p><i>[Signature]</i> <b>HON. LYNDEN S. TULAWIE</b> Board Member, 1<sup>st</sup> District</p> <p><i>[Signature]</i> <b>HON. NURIHATA M. SALAHUDDIN</b> Board Member, Rep. Women Sector</p>	<p><i>[Signature]</i> <b>HON. KHALIL T. HAJIBIN</b> Board Member, 2<sup>nd</sup> District</p> <p><i>[Signature]</i> <b>HON. HECTOR M. BUCLAO</b> Board Member, 2<sup>nd</sup> District</p> <p><i>[Signature]</i> <b>HON. MALCON T. 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Source: Approval of payment to the sultanate of Sulu by Muhamad Zaki Mustafa in "Kisah Kesultanan Sulu 'Memajak Sabah' kepada Malaysia" (22 February 2013). Retrieved at <http://inisekadarinfo.blogspot.com>