

# ATENEO LAW JOURNAL

## LEGAL ASPECTS OF THE NORTH BORNEO QUESTION \*

*Pacifico A. Ortiz*

The question of political sovereignty over British North Borneo first became a matter of public official concern for the Philippine Government when in a press statement given on June 23, 1962, President Macapagal, reading from the diplomatic note delivered the day before to the British Ambassador to the Philippines, declared:

The Government of the Philippines believes that any dispute between our two countries can be settled peacefully and in an atmosphere of goodwill and amity. In this spirit, I would request you to convey to Her Majesty's Government the desire of the Philippine Government to have conversations started either in Manila or in London between the representatives of our two Governments in order that the matter of *ownership, sovereignty and jurisdiction* and all other relevant points at issue in the North Borneo question may be fully discussed. (Italics added).

This diplomatic note was in reply to the British *aide-mémoire* handed to the Philippine Ambassador in London on May 24, 1962, which among other things stated:

Her Majesty's Government are convinced that the British Crown is entitled to and enjoys sovereignty over North Borneo and that no valid claim to such sovereignty could lie from any quarter, whether by inheritance of rights of the Sultan of Sulu (the only rights of his heirs being to continue to receive their shares of cession money) or by virtue of former Spanish and American sovereignty over the Sulu Archipelago in the Philippine Islands. In the interest of the people of British North Borneo, no less than because of their undoubted legal rights, Her Majesty's Government would be bound to resist any claim to part of North Borneo whether advanced by the Philippine Government or by private persons in the Philippines.

\* Courtesy of PHILIPPINE STUDIES, Vol. II No. 1 (Jan. 1963).

Copyright 1963 under Act 3134, by the College of Law, Ateneo de Manila. Reproduction of editorial matter in any manner, in whole or in part, without the permission of the publisher is prohibited.

*The Ateneo Law Journal* is published four times during the academic year by the student body of the Ateneo College of Law.

Unsigned and uninitialed writing are by members of the Editorial Board  
Subscription rates: ₱4.00 per issue; ₱14.00 per year. Foreign rates: \$1.50 per issue; \$5.00 per year.

3  
try  
ed  
ist-  
ov-  
eir  
ity  
te-  
an  
  
ng  
m-  
ch  
ve  
ad  
ch  
p-  
m-  
se  
il-  
al  
he  
re  
  
il-  
a-  
re  
at  
re  
e-  
  
s.  
it  
r-  
D,  
a  
  
y  
st  
a-  
e

With this exchange of notes, the North Borneo question which was first brought to the attention of the Philippine Government sixteen years ago by Francis B. Harrison<sup>1</sup>, former American Governor General and at the time, adviser to President Roxas, took on a definite meaning and raised a definite issue between the Republic of the Philippines and Great Britain: the *issue of sovereignty over North Borneo*.

Since 1946, a number of unpublished memoranda<sup>2</sup> have been made by officials of the Department of Foreign Affairs and by other experts at the behest of the Government, but for lack of a formal request from the Sultan's heirs for government intervention on their behalf on the issue of sovereignty, the Philippine Government held this matter under study all these years. Such a request for intervention was made at long last by the heirs on February 5, 1962, sometime 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 they intend to set up by August of 1963.<sup>3</sup>

Prior to this, however, there had been many attempts on the part of the heirs of the Sultan to negotiate on a private level with the British North Borneo Company and with the British Government for a more equitable compensation for the lease of the North Borneo territory. At one time in 1946, Judge Teopisto Guingona was engaged as attorney-in-fact of the heirs. Later, in 1957, a syndicate headed by Nicasio Osmeña, also acting as attorney-in-fact for the heirs, attempted without success to negotiate with the British Foreign Office for a lump sum payment of fifteen million U.S. dollars in full settlement

<sup>1</sup>Harrison said in his memorandum of February 27, 1947, addressed to Secretary of Foreign Affairs and Vice-President Quirino regarding the annexation of North Borneo as a British Crown Colony: "The action of the British Government in announcing on the 16th of July (1946), just 12 days after the inauguration of the Republic of the Philippines, a step taken by the British Government unilaterally, and without any special notice to the Sultanate of Sulu, nor consideration of their legal rights, was an act of political aggression, which would be promptly repudiated by the Government of the Republic of the Philippines. The proposal to lay this case before the United Nations should bring the whole matter before the bar of world opinion." *Borneo Records*, I. Manila: Department of Foreign Affairs (DFA), 434 pages.

<sup>2</sup>Among the records of the Department of Foreign Affairs, the writer finds memoranda submitted by Gov. Harrison, Counsellor Madamba, Ambassador Melencio, Dr. Beyer, Judge Regala, Dr. Borja, Mr. Abubakar, Mr. Usman, Mr. Katigbak, Mrs. Garmsen, Mr. Giron, Mr. Vamenta, Judge Guingona, Minister Quintero, and others.

<sup>3</sup>See J. C. Orendain: *Petition Addressed by the Heirs of the Sultan of Sulu to the Department of Foreign Affairs Re Their Claim of Proprietary Rights Over North Borneo and Philippine Sovereignty Over the Territory*; *Borneo Records*, DFA, Manila.

of the lease agreement. Finally, as referred to above, on February 5, 1962, J. C. Orendain acting as counsel for the heirs, submitted a formal petition to the Department of Foreign Affairs requesting official assistance "in presenting this matter before the Government of the United Kingdom, that they may regain their proprietary rights over the territory, and that the sovereignty over North Borneo shall be turned over to the Philippine Republic, being the home and the country to which the Sultan owed allegiance."<sup>4</sup>

The publicity given to this petition and a series of probing articles by Napoleon G. Rama in the *Philippine Free Press*<sup>5</sup> generated a nation-wide interest in the North Borneo Question which made it a hot political issue. Congressman Jovito Salonga gave eloquent expression to this nation-wide interest in a sober and well-received speech he delivered on the floor of Congress which was, in no small measure, responsible for the unanimous approval by the House of Representatives of *Resolution No. 7*, sponsored by Congressman Godofredo Ramos, Chairman of the House Committee on Foreign Affairs, urging the President of the Philippines "to take the necessary steps consistent with international law and procedure for the recovery of a certain portion of the Island of Borneo and adjacent islands which appertain to the Philippines."<sup>6</sup>

The spirited clamor from various quarters for an unequivocal stand on the North Borneo question led President Macapagal, as we said above, to define the official position of the Philippine Government vis-a-vis that of the British Government — a position which was later brought to the attention of the United Nations by Vice-President Pelaez, in an address he delivered before the General Assembly on September 27, 1962:

We stand on what we consider to be valid and legal and historical grounds. Our claim has been put forward with sincere assurance of our 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.<sup>7</sup>

Six months passed before the British Government gave a

<sup>4</sup>*Ibid.*

<sup>5</sup>Napoleon G. Rama, *Philippine Free Press*: December 30, 1961, January 20, 1962; March 10, 1962; April 7, 1962; April 21, 1962.

<sup>6</sup>*House Resolution No. 7*, approved April 24, 1962, Fifth Congress, First Regular Session. A similar resolution, *Senate Resolution No. 17*, was sponsored in the Senate by Senator Balao, but Congress adjourned before the Senate could act upon it.

<sup>7</sup>*Manila Times*. October 9, 1962, p. 2.

categorical reply to the Philippine Government's request. Finally, on December 29, 1962, influenced perhaps by the revolt in Brunei which broke out three weeks before, the British Government agreed to hold consultations with the Philippine Government on problems of mutual interest, including the North Borneo question. Vice-President Pelaez and British Ambassador Pilcher issued a joint statement as follows:

The Philippine and British Governments being vitally concerned in the security and stability of South East Asia, have decided to hold conversations about questions and problems of mutual interest. The British Government have responded to the Philippine Government's desire for talks, first expressed in their note of June 22, by inviting the Philippine Government to send a delegation to London for consultations at a mutually convenient date in January, 1963. Recent developments have made such conversations, in the spirit of the Manila Treaty (SEATO) and the Pacific Charter (U.N.), highly desirable.<sup>8</sup>

This article will deal with: (1) the historical facts of the case, (2) the legal issues and conclusions arising from those facts. For lack of space, we shall limit ourselves to the legal issues bearing on the sovereign rights of the Sultan, leaving for future treatment (a) the proprietary rights of the Sultan's heirs, and (b) the public policy the Republic of the Philippines should follow vis-a-vis Great Britain and the projected Federation of Malaysia.

#### HISTORICAL FACTS OF THE CASE

Before 1878, North Borneo was admittedly in the sovereign possession of the Sultan of Sulu who, from time immemorial, through a series of treaties of peace, friendship and commerce, had been recognized by Spain, Great Britain, and other European powers as a sovereign ruler in his own right.<sup>9</sup>

According to Prof. Tregonning of the University of Singapore, this territory<sup>10</sup> was ceded to the Sultan of Sulu by the

<sup>8</sup> *Sunday Chronicle*, December 30, 1962, p. 1.

<sup>9</sup> See *Treaties between the East India Company and Sulu: 1761-69; Treaty Between Spain and Sulu of 1836; Appendices 1 and 2, in Papers Relating to the Affairs of Sulu and Borneo and to the Grant of Charter of Incorporation to the British North Borneo Company*; Presented to both Houses of Parliament by Command of Her Majesty, 1883. (London; Harrison and Sons). This document will henceforth be referred to as: *Affairs of Sulu and Borneo*.

<sup>10</sup> The territory leased by the Sultan of Sulu in 1878 to Baron von Overbeck used to be called Sabah by the natives, and comprises not the whole, but only a part, of what is now known as British North Borneo — commencing from the Padassan River on the northwest coast and extending along the whole coast as far as the Sibuco River in the south and comprising amongst others the states of Paitan, Sugut, Bangaya, Labuk, Sandakan, Kinabatangan, Mumiang, and all territories to the southward thereof bordering on Darvel Bay and as far as the Sibuco River with all the

Sultan of Brunei in 1704, in return for help in suppressing a rebellion.<sup>11</sup> Knowing this, Baron von Overbeck<sup>12</sup> entered into fresh negotiations with the Sultan of Sulu for the lease of the North Borneo territory, although the same had been included within the territory previously leased to Overbeck under a dubious title by the Sultan of Brunei.<sup>13</sup>

Accompanied by William H. Treacher, Acting British Consul-General at Labuan, Overbeck, representing Alfred Dent who had advanced £10,000 for the venture, went to Sulu in the early part of January 1878 to negotiate for the North Borneo territory. At this time the Spanish expeditionary forces under Captain-General Malcampo were closing in on the Sultan, a circumstance which made it easier for Baron von Overbeck to obtain from him the lease of North Borneo for the meagre rental of \$5,000 (Malayan) a year.

In the archives of the Spanish Ministry of Foreign Affairs in Madrid, we find a series of letters which, taken together with the reports of Treacher, Overbeck and Dent, contained in *Affairs of Sulu and Borneo*, give us a full picture of the circumstances under which Sultan Jamalul Alam signed the contract with Baron von Overbeck.<sup>14</sup> (See appendices).

It seems clear from these documents that the Sultan signed a contract previously prepared by Overbeck and modelled after

islands within three marine leagues of the coast. A portion of this territory bordering on the Sibuco River is now a part of Kalimantan, or Indonesian Borneo, which is that part of Borneo the Indonesian Republic inherited from the Netherlands in 1950. The geographical boundaries between Dutch Borneo and British North Borneo Company Territory were defined by a treaty concluded in 1891. The Philippine North Borneo claims have not yet been defined geographically, but it is unlikely that they would include that portion of North Borneo now forming part of Kalimantan.

<sup>11</sup> K. G. Tregonning: *Under Chartered Company Rule (University of Malaya Press: 1958)*, p. 11.

<sup>12</sup> *Ibid.* Baron von Overbeck was once the Austrian Consul-General at Hongkong, before he went into business with Alfred Dent of London whom he interested in financing the North Borneo lease (p. 9).

<sup>13</sup> See Letter of Acting Consul-General Treacher to the Earl of Derby. Document 18, *Affairs of Sulu and Borneo*.

<sup>14</sup> Together with the Letter of Acting Consul-General Treacher to the Marquis of Salisbury in *Affairs of Sulu and Borneo*, Document 132, the following are given in full in the Appendices: (1) Letter of Sultan of Sulu to Overbeck cancelling the contract of lease; (2) Letter of Governor of Jolo to Overbeck advising him of the cancellation; and (3) Letter from Overbeck to the Governor of Jolo asserting that the contract cannot be cancelled because it was a contract in perpetuity. All these letters are found in their Spanish translation in the Ministry of Foreign Affairs, Madrid: *General Archives, Overseas Division, Philippine Islands, Files 1874-1883*. (This document will henceforth be referred to as *General Archives, Philippine Islands—Madrid.*)

the contract he obtained from the Sultan of Brunei; that he signed it because he thought it was the best he could make of a bad bargain — since it was represented to him by Overbeck that the Sultan of Brunei was going to seize Sandakan anyway, and he (the Sultan of Sulu) would not be in a position to prevent this, because the Spanish expeditionary forces were about to arrive to destroy all of Jolo. He reckoned therefore that the best thing to do under the circumstances was to accept Overbeck's offer of \$5,000 a year for that part of his sultanate which he would not be in a position to defend anyway. Let us quote a portion of the letter of the Sultan to the Governor General of the Philippines:

Referring to what has been stated in the newspapers of Singapore to the effect that I have ceded Sandakan to Overbeck, I must state that this is not true. Overbeck came to me and tried to lease Sandakan from me for 3,000 pesos (sic) per year. I refused to do this and I told him that if he wanted it, he could have it for 8,000. Thereupon he said: 'Whether you make the grant or not, I will do what I intend to, because the Sultan of Borneo (Brunei) will seize Sandakan.' Thereupon he left for Lung-Banca (Jolo) and when he came back he told us that very soon the Captain General would arrive and destroy all of Jolo. This news forced our hand because we carefully thought it over and believed that in this way we could also obtain an increase of 5,000 pesos.<sup>15</sup>

There seems to be no reason to doubt that the Sultan executed on January 22, 1878 two documents in favor of Overbeck and Dent: (1) a *deed of lease* (or cession?) whereby on behalf of himself, his heirs and successors, the Sultan granted to Overbeck and Dent conjointly, their heirs, successors and 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; (2) a *commission of government*, appointing Baron von Overbeck supreme ruler of the granted territory, with the title of Datu Bandahara and Rajah of Sandakan, and delegating to him full legislative and executive authority, the rights of property vested in the Sultan over the soil, the rights over the production of the country, and the right of levying customs and others dues and taxes.

The Deed of 1878, of which a photostatic copy was obtained by the Philippine Government from the British North Borneo Company through the courtesy of the U.S. State Department, was written in the Malayan language and in Arabic characters, and signed by the Sultan. Its English translation as found in

<sup>15</sup> *General Archives, Philippine Islands—Madrid.*

*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, and now 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. In his *Brief Memorandum on the Government of the Sultanate of Sulu and Powers of the Sultan during the 19th Century*,<sup>16</sup> Dr. Beyer states that before and after the time Sultan Jamalul Alam signed the 1878 lease it was generally accepted in Sulu that the written concurrence or consent of the State Council or *Ruma Bechara* was necessary to legalize and authenticate the Sultan's more serious acts — and certainly the leasing of several tens of thousands of square miles of North Borneo land was a matter of more than ordinary concern to the whole Sulu people. Furthermore, I do not remember ever seeing any other important Sulu document with the Sultan's signature alone; practically always at least the Datu Raja Muda and the Prime Minister, and frequently other royal datus as well, signed with him. In the case of treaties, trade agreements, and life formalities, there are never less than five or six signatures.

That the real intention of the Sultan was to lease, not cede, the territory is clear from the letter which he wrote to Baron von Overbeck on the same day he signed the Treaty of Capitulation of July 22, 1878, cancelling the contract:

As the 'Capitulation' has been signed today with Spain by the representatives of His Excellency, the Governor and Captain General of the Philippine Islands and by myself, accompanied by the main Dattos in representation of this Country, it is my will to cancel the contract of lease of Sandakan, etc., signed by you last January because in addition to the fact that the Crown of Spain is in possession of all the territory of the Sultanate as set forth in the basic provisions of the Treaty of this date and the previous treaties, the contract is without any legal effect as I advised you in my communication of April since you failed to perform the provisions of the contract of lease made by you.<sup>17</sup>

This April communication referred to in this letter, if extant, is not available at present. We cannot therefore tell for sure what provision of the contract Baron von Overbeck failed to fulfill. It may be surmised, however, that it had something to do with the \$5,000 consideration, which the beleaguered Sultan needed badly in order to purchase arms against Spain.

<sup>16</sup> *Borneo Records*, DFA, Manila.

<sup>17</sup> Letter from the Sultan to Overbeck; *General Archives, Philippine Islands—Madrid.*

To complete the picture, we must refer to one more letter — a letter written by Consul-General Treacher to the Marquis of Salisbury on August 24, 1878, in which he said: "Baron von Overbeck informed me that the Sultan had previously warned him that if he received a letter from him, either written in the Sulu language, instead of Malay, or not properly sealed, then the Baron was to consider it as not emanating from His Highness, but as the work of the Spanish. The letter (from the Sultan to Overbeck, cancelling the lease) was written in Sulu, and, it is said, by Don Pedro, a Spanish Naval Officer, who speaks and writes that language fluently. It was, moreover, forwarded to Baron de Overbeck through the Spanish Governor." It is clear from all this that the Sultan wrote the letter of cancellation under duress and upon dictation of the Spanish Military Governor of Jolo.

#### TREATIES OF CAPITULATION

The treaties referred to in the Sultan's letter to Overbeck are: (1) The treaty of September 23, 1836, called *Capitulations of Peace, Protection and Commerce between the Government of Her Catholic Majesty and the Sultan and Datus of Sulu*; (2) the treaty of April 30, 1851, entitled *Act of Incorporation of the Sultanate of Sulu into the Spanish Monarchy*; and (3) the treaty of July 22, 1878, entitled *An Act Drafted on the Basis of Pacification and Capitulation Presented by the Sultan of Sulu and the Datus to His Majesty, King Alfonso XII*.<sup>18</sup>

It is important to examine these treaties and understand their bearing on the sovereignty of the Sultanate of Sulu. For if by any of them the Sultan of Sulu relinquished or lost his sovereignty over the North Borneo territory in favor of Spain, no dispute over sovereignty rights could now arise between Great Britain and the Sultanate of Sulu, or between Great Britain and the Philippines.

*Treaty of September 23, 1836.* — This treaty, signed by Capt. José M. Halcón, representing the Governor General of the Philippines, and Sultan Jamalul Kiram I and his Datus was a *Treaty of Peace, Protection and Commerce*, regulating boat licenses and the duties to be paid by Sulu boats in Manila and Zamboanga, and by Spanish vessels in Jolo; guaranteeing general peace and

<sup>18</sup>All these treaties are found in Najeeb Saleeby: *The History of Sulu*, (Manila: Bureau of Printing: 1908).

safety to Sulu boats in Philippine waters and to Spanish and Filipino craft in the Sulu Sea.

By this treaty, Spain did not claim sovereignty over Sulu, but merely offered "the protection of Her Government and the aid of fleets and soldiers for the wars which the Sultan shall find necessary to wage against enemies who shall attack him, or in order to accomplish the subjection of the peoples who rebel in all the confines of the islands which are found *within Spanish jurisdiction, and which extend from the western point of Mindanao as far as Borneo and Palawan, except Sandakan and the other islands tributary to the Sultan on the coast of Borneo.*" (Italics added.)

On his part, the Sultan of Sulu, "accepting the friendship of the Spanish Government, binds himself to keep peace with the vassals of Her Catholic Majesty, to consider as his enemies those who hereafter may be such to the Spanish Nation."<sup>19</sup>

*Treaty of April 30, 1851.* — This treaty was signed by the Sultan of Sulu, Mohammed Pulalun, and Colonel José María de Carlos y O'Doyle, politico-military Governor of Zamboanga, and was forced upon the Sultan after the bloody conclusion of the punitive expedition carried out against Sulu by Governor-General Antonio de Urbiztondo in the first months of 1851. The Treaty was declared to be "an act of incorporation of the Sultanate of Sulu to the Spanish Monarchy." According to Saleeby: "The Sulus understood it to be a firm agreement and friendly union with Spain. They, however, appear to have recognized the supremacy of Spain and accepted her protectorate."<sup>20</sup>

By Article 2 of the Treaty, the Sultan and his datus solemnly promise to maintain the integrity of the territory of Sulu and its dependencies as a part of the Archipelago belonging to the Spanish Government. By Article 3, they are divested of their power to make or sign treaties, commercial agreements or alliances of any kind with European powers, companies, persons or corporations under pain of nullity; they declare all treaties made with other powers to be null and void if they are prejudicial to the ancient and indisputable rights held by Spain over the entire Sulu Archipelago, as part of the Philippine Islands. The treaties referred to above may have been the

<sup>19</sup>*Ibid.*, See *Treaty of 1836*, pp. 194-199.

<sup>20</sup>*Ibid.*, See *Treaty of 1851*, p. 209.

Treaties between East India Company and Sulu of 1761-69 and the Convention of Commerce between Great Britain and Sulu of May 29, 1849,<sup>21</sup> in which the Sultan of Sulu "engages not to make any cession of territory within his dominion to any other nation and to subjects and citizens thereof, and not to acknowledge *suzeraineté* of any other state, without the consent of her Britannic Majesty."

*Treaty of Capitulation of July 22, 1878.* — This Treaty, signed by Sultan Jamalul Alam and Col. Carlos Martínez, Governor of Sulu, was concluded also as an aftermath of another punitive expedition in 1876 led by Captain General Malcampo which culminated with the Spanish Government's decision to occupy Sulu permanently as an essential factor in its pacification. By Article 1 of this treaty, the Sultan and his Datus declare that the sovereignty of Spain over all the Archipelago of Sulu and its dependencies is indisputable, and as a natural consequence of this declaration, they constitute themselves loyal subjects of His Majesty King Alfonso XII. However, by Article 4, the Sultan continues to exercise the power to collect duties from foreign merchants and ships trading with places not occupied by the Government. And by Article 9, the internal administration of Sulu, its customs, laws, and religion were fully respected and were not subject to Spanish jurisdiction or approval.

It seems, then, in the opinion of Saleeby, that the status of Sulu, as defined by the Treaty of 1878, the last entered into between Sulu and Spain, was that of a protectorate rather than a dependency. Its internal sovereignty was not appreciably diminished by any of these treaties while its external sovereignty, on paper almost extinguished by these treaties, continued to enjoy the full recognition of such European powers as Great Britain, Germany and Holland. For all practical purposes, in the estimate at least of Great Britain, the Treaty of 1878 by which Spain reaffirmed her sovereignty over Sulu and its dependencies, remained a unilateral declaration — and was to remain so until 1885.

Soon after the Treaty of 1878 was made public, the British Ambassador in Madrid presented a formal letter of protest against some of its stipulations. He said:

The most important stipulations of the Treaty are, in the opinion of Her Majesty's Government, those which declare that the sovereignty of Spain over the archipelago of Sulu and its dependencies is incontrovertible

<sup>21</sup>*Ibid.*, *Affairs of Sulu and Borneo*.

and that Sulu and its dependencies will hoist the Spanish flag. Her Majesty's Government consider that the sovereignty of Spain over the Sulu Archipelago and its dependencies contained in the treaty in question, is at variance with the *modus vivendi* provided for by the Protocol of 11th March, 1877 . . . and feel called upon formally to reserve to themselves the faculty of declining to recognize the new Treaty . . .<sup>22</sup>

*Protocol of Sulu of May 30, 1877.*<sup>23</sup> — The protocol was the final outcome of the vigorous protests of Great Britain and Germany against Spain's policy of demanding that foreign ships trading in the Sulu Archipelago should first call at Zamboanga to pay their harbour dues there, and to provide themselves with a navigation permit. This practically amounted to a blockade of Sulu and a declaration of Spanish sovereignty over Sulu, which Great Britain and Germany were not prepared to recognize at this time and for many more years to come.

The Spanish seizure of the German ships *Marie Louise* and *Gazelle*<sup>24</sup> in Sulu waters provided the occasion for the start of the negotiations. In the end, it was agreed between Spain, Germany and Great Britain that "commerce and direct trading by ships and subjects of Great Britain, Germany and the other powers are declared to be absolutely free with the Sulu Archipelago and in all parts thereof; that the Spanish authorities shall no longer require ships and subjects of Great Britain, Germany and other powers going from one point to another within the Sulu waters . . . to touch before or after at any specified place in the Archipelago to pay any dues whatsoever."<sup>25</sup>

Throughout the negotiations, the British Ambassadors in Madrid and Berlin were instructed to make it clear to the Spanish Government that "the protocol did not in any way imply recognition of the Spanish claims of sovereignty over Sulu and its dependencies . . . that whatever rights Spain may have had to the sovereignty of Sulu and its dependencies, these rights must have lapsed owing to the complete failure of Spain to attain a *de facto* control over the territory claimed."<sup>26</sup>

The merely nominal hold of Spain over Sulu prior to 1878 was impliedly admitted by the Spanish Foreign Minister in the statement of facts which precedes the articles of the Protocol

<sup>22</sup>*Ibid.*, *Affairs of Sulu and Borneo*, Document 153, Inclosure.

<sup>23</sup>*Ibid.*, p. 367.

<sup>24</sup>*Ibid.*, *Affairs of Sulu and Borneo*, Documents 7, 8, and 10.

<sup>25</sup>*Ibid.*, *Protocol of Sulu of 1877*.

<sup>26</sup>*Ibid.*, Letter of Earl Granville to Mr. Morier, *Affairs of Sulu and Borneo*, Document 197.



of 1877: "The Government of His Majesty the King of Spain admits that it cannot guarantee the security of commerce at dues paid."<sup>27</sup>

After the Treaty of 1878, with Spain establishing a large permanent garrison in Jolo, and with the increased efficiency of its naval forces to stamp out Moro piracy, things began to change. The Spanish Government was not contended to solidify its hold over Sulu; it started pushing its claims of sovereignty over that portion of the territory in North Borneo which belonged to the Sultan of Sulu. Several attempts were made by the Spanish Governor of Jolo to have the Spanish flag flown over Sandakan, but these efforts were resisted by the native population as well as by the British officials.

Nevertheless, the British Government was becoming more and more concerned over Spain's possible intentions in North Borneo. This concern was expressed by the Minister of Foreign Affairs, the Marquis of Salisbury, in his letter to the British Ambassador in Madrid, Mr. Sackville-West, dated October 1, 1878:

The reported proceedings on the part of Spanish officers with regard to Borneo are calculated to cause very serious uneasiness to Her Majesty's Government, in view of the important British interest existing in that island, and I have to request that you will inquire of the Spanish Minister for Foreign Affairs whether the reports which have reached Her Majesty's Government are accurate, and you will remind His Excellency of the assurance spontaneously given to Mr. Layard by Señor Calderon Collantes, on the 3rd January, 1877, that the Spanish Government 'Had no designs whatever on Borneo, and limited the claims of Spanish sovereignty to Sulu and adjacent islands.'<sup>28</sup>

The situation was now ripe for diplomatic maneuvers. Knowing how Spain badly wanted at all cost to have her claims of sovereignty over Sulu firmly recognized by the European powers, the British Government was now going to press upon Spain her own claims over North Borneo, in exchange for Great Britain's recognition of Spain's sovereignty over Sulu and its dependencies. Accordingly, Great Britain took a step calculated to strengthen her position of influence over North Borneo and to evoke uneasiness and desire for diplomatic conversations on the part of Spain, Germany and Holland.

The British Government, under Prime Minister Gladstone,

<sup>27</sup>*Ibid.*, Protocol of Sulu of 1877.

<sup>28</sup>*Ibid.*, Affairs of Sulu and Borneo, Document 131.

approved and granted on November 1, 1881<sup>29</sup> a Royal Charter to the British North Borneo Provisional Association headed by Alfred Dent and Baron von Overbeck.

The granting of a Royal Charter to private British companies engaged in trade and development of natural resources in backward territories has more often than not preceded the eventual conversion of that territory into a colony or protectorate of Great Britain. This was the history of the East India Company, the Hudson Bay Company, the New Zealand Company, etc. There was ample reason therefore for Spain and the Netherlands<sup>30</sup> to become alarmed at the granting of the Royal Charter to the British North Borneo Provisional Association. While Spain was not anxious, nor indeed in a military position, to take hold of North Borneo, she wanted to have the *status quo* of North Borneo maintained — an independent territory, not occupied by Great Britain, Germany or Holland. This *status quo*, so vital to the protection of her control over Sulu and its dependencies, was now threatened by the granting of the Royal Charter.

On November 16, 1881, fifteen days after the granting of the Royal Charter, the Spanish Ambassador in London, Marquis de Casa La-Iglesia, delivered to the British Foreign Secretary the official protest of the Spanish Government against the grant of the Charter,<sup>31</sup> stating among other things that in virtue of the treaties of capitulation of 1836, 1851, and 1878, Spain exercised sovereignty over Sulu and its dependencies including North Borneo, and the Sultan of Sulu therefore had no right to enter into any treaties or make any cessions whatever.

The reply of the British Foreign Minister, Earl Granville, was to the effect that

the Spanish claims over North Borneo might be described as paper claims, inasmuch as they had never been acted upon, and the Spanish Government on more than one occasion had declared that it was not their intention to do so . . . That (the British Government) in concert with the German Government had always declined to recognize the sovereignty claimed by Spain over the dominions of the Sultan, whether in Borneo or in the Sulu Archipelago.<sup>32</sup>

<sup>29</sup>*Ibid.*, Royal Charter, Affairs of Sulu and Borneo, Document 193, Inclosure

<sup>30</sup>*Ibid.*, Affairs of Sulu and Borneo, Document 197.

<sup>31</sup>*Jolo y Borneo — A Las Cortes En La Legislatura de 1885*, (Madrid, Imprenta de Miguel Ginesta, 1886), Document 4. These documents are in microfilm in the archives of the Ateneo de Manila.

<sup>32</sup>*Affairs of Sulu and Borneo*, Document 197.

Granville let it be understood, however, that Great Britain stood ready to review the situation, that perhaps the British Government would consider giving *formal* recognition of Spain's sovereignty over Sulu and its dependencies, if she were in return "to abandon what was, in fact, a merely nominal claim over a certain undetermined portion of North Borneo."<sup>33</sup>

In the meantime, the British Government, in instructions to Mr. Morier, the British Ambassador at Madrid, gave the following explanation to the Spanish Government of the nature of the Royal Charter granted to the British North Borneo Company. Because of its important bearing on the legal aspects of the question, we shall quote extensively from this document.

A correspondence also took place on the subject of cessions to Mr. Dent between Her Majesty's Government and that of the Netherlands . . . The Netherlands Government opposed the grant of the Charter applied for by Mr. Dent as being incompatible with the Treaty of 1824, which, they contended, precluded the formation of any British Settlement in Borneo.

The objection did not properly arise in the present case, as there was no question of the annexation of North Borneo by Great Britain, or of the establishment of a British Protectorate there. This was pointed out to the Netherlands Government in Lord Salisbury's despatch to Mr. Stuart of the 24th November, 1879, and the character of Mr. Dent's undertaking and of the Charter then under consideration was fully explained.

The principal legal effect of the Charter applied for by Mr. Dent would be to confer the ordinary incidents of incorporation on his Association. It was open to him to obtain incorporation by registration under the Companies Acts, and to carry out his scheme independently of Her Majesty's Government, but the incorporation of the Company by Royal Charter would be the formal recognition of the title of Mr. Dent and his Association to the territories granted to him by the Sultans, and in return for such recognition the Company offered to submit to the control of Her Majesty's Government in the exercise of the powers derived from the Sultans, especially with regard to the treatment of the natives, and in the settlement of any questions arising between the Company and foreign Powers.

You will perceive from an examination of its provisions that the effect is to restrict and curtail the powers of the Company and not to create or enlarge them.

The *British North Borneo Company* are in fact established under *three Charters*. (1) The Charter and territorial Concession from the Sultan of Sulu; (2) the Charter and territorial Concession from the Sultan of Brunei; (3) the British Charter of Incorporation.

The first two Charters, from the Sultans of Sulu and Brunei, are those

<sup>33</sup> *Ibid.*, *Affairs of Sulu and Borneo*, Document 197.

under which the Company derive their title to the possession of the territories in question, and their authority to administer the government of those territories by delegation from the Sultans.

The third Charter is the British Charter, under which the Company had obtained incorporation and a recognition by Her Majesty's Government of their title to the territories granted. In return for incorporation by Royal Charter, and for the recognition of the Concessions, the Company had surrendered to Her Majesty's Government various powers of control over their proceedings which, though of a negative character only, are sufficient for the prevention by Her Majesty's Government of any abuse in the exercise of the authority conferred by the Sultans. It is important to bear in mind that no such control would have been reserved to the Crown had the Company taken incorporation in the usual manner by registration under the Companies Acts and elected to follow their own course independently of Government support.

The British Charter therefore differs essentially from the previous charters granted by the Crown to the East India Company, the Hudson Bay Company, the New Zealand Company, and other Associations of that character, in the fact that the Crown in the present case assumes no dominion or sovereignty over the territories occupied by the Company, nor does it purport to grant to the Company any powers of government thereover; it merely confers upon the person associated the status and incidents of a body corporate, and recognizes the grants of territory and the powers of government made and delegated by the Sultans in whom the sovereignty remains vested.

The territories granted to the Company have been for generations under the government of the Sultans of Sulu and Brunei, with whom Great Britain has had Treaties of Peace and Commerce. . .<sup>34</sup>

No less than Prime Minister William E. Gladstone confirmed these official statements in the House of Commons. Acknowledging that the remarkable powers obtained by the British North Borneo Company involved the essence of sovereignty, he explained that these powers were not derived from the British Government but from the sovereignty of the native chief; that, as far as the English Government was concerned, it had no greater obligation to protect the Company than "to protect any other subject who might be in pursuit of objects not unlawful."<sup>35</sup>

#### PROTOCOL OF SULU OF MARCH 7, 1885

These official disclaimers regarding North Borneo dispelled somewhat Spain's worst suspicions and she now hastened to

<sup>34</sup>*Ibid.*, *Affairs of Sulu and Borneo*, Document 197.

<sup>35</sup>Prime Minister Gladstone, as quoted in Congressman Salonga's speech before the Fifth Congress, First Regular Session.



conclude with Great Britain and Germany the Protocol of Sulu of March 7, 1885.<sup>36</sup> This was practically the same as the Protocol of 1877, but with two far-reaching changes. First by Article I, "the Governments of Germany and Great Britain recognized the sovereignty of Spain over the parts which are effectively occupied as well as over those which are not yet occupied of the Archipelago of Sulu — which as hereby defined includes all the islands between the western extremity of the island of Mindanao on one side and the mainland of Borneo and the Island of Palawan on the other." Second, the 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, including the neighboring islands of Balumbagan, Banguay, Malawati, and all those comprised within a zone of three maritime leagues from the coast, and which are part of the territories administered by the Company known as the *British North Borneo Company*." (Italics added).

By this Protocol of 1885, the North Borneo territory belonging to the sovereignty of the Sultan of Sulu was henceforth recognized by Spain to belong to Great Britain's sphere of influence.

Three years later, in 1888, while Sulu was in the throes of civil war<sup>37</sup> the "State of North Borneo", by an agreement between the British North Borneo Company and Great Britain, was made a British Protectorate apparently without the knowledge or consent of the Sultan of Sulu from whom alone, by official admission of the British Government itself, the North Borneo Company derived its rights and powers to govern the territory.

This was the *de facto* status of the North Borneo territory until July 16, 1946, when by another unilateral action of Great Britain and the British North Borneo Company, the North Borneo territory was made a British Crown Colony.<sup>38</sup>

<sup>36</sup>Saleeby, *op. cit.*, *Protocol of Sulu of 1885*, p. 371.

<sup>37</sup>*Ibid.*, For the next 10 years after the death of Sultan Badarud Din II on February 2, 1884, the Sultanate was rent by what amounted to a civil war, the partisans of the young Raja Muda Amirul Kiram fighting against the partisans of Datu Harun-ar-Rashid who was being supported by the Spanish forces under Governor Arolas; p. 240-244.

<sup>38</sup>*Royal Cession Order of July 16, 1946.*

## TREATY OF PARIS OF DECEMBER 10, 1898

At the conclusion of the Spanish-American war, Spain signed the Treaty of Paris, ceding the Philippines to the United States. Article 3 of this Treaty as modified by the sole article of the Washington Treaty of November 7, 1900, and further clarified by the Convention of January 2, 1930 signed by Great Britain and the United States, defines the geographical demarcation of the Philippines. This geographical demarcation was bodily incorporated in Article I, Section 1, of the Constitution of the Philippines ratified on May 14, 1935, while the Philippines was still under the sovereignty of the United States.<sup>39</sup>

The North Borneo territory and its island dependencies are not included within this geographical demarcation.

American sovereignty came just in time to foil the efforts of the British North Borneo Company to obtain additional territory in the Sulu Archipelago.<sup>40</sup> However, in 1903, they were able to obtain from the Sultan of Sulu for an additional \$300 (Malayan) a year a Confirmatory Deed stipulating that certain islands not specifically mentioned in the Deed of 1878 had in fact been always understood to be included therein.<sup>41</sup> Thus the total amount paid to the Sultan by the British North Borneo Company was \$5,300 every year. This amount according to Tregonning, has been religiously paid to the Sultan every year since 1878. There was however a period during the vacancy of the sultanate after the death of Jamalul Kiram in 1936 when the British North Borneo Company, unable to decide which claimants were legitimate heirs of the Sultan, could not make the

<sup>39</sup>There was a long debate in the Committee on Territorial Delimitation of the Constitutional Convention as to whether the national territory should be delimited in the constitution. What swung the Convention to adopt what actually became Article I of the Constitution was the argument voiced by Delegate Singson-Encarnacion that if no delimitation of territory were fixed in the Constitution, England with the consent of the United States might in the future take over the islands in the Archipelago of Sulu included within Philippine territory by the Convention of Washington of 1930, but lying outside Philippine territory as described in the Treaty of Paris and the Tydings-McDuffie Law granting Philippine independence. Jose M. Aruego, *The Framing of the Philippine Constitution*, Volume I, p. 122.

<sup>40</sup>Tregonning, *op. cit.*, p. 46.

<sup>41</sup>*Treaties and Engagements Affecting Malay States and Borneo*, edited by Maxwell and Gibson, (London: 1924).

necessary payments and had to deposit the money as a trust fund.

#### THE MACASKIE DECISION

A suit was brought by Dayang-Dayang Hadji Plandao Kiram and eight other heirs of the Sultan before the High Court of North Borneo against the Government of North Borneo to obtain a declaration that they were entitled to receive the yearly rentals, or, to use the Court's term, "cession monies", payable under the Deed of 1878. The Court gave a favorable decision<sup>42</sup> to the petitioners, after satisfying itself that no adverse claims could possibly come from the Philippine Government. However, in an obiter dictum, the court said: "It is abundantly plain that the successors in sovereignty of the Sultan are the Government of the Philippine Islands." The Court, in other words, would have given the rentals or cession monies to the Philippine Government rather than to the heirs, if the Philippine Government had intervened in the case in its own behalf. But the Government had placed itself in estoppel, because as the Court put it, "the Philippine Government allowed Sultan Jamalul Kiram to enjoy the cession monies as a private person since 1915, they have made no claim on his death and have by a judgement of a Philippine court recognized the right of the private heirs to receive the cession monies."

Hence, with the extinction of the Sultanate, and the "cession" nature of the Deed of 1878 (two facts which judge Macaskie gratuitously assumed), the only question that can arise in the opinion of the Court is the question of the proprietary rights of the heirs of the Sultan. The question of sovereign rights had become moot with the death of Jamalul Kiram in 1936.

#### STATUS OF THE SULU SULTANATE

What was the status of the Sulu Sultanate before and after 1936? Was it ever extinguished for failure to elect a successor to the Sultan, or because of its non-recognition by the Commonwealth Government?

Up until the death of Jamalul Kiram in 1936, there was no doubt whatever about the existence of the Sultanate. But the

<sup>42</sup>The decision was handed down on December 18, 1939 by Chief Justice C. F. Macaskie of the High Court of the State of North Borneo. Civil Suit No. 169/39. This decision henceforth will be cited as the "Macaskie Decision".

question may be asked as to the status of the Sultanate vis-a-vis the Government of the Philippines during the Spanish regime, the American regime, and the Commonwealth period.

During the Spanish regime, in virtue of the Treaty of 1878, the Sultanate had become a kind of protectorate of Spain, rather than a dependency. To all intents and purposes, except in the field of foreign relations, the Sultan exercised sovereignty over Sulu and its dependencies — up to the very end of the Spanish regime.

#### BATES TREATY OF AUGUST 20, 1899

On August 20, 1899, a year after the Treaty of Paris, General John C. Bates, representing the U.S. Military Authority in the Philippines, entered into a treaty with the Sultan of Jolo, Paduka Raja Muda, which, in effect, recognized the existence of the Government of Sulu, and was intended to preserve the previous status of internal sovereignty or autonomy for the Sultanate, consistent with the recognition of the sovereignty of the United States over Sulu and its dependencies. This treaty, however, was not approved by the President of the United States, and was abrogated in 1904 because of the unsatisfactory provision on the abolition of slavery, and the continued Moro practice of raiding and enslaving among the inland tribes.

#### CARPENTER AGREEMENT OF MARCH 22, 1915

The abrogation of the Bates Treaty did not immediately change the situation and status of the Sultan. He continued to exercise a good measure of internal sovereignty — such as jurisdiction in both criminal and civil cases among the Moros in the Sulu Archipelago; collection of taxes from pearl and turtle fisheries and from markets, etc. — a *modus vivendi* which gave rise to numerous conflicts between the Sultan and the officials of the Philippine Government.

To remedy this situation, the Carpenter Agreement was signed on March 22, 1915 between the Sultan Jamalul Kiram and Frank Carpenter, representing the Governor-General of the Philippines, who at that time was Francis B. Harrison.

By this agreement, the United States continued to recognize the Sultan as the Titular Head of the Mohammedan Church in the Sulu Archipelago "with all the rights and privileges which under the Government of the United States of America may be exercised by such an ecclesiastical authority..." He was how-

ever divested of all temporal sovereignty over his subjects within American territory, and made to recognize "the sovereignty of the United States, and the exercise by His Excellency the Governor General and the representatives of that Government in Mindanao and Sulu of all the attributes of sovereign government that are exercised elsewhere in American territory and dependencies including the adjudication by government courts or its other duly authorized officers of all civil and criminal cases falling within the laws and orders of the Government."

Thus the Sultan ceased to be recognized as temporal sovereign within American territory. Did he also cease by this treaty to be recognized as temporal sovereign elsewhere, outside American territory?

Governor Carpenter himself, who negotiated the agreement, provides the answer. In a letter to the Director of Non-Christian Tribes dated May 4, 1920, he states:

It is necessary however that there be clearly of official record the fact that the termination of the temporal sovereignty of the Sultanate of Sulu within American territory is understood to be wholly without prejudice or effect as to the temporal sovereignty and ecclesiastical authority of the Sultanate beyond the territorial jurisdiction of the United States Government, especially with reference to that portion of the Island of Borneo which as a dependency of the Sultanate of Sulu is understood to be held under lease by the chartered company which is known as the 'British North Borneo Company'...<sup>43</sup>

It would seem that with regard to the North Borneo territory, whatever residual sovereignty the Sultan still had since 1878, the same continued to be vested in him even after the Treaty of Paris, the Bates Treaty, and the Carpenter Agreement. Governor Harrison, under whose administration the Carpenter Agreement was signed, testifies that the Sultan continued to be looked upon in North Borneo as the sovereign of that territory. He writes:

The practice in Sandakan up to that date (the death of Jamalul Kiram in 1936) had been, when the Sultan of Sulu visited Sandakan, that his flag was flown above that of the Chartered Company, and his vessel was received with a ceremonial salute of 21 guns.

Among the various efforts made during those years by the governors of the British North Borneo Company to acquire a good title to the ownership of these territories were the attempts made to induce Sultan

<sup>43</sup>Letter of Governor Carpenter to Director of Non-Christian Tribes dated May 4, 1920, as quoted in Beyer's "Brief Memorandum on the Government of the Sultanate of Sulu and Powers of the Sultan during the 19th Century", in *Borneo Records*, Manila: DFA.

Jamalul Kiram to take up his residence in Sandakan where a palace was offered him by the government — in hopes, no doubt, of persuading him to place himself under their protection. Upon two occasions, in the administration of the present writer, the late Gov. Frank Carpenter of the Department of Mindanao and Sulu had to send the Chief of Police of Jolo to bring the Sultan back from Sandakan.<sup>44</sup>

THE SULTANATE UNDER THE COMMONWEALTH, 1935-46

In the case, *Dayang-Dayang Hadji Piandao vs. the Government of Borneo*, Justice Macaskie states:

After the death of Sultan Jamalul Kiram in 1936 the Philippine Government, the successors in sovereignty of the United States of America, decided not to recognize the continued existence of the Sultanate, according to a letter to the Governor of North Borneo dated 28th July, 1936, from His Britannic Majesty's Consul General in Manila.

The situation now appears to be that the Government of the Philippine Islands will no longer recognize the title of Sultan or attribute to the holder, that is to anyone recognized by the people of Sulu as Sultan, the attenuated prerogatives enjoyed by the late Sultan Jamalul Kiram.<sup>45</sup>

The present writer has not come across any official document or statement of policy on which these views of the British Consulate and of Justice Macaskie could be based. The nearest thing to it is President Quezon's refusal to be drawn into Moro partisan politics when asked to decide which of the several claimants to the Sultanate he would recognize as Sultan of Sulu. For reasons we shall state later, this attitude of President Quezon was not equivalent to the abolition of the Sultanate. Neither was the "Moro Policy" he later embodied in his *Memorandum on Administration of Affairs in Mindanao*, dated September 20, 1937 and directed to the Secretary of Interior:

The weakness in the policy heretofore adopted by the Government of the Philippines in dealing with the Mohammedan Filipinos or Moros in Mindanao and the Sulu Archipelago is to give some sort of recognition to the datus, so that they have become in practice *ex officio* officials of the Government. This policy must be stopped and changed radically. It gives the impression that there is a dual government for the Moros — one exercised by the appointed or elected officials of the government and the other by the datus or sultans. It perpetuates the overlordships exercised through the ages by these datus and sultans over the sacup, who, on this account, continues to be, in fact, slaves of their sultans and datus as they were under the Spanish regime . . . From this time on you should instruct the governors and municipal presidents in the provinces composing the

<sup>44</sup>Memorandum of F. B. Harrison to Hon. Roberto Regala, DFA, dated September 26, 1949. In *Borneo Records* Manila: DFA.

<sup>45</sup>*Ibid.*, *Macaskie Decision*.

territory under the jurisdiction of the Commissioner of Mindanao and Sulu to deal directly with the people instead of with the datus, sultans, leaders or caciques.<sup>46</sup>

As is plain, nothing in this policy can be interpreted as a departure from the *modus vivendi* established by the Carpenter Agreement, in regard to the continued existence of the spiritual jurisdiction of the Sultan within Philippine territory, and the continued existence of both the spiritual and temporal jurisdiction of the Sultan over territories belonging to him and lying outside Philippine jurisdiction.

To quote from Harrison once more:

The present writer was adviser to President Quezon at that time and now states that Mr. Quezon had consistently worked for an assimilation of the Mohammedan populations of the Philippines into the general body of the citizens, and he did not encourage any particularism in the Moro regions or else where. This was, however, not legally an attempt to abolish the Sultanate of Sulu, which this government had no right whatsoever to do...<sup>47</sup>

In the opinion of Harrison, the Sultanate could be abolished only by the Moros themselves either by positive action or by the neglect to elect a new Sultan — which did not obtain in this case since, following the death of Sultan Jamalul Kiram, the Ruma Bechara immediately acted on his succession, although for years it could not agree on which of the aspirants to the Sultanate should be recognized as the legitimate successor of Jamalul Kiram.

The only other way an ancient state like the Sultanate could have been abolished is by force or armed conquest which apparently did not take place even under the events that led to the Treaties of Capitulation of 1836, 1851, and 1878; the Protocols of Sulu of 1877 and 1885; nor under those which led to the Treaty of Paris of 1898, the Bates Treaty of 1899, and the Carpenter Agreement of 1915. The Sultanate is still in existence today, and the Ruma Bechara has finally agreed last summer to recognize Sultan Esmail Kiram as the legitimate successor of Jamalul Kiram.

It was Sultan Esmail Kiram who, on behalf of the Sultan's heirs, gave notice on November 25, 1957, to the successors-in-interest of Overbeck and Dent and the British North Borneo

<sup>46</sup>Memorandum of President Quezon on the Administration of Mindanao, *Messages of the President*, Volume III, (Manila: Bureau of Printing, 1938), p. 357.

<sup>47</sup>Harrison, *op. cit.*

Company of the termination of lease of the territories of the Sultanate of Sulu in North Borneo effective January 22, 1958.

This notice came 12 years after Great Britain had unilaterally annexed North Borneo as a British Colony, on July 16, 1946, in virtue of the formal cession of the territory made unilaterally by the British North Borneo Company without consultation with the Sultan of Sulu.<sup>48</sup>

It is the contention of the Heirs of the Sultan that the British North Borneo Company had no right whatsoever to *cede* North Borneo territory to the British Crown, because it never became the owner nor the sovereign of North Borneo, but was a mere lessee of the Sultanate, and exercised powers of jurisdiction only as a delegate of the Sultan. The North Borneo Company could not *cede* to the British Crown whatever had been granted to it by the Sultan. The British Crown, therefore, cannot have a valid title to sovereignty in virtue of that cession.

If any party has the right to *cede*, that party is the legitimate owner and sovereign of North Borneo, the Sultan of Sulu. On April 29, 1962, that was exactly what Sultan Esmail Kiram did: acting with the advice and authority of the Ruma Bechara, Sultan Esmail Kiram ceded to the Republic of the Philippines the territory of North Borneo, and the full sovereignty, title and dominion over the Territory, without prejudice to such proprietary rights as the heirs of Sultan Jamalul Kiram may have.

#### LEGAL ASPECTS OF THE NORTH BORNEO QUESTION

From the foregoing historical data, it is clear that the Sultan of Sulu, previous to the Deed of 1878, was the Sovereign Ruler of the North Borneo Territory. On the one hand, his sovereignty was recognized by many nations which entered into treaties of friendship and commerce with him long before 1878. On the other, the North Borneo Territory was not just a personal property of the Sultan, but a sovereign possession having been ceded to him as a reward for the military help the Sulus gave to the Sultan of Brunei.

The only question, therefore, to be resolved is whether by this Deed of 1878, or by any other deed or fact subsequent to it, the Sultan of Sulu relinquished or lost his sovereignty over North Borneo.

Internal analysis of the Deed of 1878 itself reveals strong

<sup>48</sup>*Borneo Records*, Manila: DFA.

and valid reasons to hold that it was a *lease*, although a lease in perpetuity:<sup>49</sup> *first*, because "padjak", the word of conveyance used in the document, by itself means "lease" rather than "sale" or "cession"; *second*, because the very manner in which payment of the consideration is made, which is annually in perpetuity, and the smallness of the amount offered, which is \$5,000 (Malayan), for a territory which even then was already producing more, underline the nature of the transaction as one of lease. It is unlikely, if the parties intended it as a sale or cession, that the Sultan would settle for so meagre a sum as consideration, and for the British, on the other hand, to burden themselves perpetually, for as long as an heir of the Sultan survives. It is characteristic of sale that the consideration should at least equal the value of the object, and should be paid outright or within a terminable and definite time; as it is characteristic of lease that the consideration be paid from time to time as long as the tenancy exists.

*Third*, the very provisions of the Deed clearly imply lease: (a) it is stipulated in no uncertain terms that the "territories (referring to North Borneo) are hereby declared vested in Baron von Overbeck and Alfred Dent... for as long as they choose or desire to hold them" (italics added). In fine, a possible reversion of North Borneo to the Sultanate was contemplated. This could only happen if the Deed of 1878 was a *lease*; (b) it is likewise covenanted that the "rights and privileges conferred by this grant" may not be transferred to a third party "without the sanction of Her Britannic Majesty's Government first being obtained." Stated in a different way, the Sultan of Sulu could negotiate North Borneo to a third party, although subject to British sanction. Would this privilege to convey have been granted to the Sultan if the Deed of 1878 was a *sale*? The ground on which the grant was planted would be more firm if the Deed of 1878 were a *lease*. (c) The Deed has provided for the manner in which disputes between the parties may be settled. Disputes likely to arise could only involve payment of the consideration, which is improper to anticipate in a contract of sale or cession where the consideration is fully agreed upon in one singular transaction

<sup>49</sup>"Lease — a contract by which one conveys lands, tenements, or hereditaments for life, for a term of years, or at will, or for any less interest than that of the lessor, usually for a specified rent or compensation." *Webster's New International Dictionary*, 2nd Ed.; see also *Bouvier's Law Dictionary*, 3rd Ed.

and paid at a fixed date, unlike in a lease where it is paid periodically and therefore with plenty of room for breach.

To override the lease-character of the Deed of 1878 on this score, it may be claimed that the annuity is given gratuitously. But if it were gratuitous, then payment would be terminable at will, and then, ultimately, the dispute clause would have been useless.

An English version of the Deed of 1878 gives "padjak" the meaning of *cession*. The inaccuracy of this translation need not be belabored. Suffice it to say that it cannot be maintained without being inconsistent with the real import of the document as borne out by the amplifying stipulations and covenants adduced in the preceding considerations. However, granting *arguendo* that the Deed of 1878 was a cession, even then it could not have involved sovereign, but mere proprietary, rights. *First*, because cession of territory, understood in international law as the transfer of sovereignty over a definite area of territory<sup>50</sup> requires that the ceding subject and the cessionary be *both* States.<sup>51</sup> As a rule, cession made to a private person is outside the pale of international law.<sup>52</sup> The only recognized exception is when his State invests him with authority to acquire territory on its behalf.<sup>53</sup> And when he is acting in a private individual capacity, the only accepted exceptions are: (a) when he declares the existence of a new State and other States recognize it, and (b) when at his request an existing State acknowledges his acquisition as having been made on its behalf.<sup>54</sup> Even then, it is essential that the territory acquired be not under the territorial supremacy of any State.<sup>55</sup>

*Second*, because cession can be effected only by means of a treaty,<sup>56</sup> and a treaty can be concluded only between Sovereigns,<sup>57</sup> Overbeck and Dent, when they signed the Deed of 1878, did not

<sup>50</sup>Oppenheim: *International Law — A Treatise*, edited by Lauterpacht, Volume I, 8th Ed., 1955, p. 547. Fenwick: *International Law*, 3rd Ed., 1952, p. 358. Hackworth: *Digest of International Law*; Volume I, Washington, 1940, p. 421.

<sup>51</sup>*Ibid.*

<sup>52</sup>*Ibid.*

<sup>53</sup>*Ibid.*, p. 544-5.

<sup>54</sup>*Ibid.*

<sup>55</sup>*Ibid.*, p. 544

<sup>56</sup>*Ibid.*, p. 548

<sup>57</sup>*Ibid.*, p. 882; Fenwick, *ibid.*, p. 432; Schwarzenberger, *A Manual of International Law*, 4th Ed., 1960, p. 140.

act in the name of Great Britain. In fact, they had to negotiate with the British Government later on for the Charter of the North Borneo Company which they subsequently formed. And it is noteworthy that the Charter itself did not constitute them, nor the Company, as representative or agents of the British Government. Overbeck and Dent, therefore, could not have validly acquired North Borneo by cession in favor of Great Britain. Neither could they have acquired it as private individuals, for no evidence exists that they proclaimed North Borneo as a new State recognized by other Powers, and by the provisions of the Charter of the North Borneo Company itself, acknowledging that the sovereign rights and powers exercised over North Borneo by Overbeck and Dent were merely delegated by the Sultan, Great Britain disclaimed acquisition on its behalf. In any case, the North Borneo territory was not a *terra nullius*; it had long been under the sovereign control of the Sultan of Sulu.

It may be claimed that the Sultan of Sulu, by signing the Treaty of Capitulation of July 22, 1878, recognizing the sovereignty of Spain over Sulu and its dependencies, and constituting himself a loyal subject of the Spanish Crown, lost his sovereignty over North Borneo by surrendering it to Spain, which in return renounced it in favor of Great Britain by the Protocol of 1885.

This position cannot be admitted. First, because, as maintained by Great Britain and Germany themselves, Spain's control over most of Sulu and its dependencies was merely nominal. Spain could raid and punish, but it could not and did not subdue the Moros. While it is true that in the Protocol of 1885 Great Britain and Germany at last recognized the sovereignty of Spain over Sulu and its dependencies in exchange for Spain's renouncing *vis-a-vis* Great Britain her own claims of sovereignty over North Borneo, nevertheless Spain's sovereign control over Sulu and its dependencies was hardly more effective in 1885 than it was before 1878; nor was the Sultan's internal autonomy appreciably diminished thereafter. The Sultanate of Sulu remained unsubjected to the end of the Spanish regime. Second, because Article I of the Treaty of 1836, as re-affirmed by Article II of the Protocol of 1885, clearly excludes North Borneo territory from the geographical unit known under Spanish Law as the Island of Jolo and its dependencies ("la isla de Jolo y sus dependencias") — over which by the Treaty of 1878 Spain is recognized to exercise sovereignty.

Hence, Spain's sovereignty over "Sulu and its dependencies" does not necessarily include sovereignty over North Borneo.

The question may be raised as to how the Sultan could recognize in Sulu and its dependencies the sovereignty of Spain over him, and yet remain himself a sovereign in his own right over North Borneo. Can a person be a subject of one country and the sovereign of another?

Whatever reasons other countries may invoke for the negative side, Great Britain can in no way invoke them in her own case. For it was Great Britain herself who gave birth to this rule that a subject in one country can be the sovereign in another. The cession about the years 1846 to 1853, by the Sultan of Brunei to James Brooke, of the territory known as Sarawak, raised the question whether it is possible for a British subject to acquire the status of independent sovereign. Three years later, in February 15, 1856, the British Government upon the advice by the Law Officers reached the conclusion that it was legally competent to the Crown to permit one of its subjects to become the Head of a foreign sovereign state.<sup>58</sup>

In 1946 the same principle was recognized by Great Britain when Sir Charles Vyner Brooke, the last Rajah of Sarawak and a British subject, ceded Sarawak to the British Crown. Cession of territory is an act which only a sovereign can do.

It can be sustained, therefore, that the Sultan of Sulu, notwithstanding his becoming himself a loyal subject of Spain and later of the United States, remained nevertheless the sovereign of his North Borneo territory, under the theory that both Spain and the United States which in this case had become his protectors permitted him to exercise residual sovereignty over North Borneo, and to continue receiving the money rentals from the North Borneo Company. By the Protocol of 1885, Spain did not recognize Great Britain as sovereign over North Borneo — she only gave up her own claims of sovereignty over North Borneo and recognized Britain's legitimate interests to consider North Borneo within her sphere of influence. Spain, therefore, knew that the North Borneo territory remained in *status quo*, under the sovereignty of the Sultan, and by renouncing her own claims of sovereignty over North Borneo, Spain thereby was equivalently allowing the Sultan to remain the sovereign of North Borneo.

Secondly, the United States under the Bates Treaty and the

<sup>58</sup>McNair: *International Law Opinions*, Volume I, (Cambridge: 1956), p. 15-21.



Carpenter Agreement knew about the North Borneo possessions of the Sultan. The fact that the Agreement divests the Sultan of his temporal jurisdiction only within the limits of American territory is tantamount to allowing him to remain what he was before: the sovereign of North Borneo.

Nor, thirdly, did the Moro Policy of President Quezon put an end to the Sultan's sovereignty over North Borneo. That policy, as we said above, was no departure from the *modus vivendi* established by the Carpenter Agreement, as far as the dominions of the Sultan outside Philippine territory were concerned. Foreign relations, under the Commonwealth Government, were still the sole prerogative of the United States Government. It is for this same reason that the Philippine Commonwealth could not very well include North Borneo within the geographical demarcation of Philippine territory. Apart from the fact that this would have needed a cession or a grant from the Sultan in favor of the Philippine Commonwealth, inclusion of North Borneo within Philippine territory would certainly have meant a veto of the provision by the United States, since the United States by the Convention of 1930 had agreed that as far as U.S. territory in the Philippines was concerned, it did not extend into North Borneo which Great Britain claimed to be under her protection.

It may be objected that by the very fact that the United States signed the Convention of 1930 — recognizing the British Protectorate over North Borneo — she was thereby putting an end to the Sultan's sovereignty over North Borneo. In the light of the Carpenter Agreement, which was never abrogated by the United States either expressly or implicitly, nothing in the Convention of 1930 could be interpreted as a rejection by the United States of the Sultan's claim of sovereignty over North Borneo. The Convention merely formalized into a treaty the extent of the territory ceded by Spain to the United States. Obviously, by the Treaty of Paris and the Treaty at Washington of 1900, North Borneo was never ceded to the United States. It always remained under the sovereignty of the Sultan of Sulu — a sovereignty which could not have been extinguished merely because Britain had extended unilaterally in 1888 her protectorate over a territory leased to the North Borneo Company. With all the official assurances made by Great Britain that the North Borneo Company ruled not because of delegation of powers from the British Crown, but because of delegation of powers from the Sultan of Sulu, it could indeed be a confession of naked aggression on the part of Great Britain to claim now that the Protectorate

Treaty of 1888 she signed with the North Borneo Company without the knowledge of the Sultan meant the abolition of the Sultan's sovereignty.

That the Sultan did not protest the protectorate treaty between Great Britain and the North Borneo Company can readily be explained by the fact that the Sultan of Sulu could not have considered this as tantamount to a denial of his sovereignty, when, in fact, it was agreed in the Deed of 1878 between the Sultan and Overbeck and Dent that in case of dispute Great Britain would be called upon to arbitrate. It is understandable therefore that the protectorate of Great Britain whose intervention in disputes was agreed upon in the contract would not by itself elicit a protest from the Sultan.

After the death of Sultan Jamalul Kiram in 1936, the *Ruma Bechara* (Council of Datus) failed till this year (1962) to elect his successor, or rather, to agree on a legitimate successor — for several vying successors were actually set up after the death of Sultan Jamalul Kiram. It may be argued therefore that this interregnum in the Sultanate constituted abandonment in international law, such that Great Britain could claim acquisition of North Borneo by occupation and/or prescription. This argument has no validity whatsoever. Abandonment as a mode of losing territory under international law requires physical desertion of the territory and intention of giving up sovereignty over it.<sup>59</sup> Physical desertion alone does not make the territory derelict, as long as *spes redeundi*, which is presumed during a reasonable time<sup>60</sup> and which can be shown by the simple expediency of leaving upon the territory official marks and symbols of property, or mere protest against the intrusion of other powers into the territory,<sup>61</sup> remains.<sup>62</sup> In the case of North Borneo, we cannot even speak of physical desertion. The descendants of the Sulu warriors who came to the aid of the Sultan of Brunei of 1704 remained there. The Sultan himself up until his death in 1936 used to visit Sandakan, on which occasions, he was received as a sovereign. After his death, the only formality missing was a definite successor to

<sup>59</sup>Oppenheim, *op. cit.*, p. 580; Hackworth, *op. cit.*, p. 442.

<sup>60</sup>Hall, cited in *Despatch from the Marquess of Salisbury to Mr. Phipps*, McNair, *ibid.*, p. 304.

<sup>61</sup>Briggs: "Clippertown Island Arbitration", *The Law of Nations—Cases, Documents, Notes*; 2nd Ed., 1952, p. 247.

Bishop: "The Island of Palmas Case", *International Law, — Cases and Materials*, (New York: 1953), p. 365.

<sup>62</sup>Oppenheim, *loc. cit.*, p. 580; Hackworth, *loc. cit.*, p. 442.

the Sultanate. Even this defect has already been cured with the recognition by the *Ruma Bechara* of Sultan Esmail Kiram. In any case, the temporary vacancy of the Sultanate would not have vitally altered the *status quo*, since the sovereign rights the Sultan would have wielded were being exercised by delegation by the North Borneo Company. Furthermore, the British Government continued paying the annual consideration to the heirs of the Sultan, or, failing to contact the heirs, continued depositing in trust funds the amounts due to the heirs, an explicit recognition and acknowledgement of the continuity of the Sultanate.

In resumé, on the basis of the historical facts presented, there are solid reasons to sustain, *first*, that the Deed of 1878 was a *lease*; *second*, that even if it were a *cession*, it was null and void as such owing to non-observance of the formalities required and for lack of contractual capacity on the part of Overbeck and Dent; *third*, that the Sultan, although he signed the Treaty of Capitulation of 1878 and constituted himself a loyal subject of Spain, and later, of the United States remained the sovereign of North Borneo; *fourth*, that the Sultanate was not extinguished nor was the North Borneo territory ever abandoned in a manner that would entitle Great Britain to acquire it by occupation and/or prescription under international law; *fifth*, that, therefore, the successors of Sultan Jamalul Alam since 1878 continue in possession of Borneo; and *sixth*, that therefore, finally, if they cede North Borneo to the Philippine Government as they actually did sometime last summer, the Philippine Government would then become the rightful sovereign thereover.

#### Appendices

##### GRANT BY SULTAN DE SULU OF TERRITORIES AND LANDS ON THE MAINLAND OF THE ISLAND OF BORNEO. DATED 22ND JANUARY 1878<sup>63</sup>

We Sri Paduka Maulana Al Sultan Mohamet Al Alam Bin Sri Paduka Almarhom Al Sultan Mohamet Fathloñ 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

<sup>63</sup>Translation of Deed of 1878 by Maxwell and Gibson in *Treaties and Engagements Affecting the Malay States and Borneo*.

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 dollars 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.

##### GRANT BY THE SULTAN OF SULU OF A PERMANENT LEASE COVERING HIS LANDS AND TERRITORIES ON THE ISLAND OF BORNEO. Dated January 22, 1878.<sup>64</sup>

We, Sri Paduka Maulana Al Sultan MOHAMMED

<sup>64</sup>Translation of Deed of 1878 by Prof. Harold C. Conklin.

JAMALUL ALAM, Son of Sri Paduka Marhum Al 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, China-batangan, 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 Jamalul 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 Al 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.

Witness to seal and signature  
(Sgd.) W. H. TREACHER

Seal of the Sultan  
Jamalul Alam

H.B.M. Acting Consul General in  
Borneo

COMMISSION FROM THE SULTAN OF SULU APPOINTING BARON DE  
OVERBECK DATU BANDAHERA AND RAJAH OF SANDAKAN.

Dated 22nd January 1878.<sup>65</sup>

To all nations on the face of the earth whom these matters may concern. We Sri Paduka Maulana Al Sultan Mohamet Jamal Al Alam Al Bin Marhom Sri Paduka Maulana Al Sultan Mahomet Fathlon Sultan of Sulu and its dependencies send greetings:

Whereas we have seen fit to grant unto our trusty and well beloved friends Gustavus Baron de Overbeck and Alfred Dent, Esquire, certain portions of the dominions owned by us comprising all the lands on the north and east coast of the Island of Borneo from the Pandassan River on the north-west to the Sibuco River on the east coast including amongst others the states of Paitan, Sugut, Bangaya, Labuk, Sandakan, Kina Batangan, and Mumiang and all the lands and territories in Darvel Bay as far as the Sibuco River *together with all the lands belonging thereto* for a certain consideration between us agreed: and

Whereas the said Baron de Overbeck is the chief and only authorized representative of his Company in Borneo;

Now therefore know ye that we the Sultan Sri Paduka Maulana Al Sultan Mahomet Jamal Al Alam Bin Al Morham Sri Paduka Al Sultan Mahomet Fathlon Sultan of Sulu and its dependencies have nominated and appointed, and do hereby nominate and appoint, Baron de Overbeck supreme and independent ruler of the above named territories with the title of Datu Bandahara and Rajah of Sandakan with absolute power over life and death of the inhabitants of the country with all the absolute rights of property over the soil of the country vested in us and the right to dispose of the same as well as

<sup>65</sup>From the records of the former Bureau of Insular Affairs, File No. 980-24—Treaty (Washington, D.C., 1946).

the rights over the productions of the country whether mineral, vegetable or animal with the rights of making laws, coining money, creating an army and navy and levying customs dues on home and foreign trade and shipping and other dues and taxes on the inhabitants as to him may seem good or expedient together with all other powers and rights usually exercised by and belonging to sovereign rulers and which we hereby delegate to him of our own free and sovereign will.

And we call upon all foreign nations with whom we have formed friendly treaties or alliances and we command all Datus, Nobles, Governors, Chiefs and people owing alliance to us in the said territories to receive and acknowledge the said Datu Bandahara as the supreme ruler over the said States and to obey his commands and respect his authority therein as our own. And in the case of the death or the retirement from office of the said Datu Bandahara then his duly appointed successor in the office of supreme ruler and governor-in-chief of the Company's territories in Borneo shall likewise if appointed thereto by the Company succeed to the title of Datu Bandahara and Rajah of Sandakan and all the powers above enumerated be vested in him.

Done at the Palace of the Sultan at Lipuk in the Island of Sulu on the nineteenth of Maharam A.H. 1295 being the 22nd day of January A.D. 1878.

ACTING CONSUL-GENERAL TREACHER TO THE MARQUIS OF  
SALISBURY. — (Received October 7.)<sup>66</sup>

Labuan, August 24, 1878.

My Lord

WITH reference to the subject of the Spanish claims to Sandakan and the Sultan of Sulu's Bornean possessions, I have the honour to transmit herewith copy of a letter from the Sultan of Sulu to Baron de Overbeck, said to have been written at the dictation of the Spanish Governor at Banuwa, and dated the 23rd July, the day after the signing of the Treaty with Spain of the 22nd July, in which His Highness states that the Spanish have full sway over the territories belonging to him, and that consequently the question of cession of Sandakan must now be settled with the Captain-General of the Philippines and the Governor of Banuwa.

<sup>66</sup>Affairs of Sulu and Borneo, Document 132.

Baron Overbeck informed me that the Sultan had previously warned him that if he received a letter from him, either written in the Sulu language, instead of Malay, or not properly sealed, then the Baron was to consider it as not emanating from His Highness, but as the work of the Spanish.

The letter was written in Sulu, and, it is said, by Don Pedro, a Spanish naval officer, who speaks and writes that language fluently. It was, moreover, forwarded to Baron de Overbeck through the Spanish Governor.

I also inclose copy of a letter addressed to the Sultan on the 25th July by the Spanish Governor of Banuwa, telling His Highness to take no further steps in the matter, but to refer Baron de Overbeck to the Spanish authorities.

These copies were furnished to me, at my request, by Baron de Overbeck.

A correspondence also passed between the Governor of Banuwa and the Baron, the former asserting the claims of Spain to Sandakan; but these letters I have not seen. I need scarcely say that Baron de Overbeck refused to recede from his position.

It is reported also that the Spaniards are intriguing to have Datu Haroun, a nephew or cousin of the Sultan, reappointed as Governor of Sandakan. This Datu was recalled from that post some four years ago, owing to his interfering with the trade of the Labuan Spaniards, and was mainly instrumental in having the Spanish flag hoisted recently at Meimbong, and in the vicinity of the Sultan's palace. I should state that the Spanish flag does not appear to be permanently hoisted in this portion of Sulu, but merely for the occasion, and as a recognition of the paramount authority of Spain.

I have, & c.

(Signed) W. H. TREACHER

LETTER OF SULTAN MUJAMAD DEHAMALUL  
TO BARON DE OVERBECK<sup>67</sup>

There is a seal reading:

Governor General of the  
Philippine Islands

Translation:

The Paduca Majasari Maulana, Sultan Mujamad Dehamalul

<sup>67</sup>General Archives, Philippine Islands, loc. cit.

Alam, to his brother, the Governor of Jolo.

I herewith beg to advise you of the letter which I have written Baron de Overbeck reading as follows:

The Paduca Majasari Maulana, Sultan Mujamad Dehamalul Alam to Baron de Overbeck.

As the "capitulation" has been signed today with Spain by the representatives of His Excellency, the Governor and Captain General of the Philippine Islands and by myself, accompanied by the main Dattos in representation of this Country, it is my will to cancel the contract of lease of Sandakan, etc., signed by you last January because in addition to the fact that the Crown of Spain is in possession of all the territory of the Sultanate as set forth in the basic provisions of the Treaty of this date and the previous treaties, the contract is without any legal effect as I advised you in my communication of April since you failed to perform the provisions of the contract of lease made by you.

On this same day, I am communicating my resolution to His Excellency, the Governor General of the Philippine Islands and to the Governor of Jolo who may take any action they may deem advisable in this matter. I am advising you of the foregoing so that you may take any measures or steps which you may deem opportune.

Licup, July 22, 1878

Sultan of Jolo.

This is followed by a flourish and seals.

The foregoing is a true translation from the original written in Arabic.

Licup, July 22, 1878.

The interpreter — Pedro Ortuoste.

The foregoing is a true transcript — Tomas Aguirre.

LETTER OF CARLOS MARTINEZ TO BARON DE OVERBECK<sup>68</sup>

There is a seal reading:

Office of the Governor General of  
the Philippine Islands — Secretariat  
Military Provisional Governor  
of Jolo.

<sup>68</sup>*Ibid.*

Official letter written in Spanish.

To Baron de Overbeck on board the Steamer "Washi" in the roadstead of Meimbang-Licup (Residence of the Sultan of Jolo) — July 22, 1878.

Sir:

The "capitulation" has been signed today by the Commissioners who, under my Presidency, represent His Excellency, the Governor and Captain General of the Philippine Islands, with the Sultan of this Archipelago and representatives of the country. The Sultan advised me that he had executed with you a contract for the lease of Sandakan and its dependencies, which contract was cancelled by the Sultan for the reasons set forth in the letter sent to me and of which I am enclosing herewith a copy duly translated and certified. By virtue of the instrument of peace and capitulation signed today, and by virtue of the previous treaties, Spain is in the possession of all the territory of the Sultanate, including the Sandakan Bay and the dependencies thereof in Borneo, and therefore, without any prejudice to whatever may be resolved by His Excellency, the Governor General of the Philippine Islands, I am advising you of the above in due time for your proper information.

May God protect you for many years.

The Colonel — Governor of Jolo — Carlos Martinez.

The foregoing is a true transcript.

The Colonel — Governor — Carlos Martinez.

The foregoing is a true transcript — Tomas Aguirre.

LETTER OF BARON DE OVERBECK TO GOVERNOR  
CARLOS MARTINEZ<sup>69</sup>

There is a seal reading:

Office of the Governor General  
of the Philippine Islands

Secretariat — Screw Steam "Washi" — Meimbang — July 24, 1878

Dear Sir:

I beg to acknowledge receipt of the letter of Your Excellency dated the 22nd inst. (received only today) advising me that the present possession of the Sultanate of Jolo had become, in accordance with the treaty signed on the said day, a

<sup>69</sup>*Ibid.*

Protectorate of the Crown of Spain, adding that the said possessions, in addition to the Archipelago of Jolo, comprise Sandakan Bay and the dependencies of the Sultan in Borneo. Without entering here further than necessary into any discussion as to the merits of the matter involved, I will ask Your Excellency to permit me to advise you that the agreement executed between His Highness, the Sultan and myself, as representative of British interests, in connection with the assignment of certain portion of the eastern coast of Borneo, claimed by His Highness as part of his domain, was concluded for all times and perpetually, signed in my presence and certified by the representative of His British Majesty and Consul General in Borneo, and could not possibly be affected or cancelled by any subsequent treaty executed by His Highness with other parties concerning those territories which may still belong to him. I therefore take advantage of this opportunity to inform Your Excellency that in any event, I, in the name of the interested parties represented by me, have no intention whatsoever of withdrawing from the agreement concluded between His Highness, the Sultan and or myself or to permit that same be cancelled under any pretext whatsoever.

In conclusion, I will ask Your Excellency to permit me to advise you that this matter, as far as I am concerned and as far as the interests represented by me are concerned, has been fully reported and submitted to the Government of His British Majesty.

Your most obedient servant

Signed: Overbeck

To His Excellency, Governor Carlos Martinez (C. C.) on board the vessel of His Catholic Majesty, "Vencedora", Meimbang.

I, the undersigned, Interpreter of this Office of the Governor General herewith certify that the foregoing is a true verbatim translation from the original written in the English language, to which I refer.

Manila, August 19, 1878 — Ramon Blanco

The foregoing is a true transcript — Tomas Aguirre

# ATENEO LAW JOURNAL

*Published four times during the academic year by Ateneo Law Students*

## EDITORIAL BOARD

FERNANDO T. CHUA  
*Editor-in-Chief*

RAYMUNDO R. DIZON, JR.  
*Article Editor*

JORGE M. JUCO  
*Note Editor*

RAFAEL E. EVANGELISTA, JR.  
*Developments Editor*

ROBERTO R. ROMULO  
*Developments Editor*

RAMON F. AVIADO, JR.  
*Case Editor*

EDUARDO J. BERENGUER  
*Case Editor*

RAUL C. RABE  
*Case Editor*

FRANCISCO E. RODRIGO, JR.  
*Legislation Editor*

CARMELO F. FERNANDEZ  
*Administrative Rules & Rulings Editor*

EDUARDO D. DE LOS ANGELES  
*Book Note Editor*

## STAFF WRITERS

ALFREDO A. ALTO  
DEMOSTHENES S. BABAN  
LUISITO G. BALUYUT  
RUBEN R. BASA  
ANTONIO E. BENGZON  
ARSENIO G. BONIFACIO II  
ARTURO A. BORJAL  
NAZAR E. CHAVES  
VICENTE B. CHUIDIAN

ROGELIO A. CORTES  
JOSE V. NEPOMUCENO  
ROGELIO C. NICANDRO  
ANTONIO B. ORTIZ  
ANTONIO C. PACIS  
ANTONIO O. PARO  
RAUL M. RODRIGUEZ  
LUIS F. SISON  
TEODORO C. VILLARMIA

## BUSINESS & CIRCULATION

WILLIAM H. TIONGSON  
*Business & Exchange Editor*

BENJAMIN S. FORMOSO  
ERNESTO C. JACINTO

ROMULUS S. PROTASIO  
JOSE R. RECINTO, JR.

## FACULTY ADVISER

RODOLFO U. JIMENEZ

DEDICATED TO OUR LADY, SEAT OF WISDOM