THE PHILIPPINE CLAIM TO SABAH AND INTERNATIONAL LAW**

I. INTRODUCTION

The establishment of Malaysia on September 16, 1963[1] (through the merger of Federation of Malaya, and North Borneo/Sabah,[2] Sarawak and Singapore) was beset with local and foreign difficulties. Internally, Singapore's continued friction with the Central Malaysian Government precipitated the secession of Singapore and its establishment as an independent sovereign Republic on 9 August, 1965.[3] On the international level the establishment of the new Federation evoked objections from Indonesia and the Philippines: Indonesia asserted that the inhabitants of Sabah and Sarawak were being coerced into this arrangement, branded it as a neo-colonialist plot and launched its "Confrontation Policy" (involving armed hostilities) against Malaysia. The Philippines' principal concern was its claim that legal sovereignty over Sabah vests in the Philippines. With the termination of the Confrontation Policy in 1965, and normalization of the relations between Malaysia and Indonesia, the Philippine Government resumed its vigorous efforts to pursue its claim over Sabah and consistently urged Malaysia to agree to submit the dispute to the International Court of Justice for final settlement.[4] Malaysia, for reasons which it has not disclosed, has so far declined the invitation to adjudication by the World Court.

** Based on an address to the Law Alumni of the Universities of Malaya and Singapore, September 10, 1968.

Statements of Philippine or Malaysian officials referred to in footnotes with no indication of source were supplied to the writer by (a) Embassy of Philippines in Malaysia, (b) Consulate-General, the Philippines, in Singapore and (c) Mr. R. Ramani, Ministry of Foreign Affairs, Malaysia. The writer wishes to place on record his gratitude for the cooperation which he has received.

1. See Malaysia Agreement, 1963 between the governments of United Kingdom, Federation of Malaya, North Borneo, Sarawak and Singapore, U.K. *Command Paper* 2094; (1963) 2 *International Legal Materials,* p. 816.

2. While the writer uses the name "Sabah" in the text, it should be pointed out that prior to the establishment of Malaysia, the disputed territory was commonly referred to as "North Borneo," while "Sabah" is the name used more frequently subsequent to the creation of Malaysia.

3. See Independence of Singapore Agreement, 7 August 1965, between the Malaysian Government and the Singapore Government. (1965) 4 *International Legal Materials,* p. 932.

4. The Philippines has accepted the compulsory jurisdiction of the I.C.J. pursuant to Article 36(2) of the Statute of the Court: (1947) 7 *United Nations Treaty Series,* p. 230. But Malaysia has not done so: the matter can be submitted to the I.CJ. only through a special agreement concluded between both countries.

Although the Philippine claim is founded on legal as well as other bases [5] this article will discuss only some of the more relevant international law issues.[6] In Sections II and III the Philippine arguments that sovereignty over Sabah was not, and could not have been, transferred to the British in 1878 are discussed. Section IV questions the legal position of the Philippines in the light of the doctrine of acquiescence. In Section V we evaluate the claim in relation to the criterion of self–determination. It may be indicated at the outset that the conclusions of the writer are that the Philippine case is essentially weak in international law and that there are several persuasive arguments with which Malaysia could rebut the legal arguments of the Philippines.

The historical background to the dispute is complicated[7] but a brief account at least is necessary to view the dispute in its perspective, to understand the origins of the dispute and to appreciate some of the legal problems involved. In 1877 two individuals, Dent (an Englishman) and Overbeck (an Austrian), concluded agreements with the Sultan of Brunei by which the Sultan ceded to them substantial parts of Sabah.[8]

At that time another Ruler, the Sultan of Sulu, was known to claim sovereignty over the territory in question: the claim asserting that the territory had been ceded to him in 1704 by the Sultan of Brunei as a reward for assistance in quelling a rebellion in Brunei. Presumably out of caution, Dent and Overbeck in 1878 concluded with the Sultan of Sulu an agreement whereby this Sultan granted the territory to them.[9] In the meantime Dent, (who, with Overbeck, headed the British North Borneo Provisional Association) petitioned to the British Government

5. Statements made by official Philippine spokesmen have often combined legal arguments with other considerations. This is particularly true of the Philippine position on the claim before the establishment of Malaysia when, not infrequently, reference was made to the security threats to the Philippines if Sabah became part of Malaysia. Vice–President Palaez in his Opening Statement at the Anglo–Philippine talks in London in 1963 said on 28 January, 1966: "Our claim to North Borneo, in short, involves political and security considerations of highest importance." (1963) 2 *Philippine Journal of International Law,* p. 234, hereinafter referred to as the *Palaez Statement.*

6. For a quick survey of various legal arguments that may have a bearing on the Philippine claim, see Alafriz, "On the North Borneo Question," (1963) 2 *Philippine Journal of International Law* p. 78; Arreglado, "Comments on 'The North Borneo Question' ", *Ibid.*, p. 100; Salonga, "A Reply to the Sumu–long Report on the Philippine Claim to North Borneo," *Ibid.*, 18; Africa, "The Legal Status of the British Occupation of North Borneo," *Ibid.*, p. 388 [this volume of the *Philippine Journal* also contains a compilation of selected documents on the Sabah Claim], and Ortiz *Legal Aspects of the North Borneo Question* (1964).

7. See Wright "Historical Notes on the North Borneo Dispute" (1966) 25 *Journal of Asian Studies* p. 471.

8. For texts of these agreements dated 29 December, 1877 see Maxwell and Gibson, *Treaties and Engagements affecting the Malay States and Borneo,* (1924) pp. 154–155.

9. *Ibid.*, at p. 158. The translation in Maxwell and Gibson's compilation is challenged by the Philippines. The Philippines essentially relies upon a translation by Professor Harold Conklin of Yale University which is reproduced in full in Ortiz, *op. cit., supra,* note 6, at p. 41.

for a Royal Charter and this Charter was granted on November 1, 1881.[10] Pursuant to this Charter the British North Borneo Company was established (in March 1882) to which was transferred all the grants and commissions of the previous British North Borneo Provisional Association. In May 1888, North Borneo became a British Protectorate,[11] and in 1946 the United Kingdom asserted full sovereignty over the territory when it was annexed as a Crown Colony[12] (after the Company had sold its interests to the Crown). The next change in status was on September 16, 1963 when, upon Sabah's joining Malaysia as a constituent State. United Kingdom relinquished all sovereignty and jurisdiction over the territory. In accordance with the Malaysia Agreement, such sovereignty was thenceforth vested in Malaysia.

The Philippines maintains that in law sovereignty over Sabah vests in the Philippines. In presenting its claim, the Philippines considers itself successor in sovereignty over the possessions of the Sulu Sultanate.[13] The succession theory is based essentially upon a series of instruments executed in 1964[14] whereby certain alleged heirs of the Sulu Sultan transferred [15] to the Philippine Government all sovereignty, rights and interests they may have in Sabah. The Philippines could also argue (it would be a rather weak argument) that they are successors by virtue of the fact that upon Independence in 1946 it succeeded to the sovereign rights of the United States which, in turn, had earlier

10. For the next of the Charter see Maxwell and Gibson, op. *cit*., *supra,* note 8 at p. 160.

11. British Protectorate Agreement 1888, Maxwell and Gibson, *op. cit*., *supra,* note 8 at p. 178.

12. North Borneo Cession Order–in–Council, July 10, 1946: (1953) 146 *British and Foreign State Papers* 1946, p. 173.

13. A Reuter report of 4 October 1962 quoted Philippine Acting Foreign Secretary Mr. Salvador Lopez "The Philippine Government, having now become the successor in sovereignty to the Sultanate of Sulu, considers the issues joined and a dispute existing." *The Straits Times* (Singapore), 5 October 1962.

14. These instruments are:— (a) Instrument dated April 24, 1962 whereby five heirs transferred their claim to North Borneo to the Philippine Government; (b) Resolution of Ruma Bechara of Sulu authorizing the Sultan in Council to transfer his title of sovereignty over North Borneo to the Philippines dated August 29, 1962; (c) Document signed by the Philippine President, September 11 1962 authorizing Vice–president Emmanuel Palaez to accept an instrument of cession of rights over Sabah from one of the heirs; and (d) Instrument of cession of North Borneo by "Sultan Mohammed Esmail Kiram, Sultan of Sulu." September 12, 1962.

15. Whether this transference of sovereignty has any validity appears to be doubtful. See Bob Reece, "Sabah Rattling", (1968) 35 *Far Eastern Economic Review*, p. 387, who points out (a) that these instruments do not truly transfer sovereignty since the heirs reserved certain rights to themselves, and (b) there is much doubt as to whether these individuals are indeed the rightful heirs "There has been a good deal of controversy over who precisely should be regarded as the rightful Sultan. . . ." (p. 389).

succeeded to Spain's sovereignty over the Philippines and the Sulu Sultanate.[16]

Malaysia is in the position of defendant–State in the dispute also through succession being successor to United Kingdom in respect of Sabah. Prior to the establishment of Malaysia, it was agreed between Malaysia, the Philippines and Indonesia that ". . . the inclusion of North Borneo in the Federation of Malaysia would not prejudice either the [Philippine] claim or any right thereunder" and that the Philippines would have the right to continue to pursue the claim "in accordance with international law and the principle of pacific settlement of disputes."[17]

One further introductory point may be made. We have already seen that Dent and Overbeck concluded two sets of agreements: with the Sultan of Brunei in 1877 and with the Sultan of Sulu in 1878. It is interesting to note that the Philippines, in all its documents and legal presentations, has assumed that the *relevance* of the 1878 Sultan of Sulu grant will not be challenged and that the dispute was only over its interpretation and scope.[18] This assumption was not challenged by United Kingdom during the Anglo–Philippine talks on the claim prior to the creation of Malaysia: the British only argued that that instrument was not a lease and was a cession in perpetuity. But at the Bangkok Talks, it was challenged by the Malaysian Government whose representative stated:[19]

> Our questions indicated that we wished to challenge your basic assumption that the Sultan of Sulu had in fact any sovereignty over the territory. . . . We drew your attention to the documents of that time establishing that over the entire territory which is now Sabah. . . it was the Sultan of Brunei who in fact had sovereignty and conveyed that sovereignty to Dent and Overbeck. . . .

The Philippines, in positing its claim on the 1878 Sultan of Sulu Grant maintains that in 1704 the Sultan of Brunei had ceded North

16. Under the Treaty of Paris, 1898 *Foreign Relations of United States, 1898,* p. 831 (1901). The hesitation of the Philippines to rely on such an argument may be because it is open to challenge since (a) under an 1885 Agreement (Maxwell and Gibson, *op. cit.*, *supra,* note 8 at p. 174) Spain relinquished all claims to North Borneo; (b) under the Anglo–US Boundary Convention, 1930, United States recognized sovereignty over the territory (see Section IV on acquiescence, *infra*). An argument could therefore be made that neither Spain nor United States acquired any sovereignty over North Borneo to which the Philippines could have succeeded.

17. Manila Accord, July 31, 1963 signed by President Soekarno of Indonesia, President Macapagal of the Philippines and Prime Minister Tunku Abdul Rahman of Malaysia, (1965) 550 *United Nations Treaty Series* p. 344.

18. ". . . first of all, and nobody seriously questions this, that the Sultan of Sulu was the sovereign of Sabah in 1878." — Statement by Ambassador Leon Ma. Guerrero, Member of the Philippines Delegation to Bangkok talks on Sabah made at a Luncheon Press Conference, Bangkok, July 13, 1968. By "Bangkok Talks" the writer refers to the series of meetings held at Bangkok in July 1968 between representatives of Malaysian and Philippine Governments to clarify the claim and to discuss the means of settling the dispute.

19. Statement by Tan Sri M. Ghazali bin Shafie, Leader of the Malaysian delegation to the Bangkok Talks, 15 July 1968, hereinafter referred to as the *Ghazali Shafie Statement.*

Borneo to the Sultan of Sulu. Malaysia, in disputing this premise, is aware that no proof has yet been adduced to substantiate this 1704 cession.[20] It is not possible here to ascertain which ruler in fact had sovereignty: more work has first to be done by the historian. The important observation is that if the Sultan of Sulu did *not* have any sovereignty then the entire Philippine case falls for the Philippine claim is a historically derivative one ultimately resting on the 1878 instrument. However, the invalidity of this instrument cannot alone affect Malaysia's title since it has another set of grants to rely upon: the 1877 Sultan of Brunei agreements. In the discussion that follows we shall proceed on the assumption that the 1878 Sultan of Sulu agreement has relevance and that Sulu had sovereignty over Sabah at that time.

II. LEASE OR CESSION? THE PROPER INTERPRETATION OF THE 1878 SULTAN OF SULU GRANT.

The core of the legal basis of the Philippine claim is that the 1878 Grant by the Sultan of Sulu to Dent and Overbeck was a *lease* and not a cession; that, being a lease, sovereignty was not transferred to Dent and Overbeck and that since a transferor can only transfer what he has, the British North Borneo Company (and, later, the British Government) could not have acquired sovereignty through Dent and Overbeck. The corollary of this is that the Sultan of Sulu retained his sovereignty. It is of vital importance to the Philippines that it establish that it was a lease and/or that sovereignty was not transferred under the 1878 instrument. The arguments falling under this rubric constitute the backbone of the Philippine case as demonstrated by its consistent and emphatic reliance on it:

> It is the thesis of the Philippine Government that the Contract of 1878 was one of lease and not a transfer of sovereignty or ownership.... As Overbeck and Dent had not acquired sovereignty and dominion over North Borneo, they could not legally transfer these in favour of the British North Borneo Company. Neither could the Company transfer sovereignty and dominion to the British Crown nor could the latter transfer these rights to the Federation of Malaysia.[21]

20. See Wright *op. cit., supra,* note 7. "The Philippine Government has not produced, and it is doubtful if there is extant, a document by which Brunei granted North Borneo to Sulu. It is only the weight of Sulu tradition which sustains the Sulu claim to ownership of the area" (p. 479); "whether Sulu ever held sovereignty over North Borneo is open to dispute" (p. 481). See also Vincent Shepherd (co–author) "The von Overbeck Legacy" (1968) 35 *Far Eastern Economic Review,* p. 142 at p. 143. "If there is an honest doubt over the ownership of the territory, the balance of the weight of evidence seems to favour Brunei."

21. *Philippine Claim to North Borneo (Sabah)* volume II, p. 6 (1967). See also opening Statement by the Philippine Delegation at the Bangkok Talks 1968. "Briefly, the substance of our claim is that the sovereignty, dominion and title to the territory of North Borneo, subject of the Contract of 1878, belong to the Republic of the Philippines and that the territory was leased, and not ceded to the British North Borneo Company nor to its immediate predecessors." See also the *Palaez Statement, supra,* note 5, at p. 233: "To put it in a capsule form: it is our legal position [*inter alia*] that the aforesaid contract of 1878 . . . was one of lease."

The competing translations

In maintaining that the 1878 Grant was one of lease, the Philippines relies on a translation of that instrument by Professor Harold Conklin of Yale University [22] which differs from the translation to be found in Maxwell and Gibson's compilation.[23] It may be useful here to compare relevant portions of both translations with differences italicized.

Translation by Professor Conklin	*Translation by Maxwell and Gibson*
GRANT BY THE SULTAN *OF A PERMANENT LEASE* COVERING HIS LANDS AND TERRITORIES ON THE ISLAND OF BORNEO. Dated January 22, 1878.	GRANT BY SULTAN OF SULU *OF TERRITORIES* AND LANDS ON THE MAINLAND OF THE ISLAND OF BORNEO. Dated 22nd January, 1878.
We . . . do *hereby desire to lease*, of our own free will and satisfaction, to Gustavus Baron de Overbeck of Hongkong 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 [the said] territories. . .	We . . . hereby grant and *cede* of our own free and sovereign will to Gustavus Baron de Overbeck of Hongkong and Alfred Dent, Esquire, of London, as representatives of a British Company cojointly their heirs, associates and successors and assigns *forever and in perpetuity* all the rights and powers belonging to us over all [the said] territories. . .
In consideration of *this* (territorial?) *lease*, the honourable Gustavus Baron de Overbeck and Alfred Dent, Esquire, promise to pay . . . five thousand dollars annually. . .	In consideration of *this grant* the said Baron de Overbeck and Alfred Dent promise to pay as compensation . . . five thousand dollars per annum.
The above-mentioned territories are from today truly *leased* [to Overbeck and Dent, their successors etc.] 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.	The said territories are hereby declared *vested* in [Overbeck and Dent, their successors etc.] 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 of foreign nationality without the sanction of Her Brittanic Majesty's Government first being obtained.
. . .	. . .
. . .	
. . .	. . .

22. See footnote 9.
23. *Ibid.*

The word "lease" and contextuality

The Philippine interpretation which denies that sovereignty was transferred, places a high priority on the term "lease" in the Conklin translation and reference is also made to the fact that in Spanish translations found in Madrid the corresponding term used is "arriedmento" or lease. Ortiz maintains that "Internal analysis of the Deed of 1878 itself reveals strong and valid reasons to hold that it was a *lease,* although a lease in perpetuity: first, because "padjak" the word of conveyance used in the document, by itself means "lease" rather than "sale" or "cession"; . . . "[24]

It is submitted that the arguments on behalf of the Philippines on what is their most important aspect of the claim do not withstand closer scrutiny. The pertinent observation that has to be made is that in the interpretation of agreements the most important goal of any decision–maker or scholar would be to ascertain the intentions of the contracting parties. Where ambiguity or doubt arises, such a situation cannot be resolved merely by focussing attention upon a single word (here "lease"). The context of the whole instrument becomes relevant[25] and other portions of the agreement must be examined to ascertain whether the initial suggestion of the word "lease" (assuming that the Conklin translation is correct) is confirmed or rebutted. The International Law Commission, in its Commentaries on the Law of Treaties, appropriately remind us that the Permanent Court of International Justice has stressed that the context is not merely the article or section of the treaty in which the term occurs but the treaty as a whole.[26] In its Advisory Opinion on *The Competence of the I.L.O. to Regulate Agricultural Labour,* the Court said:—

> In considering the question before the Court upon the language of the Treaty, it is obvious that the treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.[27]

A contextual examination of the 1878 Sultan of Sulu Grant (even if we considered only the Conklin translation) discloses that the insertion of the word "lease" is not dispositive of the question of intention and

24. Ortiz, *op. cit., supra,* note 6 at p. 33. He also states that the amount and manner of payment of consideration suggests a lease. See also, President Marcos, *Our Stand on North Borneo Issue,* (Radio–Television Chat, July 21, 1968), p. 9 (1968). "The original contract was in Malay and written in Arabic and left no doubt that it was a lease, for it used the word *patjak* which means lease or rent."

25. The contextuality principle is emphasized to some extent by the International Law Commission in its Draft Articles on The Law of Treaties. The General rule on interpretation (Art. 27) provides, "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in the light of its object and purpose." Emphasis added. *The International Law Commission, Reports on the second part of its Seventeenth Session, 1966 and on its eighteenth session 1966* (U.N. Doc. A/6309/Rev. 1).

26. *Ibid.*, p. 53. Sea also MacDougal, Lasswell and Miller, *The Interpretation of Agreements and World Public Order* (1968) pp. 119–144.

27. P.C.I.J. (1922) Series B, Nos. 2 and 3, p. 23.

that several other features indicate convincingly that the conferment of sovereign rights more consistent with cession was intended. It may be observed that phrases such as *"forever and until the end of time"* and *"truly leased as long as they* [Dent and Overbeck] choose or desire to *use them"* appear even in this translation. Usage of such phrases, it is submitted, is certainly inconsistent with the concept of lease. The concept of lease in international law is analogous to that in municipal law where "it is essential that the lease shall specify the period during which the lease is to endure. The beginning and end of the term must be specified either by dates or by reference to the happening of some event or circumstance by which the length of time can be ascertained with certainty." [28]

The agreement has neither a specific delimitation of the period nor any designation of the event which can terminate the grant.

Another provision in the instrument requires attention. This is the third paragraph in which a condition is introduced: the condition being that Dent and Overbeck shall not transfer the rights obtained under the instrument to "to another nation, or a company of other [than British] nationality" without the consent of the British Government. Witness that it is the consent of the *British Government* only that is required by the instrument. If the correct interpretation is that the 1878 instrument was a lease it is strange that the lessor (the Sultan of Sulu) did not reserve for himself the right to object to any transfer. This abdication on his part of any veto over the successors to Dent and Overbeck combined with the vesting of the veto with the British Government (presumably because it was a British Company) has the effect of negating the suggestion that there was only a lease.

Commission conferring title of Datu Bendahara and Rajah of Sandakan

Not inconsistent[29] with our recommendation that the context is important, reference has to be made to another instrument concluded by the Sultan of Sulu on the same day as the Grant in question. This instrument is the *Commission from the Sultan of Sulu appointing Baron de Overbeck Datu Bendahara and Rajah of Sandakan. Dated 22nd January 1878.*[30] In this instrument, after preambular reference to the Grant to Dent and Overbeck dated the same day, Overbeck is declared to be the "supreme and independent ruler" of the territories and what is pertinent is that the Commission vested in Overbeck:

> … all the *absolute* rights of property over the soil of the country vested in use and the right to dispose of the same … as to *him may seem good or ex–*

28. Osborne, *The Concise Law Dictionary,* 4th Ed., (1954) p. 196.

29. The International Law Commission, in its Draft Articles on the Law of Treaties, Art. 27(1), defines "context for the purpose in the interpretation of a treaty" to include, *inter alia,* "Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." *International Law Commission Reports, supra,* note 25, at p. 14.

30. Maxwell and Gibson, *op. cit., supra,* note 8 at p. 159. Text may also be found in Ortiz, *op. cit., supra,* note 6 at p. 44.

> *pedient* 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.[31]

Notwithstanding the term "delegate" the intention here clearly seems to be a complete transfer of ownership over the territory especially in view of the virtually unlimited power conferred on Overbeck to "dispose" of his rights "as to him may seem good or expedient." This Commission executed on the same day as the 1878 Sultan of Sulu Grant tends to confirm the view that the latter was not a lease but a cession.

Confirmatory instrument 1903

Equally relevant is a Confirmatory instrument of 1903 between the Sultan of Sulu and the British North Borneo Company including new areas not covered under the original grant of 1878. This Confirmatory instrument explains that "this is done because the names of the islands were not mentioned in the Agreement . . . [with Overbeck and Dent of 22 January 1878]. It was known and understood between the two parties that the islands were included in the *cession* of the districts and islands mentioned in the above–named Agreement."[32] This later characterization of the 1878 Sultan of Sulu instrument as a *cession* elucidates further the intentions of the parties to that instrument.[33]

Contemporary Practice in the Region

A general but important observation to be made in this connexion is that terms such as "lease" or "cession" were used loosely in this region in the nineteenth century — a factor which ought to discourage any attempt to ascertain the nature of rights granted by only inquiring whether "lease" or some other label was employed. This point is effectively demonstrated by Wright:—

> There are many examples of the casual use of these terms where grants of territory are concerned. For example, Hongkong in 1842 was "ceded" to Britain "to be possessed in perpetuity." But Kow Chaw was, in 1898, "ceded" to Germany for a term of 99 years, and Kuang–Chau Wan was "given by lease for 99 years" to France. The Island of Labuan in 1846 was "ceded" in perpetuity to Britain.[34]

To these instances we may add that Cape Rachado (Tanjong Tuan) was "ceded" to the British Government in 1860 but the cession was to become *null and void* if the British failed to "build and keep" a lighthouse ;[35] and Ruler of Kedah, in 1800, agreed to *"give* to the English Company *forever"* certain lands on the coast opposite Penang.[36]

Such inconsistency in use of terminology should lead one to agree that "the constant factor in all these examples of territorial transfer in

31. Emphasis added.
32. Maxwell and Gibson, *op. cit*., *supra,* note 8 at p. 183.
33. See note 29.
34. Wright, *op. cit*., *supra,* note 7 at p. 483.
35. Maxwell and Gibson, *op. cit*., *supra,* note 8 at p. 34.
36. *Ibid*., at p. 98.

the nineteenth century is in the stipulated length of time of the grant." [37] Alexandrowicz's more comprehensive account of State practice in the region suggests, even further, that transfer of sovereignty was intended where words like "in full sovereignty" "forever" "in perpetuity" or "cede" were employed.[38] And as we have already seen, in both the Conklin and Maxwell and Gibson translations there is not only no indication of a period of years but instead phrases such as "forever and until the end of time," appear. If the practice in the region is to be of any assistance in interpretation[39] one has to conclude that what was contemplated was a transfer, *in perpetuity* of all the sovereignty that the Sultan of Sulu had over the area.

Annual payments

One final point needs to be discussed. The Philippine claim that the 1878 instrument was a lease and not a cession also includes the argument that the provisions concerning payment are evidence that it is a lease and not a cession. As the Philippine Congressman Salonga put it:—

> We believe that annual compensation is consistent with the concept of lease, and inconsistent with the concept of purchase.[40]

It is incorrect to state that a cession is indicated only where payment is effected in one lump–sum transaction. First, in international law voluntary cession can be executed without any consideration whatsoever.[41] A *fortiori* such payment that may be made can be effected in any manner preferred by the parties: the intentions of the parties are the overriding consideration.

37. Wright, *op. cit*., *supra,* note 7 at p. 483.

38. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (1967) pp.6. 12 (note B).

39. See the *Case Concerning Right of Passage over Indian Territory* (*Portugal* v. *India*) where the court took into account the practice in India to decide if certain instruments transferred sovereignty. "There are several instances on the record of treaties concluded by the Marathas which show that, where a transfer of sovereignty was intended, appropriate and adequate expressions like cession 'in perpetuity' or 'in perpetual sovereignty' were used. The expressions in the two *sanads* and connected relevant documents establish, on the other hand, that what was granted to the Portuguese was only a revenue tenure , . ." *I.C.J. Reports* (1960) p. 6 at p. 38,

40. Statement by Congressman Salonga at Ministerial Meeting during the Anglo–Philippine Talks, London, January 1963: (1963) 2 *Philippine Journal of International Law,* p. 240. See also Ortiz, *op. cit*., *supra,* note 6 at p. 31: arguing it is a lease he points to "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). . . 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 so long as an heir of the Sultan survives."

41. Jennings, *The Acquisition of Territory in International Law,* (1963) p. 19: "A treaty of cession may or may not be made in return for some consideration; unlike English law, international law is indifferent as to whether there is a *quid pro quo* or not."

Secondly, a survey of similar treaties and agreements concluded in the region at that time discloses that cessions of territorial sovereignty were not infrequently accompanied by annual or monthly payments. For instance —

(i) in 1800 the King of Kedah concluded a Treaty[42] agreeing "to give to the English Company *forever* "certain lands on the coast opposite Penang and "The English Company are to *pay* annually to His Highness the lang de per Tuan of Purlies and Quedah, ten thousand dollars, as long as the English shall continue in possession of Pulo Penang, and the country on the opposite coast hereafter mentioned;"

(ii) in 1824 Singapore was ceded *"in full sovereignty* and property to the Honourable the English East India Company, their heirs and successors *forever".* The Company, "in consideration of the cession" was to pay the Sultan of Johore a lump sum of $33,200 (Spanish) and a "stipend" of $11,300 (Spanish) *per mensem* during his natural life, and to pay the Tumungong of Johore a lump sum of $26,800 (Spanish) and a *monthly* "stipend" of $700 (Spanish) during his natural life;[43] and

(iii) in 1901 the Sultan of Brunei ceded to the British North Borneo Company "all the sovereign rights and powers which are within our right and power" certain lands between the Sepitong and and Trusan Rivers, but it was agreed that in consideration the Company shall pay to the Sultan, "his heirs and successors *in perpetuity* the sum of six hundred dollars ($600) per annum. . . . ."[44]

These instances clearly demonstrate that the practice in this region permitted annual payments as valid consideration for cessions and, further, that the 1878 Sultan of Sulu Grant in requiring annual payments was not an unusual instrument but one which constituted an accepted modality of transferring sovereignty. It is submitted that these are considerations which must be taken into account when inquiring if the intent in the 1878 instrument was to cede or lease.

The related argument that the smallness of the sum [$5,000] to be paid annually indicates that it is a lease may be dismissed summarily. For, if the payments were to be made indefinitely, then the amount is certainly far from being small. In any case if international law requires no consideration at all for a valid cession, then inadequacy of consideration is no argument for establishing that there was no cession.

III. THE COMPETENCE OF DENT AND OVERBECK TO ACQUIRE SOVEREIGNTY IN INTERNATIONAL LAW.

We have already discussed the claim by the Philippines that the 1878 Sultan of Sulu instrument amounted only to a lease and therefore

42. Maxwell and Gibson, *op. cit., supra,* note 8 at p. 99 (Emphasis added).

43. *Ibid.*, p. 123. (Emphasis added).

44. *Ibid.*, p. 183. (Emphasis added).

sovereignty was not transferred. A further, and an alternative, argument which has been put forward is that Dent and Overbeck could not, in any case, have acquired sovereignty in international law:

> Indeed they could not have acquired such sovereignty or dominion. Decisions and authorities support the proposition that sovereignty can be ceded only to sovereign entities or to individuals acting for sovereign entities. Obviously Dent and Overbeck could not claim to be sovereign entities, neither were they acting for any sovereign entities.[45]

> In international law, sovereignty can be ceded only to sovereign entities or to individual [sic] acting for sovereign entities. Dent and Overbeck were not sovereign; nor did they purport to act for any sovereign entity.[46]

The thrust of the argument here, as in the "lease or cession" controversy, is that if Dent and Overbeck were incapable of acquiring sovereignty then their successors, too, (the British North Borneo Company, United Kingdom and Malaysia) could not have acquired sovereignty.

Traditional international law has been heavily influenced by the concept of State sovereignty and among the many ramifications of the individuals-are-objects and States-are-subjects dichotomy is the alleged norm that sovereignty can be ceded only to individuals acting for sovereign entities. Alafriz[47] cites Oppenheim for the proposition that cession may not be made to individuals. But his reliance on this authority is misconceived. Oppenheim, it is true, states (in defining cessions) that there must be two subjects "namely the ceding State and the acquiring State. Both subjects must be States, and only those cessions in which both subjects are States concern the Law of Nations." [48] Oppenheim does *not* say that cessions to individuals are prohibited by international law or that they are unknown creatures. On the contrary, he specifically mentions cessions to private individuals and acquisition of sovereignty by them.[49] His main point (and here he is obviously viewing international law as law affecting only inter-State relations) is that international law is concerned only with cessions between States.

Even if international law does not permit individuals to acquire sovereignty our inquiry should go further and inquire whether this norm is strictly rigid and incapable of modification. If no exceptions were permitted by international law then, indeed, the Philippines may have a substantial legal argument. It is submitted, however, that interna-

45. *Palaez Statement, supra,* note 5 at p. 232.

46. Statement of Congressman Salonga, *supra,* note 40, at p. 240.

47. Alafriz, *op. cit*., *supra,* note 6 at p. 93.

48. Oppenheim, (Lauterpacht. Ed.), *International Law,* vol. 1, 8th Ed. (1955) p. 547.

49. *Ibid*., at p. 544 "Not essentially different [from the case where individuals settle in an area not belonging to any State] is the case in which a *private individual* or a corporation acquires land (*together with the sovereignty over it*) in countries which are not under the territorial supremacy of any State. If the individual or corporation which has made the acquisition requires protection by the Law of Nations, he or it must either declare a new State to be in existence and ask for its recognition by the Powers ... or must ask an existing State to acknowledge the acquisition as having been made on its behalf." (Emphasis added).

tional law does not consider this to be an inflexible norm and modifications to the rule have been recognized even in the nineteenth century.

The celebrated case of *Island of Palmas* [50] is relevant here. In this case the distinguished Arbitrator's remarks about the nature of the activities of companies such as the Dutch East India Company illustrate that international decision-makers do not hesitate to modify the norm that sovereignty can be only acquired by sovereign States:

> The acts of the [Dutch] East India Company ... in view of occupying or colonising the regions at issue in the present affair must, in international law, be entirely assimilated to acts of the Netherlands State. From the end of the 16th till the nineteenth century, companies formed by individuals and engaged in economic pursuits (Chartered Companies), were invested by the States to whom they were subject with public powers for the acquisition and administration of colonies.[51]

Bearing in mind the above-demonstrated willingness of appliers of international law to make inroads into the rule that only States *per se* can acquire sovereignty we may also observe that it was common-place in this region for native rulers to part with parcels of their territories to individuals — especially relatives who might often also have been the recepients of some royal title and thereby have acquired some qualities of sovereign entity. In inquiring whether the 1878 Sultan of Sulu instrument effectively passed sovereignty on to Dent and Overbeck one cannot be oblivious to such practices in the region.

In any case is it accurate to say that neither Dent nor Overbeck were any more than private individuals? What is the relevance of the *Commission from the Sultan of Sulu appointing Baron de Overbeck Datu Bendahara and Rajah of Sandakan ?*[52] Let us recall that this was executed simultaneous with the conclusion of the grant of the territory. In this Commission the Sultan of Sulu nominated and appointed Overbeck "supreme and independent ruler of the abovenamed territories with the title of Datu Bendahara and Rajah of Sandakan with absolute power over life and death of the inhabitants of the country . . . 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." The Sultan also called upon foreign nations to "receive and acknowledge" Overbeck "as the supreme ruler over the said States and to obey his commands and respect his authority therein as our own." The Commission also provided that upon Overbeck's death or retirement the title of Datu Bendahara and Rajah of Sandakan shall devolve upon his successor designated by the Company.

The significance of this Commission is that the Sultan of Sulu conferred certain sovereign attributes upon Overbeck on the day that the

50. 1928, *U.S.* v. *Netherlands;* U.N. Reports of International Arbitral Awards, vol. II, p. 829.

51. *Ibid*., at p. 858. Both the Conklin and Maxwell and Gibson translations of the 1878 Sultan of Sulu instrument refer to Dent and Overbeck as persons who acted "as representatives of a British Company." But this was not, however, a Chartered Company.

52. See note 30.

grant was effected. The argument may be made, therefore, that territorial sovereignty was ceded not to a private individual but to an individual possessing sovereign or quasi-sovereign qualities.

This is not as strange a phenomenon as would seem at first. The most famous instance whereby an individual acquired sovereign attributes as well as territorial sovereignty is the manner in which James Brooke, an Englishman, became Rajah of Sarawak (the State neighbouring Sabah) and acquired sovereignty over that area. In 1842, the Sultan of Brunei by deed appointed James Brooke "to be his representative and in that capacity to govern the province of Sarawak." [53] In 1846, the Sultan granted Sarawak to James Brooke "to be ruled in accordance with the wishes of [James Brooke], more especially his own but including also those of all members of his family whom he may direct to govern, and upon his part, the Lord Sultan will not interfere." [54]

That this individual effectively acquired sovereignty is underscored by the fact that when the British established Sarawak as a British Protectorate in 1888, it had to be effected through an Agreement[55] between the British Government and Rajah Charles Brooke (*i.e.* James Brooke's successor) although the latter was, in a technical sense a British subject.[56]

In view of these considerations, the Philippine argument that Dent and Overbeck, being individuals, could not have acquired sovereignty under international law becomes unpersuasive and does not substantially assist its claim to sovereignty over Sabah.

IV. THE DOCTRINE OF ACQUIESCENCE AND THE PHILIPPINE CLAIM

The rationale of the interrelated doctrines of acquiescence and estoppel in international law (at least in respect of territorial claims) is that a State claiming territorial rights must have acted consistently with its claim during the period it allegedly became entitled to such rights. Where a State does not protest or its protests are inadequate or if it keeps completely silent, such a behaviour could amount to acquiescence that may damage its case when it subsequently presents its claim

53. Maxwell and Gibson, *op. cit.*, *supra,* note 8 at p. 185.

54. *Ibid.*, at p. 186.

55. *Ibid.*, at p. 194.

56. See the various opinions of the Law Officers of the Crown on the legal status of Rajah Brooke, compiled in McNair "Aspects of State Sovereignty," (1949) 26 *British Yearbook of International Law,* p. 1 at p. 29. In these opinions, the Law Officers seem to have been more concerned with the position in English constitutional law rather than international law. McNair points out (p. 35) that in 1856 they reported that "As a question of constitutional law we are of opinion that it is legally competent to Her Majesty to permit one of Her subjects to assume the Sovereignty of a Foreign state and to recognize him as such. Without such permission from the Crown, a subject cannot acquire independent Sovereignty; the latter position being inconsistent with the allegiance which he owes his own sovereign, and which without the consent of that sovereign he cannot put off."

to the other State concerned or if the dispute is referred to third party decision-maker. MacGibbon defines acquiescence as "the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights: . . . Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection." [57] Estoppel connotes specific acts of the claimant State (cf: acquiescence which connotes inaction or omission) which are inconsistent with its claim and can be regarded as implied recognition of the rights of the other State. Although the two concepts can be distinguished, there is a connexion. As Judge Fitzmaurice said in *The Temple case* (*Thailand* v. *Cambodia*):

> ". . . acquiescence can operate as a preclusion or estoppel in certain circumstances, for instance where silence, on an occasion where there was a duty or need to speak or act, implies an agreement or a waiver, of rights, and can be regarded as a representation to that effect." [58]

The policy consideration behind such requirements in international law is that a State cannot "blow hot and cold." Further, acquiescence and estoppel promote stability: if a State has been in effective occupation of a territory for many years and the States which could have protested did *not* protest, that State is justifiably led to believe that its legal position will not be challenged and it will be disruptive of world public order if such expectations were to be violated by the filing of a claim many years later by the acquiescing States.

It should also be observed that, in inquiring whether there has been acquiescence, decision-makers normally examine the acts of the claimant State *prior* to its presentation of the formal claim to the other State or to its invoking the jurisdiction of the decision-maker. This is only reasonable since, obviously, any claimant State will adjust its actions accordingly after it has formally announced its claim on the international level. This explains why decision-makers attempt to fix a "critical" date "one object of the critical date [being] ... to prevent one of the parties from unilaterally improving its position by means of some step taken after the issue has been definitely joined. . . . " [59]

Malaysia, in its documents and statements, has not, so far as the writer is aware, specifically relied upon the legal doctrine of acquiescence against the Philippines. But at the Bangkok talks in 1968, the leader

57. MacGibbon "The Scope of Acquiescence in International Law" (1954) 31 *British Yearbook of International Law,* p. 143.

58. *I.C.J. Reports* 1962, p. 62.

59. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law, Part II." (1955-6) 32 *British Yearbook of International Law,* 20 at p. 25. Fitzmaurice draws upon the pleadings in the *Minquiers and Ecrehos case* [*I.C.J. Reports* 1953, p. 47] where he served as counsel for U.K. In its judgment in the case the court did not decide on the critical date but observed that "in view of the special circumstances of the present case, subsequent acts [*i.e.* subsequent to 1866 and 1888] should also be considered by the court, *unless the measure in question was taken with a view to improving the legal position of the party concerned." I.C.J. Reports* 1953 at p. 59, emphasis added. See the discussion on this point in Jennings, *op. cit*., *supra,* note 41 at p. 34.

of the Malaysian Delegation referred [60] to several aspects of the Philippine position and behaviour which in the writer's view could be the bases of a formidable argument of acquiescence on the part of the Philippines.

First, reference was made to Article I of the Constitution of the Philippines which defines "The National Territory" of the Philippines as follows:—

> Section 1. The Philippines comprises all the territory ceded to the United States by the Treaty of Paris concluded between the United States and Spain on the tenth day of December, eighteen hundred and ninety-eight, the limits of which are set forth in Article III of the said treaty, together with all the islands embraced in the treaty concluded at Washington, between the United States and Spain on the seventh day of November nineteen hundred, and in the treaty concluded between the United States and Great Britain on the second day of January nineteen hundred and thirty, and all territory over which the present government of the Philippine Islands exercises jurisdiction.

The Malaysian Government pointed out that in the 1930 Anglo-US Convention mentioned in this provision, "The Convention referred to . . . North Borneo as a State under British protection and asked how you could accept the boundary of your State in accordance with it, but refused to be bound by its terms. Your reply was that the Philippines was not bound as an independent State to anything previously accepted by the United States even although you derived your sovereignty as successor from the United States." [61]

The legal expert of the Philippines replied that the Anglo-US Convention "could not preclude the presentation of our claim to Sabah and could not amount to an implied recognition that Sovereignty over Sabah had been lawfully displaced from the Sultan of Sulu. The United States never purported to succeed to Sabah; it did not claim North Borneo and hence could not possibly cede or acknowledged [sic] anything in favour of the British Government." [62]

This reply of the Philippines does not meet the damaging fact that in the 1930 Convention, the United States (to whom Philippines is successor) recognised North Borneo as a territory under British Protection.[63] But when the British had established protection over North Borneo in 1888 by the Protectorate Agreement,[64] they specifically asserted (on behalf of the North Borneo Company) "*sovereignty* over the said territories." Considering this, then, the reference in the Philippine Constitution can be considered as a tacit recognition of the sovereignty that Britain claimed over the area. The argument on acquiescence here

60. *Ghazali Shafie Statement, supra,* note 19.
61. *Ibid.* See Art. 1 of the Anglo-U.S. Convention, 1930: (1935) 132 *British and Foreign State Papers, 1930 Part 1,* p. 367.
62. Statement of Dr. F.P. Feliciano of the Philippines Delegation to the Bangkok Talks, July 16, 1968, hereinafter referred to as the *Feliciano Statement.*
63. See Alafriz, *op. cit., supra,* note 6 at pp. 82, 99 who suggests that by the Bates Treaty of August 20, 1899 between U.S. and Sultan of Sulu, and the Carpenter Agreement of March 12, 1915 (as interpreted by Governor Carpenter in a letter to the Director of Non-Christian Tribes dated May 1, 1933) United States recognized the sovereignty of Sultan of Sulu over North Borneo. But these 1899 and 1915 instruments were executed *before* the 1930 Convention.
64. Maxwell and Gibson, *op. cit., supra,* note 8 at p. 178.

becomes particularly Impressive when we consider that although the Philippine Constitution could have been amended after 1946 by the then independent Philippine Government to include a reservation about North Borneo, this has not been done.

Secondly, the Malaysian Delegation alluded to the fact that "the Government of the Philippines through its Acting Secretary of Foreign Affairs had in 1950 written to the British Ambassador in Manila referring to the 1878 document as a lease and the British Embassy rejected that Note, stating that it was not a lease, no rents were due and the payments were cession monies and we asked *why there was no challenge to that refection* either on behalf of a Sultan who had been proclaimed or by the Philippine Government if they had acquired his sovereignty; all that you could give in reply was the extraordinary statement that the Philippines had then only recently become independent and its foreign relations were conducted through the good offices of the United States." [65] To this point, the legal expert of the Philippine Delegation replied:

> "You state that there was no reply on the part of the Philippines to a note from the British Embassy rejecting a prior note in 1950 from our Secretary of Foreign Affairs referring to the 1878 Deed as a lease. We fail to see how this could afford you any comfort, particularly in view of the Concurrent Resolution of both Houses of the Congress of the Philippines, adopted on April 28, 1950 which authorised the President of the Philippines to take suitable steps for the restoration of the territory of Sabah to the Sultan of Sulu and the recognition of the sovereign jurisdiction of the Republic of the Philippines over the same territory." [66]

The reference to resolutions of the Philippine legislature is not without relevance but it does not possess the same character as steps taken at the international level. Having expressed the view that the 1878 instrument was a lease to the British Government in the 1950 Note, and this view being subsequently rejected by the British a situation was created whereby the Philippines, consistent with its claim, ought to have made further response to the British. There is no evidence of further protest until 1962 when "[t]he formal claim was accordingly presented. . . . ." [67] As Fitzmaurice has pointed out:

> *"Necessity for protests to be effective in character:* It is true that opposition, even if persistently maintained, may end by losing all legal force because of its insufficient character." [68]

65. *Ghazali Shafie Statement, supra,* note 19.

66. *Feliciano Statement, supra,* note 62.

67. *Palaez Statement, supra,* note 5, at p. 234.

68. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-54: General Principles and Sources of Law," (1953) 30 *British Yearbook of International Law,* p. 1 at p. 28. See also MacGibbon, "Some observations on the Part of Protest in International Law," *Ibid.*, p. 292 "A protest constitutes a formal objection by which the protesting State makes it known that it does not recognize the legality of the acts against which protest is directed, that it does not acquiesce in the situation which such acts have created or which they threaten to create and that it has no intention of abandoning its own rights in the premises" (p. 298) and "In the event of a repetition of the acts protested against or the continuation of the situation created by them, *it is clear that scant regard will be paid to the isolated protest of a State which takes no further action* to *combat continued infringments of its rights."* (p. 311 emphasis added).

Thirdly, the Malaysian delegation referred to a 1961 Resolution of the Philippines legislature known as the Tolentino Resolution which demarcated the territorial waters of the Philippine Republic "and to the fact that the resolution did not include North Borneo as a Territory of the Philippines." [69] The legal expert of the Philippines replied, "we are unable to see how this resolution in any way affects the legal case we have presented to you. Surely you cannot seriously claim that this resolution would amount to implied recognition that would legitimize acts in derogation of lawful rights, in the face of protests of the heirs of the Sultan of Sulu and our Department of Foreign Affairs, of the Concurrent Resolution of our Congress on April 28, 1950, the succeeding Resolution of April 24, 1962 of our House of Representatives, and the London Talks of 1963." [70]

But the significant observation that may be made here is that it is inconsistent for a State which claims legal sovereignty over nearby territory to make a declaration over such an important matter as demarcation of territorial waters and yet fail to make any reservation over the territorial waters of the disputed territory.

Fourthly, reference has been made to the inaction of the Philippines in the United Nations *ad hoc* committee to examine annual summaries of information on non-self-governing territories in accordance with Article 73 (e) of the Charter. Britain, ever since 1946 has, in the capacity of the sovereign power administering Sabah, submitted the required annual reports to the relevant U.N. organs. "The Philippines became a member of the *ad hoc* Committee that was required to examine the annual summaries made by the Secretary-General on the information received. The Philippines representatives expressed a reservation about North Borneo was [sic] in December 1962, that is after sixteen long years. We would have asked you if it was not too late in the day for the Philippines then to want to regard North Borneo as unlawfully in the possession and occupation of Britain." [71] A similar reliance on this fact has been made by the Philippine Senator Sumulong:

> "Since the organization of the United Nations in 1945, Britain has . . . been submitting to the United Nations every year a report of her administration of . . . [North Borneo, Sarawak and Brunei]. During all that time, the Philippines, as a member of the United Nations has not put forward any claim of sovereignty over North Borneo nor has the Philippines registered any reservation or protest to the report submitted by British every year as the administering power over North Borneo. It was only in December of [1962] that the Philippine delegation . . . made a reservation contesting for the first time the right of the British to rule and administer North Borneo." [72]

To this point the only reply made by the Philippine legal expert was similar to the point in respect of the Tolentino resolution, ". . . that is

69. *Ghazali Shafie Statement, supra,* note 19.

70. *Feliciano Statement, supra,* note 62.

71. *Ghazali Shafie Statement, supra,* note 19.

72. Sumulong "A Report on Malaysia and on the greater Malayan Confederation in Connection with the Philippine Claim of Sovereignty to a Portion of North Borneo," (1963) 2 *Philippine Journal of International Law,* p. 6. Note that Congressman Salonga's "Reply . . .", *Ibid.*, at p. 18, contains no comment on this point.

worth very little by way of implied recognition of the lawfulness of the British possession of Sabah. You will not, of course, have forgotten the protests made by the heirs of the Sultan to the British Legation in Manila, the note of our Department of Foreign Affairs to the British Legation in 1950, and the resolutions of our Congress to which I have already pointed out." [73] A response of this nature is far from adequate as it still leaves unanswered the important question why the Philippines remained silent in the United Nations arena from 1946 to 1962 if, as it now contends, it had a right to legal sovereignty over the area even then.

The position was therefore one where Britain, in submitting annual reports on Sabah was asserting the legal authority and sovereignty over that territory. The Philippines, consistent with its claim, would have been expected to have registered protests or challenge thereby disputing Britain's assertions of sovereignty or reserving for itself rights it claimed over the area. In this connexion, it will be relevant to recall the remarks of the World Court on the failure of Thailand to protest errors in the map in *The Temple case (Thailand* v. *Cambodia)* :—

> It is clear that the circumstances were such as called for some reaction, within *a* reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*[74]

It is submitted that the above remarks concerning Thailand's failure to protest over errors in the map apply with equal validity in respect of the Philippine failure to challenge the annually repeated assertions of authority of the United Kingdom over Sabah in such an important forum of international relations as the United Nations.

Other instances were also mentioned by the Malaysian delegation which, in the writer's opinion, could also form the bases of arguments of acquiescence. For instance, (i) that part of the territory to which the Philippines is supposed to have succeeded to includes certain lands which presently are under Indonesian sovereignty. However, the Philippines has not, as yet, made any claim against the Indonesian Government. This is an inconsistency that could be damaging to the Philippines; (ii) that the alleged heirs of the Sultan of Sulu (to whose rights the Philippines claims to have succeeded) were very belated in challenging British sovereignty over Sabah. As Senator Sumulong pointed out "If the said heirs had any claim to sovereignty over North Borneo — as distinguished from proprietary claims — they could have filed a petition or reservation to the United Nations protesting against British rule and administration over North Borneo, but they did not file any such petition or reservation. It was only in February of ... [1962] that the said heirs informed our Department of Foreign Affairs that they were claiming sovereignty to North Borneo, and they offered

73. *Feliciano Statement, supra,* note 62.

74. *I.C.J. Reports* 1962, p. 23. For a good account of the relevance of *The Temple Case* to acquiescence and estoppel, see Jennings, *op. cit*., *supra,* note 41, at pp. 47-51.

to turn such claim of sovereignty to the Republic of Philippines, reserving however to themselves their proprietary rights. . . . Since the transferee acquires no better rights than the transferor, this weakens the present claim of the Republic of the Philippines." [75]

To summarise, the Philippines position is that United Kingdom never lawfully acquired sovereignty over Sabah. The Philippines acquired independence in 1946. Even if one concedes that it has no responsibility for the acts of acquiescence of the States to whom it succeeded, it had ample opportunity between 1946 and 1962 to assert its legal rights by consistent and effective challenges and protests to the British. As we have seen, however, its protests have been insufficient and ineffective on the one hand and, on the other, certain of its omissions acquire the character of acquiescence which seriously prejudices its legal claim.

Acquiescence/Estoppel Argument raised by the Philippines

In this connexion, reference should be made also to the point repeatedly made by the Philippines that United Kingdom is estopped from maintaining that it acquired sovereignty over the territory because British diplomatic correspondence shortly after the granting of the Charter in 1881 to the British North Borneo Company indicated that the British did not consider the Company to have acquired sovereignty. The correspondence most frequently relied upon is the letter of Lord Earl Granville, British Foreign Minister to the British Minister at Madrid, dated 7 January 1882 which stated:

> The British Charter [to the North Borneo Company] therefore differs essentially from the previous Charters granted by the Crown to the East India Company, the Hudson's 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 persons associated the status and incidents of a body corporate and recognizes the grants of territory and the powers of government made and delegaed by the Sultans tin whom the sovereignty remains vested.[76]

There is no doubt that diplomatic and other official comments along similar lines would have acted to the detriment of British legal rights at that time and would have acted as an estoppel *if there had been a dispute between the British and another claimant shortly thereafter.* What transpired, however, was that shortly after these utterances Britain proceeded to assert over Sabah precisely the sovereignty that it had earlier disclaimed without any effective challenge or protest emanating from any other power.

75. Sumulong, op. cit., *supra,* note 72 at p. 9.

76. Emphasis added: cited in the *Palaez Statement, supra,* note 5 at p. 232; in Congressman Salonga's Statement, *supra,* note 40 at p. 241; in President Marcos, *op. cit., supra,* note 24 at p. 9; in Alafriz, *op. cit., supra,* note 6 at p. 90; and in most of the other official statemests of the Philippine Government as well as in scholarly articles published in the Philippines.

In 1888, the British concluded an agreement with the British North Borneo Company, establishing the territory as a British protectorate. In this instrument, the British claimed that ". . . by certain grants and commissions . . . *all rights of sovereignty over the said territories* are vested in the . . , Company" and declared that the territory was to be governed by the Company as *"an independent State."* [77] In 1946, a further assertion of sovereignty was made when by Order-in-Council[78] the territory was annexed as a British Crown Colony. In the Agreement of 26 June 1946 (between the Crown and the Company) which preceded the Order-in-Council, the Company ceded the territory to the Crown "to the intent that the Crown shall, as from the day of transfer, *have full sovereign rights* over, and title to, the territory in question of the State of North Borneo. . . ." [79]

In the absence of any protests,[80] these later assertions of sovereignty by Britain considerably minimise the value of the earlier disclaimers of sovereignty contained in the diplomatic documents relied upon by the Philippines.

It is submitted that where there are competing claims of acquiescence or estoppel the criteria employed to solve the problem should be analogous to that employed to dispose of competing claims to territorial rights based on occupation In the latter situation the tendency among decision-makers is to inquire "who has done more." [81] In the former situation one may meaningfully ask which claimant has acquiesced more or is estopped to a greater extent. The acts which could conceivably affect United Kingdom detrimentally occurred mainly in the late nineteenth century and were, further, quickly and deliberately repudiated by a change in policy (through asserting sovereignty) which had never been abandoned since. The acts and omissions attributable to the Philippines are more recent, numerous and substantial. The acquiescence of States, including the Philippines, in the assertions of sovereignty

77. Maxwell and Gibson, *op. cit*., *supra,* note 8 at p. 178. (Emphasis added).

78. North Borneo Cession Order-in-Council, 10 July 1946. (1953) 146 *British and Foreign State Papers 1946,* p. 173.

79. Agreement for the Transfer of the Borneo Sovereign Eights and Assets from the British North Borneo Company to the Crown, 26 June 1946, reproduced in (1963) 2 *Philippine Journal of International Law,* p. 311.

80. Francis B. Harrison, Adviser to the Philippine President had advised on 27 February 1947 that the 1946 annexation was "an act of political aggression which should be promptly repudiated by the Government of the Republic of Philippines": (1963) 2 *Philippine Journal of International Law,* 333 at p. 339. But this advice was not followed.

81. Fitzmaurice, *op. cit*., *supra,* note 59 at p. 65 (quoting British argument in the *Minquiers and Ecrehos* case): "The essential issue, in this kind of case is not so much 'What each party has done' but 'which party has done the most?'". Fitzmaurice, in this article, states "It is clear . . . from the *Minquiers* case that the weight to be given to any act, presumption or situation, *and equally to any omission,* is not an absolute question but depends very much on whether a competing claim is in the field and *also on what is the character and intensity of that other* claim." (p. 64, emphasis added).

by Britain over North Borneo over a long period of time blurs whatever imperfections[82] there *may* have been to Britain's original title.

V. THE PHILIPPINE CLAIM AND THE CONCEPT OF SELF-DETERMINATION

The significance of the concept of self-determination in our consideration of the Philippine claim proceeds from the fact that prior to the establishment of Malaysia in 1963, Malaya, Indonesia and the Philippines requested the United Nations Secretary-General to ascertain the wishes of the people of Sabah and Sarawak[83] and the Secretary-General, after acting upon such request, concluded that the majority of the people in Sabah and Sarawak clearly wished their countries to join Malaysia.[84] The findings of the United Nations Malaysia Mission and the conclusions of the Secretary-General based on the Mission's report have, not surprisingly, been since relied upon by Malaysia as a key defence against the repeated attempts by the Philippines to have their claim adjudicated by the International Court of Justice. At the 1968 Bangkok talks, Malaysia specifically referred to the "modern legal principle"[85] of self-determination and inquired if the Philippines, in pursuing its claim, was not acting inconsistently with this principle. In our discussion of the relevant questions in this connexion we shall inquire first, whether self-determination is a norm of international law; secondly, the nature of the conclusions of the United Nations Secretary-General on the wishes of the people of Sabah; thirdly, whether these conclusions estop the Philippines from pursuing its claim, and fourthly, the relevance of self-determination to the *merits* of the Philippine claim.

(a) *Self-determination as a norm of international law*

This is a controversial area of international law but a strong argument can be made that self-determination has emerged as a norm of contemporary international law. Its detailed elaboration and application may be a difficult exercise, but the principle that high priority must be accorded to the wishes of the inhabitants of a territory to freely determine their political, economic and social development cannot now be controverted. In traditional international law, scant attention was accorded to the principle. But expectations of the international community have altered since the end of World War II and with the establishment of the United Nations. The United Nations Charter itself has

82. Schwarzenberger states: "Initially, as for instance, in the case of the transfer by way of cession from one State to another, *the validity of a title is likely to be relative.* If, however, other States recognize such a bilateral treaty, incorporate it into a multilateral treaty or estop *themselves in other ways* from contesting the transfer, the operational scope of the treaty tends increasingly to become more absolute. The more absolute a title becomes, the more apparent becomes the multiplicity of its roots." *Manual of International Law,* 5th Ed. (1967) p. 125. (Emphasis added).

83. *Yearbook of the United Nations,* (1963) pp. 41-43.

84. *Ibid.*, at p. 43.

85. *Ghazali Shafie Statement, supra,* note 19.

specific references to the concept of self-determination.[86] Subsequent intense preoccupation by the United Nations with issues of self-determination and the countless decisions taken by United Nations bodies adequately reflect practices and attitudes of the States of sufficient intensity to warrant our characterization of the right to self-determination as a norm of contemporary international law. Of the numerous United Nations decisions, reference may be made in particular to the Declaration on the Granting of Independence to Colonial Countries and Peoples 1960[87] and to the two 1966 International Covenants on Human Rights[88] which have the unusual feature of having identical provisions referring to self-determination.

One will have to ignore completely the effect of the decisions and practices of States within organized and formal arenas such as the United Nations to deny that international law recognizes self-determination. Rosalyn Higgins has brilliantly demonstrated that international law can be, and in fact is being, prescribed through interactions of States in political organs of the United Nations.[89] Examining the practice in the United Nations in the area of self-determination, she concludes: "It therefore seems inescapable that self-determination has developed into an international legal right, and is not an essentially domestic matter. The extent and scope of the right is still open to some debate . . . that Declaration [on Colonialism], taken together with seventeen years of evolving practice by United Nations organs, provides ample evidence that there now exists a legal right of self-determination.... It should also be added that a denial of self-determination is now widely regarded as a denial of human rights. . . ."[90]

On the question of the incorporation of a non-self-governing territory (which was the status of Sabah prior to its joining Malaysia) into an existing independent State, reference may appropriately be made to Principle IX of the Annex to General Assembly Resolution 154 (XV)[91] which stipulated that a non-self-governing territory integrating with an independent State should have attained an advanced stage of self-government with free political institutions. It also provided that integration should be the result of freely expressed wishes of the territory's peoples, expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage.

86. For instance, Article 1(2), Article 55, Art. 73.

87. General Assembly Resolution 1514(XV) of 14 December 1960.

88. The International Covenant on Economic, Social and Cultural Rights, 1966 and the International Covenant on Civil and Political Rights 1966 adopted by the General Assembly on 16 December 1966 [Resolution 2200(XXI) provide in Article 1(1)] "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

89. *The Development of International Law through the Political Organs of the United Nations* (1963).

90. *Ibid*., at p. 104.

91. Resolution 1541(XV), adopted on 15 December 1960 concerns "Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73 of the Charter."

(b) *The conclusions of the U.N. Secretary-General on the wishes of the people of Sabah*

Immediately before the establishment of Malaysia, the Heads of Governments of the Federation of Malaya, Indonesia and the Philippines met in Manila to discuss their differences over the formation of the new Federation. The Heads of the three States issued a Joint Statement on 5 August 1963[92] agreeing that the "United Nations Secretary-General or his representative should ascertain prior to the establishment of the Federation of Malaysia the wishes of the people of Sabah (North Borneo) and Sarawak within the context of General Assembly Resolution 1541 (VX), Principle XI of the Annex, by a fresh approach, which in the opinion of the Secretary-General is necessary to ensure complete compliance with the principle of self-determination within the requirements embodied in Principle IX. . . ."[93]

Accordingly, the Foreign Ministers of the three nations cabled the U.N. Secretary-General to send working teams to Sabah (North Borneo) and Sarawak in order to ascertain the wishes of the people there with respect to the proposed Federation. This request quoted paragraph 4 of the Joint Statement which required that the Secretary-General, in ascertaining compliance with Principle IX of Resolution 1541, should take into consideration:—

(1) The recent elections in Sabah (North Borneo) and Sarawak but nevertheless further examining, verifying and satisfying himself as to whether—
   (a) Malaysia was a major issue, if not the main issue;
   (b) Electoral registers were properly compiled;
   (c) Elections were free and there was no coercion; and
   (d) Votes were properly polled and properly counted; and
(2) The wishes of those who, being qualified to vote, could have exercised their right of self-determination had it not been for their detention for political activities,, imprisonment for political offences or absence from Sabah.

On 12 August 1963 an eight-member United Nations Malaysia Mission headed by Mr. Lawrence Michelmore was appointed by the U.N. Secretary-General and the Mission conducted its work in Sabah and Sarawak from 16 August to 5 September 1963. On the basis of the report[94] submitted by this Mission the Secretary-General arrived at his

92. (1965) 550 *United Nations Treaty Series,* p. 356.
93. Paragraph 4 of the Joint Statement, *ibid.*
94. See *Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1963-15 June 1964: General Assembly Official Records, Nineteenth Session, Suppl. No. 1A (A/5801/Add.1)* p. 8: "As is well known, the United Nations Malaysia Mission expressed the opinion that 'the participation of the two territories in the proposed Federation, having been approved by their legislative bodies, as well as by a large majorty of the people through free and impartially conducted elections, in which the question of Malaysia was a major issue), the significance of which was appreciated by the electorate, may be regarded as the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage.' I accepted this view of the Mission in my conclusions."

conclusions which were announced on 14 September 1963. In announcing his conclusions, the Secretary-General stated:

> . . . that the majority of the peoples of Sabah (North Borneo) and of Sarawak had given serious thought and careful consideration to their future and to the implications for them of participating in a Federaton of Malaysia. . . . The majority of them had concluded that they wished to bring their dependent status to an end and to realise their independence through freely chosen association with other peoples in their region with whom they felt ties of ethnic association, heritage, language, culture, economic relationship and ideals and objectives . . . the majority of the peoples of the two territories wished to engage, with the peoples of the Federation of Malaya and Singapore in an enlarged Federation through which they could strive together to realise the fulfilment of their destiny.[95]

The Secretary-General also pointed out that *"complete compliance with the principle of self-determination* within the requirements of General Assembly Resolution 1541 (XV) Principle IX of the Annex, *had been ensured"* and that there was *"no doubt about the wishes* of a sizeable majority of the peoples of these territories to join the Federation of Malaysia" (Emphasis added).

These conclusions of the U.N. Secretary-General based on the findings of the United Nations Malaysia Mission are explicit and unambiguous. In respect of Sabah, it is clear that the majority of the peoples desired to join Malaysia and the subsequent inclusion of the territory into Malaysia is consistent with their wishes and unquestionably promotive of the concept of self-determination. Although the Philippines expressed reservations about the manner in which the Mission executed its tasks in Sabah and Sarawak, it announced in the United Nations that "we do not challenge his [Secretary-General's] conclusions."[96] The conclusions of the Secretary-General are most significant not only because of the clarity with which they disclosed the genuine aspirations of the inhabitants of the disputed territory, but also because these are the findings of a third party whose authority and impartiality cannot be suspect.

(c) *Is the Philippines estopped from pursuing its claim in the light of the positive affirmation of the wishes of the people in Sabah?*

The request to the U.N. Secretary-General to ascertain the wishes of the peoples of Sabah and Sarawak was a joint request of three States, including the Philippines. The Secretary-General having made a cate-

95. *Yearbook of the United Nations,* p. 43 (1963).

96. Speech of Philippine Foreign Secretary Mr. Lopez in the U.N. General Assembly, 8 October 1963. *United Nations General Assembly Official Records, Eighteenth Session, 1233d. Plenary Meeting,* p. 5. The Philippines' criticism of the Mission's work were essentially that it was done in too short a period and that unreasonable restrictions were placed on the sending of Philippine observers.

gorical finding that the people of Sabah preferred to be part of Malaysia the question arises whether the Philippines is estopped from pursuing its claim.

It would appear that the ascertainment by the Secretary-General, although a highly authoritative determination of the desire of the people in that territory, does not preclude the Philippines from continuing to assert its claim. This view is supported by an examination of the various international instruments concluded by Malaya, Indonesia and the Philippines which make a distinction between ascertainment of the wishes of the people of Sabah for the purpose of its joining Malaysia and the right of the Philippines to pursue its claim.

In the Manila Accord [97] of July 31, 1963, "Indonesia and the Philippines stated that they would welcome the formation of Malaysia provided the support of the people of the Borneo territories is ascertained by an independent and impartial authority, the Secretary-General of the United Nations or his representative." But in that same instrument it was recorded that "The Philippines made it clear that its position on the inclusion of North Borneo in the Federation of Malaysia is subject to the final outcome of the Philippine claim to North Borneo. The Ministers took note of the Philippine claim and the right of the Philippines to continue to pursue it in accordance with international law and the principle of pacific settlement of disputes. They agreed that the inclusion of North Borneo in the Federation of Malaysia would not prejudice either the claim or any right thereunder." [98] This was also reiterated in the Joint Statement of 5 August, 1963.[99]

Thus, despite the Philippines agreeing to the ascertainment of the wishes of the people of Sabah for the purpose of its inclusion in Malaysia, it unequivocally reserved its right to pursue the claim to sovereignty even if Malaysia was to be established with Sabah as a constituent State. Although it may be inconsistent with its recognition of the concept of self-determination, the Philippines cannot be considered to be barred from continuing to assert its claim.[100]

(d) *The relevance of self-determination to the Substance of the Philippines Claim*

Although, as we have observed, the positive affirmation of the wishes of the people of Sabah cannot estop the Philippines from *asserting* its

97. *Supra,* footnote 17.

98. *Ibid*., paragraph 12 of the Accord (Emphasis added).

99. *Supra,* footnote 92.

100. An interesting question however is raised by the point made in the *Ghazali Shafie Statement:* ". . . both your [the Philippines] Foreign Secretary and Under-Secretary had stated on the very eve of the Secretary-General's conclusions being announced that 'Because of the consistent Philippine support of the principle of self-determination the sovereignty claim would have to be abandoned should the United Nations survey reveal that North Borneo wanted to join Malaysia." Can such statement have the same adverse effect on the Philippine claim as the *Ihlen Declaration* had on Norway in the *Eastern Greenland* case?

claim the pertinent question that requires consideration is whether this finding on self-determination by the U.N. Secretary-General can adversely affect the merits of the substantive claim of the Philippines.[101]

This writer's view is that self-determination generally as a concept constitutes criterion highly relevant to the resolution of competing claims of sovereignty and ownership to territories which are inhabited to a significant degree; in the particular context of our discussion, the assessment of the Philippine claim by any decision-maker should involve the according of high priority to the Secretary-General's findings that the people of Sabah wish to join Malaysia. In respect of the Sabah claim, the criterion of self-determination would call for particular attention to be paid to the fact that the majority of the population in Sabah have decisively expressed their wish to be associated with Malaysia and that a solution favouring Philippine sovereignty would undoubtedly run counter to the self-determination of the people of the disputed territory.

The writer is aware that in international law authority is scarce for the proposition that the norms for settling competing territorial claims should also include that of self-determination. But this inadequacy of prior trends in decision may be explained if we appreciate that first, many of the classic authorities on territorial claims (*e.g. Island of Palmas* case) were decided in an era when self-determination was not heard of, and secondly, most of the territories which were subject to dispute were not inhabited to any significant degree.[102] The suggestion that such inadequacy in traditional international law should not be allowed to dominate us today is, however, already appearing in scholarly writings. Sahovic and Bishop, for instance, jointly state that —

> . . . in contemporary conditions the right of self-determination of peoples deserves special consideration in the process of territorial changes, since the application of all modes of acquisition or loss of title to territory should depend on the will of the people.[103]

Can the requirement in traditional international law for observing the *inter-temporal law* rule prove a frustrating obstacle to the application of self-determination norms to the settlement of the Philippine

101. The issue of self-determination would seem to be an embarassing one for the Philippines. Almost all official documents and statements evade the question of the wishes of the people of Sabah. In statements issued before the appointment of the United Nations Malaysia Mission, the attitude adopted was that the people will be given the opportunity to express self-determination *after* the territory is restored to the Philippines (*e.g.* the *Palaez Statement, supra,* note 5). At the 1968 Bangkok Talks the detailed reply in the *Feliciano Statement* to the points raised in the *Ghazali Shafie Statement* completely ignored the latter's remarks about "modern legal principle" of self-determination.

102. Even in the most recent settlement of a territorial claim, the *Rann of Kutch* dispute (*Pakistan* v. *India*), the Arbitral Award makes no reference to self-determination since the territory is either uninhabited or uninhabitable. For excerpts from the Award, see (1968) *International Legal Materials* p. 633.

103. "The Authority of the State: its Range with Respect to Persons and Places" in *Manual of Public International Law* (Sorensen, Ed.) (1968) p. 311 at p. 324. See also Jennings (*op. cit., supra,* n. 41) who, in looking for criteria "further than a mere conveyancing law" points out (at p. 70) "there are some very general conventions or standards [and he includes self-determination amongst them], rather than principles of law, that seem to be emerging for the guidance of decision in these matters and pertinent therefore to considerations of justice rather than title."

claim? The *inter-temporal law* requirement "that the effect of an act is to be determined by the law of the time when it was done not the law of the time when the claim is made" [104] has often been emphasized as being important to resolution of territorial claims.[105] Strict and unimaginative application of the *inter-temporal law* requirement could render self-determination irrelevant in the solution of territorial disputes. In the Sabah dispute the Philippines could plausibly argue that the acts and events which determined whether Britain acquired sovereignty over the territory or not occurred in late 19th century, when international law did not recognize self-determination as a relevant norm and that the legal consequences of the events must be decided by reference exclusively to the law as of then not as of now.

It is submitted that any such recourse to the *inter-temporal law* rule to render the criterion of self-determination inadmissible to decision should be rejected. The rationale of the rule is to prevent unfair results that may arise from the retroactive application of laws. But blind application of the rule will stultify the progressive development of international law. Exceptions must be made and, indeed, have been made in special situations. For instance, the International Law Commission's Draft Articles on the Law of Treaties pays scant attention to the rule when it provides (Article 51) "If a new peremptory norm of general international law ... is established any existing treaty which is in conflict with that norm becomes void and terminates." [106]

Furthermore the *Island of Palmas* case itself makes a distinction between the creation of rights and the maintenance of rights. This aspect of that case has led one distinguished writer to state —

> Quite as important as the aspect of *inter-temporal law* ... is its corollary. The continued existence at the present time of a right which existed in the light of the law as it then stood depends on the law as it stands now: *a right which once existed does not necessarily continue to exist, if in the meantime developments in the law have introduced new criteria governing the existence of such a right.*[107]

Thus even if the Sultan of Sulu in 1878 did not transfer sovereignty to United Kingdom, the demand for restoration of sovereignty to the heirs of the Sultan or to the Philippines as their successor now nearly

104. Jennings, *op. cit*., *supra,* note 41, at p. 28.

105. "... a juridicial fact must be appreciated in the light) of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled." Arbitrator Huber in *Island of Palmas case, supra,* note 50 at p. 845; see also *Right of Passage Case, supra,* note 39 at p. 37, (the validity of a treatly cannot be "judged upon the basis of practices and procedures which have since developed only gradually") ; Fitzmaurice, *op cit*., *supra,* note 68 at p. 5 "it is not permissible to import into the legal evaluation of a previously existing situation, or of an old treaty, doctrines of modern law that did not exist or were not accepted at that time, and only resulted from subsequent development or evolution of international law."

106. *International Law Commission Reports, supra,* not 25. The argument could also be made that self-determination is a peremptory norm of international law.

107. Fitzmaurice, *op. cit*., *supra,* note 68 at p. 16.

100 years later cannot depend solely on the technical interpretations of the 1878 and related instruments, but must also be viewed in light of self-determination.

No scholar or decision-maker can ignore the fact that the population, social, cultural and economic development of Sabah is now radically different from that of 1878. Disposal of the Philippine claim cannot be effected solely and exclusively by reference to ancient historical documents and by the application of classical traditional law norms concerning territorial claims. As we have seen, the traditional criteria were evolved in times when the principle of self-determination was not recognized, when it was commonplace for colonial powers to acquire and dispose of large masses of territory as if they were ordinary chattel and where most of the territories were not inhabited or developed to any substantial degree. But expectations of States have undergone profound changes which have resulted in the emergence of self-determination as a cardinal principle. At the same time, the disputed territory, Sabah, not only has nearly 400,000 inhabitants but has also a fairly advanced socio-political development.

The application of the concept of self-determination seriously weakens the Philippine claim which is, at best, a historically derivative claim that does not make deference to the wishes of the people of the territory. On the other hand, Malaysia's legal title to the area is technically through transfer by the Malaysia Agreement (to which Sabah was also a party). The fact that Sabah was a party to the Agreement may in itself be sufficient fulfilment of self-determination. But the relation of Malaysia's title to self-determination is tremendously fortified and enhanced by the Secretary-General's authoritative finding that the majority of the people in Sabah had wished to join Malaysia.

VI. SUMMARY

Malaysia has refused to agree to have the claim referred to the International Court of Justice. It is conceivable that a State, even when it has a good case, may refuse international adjudication or arbitration purely out of political considerations. However, Malaysia's reluctance to accept jurisdiction of the World Court on this issue contrasted with the Philippines' insistent plea that this is a dispute eminently desirable for decision by the Court, has given the impression that Malaysia must have an extremely weak case. This is unfortunate for, in the view of the writer, it is the Philippine case that is weak and tenuous and the reasoning for this view has been partly outlined in the preceding discussion. We have made a recommendation for the norms of self-determination to be accorded prime deference in the assessment of the Claim: such deference devalues the weight of the Philippine claim considerably. Even if self-determination were irrelevant, it seems clear that Britain (Malaysia's predecessor in respect of Sabah) acquired sovereignty over Sabah by virtue of the 1878 Sultan of Sulu grant and that, in any case, the Philippine claim is tainted with acquiescence.

It cannot be overemphasized that the Philippine claim is at most, an abstract or inchoate one based on the historically derivative rights of

the heirs of the Sultan of Sulu. Neither the Philippines nor the heirs of the Sultan have exercised sovereignty or been in effective occupation of Sabah since 1878. The Philippines formally presented its claim only in 1962. United Kingdom was the State which had effective occupation until 16 September 1963 when Sabah became part of Malaysia in accordance with the wishes of the people (as determined by the U.N. Secretary-General). Malaysia, for purposes of international law, is now the State in "effective occupation" and exercising sovereignty over Sabah. And, unfortunately for the Philippines, international law seldom accords priority to abstract claims over claims based on effective occupation. As Jennings succintly puts it:—

> . . . the bias of the existing law is towards stability, the *status quo,* and the present effective occupation; the tendency of international courts is to let sleeping dogs lie. This is right, for the stability of territorial boundaries must always be the ultimate aim.[108]

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108. Jennings, *op. cit*., *supra,* note 41 at p. 70.

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